

GUIDE TO LASTING POWERS OF ATTORNEY FOR BUSINESS OWNERS

No-one likes to think of circumstances where they are no longer able to manage their own personal financial affairs, but what about those of your business? What would happen to your sole tradership, partnership or company if you lose mental or physical capacity? To a large extent this depends on the type of business entity you have so lets look at each in turn:

SOLE TRADER

Sole traders have the ability to dictate how to manage their businesses during their lifetimes and on their deaths. You can use both types of Lasting Powers of Attorney (health and welfare and property and finance) to assist with managing the business. You can also leave a will that gives the necessary and appropriate powers to your executors to deal with the business and its assets after your death.

It is very important for a sole trader to make a Lasting Power of Attorney (LPA) to ensure that someone is able to take over the business if they become incapacitated. Without one, the day-to-day running of the business could be severely compromised.

With sole traders, there is usually no need to have a separate business LPA provided you are happy for your chosen attorney to deal with your personal financial affairs and the running of your business. If not, then you should consider making a separate LPA for the business.

PARTNERSHIP

With any partnership, the best place to start is to consider the partnership agreement. A well thought out and well drafted agreement should deal with incapacity and its consequences. If the agreement does not properly provide for the loss of a partner's capacity (for example: it stipulates that the partner who is incapacitated must retire) then The Partnership Act 1890 will govern the partnership.

Under this Act, the partnership can be dissolved by way of an application to court - which can prove costly and time-consuming.

It is a sound idea to have a financial LPA to deal with the partnership and your interest in it.

In such an LPA it is important to carefully consider who to appoint as attorney since you may find that if the appointed attorney and partner are the same person, there is a risk that the terms of the partnership could be altered in the continuing partner's favour.

If there is no LPA in place and no provision in the partnership agreement, then you may need to apply to the Court of Protection to have a deputy appointed - again an expensive and time-consuming process.



LIMITED COMPANY

The company documents (Articles of Association and the shareholders' agreement) should deal with what happens on incapacity. The Articles of Association will usually provide that if a director becomes incapacitated, he or she will cease to be a director.

A shareholders' agreement, assuming one exists, may have provisions that would see the affected individual shareholder offering their shares for sale. This could have unintended consequences for the company.

It is not possible for a director of a company to delegate their functions as a director as their appointment as a director is a personal one. The Articles could allow for the appointment of an attorney to make decisions for the affected director but this would be highly unusual. More common is the ability to appoint an alternate director. This alternate director would step in for short periods of time such as an illness or vacation.

A shareholder may, however, appoint an attorney to exercise his/her voting rights on his/her behalf. If there is no agreement in place or if the agreement is silent on incapacity, then an LPA would be highly recommended as it would give the attorney authority to vote on the donor's behalf, allowing the business to continue running as normal.

LPAs are extremely useful for ensuring an individual's financial affairs are properly managed for them when they are no longer able to do so themselves. For anyone with a business interest, LPAs should be carefully considered in light of the existing business structure. Expert advice should be taken to ensure the correct measures are in place to secure the continuity and smooth running of the business.

At Mogers Drewett, our Private Client and Commercial lawyers work together to ensure that we offer full and comprehensive advice on all matters relating to your personal and business interests.

Bath 01225 750 000 | **Sherborne** 01935 813 691 | **Wells** 01749 342 323