

Response from PDSA to Legal Services Board

CALL FOR EVIDENCE: INVESTIGATION INTO WILL-WRITING, ESTATE ADMINISTRATION AND PROBATE ACTIVITIES

PDSA ... registered charity numbers 208271 and SCO37585

PDSA Vision ... a healthy life for all our pets.

PDSA Mission ... to care for the pets of people in need by providing free veterinary services to their sick and injured animals and promoting responsible pet ownership – this year PDSA will provide more than 2.2 million free treatments to sick and injured pets and more than 360,000 preventive treatments.

Income ... our services are funded entirely by public support and will cost more than £53 million to provide - in 2010 our gross income was £92 million, of which £39 million came from legacies

Legacies ... contributed over 70 % of our net income - for many years PDSA has consistently been among the top ten UK charities for legacy income receipts and we are notified of approximately 1,700 new legacies each year.

Our Legacy Management team ... includes 7 lawyers including 5 solicitors, 3 of whom are STEP members - we deal regularly with Solicitors, Banks, Accountants, Trust Corporations and Will writers.

We are pleased to have the opportunity to put forward our views, which are set out below.

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Will-writing (please note that the Panel has provided us with the evidence that has previously submitted to it and we do not wish for the same information to be resubmitted).

- Do you agree with the Panel's assessment of the problems in the will-writing market and resulting consumer detriments? Are you aware of any key problems and detriments that have not been identified or evidence that any problems and detriments identified are not as significant suggested or are worse?

Yes.

We regularly see professionally drawn wills which do not clearly identify the intended beneficiaries. In the case of charities this is easy to do by simply including the charity registration number.

We often see wills where no contingency provision is made in case an individual beneficiary predeceases or an organisation no longer exists as at the date of the testator's death, leading to uncertainty and possible partial intestacy.

Wills sometimes include gifts to charities which are conditional, such conditions being outside the remit of the named charity. A call to the charity before the will is drafted could easily avoid such a problem.

Professional will draftsmen often fail to establish whether assets held jointly by their clients are or are not to accrue to the joint owner.

It appears that it is rarely pointed out to clients that they should consider making provision for any pets which may survive them.

- Do you agree with the Panel's assessment that will-writing should be a reserved legal activity? Do you agree with Panel's assessment that alternatives to statutory regulation - such as consumer information, enforcement of existing legislation and voluntary self-regulatory schemes are unlikely to protect against the identified problems and detriments? Do you think that assessed accreditation schemes and quality marks specific to this field would benefit consumers either as a supplement or alternative to statutory regulation?

Yes.

- What do good providers will-writing services currently do to protect against problems and ensure that consumers receive a quality service?

They train, specialise, update their knowledge and precedents, take and retain detailed instructions and notes, check and check again drafts and original wills, and oversee execution of wills.

A number of cases decided recently reveal that professional will draftsmen have failed to properly understand and/or record the intentions of their clients.

There appears also to be little evidence that will drafters raise with their clients the question as to whether they have made any promises which may amount to estoppels, and so defeat the intentions set out in the will.

- If will-writing was to be a reserved activity what specific activities should be included within the scope of the reservation? The Panel has suggested that the scope of regulation should include the commission, sale and preparation of will-writing and related services for fee, gain or reward.

Agreed.

- What specific protections are needed for each problem and detriment that has been identified? Do you agree with the “core elements” (as set out above) that the Panel believe are needed? Do you think that any of the “core elements” are not required on a mandatory basis or that there are other protections that are also required?

We agree with the Panel.

- What impacts do you think regulation might have on consumer protection, competition, access to services, the cost of services and the administration of justice?

It will

- a) improve consumer protection
- b) have little or no effect on access or cost
- c) improve administration of justice

Probate and estate administration

- What are the key outcomes for consumers that we should aim to achieve?

Estates should be administered in accordance with the will and the law. Estate contents should be identified early, protected, and their value maximised during the administration period. Tax saving opportunities should be identified. Correct tax liability established with HMRC. The estate must then be distributed correctly.

- What are the existing problems experienced by consumers of probate and estate administration services (testators, executors and beneficiaries)? What are the causes? What are the consequences? What evidence is there of consumer harm?

Problems include;

- i) No accounts
- ii) Inaccurate accounts
- iii) Incorrect distributions
- iv) Lack of communication
- v) Overcharging
- vi) No forum for complaint for charities with over £1million turnover
- vii) Fraud - we have experienced a number of cases where professionals acting as or for executors have acted fraudulently and misappropriated estate funds (there is no mechanism for ensuring transparency, it is too easy for executors not to reveal to beneficiaries the full extent of the assets comprised in the estate)

viii) Undue delays in completing the administration of estates

Causes include;

- i) Inadequate training
- ii) Lack of clear guidelines on what is required of an executor
- iii) Incompetence
- iv) Criminality/greed

Consumer harm;

- i) Testators' wishes are not carried into effect
- ii) Beneficiaries receive less than their true entitlement
- iii) Cheats have to do relatively little to prosper

A major difficulty for beneficiaries is that they are not “clients” (unless they are also executors) and there is no consistency among professionals in communicating with and accounting to beneficiaries.

- To what extent are avoidable problems with the process of probate and dealing with a person's estate after death a consequence of a poorly drafted will or there not being a will? To what extent are problems a direct result of actions taken while administering the estate?

A poorly drafted or a lost will can defeat a testator's wishes and leave beneficiaries out of pocket. Our experience is that many of the problems we encounter do stem from poor drafting.

However, problems also arise as a direct result of actions taken, or indeed failure to take appropriate action, during the course of the administration. Sometimes this is basic, such as making distributions which depart from the terms of the will (because “that's what the testator would have wanted”) or making payments to executors or other parties which are not authorised by the will or under general law.

- How and at what stages of the process are problems normally discovered? How and how easily can problems be put right and detriments reversed?

Problems with a will are normally discovered early in the administration.

Problems with estate administration are generally only discovered later, if at all.

It is not easy to discover problems whilst the duties of executors toward beneficiaries are “woolly” and ill defined. Rectifying mistakes and reversing detriment often requires costly and lengthy litigation – in practice, compromises have to be sought, but this often results in the testator's wishes not being fulfilled.

What do good providers of probate and estate administration services currently do to protect against problems and ensure that consumers receive a quality service?

Good providers of probate and estate administration follow STEP guidelines, and Law Society Best Practice Guidance (such as that set out in the publication “Charities as beneficiaries”). However, neither are compulsory.

- Are self-regulation and general consumer and criminal law capable of addressing consumer harm? Do you think that assessed accreditation schemes and quality marks specific to this field would benefit consumers either as a supplement or alternative to statutory regulation?

No, and yes.

- If providers of probate and estate administration services were regulated, what form of regulation should this take, and what are the core elements that should be included within the regulatory system? What specific harm would each core element protect against?

We would hope the eight “problems” we listed above would be addressed.

- What impacts do you think regulation might have on consumer protection, competition, access to services, the cost of services and the administration of justice?

It will

- a) improve consumer protection
- b) have little or no effect on access or cost
- c) improve administration of justice

- How effective is the regulation of the existing reserved activity of preparing papers on which to found or oppose a grant of probate or letters of administration? How does this regulation work in practice, what benefits does it bring for consumers and how does it impact on the way that providers organise themselves to deliver services?

We have no comment, other than to say that grants can be extracted personally by executors which to a large extent can circumvent the regulation.

We would welcome information about the size and characteristics of the market including the different types of organisations undertaking will-writing, probate and estate administration services, the mix of these services offered and common referral links between different types of organisations in relation to the different services.

We note what you say. We will not comment just now, except to say that the increasing number of lay executors who extract a grant and administer an estate without professional guidance can often lead to the wishes of the testator not being fulfilled.

PDSA
4 November 2011