

Tax planning: lasting power of attorney for farmers

Setting up a lasting power of attorney is a shrewd move for farmers as they prepare to pass their business to the next generation, giving them flexibility and protection from a punitive tax bill, says Julie Butler of Butler & Co

16 Jul 2019



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The average age of a farmer is said to be approaching 60. With agriculture being one of the most dangerous industries to work in, that farmer is at risk of injury from machinery, livestock and other dangers on a daily basis, injuries which can lead to both physical and mental incapacity.

In addition, it is understood that half of all farmers are likely to suffer work-related illnesses.

As such, having lasting powers of attorney (LPA) is equally as important as having an up-to-date will, not only to ensure continuity with lifetime planning and reach the most effective tax strategy, but also to guarantee that any future wishes are met.

An LPA gives one or more people the legal authority to act as though they are the farmer in the event that they become physically or mentally incapable. There are two types of LPA: one that deals with finances and property and one that deals with health and welfare.

Flexibility and cost savings

The farmer might believe that someone they regard as their next of kin can continue to make decisions for them in relation to their business. However, the law does not state

that someone who is regarded as next of kin can make financial decisions for the farmer if they lose their mental capacity to make those decisions themselves.

Therefore, if the farmer is deemed to be 'incapable' of dealing with their affairs and there is no LPA in place, everything to do with their finances stops: tax returns cannot be signed, property sales cannot be completed and bills cannot be paid.

Without appointing an attorney under an LPA, or an old-style enduring power of attorney, a court application will be necessary to appoint a person, known as a deputy, to act on the farmer's behalf in such a situation.

Finances cannot be unlocked unless the farmer becomes subject to a Deputyship Order from the Court of Protection; a formal court procedure which can be lengthy (often more than six months from start to finish), expensive, inflexible and often limited.

Furthermore, the person appointed by the court as the deputy may not even be a family member or the person of your choice. This can have a devastating impact on the farming business.

LPA and occupation

However, while the LPA is needed for protection, it can also be used as a useful tax planning tool by farmers. In order to achieve full inheritance tax (IHT) reliefs in the form of business property relief (BPR) and agricultural property relief (APR), the farmer should be actively trading at the date of death.

Ideally, the farmer should also still be in occupation of the farmhouse for APR under s. 117 Inheritance Tax Act 1984 (IHTA 1984). This is on the basis, however, that the farmer has not made a lifetime transfer of the farm to a member of their family as part of their succession planning already.

Assuming the above applies, should the farmer then suffer dementia the attorney appointed under the LPA can stand in their shoes.

For example, let us assume Mr Giles' daughter, Dorothy, was his appointed attorney under the LPA. If Dorothy was in occupation of the farmhouse along with her father to take care of him, this can help with an APR claim on it.

If Mr Giles farms the land with his sons, David and James, who each live in separate farm cottages, then ensuring Dorothy is involved in the financial decisions for the farm under the LPA and works with David and James as a partner on the farm, this will again bolster any claims.

Dorothy is effectively an extension of her father, ensuring that he is effectively still trading up to his death.

In the same way that a farm will can be used as part of IHT planning and full succession planning, so too can the LPA. Important areas to consider are the sections for preferences, namely the wishes of the individual, and the instructions, which are effectively demands. Failing to include instructions or including instructions that go against the legal framework of LPAs are where most problems arise.

Lifetime gifting: necessity to consider

Nowadays there are many factors which may support giving consideration to lifetime transfers of all or part of the family farm, not least concerns over the future availability of APR should there be a possible change in government.

Indeed, many of the current advantages of holdover relief, rollover relief of entrepreneur's relief for capital gains tax (CGT) could also be lost, as could the 20% rate of CGT. Currently the UK enjoys the lowest rates of CGT since its introduction.

With the increased probate fees for estates worth up to £2m due at some point this year and the £2m threshold for the residency nil rate band, it has arguably become a necessity to consider some lifetime gifting sooner rather than later.

As such, when looking at the LPA, tax advisers should also ensure there is a review of the whole succession plan for farms.

When someone loses capacity, the farming family often erroneously believe that no further tax and succession planning can be undertaken or, indeed, are understandably preoccupied with caring for their loved ones.

Tax advisers should endeavor to assist during this time and work closely with attorneys of registered LPAs to continue succession planning, recommending how best to pass on family assets.

About the authors

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