

Inquiry Report

Amy Marion Dwyer Will Trust

Registered Charity Number 1149743



A statement of the results of an inquiry into the Amy Marion Dwyer Will Trust (registered charity number 1149743).

Published on 25 July 2014.

The Charity

The Charity is governed by the Will of Amy Marion Dwyer dated 9 March 1949.

Its objects are:

“to hold the capital and income of the Trust for the People’s Dispensary for Sick Animals with a request to keep the grave of the deceased mother in good repair and in the event of the PDSA failing to comply with the request, to The Royal Society for the Prevention of Cruelty to Animals.”

The Charity’s entry on the Register of Charities can be found here <http://www.charitycommission.gov.uk/find-charities/>

Background to The Issues under Investigation

In her Will dated 9 March 1949 Amy Marion Dwyer provided (clause 6) that:

‘I devise and bequeath the rest residue and remainder of my estate ... to my Trustees upon trust for ... during his life and after his death as to both capital and income to the Trustees for the time being of the Peoples Dispensary for Sick Animals and I commit to their keeping the care and charge of my Mother’s grave in the Cemetery at Bournemouth and I request them to keep the same in good repair and the inscriptions thereon legible and to rebuild the same when necessary but in the event of their failing to comply with this request I give and bequeath both capital and income to the Trustees for the time being of the National Society for the Prevention of Cruelty to Animals subject to an upon the same terms and conditions as hereinbefore expressed.’

Mrs Dwyer died in 1956 and the life tenant died on 28 December 1971¹.

In April 2011 the Commission was contacted by a solicitor acting on behalf of the Peoples Dispensary for Sick Animals (“the PDSA”) as a beneficiary of the Will. They expressed concern about the administration of the charity, including although they were not the only issues alleged, unauthorised trustee payments for professional fees, unauthorised investments and losses in relation to failures to exercise rent review provisions in the leases of property owned by the Charity.

When considering the concerns raised by the PDSA the Commission took the view that the Will Trust was a charitable fund with an annual income over £5,000 and therefore liable for compulsory registration as it met the statutory requirements under section 30(1) of the Charities Act 2011. In June 2011 the Commission wrote to the Trustees informing them of their legal obligation to register.

¹ The trustees of the will trust have always been partners of Harold G Walker & Co (now known as HGW solicitors).

Despite several reminders the Commission did not receive a substantive response until November 2011 when the Trustees challenged the Commission's view on charitable status claiming that *"... the primary object of the trust appears to be the maintenance of the grave. We therefore do not agree that the particular purpose of the trust is charitable."* The Trustees maintained that this was supported by Counsel's advice obtained on three separate occasions, in 1974, 1995 and 1996. The Commission considered the 1995 and 1996 advice.

In February 2012, the Commission wrote to the Trustees again restating its legal opinion on the charity's status "the maintenance of the grave was clearly not the primary purpose and this was not the conclusion in any of the three Counsel's opinions..... on a practical level the grave is a small ordinary plot (not a tomb or a mausoleum) and this was a substantial gift comprising of several properties and a significant amount of cash. Therefore, in practical terms, it is difficult to see how the main purpose could be interpreted as the maintenance of the grave. We take the view that there is a very strong case to say that this is a charity and that, given its size, it should register with the Commission. Failure to register a charity, particularly when invited to do so by the Commission, is strong evidence of mismanagement and misconduct in the administration of a charity." The beneficiaries of the will trust are charities and therefore the assets are held for exclusively charitable purposes.

The Commission also made clear to the Trustees that it failed to see how they could be properly discharging their duties and responsibilities as charity trustees if they ignored the Commission's advice on the following issues:

- registration of the charity;
- that charity trustees cannot receive any benefit from the assets of their trust (including charging fees for acting as trustee) unless there is a specific power to do so in the governing document or they have authority from the Commission or the Court; -(The 1949 Will had not included a professional charging clause);
- the trustees' duties for managing the charity's assets and resources; and
- the statutory requirements to produce accounts and reports.

The Trustees' failed to respond to the Commission's correspondence and requests in it. Given the Trustees lack of cooperation and as the regulatory concerns identified remained unresolved the case was escalated and, on 9 May 2012 the Commission opened a statutory inquiry ("the Inquiry") into the Charity under section 46 of the Charities Act 2011. The inquiry closed on 25 July 2014 with the publication of this report.

The issues under investigation were:

- the administration, governance and management of the Charity by the charity trustees; and
- whether or not the charity trustees had complied with and fulfilled their duties and responsibilities as Trustees under charity law, in particular in relation to addressing the concerns raised by the PDSA.

Findings

On the 30 May 2012 the Inquiry wrote to the Trustees to inform them that a statutory inquiry had been opened and requested that they explain what action (if any) they had taken to ensure that the Charity was registered with the Commission, or if they remained of the view that the Charity is not charitable and did not qualify for registration as a Charity, to set out the reasons for this.

Registration

The Trustees sought specialist legal advice and in July 2012 the Inquiry was advised that an application to register had been submitted. As a result of the Commission's intervention during the inquiry the Charity was registered on 13 November 2012.

Administration of the Charity

The Inquiry examined correspondence dating back to 1999 between the Charity and the PDSA and/or their representatives in which the PDSA raised its concerns about the management of the Will Trust with the Trustees.

The inquiry found that in a letter to the Trustees dated 16 December 2011 the PDSA's representatives identified and set out the heads of losses to the Charity which it considered to be the responsibility of the Trustees.

This letter detailed the losses to the Charity to be as follows:

"(a) Unauthorised fees deducted between 6 April 1994 and 5 April 2010 - £31,641.24

(b) Insurance Premiums not recovered from tenants to 5 April 2010 - £724.85

(c) Losses in relation to Mortgages (unauthorised investments for the purposes of the Trustee Act 1925 and Trustee Investment Act 1961) - £8,872.75

(d) Losses in relation to failures to exercise rent review provisions in the leases of the Charity's property - £25,150

(e) Interest

In addition, legal costs expended by the PDSA to pursue the losses"².

In January 2013 the Trustees advised the Inquiry that the complaints raised by the PDSA had been referred to the Trustees' Professional Indemnity Insurers and a surveyor had also been instructed by the Trustees to look into the matter.

The Inquiry requested updates from the Trustees on the progress being made by the Professional Indemnity Insurers and the surveyors but these updates were not forthcoming and when updates were eventually submitted they failed to materially address the regulatory concerns. The Trustees did not demonstrate any willingness or appetite to address the potential claims and seek resolution of them.

² The Trustees of the Charity have, since the conclusion of the substantive phase of the Inquiry, advised the Commission that they have requested the representatives of the PDSA to support the perceived loss figures with calculations as the Trustees do not believe any material losses have in fact occurred to the Charity as the result of the items set out above. The Trustees advised that they are continuing discussions with the PDSA on this matter.

The inquiry also found, the Trustees failed to acknowledge all parts of the complaint raised by the PDSA. When contacting their Professional Indemnity Insurers, the Trustees limited their referral to the rent review issue (point c above). In correspondence of 25 January 2013 and 16 July 2013 the Trustees did not mention to the Commission the other potential claims (points a, b and d) or inform the Inquiry of what they intended to do in order to resolve all parts of the complaint with the PDSA.

The Inquiry found that these issues had been brought to the Trustees' attention as far back as 1999 but the Trustees had not properly turned their attention to dealing with them and ensuring they carried out their duties as trustees, even if they rejected at that time it was a charitable trust, the relevant duties owed as a trustee of a non-charitable Will Trust are in many aspects the same/similar. The Inquiry found that the Trustees did not take the necessary or reasonable steps to deal with the claims and regularise the situation. Furthermore the Trustees did not respond to the Commission's enquiries and engagement with them, which dated back to 2011. They were given numerous chances to resolve the situation and the Inquiry considered this was mismanagement in the administration of the charitable trust. The Trustees appeared to be unwilling to voluntarily take the necessary steps to engage with the PDSA and bring about a resolution.

The Trustees response to the Inquiry was that they do not consider themselves experts in trust law nor do they wish to continue as trustees of the Charity. However, despite being informed by the Commission in June 2013 of the options available to them no progress had been made to either (i) find replacement trustees or (ii) liquidate the assets of the trust and apply them in accordance with the Will. As a result, regulatory action was taken.

The Inquiry acknowledges that the PDSA's claims of negligence have raised issues of legal and financial liability which need to be carefully considered by the Trustees particularly given their potential personal liability but given the length of time since this was formally brought to the Trustees attention the Commission would have expected this matter to have been more expediently dealt with, the Trustees have failed to take significant steps to seeking a resolution.

The Inquiry did not seek to examine the details of the PDSA's claims; the focus of the investigation was to investigate whether the Trustees were taking all reasonable steps to address the concerns with the PDSA themselves. In essence the PDSA and the Charity were in dispute and even if the Commission may get involved, it is the responsibility of the trustees to try to resolve the disagreement or dispute.

Conclusions

The Commission concludes that whilst the Trustees did take the necessary steps and register the Will Trust as a Charity, they failed to carry out their duties and responsibilities with regards to dealing with the claims raised by the PDSA. The issue of the Charity's on-going governance has not yet been resolved nor the potential liabilities of the trustees and former trustees for the breaches of trust alleged by the PDSA.

However, the Inquiry notes that during the Inquiry the Trustees did make disbursements to the PDSA and ceased to charge fees for their services.

Regulatory Action Taken

On 20 January 2014 the Commission issued an Order ("the Order") made under section 84 of the Charities Act 2011 which permits the Commission to direct any action to be taken that it considers "expedient in the interests of the charity". The Order required the Trustees to carry out a review of the governance arrangements for the Charity, setting out what actions they intend to take over the next 12 months regarding the management and administration of the Charity.

The Trustees were also directed to provide explanations as to why the matters reported to their Professional Indemnity Insurers did not include the PDSA's concerns in relation to the investment of charity funds and the fees charged by the firm were not reported, particularly given that there is no professional charging clause in the Will Trust.

In complying with the Order the Trustees are required to formally report back to the Commission, identifying the actions they will take to resolve the claims made by the PDSA and address the future governance of the Charity. Failure to comply with our Order may result in proceedings for contempt of court.

The actions set out in the Order must be taken by 20 August 2014 and the Trustees' progress in taking this action is being monitored by the Commission.

On 10 March 2014 the Charity informed the Commission that the Trustees had appointed a person to deal with Trust Administration and that this person had taken over the day to day management of the Charity. Furthermore the Charity apologised for the *"the lack of response and communication over the years"* which they attribute to *"a number of changes in personnel at the firm and no one person taking ownership of the file"* and whilst this was *"administratively regrettable"* the Charity does not *"believe any losses or disadvantages to the Charity Beneficiaries have taken place"*.

This is contested by the PDSA which takes the view that the failure of the Trustees to address the concerns identified by them has incurred expenditure on the part of the Charity in legal costs to seek to bring the matter to a satisfactory conclusion.

Issues for the wider sector

The Commission has a duty to maintain an accurate Register of Charities. Where a Charity has an annual income of over £5,000 the duty to register a charity rests with the trustees. Failure to register the charity where there is a legal obligation to do so does not exclude the charity from the Commission's jurisdiction. For the purposes of charity law in England and Wales, a charity is any institution, corporate or not, established for charitable purposes and for the public benefit and subject to the control of the High Court. Executors and trustees of Will Trusts should be alert to whether a Will establishes a charitable trust and that whether in due course it must be registered as a Charity. Where a charity established by a will or a charitable appeal is established for a short time the Commission will not normally enforce the duty to register. However, the trustees must still keep records of income and expenditure of charitable funds and prepare accounting statements.

Charities can sometimes disagree with each other over issues such as entitlement to funds. The Commission is often asked to take one side or the other. The Commission will only get involved in exceptional circumstances – on the whole, it expects charities to take advice and to seek to resolve the issue itself.

It is the responsibility of trustees to try to resolve any disagreement or dispute.

Legal action is an option open to trustees, however, the Commission will expect charities to, explore all the other reasonable options open to them to resolve the issue, such as dispute resolution or agreeing a legal compromise. Asking the Court to resolve a dispute should be seen as the last remaining option. The Courts, the Commission and the public expect a charity's funds to be spent on carrying out the charity's purposes and litigation outcomes are uncertain. As a result spending money on legal costs should only be the last resort for trustees. However trustees have an overarching duty to protect or secure the charity's assets and they may have to use legal action to meet that.

