

Enduring power of attorney, lasting powers of attorney and receivership

If you lose mental capacity because of dementia, you will need someone else to manage your legal, financial and health affairs. Currently, you can make an 'enduring power of attorney', which means a person of your choosing will be able to manage your finances for you, or someone can apply for 'receivership' on your behalf. In 2007, you will be able to make a 'lasting power of attorney'; this will enable you to choose a person to make decisions regarding your health and welfare, as well as your finances.

Enduring power of attorney

It is sensible to make an enduring power of attorney (EPA), as this enables you to select one or more people to act for you now, if you wish, and in the future, should you become mentally incapable. It gives you the opportunity to have a say about your future; it will also make it easier for your carers to act on your behalf in the future. You can set up an EPA as long as you are aware of what is involved and can show that you understand the process. If you have a query or complaint about an EPA or receivership, contact the public guardianship office (see below).

What is an EPA?

An EPA is a legal process in which you, the 'donor', give the legal right to one or more people, the 'attorneys', to manage your financial affairs and property.

This power can come into effect immediately, and has the same status as an ordinary power of attorney. This means that your attorneys can manage part or all of your financial affairs for you, or you can continue to manage them yourself while you are able to and hand over responsibility later.

The difference between an enduring power of attorney and an ordinary power of attorney is that an ordinary power of attorney becomes invalid if the donor becomes mentally incapable, whereas an enduring power of attorney becomes effective, providing the necessary steps are taken.

If you become mentally incapable, your attorneys will apply to register your EPA with the public guardianship office. While the registration is being processed, they can use your finances for essentials on your behalf, such as food or payment of regular bills. However, they are not able to arrange larger transactions, such as the sale of your house, until the EPA has been registered. You can specify that the EPA can only come into effect once you become mentally incapable. However, there are drawbacks to restricting the EPA in this way. For example:

- Even if you are not mentally incapable, you are likely to find it more and more difficult to deal with financial affairs as your dementia progresses. No one will have the authority to take over your responsibilities if you need them to do so.
- Once you do become mentally incapable, no one will be able to act on your behalf during the time that it takes for an EPA to be registered.

Who can make an EPA?

You can make an EPA if you have a diagnosis of dementia but you must be able to show that you understand what it is and what it is intended to do.

Get a doctor's advice if there is any doubt about your capacity to understand. If the doctor confirms that you are able to understand, it is a good idea for them to witness your signature.

You can also revoke an EPA, but only while you are still considered to be mentally capable.

First steps

If you are considering making an EPA it is advisable to seek independent legal advice from a solicitor. For ways of finding a solicitor, see the Alzheimer's Society's information sheet *Legal and financial tips* or contact the Alzheimer's Helpline.

An EPA must be made on a specific form available from a solicitor or law stationers. Ensure that an up-to-date form is used and that it is completed correctly, or it will not be valid. Your solicitor can advise you.

Once the form has been completed, it must be signed by the donor and witnessed. It must then be signed by the attorney(s) and witnessed. The attorney(s) must sign the form before the donor becomes mentally incapable. The attorney(s) may not act as witness(es).

If the original document is held by an attorney or at a solicitor's or a bank, you should also keep a copy. The solicitor can provide certified copies of the document.

It may help to avoid later misunderstandings if you call a family meeting to explain your reasons for making an EPA.

Selecting an attorney

Consider the age and circumstances of any prospective attorney and whether they will have the time and energy for such a commitment.

You should choose somebody who knows you well and who you trust; this is often a partner or close family member. However, some people prefer to choose someone with whom they are not so emotionally involved. Do what feels right for you.

Consider whether to appoint one or more attorneys and, if you decide to appoint more than one, decide how they should act. There are two ways in which they could act: 'jointly' or 'jointly and severally'. If attorneys are appointed 'jointly', they must act together. If one of them dies or resigns, the EPA is no longer valid, as the Enduring Power of Attorney Act 1985 does not allow for replacements. Other arrangements may have to be made.

However, if the attorneys are appointed to act 'jointly and severally', they can act both together and separately. This means that if an attorney dies or resigns, the surviving attorney(s) can still act.

The attorney's powers

Consider what authority you wish to give your attorney(s). You can give:

- A general authority, which allows an attorney to carry out any transactions on your behalf that you are legally able to delegate
- A more limited authority to deal with certain aspects of your property and affairs, as detailed by you on the EPA form.

Both the general and more limited authority can be qualified by certain conditions or restrictions. You can also appoint different attorneys to have different responsibilities, but it is advisable to keep arrangements as simple as you can.

The kinds of activities an attorney can carry out on your behalf include:

- Signing cheques and withdrawing money from savings accounts
- Buying or selling shares or houses
- Using your assets to finance your residential or nursing care.

The attorney(s) may also have limited powers to use your assets to benefit anyone for whom you might have been expected to make provision, to make gifts on special occasions or to make donations to charities that you are likely to have made.

However, a financial attorney has no power over you. They cannot direct where you live, for example.

The attorney's duties

The attorney must act in your best interests and consider your needs and wishes as far as possible.

They must not take advantage of your position to gain any benefit for themselves. They must keep your money and property separate from their own and from that of other people and they should keep accounts of any dealings on your behalf.

Attorneys must keep your affairs private unless you have stipulated otherwise on the EPA form or it can be demonstrated that it is in your best interests to pass on information to somebody else.

A person can refuse to act as attorney but if they agree to take on the responsibility, they immediately become subject to the duties of attorney. Failure to comply could mean the EPA is cancelled, and in some cases the attorney may be taken to court on charges of fraud or negligence. The role carries with it power and responsibility and should not be entered into lightly.

Registering the EPA

When the attorney(s) consider that you have become or are becoming mentally incapable they should notify you and certain close relatives of their intention to register the EPA. Notification must be made on an EP1 form. Your solicitor, or customer services at the public guardianship office, can explain which relatives need to be informed.

An application to register must immediately be made to the public guardianship office on Form EP2, accompanied by the original EPA document and the registration fee. Forms EP1 and EP2 are available from legal stationers or from the public guardianship office.

The registration fee was set at £120 in April 2005. However, your attorney can apply for a reduction if paying this fee is likely to cause you hardship. If you are receiving income support or your care home fees are being paid by the local authority, the fee will generally be waived. People with savings of less than £12,500 (April 2005-2006 figures) and no property may qualify for a reduced fee. Fees are reviewed each year.

The public guardianship office will hold the papers for 35 days from the date that the last EP1 was sent. This gives you and your relatives time to make any objections. If there are no problems, registration will take place.

Once the EPA has been registered, the attorney(s) can make binding decisions about your financial affairs. The court of protection can ask attorneys to produce accounts, although this usually only occurs if there has been a query or complaint about the way the EPA is being handled. There is a charge for checking accounts.

Complaints

Attorneys are expected to act 'reasonably' and in your best interests. The public guardianship office and the court of protection do not monitor the way an attorney acts under the EPA. However, they will consider any complaints about the way an attorney acts once the EPA has been registered. The court of protection will decide whether that person should remain an attorney or whether other arrangements should be made.

What is the court of protection?

The court of protection is an office of the supreme court with jurisdiction in England and Wales. Its function is to protect the finances and property of people who are mentally incapable of dealing with their own affairs. Proceedings are confidential, in order to protect people's privacy, and are kept as informal as possible. Most of the court's business is conducted by post.

What is the public guardianship office?

The public guardianship office (to be renamed the office of the public guardian when the Mental Capacity Act comes into force in 2007) is an executive agency within the lord chancellor's department. Its protection division is responsible for the day-to-day administration of cases that come under the jurisdiction of the court of protection. It is also responsible for the registration of EPAs.

Lasting powers of attorney

The Mental Capacity Act 2005 has made provision for people to choose someone to manage not only their finances and property should they become incapable, but also to make health and welfare decisions on their behalf. They will be able to do this through a lasting power of attorney (LPA). LPAs will replace EPAs in 2007, when the Mental Capacity Act comes into force, although EPAs made before this time will still be valid.

An LPA will enable you (the donor) to nominate a spokesperson (the attorney, sometimes referred to as a 'donee') to make decisions regarding your personal welfare, including healthcare and consent to medical treatment. Different attorneys can be named for making different kinds of decisions; you will need to think carefully about who you nominate.

Whereas an EPA can be used when the person still has capacity, an LPA will only become legal once the person has lost capacity. Both EPAs and LPAs will need to be set up using an official form and be registered with the office of the public guardian (currently the public guardianship office). EPAs set up before the Mental Capacity Act comes into force will still be valid.

You must decide whether you want your attorney to act generally or only in relation to specific situations. For example, the attorney will only be able to make decisions about end of life treatment if you have included this in a clear statement on the LPA form. However, the LPA form will not grant the attorney the right to demand certain medical treatment for you if the medical professionals are not in agreement; nor will it give the attorney the right to make decisions which are not in your best interests.

Receivership

If you have not made an EPA and you become mentally incapable of managing your financial affairs, it may be necessary to appoint a receiver to manage them. This is done through the court of protection, although if managing your financial affairs consists simply of managing your income from benefits, it may be done through appointeeship. For more information see the Alzheimer's Society's information sheet *Legal and financial tips*.

Who can become a receiver?

A close relative usually acts as a receiver, but it could be a friend, a bank manager or the local authority. If no one suitable can be found, the court of protection can appoint a solicitor as receiver.

A receiver has a considerable number of responsibilities that can be very demanding and time-consuming. Anyone wishing to become a receiver should consider whether they will be able to fulfil the obligations. They should read the free booklets produced by the public guardianship office, Receiver's handbook and Making an application, to ensure that they understand what being a receiver involves.

First steps

The first step is to get the application forms from the customer services unit of the public guardianship office. The customer services unit can also help with queries about the forms, although it cannot give legal advice. The person filling in the forms can apply to be appointed as receiver themselves or ask for someone else to be appointed. The completed forms should be returned to the public guardianship office with the application fee. The public guardianship office will then assess your needs and write to you to let you know what is proposed, so you can object if you wish.

If the court is satisfied that this is the right course of action, it will appoint a receiver (or make a short order - see below). Both these arrangements give the person selected the legal authority to manage your financial affairs on your behalf, in accordance with the court's instructions. In either case, the court will set out the exact duties and responsibilities involved.

What can a receiver do?

The receiver will manage your income to ensure that your day-to-day needs are met and bills are paid, that any property is kept in a good state, that your income tax affairs are kept up to date and that important documents are in order and kept safely.

The court of protection must authorise any use of your capital on your behalf. The receiver must liaise with the court about any investments, which are usually made by the court, and about the sale of property, which must be approved by the court.

The receiver should be aware of your needs and wishes and consult you as far as possible on how you would like your money to be spent.

A receiver has to submit annual accounts to the court of protection and take out a security bond to safeguard your assets. They can reclaim the cost from your money.

Short order

In some cases the court may decide to make a short order rather than appoint a receiver. This is a simpler and more limited arrangement and usually occurs when your assets do not exceed £12,500 in cash after debts have been paid (April 2005-2006 figures), or when there is no property to be sold and you do not have a level of income that the court considers needs to be managed by a receiver. A short order may authorise someone:

- To use pensions and trust income on your behalf
- To receive and use for your benefit some or all of your money held in a bank or building society
- To pay care home fees and any other debts and expenses
- To make sure any documents and valuables are safely looked after.

A short order with ongoing supervision from the public guardianship office will cost £80 and then £190 on the anniversary date and on every anniversary date following that.

Fees

There are some fees. The public guardianship office can give details of who is eligible for remission. Generally, people with assets of less than £12,500 (April 2005 figures) can have their fees reduced.

The following fees apply when someone is appointed receiver for a person with more than £12,500:

- Commencement fee of £240
- Appointment fee of £315
- Anniversary fee £240
- Annual account fee £100

There may also be fees if the court has to approve or authorise transactions or services for the receiver. The public guardianship office can give details. When the person dies, the winding up fee is £290. Fees are reviewed each year.

Helpful organisations

Age Concern England

Freepost SWB 30375
Ashburton, Devon TQ13 7ZZ

Freephone information line: 0800 00 99 66

Website: <http://www.ace.org.uk/>

The freephone information line is available from 7am to 7pm every day. Useful factsheets include *Legal arrangements for managing financial affairs*.

Citizens advice bureaux (CAB)

To find details of your nearest CAB look in the phone book, ask at your local library or consult the CAB website at <http://www.citizensadvice.org.uk/>

Your local CAB is often the best starting point for advice. The service is free, confidential and independent. Most CABs have a solicitor and some have an accountant available at certain times to give free initial advice.

Public Guardianship Office

Archway Tower
2 Junction Road, London N19 5SZ

Customer services phone: 0845 330 2900

Email: custserv@guardianship.gov.uk

Website: <http://www.guardianship.gov.uk/>

Customer services provide free booklets on enduring power of attorney and receivership. Their phoneline is available from 9am to 5pm on weekdays. The court of protection is at the same address.

Solicitors for the Elderly

Julie Cameron
PO Box Ltd, Broxburne
Herts EN10 7YY

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