

A Business Lasting Power of Attorney

Introduction

One in 6.8 people experience mental health problems in the work place (Mental Health Foundation).

The Mental Capacity Act 2005 (“the Act”), 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. In some instances, it will not be appropriate for the same person to make both personal financial decisions and business decisions on behalf of the donor.

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A Business LPA allows you to appoint an attorney to make decisions concerning your business interests when you are unavailable (it is possible to use a Property and Financial Affairs LPA and/or a Business LPA as if it were ‘an ordinary power of attorney’) or lack capacity. An attorney under a Business LPA may, for example, make decisions (unless you provide otherwise) concerning:

- control, management, sale, exchange and acquisition of business assets;
- entering into contracts;
- 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. It is important that the business attorney is familiar with the business concerned and is someone whom you trust with your business affairs. When making decisions, your business attorney should consider how you would have made the decision, apply certain principles (set out in the Act) to the decision, and act in your best interests when making the decision. Appointing one of your other partners/directors may be suitable to protect your business, however conflict of interest and influence should be considered and, where appropriate, an independent attorney appointed to act in your best interests.

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. This application process can take six months or more and during this time the business would be exposed to the risk of the bank considering freezing their bank account. 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.

If you operate your business on your own and you lose capacity, no-one would be able to make immediate decisions. Even if your business is operated as a partnership or a company, you should consider appointing an attorney to make decisions concerning your interests when you are unable to do so. If you are a person with significant control, a loss of capacity would seriously affect the running of the business and its ability to function. It may not be possible to complete the sale of the business or other transactions. The partnership agreement or articles of association and any shareholders’ agreement should be reviewed.

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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 Office of the Public Guardian website at:

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

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 future development and expansion of the business; and
- sale of the business.

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 31 October 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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