



Death benefits

As pensions lawyers, we see certain issues cropping up time and time again in death benefit cases. Here, we take a look at some of the more common pitfalls faced by trustees and pensions managers.

Scheme's policy incorrectly reflects the rules

Scheme booklets and policy documents can be very helpful summaries of the rules, but may not always be completely accurate. It is important to look at the actual trust deed or rules and check the wording carefully: there may be nuances or qualifications which are not reflected in the booklet or policy document. Depending on the history of the scheme's governing documents, the calculation of the lump sum may be governed by a previous set of

rules, even though the process for paying and the people eligible to receive a lump sum are set out in the current rules. The starting point should therefore always be to work out which rules apply to the member, before checking them thoroughly to find out which kinds of individuals can qualify as beneficiaries, and on what grounds. Failure to accurately follow the scheme's rules will expose the trustees to claims from unhappy potential beneficiaries.

Nominated beneficiary

Many members complete an expression of wishes statement, naming an individual as their preferred beneficiary. However, in most schemes the trustees are not bound by the member's nomination. As such, failure to carefully consider the expression of wish form will almost certainly be maladministration. Any expression of wishes should be checked against the member's will (if there is one). The date of the statement is also relevant. If the nomination was made a long time ago, it will be necessary to investigate whether there has since been a change in the member's circumstances – for example, a separation, a divorce or remarriage, the birth of a child, a death in the family or a change in the financial position of the

nominated beneficiary. Further investigation could reveal that the member had a dependant outside of the immediate family. If that is the case, then it will also be important to consider whether the nomination would leave that dependant in financial difficulties.

Taking time to assess the circumstances at the date of the member's death enables the decision-maker to judge how much weight to give to a nomination. However, failure by a deceased member to alter the expression of wishes in accordance with a change in family circumstances may not be accidental – the decision-maker should also consider if the member intended the form to remain as it was.

Case study: Mr S (2018 Pensions Ombudsman decision)

Facts

Mr K joined a group personal pension plan approximately six years before his death. He nominated Ms D 'a family friend' to receive a lump sum death benefit. On his death, the administrator paid the amount to Ms D. Mr K's father said she was not in a relationship with Mr K, and had not been in contact with him for several years. The administrator said the nomination was legally binding.

Decision

The administrator had misdirected itself and misinterpreted the rules – the administrator had a discretionary power when distributing the death benefit. By treating the nomination as legally binding, it had fettered that discretion. The administrator was directed to identify potential beneficiaries and make the decision wholly afresh (ignoring the fact that payment had already been made to Ms D) and pay compensation.

He said, she said

The family circumstances of deceased members can be difficult to unravel, especially when emotions between competing beneficiaries are running high. Nonetheless, the right questions must be asked, and the answers given should be pursued where necessary so that the decision-maker can make a fully informed decision. In some cases, this can prove very challenging –

especially when there are conflicting reports or claims from different interested parties – but a failure to ask enough questions to ensure that the facts are fully established may well leave the trustees' decision open to challenge. If a decision is later disputed, the person or committee who made it will need to be able to show that they established the facts fully.

Case study: Mrs D (2019 Pensions Ombudsman decision)

Facts

Mr and Mrs D married in 1981 and in 1987 Mr D took out a personal pension – he completed an expression of wishes form nominating Mrs D to receive the death benefits. In 2007, Mr and Mrs D separated (but did not divorce). In 2015, Mr D made a will which stated he had two pensions (neither of which was this personal pension), and that the survivor's pension under one should be paid to Mrs D and under the other to his current partner Miss Y. In 2017, he wrote another will (not witnessed) making this allocation but also stating that he left 'proceeds from private pensions' to Miss Y. Shortly afterwards, Mr D passed away. Payment was made to Miss Y; Mrs D complained.

Decision

The Deputy Pensions Ombudsman (DPO) found that insufficient inquiries had been made of Mrs D and Miss Y to determine the extent of their dependency before deciding how to distribute the benefits. It was not clear from the record of decision what weight, if any, had been given to the extent of Mrs D's dependency. The administrator was directed to make a new decision about how to distribute the death benefits and, in communicating the decision to the potential beneficiaries, to (i) state its reasons, (ii) highlight the rules used to make the decision and (iii) highlight the information/evidence taken into account to reach the decision.

Difficulties in identifying 'dependants'

Failure to identify all potential dependants is another reason why a death benefit decision might be challenged. Where the rules provide that certain of the member's relatives fall within the category of potential beneficiaries, such as their spouse or children, the trustees should be able to easily identify who these people are. However, where rules include other categories of potential beneficiary, such as

individuals who are 'financially dependent' on the member, this is not so clear cut.

Understanding what exactly is meant by financial dependency can be a challenge. It is common for an unmarried partner to claim dependency, but it may not always be appropriate to treat a co-habiting partner as a dependant for the purposes of the scheme, as the following case study shows.

Case study: *Wild v Smith* (1996 Pensions Ombudsman decision, appealed to the High Court)

Facts

A deceased member's son complained about how trustees exercised their discretion to pay a lump sum of £140,000 on his father's death. The relevant scheme rules had a power to pay a lump sum on death in service. The potential beneficiaries included:

- the member's spouse or other relative; or
- someone financially dependent on the member 'for all or any of the ordinary necessities of life'.

Seven years before his death, the member had nominated his son and daughter to receive any lump sum (50% each). When he died he was living with a woman, Mrs Slack. The trustees did not follow the member's nomination and paid £80,000 to Mrs Slack and a further £60,000 to Mrs Slack on trust for life with the capital going to the member's son and daughter on her death.

Decision

The Trustees were wrong to conclude that Mrs Slack was financially dependent on the member. Dependency meant not being able to look after herself if required to do so. Although the member was paying all their joint living expenses, and Mrs Slack had invested her savings in renovations to their joint home, Mrs Slack had chosen to give up work (rather than being forced to by circumstances) and had her own property. This meant that she was merely benefiting from the member's earnings rather than being financially dependent on him and could not have been a possible beneficiary within the scheme rules. The trustees were therefore acting outside of their powers in paying the lump sum to her. The trustees had also made no enquiries as to other possible beneficiaries, eg via the family or the solicitor administering the member's estate. The trustees had not properly exercised their discretion and the money had to be paid to the member's estate.

Delegating decisions

It is common for trustee boards to delegate death benefit decisions to a committee. To do this properly, the delegation must be permitted by the trust deed and rules of the scheme. The delegate's role and authority should be set out clearly, and the terms of the delegation should cover whether, and in what circumstances, the decision-making power should revert to the whole trustee board. A decision made without the proper authority can be overturned.

Even if decisions are being taken by a committee, all trustees need to be knowledgeable about the process for decision-making and capable of checking that the committee is working properly. Ultimately, the full board retains responsibility for the decisions of the committee, so the committee should report back on the decisions made for monitoring purposes. To avoid a challenge regarding the decision-maker's authority, it is

important that the committee follows this process diligently, making it clear that it has followed correct procedures and kept within its terms of reference.

Recording decisions

If a decision is challenged, the decision-making process will need to be able to withstand intense scrutiny. If there is no paper trail that fully records the decision and the decision-making process, then the decision may be open to challenge. A simple note of the final decision itself is not enough. Records should include all of the information gathered, which factors were considered and which of these were disregarded (and why). If the scheme has a policy or guidelines for the process, the record should confirm whether they were followed or departed from by decision-makers (and the reasons for doing so). The reasons for the final decision should be fully recorded, including details of which factors were most influential.

Case study: Dr G (2018 Pensions Ombudsman decision)

Facts

The deceased member's partner complained that she had not been awarded any death benefits. On the death of the member (Mr T) they were co-habiting. Several years prior to his death Mr T had completed an expression of wishes form which nominated himself only. In 2015, Dr G successfully complained to the Pensions Ombudsman about a decision not to award her any death benefits. In 2017, it was again decided that Dr G was not entitled to any death benefits (the value being paid to Mr T's estate). Dr G brought another complaint.

Decision

The complaint was upheld. The minutes of the decision set out various facts followed by the conclusion that Dr G was not entitled to any death benefits and the value would be paid to the estate – it did not include the reasoning for this decision. This meant that it was not possible to establish whether the administrator had exercised its discretion appropriately.

The Ombudsman commented that 'I consider the absence of any documented reasons to support a decision as indicating that there were in fact no supportable reasons for the decision. Documented reasons need not themselves be lengthy but should be sufficient to convey to the reader an understanding of the factors which have been given some weight. It may also be appropriate to record why some factors have been discounted. The reasons should be sufficient to enable an aggrieved party to know whether there are grounds to challenge the decision'.

When things go wrong

Trustees must be absolutely certain about their decision before making a payment. It can be very difficult to get money back after it has been paid out, and disputes can be costly and time-consuming to resolve (as well as causing distress to the family of the deceased member).

Recovering payments made in error can be tricky (see, for example, our guide to [recovering overpaid pensions at www.allenoverly.com/overpayments](http://www.allenoverly.com/overpayments)) – but we can help you find an appropriate strategy for your specific circumstances if a mistake of this kind has been made.

For more information on avoiding and managing pensions disputes, please visit our Pensions in Dispute site at www.allenoverly.com/pensionsindispute

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