



Chadwick Lawrence

Yorkshire's Legal People

Enduring Powers of Attorney.



Enduring Powers of Attorney

An Enduring Power of Attorney is a legal document under which an individual ('donor') has appointed an Attorney(s) to make decisions relating to the donor's property and financial affairs. Since 1 October 2007, Enduring Powers of Attorney could no longer be made as the regime of 'Lasting Powers of Attorney' came into force (see our separate information sheet on Lasting Powers of Attorney). However, pre-existing Enduring Powers of Attorney continue to be valid and can still be used.

Why do the documents require registration?

The distinguishing factor regarding Enduring Powers of Attorney is that the Attorney(s) appointed under the same are under a legal duty to register the document with the Office of the Public Guardian when they have reason to believe that the donor is, or is becoming, mentally incapable of managing and administering their property and financial affairs. Whilst the donor still retains mental capacity, the document can be used by the Attorney without registration and unless the Attorney requires legal advice on their specific duties under the Mental Capacity Act 2005, there is little that is required.

However, in order to register the documentation, certain steps must be taken to deal with the same. The Attorney must complete the relevant application form to lodge with the original Enduring Power of Attorney at the Office of the Public Guardian, together with notifying the donor and at least three family members of the intention to register the same.

Which family members must be notified?

When the Attorney is applying to register the document, the Attorneys must notify at least three relatives from a list which specifies an order of priority. Each person must be separately notified. We will advise you on the individual relatives that require notification as appropriate depending on the circumstances, and also proceed to deal with the notification on your behalf. If there are less than three relatives, or a relative cannot be located, we will advise you appropriately of the action required.

Why do you have to serve notice on relatives/the Donor?

The regime regarding notification of relatives and the Donor is so that a family member has the opportunity to object to the registration should they wish, which acts as a safeguard for the donor in the event that an Attorney is not acting in the best interests of the donor or is falsely registering the document.

What if Attorneys are appointed to act jointly and severally?

A joint and several appointment means that, if there are two or more appointed Attorneys, that the Attorneys can either make decisions together or separately. If this is the case, only one Attorney is required to register the Enduring Power of Attorney alone, but they must give notice to the existing Attorneys in the prescribed form.

If Attorneys are appointed jointly, both Attorneys must be party to the application for registration of the document. This may cause problems if one Attorney does not agree to a proposed action, as that action (such as registration) cannot be taken.

What about fees?

In addition to our legal fees to deal with the same, there is a mandatory registration fee of £82 to register the document with the Office of the Public Guardian (subject to a potential fee exemption, which we will advise on if appropriate).

What happens when the document is registered?.

When the document has been registered with the Office of the Public Guardian, it will be returned with a 'Validated-OPG' perforation on the original document. The document can then be used whenever it is required. Attorneys must act in the best interests of the individual donor and ensure that they keep separate accounts, together with ensuring that they consider the Mental Capacity Act 2005 and supporting Code of Practice when acting on behalf of the Donor.

Should I replace my Enduring Power of Attorney with a Lasting Power of Attorney?

If you still have capacity, you can certainly revoke your existing Enduring Power of Attorney and replace it with a new Property and Finances Lasting Power of Attorney. This will also enable you to make a health and care Lasting Power of Attorney (Enduring Powers of Attorney only ever cover property and financial decisions as opposed to health and care).

Although you cannot make an Enduring Power of Attorney anymore, they still remain a valid document. You may however wish to consider seeking advice on putting in place Lasting Powers of Attorney so as to ensure that the document still accords with your wishes. There are also some advantages to creating Lasting Powers of Attorney in replacement and a few of those reasons 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. Existing Powers of Attorney do not provide those express powers and as such, 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.

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 and signed correctly. If there is a mistake in an Enduring Power of Attorney which is detected on registration of the same, the Office of the Public Guardian 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. 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, onerous and time-consuming.

Contact our experienced team on 0800 015 0340 if you are an Attorney and require assistance in registering the Enduring Power of Attorney, or if you would wish to find our more information on converting your Enduring Power of Attorney to a Lasting Power of Attorney.