

A Business Lasting Power of Attorney for Farming Clients

Introduction

“If we create something, we should aim to protect it” is sage advice and particularly so when it comes to planning for the future and thinking about who you would rely on if you needed practical support.

The Mental Capacity Act 2005, which came into effect on 1 October 2007, introduced two types of Lasting Power of Attorney (LPA) – a Property and Financial Affairs LPA and a Health and Welfare LPA.

A Property and Financial Affairs LPA allows your attorney(s) to deal with your property and finances and you can create multiple LPAs specifying which matters (which may be personal or business) are covered by each LPA.

A Business Lasting Power of Attorney

An LPA may authorise your attorney(s) only to make decisions affecting the operation of your farming business, i.e. a Business LPA. A business attorney may, for example, make decisions (unless you provide otherwise) concerning:

- control, management, sale, exchange and acquisition of farming assets (e.g. land, equipment, and livestock);
- entering into farm business tenancies, herbage agreements and other contracts;
- undertaking appropriate planning so that any available tax reliefs and subsidies are not lost;
- paying wages and tax;
- hiring and removing employees; and
- managing health and safety issues.

The business attorney may be said to be standing in your shoes. When making decisions, your business attorney should consider how you would have made the decision, apply the Mental Capacity Act principles to the decision, and act in your best interests when making the decision.

If there is no Business LPA in place and you lose capacity, an application to the Court of Protection for a “deputyship” order can be made. Whilst any views you can express should be taken into account, you will not be in control of exactly who is appointed as deputy, as this decision ultimately rests with the Court. During this time your farm would be at risk from problems such as the bank freezing the farm account, contracts not being fulfilled and loss of confidence from the farming community. If you operate your farming business on your own and you lose capacity, no-one would be able to make immediate decisions. Even if your farming business is operated as a partnership, you should consider appointing an attorney to make decisions concerning your interests when you are unable to do so. The partnership agreement should also be reviewed.

The Code of Practice

An attorney – or anyone making decisions on behalf of another person who lacks capacity – must have regard to the Code of Practice issued under the Act. This is a useful, if lengthy, document which aims to provide help and guidance with illustrations of particular dilemmas faced by those having to make decisions. Copies are available from the Stationery Office or in PDF form from the OPG website at:

<http://www.publicguardian.gov.uk>

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Avoiding problems

Problems often arise where there is a lack of understanding over what an attorney can and cannot do or where one attorney fails to co-operate with another or to consult with other interested parties. In addition to the Business LPA itself, you may also wish to consider writing a letter of wishes to make your business attorney aware of your wishes and other information such as:

- what should happen immediately after you lose capacity;
- the farm's future development and expansion; and
- sale of the farm.

Why Thomson Snell & Passmore

We have a great deal of experience in this area of practice. We have looked after the affairs of our clients for generations and frequently act as attorneys and deputies for them. We have one of a handful of dedicated teams of lawyers in the country specialising in Court of Protection work, acting for deputies, attorneys and relatives in all aspects of Court of Protection proceedings.

Disclaimer

This information sheet is written as a general guide. As any course of action must depend on your individual circumstances, you are strongly recommended to obtain specific professional advice before you proceed. We do not accept any responsibility for action which may be taken as a result of having read this information sheet.

The law is stated as at 30 June 2021.

If you require further information, please discuss with your usual contact in the firm or email Una Angus at:

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Alternatively, please speak with Una or another member of the Private Client team on 01892 510000.

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