

The nuclear family hasn't yet been consigned to history. However, in an age of civil partnerships, same-sex marriages and co-habiting couples who opt against exchanging wedding vows, it's just one of several options. The change has been underlined this year by two landmark legal rulings in the cases of *Brewster v Northern Ireland Local Government Officers' Superannuation Committee* and *Walker v Innospec*.

In February, Denise Brewster, a lifeguard from Coleraine, won a six-year legal battle to gain access to her long-term partner's pension. She had shared a home with local government employee Lenny McMullan for 10 years and the couple got engaged just two days before his sudden death from a haemorrhage.

However, on the basis that her partner hadn't signed a nomination form (aka expression of wish form) confirming her as dependant – a requirement not imposed on married members or those in civil partnerships – she was denied a pension, until the Supreme Court upheld her appeal and agreed that she had been unfairly discriminated against because of her marital status.

In July, the same court also upheld an appeal by ex-cavalry officer John Walker and ruled that his husband would be entitled on his death to a spouse's pension. The decision overruled an exemption in the Equality Act that permitted employers to exclude same-sex partners from spousal benefits paid into a pension fund prior to civil partnerships becoming legal in December 2005.

Until now, it has not been unusual for the surviving partner of a same sex relationship to find that he/she isn't eligible for the same benefits that would apply for partners in an opposite sex relationship.

These decisions aren't the only developments that pension scheme trustees must take into account. Mutual insurer Royal London recently highlighted data issued by the Office

#### Summary

- Disputes over death benefit awards have increased, due often to it being unclear who the beneficiary should be.
- Completed expression of wish forms can actually compound the problem if they are not kept up to date to reflect scheme members' changed circumstances.
- Two landmark Supreme Court rulings this year have strengthened the rights of unmarried and same-sex partners.
- The Pensions Ombudsman acts as the arbiter of last resort for unresolved disputes.

## Benefit of the doubt

**Modern life presents challenges for pension scheme trustees deciding who receives the death benefit. The expression of wish form can help, but too often it doesn't reflect members' changing personal circumstances, reports Graham Buck**

for National Statistics that revealed a growing number of 'silver splicers' and 'silver splitters' – terms for people getting married or divorcing later in life – and said there was a growing risk that it could result in an individual's pension benefits going to the wrong person.

The insurer noted that expression of wish forms allow scheme members to nominate their chosen beneficiary on their death, both covering the payment of an ongoing pension to the surviving widow or widower and/or the payment of lump-sum benefits.

Problems arise for scheme trustees where a member either hasn't completed the form or has failed to update it. Consequently, if their marital status has since changed it may result in an ex-spouse receiving the benefits at the expense of a current spouse or partner, as well as children and stepchildren of a new relationship not being provided for.

#### Complex lives

"People's lives definitely are getting more complicated," says Royal London's personal finance specialist, Helen Morrissey. "More of us are cohabitating,

which was a central issue in the Brewster case.

"People who are unmarried, but in a long-term partnership, have often assumed that it gives them automatic eligibility to the same benefits as married couples. They've received a shock when this turns out to be an incorrect assumption."

Sackers associate director Tom Jackman adds that there is also the potential for problems when a person's personal circumstances change subsequent to he/she completing an expression of wish form.

"Pension schemes have proved popular as they're a relatively tax-efficient form of employee remuneration and death benefits are no exception," he says.

"Where the benefit is payable to a spouse or dependant the beneficiary may be specified out in the scheme rules. However, in many cases the scheme trustees have discretion as to the recipient of the benefit. This is especially common with lump-sum benefits, where the discretionary structure has advantages relating to inheritance tax."

While trustees have a duty to take



account of a member's wishes, they are not necessarily required to carry them out if they believe there is another, more appropriate option, or if the scheme rules prevent those wishes from being carried out.

"For most UK schemes, while the trustees will comply with the expression of wish form as far as possible they're not bound by it as the benefit is paid free of inheritance tax," says Allen & Overy a partner and senior associate Jane Higgins. "So they will take into account whether the member's circumstances have subsequently changed, or whether other potential beneficiaries emerge."

Prudential's technical team head, Les Cameron, notes that where a scheme member has divorced since completing their expression of wish form it often won't be clear if the divorce was amicable and if they wish their ex-partner to continue as a beneficiary or want them cut out.

"So it's important that you regularly check your distribution arrangements and ensure that they still reflect your wishes," he recommends. "The scheme that I belong to issues a yearly reminder so there is an opportunity to update it."

Where the decision is less than clear-cut, various factors will be taken into consideration. In some cases, the trustees will talk to the deceased scheme member's line manager who may be able provide insights – for example, such as whether he/she maintained an amicable relationship with an ex-partner following their divorce.

"Wherever possible, when there is an element of doubt on who the beneficiary is, the trustees should attempt to talk to a number of people," adds Morrissey.

Jackman comments that the challenge is added to by the fact that today's worker rarely stays with the same employer for life. "The workforce has become much more mobile and a worker's rights are typically deferred – they may have left the company scheme years before, or worked overseas for a spell – so there are problems in getting up-to-date personal information.

"There are also situations, such as a family feud or a messy marital break-up, which are very challenging for the trustees to deal with. Some real-life situations equal anything in an *EastEnders* plot and it's hard for them to decide what the best course of action is in the circumstances. Whatever their decision, at least one of the affected parties won't be happy."

#### A final resort

Higgins says that scheme trustees have a duty to identify and locate other potential beneficiaries if there are rival claims and where possible to complete their investigation within two years of the death occurring as the tax treatment subsequently changes.

"So they will attempt to complete the investigation and take their decision reasonably quickly," she adds. "However,

while this can subsequently be changed where new circumstances subsequently come to light, any resulting redistribution may not be easy – particularly if the money has already been paid out."

For bigger schemes, which will be dealing with claims on a daily basis, it's common for the trustees to look for guidance. "The final decision may be delegated to a sub-group of trustees or a delegated local committee who may have specific knowledge of the individual concerned," says Jackman.

Any disputes arising from the payment must initially go before the trustees, who will consider it via a two-stage complaints procedure. Only if and when that process has been exhausted will the matter then be passed to the Pensions Ombudsman.

"Cases tend to be referred to the ombudsman only as a last resort," confirms Jackman. "With discretionary benefits, it's hard to challenge the trustees' decision, provided it can be shown to have gone through a robust process.

"The ombudsman may intervene only if and when he feels that process has been inadequate in some respect – although appealing to the ombudsman is a relatively easy process and one that can be done online."

Indeed, the ombudsman reports the total number of complaints (closed/determined) received over the past three years relating to death benefits is 87 – or just 4 per cent of its total volume of complaints, with 40 cases in 2014-15, 22 in 2015-16 and 25 in the latest year.

Lastly, Allen & Overy notes that while schemes offer helpful written summaries of their rules, these may not always be completely accurate. "When considering a death benefit claim, 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 document."

Written by Graham Buck, a freelance journalist