



Legal matters

People with dementia should organise their legal affairs while they are still able to do so. A person will then be able to have a say over the decisions that affect them and planning also helps to avoid legal problems in the future.

It may be advantageous to involve family or friends in the process. When completing legal documents it is advisable to seek information and advice from a lawyer to ensure they are correct and legally valid.

Everyone should have a will and an Enduring Power of Attorney.

Wills

A will ensures that when a person dies, their money and possessions go to the people of their choice.

It is important to seek legal advice when a will is set-up or updated, and to let the lawyer know of a diagnosis of dementia. If the lawyer is unsure of a person's mental capability they may recommend to the person to have an appropriately qualified health professional (probably the person's GP in the first instance) check their decision-making abilities. It is important to follow this procedure as it will reduce the chance of family or friends arguing the validity of the will, after a person has died.

Enduring Power Of Attorney (EPA)

An Enduring Power of Attorney (EPA) is an authority given by you to another person to look after your affairs and it continues to be valid even if you lose your capacity to make or communicate decisions.

Contrary to a commonly held belief, a spouse or next of kin cannot make decisions on behalf of someone who lacks mental capacity, without specific prior authorisation provided in an EPA or an appropriate order from the Family Court.

Please note that having an authority to sign on another person's bank account is not the same as an EPA.

Once a person loses capacity the authority to sign on a bank account may become null and void. However, an authorised person should inform the bank and make sure the person who has lost the capacity does not have access to a cheque book, bankcards and pin numbers. The bank may require medical evidence of lost capacity.

What is capacity?

Capacity is the legal term that means the ability to make and understand the consequences of decisions. If a person has lost their capacity they are sometimes described as being legally incapable (from the Protection of Personal and Property Rights Act 1988 – usually called the "3PR" Act).

Having a diagnosis of dementia does not mean you automatically lack mental capacity.

However, there may be a time when the disease progresses and you are unable to make these decisions and you will lose capacity or you may have capacity at intervals only.



An EPA must be organised BEFORE a person loses capacity, otherwise the power will be invalid.

There are two kinds of EPA and a separate document must be signed for each:

- one that covers a person's property,
- one that covers a person's care and welfare.

The person you appoint to act on your behalf is called an **attorney**. The person giving the attorney the authority to manage their affairs is called the **donor**. A donor often appoints one attorney to manage their care and welfare and a different attorney to manage their property.

The EPA form needs to be signed by the donor and the attorney appointed, with both signatures being independently witnessed. An attorney must be at least 20 years old, a New Zealand resident, not bankrupt, legally capable and not subject to a personal or property order. It is advisable to have the document prepared by a lawyer or trustee company (such as Public Trust).

When appointing attorneys, consider whether they have the skills, judgement and time to handle a person's affairs. This person or company will have considerable power over a person's property, affairs and welfare, so take the time to make this decision. It is also important to note that the attorney for personal care and welfare needs to be able to work closely with the property attorney, so this should be thought of when appointing attorney/s. It may also be wise to choose a substitute attorney in case any person is unable or unwilling to act on a person's behalf.

EPA – Property

Property is more than just land and houses, and includes businesses, bank accounts, life insurance, shares and all other possessions such as furniture and jewellery.

An attorney can be given general authority to act on a person's behalf, or it can be limited to specific property or specific circumstances. You can appoint one or more attorneys for property and the attorneys can be a person or a trustee company. It should be noted, however, that a lawyer or trustee company is likely to expect remuneration for their services in this regard.

It may be beneficial to appoint two attorneys to act jointly (and not separately) so that neither can act without the knowledge and approval of the other.

EPA – Personal Care and Welfare

Only one welfare attorney can be appointed and they must be an individual (not a trustee company).

The attorney's role is to help deal with the donor's personal care needs, including deciding what rest home is appropriate, or what general medical treatment a person should have. They cannot make decisions relating to marriage or divorce, refuse consent to standard or life-saving medical treatment like a blood transfusion, or consent to medical experimentation.

Conflict Between Attorneys

If there is a conflict between the attorneys under the EPA in carrying out their respective powers or duties, then personal care and welfare prevails. However, either attorney can apply to the Court asking it to direct otherwise.

Revoking an EPA

The donor can change, vary or revoke an EPA at any time while they are still mentally capable. As this is a serious step, a lawyer should be consulted. Different procedures are needed for revocation, variation and replacement and legal advice should be sought as to which is most suitable for the situation.

Court Orders

If someone is already incapable of looking after their affairs and they have not set up an EPA, then certain people designated in the 3PR Act can apply to the Family Court for a personal order or to appoint a property manager and/or welfare guardian.

The appointment of a property manager or welfare guardian through the Family Court (the Court) takes longer and is more expensive than setting up an EPA, and the person appointed may not be someone you would have chosen. So if possible, do not leave this as a “fall back” position.

Personal Orders

(For people who do not have an EPA)

If a person becomes unable to manage one or more areas of their personal care, the Court can make a personal order for their protection. A personal order is an instruction given by a Judge, requiring an action to be taken to look after a specific part of an incapacitated person's care and welfare, for example an order about where the person is to live or an order that a person receive medical advice or treatment.

The Court will decide on a person's capacity and whether or not it should make an order. There are eleven types of personal orders, which include payment for work performed, that the person be provided with specific living arrangements, and the person be provided with medical advice or treatment.

A personal order expires at the time set in the order. If no time is set, the order stops when all tasks set in the order are completed, or 12 months after the order was made, whichever comes first.

Property Managers

(For people who do not have an EPA)

The Family Court can make two kinds of orders about property.

Personal Order over property

If the property is not large (no single item is worth more than \$2,000 or the income or benefit is less than \$20,000 a year), the Court may make a personal order instead of a full property order. A personal order can be granted to anyone whom the Court can trust to handle the property.

Property Order over property

This is an order which appoints a property manager for any person who lacks the competence to manage their own affairs. Property managers can be appointed for property of any value. As far as possible, the Court will try and find out the wishes of the person concerned when appointing a property manager.

Property managers can pay bills, carry out repairs, carry on a business and sell or let property. Each property order made by the Court lists the specific rights and powers given to the property manager. Property managers are bound by certain duties and restrictions, and have to report annually to the Court to show they are managing the person's property appropriately. Property managers can claim expenses from the estate but they are not normally paid unless the Court provides for remuneration.

It is important to note that the Court can't appoint a property manager just because a person is making unwise decisions about their money or property. The Court must be satisfied that a property manager is necessary to protect the person's financial interest.



Welfare Guardians

(For people who do not have an EPA)

The Family Court can only appoint a welfare guardian if the person completely lacks capacity and the appointment is absolutely necessary. In selecting and appointing a welfare guardian the Court must take account of the wishes and needs of the person concerned, and the ability of the appointee to promote and protect the person's best interests.

The welfare guardian's role then becomes like that of the personal care and welfare attorney mentioned under EPA's above.

Advance Directives

Advance directives are sometimes referred to as a living will, and they state what medical treatments a person would like to receive if they became unable to make or communicate these decisions. It also allows a person to tell their doctor what treatment they don't want in a particular situation.

Like an EPA, an advance directive must be drawn up while a person still has the capacity to do so.

It is best to initially speak to a doctor about wishes regarding medical treatment. They can say what sort of treatments a person is likely to have in the future and the consequences of having, or not having these treatments.

An advance directive differs from an EPA and should not be seen as an alternative. An advance directive is not legally binding, and a clinician may choose to not follow it. However, it does provide an indication of your wishes. An advance directive can be part of your welfare EPA and will assist an attorney in making decisions.

The information contained within this information sheet is intended for information only and should not replace discussion with a professional or be taken as legal advice.

Age Concern New Zealand produces a brochure and booklet on Enduring Powers of Attorney which can be obtained from your local Age Concern Council (www.ageconcern.org.nz).

Your local Citizens Advice Bureau or Community Law Centre can provide more help and information and the Family Court (www.courts.govt.nz/family) and Law Society (www.nz-lawsoc.org.nz) have informative brochures available on their websites.

