

# The importance of reviewing an expression of wishes



## Key takeaways:

- How pension death benefits may be paid by a scheme
- What information may be contained in an expression of wishes
- Why it is key to establish if the scheme administrator is subject to a binding nomination

## Category:

Pension death benefits

## We consider pension death benefit options and the need to review clients' expressions of wishes

Pension death benefit options became more flexible from 6 April 2015 when 'nominee' and 'successor' pensions were introduced. A catch-all term of 'beneficiaries' pension is now widely used to incorporate dependants, nominees and successors.

Prior to the Taxation of Pensions Act 2014, although lump sum pension death benefits could be paid to anyone, pension benefits could only be paid to a 'dependant.' The removal of this restriction has made pension death benefit planning far more flexible and members are advised to review their pension death benefit options if they have not done so already since April 2015.

The ability to include non-dependent children or grandchildren as nominees will be of interest to some. Not being in a

registered legal partnership (marriage/civil partnership) previously had the potential to cause challenges as the **dependant** status of a partner relies upon "...the opinion of the scheme administrator..." (FA2004, Schedule 28 para15(3)). Unmarried partners can now be nominated by the member and not rely upon the scheme's opinion of their dependency upon the member.

Note: It is very important for clients to understand the death benefit options available under their scheme, to ensure they match their requirements and where appropriate to ensure an up-to-date expression of wishes is lodged with their scheme administrator.

### How death benefits will be paid by the scheme

The scheme must decide not only how to pay benefits (as a lump sum or a pension) but also who receives the benefits.

The scheme will typically be able to pay the benefits at their discretion, but this may not always be the case. It is therefore important to understand the death benefit process the scheme will adopt on the member's death.

### Binding nomination

Where the scheme allows, a **binding nomination** may be in place whereby the member makes a nomination over which the scheme cannot exercise discretion – it is binding upon the scheme.

This type of arrangement is not typical and there is an inheritance tax (IHT) implication of a binding nomination. The member, in exercising control over the destination of the funds, may be seen as retaining a general power to dispose

of their pension death benefits up to their death and s5(2) of the Inheritance Act (IHTA 1984) may apply. Although such a nomination is binding on the scheme on the member's death, the member can revoke the nomination in their lifetime.

Where binding nominations are allowed by the scheme, the scheme may restrict them such that they can only provide for benefits to a registered legal partner, where the **transfer between spouses/civil partners exemption** (IHTA 1984 s18) would apply.

### Integrated trust

The member may have assigned their lump sum pension death benefits into a trust. This will be a 'bypass trust' but it is important to distinguish between an integrated bypass trust and a pilot trust version.

Where a pilot trust version of a bypass trust is used, the trust

is typically established with a notional settlement (£10 for example) and the member provides the pension scheme with an expression of wishes requesting that the scheme consider making a lump sum death benefit payment to the trust. The scheme retains discretion over the payment as the expression of wishes is not a binding nomination.

Compare this to an integrated trust where the member has irrevocably assigned his lump sum death benefits into trust. The scheme has no discretion in this situation and any lump sum death benefits will be assigned into the trust. Where

such an arrangement has been established but is no longer appropriate there may be two 'get out of jail' cards:

- transfer to another pension scheme, breaking the link between the fund and the trust (subject to the trust deed wording)
- the scheme may retain the discretion to pay death benefits in the form of a beneficiaries' pension, as opposed to a lump sum. If the scheme exercises its discretion to designate the funds into a dependant's pension there is no lump sum to pay into the trust.

### Scheme discretion

In most circumstances pension schemes will exercise their discretion regarding the payment of pension death benefits. Where this is the case it is important for the member to provide the scheme with an expression of wishes and to review that document regularly, perhaps as part of the financial planning review.

#### Discretion and the expression of wishes

The member should understand that an expression of wishes is not a binding instruction to the trustees and the trustees can, and indeed should, consider alternative beneficiaries. That said, it is often the case that the scheme, having considered the various potential beneficiaries and exercised their discretion, will distribute or nominate death benefits according to the member's wishes.

Although there are several circumstances (not covered in this note) where IHT can apply in respect of pension funds, death benefits paid at the scheme's discretion will normally not attract an IHT charge. The member should be advised that the trustees' discretion is therefore critical in protecting the death benefits from IHT.

On death of a pension scheme member there may be a number of conflicting claims to the death benefits and the situation can become acrimonious. It is important for the scheme to pay due regard to the various claims and to exercise their discretion. It is also important that the member makes their preferences clear in their expression of wishes.

Note: Failure to exercise discretion, or failure to demonstrate that discretion has been exercised, may result in complaints to the Financial Ombudsman Service (FOS).

### Content of an expression of wishes

The expression of wishes should make it clear who the member would like to benefit from their pension fund on their death. They may also wish to indicate how they would like the benefits to be paid (lump sum or pension).

#### Percentage allocations where more than one nominee

There is some debate about the need to indicate percentage allocations where multiple people are named as potential beneficiaries.

It seems sensible, where the member's wish is for multiple people to receive benefits, to indicate the proportions or percentages in which they would like those benefits to be allocated.

## Case study

Consider for example Jerry who would like 50% of his pension fund to provide an ongoing pension entitlement for his widow (Janet) but would like the remaining 50%, split equally, to be paid to each of his children (Joseph & Josephine) as a lump sum so that they can clear mortgages or other liabilities.

Jerry's expression of wishes (nomination) may indicate:

- ▶ My spouse Janet 50%
- ▶ My son Joseph 25%
- ▶ My daughter Josephine 25%

### One main beneficiary and backstop beneficiaries

Alternatively Jerry may want his wife to be considered as the primary beneficiary of his pension and to receive the fund in full but, should she pre-decease him or should she not require the funds, he would like his children to be considered as potential beneficiaries instead.

His nomination may indicate:

- ▶ My spouse Janet 98%
- ▶ My son Joseph 1%
- ▶ My daughter Josephine 1%

This is certainly not wrong but would be unnecessary as a valid nomination does not require an indicative percentage allocation (that said it would be prudent to discuss with the particular scheme as they may have a preferred format for expressions of wishes).

An argument in favour of the 98%/1%/1% approach is that this would clearly indicate to the scheme that the member does **not** want the benefits allocated equally between the nominees and that a 1% allocation should trigger enquiries by the scheme as to the member's true wishes.

A contrary argument is that the expression of wishes is intended to indicate what the member would like to be done

(it is after all intended to be an expression of their wishes). If the member has included a percentage (when one is not required for a valid nomination) it may be reasonable for the trustee to assume this was indeed what the member wanted.

### Free text in the expression of wishes

It is also perfectly reasonable to include some text in the expression of wishes to provide the scheme with additional supporting information. "100% to my widow Janet but, in the event that my wife has predeceased me or, upon having conducted enquiries, the trustees establish that my widow does not require the funds, then equally to my children Joseph and Josephine".

It is prudent to discuss the format of the expression of wishes with the scheme provider, but it is hard to see why a scheme would not want the clearest possible indication of the member's wishes. Clearest indication is important; the trustees are unlikely to welcome an expression of wishes that contains a list of endless caveats, conditions or 'what if' scenarios.

Many schemes will provide a death benefit nomination proforma and some will include "white space" for additional information.

### Is it necessary to identify a nominee by name or can they be identified as a member of a class?

Does Jerry have to name his son and daughter, or could he refer to them as a class of people ie. his 'children'? The legislation refers to a nominee as "...an individual..." - you can refer to the dictionary definition of an "individual" and come to your own conclusion but it would nevertheless be advisable to check with the scheme whether they would accept a nomination that identifies nominees as members of a 'class' rather than specifically by name.

### Is it necessary to provide a nomination if anyone can, in fact, be a nominee?

Because anyone could be a nominee it will speed up the death benefit payment process if the member has left a clear expression of wishes (subject of course to any contrary claims).

## Nominees

Finance Act 2004, as amended by Taxation of Pensions Act 2014:

A nominee is an individual

- nominated by the member or
- nominated by the scheme administrator

The nominee cannot be a dependant of the member (they will qualify as a dependant anyway).

**Critically, although it is possible for the scheme administrator to make a valid nomination, the scheme administrator cannot make a valid nomination if:**

- there is a surviving dependant of the member, or
- the member has made a nomination (in favour of an individual or a charity)

Let's look again at Jerry's situation. Jerry can nominate Joseph and Josephine to receive nominees' pensions even though they are adult children and no longer dependent and despite leaving a surviving spouse.

**If, on the other hand, Jerry fails to make such a nomination, the scheme will be restricted in its options:**

- the scheme could pay a lump sum benefit to anyone (including his children), but
- the scheme can only provide a pension to his widow Janet.

As a surviving spouse, Janet automatically qualifies as a dependant. Because the member has left a surviving dependant the scheme is unable to make a valid nomination. Joseph and Josephine cannot therefore receive nominee pensions.

## Grant of probate

The deceased's personal representatives (PRs) may require a grant of probate to take possession and control of the deceased's assets and to administer the deceased's estate. Pension death benefits are not an asset of the deceased's estate and so it may be reasonable to assume a grant of probate is not required when liaising with the pension scheme in respect of a deceased member's death benefits.

**A pension scheme may require sight of a grant of probate/ letters of administration for the following reasons:**

- To confirm validity of a will (or indeed the absence of a will) where one has been submitted to, or requested by, the pension trustees as evidence in the decision-making process.

It is critical therefore that Jerry provides his scheme with an expression of wishes and nominates his children as potential beneficiaries to provide the scheme with maximum flexibility.

### The death claims process

When a pension scheme member dies, the trustees will need to establish who should benefit. Assuming there is no binding nomination and no integrated trust, the trustees will need to consider the range of potential beneficiaries. They will pay regard to the expression of wishes, if there is one, but they may well liaise with the deceased's personal representatives and dependants.

It is quite possible that the trustees may decide **not** to pay benefits as per the expression of wishes. It could be that they consider there is a stronger claim or that the expression of wishes, having been submitted some time ago, no longer reflects the deceased member's situation.

### Reviewing the expression of wishes

Perhaps the member has divorced or married, re-married, had children or grandchildren in the intervening period between submitting the expression of wishes and their death. They may have written a will since submitting the expression of wishes that indicates a change in circumstances or attitudes towards who should benefit from their wealth on their death.

Reviewing the expression of wishes periodically is advisable, perhaps at the annual financial planning review, but certainly if there have been significant life events. Where the member has indicated that a relatively old expression of wishes is still relevant it would be prudent to record that in a file note.

- To verify the identity of the PRs who may be liaising with the scheme and as the deceased's estate is a potential beneficiary of the death benefits.
- To enable the scheme administrator to satisfy its legislative obligation to notify the deceased member's PRs of a benefit crystallisation event (BCE) arising on the member's death.

This final point is not widely understood<sup>1</sup> and indeed may not be relevant where the member has died aged 75 or over, where benefits were already crystallised at death or where benefits are not designated within 2 years of the member's death and the 'two-year rule' applies.

It may be that the deceased's pension scheme requests sight of grant of probate even though the PRs have not needed to apply for one to complete the administration of the estate.

<sup>1</sup><https://www.gov.uk/hmrc-internal-manuals/pensions-tax-manual/ptm165100>

### In summary...

#### It is important to establish:

- Is the scheme administrator currently subject to a binding nomination?
- If so, is that still appropriate, or should it be revoked by the member?
- Is there an integrated trust in place that would automatically receive lump sum death benefits?
- Again, is this appropriate and would a transfer be required to remove the integrated trust?

#### Where the scheme will apply its discretion:

- provide the scheme with an expression of wishes
- regularly review the expression of wishes (perhaps as part of the annual financial review)
- Check if the pension scheme provides a death benefit nomination proforma
- On a member's (client's) death, be aware of the pension scheme's death claims process and what information may be required.

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