



ALLINGTON
HUGHES

Law

A guide for business owners

CHESTER
T: 01244 312 166

WREXHAM
T: 01978 291 000

LLANRWST
T: 01492 641 222

www.allingtonhughes.co.uk

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A blue-tinted photograph of two business people shaking hands. The person on the left is wearing a suit jacket with four buttons on the sleeve. The person on the right is wearing a dark suit jacket. The background is blurred, showing other people in business attire.

Starting up or buying a business

Business structure

When looking to start up a business quite often it can be difficult to know what structure will work best for you and your business. There are advantages and disadvantages to each type of business structure.

We have set out below a short overview of the three main structures used by businesses although there are more. It is important to note that you can change your structure if what you start with isn't working for you as the business develops.

You are also advised to seek advice from your accountant or tax adviser when giving consideration to what structure is the best for your business needs.

Sole Trader

A sole trader is a person who is in business for themselves and operates alone. As a sole trader you might market your business in your own name or Mr Thomas trading as AT Plastering. Regardless of whether you use a "trading as" name, you are personally liable for all debts and liabilities of the business.

The advantage to being a sole trader however is there is a lot less formality when it comes to the management and running of the business and that information remains confidential to you and is not public.

General Partnership

A general partnership is defined as being "a relationship which subsists between two or more persons carrying on business in common with a view to profit".

The advantages of a partnership are much the same as those that are self-employed however Partners in business will usually enter into a Partnership Agreement to record the terms, conditions and expectations for the management and operation of the business. It is always advisable to take this step to save any confusion between the partners later down the track.

The disadvantage to a general partnership is that it is not a separate legal entity and its partners are therefore ultimately liable, jointly, for all debts and liabilities.

Limited Company

Unlike a sole trader and partnership, a limited company is a separate legal entity which is owned by the shareholders (its members) and managed by its directors.

The primary attraction to a limited company structure is that the members have limited liability for the debt and liabilities of the company; they are instead debts of the company in its own right. A company can enter into contracts, buy assets and property in the company name and thus any liabilities that attach will be borne by the company.

The disadvantage to using a company structure is that it brings with it more formality in terms of reporting to Companies House and HMRC and that information being public. There is also set processes and procedures that should be followed in compliance with the Companies Act 2006 when it comes to making operational decisions.

Buying a business

When buying a business or part of a business this transaction is often termed as an asset purchase or a share purchase.

An **asset purchase** is when you agree to buy certain business assets from the seller e.g. tools and machinery, customer contracts, goodwill, intellectual property and sometimes the business name. When buying the assets only you very rarely agree to take on any of the debts of the business and you will ordinarily, need to set up your own contracts with suppliers, insurers, utility providers and such like following completion.

You should be aware however that if the business is operating with employees and you are buying it as a going concern then the Transfer of Undertaking (Protection for Employment) Regulations 2006 (TUPE) is likely to apply meaning that you will inherit the employees on their existing terms and conditions and those employees will have additional employment protections should they be dismissed for a reason related to the transfer of their employment.

A **share purchase** is where you are buying some or all of the share capital in a Company. You will ordinarily then become a director of the company and you or any company that you set up for the purposes of the purchase will become a shareholder. You will effectively step into the shoes of the seller and become responsible for satisfying all obligation and liabilities the company has entered into. A share purchase is a more complex transaction and quite often completion accounts will be needed.

It is very important when looking at purchasing a business whether just the assets of the shares that you carry out your own due diligence to assess the viability of the business. You should expect to ask the seller for information and documentation in support of their answers on a whole range of matters from accounting, financing, loans, outstanding creditors/debtors, copies of customer contracts, to assess whether those contracts can be transferred or whether a novation is required, how many employees there are, what terms of employment apply, what software is available and the costs associated with that, has any litigation been brought against the business etc.

Once due diligence has been presented the transaction will be recorded in either an Asset Purchase Agreement or a Share Purchase Agreement. It is usual for the Buyer/its solicitors to prepare the first draft of the documents. There are also other transactional documents which may apply depending upon the type of transaction and we would advise and assist you throughout up to and including completion.

We too can advise and assist if you are selling your business.

More often than not when purchasing a business you will be purchasing property or looking to take over or negotiate a new lease of the premises from where the business operates. Please see our further section on the ranges of services we offer related to Business Premises.

For further details on our full range of corporate and commercial services visit our website.

Contracts

Employment Contracts, Contracts for Services, Consultancy Agreements and the like are all essential in setting out the terms of engagement between two parties. Having a contract in place from the outset sets out clearly the expectations and terms to which everyone is working.

When drafting a contract it will also ensure that you give proper regard to the status of the employment relationship e.g. is the individual an employee, worker or self-employed contractor? Drafting a contract that is not representative of the true nature of the employment relationship will be of limited assistance when a dispute arises.

It is important that the legitimate interests of your business are secured and regard should be given to what, if any, restrictive covenants will be necessary to ensure business protection not only during the employment relationship but after it has terminated.

Having properly drafted contracts will serve to reduce any ambiguity when an issue arises and we are here to assist in drafting tailor made contracts for your business needs.

Handbooks

An employment handbook is an essential tool for any workplace as it sets out all company policies and procedures that all members of staff should adhere to. It also sets out your business values and expectation.

There are numerous policies a company can have within its handbook the primary ones being:-

- Grievance and Disciplinary Procedures
- Absence Management
- Holiday Pay
- Family Friendly Policies e.g. Maternity, Paternity, Adoption and Shared Parental Leave Rights
- Equality and Diversity
- Whistleblowing

Other policies can include for example IT and Communications, Wellbeing, Social Media and Health & Safety.

Having policies and procedures in place, and more importantly, following them, ensures uniformity across the business and will serve to ensure that any issue is dealt with reasonably and will assist in defending any complaint that may arise.

Director service agreement

A director service agreement is an employment contract for an executive director.

This type of agreement may initially appear similar to an employment contract however it is more in depth in terms of what their roles and responsibilities are and indeed what their obligations are to the company.

For our full range of employment services please visit our website.

Agreements to manage the relationship between business owners

A **Partnership Agreement or Partnership Deed** is a legally binding contract which sets out the rights and obligations of the Partners. Whilst such agreements can be verbal it is advisable to have some form of written agreement signed by all parties to save any ambiguity.

Such an agreement will cover, for example, the Partners' understanding of the nature and place of the firm's business, when the partnership commenced, the name of the firm, provision of capital by the partners, division of profits and loss, the day-to-day management and duties held by the partners and what happens where a partner leaves or dies.

Where there is no agreement the Partnership Act 1890 applies automatically unless there is an informal agreement with sufficient evidence to suggest otherwise.

A **shareholder agreement** like a Partnership Agreement will bind all the parties to the terms and the usual remedies for breach of contract will be available if any of the parties breach its terms. Such an agreement might typically include provisions as to what business the company can do, what matters require the Shareholder consent (rather than just the directors), the transfer of shares, the issue of new shares and holding directorship.

Typical clauses in a Shareholders Agreement might include:-

- An undertaking that the company will not amend its articles without the consent of all parties.
- Similar undertakings regarding changes in capital or share capital structure.
- Requirements on unanimity among Shareholders for major decisions (e.g. sale of the business)
- Restrictions on borrowing and offering security over the company's assets.
- Agreements regarding further financing for the company.
- Agreement on dividend policy.
- The right for each party to be a director and or be employed or take part in management.
- Agreement not to compete with the company's business.
- Agreement on treatment of intellectual property rights.
- Provisions dealing with the departure of a Shareholders.
- Provisions for the resolution of deadlock in decision-making.

We are able to provide advice and assistance in the drafting of your Partnership or Shareholder Agreement and supporting you with any variations as your business develops.

Business premises

You may need advice on your business premises when you are setting up your business or, in the case of established businesses, during any period you need to expand, downsize or relocate.

Equally if you invest in commercial property you may need advice in connection with premises you are acquiring or disposing of commercial premises in your property portfolio.

We can offer advice and assistance with a broad range of property related transactions, including those outlined in this section.

Sale and purchase

We can assist you with the sale and purchase of freehold and leasehold commercial property, including:

- Exclusivity agreements;
- Sale Contracts;
- Easements;
- Options and pre-emption agreements;
- Overage agreements;
- Financing/re-financing of commercial property;
- Development work (including the acquisition of land intended for onward development, and advice on planning obligation agreements such as s.106 agreements and unilateral undertakings); and
- The property aspects of your business or share sale.

Leases for business premises

Whether you are a Landlord or the Tenant, we can assist you with commercial leases of business premises, including:


- Agreements for lease;
- Leases (for all types of commercial premises, including office; retail; restaurants and industrial/warehouse premises);
- Short term occupation arrangements such as the grant of licences to occupy and tenancies at will;
- Surrender of leases;
- Advice on and/or exercise of options to break; and
- The Landlord & Tenant Act 1954 (and any required exclusion of security of tenure or termination/renewal notices to be served under the terms of this Act).

For further details of commercial property services please visit our website.

Farming businesses

Our experienced Agricultural Law team based across our three offices in Wrexham, Llanrwst and Chester can assist you with all aspects of your farming business.

As members of both the Agricultural Law Association and Royal Welsh Agricultural Society, our team can assist with all aspect of your farming business - find out more on our website.



Dealing with the day-to-day

Management of business premises

If your business occupies leasehold property or you are a landlord with property which is let to businesses, then you may need our services to deal with property management documentation, including:

- Licences – licences to assign, sub-let, alter the premises, change of use and to charge;
- Deeds of assignment;
- Deeds of rectification and variation of leases; and
- Rent Deposit Deeds.

Title and general property matters

We can also assist with other commercial property related matters that may affect your business premises or investment properties, including:

- Buying and selling unregistered land;
- First registrations of unregistered land;
- Rectification of titles at HM Land Registry;
- Adverse possession applications to the Land Registry; and
- Acting for charities in the sale, purchase and letting of land.

Terms and conditions of business

Whether you are supplying goods and/or services to a customer it is important that from the outset expectations are managed. This is often through standard terms and conditions of business or in other cases more spoke terms or a form of supply agreement.

Such agreements set out very clearly the expectations of the parties to include:-

- What the goods and/or services are
- Order processing
- Pricing and payment terms
- Delivery obligations
- Warranties
- Steps to take when goods are not of satisfactory quality
- Limitations on when liability will arise
- Intellectual property
- Terminating the contract

Your terms and conditions will be your main agreement between you and your customer, particularly should an issue arise, and it important therefore that they are comprehensive and clear to reduce any issues that might arise.

Employment matters

We offer advice and assistance that is tailored to your business needs and our highly skilled and specialised team can offer support in the following areas:-

- Day-to-day HR queries
- Drafting and advising upon employment contracts, service agreements and consultancy agreements
- Advising upon restrictive covenants
- Employment handbooks
- Privacy and Data Protection
- Employment status and self-employment
- Disciplinary and Grievances
- Discrimination
- Family and Pregnancy matters e.g. Maternity, Paternity, Adoption and Shared Parental Leave and Pay rights
- Dealing with absence / long term ill health
- Redundancy and restructure
- Transfer of Undertakings (TUPE)
- Whistleblowing
- Settlement Agreements
- ACAS Early Conciliation
- Employment Tribunal representation
- Workplace Mediation

Dispute resolution

Our Dispute resolution department acts for both private and commercial clients to assist with resolution to your dispute.

Usually in a dispute resolution we would draft letters before action, pleadings and statements to the court where necessary to be able to set out your position robustly. There are alternative methods of dispute resolution such as mediation or arbitration which are encouraged. One of these options could be more effective and seamless for you.

Mediation is a key way of reducing financial costs to individuals, as a result of lengthy Court cases being avoided and it reduces lost opportunity costs and loss in management time. It can also reduce emotional stress when the matter is resolved quicker.

How does mediation work?

A mediator will work towards facilitating an agreement between both parties. Mediation offers a private forum in which everyone can gain a better understanding of each other's' positions and work together to explore options for resolution. During the process, the mediator meets in a private room with each party to discuss the problem confidentially. This allows each party to be frank with the mediator and have a realistic look at their case in private. Mediation allows more creativity and flexibility over settlement options than the court does.

Who can use mediation?

Mediation can be used in almost any kind of civil dispute case, from small claims matters to complex high value disputes and appeals. Mediation can also be used for business matters.

When will the matter be settled?

This very much depends on the parties, but ultimately, mediation works very well and may result in the parties reaching a settlement that is either documented at the mediation or shortly thereafter. Alternatively, the parties may use the discussions at the mediation as a springboard for further settlement talks after the mediation. Mediation does have a very high success rate and assists greatly in helping to narrow the issues between the parties.

If I have issued Court proceedings, is it too late to mediate?

Mediation can take place at any stage from before issuing court or arbitration proceedings, through to appeal. We would always recommend mediation takes place before proceedings take place, if possible.

Arbitration is when the parties' rights to refer their disagreement to arbitration must be set out in the contract. Expert determination involves the parties choosing an impartial expert to decide the issue.

Breach of contract

We advise on all types of contract and will assist with the drafting of contracts and upon the consideration of contracts drafted by others. When issues arise, we will assist you in negotiating on the interpretation of contracts and on the validity of the various clauses.

Professional negligence

We can assist you with a claim against a professional whose work has fallen below the expected standard as a result of which you have suffered loss. This could include solicitors, accountants, surveyors or any other professional instructed by you whose service has been unacceptable in your view. We will fully investigate your complaint against the professional and advise you on the way forward with regard to a letter of claim, alternative dispute resolution where possible and court proceedings where necessary.

Partnership/Shareholder disputes

Sometimes the relationship between individuals who enter into a business relationship with each other breaks down and advice is required as to how you extract yourself from that situation on the best terms for yourself and without causing prejudice to any future business venture.

We would be happy to advise on such methods at all stages in proceedings and in order to ensure your case is dealt with as effectively as possible in terms of cost and time.

For our full range of Dispute Resolution services please visit our website.

Criminal regulation

Our Criminal and Regulatory Department have vast experience of dealing with a broad range of regulatory offences and have dealt with investigations and/or court proceedings brought by Royal Mail, the NHS, the Information Commissioner's Office (ICO) and Natural Resources Wales.

We also have a wealth of experience dealing with Proceeds of Crime Act (POCA) proceedings following conviction.

All criminal matters can be broken up into 2 separate categories;

- Investigation – interviews under Caution after arrest or voluntary interviews with the Police or other investigative bodies
- Court Proceedings – where a case is taken to court and heard either in the Magistrates' Court or the Crown Court.

We can offer advice and representation at all stages of proceedings, from the initial investigation up to and including the Crown Court.

Any allegations or charges brought against you personally or your employees may be eligible for Legal Aid. If charges were to be brought in respect of the Company then there is no Legal Aid available and representation would need to be funded on a private paying basis.

In all cases we will be able to provide you with you a fair and realistic quote based on the likely length of the case, its complexity and the amount of preparation required.

Any quote will be based on an estimate of time spent at court, attendances on you and any witnesses, preparation and any additional work or research which may be required, together with travel and any disbursements e.g. mileage. This quote would also include an estimate of your barrister's fees if necessary.

It is always advisable to seek expert advice at the earliest opportunity.

For further information on our Criminal Regulation Services please visit our website.

A photograph of two men in an office setting. One man, wearing glasses and a light-colored shirt, is shaking hands with another man who has a beard and is smiling. They are standing over a desk with papers and a small potted plant. The entire image is overlaid with a semi-transparent blue filter.

Ensuring your affairs
are in order as the
business grows

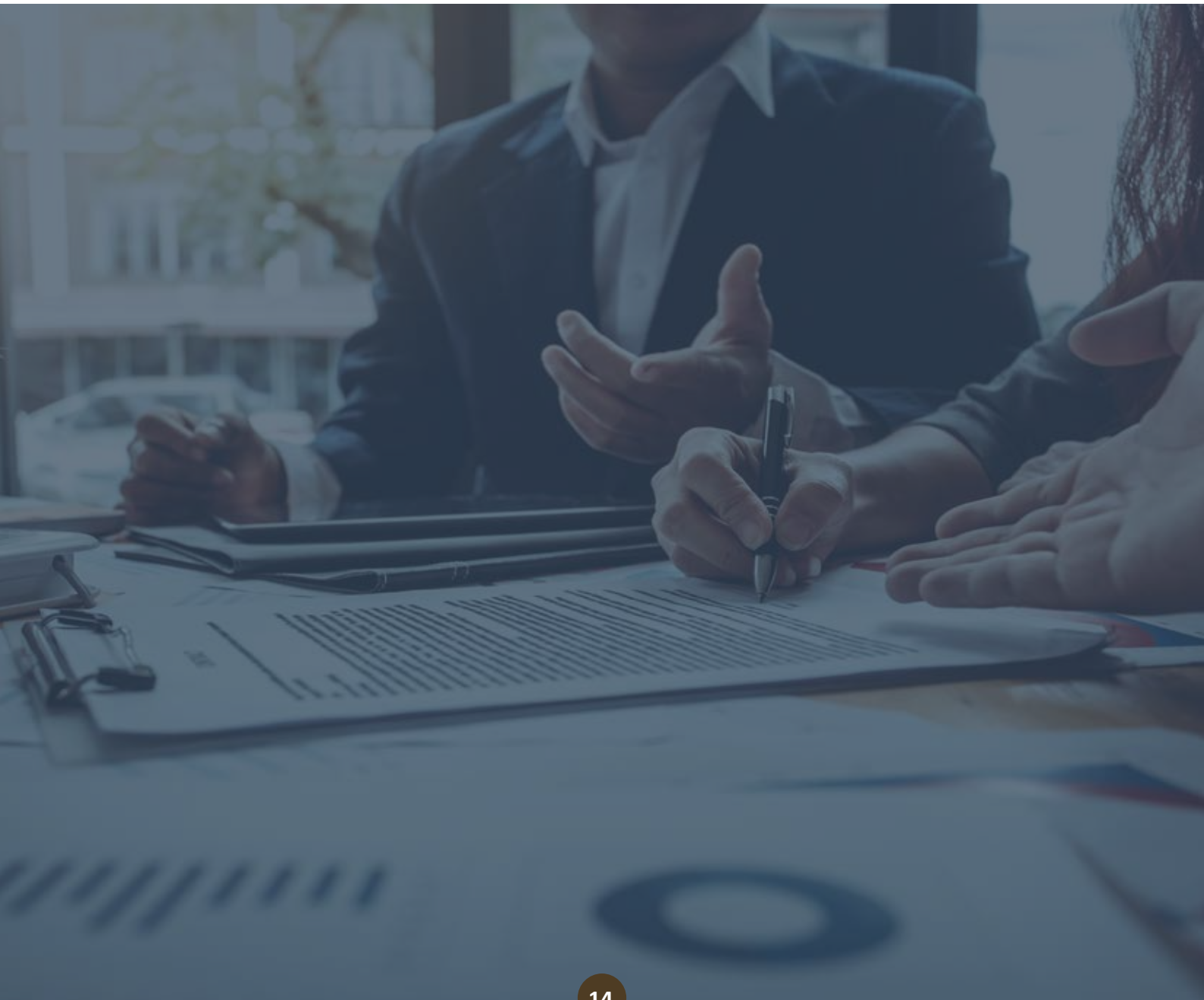
Cross-option agreements for shareholders

Having built up a successful business it is important for the business and for your family that all matters are in order and that would include what happens to your shares in the event of your death.

While the Articles of Association and/or Shareholder Agreement will in part deal with this, quite often they do not go far enough. It may not be beneficial for the business to have the deceased's personal representative simply acquire and hold onto those shares indefinitely/or have an active role within the business. Where the personal representative wishes to sell those shares the members will want control over that but quite often they may not be able to finance that purchase.

Having a cross options agreement gives the surviving shareholders the right to buy the deceased shareholder's shares and gives their personal representatives the right to require the survivors to buy those shares. Life insurance is put into place to fund the purchase of shares.

The Agreement sets out the obligations and rights of the surviving shareholders and the personal representative and a procedure/timescale within which certain action should be taken.



Pre-nuptial agreements for business

As a business owner, it is always sensible to plan for the worst. When it comes to getting married, while nobody wants to be pessimistic, it is wise to consider how your business might be affected if your marriage ended in divorce. This is especially true when dealing with a family business where other relatives could be affected if your business became involved in any divorce proceedings. Forward planning can protect the business.

Whilst a pre-nuptial agreement is not automatically legally binding in England & Wales, it can be upheld by a Court if it meets the qualifying criteria:-

- The agreement must be freely entered into.
- Both parties must understand the implications of the agreement.
- The agreement must be fair.
- The agreement must be contractually valid.
- The agreement must have been made at least 28 days before the wedding.
- There should be disclosure about the wider financial circumstances.
- Both parties must have received legal advice.
- It should not prejudice any children
- Both parties' needs must be met

A pre-nuptial agreement can deal with the following:-

- Exclude inherited assets
- Ring-fence assets brought into the marriage
- Safeguarding children's inheritance
- Protect business assets

Without a pre-nuptial agreement, on a divorce a business could be put at risk. The content of a pre-nuptial agreement could cover matters such as :-

- Establishing the value of the business as at the date of the marriage – this is important if it is agreed that only the value of the business that has accrued during the course of the marriage be taken into account on any divorce.
- Detailing how the business will be valued on divorce.
- How any depreciation/appreciation in the business during the course of the marriage should be split. This may well depend upon the intended role the spouse will play in the business and this role can be defined, and allowances made for potential changes in roles.
- Details as to how income from/investment in the business should be handed.
- Succession planning.

For our full range of Family services please visit our website.

Wills and Succession Planning

A lot of us delay making a will and some people simply assume there is no reason to make a will as their estates will pass as they think it should, for example, to a spouse.

The reality is that when you die, your estate will pass in one of two ways:

- either as the law provides under the Intestacy Rules; or
- in accordance with any valid will that you have executed.

Without a Will, your business interest(s) could pass to a family member who has no interest in the business or lacks the necessary skills to successfully manage a business.

Allington Hughes can help you to write a tax-efficient Will ensuring that your business interests pass in accordance with your wishes.

Powers of Attorney

A lasting power of attorney (LPA) is a legal document authorising a chosen person or people (known as attorneys) to make certain decisions and act on your behalf.

An LPA is a very important document as it allows your attorneys to step in and manage your financial affairs or make decisions regarding your health and care, should you require assistance or become incapable of making certain decisions. Unless you have a LPA in place, no one has an automatic right to assist you in this manner.

As a business owner, you might wish to consider making a LPA appointing attorneys specifically for business-related decisions and actions. Your chosen attorneys would then have authority to assist in running your business if you were abroad, in an accident or acquired a medical condition which affected your mental capacity.

For a full range of services we provide for wills, trusts and probate please visit our website.

YOUR TRUSTED, LOCAL LAW FIRM

Providing specialist and affordable legal advice

For you and for your business



Our offices

CHESTER

2 Vicars Lane, Chester, CH1 1QX

Tel: 01244 312166

Email: chester@allingtonhughes.co.uk

WREXHAM

10 Grosvenor Road, Wrexham LL11 1SD

Tel: 01978 291000

Email: wrexham@allingtonhughes.co.uk

LLANRWST

Bank Buildings, Llanrwst, LL26 0LS

Tel: 01492 641222

Email: llanrwst@allingtonhughes.co.uk

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HUGHES

Law



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www.allingtonhughes.co.uk

CHESTER
T: 01244 312166

WREXHAM
T: 01978 291000

LLANRWST
T: 01492 641222