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11 October 2001

Dear Ann

The Macfarlane Trust

At our recent meeting you asked me to provide written advice on a number of issues.

1 Powers of the trustees to make grants or loans to beneficiaries

The objects of the Trust are:-

"To relieve those persons suffering from haemophilia who as a result of receiving infected blood products in the United Kingdom are suffering from Acquired Immune Deficiency Syndrome or are infected with human immunodeficiency virus and who are in need of assistance or the needy spouses parents children or other dependants of such persons and the needy spouses parents children or other dependants of such persons who have died".

In furtherance of these objects the trust deed provides that

"the trustees have power to provide or assist in the provision of financial aid, holidays, food, clothing and other articles or assistance in kind or of shelter, hospice, housing or other accommodation (whether temporary or permanent)."

In practice, the trustees make funds available to the beneficiaries by way of donations or grants for a variety of purposes in furtherance of the objects.

Typically loans are made for larger payments and are usually related to the purchase of a property, for example topping up a first charge from a building society, or for home improvement or debt management purposes.

We understand that the rationale for the trustees' decision to make loans rather than grants is a desire to be seen to be acting fairly and consistently as between beneficiaries. There is however no requirement in the trust deed for the Trust to make loans rather than grants. If the trustees chose to make funds available to the beneficiaries by way of outright donation they would not be acting improperly or outside their objects or powers.

2 Security for loans

As mentioned above, the trustees are not under a duty to make funding available by way of loan rather than by an outright donation. Similarly where the trustees do make payments available by way of loan they are under no duty to take security for that loan.

Generally, loans from the trustees to beneficiaries are secured by way of a second charge, in most cases a building society will hold a first charge over the beneficiary's property. In a number of cases second charges have been taken to secure relatively small sums. If the trustees do wish to make loans rather than outright donations then it is important that there is a loan agreement as this is evidence of the amount of the loan. However the effectiveness of a second charge to secure the Trust's interests may in some cases be doubtful. Therefore the trustees may decide quite reasonably that it is better to take a risk that the loans are not recoverable rather than spend money on legal fees in order to get security.

I set out below a number of examples where a second charge may not be effective:

(a) There may not be sufficient equity left in the property. You should also bear in mind that house values can go down, and also that it is quite common not to be able to realise the technical open market value of a property when it actually comes to selling that property.

(b) In some of the cases where you have taken charges, the property charged is owned both by the immediate beneficiary and his or her spouse. There have been numerous cases involving commercial lenders where a spouse has in effect managed to get out of a charge, leaving the lender with only a charge over the borrower's share in the property, which will not necessarily be 50%. Many of these cases involve the spouse arguing that he or she was unduly influenced by their partner in signing the charge. The only definitive way to avoid this risk is for the spouse to receive independent legal advice, but this is difficult to achieve in many of the transaction where we have acted.

(c) In many of the cases, the beneficiary may be very close to technical bankruptcy, if not actually bankrupt. Depending on individual circumstances, it is a possibility for a charge to be set aside (i.e. annulled) by a court, if it can be shown that the beneficiary was bankrupt, or became bankrupt within 6 months of the charge. These cases are dependant upon the argument that, by granting the charge, the beneficiary is putting the Trust in a better position that the beneficiary's other creditors, and there is a particular risk of this if the charge is taken after the monies have actually been lent.

(d) One of the advantages in a creditor taking a charge over a property is that it gives the party taking the charge the ability, in an enforcement situation, to sell the property. However, in the case of the Trust, this may conflict with the Trust's policy that the immediate relatives of the beneficiary can continue to live in the property after the beneficiary's death. In practical

terms, enforcement of the security means selling the property with vacant possession.

(e) The costs of enforcement of the security can be great, particularly if the situation is complicated by a first chargee, and any disputes with the beneficiary's family. Even if there is sufficient equity in the property when the second charge is taken, this may not be the case if the costs of enforcement are taken into account.

These issues should be weighed up against the benefits in taking a charge, which principally are that the beneficiary will not be able to sell the property without the Trust's consent, and that in an insolvency situation, the Trust will be ranked as a secured creditor. Although other secured creditors who have taken security before the Trust did, particularly any first chargee, will rank ahead of the Trust, the Trust's position is enhanced vis-à-vis any unsecured creditors. However, this latter benefit only crystallizes in a bankruptcy situation, but it is on bankruptcy that many of the negative factors outlined above become particularly relevant.

Apart from concerns regarding the effectiveness of second charges in terms of their enforceability the trustees should also consider the risk to the reputation of the Trust if the trustees were ever to seek to enforce the charge against the beneficiary's property and whether in reality they would wish to do this. I have set out on the attachment to this letter a list of the charges recently completed and our costs in connection with this work.

It follows that if the trustees wish to continue to make loans rather than donations to beneficiaries then perhaps they would wish to reconsider their policy on taking security. For example a ceiling might be set below which a charge is not taken. I venture to suggest £60,000. I suggest that in some cases a simple loan agreement (perhaps in the form already provided to you) would be more appropriate than a charge. The details of the agreement could be completed by the Trust itself without legal advice on each occasion unless unusual considerations arise.

3 Funding fertility treatment

You mentioned that one issue that causes the trustees some concern is the funding of fertility treatment by the Trust. The relief of persons who are infertile either through the provision of information, advice and support or financial assistance to pay for treatment is an accepted charitable purpose. The objects of the Trust are sufficiently wide to cover funding for fertility treatment and it is open to the Trust to meet the costs of such treatment notwithstanding that this may be available on the NHS (at least in some areas). However whether or not the trustees choose to give funding for such treatment is entirely a matter for their discretion.

Under Article 12 of the Human Rights Act 1998 men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercise of this right. While artificial and assisted reproduction fall within this Article, commentators take the view that there seems to be no obligation on a State to provide for these procedures to take place. If there is no obligation on a State then there can be no obligation on a voluntary organisation (even if that voluntary organisation is in receipt of government funding). There have been cases

brought against charities under the Human Rights legislation and it is clear that in some cases where a Trust is discharging functions of a public nature the legislation would apply. However that is not the case here.

I understand there is a further concern regarding any liabilities that may arise in connection with the Trust funding fertility treatment. The position of the Trust is that it is merely making funds available to the beneficiary to undergo the treatment. The Trust is not itself providing the treatment. If as a consequence of the treatment the beneficiary's partner or child became infected with HIV then liability would fall on those responsible for providing the fertility treatment in a negligent manner. The Trust should not, however, contract with the NHS Trust to provide treatment for an individual. Grants should be made direct to the individuals. This would avoid the risk of the Trust being involved in any legal action. However the Trust's position could be protected by a form of disclaimer.

It may be that the trustees would wish to adopt a policy statement which sets out in broad terms the areas where funding (whether by way of grant or loan) would be considered.

4 Services provided to the non-charitable trusts

The Trust provides administrative support to two non-charitable trusts, the Macfarlane (Special Payments) Trust and the Macfarlane (Special Payments) (No.2) Trust. The Trust is clearly ideally placed to provide this administrative support. However the cost of administering these two non-charitable trusts and the cost of passing funds over to the beneficiaries of these two funds should not be borne by the Trust and administrative costs should be apportioned and a charge made in respect of the services the Trust provides.

5 Trustees

I understand new trustees have not yet been appointed by the Department of Health. The trust deed provides for a body of ten trustees, four to be appointed by the Secretary of State for Social Services (DSS trustees) and six by the Executive Committee of the Haemophilia Society (Society trustees). The power of appointing new trustees in place of the DSS trustees and the Society trustees is vested in the Secretary of State for Social Services and the Society respectively. The deed does not contain any provisions relating to the quorum required for meetings of the trustees. This means that provided that a majority of the trustees attend meetings, the meetings will be quorate. There is no requirement that a certain number of "DSS" or "Society" trustees are in attendance at meetings in order for them to be quorate.

However while the Board of Trustees is not improperly constituted at the present time steps should be taken for the vacancies to be filled. If continuing vacancies are causing difficulties in the administration of the Trust then the trustees may wish to consider raising with the Secretary of State the possibility of varying the trust deed in order to amend the appointment provisions. The amendment could perhaps give the

continuing trustees the power to appoint new trustees in the place of retiring "DSS" trustees where, for example, the right of appointment has not been exercised within 3 months of the vacancy arising.

Yours sincerely

Gillian Fletcher

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