

Cross-border mental capacity issues — how we can help

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An important part of estate planning is to anticipate the impact for individuals and their families of any decline in mental or physical health in the years to come. Lasting Powers of Attorney ('LPA') (which replaced Enduring Powers of Attorney in England and Wales in 2007) were developed to help individuals and their families manage the consequences of such an event.

Under an LPA, an attorney- or more than one- can be appointed to make decisions on behalf of the maker of the LPA in the event that they are no longer able to do so. LPAs can cover either decisions affecting property and finances or those about health and welfare issues or both. LPAs are a popular method of planning ahead to ensure that assets, medical treatment decisions, living arrangements and day to day issues are administered by a person of the client's choice, acting in their best interests, should they lose capacity to deal with matters themselves.

Where decisions to be made involve an international element- where a person has moved abroad, or owns assets abroad and then loses mental capacity, matters become much more complex. The internationalisation of wealth means that this is an increasingly common issue to be addressed.

Withers' specialist power of attorney team have experience in advising on whether a Lasting Power of Attorney will be the right document to deal with a person's international assets as well as those in England and Wales.

Specialist local advice may well also be needed and Withers' international offices are able to provide advice in a number of jurisdictions. We can also advise international clients of the firm as to whether their local power of attorney will be usable in respect of their assets in England and Wales or its effect in relation to medical treatment and welfare issues. Our team has expertise in applying to the Court of Protection to confirm the authority of a foreign attorney to operate their power in England and Wales.

Where someone has not made a suitable power of attorney- and sadly becomes mentally incapacitated with financial assets which require management- an application to the Court of Protection may be required for appropriate management arrangements to be put in place, either by an order of the Court or the appointment of a Deputy. Our team makes applications to the Court in international situations, often working with local attorneys who are dealing with other aspects of the client's estate. We have experience of a range of possible outcomes in foreign jurisdictions – confirmation of the authority of the deputy, appointing a local guardian to act or providing the deputy with an appropriate authority to act overseas.

A deputy equivalent appointed abroad in respect of a client's international assets may wish to use their authority to deal with assets in England and Wales. This may involve an application to the Court of Protection on which our team can advise.

International estate planning generally is complex and the powers of attorneys and deputies to plan for the incapable person they represent can be limited. We can advise on the actions attorneys and deputies can take without specific Court authority and those for which an order will be required.

International capacity issues do not just arise in a financial context; issues of welfare often have cross-border concerns. As families become international, where a vulnerable member of the family who lacks capacity should live can become a difficult- and potentially contentious- question. Our team has expertise in cross-border welfare matters, particularly where the issue has become contentious, and acted in the leading cross-border welfare case under the Mental Capacity Act 2005.

Our elder law and mental capacity team is multi disciplinary and cross border. We have specialists in our offices in New Haven Connecticut and Singapore as well as London. The team is recommended in Chambers 2014 and the Legal 500 2013 as a leading Court of Protection practice.

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