

Pensions problems for modern families

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The changing nature of the family can make trustees' roles more difficult when it comes to working out the benefits that should be paid out in the event of an early death. Louise Ashford and Laura MacPhee investigate a very modern dilemma.

Uncompleted paperwork. It sounds like an administrative chore, but it can lead to some of the most difficult decisions you will ever have to make as a trustee.

Mr Symons died on 26 April 2009 at the age of 55. He left behind a first wife, from whom he was divorced, and their three children. He also left behind his second wife, who had four children from a previous marriage. Mr Symons met the second Mrs Symons in 2000 and married her in 2008.

Mr Symons had last advised the trustees of his pension scheme, AstraZeneca Pension Fund, of his wishes in 2001. In that letter, he nominated the three children from his first marriage as equal recipients of his death benefit.

Following his second marriage, Mr Symons changed his will. He and his second wife wrote mirror wills that left their estate under discretionary trust for their seven children, split 80:20 in favour of his second wife's four children.

The second Mrs Symons believed Mr Symons had simply not got around to updating his Expression of Wish form, and that the same arrangement should apply to the division of his death benefit. As Mr Symons' death meant a substantial decrease in her income, she also asked for a widow's pension.

When he died, Mr Symons had not been paying maintenance to his three biological children and had not been in contact with them for the final eight years of his life, although he had successfully fought for access to them in an expensive legal battle. He had stopped his maintenance payments after he became unemployed; attempts to recommence payments were not acknowledged. He had never officially adopted the second Mrs Symons' four children.

After Mr Symons' death, the trustees made enquiries. They established the dates of Mr Symons' first and second marriages, his legal relationship with the seven children who could potentially have benefited, considered Mr Symons' will, and looked at to what extent the second Mrs Symons was financially dependent on Mr Symons.

Eventually, they elected to pay Mr Symons' three biological children the benefit in a lump sum, in three equal shares. Mrs Symons appealed the decision several times, ultimately taking it to the Pensions Ombudsman. She believed the trustees had ignored her – and her children's – dependency on Mr Symons.

The Ombudsman said that in making their decision, the trustees had made "thorough enquiries... regarding Mrs Symons' financial position and financial dependency on Mr Symons. Against this, the trustees balanced the facts that Mr Symons had not changed his Expression of Wish under the fund following his remarriage, his desire to obtain legal access to his children, and his attempt to recommence maintenance payments once he had regained employment, all of which pointing to a desire to provide for his biological children."

Ultimately, the Ombudsman ruled in the trustees' favour.

This case and many others are published on the Ombudsman's website. However, such emotionally charged and complex situations are sadly not uncommon and, if anything, are occurring more often.

The modern family is changing. Marriage and 2.4 children are becoming increasingly less common. Office for National Statistics' research shows the institution is on the wane. According to the body's latest General Lifestyle Survey, published earlier this month, the proportion of one-parent households has tripled over the past 40 years. Our relationships are more fluid than those of our forebears, which poses challenges for trustees struggling to reach equitable decisions in the event of an untimely death.

Trustee boards are devoting more and more time to the resolution of these issues. Skip McMullan, the chair of trustees for the Bank of America pension scheme, says his scheme has just created a new sub-committee that deals purely with the allocation of death benefits.

Steve Delo, chief executive of independent trustee firm PAN Governance, concurs. "I look back to when I started in the industry, on an admin team, and it used to be that someone could die in the morning and have the benefit paid out in the afternoon. It simply doesn't work in the same way now."

As the institution of marriage evolves, trustees are confronting ever-more complex legal conundrums. Gay couples who have entered a civil partnership do not have the same rights as married couples when it comes to pensions, for example.

Case study: Should civil partners be eligible?

Mr Walker was a member of the chemical company's defined benefit pension scheme while he was working there between 2000 and 2003. He then entered into a civil partnership, but found that his partner would not receive any benefits for that period. This is because schemes are only legally obliged to back-date benefits to December 2005, when the Civil Partnership Act 2004 came into force.

At the time, some schemes chose to extend benefits for civil partners to cover the full length of employee service, as they would for married members. The Innospec scheme did not, and Mr Walker challenged these restrictions in the Employment Tribunal.

The tribunal found in his favour, and said the scheme was not entitled to limit the accrual of benefits to a certain time frame, and the UK government had failed to implement the Equal Treatment Framework Directive, a European instrument first drafted in 1998. These rules state that it is illegal to discriminate on a number of grounds, one of which was sexuality.

Employment tribunal decisions only bind the parties involved in the case, so it has not created a precedent.

However, the scheme is appealing the decision in court, the outcome of which will apply to other schemes. Silverman Sherliker partner Jennie Kreser says it is unlikely the court would rule against Mr Walker, particularly because the European Court of Justice held that time restrictions were illegal in two German cases.

If you marry someone at a certain point in time and they die while still married to you, you are (in most circumstances, along with their other beneficiaries) entitled to their death benefits from whenever they started contributing to a pension, which can be years before the marriage took place.

In contrast, as it stands, pension schemes can choose to provide death benefits to civil partners only from the time when civil partnerships became legal – 5 December 2005. "Around about 2005-06 schemes were very much heading for deficit – even then things weren't looking overly healthy. Of course the vast majority of schemes did just that," explains Jennie Kreser, partner at law firm Silverman Sherliker.

However, a case making its way through the courts at present may put civil partnerships on an equal footing with marriage (see box, Walker v Innospec, p20).

The blame game

However confident you are of your trustee board's logic in reaching a decision, any trustee's worst nightmare is having a death benefits decision appealed. But trustees are finding ways to alleviate, if not eliminate, difficulties in this area.

Although trustees must use their discretion, nothing beats an up-to-date Expression of Wish form to give an indication of a member's thinking, as well as an audit trail to help to kick-start enquiries.

"The main issues we face are where, despite reminders, we have deceased members with no completed Beneficiary Forms," says Colin Greatorex, trustee of the Molson Coors scheme. He says that encouraging members to keep their forms up to date can be an uphill battle, but that regular reminders can help.

Bank of America's McMullan has alighted on another solution, with the help of technology. "When you log into the pensions site, you can't get onto the rest of the site unless you answer the question: 'Is your Expression of Wish form up to date?'"

Data security is not an issue, McMullan says. "The way things are set up, the Expression of Wish form can't be done online. Members get the prompt, but it then gives you a link to print the form. You've then got to complete it, sign it, and send it in."

There are some general principles trustees should bear in mind when making decisions.

A quiet, but healthy scepticism is invaluable. "People can be quite shifty when it comes to money," says Delo.

Another trustee, who did not want to be named, went further, saying: "The best thing for trustees to bear in mind when it comes to doing these things is that people lie."

McMullan says: "We have complicated cases and there is no substitute for some good, old-fashioned detective work to actually understand what's been going on."

Case study – survivorship

Mrs Earle was left almost destitute after her husband died, thanks to poor administration. Mr Earle had written a nomination form in 2000, which stated that his death benefits should be paid to his two adult daughters from his first marriage. A year later he had met and married the current Mrs Earle. When he died an active member of his pension scheme, she received a widow's pension of £3,597.60.

The scheme's administrators wrote a memo to the trustee board's secretary and pensions manager, stating that although there was a nomination form there was also a surviving spouse. The secretary wrote back instructing them to pay the benefits in the nomination form, which made no mention of Mrs Earle. Accordingly, the full lump sum of £100,667.21 was divided between his two daughters.

Mrs Earle, who was her husband's sole financial dependent, challenged the decision. The Ombudsman said the trustee board had not considered the matter properly, and directed the trustees to reconsider the distribution of the lump sum.

Care is needed

Be careful if you delegate any powers to third parties, such as administrators. One trustee says: "I think administrators are getting a bit sloppy and becoming less helpful to trustees."

The same trustee tells an alarming story, where Member X died and the administrator recommended his death benefit should be paid to his mother. The Expression of Wish form was dated 1994 and the trustee

board knew that Member X was 72 when he died. The trustee board asked the administrator if Member X's mother was definitely still alive. It transpired that if she had been, she would have been 110, but she had actually died in 1996.

Helpfully, the Pensions Ombudsman, which serves as an impartial resolution forum for these disputes and has the power to compel trustees to make death benefit decisions again when it deems it necessary, publishes a guide called *How to avoid the Pensions Ombudsman* (see box, p21).

Delo says: "A lot of the Ombudsman stuff is about trustee boards simply not taking factors into account, probably because they weren't aware of them. Sometimes it's difficult to be aware of them. We often get situations where you could be dealing with an Expression of Wish form that could be 10 or 15 years old. That's not untypical. So you can imagine, a lot changes for someone in that sort of period."

In an ideal world, these changes would be expressed with crystal clarity on an Expression of Wish form. Unfortunately the real world is not so clear cut.

Avoiding the Ombudsman

There are a number of general principles trustees should follow to keep out of the Ombudsman's path.

First, they should ensure they know what the scheme rules say about death benefits. They should also ensure that the intended beneficiary falls within the class who could be entitled to such a payment, for example a spouse or child.

Whoever takes the decision must have access to all the necessary information, and exercises his or her discretion appropriately. Trustees should ask colleagues if they know of anyone else who needs to be considered. They should give the nomination form appropriate weight, but consider it in the context of the surrounding circumstances. They should investigate the member's domestic and financial situation as well as that of possible beneficiaries.

The trustees should also establish whether the member has made any other financial provision, for example in a will. Finally, the trustees must inform all the relevant parties of their decision, and act with sensitivity.