

WHO'S AT THE HELM IF YOU'RE NOT?



WHO CARRIES ON YOUR BUSINESS IF YOU CAN'T?

Powers of Attorney are mainly associated with elderly people suffering an incapacity, most commonly in relation to dementia or Alzheimers. However mental incapacity can strike any of us at any time whether temporarily or permanently. We all travel regularly and may even participate in extreme sports. Illness or an accident might occur that will affect your ability to perform your duties and carry on your business. This could have a devastating effect on your business and on your income for yourself and your family.

SOLE TRADER

If you are a sole trader you will run your business as an individual and the business does not have its own legal entity. A Business Lasting Power of Attorney therefore can be a very effective way for you to make provision for the continuity of your business affairs in the event of an accident or illness striking.

PARTNERSHIP

If you operate your business as a partnership you may have already made provision within a **Partnership Agreement** and you should consult your Partners before making a Business Power of Attorney.

If you don't have a Partnership Agreement there is no provision within the Partnership Act dealing with incapacity of a Partner and therefore you and your fellow Partners could find yourselves in difficulties. It is common for business partners to appoint each other or a professional or close family member. Sole appointment can be made or they can act jointly.

If your business account requires two signatures to operate and one of you become incapable of managing your business affairs the whole business will be affected; you may not be able to for example; pay the creditors; salaries or rent on a business premise. This could also restrict the acceptance of new business.

LIMITED COMPANIES

If you are a Company Director you may already have provision within your Articles of Association and these should be checked before making any Business Power of Attorney. If your Company uses the model articles for private companies limited by shares as set out in the Companies Model Articles Regulations 2008 "*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 3 months*". This may meet your requirements but if not you should consider both amending your Articles of Association and making a Lasting Power of Attorney that does suit your needs. If you are the sole director it may not be appropriate to amend these Articles and a Business Lasting Power of Attorney would enable someone of your choice that you trust to continue the day to day running of the Company.

WHEN SHOULD I CONSIDER A POWER OF ATTORNEY?

Powers of Attorney are not limited to old age and it is never too early to make one but it is almost certainly, in some circumstances, too late.



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WHAT DO I NEED TO MAKE A POWER OF ATTORNEY?

Give thought to whom you trust most to run your business in your best interest (and the best interest of the business). Get their consent, contact details including their date of birth.

Discuss your requirements with your legal adviser who can draft the Lasting Power of Attorney, restricting this to your business affairs (if necessary) and making this bespoke to your needs and the needs of your business.

WHAT ABOUT MY PERSONAL AFFAIRS?

A Power of Attorney, unless drafted otherwise, will cover **all** of your Property and Affairs both personal and business. This may suit you or it may not. You can have more than one Power of Attorney in place; a business Power of Attorney limited to the running of your business and a personal Power of Attorney limited to your personal financial affairs. It is important you consider who has the necessary skills and resources to make business decisions and who is best placed to make those decisions about your personal affairs.

WHEN CAN A POWER OF ATTORNEY BE USED?

For a Power of Attorney to be valid it must first be registered at the Office of the Public Guardian. This does not necessarily mean that it has to be used straight away. Your Attorneys can use it with your permission and on your instruction even if you still have capacity. They will also be able to use it during any periods of incapacity whether temporary or permanent. You may wish to protect your interests further by not releasing a copy to your attorneys straight away. The Power of Attorney can be stored at your solicitors with a restriction only to be released with your authority or in the event of your mental incapacity.

WHAT HAPPENS IF I CAN NO LONGER RUN MY BUSINESS AND HOW IS IT VALUED?

For sole traders the value of your business will likely depend on the assets and how easily the business can be carried on by someone else. It might be difficult to sell, and the value based on the assets: if the business can be carried on by the current staff (or a buyer) then the value might be based on profits.

A Partnership Agreement will often have a mechanism for valuing a partner's interest. Frequently, a partner will receive a combination of the value of their capital account, any undrawn profit share and any loans owed to them. Sometimes an outgoing partner will be paid over a number of months or years, so the business can afford to pay them.

If there is no partnership agreement, the partnership is dissolved and the outgoing partner will be entitled to their share of the subject to the payment of any liabilities. The automatic dissolution of a partnership is often an unintended consequence of not having a written partnership agreement and might not provide for a partner who can not work or their family.

For Shareholders in a Company, there might be a valuation mechanism contained in a Shareholders' Agreement or the Company's Articles of – the valuation mechanism will often be a fair value basis and might take in to account the percentage shareholding.

Whatever the type of business it is best to consider what would happen in the event you could no longer carry on your business and seek proper legal advice before problems arise.

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