It is important for everyone to consider who will deal with your affairs in the event of mental or physical incapacity, particularly as more people live to greater ages. The best way of achieving this is to draw up a lasting power of attorney giving someone you trust power to deal with your financial affairs in the event of your incapacity. If you own a business then it is particularly vital that you give some consideration to what would happen in these circumstances.

The starting point

Businesses can operate via a number of different entities and in considering what action should be taken to deal with possible future incapacity the first step should be to consider your business vehicle: is it a limited company, a partnership, limited liability partnership or are you a sole trader?

Limited company directors and shareholders

The first step for limited company directors and shareholders is to check the terms of the company’s governing documents, the Articles of Association (Articles) and any shareholders agreement. The Articles are very likely to provide that if a director becomes incapacitated he or she will cease to be a director. A shareholders agreement could include provisions which may have a potential adverse impact, for example an obligation on that individual to offer their shares for sale in those circumstances.

The position of director is a personal appointment so it is not possible to appoint an attorney to make decisions for you in that capacity unless the Articles (unusually) allow this.

However, your position as a shareholder will often carry with it voting rights and an attorney, if appointed, would be able to exercise those rights on your behalf, subject again to any provisions in the governing documents.

Partners

If you are a partner then the first document to consult would be the partnership agreement. This may provide that the partner has to retire compulsorily in these circumstances. If there is no partnership agreement, then the Partnership 1890 provides that the courts can dissolve the partnership in this situation. Subject to these points, an attorney appointed under a finance Lasting Power of Attorney (LPA) would be able to deal with your interest in the partnership if necessary in an interim period.

Sole traders

If you are a sole trader then you will have no partners or directors who can carry on your role. It is therefore vital that a sole trader draws up a LPA. This means that in the event of your incapacity someone trusted can run the business, pay its bills and control the business bank account.

You may feel that the person that you would trust to run the business is different from the person you would wish to look after your personal affairs. If that’s the case this can be dealt with quite easily by drawing up two separate LPAs, one to deal with personal affairs and one for business finances.
If the sole trader is already incapacitated then an application can be made to the Court of Protection for the appointment of a Deputy who will be able to deal with the business in the same way as an attorney. However, this is a longer and more expensive process than entering into an LPA so the best advice is usually to take action to avoid a court application by drawing up an LPA.

**Further information**

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