

Public benefit guidance on specific charitable purposes and issues

The Charity Commission has now published its final supplementary guidance for charities to achieve public benefit.

The guidance covers:

- Fee charging charities
- Educational charities
- Charities for the prevention or relief of poverty
- Charities for the advancement of religion

All trustees have a duty to consider public benefit guidance and to report on public benefit in the Trustees' Annual Report (for accounting periods starting on or after 1 April 2008).

Fee-charging charities

The guidance (in its Annexes) includes useful checklists for how fee-charging schools, healthcare charities, arts organisations and museums can provide sufficient opportunity to benefit people who are unable to pay the fees.

The main body of the guidance includes the following points:

- The Charity Commission will look for fee charging charities to provide significant opportunities for people to benefit from the main service being offered rather than just peripheral activities
- Charities are encouraged to be imaginative in how they provide real benefit consistent with their objects
- Public benefit is only an issue where the service that is charged for forms a significant part of the charity's aims or activities, or, the fees that are charged are high
- Public benefit provided by charged for services still counts when assessing overall public benefit

The advancement of education

In the context of a school, the Charity Commission recognises that advancing education can be wider than educating its own pupils and can include a broader view of the role of the school within the community. This could include providing adult education or voluntary community activities.

However, only benefits that arise from carrying out those aims contained within the objects can be taken into consideration. Accordingly, if the objects presently only provide for the

education of the school's own pupils, then public benefit in relation to others will not count in assessing public benefit. A change in the objects would be required, with the consent of the Charity Commission.

The prevention or relief of poverty

There must be a rational link between the object of relieving poverty and the persons that benefit from the charity. The beneficial class should be properly defined and also the charity should have stated objective criteria enabling the trustees to assess the needs of their potential beneficiaries and rank them in order of need.

It is accepted that the relief of poverty can be achieved by addressing wider social conditions. When demonstrating public benefit it is necessary to be able to make an objective link between poverty and the wider social factors.

The advancement of religion

It is not sufficient for the charity to be established solely for the benefit of the followers or adherents of a particular religion.

With charities whose aims include advancing religion, the beneficiaries are normally the followers or adherents, the wider church and the public generally.

In some cases, the "wider public" can benefit by being able to participate in worship, or by being the recipient of a charitable act undertaken by an adherent. Further, the wider public benefits when the values expressed by the religion are put into practice in a way that leads to the moral or spiritual welfare or improvement of society.

The guidance can be found on the Charity Commission's website at:

www.charitycommission.gov.uk/publicbenefit/default.asp

For further information please contact William Hopkin, barrister, on 01392 685290 or email william.hopkin@footanstey.com

CHARITIES UPDATE

Government financial support for charity mergers

Working together

The current merger between Help the Aged and Age Concern has highlighted the increasing trend of charities working together collaboratively, perhaps to create greater efficiencies or to achieve better results for beneficiaries which would not be possible by acting alone. The government has now announced additional funding to help more charities to do this.

Foot Anstey has been advising a number of south west based organisations recently on issues such as informal joint working arrangements through to legally binding joint ventures and full mergers.

Legal help

The trend towards greater joint working has been actively encouraged by the Charity Commission. There have also been recent changes to legislation to make charity mergers easier from the legal viewpoint, such as the new "Register of Mergers" held by the Commission which should allow legacies given to an old charity after a merger to be passed to the merged organisation without having to keep the old charity in existence.

Having said this, it is vital that any joint working is properly considered by trustees and appropriate professional advice taken to ensure it is structured correctly and has the best chance of success. The one off costs to a charity of a merger or other joint working project can be significant, which may be preventing some organisations from taking full advantage. But there will be some additional funding available shortly to help.

Financial assistance

In its recent initiative "Real Help for Communities: Volunteers, Charities and Social Enterprises", the Government has announced a £16.5m "Modernisation Fund" intended to

support viable organisations access specialist services in order to restructure and become more efficient and resilient in the recession.

We understand that from April organisations with incomes of more than £750,000 will be able to apply to Future Builders for loans of between £30,000 and £500,000, interest free for up to five years in order to seek specialist advice and guidance on merging. This is expected to be available in April.

In early summer, as part of the same programme, Capacity Builders will open a small grants programme for small organisations turning over below £1m to assist with exploring the benefits of collaboration, merger and restructuring.

Downturn focus

We understand this aspect of the funding will be aimed primarily at organisations working in areas at most risk of being affected by the economic downturn and which specialise in providing services of particular importance to communities during a recession, for example family support, debt advice and counselling and tackling homelessness.

Given the difficult and uncertain economic climate, the increasing demands on many charities' services, and resulting severe funding pressures, we can only see the trend for increased joint working continuing and it is to be hoped that this funding will enable more organisations which are considering joint working to make it happen.

For further information please contact the head and partner of the charities and social enterprise team, James Evans, on 01392 685243 or email james.evans@footanstey.com

Where there's a Will, there's often an argument!

The voluntary and community sector benefits hugely from legacies. The purpose of this article is to provide an introduction as to how disappointed beneficiaries may seek to challenge Wills made to charitable organisations and, conversely, how a charitable organisation can maximise gifts intended for them.

Unlike France and many other European countries, England and Wales have no rules in relation to who is allowed to inherit property. We recognise the right for a person to leave their whole estate on their death to whoever they choose, under the terms of their Will. However, this does not mean that a person's Will cannot be contested by disappointed beneficiaries.

Examples of the grounds on which legacies may be challenged include:

1. Lack of due execution

A Will must be signed by the testator (the person making the Will) in the presence of two witnesses who should then sign their name in the presence of the testator. Witnesses to a Will cannot be beneficiaries or spouses of beneficiaries and must be over 18. If a beneficiary does witness a Will this will not render the entire Will invalid but will invalidate the witness's gift.

2. Lack of testamentary capacity/lack of knowledge and approval

In order to make a Will a testator must know, at the relevant time, the effects of making a Will, the extent of the property he or she is disposing of and the people he or she ought to consider when making their Will.

In the recent case of *Blackman v Man*, the deceased left the bulk of her fortune, some £10m, to the owners of her favourite Chinese restaurant. The deceased was suffering from mild dementia at the time of making her Will and the deceased's nieces and nephews brought a claim to have the Will declared invalid on the grounds of both lack of testamentary capacity and lack of knowledge and approval. Her nieces and nephew would then inherit under the intestacy rules.

However, the court decided that the deceased had been capable of making her Will at the relevant time and knew and approved of its contents. She had been very close to the Man family for several decades and was treated as a grandmother of the family. In contrast, she had had very little contact with her nieces and nephews who she believed were only interested in her money. Therefore her Will was held to be valid.

Usually if a Will is signed and witnessed correctly there is a presumption that the testator knew and approved of its contents. An attestation clause will strengthen this presumption. However, if suspicious circumstances surround the making of the Will it is then up to the person applying for probate of the Will to prove that the testator knew and approved of their Will. A suspicious circumstance would be where the Will was drafted by the main beneficiary.

3. Undue influence

For gifts made during the testator's lifetime there is a presumption of undue influence in certain circumstances. Unfortunately this is not the case where undue influence is alleged in relation to Wills and it is therefore very hard to prove and does not often succeed. However, in the recent case of *Re Edwards*, the Court did set aside a Will due to undue influence. The deceased had cut out her helpful son (John) in favour of her alcoholic son (Terence) who lived with her and who she was scared of. The judge found that Terence had poisoned the deceased's mind against John by making untruthful accusations against him and his wife which made the deceased change her Will in Terence's favour. The judge accused Terence of fraudulent calumny, in that he either knew that the accusations against his brother were false or did not care whether they were true or false.

4. The Inheritance (Provision for Family and Dependants) Act 1975

This Act gives the court power to vary a deceased person's Will in order to provide a family member or other dependant with reasonable financial provision. If a spouse is claiming, he or she will be able to claim what is considered reasonable in all the circumstances of the case. In all other cases an applicant can only claim provision for his or her maintenance. If probate has already been granted then there is a time limit of just six months from the date of the Grant of Probate within which to bring a claim under the 1975 Act.

In *Negus v Bahouse* the deceased had cohabited with a partner for eight years after divorcing his wife. His Will pre-dated him meeting his partner and he left most of his £2.2m estate to his son. His partner applied under the 1975 Act and was awarded the house, without any mortgage, and £240,000.

5. Fraud

In relation to Wills, fraud usually occurs in the form of forgery or the suppression of a Will. Cases of forged Wills may seem extreme but do occur.

In the recent case of *Kwawagen v RNL* and *Cancer Research UK* the daughter of the deceased sought a declaration that her father had died intestate; the charities contended that the deceased had made a valid Will which left his estate to them. The deceased's daughter had gone through her father's papers after his death together with two neighbours. The neighbours said they had come across an original Will and the daughter had taken it away: that was the last that was seen of it. The judge heard evidence from a number of people involved and decided that the deceased had made a Will in favour of the charities.



6. Proprietary estoppel

The doctrine of proprietary estoppel enables a person who has been promised an interest in property to claim it in certain circumstances where it has been left to someone else. It must be shown that the claimant had been assured that they would have an interest in the property, that they had changed their situation based on the assurance, e.g. had given up their rights to another property. The claimant must have suffered to their detriment by their reliance on the promise which was not subsequently fulfilled.

The Charity Commission's view is that proprietary estoppel claims are exceptionally difficult to establish and charities would be unwise to settle such a claim. However, there have been recent cases of successful proprietary estoppel claims and charities would therefore be wise to take legal advice on the merits of such a claim.

In the case of *Thorner v Curtis*, the Court awarded Thorner his uncle's farm. His uncle had made a Will leaving his residuary estate to Thorner but had then revoked it because he was minded to change some of the pecuniary legacies. Unfortunately the uncle died before he had made a new Will and so his estate fell to be distributed in accordance with the intestacy rules.

In expectation of inheriting the farm, Thorner had worked for his uncle for nothing for a long time and had worked hard. He had passed up other opportunities that had come his way. However, Thorner was not awarded the whole of the estate, as he had been promised, because the remedy for proprietary estoppel is the minimum that is needed to compensate for the detriment that has been suffered.

Conclusion

Voluntary and community organisations should be robust in defending their entitlements. In the event of a dispute legal advice should be sought.

For further information in relation to contested legacies, please contact David Turner, partner, on 01392 685219 or email david.turner@footanstey.com

Exempt and excepted charities – do you now need to register?

New legislation in relation to the registration of exempt and excepted charities with the Charity Commission came into force on 31 January 2009.

Presently excepted charities

There is now a requirement for charities which are currently excepted from the requirement to register with the Charity Commission to be registered, if their gross income exceeds £100,000. Included within this category are:

- Charities connected with churches and chapels belonging to various Christian denominations
- Charitable service funds of the armed forces; and Scout and Guide groups

The Charity Commission anticipate around 5,000 charities will be required to register.

The registration regime remains complex and there are differing mechanisms and indeed enduring exemptions depending on the type of charity.

There is a specific timetable for registration in relation to church charities. This may be viewed on the Charity Commission website by following this link:

www.charitycommission.gov.uk/registration/charprog.asp

Presently exempt charities

Currently a large number of charities are exempt from registration with the Charity Commission, but many are likely to need to register with the Charity Commission later this year.

Exempt charity status for foundation and voluntary aided schools will be removed on 1 October 2009. Accordingly, foundation and voluntary aided schools should now plan for registration with the Charity Commission.

There will be further changes for "exempt" charities with incomes over £100,000. Those with an alternative "principal regulator" will continue to be supervised by that body (for example the Housing Corporation for registered social landlords). Those with no such regulator will be required to register with the Charity Commission.

This change is expected to impact in particular charitable industrial and provident societies (which are not registered with the Housing Corporation), which again should prepare for registration.

For more information please contact James Evans, partner, on 01392 685243 or email james.evans@footanstey.com