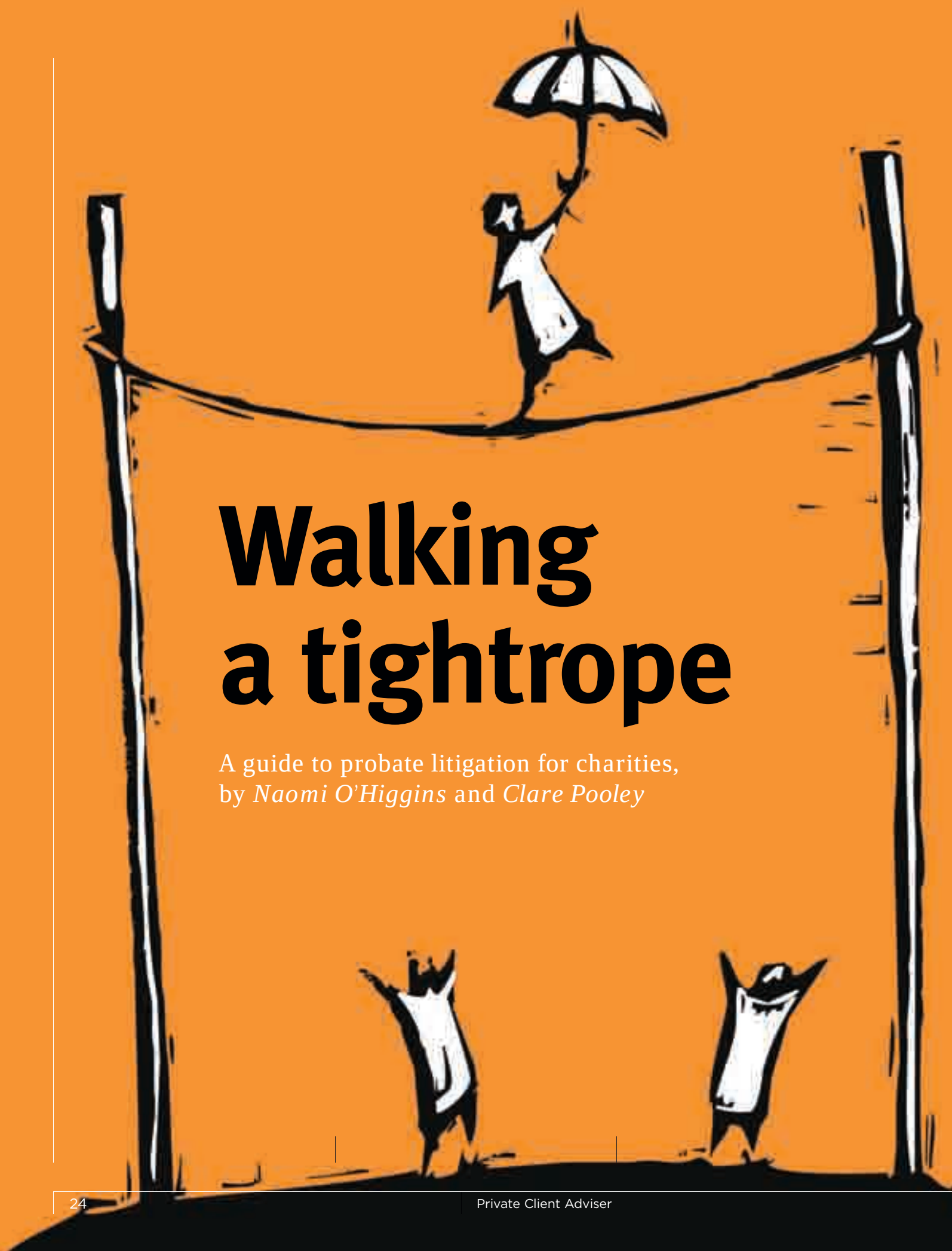

Walking a tightrope

A guide to probate litigation for charities, by *Naomi O'Higgins* and *Clare Pooley*

The current economic climate has meant that the ability of charities to protect their legacy income has become even more challenging than in the past. The decline in overall legacy income received by charities in the past several years has been coupled with a general rise in contentious probate claims.

Indeed, in July 2012, the *Financial Times* ('Inheritance battles double in crisis,' 13 July 2012) reported that the number of High Court cases in 2011 contesting wills, trusts and probate totalled 663, almost double the number of such claims issued in 2006.

As many cases would have settled before reaching court, these figures suggest that such disputes are become increasingly common. This is at a time when, according to figures compiled by CharitiesDirect.com, legacy income made up about 11 per cent (or over £1bn in 2010) of the total income received by UK charities.

These figures bring into stark focus the importance of charities ensuring that they are well equipped to handle challenges to their legacy income which may be posed by costly probate-related litigation.

Challenging times

Charities may become embroiled in probate litigation principally:

- where there is challenge of the validity of a will of which a charity is a beneficiary; or
- when an application is made pursuant to the Inheritance (Provision for Family and Dependants) Act 1975 ('Inheritance Act'). This is an application made to the courts by a person who was financially dependant on the testator, requesting that the court use its powers to redistribute the testator's assets.

1. Validity

There are a number of grounds on which the validity of a will can be challenged but, commonly, a claimant who is seeking to challenge a will under which a charity has benefited to his detriment, may allege that the person making the will (testator/testatrix) lacked mental capacity to make the will or perhaps failed to know or approve the contents of his or her will.

The attitude of the courts in recent probate litigation cases has not provided much cause for comfort for charities. The court failed to uphold the validity of legacies made to charities in the relatively recent cases of *Sharp v Adam* [2006] EWCA Civ 449 and *Gill v Woodall* [2011] Ch 380 because the gifts were at odds with, or inconsistent with, the testator's expressed views during their lifetime.

2. Inheritance Act claims

A claim under the Inheritance Act may occur when a potential beneficiary finds that they have been disinherited in favour of a charity. In spite of the supposedly hallowed principle of English law of testamentary freedom whereby a person is free to dispose of his assets as he wishes without constraints, the stance of the court in Inheritance Act cases has been unsympathetic to testators who have not made 'adequate' financial provision for their dependants.

In recent Inheritance Act cases, such as *Ilott v Mitson* [2011] EWCA Civ 346 (where the testatrix benefited three animal charities over her daughter), the focus of the court appears to be solely on the reasonableness of the provision made by the testator for the claimant without any regard being given to the testator's wishes or motivations.

This may mean that a charity that is a party to an Inheritance Act claim will face an uphill battle even where it can be shown (as was the case in *Re Besterman* [1984] Ch 458 that the testator had a close connection with or sense of duty toward a particular charity. There was a slight exception to this in the Court of Appeal case of *Baynes v Hedger* [2009] EWCA 374 where a gift to charity was upheld. However, this decision appears

Courting appeal

Before pursuing legal action, charities should bear in mind:

- taking and considering legal advice for any litigation (except trivial or routine claims);
- the relative strengths of the case in any potential defence or counterclaim. Specialist advice may need to be taken to consider the merits and risks of the case (particularly from a costs perspective);
- the ability of the defendant to deliver the remedy sought;
- the ability of the defendant to make payments if they lose the case;
- the consequences for the charity if it does not engage in litigation;
- whether the charity has sufficient funds to meet the costs incurred, particularly if it ends up losing the case and has to pay the other side's costs;
- the impact on spending charity funds on litigation, given that this may have the effect of depriving the charity of these funds to carry out its purposes;
- the availability of conditional-fee agreements and legal expenses insurance to mitigate costs risks;
- the impact on the charity devoting its (non-financial) resources to the litigation;
- the impact on the charity's reputation;
- whether any of the trustees are conflicted in making the decision.

Source: Charity Commission Board Paper No (10) OBM 27

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to be based more on the perceived weakness of the claimant's case than anything else.

Careful consideration

Litigation is a risky process for any party, but particularly for a charity when the need to safeguard its resources is paramount.

Litigation can be extremely expensive. The general rule is that the losing party will pay the winner's costs. However, even where a claim is won outright, it is extremely unlikely that all costs will be recovered successfully.

Probate litigation involving charities is always of interest to the national press, particularly when high-profile, well-known charities are involved. This makes it even more essential that a charity follows the correct steps and, in particular, obtains clear legal advice prior to embarking on litigation.

Mishandling litigation can damage public perception of the charity and may also give rise to considerable adverse publicity. Not only may this have an impact on future legacy income, but it may have more widespread negative impact on the charity such as its ability to obtain funding from the government, as well as the additional impact on the morale of the charity itself.

So what should a charity do when it is considering whether or not to take or defend probate litigation proceedings?

It is clear that embarking on litigation can prove risky for charities with uncertain outcomes. Legal proceedings relating to a legacy to a charity can create a particular tension for the charities concerned. This is because charitable trustees will need to balance their duty to ensure that their charity receives all that it is entitled to under the terms of a will, against the Charity Commission's view that charities should consider litigation as a last resort.

Practically speaking, this means that a charity must give careful consideration as to whether it is in their best interests to take or defend legal proceedings. In its draft guidance (Board Paper No (10) OBM 27), the Charity Commission

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states that charities will need to consider a variety of factors before pursuing legal action (see box).

The list reinforces the Charity Commission's reluctance to see a charity's funds spent on anything except furthering its purposes. Consistent with this approach, the Charity Commission also expects charities to consider alternatives to taking or defending legal proceedings. Principally, the Charity Commission will expect to see that charities have engaged in alternative dispute resolution such as negotiation or mediation.

The Civil Procedure Rules set out rules for making and accepting offers of settlement which affords significant costs and tactical advantages on parties if used correctly. Conversely, those parties to litigation who reject a sensible offer may find themselves penalised.

In certain circumstances, disputes in relation to wills may be resolved by the trustees of the charity making a one-off payment of a lump sum to the other parties to the litigation. If such a payment is to be made, the charities will require authority from the Charity Commission to do so.

End result

Sometimes, having considered the relevant factors and having made attempts to settle, a charity may conclude that it cannot avoid being involved in litigation. However, the charity will need to do what it can to mitigate the risks to funds held to carry out the purposes of the charity. Where there are charitable trustees, the usual rule is that they are entitled to indemnify themselves from the charity's funds, but the court has on occasion made the trustees personally liable.

Where there is an indemnity, the effect will be to reduce the charity's funds, but this risk can be addressed in a number of ways. In some cases, where the charity's solicitors believe that their client has a strong case, they may be willing to enter into a conditional fee agreement ('no win, no fee'). This is often accompanied by what is known as 'after-the-event insurance'. This insurance is designed to pay the other side's legal costs if the litigation is lost.

Another alternative is to make an application to the court for what is known as a Re Beddoe Order. This is an order authorising the trustees to take or defend legal proceedings and to use the charity's funds for that purpose. The charity will need to apply to the Charity Commission for its consent before making an application for a Re Beddoe Order. This may mean that this is a costly option and more appropriate where large sums of money or technically complex legal matters are in question.

It is clear that the charities have to walk an increasingly tight line between maximising their potential entitlement under a legacy without endangering the charity's resources in the first instance. ■

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