

The need for regulation for estate administration and will writers – full article

In the last few months, the press have reported a number of cases of theft of estate assets by executors. A Court in Northampton heard that a former borough councillor stole £81,000 from an estate to which he was executor so that he could take his wife on a luxury cruise and repay his bookmaker the £25,000 he'd lost on the horses. Lincoln Crown Court is currently hearing a case where it is alleged that cash, intended to be distributed to charities and relatives and friends of the deceased, was pocketed as a result of the alleged greed and criminal activity of the professional executors, an accountant and an ex-solicitor.

These cases, amongst others, highlight the problems currently challenging the Legal Services Board (LSB) as they consider the need for regulation of probate in the light of the changing face of legal services provision. Then add to this the need to provide more choice for the consumer as identified back in March 2001 when the Office of Fair Trading issued its report "Competition in the Professions".

The need for regulation is pressing but the changes must be made at a measured pace after consultation and discussion and with a full understanding of the risks of not regulating estate administration.

Application for a grant of probate – for a fee – has been and remains a reserved activity (i.e. performed solely by solicitors, barristers, notaries public and Trust Corporations). However, all the work before and after the application can be undertaken, for a fee, by anyone, without restriction. Indeed, it is open to lay executors to apply for a grant themselves though not for a fee - hence the large number of personal applications. The risk, therefore, is that an unscrupulous executor can, once he has the grant, sell assets and plunder bank accounts without any real control or oversight. The current law is outdated and does not address the real problems.

Further the sweeping changes in the Legal Service Sector are being introduced to provide more choice with greater protection for the consumer. Introducing the Legal Services Bill 2006-2007 in the House of Lords, the then Lord Chancellor and Secretary of State for Constitutional Affairs, Lord Falconer, clearly set out the intentions behind the legislation:

"The Bill puts consumers' interests at the heart of the regulatory arrangements. It provides for a Legal Services Board to provide strong, independent oversight with day-to-day regulation left to front-line regulators; statutory objectives for those with regulatory duties and principles for the legal profession; alternative business structures to enable lawyers and non lawyers to work together on an equal footing to deliver legal and other services —external investment will also be possible; a single and fully independent Office for Legal Complaints; and a mechanism to protect consumers if new problems occur"

How might regulation affect providers of estate administration services?

It is not intended to change the current procedures for lay executors to apply for a grant and to administer an estate. Regulation is directed against the amateur or untrained professional offering executorship services with little or no protection for the consumer. As these businesses have become more mature the risk has grown and the number of operators has increased as they see the potential rewards in one of the few unregulated business sectors. You only have to read the consumer press to see regular stories of lost legacies or unscrupulous pricing.

There are a number of risks to the consumer which regulation needs to address:

Firstly, regulation would provide transparency of pricing, so that consumers could compare providers on a like-for-like basis (Is an organisation quoting a fee? or estimating it? Does the fee include VAT? Does it include third party costs and other disbursements? Is it a fixed fee, or a time-based rate, or a percentage?). At present, it's quite tricky for even a sophisticated consumer to make an informed decision.

Secondly, estate funds might be at risk. Regulation could require trust corporations, and others offering a service on commercial terms, to follow similar rules relating to client monies that solicitors and accountants currently follow – for example they must establish separate office and client to protect client monies with tight financial and internal controls which would reduce the risk of fraud and theft.

Estates can go wrong and while it may not always be the fault of the professional, anyone offering these services needs to have a suitable level of competence and training. It almost goes without saying that a regulator ought to require those it regulates to carry professional indemnity insurance at the appropriate level. Similarly, the organisation should subscribe to approved service level agreements and its people should be demonstrably capable of carrying out their roles, which comes down to training and continuing professional development.

A regulator ought also to provide a code of conduct to which regulated bodies should adhere. A code of conduct does not necessarily provide all the answers but it does set some minimum level of standards and provide quality assurance.

Finally in the event of a problem, a dissatisfied consumer ought to be able to complain to an independent body which could, if necessary, compensate the consumer and discipline the service provider, including striking them off in the case of serious breaches, e.g. criminal activity.

How might regulation affect will-writers?

As to the regulation of will-writing, the practice of whoever drafts the will - whether a solicitor or a will-writer from the independent sector - naming themselves as executor continues. The testator will often not fully understand the implications of this appointment and will have little idea of the executors' competence, service level or fees. This means that unregulated professional executors with little experience or qualifications are often positioned to carry out the administration of

complex estates with no oversight or control. It is open to the beneficiaries to ask the executor to renounce but, if he refuses, there is little that they can do short of issuing proceedings.

Some elements of the independent will writing sector have also promoted the growth of a pre-paid probate service bundled into the estate planning and will drafting package. The proposition is usually that a fee paid now secures a probate and administration service for the testators' executors come the dread day. However there is seldom any indication – let alone guarantee – of who will deliver the service come the time, or at what price. This can leave executors in something of a cleft stick: has their testator paid for a full estate administration service or not? If not, what have they bought? If so, who will provide the service? Are they competent? Perhaps extension of the regulatory net to the will-writing industry would bring greater transparency to this particular problem.

As with regulating estate administration, common sense suggests that will-writing, currently an unregulated activity, could be tidied up at the very least. Whilst professional bodies such as STEP ensure that their members are rigorously trained to correctly deliver the services for which they charge a fee, some solicitors, and those in the independent will-writing industry, are less adequately trained. A solicitor's practising certificate is no guarantee of competence in any particular discipline – the writer has seen numerous wills drafted by solicitors who have demonstrably little expertise – and there also seem to be elements of the independent sector who could pose a danger to their clients and to the reputation of competent independents. Here, as before, an independent body, delivering a proper training scheme, continuing professional development and sanctions against dishonesty and serial incompetence ought to give the public confidence. However, although estate administration will be regulated (although, as yet, it is not clear by whom), the LSB has yet to act on Lord Hunt's comment that "...the regulatory net might be extended to cover will-writing."

Opening up the market

Solicitors continue to dominate the probate market place and, following its creation as its front line regulator by the LSB, are regulated by the Solicitors Regulation Authority. The gap in the regime relates to Alternative Business Structures (ABSs). The Legal Services Act allows law firms to become part of larger organisations such as banks and supermarkets who in turn can offer legal services. It also opens the way for specialist firms comprising lawyers, accountants, financial advisers and other professionals to offer specific services. The LSB have now set out their proposals and have confirmed that ABSs will be regulated to license services from October 2011.

Although no front line regulator has yet been selected, or created, for ABS, major players such as the Co-Operative Group and the Halifax are aggressively marketing legal services while private equity groups are poised to invest into law firms and specific market sectors.

The LSB will in due course publish guidance explaining how applications for becoming licensing authorities for ABS from Approved Regulators will be evaluated, following a consultation exercise. This will be followed by final guidance to potential licensing authorities on the content of their regulatory frameworks. Whoever is selected, or created, will need time to prepare their licensing

framework - *“frameworks that we will ensure focus on outcomes for consumers, rather than over-complicated rules that stifle innovation and better value.”*

Welcome change

Regulation would provide consumers of estate administration services with a level playing field where they could compare service against service and price against price. The companies that currently offer a service would have to ensure that their game was raised high enough to meet standards set by an external body. Perhaps the costs would deter some players from staying in the game. Others would, doubtless, relish the opportunity to shine. Some organisations might fall away while others thrive. In the end, the biggest winner will be the consumer. Kings Court is ready for, and welcomes the prospect of, regulation of the estate administration sector and invites the LSB to:

1. Make decisions and move as quickly as possible to ensure that rogue executors are prevented from acting.
2. Require estate administration service providers to establish separate office and client accounts. The safety of client monies must be a priority.
3. Devise and implement appropriate training and CPD benchmarks.
4. Require market participants to carry professional indemnity insurance.
5. Establish a level playing field for ABSs – do not penalise those businesses that have invested in systems, processes and resources to give an improved service to clients and enable them to offer benefits such as home visits and fixed fee quotations.
6. Review “pre-paid probate” arrangements for value to the consumer.

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