

vCJD TRUST

QUESTIONS FOR SIR ROBERT OWEN ARISING OUT OF PROPOSED CHANGES TO TRUST DEED

The Basic Sum – Clause 3

Re: proposal to limit distribution to those entitled under will or intestacy when victim has died:

1. One example has been given of c.90 people connected with one victim suggesting that they were "Qualifiers" for payment under the Scheme – this is likely to be atypical – to what extent is the definition in the Scheme causing problems in other cases?
2. To what extent are payments being made historically and currently to individuals who would not be entitled under a will or the rules of intestacy? In other words, how much difference is it likely to make as to who receives the payments?
3. How will the Trust deal with the dissatisfaction arising on where the money all goes to someone nominally entitled under the rules of intestacy but who was not close to and did not provide any care for the victim in their lifetime?

The Experience – Clause 4

4. The additional sum of £5k for the experience of vCJD for his/her family should not be historic. It related to those families who did not have the benefit of the care scheme set up in October 2001. Is this of any relevance going forward?
5. If it is of ongoing relevance could not the Trustees simply exercise their discretion to limit the investigations which were going to be made as to who might be entitled given that the shares were going to be in a relatively small sum? Why not just identify the main family members/care-givers? Or get their legal representative to seek agreement from the qualifiers regarding distribution?

6. What if the Trust Deed were amended so that this element (which relates to the care of the victim) was to be given instead as part of a larger sum to the victim? Likely reception to this?

Psychiatric Condition – Clause 4.3.1

7. The sum of only £5k is payable to a qualifier in the case of an identifiable psychiatric condition. Again this is an area where costs appear to be disproportionate. Can the Trustees have some kind of filter for assessing whether there is likely to be an identifiable psychiatric condition prior to obtaining psychiatric reports e.g. seeing if there is mention in that person's medical records of significant psychiatric symptoms?

Particular Financial or Emotional Hardship – Clause 4.3.2

8. Given that it is not unusual for trustees to have to use their discretion to administer limited funds on the basis of need and hardship, why have they found this task so difficult? Why do they suggest this is "invidious"?
9. Have the Trustees considered simply exercising their discretion not to make payments under clause 4.3.2 if the costs and burden of considering these claims is disproportionate to the amount payable? They were given a ring-fenced sum so that they *could* turn down extravagant claims. They have total discretion both as to whether to make a payment and the amount (subject to the limit on the Discretionary Fund). The claimants would not be entitled to these sums in any event at common law. It could be limited to topping up in the event that the dependency payment were to be far too ~~low~~ (e.g. if the victim were a surgeon likely to have earned very well in the future with young dependents)
10. Have the Trustees considered defining "particular" so as to limit the category of persons payable? This would mean that investigation would not be required unless the claim's circumstances crossed a certain threshold of seriousness.
11. Would it assist if the wording of "particular" in the Trust Deed were changed to "exceptional"?
12. What does Sir Robert think are the likely consequences if the provision for these payments is removed entirely, say in return for increased amount to victim? Advantages and disadvantages?

Care – Clause 5

13. The Trustees have adopted a common law approach to assessing care. This has provoked dissatisfaction but is not such dissatisfaction unreasonable in circumstances where those persons would otherwise have to go to court and would not recover more? Should he not simply be more robust about this? Is not Sir Robert himself suggesting any future scheme could follow a common law model?

Provision of information generally

14. It has been suggested that the failure to provide or piecemeal provision of information has caused problems (which is obviously a matter for the victim's family or solicitors) – what has been done or could be done to avoid this problem in the future? Can more families be encouraged to use the Secretariat directly given that this materially reduces the costs?
15. Can the Trustees not insist on provision of full information in relation to a claim before it will be assessed? For example, problems appear to have arisen from the fact that the claims for hardship and supporting information generally post-dated the decision by the Trustees on the rest of the claim i.e. Irwin Mitchell waited to see what they could get on the main claim and then put in a further claim, thus delaying the whole process and increasing the chances of getting more money in total. This has increased costs and given rise to criticism of the Trustees for not finally settling claims quickly enough.

Standard sum proposed in draft Trust Deed

16. Why are the Trustees proposing the sum of £200k when the average payment to date appears to be only £163k (incl. hardship payments) or £156K (excl. hardship payments)?
17. To what extent would the sum of £200k be under-compensating some future victims? (It would help to get a handle on the likely number of "net losers" and the sort of amounts by which they would lose out).
18. Has the figure of £200k already been communicated to families or their legal representatives?
19. Is it proposed that cases determined prior to March 2007 which received less than £200k will be topped up to that amount?

Costs

20. Why have legal costs (both those of the Trust's own secretariat and those of the families' solicitors, Irwin Mitchell – who also received £1.6M from the Department of Health for their costs in setting up the Scheme) not been controlled in the way that was anticipated bearing in mind that costs were always going to come out of the Main Fund?
21. Would the appointment of professional trustees for individual victims really simplify matters? Likely costs? Who would be appointed? Irwin Mitchell?
22. What about giving the Trustees power to appoint a pair of national centrally appointed guardians for all victims and qualifiers?

Trustees/Secretariat

23. Does Sir Robert need stronger Trustees? Different expertise?
24. Does he need a better secretariat?
25. When his term of office expires, is he prepared to accept re-nomination? If not, any recommendations to Lord Chief Justice about his successor?
26. What about the future? Have the scheme administered by the McFarlane Trust?

Consultation

27. Who will carry out the consultation process?
28. What will happen in the event of divided/dissatisfied responses?