

Market study into the supply of legal services in England and Wales

Introduction

STEP is the worldwide professional association for those advising families across generations. We help people understand the issues families face in this area and promote best practice, professional integrity and education to our members.

Today we have over 20,000 members across 95 countries, with over 7,000 members in the UK. Our membership is drawn from a range of professions, including lawyers, accountants and other specialists. Our members help families plan for their futures: from drafting a will or advising family businesses, to helping international families and protecting vulnerable family members.

We take a leading role in explaining our members' views and expertise to governments, tax authorities, regulators and the public. We work with governments and regulatory authorities to examine the likely impact of any proposed changes, providing technical advice and support and responding to consultations.

We welcome this opportunity to provide input into the market study launched by the Competition & Markets Authority into the supply of legal services in England and Wales. We shall confine our comments to the issues we see in the area of will writing and probate services to individual consumers. This is a key area of activity for many of STEP England and Wales members.

1. Executive Summary

- 1.1 We believe the scope of the case study should be widened to include estate administration. Will writing, probate and estate administration effectively form a single market, with estate administration generally regarded as the value added component within that market.
- 1.2 Estate administration is also the area where the consumer is most at risk of serious criminal behaviour such as fraud.
- 1.3 The ability of consumers to drive effective competition is limited by a variety of factors. Typically wills are drafted infrequently and any serious defects in the drafting are unlikely to be discovered for some years, often only after the death of the original client.
- 1.4 The primary focus should be on the prevention of mistakes rather than on ensuring financial redress after mistakes have been made. Mistakes in will drafting or estate administration can result in not only substantial financial losses for families but also significant emotional distress at a time when families are often vulnerable after the death of a close family member.
- 1.5 Current regulatory structures have not kept pace with the evolution of the private client legal services market. Regulatory boundaries are too often based on traditional professional boundaries which now fit poorly with the new types of business that are emerging offering a broad range of related services to families.
- 1.6 Informed consumer choice is also hampered by the lack of any clear information on the value of differing practitioner qualifications and their relevance to will writing, probate and estate administration.

2. Scope of the CMA Study

- 2.1 It would be sensible to widen the scope of the case study focused on will writing and probate services to include estate administration services. These three areas of activity are in reality so closely linked that for consumers and legal services suppliers alike they effectively form a single market of inheritance services. These links were noted by the Legal Services Consumer Panel in its 2012 report “Probate and Estate Administration”¹ which highlighted the “strong linkages between will-writing and probate and estate administration”.
- 2.2 Fees for estate administration are often substantially higher than for will writing and probate services. The higher fees for estate administration reflect the risks and work involved, particularly given that the value of the estate can often be substantial due to the impact of rising house prices. Estate administration is therefore often seen as the ‘value added’ area of the package of inheritance services.
- 2.3 Many firms therefore see will writing and probate services as a route to attracting the more valuable estate administration work. If handled properly that is perfectly legitimate, although unfortunately abuse can occur when a will is being drafted if the client is not given adequate choices or informed of their choices. The STEP Code for Will Preparation in England & Wales², which applies to all STEP members who prepare wills in England & Wales, thus requires that preparation of a will must not be conditional on the will drafter being appointed executor and/or trustee. There are concerns however, that unscrupulous will drafters sometimes include clauses appointing themselves to handle probate or estate administration without the client fully understanding the implications of this.
- 2.4 Another reason for including estate administration in any study of how the legal services market is currently serving consumers is that, as a result of the inherent nature of the work, there is an above average risk of fraudulent activity among unscrupulous practitioners. This was an issue highlighted by STEP in its 2010 report on “Cowboy Will Writing – Incompetence and dishonesty in the UK wills market”³ and was also identified as a serious risk in the Legal Services Consumer Panel 2012 report.

3. The Ability of Consumers to Drive Effective Competition

- 3.1 While probate activities are a reserved activity, in practice it is relatively common for non-authorised persons to offer will writing and estate administration services. A third party service supplier may well then be used to provide reserved probate services as part of the overall offering. In those circumstances there is no effective statutory bar to anyone setting up a business to provide will writing and estate administration services and to market the associated probate services.

¹See http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2012-03-19_LSB_PEAFinal.pdf

² See <http://www.step.org/sites/default/files/Policy/will-code.pdf>

³ See http://www.step.org/sites/default/files/Comms/reports/Will_Writing_Report.pdf

- 3.2 Typically the initial contact with the client will be through the will writing offering. Will writing in particular, therefore, is increasingly being widely promoted by non-traditional suppliers of legal services such as estate agents, banks and other mortgage suppliers and insurers, some of whom use in-house expertise while others effectively then contract out any legal services work. The will writing market has also attracted many relatively small market entrants, who may or may not hold any widely recognised qualifications, many of them having left the IFA market in the face of commission reforms in that market.
- 3.3 The will writing market has some unusual features which are likely to impact on consumers' ability to make informed choices and drive competition. As in many markets, consumers buy wills infrequently. It is therefore difficult for the consumer to "learn from experience". Perhaps uniquely, however the 'product' (i.e. the will) will often not actually be used, and found to be either satisfactory or defective, until after the death of the client.
- 3.4 Another feature of the will writing market is that while the fees paid for the writing of a will are often relatively modest, the consequences of a mistake may well not only be discovered after death but they can be financially substantial. Just as importantly, any mistake in the drafting of a will can cause enormous emotional suffering to families at what is often in any case a very difficult period after the death of a family member.
- 3.5 These issues combined argue that the prevention of mistakes, by requiring high standards of training and CPD, is likely to be a far more important element in effectively protecting consumers, than mechanisms focused primarily on offering access to financial redress. STEP's Code for Will Preparation in England & Wales lays down clear rules regarding both transparency and the reasonableness of charges. We believe most other reputable professional bodies have similar rules. Unfortunately, however, not all will writers are members of reputable professional bodies.
- 3.6 Informed consumer choice is also hampered by the lack of any clear information on the value of differing qualifications practitioners may have and their relevance to will writing and estate administration. STEP aims to offer a clear set of standards and a structure against which both consumers and employers are able to make an informed decision in seeking advice for their will writing and estate administration needs and full information on our qualifications is available on our website.⁴ Thus STEP offers a range of qualifications which are set against the framework for higher education qualifications (FHEQ) in England, Wales and Northern Ireland. STEP's entry level qualification (FHEQ Level 4) is the 'STEP Certificate in Trusts and Estates - England and Wales' (30 credits at Level 4). This sits alongside the more advanced "STEP Diploma in Trusts and Estates - England and Wales" (120 credits at Level 6) and the specialised 'STEP Advanced Certificate in Will Preparation - England and Wales' (30 Credits at level 6). Taken together these qualifications provide a structured approach to developing the requisite knowledge to administer and advise on a client's needs in estate administration and the preparation of a will, from background knowledge enabling an individual to work on a case file under supervision (Certificate) to advising a client and managing their affairs as principal advisor (Diploma and Advanced Certificate).

⁴ See <http://www.step.org/qualifications-membership-framework>

3.7 Unfortunately some of the professional qualifications offered elsewhere are harder to rank in terms of any widely recognised academic framework and/or have limited relevance to will writing and estate administration. We are also concerned that, in contrast to the focused approach of STEP's qualifications, too often when the qualifications of other practitioners are examined in detail they turn out to be generalist in nature and have little practical relevance to the will writing and estate administration market.

4. Are existing regulations and redress mechanisms adequate?

4.1 STEP has consistently argued for regulatory reform in the will writing, probate and estate administration market. The current regulatory framework both does little to build confidence amongst consumers and instead risks leaving them confused. It also potentially leaves many consumers with little or no protection in a market that is complex and poorly understood. Thus consumers are currently confronted by a mix of practitioners, some of whom are:

- i. subject to statutory regulation,
- ii. not subject to statutory regulation but members of reputable professional bodies,
- iii. practitioners who belong to no reputable professional body and may even have little or no formal training . A further problem for consumers is that historically such unqualified individuals have been known to claim membership of prestigious sounding, but otherwise unknown, professional bodies.

4.2 The primary objective of regulatory reform should be the simplification of the current confusing structure in legal services of multiple regulators and multiple tiers of regulation. Not only does the range of regulators create confusion, but current regulatory structures, which are typically based on traditional professional boundaries, fit poorly with the new types of business that are emerging.

4.3 These new business structures are frequently based on offering a range of professional services to families spanning legal, financial and tax advice. In this context a simpler, more open regulatory structure aimed at ensuring consistent standards from service providers, whatever their background, would be preferable in terms of encouraging fair competition, a more effective market place and minimising regulatory costs.

4.4 Such a structure also needs to recognise that client needs are diverse. In terms of consumers with relatively simple affairs, the appropriate level of skills needed to draft an appropriate will, handle a probate application and administer a modest estate may well be less than is needed in more complex cases. With appropriate protections in place, particularly around the recognition of when a case is not straightforward, such cases may well be handled adequately by those with lesser qualifications, at less cost to the client. This segment of the market may be ill served by regulations which are focused on ensuring the same very high level of professional training across the whole spectrum of market participants.

- 4.5 Redress mechanisms are similarly complicated by the broad range of market participants and their differing backgrounds. While some will be covered by the Legal Services Ombudsman, others offering will writing and estate administration services may be effectively regulated by one or other of the accountancy bodies or be members of professional bodies with their own complaints and professional standards processes. STEP's Professional Codes (including our Code for Will Preparation in England and Wales) plus details of our complaints and disciplinary process can be found at <http://www.step.org/professional-standards>. In reality however, there are a significant number of practitioners operating outside of the scope of any sort of external consumer complaints and redress process and therefore avoiding the costs of such schemes. This represents a significant hurdle to extending such schemes on a voluntary basis.

STEP
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