



# Chadwick Lawrence

Yorkshire's Legal People

Lasting Powers of Attorney

## Lasting Powers of Attorney

Lasting Powers of Attorney are legal documents that operate during your lifetime to authorise others (referred to as 'Attorney(s)') to deal with your property and finances, and/or to make decisions relating to your health and care.

There are two types of Power of Attorney:-

1. Lasting Power of Attorney for Property and Financial Affairs.

This document allows you to appoint an Attorney to deal with your finances, which may include making decisions regarding closure or management of bank accounts, dealing with your tax position, claiming benefits/pensions, paying your bills and selling property/investments (for example, if you were to move into residential care).

For this document, you have a choice as to whether to allow your Attorneys to act for you as soon as the document is registered (with your consent, only) or only if you have lost mental capacity and can no longer make decisions for yourself.

You can appoint different Attorneys for your personal and business affairs. For more information in relation to Business Powers of Attorney, please see our separate factsheet on this topic.

Your Attorney would not have the authority to make a Will on your behalf, nor would they have the authority to make gifts unless on certain occasions (such as a wedding or occasions where presents are given within families), or to charities to whom the donor made or might have been expected to make a gift to. Any gift must be reasonable in the circumstances, considering the size of the donor's estate. If an Attorney wishes to make substantial gifts (for example in the interest of Inheritance Tax planning), an application to the Court of Protection to obtain authority must be made to authorise the gift.

2. Lasting Power of Attorney for Health and Care

This document allows you to appoint an Attorney to make decisions relating to your health and welfare, and those decisions may include consenting or refusing life sustaining treatment, where you may live if you were to move into residential care, and your daily routine. This document can only ever be used if you have lost mental capacity, so your Attorneys could only ever make decisions relating to your Health and Care if you are unable to make those decisions yourself.

Your Attorneys must always act in your best interests and you retain control of your affairs until you are unable to make those decisions for yourself.

### Appointing Attorneys

You can appoint one or more Attorney to act on your behalf. Your Attorneys do not need to be the same person for both types of Power. You can also appoint 'replacement Attorneys' so that in the event that your original Attorneys cannot act by reason of their own incapacity or death, then the replacement Attorneys can step in and act.

You cannot appoint a minor or a bankrupt individual to be your Attorney

### How can I appoint my Attorneys to act?

If you appoint more than one Attorney, you can appoint them to act 'Jointly' (they can only ever make decisions unanimously and together), 'Jointly and Severally' (where they can make decisions together or separately) or 'Jointly' for some decisions and 'Jointly and Severally' for other decisions.

We usually recommend that you appoint your Attorneys to act 'Jointly and Severally' as if, for example one of your Attorneys was on holiday or had passed away, the document would be unusable if you had appointed the Attorneys to act 'Jointly'. This decision however is entirely the donors.

### What Powers do my Attorneys have?

When making any decisions, the Attorney must follow the statutory principles as set out in Section 1 of the Mental Capacity Act 2005.

The Mental Capacity Act 2005 also creates a duty on the Attorneys to follow the Code of Practice, which provides guidance on decision making. Failures to follow the code may be considered if there is a complaint lodged with the Court of Protection, to determine whether the individual is acting in the best interests of the donor. The Code of Practice can be found at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/497253/Mental-capacity-act-code-of-practice.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf)

### Notification of individuals

The donor can select to notify an individual that the Powers of Attorney are being registered. This is usually recommended where the donor is not applying to register (i.e. the Attorneys apply to register at a later date).

We will discuss the possibility of notifications with you, to see whether the use of this service would be advisable in your circumstances.

### What are preferences and instructions?

Lasting Powers of Attorney carry the ability to include specific 'preferences and instructions' in the documentation. The donor can therefore include conditions and guidance within the documents themselves. The instructions are usually included for the following reasons:-

1. To give the Attorney the specific authority (such as a power to invest, or to obtain financial records which otherwise wouldn't be available);
2. To provide guidance to the Attorneys to assist them make a decision in the event that the donor loses mental capacity;
3. To place a limitation on the ability to act.

Alternatively, guidance can be placed in a separate Letter of Wishes rather than the Power of Attorney itself to guide the Attorneys. This is beneficial as the donor can update the letter of wishes as and when based on changes to the donor's opinion.

At Chadwick Lawrence, we have adapted some standard form instructions to insert into the Powers of Attorney to make them more useable and tailored to your circumstances. We will discuss these with you where appropriate.

### Registering the Power of Attorney

A Lasting Power of Attorney must be registered at the Office of the Public Guardian (OPG) in order to be used (unlike the old style Ensuring Power of Attorney – see our separate fact sheet on this topic). Whilst a Power of Attorney does not require registration automatically, we usually register the document on your behalf as part of our service (unless ordered otherwise) so as to make things easier when the Power does need to be used in the future. This is because if the document is not registered and the donor has since lost mental capacity, if the OPG pick a fault with the document, then problems can occur if the Attorneys try to register the document at a later date.

The Attorneys have no authority to make decisions whilst the Power of Attorney is pending registration. We therefore recommend that if a decision must be made within the registration period, that a General Power of Attorney is set up alongside that of a Lasting Power of Attorney to cover the period until registration.

A General Power of Attorney enables an individual (called the 'Donor') to grant a general power conferring 'authority to do on behalf of the donor anything which he can lawfully do by an Attorney'. If a donor loses mental capacity, the general Power of Attorney is no longer valid which is why they are only used for a short period of time as they do not 'endure' capacity loss alike a Lasting Power of Attorney.

#### What are the responsibilities of the Office of the Public Guardian?

As confirmed above, the Lasting Power of Attorney must be registered with the Office of the Public Guardian (OPG) before it can be used. The OPG have many responsibilities which include the management of a register of Lasting Powers of Attorney, and investigating complaints about the way in which Attorneys are acting, amongst other duties.

#### What are the registration fees.

To register the document at the OPG, they charge a standard registration fee of £82 per document. However, if a donor has a low income (less than £12,000 per annum) then they may be eligible for a reduced fee on the production of evidence of earnings. Depending on what benefits the donor receives, the donor may alternatively qualify to not have to pay a fee at all. To obtain this benefit, form LPA120A must be completed and lodged with the application. We can advise on this where appropriate and assist you to produce the relevant evidence to lodge with the application.

#### I have an Enduring Power of Attorney – do I need to change this to a Lasting Power of Attorney?

Although you cannot make an Enduring Power of Attorney (EPA) anymore, they still remain a valid document. You may however wish to consider seeking advice on putting in place Lasting Powers of Attorney (as an alternative to the EPA) so as to ensure that the document still accords with your wishes. There are also some advantages to LPAs over EPAs and a few are detailed as follows:-

1. Enduring Powers of Attorney only cover Property and Financial Decisions, whereas Lasting Powers of Attorney can cover both property and financial affairs, and health and care decisions.
2. As soon as Lasting Powers of Attorney are registered, they can be used whenever (including when the donor has lost mental capacity). Enduring Powers of Attorney must be registered when the donor begins to lose mental capacity and this process can take some months to be

dealt with – Attorneys cannot act whilst the Power is being registered which often results in delays when the Powers are needed most.

3. You can indicate preferences in Lasting Powers of Attorney, and at Chadwick Lawrence we have developed some standard form preferences and instructions to insert into the documents to make the same more useable. Any existing Enduring Power of Attorney does not provide those express powers and as such, the documents are less flexible.
4. Enduring Powers of Attorney are automatically revoked if either the donor or an Attorney is declared bankrupt. This may still affect a Lasting Power of Attorney for Property and Financial Affairs, but it does not automatically revoke the document.
5. As Lasting Powers of Attorney are usually registered immediately upon execution, this acts as a safeguard as the Office of the Public Guardian check the documentation before the registration – the registration acts as a 'validation' that the papers have been completed correctly. If there is a mistake in an Enduring Power of Attorney which is detected upon registration of the same, the OPG will reject the same and as the donor will have begun to lose their mental capacity, they will no longer be able to create a new form Lasting Power of Attorney and the family will instead have to apply to the Court of Protection to be appointed as deputies for the individual, a process that is costly and lengthy, with more onerous duties.

Should you wish to find out more information about Lasting Powers of Attorney, contact our experienced team on 0800 015 0340 to discuss, where an appointment can be booked for you to see a professional.