TECHNICAL ADVICE

FROM THE IPW TECHNICAL PANEL

Business LPAs

Background

I am often asked about creating LPAs for clients who have business assets so I included this guidance in the Intro to the Mental Capacity Act and LPAs course for two years now.

However, our sponsors Wilkes under the excellent guidance of Ann-Maria Aston, gave a very informative talk at Rob Phipps' quarterly training meeting last month which is available for viewing if you were unable to attend. Please contact Jackie Morton in the office for the link.

This matter has been raised again in the last week or so with the technical team so I would draw your attention to the relevant guidance as there are various implications of appointing attorneys for business assets.

I would like to thank my fellow trainer John Wilford for his assistance in putting this article together.

Your client *can* appoint the same person(s) as the Attorney(s) in a personal financial LPA and business financial LPA if they want to. However, in many cases, it will be inappropriate to appoint the same person to manage both personal and business affairs as capability, conflicts of interest, requirements of regulatory bodies, insurance and the partnership agreement or articles of association are just some reasons why this may not be possible or, indeed, advisable.

If your client intends to use the same Attorneys for both personal and business regardless, they can just create a single LPA on one LP1F form.

If one form is being used to appoint the same Attorneys for both personal and business matters, it is advisable to set out clearly that the form is intended to cover both. The **Code of Practice for the Mental Capacity Act 2005** contains a list of the types of decisions that a property and financial affairs Attorney might make (subject to any express restrictions made on the LPA form). Although the list is not exhaustive, it is indicative – and notably, the emphasis is on decisions that relate to personal property and personal financial affairs, such as paying the mortgage and household expenses.

Bear in mind that creating confusion regarding the scope of the Attorneys' powers may result in the Office of the Public Guardian rejecting the LPA at worst or severing restrictions at best, thus possibly rendering the document worthless.

Setting out expressly that the LPA is intended to apply to your business avoids any doubt.

As mentioned previously in this guide, if someone loses mental capacity and they haven't made a Lasting Power of Attorney, someone would need to apply to the Court for a **Deputyship Order** to act on their behalf. This is expensive and the applicant may not be who your client would have chosen.

The process can also be lengthy – currently taking between 12 and 18 months to complete due the COVID-19 pandemic. In the meantime, nobody can make financial decisions on your client's behalf.

Even if your client has a joint bank account with their spouse, it can be frozen until a Deputyship Order is produced. Business accounts can also be frozen, even where these are held jointly held in the names of business partners or directors. With no funds, businesses in these circumstances can fail.

Having a Business Lasting Power of Attorney in place allows someone that your client trusts– someone who understands their business – to take over the day-to-day affairs as soon as they are needed. The Attorney might be given the power to pay suppliers and staff, access and manage bank accounts, invest assets, handle tax matters and enter into contracts. Of course, they can limit the Attorney's power, but they need to ensure that the company can continue to operate with any limits in place.

Types of Businesses

There are different considerations for business LPAs, depending on what type of business your client has.

Sole traders

Sole traders run their businesses as individuals – the business is not therefore legally separate from the business owner. A business LPA will often be advisable for a sole trader as they have no "partners" who could run the business for them if they did lose capacity. So, the lack of an LPA may expose the business to unnecessary risk.

Partners (general partnerships and limited partnerships)

Partnerships will be subject to any Partnership Agreement, together with the provisions of the **Partnership Act 1890** or the **Limited Partnerships Act 1907**.

Partners need to consult their partnership agreement as this may contain provisions relating to the incapacity of the partners. Of note however, provisions removing partners who lack mental capacity may be in breach of anti-discrimination legislation. In order to manage a potential situation with a partner who lacks mental capacity and to reduce the risk of discrimination claims, the partners should each consider putting in place a Business Lasting Power of Attorney.

Limited Liability Partnerships

Limited liability partnerships are subject to the **Limited Liability Partnerships Act 2000** and subject to many of the provisions of the **Companies Act 2006**. They often adopt Model Articles of Association. Members of an LLP should review their articles and remove any potentially discriminatory clauses. They may then wish to each appoint an Attorney using a Business LPA.

Limited Companies

Company directors

Many companies use the **Companies (Model Articles) Regulations 2008** which used to contain provisions allowing the removal of directors who lacked mental capacity.

However, these were amended in April 2013. From this date, various provisions were removed from Schedules 1, 2 and 3 of the Articles by the **Mental Health (Discrimination) Act 2013**, including Paragraph 18(e) of Schedule 1 which stated:

"A person ceases to be a director as soon as by reason of that person's mental health, a court makes an order which wholly or partly prevents that person from personally exercising any powers or rights which that person would otherwise have."

However, although not expressly revoked, it is possible that attempts to remove a director who lacked mental capacity under Paragraph 18(d) of the Model Articles (and similar provisions contained in Schedules 2 and 3) would *also* fail if the grounds for or process of removal were found to be discriminatory. Paragraph 18(d) states:

"A person ceases to be a director as soon as a registered medical practitioner who is treating that person gives a written opinion to the company stating that that person has become physically or mentally incapable of acting as a director and may remain so for more than three months."

Directors need to check their articles of association for similar clauses. In order to protect the company's interest and avoid possible claims of discrimination, it makes sense for all Directors to execute a business Lasting Power of Attorney.

Some have claimed that individual directors cannot delegate their authority or authorise a proxy and often you will hear the New South Wales case of Mancini v Mancini cited in which it is stated:

"The office of a director is not a property right capable of being exercised by an Attorney or other substitute or delegate of the person holding the office."

However it is important to appreciate that this case is not an accurate representation of English, Welsh or Scottish law (nor Australian for that matter). Directors *may* amend their articles of association to include delegation authority by an individual director, if the articles do not already permit it.

Unless the director is a **sole** director, he/she cannot appoint an individual to be a director in his/her place without the board of director's approval. However, if the rules of agency are applied, a principal (Donor) is able to appoint a proxy (Attorney) to make decisions on their behalf.

This is not the same as appointing someone to be a 'full' director. When an LPA is used in a business context, the underlying principle is that the nominated Attorney remains the agent.

Directors should:

• Check to see if their articles of association include delegation authority by an individual director. If not, they may wish to amend the articles by special resolution.

• Check to see if any provisions of the articles may be considered discriminatory under the Mental Health (Discrimination) Act 2013 and amend by special resolution as necessary.

• Consider whether all Directors should make a business LPA to protect the company's interests.

How do you create an LPA for Business Affairs?

Business LPAs are made on form LP1F in the usual way, and the same rules apply, governing for example who can act as an Attorney, the certificate provider, and witnesses.

An important point to note is that if your client decides to make both a business LPA and personal LPA, each needs to contain instructions in Section 7 of the form limiting their scope – i.e.

- The personal LPA should specify that your Attorneys have general authority to act in relation to all of your property and financial affairs except for the relevant business, in respect of which you have executed a separate lasting power of Attorney.
- The business LPA should specify that your Attorney's authority is limited to your business.

When does the Attorney's authority end for a business LPA?

Section 4 of the **Mental Capacity Act 2005** states that Attorneys must:

"…so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him."

Attorneys must also consider the **Code of Practice for the Mental Capacity Act 2005**, particularly Section 7.52

Sue Ioannou

Chair and Head of Training

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