

# Law & More



## Is there a hidden threat to your home?

A recent study by the organisation Solicitors for the Elderly has warned that the UK is heading for an incapacity crisis with a wide gap between the rising number of people likely to lose capacity and the relatively small number who have arranged a Health & Welfare Lasting Power of Attorney (Healthcare LPA). The study states that, of the 12.8 million British residents over the age of 65, one in fourteen will develop dementia.

### Who do you trust to make decisions on your behalf?

The consequences of not having a Healthcare LPA can be severe.

**Most people assume that, if they lose capacity, decisions about their health and social care are made by their family members.**

In the absence of a Healthcare LPA, this is not the case. Decision making with regard to social care rests with the Local Authority and, whilst they might take into account the wishes of next of kin, increasingly those wishes are being overridden.

### Financial black hole

It is worth remembering that, if a person is cared for in their own home, once their savings are reduced below a certain level, the Local Authority has to fund that person's care.

In these circumstances, the home is completely disregarded when assessing a person's means to pay for their own care. If that person is, instead, in a care home, that person's house becomes available to pay for their care.

Therefore, where a person living alone (whether single or widowed) lacks mental capacity and requires care, there is a big financial incentive on the Local Authority to decide that residential care is better for the individual than care at home. This is simply because if that person is cared for at home, the State might have to pick up the costs, whereas if they are in a residential home their property (or the proceeds of sale of it) are available, and they will be a private payer until their equity in the property is exhausted.

### Real Problems

Recently, we have encountered a number of situations where the wishes of family (without a Healthcare LPA) have been overridden and care decisions have been made against those wishes. One Local Authority employee told a client of ours whose husband lacked capacity that it was unfortunately "none of her business" which care home was selected by the Local Authority for our client's husband due to a lack of legal authority.

We frequently experience the frustration of local authority professionals who express concern that a lack of resources means that, despite their best efforts, they cannot always act in the best care interests of the individual.

### The solution

If you make a Healthcare LPA nominating those whom you trust to represent your wishes should you lack capacity in the future, then the decision rests with those people, rather than the State. We find that there is nothing more frustrating for loved ones than to know what someone would want, only for those wishes to be overridden by the State which has a vested interest in making an alternative decision. Making a Healthcare LPA is a simple way to protect you and your family.

It still remains the case that we consider Financial LPAs to be essential, but are also strongly recommending our clients to consider putting Healthcare LPAs in place.

Please contact Jerome Dodge, the head of our award-winning Private Client Department, or another member of the team if you, or those close to you, do not have a Healthcare LPA (and/or a Financial LPA) and would like us to assist or provide further information.



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# Loss of mental capacity: the impact on owner managed companies

Many owner managed companies rely heavily on a small number of individuals to successfully run and manage the business on a day to day basis. These individuals will both own and manage the business and so share both shareholder and director responsibilities. Losing mental capacity has obvious and potentially disastrous effects on an individual's personal life but also can have a serious impact on a company and its shareholders.

If a decision maker in the company loses mental capacity, this can prevent the company from making key decisions which can have a serious impact on the other shareholders and can stall the management of the company.



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## Removing a Director

If the company has adopted Model Articles, rather than bespoke Articles of Association, then Article 18 provides that a person's directorship will be terminated in the event that 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.

This will ensure board decisions can continue to be made; particularly important where the company has only two directors.

## Shareholders' Agreement

While the Model Articles deal with a person's status as a director, his or her shareholding remains unaffected.

While one should be wary of a "one size fits all" approach, a common method of planning for mental incapacity is for the shareholders to enter into a shareholders' agreement which deals with what is to happen in the event of a shareholder losing mental capacity (concurrently, the shareholders should also consider what is to happen on death or serious physical incapacity).

The shareholders can agree that losing mental capacity is a trigger for that shareholder to sell his or her shares, either back to the company or to the remaining shareholders. This ensures the relatives of that shareholder benefit from the value of the shares and the remaining shareholders can continue with the running of the business. Any such agreement should be carefully drafted and considered in light of the circumstances at hand.

## Your Options

If you would like to discuss the options available to you and your company to deal with the above issue, then please do contact Tilly Clarke at Blanchards Bailey LLP for more information.



## Who will manage your financial affairs?



Unfortunately, there are too many incidents of lay attorneys and deputies taking advantage of their position and using the person's assets as their own. We see this more often when there is a dispute within the family and those acting believe they should be paid for the work they are undertaking or believe they are distributing assets in a way which the person would have wanted, if they had capacity, but without documenting it correctly or seeking the Court's permission.

In circumstances where someone is not undertaking their responsibilities, or has behaved or is behaving in a way that contravenes their authority or is not in the donor's best interests, the Court may revoke the Lasting Power of Attorney, if the donor lacks capacity to do so.

In the case of *Re AH*[2016] EWCOP9 the Court were satisfied that the attorney, Colin, had breached his duties and responsibilities to Alma, who did not have capacity. Alma had appointed her niece's husband, Colin, as her sole attorney.

**Colin had not been paying the care home fees, accruing a debt of £100,000, putting the placement at risk. He generally failed to engage with the nursing home and infrequently visited. An unaccounted £29,489.97 was spent from Alma's account and no accounts or bank statements were produced from the time the LPA was registered.**

Another property was bought in Alma's name for £60,000, two months after the registration of the LPA.

Personal allowance payments to Alma amounted to less than £10 a month and she was not even afforded modest luxuries. Colin continued to have a joint bank account with Alma upon his appointment, from which there was some concerning expenditure.

It is important to consider carefully who you appoint as an attorney, depending upon your family circumstances, and you should consider having both a lay attorney and a professional attorney. We can assist you if you believe an attorney or a deputy is not managing your affairs correctly.

## Relationship Breakdown: Do I still have a Pension?

**One of the major personal assets of most people is their pension. When a marriage or civil partnership ends it is possible for one of the partners to the relationship to make a claim against the other in relation to their pension.**

Historically, it was possible for a Court Order to be obtained which allowed part of one partner's pension to be 'earmarked' for the other. If the pension holding partner continued to make contributions to their pension, those contributions would also benefit their former partner (which was not a particular incentive to keep making contributions!). Also, if the individual who held the pension died before the other, the pension entitlement of both partners died with them.

A much fairer arrangement is now possible. If a Pension Sharing Order is applied for, the right to part of the pension is not attached to the existing pension scheme. The relevant proportion of the pension is withdrawn from the original scheme and placed into a new one; the pension is separated. Neither partner is reliant on the other outliving them and nor does one partner have to pay into the other partner's pension pot if they wish to keep making contributions.

This kind of arrangement can be dealt with in a number of ways. A pension has a cash equivalent value, which is the amount at which the scheme is valued when transferred into a different fund. This is different to the lump sum you would receive from the scheme upon retirement. The cash value is not always easy to value as it may not be a simple percentage split.

Further calculations may be required to take into account all the assets of the relationship (and assets obtained before the relationship began) so as to achieve equality.

**It may be that a pension claim is offset against other assets. For example, one partner may keep all the equity in the former matrimonial home and the other all or most of the pension.**

Pensions are a minefield. When a relationship breaks down, it is really important to take advice from us in relation to both the legal ending of the relationship and division of the assets of the relationship.

We can ensure that you make the best decision for you and your future.



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# Backing a sustainable cause



Blanchards Bailey has chosen to partner Sustainable Dorset as its official charity partner for 2018. Sustainable Dorset aims to raise awareness and increase interest and involvement in sustainability, such as local food systems, renewable energy and low-carbon travel.

Blanchards Bailey associate, Edward O'Brien, who heads the firm's charity and social committee, said:

**"We are really impressed with the work that Sustainable Dorset is doing. The organisation supports and encourages sustainable activity all across Dorset by working with businesses and by organising events for the public. We hope that supporting Sustainable Dorset over the coming year will give all the team at Blanchards Bailey the inspiration to live and work a little bit greener."**



## Rollapaluza – Back by popular demand

Following the success of our static bike race evening last year, Blanchards Bailey was proud to once again host the recent Rollapaluza cycling fundraiser to raise money for our charity of the year, Sustainable Dorset. The event saw competitors race against each other on stationary bikes in intense 250m race heats in different categories with the fastest competitors facing off in a grand final.

It was a fantastic evening full of excitement and, at times, tension with a nail biting final. A huge thank you goes out to everyone involved who helped to raise much needed funds for Sustainable Dorset, including the businesses

who supported the event by attending, providing sponsorship and donating prizes.

Paul Dunlop, Principal at Blanchards Bailey, said:

**"Once again it was a fantastic evening of entertainment and it was wonderful to see so many people, cyclists and non cyclists, joining in and showing their support for such a worthwhile cause."**

All profits will be donated to our charity of the year, Sustainable Dorset; a local charity connecting people and communities to protect Dorset's natural environment, and raise awareness of sustainability.



## Taste of Dorset 2018 – Finalists Announced

The finalists have now been announced for the Best Vineyard or Distillery category at the 2018 Taste of Dorset Awards. This is the second year we have sponsored the category alongside event organisers, Blackmore Vale Magazine; an award which showcases the best the region has to offer from its glorious array of producers, many of which distribute their popular products across the country and abroad.

This year's finalists are: Black Cow Vodka, Beaminster; D'Urberville Vineyard, Bradford Peverell, near Dorchester; Langham Wine Estate, Crawthorne, near Dorchester and Pothecarry Gin, Christchurch.

The final taste tests took place in October, before the awards night on Tuesday 6th November, and several of the Blanchards Bailey team were part of the judging panel. Sarah Heath, Head of Commercial Services said:

**"The Taste of Dorset Awards are always a date we highlight on the calendar each year. It's great to be able to celebrate the successes of local businesses and producers and give them the credit they deserve."**

For more information see [www.digital-thisis.co.uk/dorset/tasteofdorset](http://www.digital-thisis.co.uk/dorset/tasteofdorset)



## Alan Horne presented with Certificate of Appreciation

Blanchards Bailey Chief Executive, Alan Horne, was presented with a Certificate of Appreciation by Blandford Forum Town Council for his invaluable contribution to the town and his support of the Town Council.

Alan has provided legal advice, support and guidance to the Town Council since 1982 and gratefully received his surprise recognition from outgoing Mayor, Cllr Peter Clark, at the Mayor Making ceremony in May.

## New hires

It has been a busy few months at Blanchards Bailey HQ and we have hired several new members of staff. Amongst them are:



**Stacey Brooker**  
Solicitor  
Commercial Property

Stacey is a Solicitor who has considerable experience, with particular expertise in secured lending and development work; a welcome addition to the well respected and growing Commercial Services Team.



**Helen Matthews**  
Solicitor  
Private Client

Helen is an experienced Solicitor, returning to the law following a career break to raise her family, who specialises in Wills and Tax and Estate Planning, including all aspects of Powers of Attorney.



**Meggie Crane**  
Graduate Legal Executive  
Private Client

Meggie is a Graduate Legal Executive who has worked in Dorset for over 12 years and specialises in Estate Administration and Planning, Wills and Powers of Attorney.