
Pension Death Benefits: Opportunities and Pitfalls

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1. Introduction

The will is not the only instrument available to pass wealth on death in England and Wales. For instance, survivorship operating on the death of a joint tenant, and the *donatio mortis causa*, can function as a means for benefitting someone on death. The same is true of trusts, life assurance policies, statutory nominations and private pension schemes. For this reason, in the United States, these mechanisms are generally referred to as ‘will-substitutes’,¹ ie instruments that, like wills, transfer wealth on death, but do so outside traditional probate procedures. It is true that these mechanisms operate like wills in that they allow for wealth to pass with effect on death whilst remaining revocable up until that moment. However, the term ‘will-substitutes’ does not quite capture their essence because these mechanisms often complement wills, without operating as a ‘substitute’.² Indeed, due to the asset-specific nature of most of them, frequently a will is still required or desirable. In addition, these instruments can often do more than a will: they are capable of pursuing a number of additional functions and are at times also more sophisticated.³

The term ‘will-substitute’ is not normally used as a term of art on this side of the Atlantic, where there is little scholarly debate about the transfer of wealth on

* The author would like to thank Victoria Coleman for assistance with the research, Prue Vines for help with Australian sources, and David Pollard, Dan Schaffer, and Lionel Smith for invaluable comments on an earlier draft of this chapter. The author is further grateful to the Alexander von Humboldt Foundation for funding a sabbatical leave during which parts of this chapter were written and to the John Fell Fund for funding research assistance for this chapter.

¹ JH Langbein, ‘The Nonprobate Revolution and the Future of the Law of Succession’ (1983–84) 97 *Harvard Law Review* 1108 at 1109.

² A Braun and A Röthel, ‘Exploring Means of Transferring Wealth on Death’, ch 16 in A Braun and A Röthel (eds), *Passing Wealth on Death: Will-Substitutes in Comparative Perspective* (Oxford, Hart Publishing) (hereinafter ‘*Will-Substitutes*’) VII.B, 364–66.

³ *ibid.*

death outside probate.⁴ I have argued elsewhere that England and Wales have not experienced a non-probate revolution in the same way that the United States have.⁵ Nevertheless, in recent years, a substantial amount of wealth seems to have been passed on death through ways other than wills and intestacy, such as life assurance policies, private pension schemes and survivorship operating on death of a joint tenant of real property, bank accounts or annuities.⁶ Other instruments popular in the United States,⁷ such as transfer-on-death (TOD) registrations of securities or automobiles, payable-on-death (POD) bank accounts, and transfer-on-death deeds of land, do not seem to be available in England and Wales, and revocable trusts are apparently not as popular.⁸

In the United States, the primary rationale behind the use of 'will-substitutes' is the desire to avoid probate, so as to reduce fees and delays in the administration of the estate and to maintain privacy.⁹ Due to differences in the probate procedure, probate avoidance does not represent a major incentive in England and Wales. Tax considerations would seem to be much more important, as well as the fact that nowadays wealth is simply invested differently.¹⁰ In other words, wealth is frequently saved in financial investments that normally permit a transfer of wealth on death with methods that obviate the need for a will.

This contribution focuses on the functioning of private pension schemes as a vehicle for the transfer of wealth on death in England and Wales. It analyses what benefits can be passed on the death of a member of such schemes and how recipients of death benefits are determined. In particular, it examines the nature of pension nominations and how they operate, and questions whether they provide an effective and reliable estate planning device.¹¹

⁴ Exceptions are G Miller, *The Machinery of Succession*, 2nd edn (Aldershot, Dartmouth Publishing Co Ltd, 1996) chs 14–17; C Sawyer and M Spero, *Succession, Wills and Probate*, 3rd edn (London and New York, Routledge, 2015) ch 2; R Kerridge (assisted by AHR Brierley), *Parry and Kerridge: The Law of Succession*, 12th edn (London, Sweet & Maxwell, 2009) 1–5 (hereinafter 'Parry and Kerridge').

⁵ For details, see A Braun, 'Will-Substitutes in England and Wales', ch 3 in *Will-Substitutes* (n 2 above), 51.

⁶ Other mechanisms are statutory nominations and *donationes mortis causa*.

⁷ For a discussion of the devices most common in the US, see JH Langbein, 'Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers' (2012) 38 *ACTEC Law Journal* 1 at 10; MB Leslie and SE Sterk, 'Revisiting the Revolution: Reintegrating the Wealth Transmission System' (2015) 56 *Boston College Law Review* 61, and T Gallanis, 'Will-Substitutes: A US Perspective', ch 1 in *Will-Substitutes* (n 2 above) 9. There is no agreement, however, as to which instruments are most relevant from an economic perspective.

⁸ Braun (n 5 above) II, 53. They are, however, common in off-shore jurisdictions: see C McKenzie, 'Having and Eating the Cake: A Global Survey of Settlor Reserved Power Trusts: Part 1' (2007) *Private Client Business* 336 at 339.

⁹ Langbein, 'The Nonprobate Revolution' (n 1 above) 1116. See also Gallanis (n 7 above) 11–12 who mentions further reasons.

¹⁰ Braun (n 5 above) IV, 71 ff.

¹¹ The effect of the payment of pension death benefits on third parties, such as creditors, family members and dependants, has been dealt with elsewhere: see Braun (n 5 above) III. D and E, 66–69.

2. Using Pension Schemes to Transfer Wealth on Death

2.1. Types of Schemes and Death Benefits

There are two main types of private pension schemes available in England and Wales: occupational pension schemes and personal pension schemes. Personal pension schemes are always defined contribution schemes, while occupational pension schemes take the form of a defined benefit (DB), a defined contribution (DC) (which is more common), or a hybrid scheme that provides a combination of DB and DC benefits. A person can be a member of both a personal pension scheme and an occupational scheme.

Although the primary purpose of such schemes is to provide for the retirement of the scheme member, they can also benefit someone on the death of the member. The type of death benefit payable varies considerably, depending on the nature of the scheme and on whether or not the member dies before or after retirement. Where the member dies before retirement, pension schemes usually provide death benefits in the form of a lump-sum payment, a dependant's pension or a combination of both. By contrast, where the member dies after retirement, some death benefits may be payable in the form of a guaranteed pension. In this case, if the member dies before the end of the guaranteed period, any remaining payments will be paid to the member's estate, to be distributed according to the will or intestacy rules. Defined benefit schemes will often pay a proportion of the pension the member was receiving when he died to his spouse or children. If, upon retirement, the member has invested the pension pot in a drawdown pension or an annuity, more benefits may be payable on death.

There are two main types of annuities: guaranteed term annuities and joint-life annuities. In the case of the former, the insurance company will make the payments for a guaranteed period,¹² even if the member dies, while in the latter case, the payment is made for the life of the survivor. Drawdown pensions are more flexible in that a death benefit can be provided to dependants in the form of a drawdown pension, a lump-sum payment or an annuity. In addition, in 2006, value protection annuities became available, which, in the event of death, provide a return of any unpaid capital as a lump-sum.

Thus, pensions offer a variety of different possible ways of passing wealth on the death of the member and sometimes the amount of money passed is significant. For instance, in the case of occupational pension schemes, lump-sum payments

¹² Before April 2015, the guaranteed period was for up to a maximum of 10 years, but under the new rules the period is no longer restricted.

are normally calculated as a multiple of the member's yearly earning at the time of death, or a multiple of four times the annual salary or greater. Most personal pensions will pay the full value of the pension fund so that the amount can be considerable.¹³ In some instances, both a lump-sum and a dependant's pension of up to two thirds of the member's prospective pension, plus return of the member's contributions with interest, is payable.¹⁴

2.2. Attractiveness of Pension Schemes for the Transfer of Wealth on Death

While personal pension schemes were introduced in 1988,¹⁵ occupational pension schemes have been available longer,¹⁶ though gaining in popularity especially in the course of the twentieth century. Together with homes, today pensions often represent a household's most significant financial asset.¹⁷ The most recent figures show that, in 2012, £2,405 billion was invested in private pension funds.¹⁸

The primary reason why someone joins a private pension scheme is to arrange for his or her retirement and, in particular, to provide for cases of old age or ill health. Although, at least in DB schemes, members are concerned about what their scheme will provide to their loved ones on their death, estate planning is not necessarily a key consideration for members. However, providing benefits to the same or next generation through a pension scheme offers certain advantages. Since pension death benefits generally pass outside probate, without entering the estate of the deceased, creditors cannot easily get a hold of them and the powers of the courts under the family provision legislation do not usually extend to them.¹⁹ Moreover, pension death benefits offer certain tax advantages that other 'will-substitutes' do not necessarily enjoy.²⁰ In this respect, recent changes to the tax

¹³ In determination *Childs-Hopkins* (K00663) the lump-sum amounted to £96,000, in *Wheeler* (PO-267) £150,053, and in *Tompkins* (J00510) £562,600.

¹⁴ For details, see Office for National Statistics, *Occupational Pension Scheme Survey Annual Report 2011*, chs 5 and 6.

¹⁵ Finance Act 1987. The immediate predecessors of personal pension schemes were Retirement Annuity Contracts.

¹⁶ P Thane, *Old Age in English History. Past Experiences, Present Issues* (Oxford, Oxford University Press, 2000) 250 at 381–82; CG Lewin, *Pensions and Insurance before 1800* (East Linton, Tuckwell, 2003).

¹⁷ In 2012–14, aggregate total wealth (including private pension wealth) of all private households in Great Britain was £11.1 trillion, and private pension wealth was the largest component, accounting for 40%. See *Total Wealth, Wealth in Great Britain, 2012–14*, ch 2. See also the English Law Commission's report on *Intestacy and Family Provision Claims on Death* (Law Com No 331, 2011) 145, para 7.99.

¹⁸ This amount represents an 8% increase from £2,230 billion in 2011: 'Funds held in Life and Pension Products in 2012', *Association of British Insurers Data Bulletin*, November 2013, 2.

¹⁹ Property in relation to nominations pursuant to an enactment may be included: *Goenka v Goenka* [2014] EWHC 2966 (Ch). This represents, however, an exception, as most private sector occupational pension schemes are not created by enactment. For further details see Braun (n 5 above) III.E, 67–69, and *Tolley's Pension Law*, Issue 85 (September 2014), D3-86-7.

²⁰ For details, see Braun (n 5 above) IV.C, 71–73.

regime applicable to death benefits of DC schemes have provided an even greater incentive for using such schemes as a means of benefitting someone on death.²¹

The primary rationale behind the reforms was to provide greater flexibility to members as to how they can access their pension savings once they reach the age of 55, ie as a lump-sum, pension, annuity, or drawdown pension. Up until recently, when a member of a defined contribution scheme retired, he or she could take 25 per cent of the defined contribution pot as a lump-sum tax-free; while the remainder, if taken as a lump-sum, was subject to onerous taxes. Depending on the scheme, the effect of pension legislation was that the member had to invest the remaining 75 per cent by purchasing an annuity, a drawdown pension, or a combination of the two.²² Since April 2015, members can draw down their entire pension once they reach the age of 55, and are no longer forced to invest their pensions in annuities or drawdown pensions.

Conversely, other changes introduced by the 2015 pension reform have been aimed at persuading members to pass their wealth onto the same or next generation. Prior to the reform, a deceased member's defined contribution pension could be paid out as a lump-sum tax-free if the member died before the age of 75 and before he or she had touched his or her pension pot. Otherwise, if the member was over the age of 75 when he or she died, or had already started to take benefits from his or her pension pot, it was taxed at 55 per cent. This 55 per cent tax charge was abolished with effect from 6 April 2015. Under the new legislation, whether or not tax is payable on a lump-sum depends only on the age of the member when he or she dies. If the member dies before the age of 75, his or her beneficiary can take the whole pot as a tax-free lump-sum, or use it to provide a regular pension through a flexi-access drawdown arrangement or annuity, both of which are tax-free. If the member dies after the age of 75, the beneficiary can take the whole pot as a lump-sum, but it will be taxed at 45 per cent (although the government is expected to review this). With effect from 6 April 2016, if the defined contribution pot is used to provide a pension (through a drawdown arrangement or by purchasing an annuity), it will be taxed at the beneficiary's income tax rate. If the beneficiary chooses to take regular smaller lump-sums, they too will be taxed as income.²³

In addition to these tax incentives, the new regime facilitates a transfer of certain death benefits to anyone chosen by the member. For instance, joint-life annuities can now be passed on to any chosen beneficiary, and not just to the spouse, the civil partner, or a dependant. And, whereas under the old rules the option to take

²¹ On 21 April 2015, HMRC updated its Inheritance Tax Manual (IHTM) due to changes that resulted from the Taxation of Pensions Act 2014 (in force from 6 April 2015). The guidance IHTM17052 (*Pensions: IHT charges: General power over death benefits*) confirms that death benefits will only be treated as part of the member's estate for IHT purposes if the scheme provider is bound to pay the benefits in a particular form in accordance with the member's directions.

²² Lifetime annuities were often best suited for those with a smaller pension fund. See *Tolley's Tax Guide 2012–13*, at 341, and Pensions Policy Institute, *Briefing Note No 61*, (December 2011).

²³ These changes do not apply to NEST (National Employment Savings Trust), a defined contribution workplace pension scheme set up by the Labour Government in 2008.

a pension from a drawdown scheme of a deceased member was only available for their dependants, now any beneficiary can take a pension from such a scheme, in addition to a lump-sum.

Whilst it is true that these reforms have made the transfer of wealth through defined contribution schemes more attractive, in England and Wales, besides there being an annual allowance for relief on pension contributions, there is also a lifetime cap allowance for payments made into a pension.²⁴ The cap for the tax year 2015–16 was £1.25 million, reduced from £1.5 million in 2013–14 and falling to £1 million from 6 April 2016. Although theoretically one can invest more in a pension scheme, tax is charged at 55 per cent on the amount exceeding the cap when the money is taken out. This imposes a considerable restriction on pensions as an effective ‘will-substitute’, especially for higher earners.

3. The Distribution of Pension Death Benefits: Potential Problems

The pension death benefits described above are not transferred by will, but are paid out by the trustees or scheme administrators in accordance with the rules of each scheme.²⁵ The benefit is distributed by a will or intestacy rules only where the payment is made to the deceased’s estate. While some death benefits (typically the pensions element) are payable to the spouse, children and dependants (as defined), lump-sum benefits tend to be payable to one or more persons in a beneficiary class. Generally, both occupational and personal pension schemes allow members to nominate a beneficiary or beneficiaries by filling in a particular nomination form. Such nominations typically serve two purposes: they add someone to the potential class, where they would otherwise not be included, and they indicate how the lump-sum should be distributed.

Pension nominations are similar to wills, in that they take effect on death and are usually revocable up until that moment. Exactly how they work and what they require depends, however, on each scheme. For instance, each scheme prescribes a different set of formality rules for the nomination and revocation of a beneficiary and varying definitions of the beneficiary class for the purposes of distributing the lump-sum death benefit. And while in some schemes the trustees must pay in accordance with the member’s nomination, in most schemes, the trustees will take the nomination into account, but are not obliged to pay in accordance with it

²⁴ In the US and Canada, there is no flat-amount lifetime cap as in England and Wales, but there are yearly limits on how much can be contributed. The limits depend on a person’s yearly income, and differ from one type of retirement account to another.

²⁵ Depending on whether or not the scheme is trust or contract-based, distribution takes place through trustees or scheme administrators. When reference to trustees is made, this chapter intends to refer to trustees and scheme administrators.

or, if specified, in accordance with the proportions that the deceased member had indicated. England and Wales thus lack the kind of uniform statutory framework that regulates pension nominations in other common law jurisdictions.²⁶ Instead, regulation is largely left to those who draft the schemes.

This raises a number of potential problems, which, from the perspective of the member of the scheme, render pension schemes a somewhat unreliable estate planning device. First, the lack of standardised rules for nominations creates uncertainty and leaves room for mistakes when nominations are made or revoked. Further, the exact legal nature of nominations remains undetermined. It is conceptually uncertain whether they should be treated as lifetime or testamentary dispositions, or even as dispositions at all. It is, therefore, unclear whether the provisions applicable to wills should be extended by analogy to nominations. For instance, while marriage usually revokes a will, it does not automatically revoke a pension nomination,²⁷ unless of course this is stipulated by the scheme. An additional problem is that the way in which nominations and wills interact is uncertain. For example, what happens if a member of a scheme tries to revoke a pension nomination in a later will?²⁸

Another significant problem from the perspective of the members of pension schemes is that their wishes may not be fulfilled. Even though the member is usually permitted to nominate a beneficiary, unlike in the case of wills, the member's choice may be limited by the rules of the scheme to certain classes of persons. Dependants' pensions can only go to those falling within the class of 'dependants', as defined by the Finance Act 2004,²⁹ and pension schemes can restrict the choice of beneficiaries of lump-sum benefits. What is more, as mentioned earlier, unlike in other common law jurisdictions, such as the United States and Canada, and to a certain extent also Australia,³⁰ in England and Wales, nominations of most schemes are not, in principle, binding upon the trustees, who can decide to distribute the benefit to someone other than the nominee.³¹ For this reason, pension nominations are often described as mere letters of wishes.

²⁶ Many Canadian provinces have legislation regulating beneficiary designations. For instance, in Alberta, the Wills and Succession Act, SA 2010, c W-12.2, includes specific provisions dealing with beneficiary designations. Interestingly, these provisions seem to have their roots in the English legislation on statutory nominations: see RE Scane, 'Non-Insurance Beneficiary Designations' (1993) 72 *Canadian Bar Review* 178 at 192. Australian statutory law also regulates nominations: see Section 6 below.

²⁷ In *Baird v Baird* [1990] 2 AC 548 (PC), the testator's marriage did not revoke the nomination.

²⁸ See Section 5.1.1.2 below.

²⁹ Finance Act 2004, s 167 and sch 28, para 16, as added by sch 10 of the Finance Act 2005, para 26, which extends the definition of 'dependant' to a person who was married to a member when the member first became entitled to a pension under the pension scheme.

³⁰ For Australia, see Section 6 below. For the US, see Gallanis (n 7 above), and for Canada, see A Campbell, 'Will-Substitutes in Canada', ch 2 in *Will-Substitutes* (n 2 above), as well as L Smith, 'Will-Substitutes and Creditors: Canada and the US', ch 12 in the same book.

³¹ An exception is, for example, represented by nominations within the NEST scheme mentioned in n 23 above.

Furthermore, under some schemes, for pensions paid out in the case of death after retirement, the amount of the survivor's benefit can be reduced or stopped altogether, depending on the age difference between the spouses or the length of their marriage. Also, since the legal right to equality following the Civil Partnership Act 2004 applies only to services rendered after 2005, some schemes may restrict payments to a surviving civil partner so as to reflect only the period of the deceased member's pensionable service since 5 December 2005.³²

Finally, and linked to the non-binding nature of nominations, the payment of death benefits can be slower than expected, as trustees can take up to two years to reach a decision.³³ Thus, to summarise, the transfer of wealth on death through pension schemes may not be problem-free and poses its own challenges.

4. The Elusive Nature of Pension Nominations

4.1. Introduction

As noted earlier, the legal nature of nominations under a pension scheme is arguably unclear, at least where the trustees have no discretion and must follow the direction of the member. According to Megarry J,³⁴ pension nominations are 'odd creatures', and therefore difficult to qualify.³⁵ Nonetheless, establishing the nature of pension scheme nominations is important in order to determine whether or not they fall within the scope of current succession rules, and in particular those applicable to wills. If pension scheme nominations are classified as testamentary dispositions, both mandatory rules (those concerning formalities) and default rules (those concerning construction, automatic revocation, forfeiture, and so on) could apply.

In England and Wales, questions as to the nature of pension nominations and whether they are testamentary, have, thus far, only been addressed in relation to the formality requirements established in section 9 of the Wills Act 1837, and only in two decisions, both of which are somewhat inconclusive as to the conceptual

³² *Innospec Ltd and others v Walker (Sex Discrimination: Sexual Orientation)* [2014] UKEAT 0232/13/1802. The Employment Appeal Tribunal found that the discrimination suffered by the member was not unlawful and, on appeal, the Court of Appeal confirmed the validity of the exception to equal treatment. See *O'Brien v Ministry of Justice & Walker v Innospec and others* [2015] EWCA Civ 1000.

³³ The two-year period has been removed by the Finance Act 2011 for deaths where the member is over 75.

³⁴ *In re Danish Bacon Co Ltd Staff Pension Fund* [1971] 1 WLR 248 (Ch) 257.

³⁵ Counsel in *ibid* 256 defined them as 'sui generis, with some of the characteristics of an appointment under a power, some of the characteristics of a will, and some of the characteristics of a donatio mortis causa. As Alice said, "curiouser and curiouser"'. Scane (n 26 above) 179 speaks of 'mysterious juridical creatures' and in *Re Cairnes (deceased)* [1983] 4 FLR 225 at 228, Anthony Lincoln J defined them as 'a hybrid concept'.

nature of pension nominations.³⁶ Section 9 requires that a valid will be made in writing and signed in the presence of two witnesses. Section 1 of the Wills Act 1837 provides that ‘the word “will”; shall extend to a testament, and to a codicil ... and to any other testamentary disposition’.³⁷ In theory, therefore, the formality requirements apply to ‘testamentary dispositions’. However, the legislature does not tell us what a ‘testamentary disposition’ is, nor does it explicitly extend the Wills Act 1837 to pension nominations, or exempt them from its scope.³⁸ In fact, the issue of what constitutes a testamentary disposition continues to remain controversial, and not just in this context.³⁹ For the purposes of this chapter, it suffices to note that the prevailing view since *Cock v Cooke* seems to be that any legal act that purports to make a transfer that takes effect only upon death (and which is therefore ambulatory) and that is revocable up until that point is a testamentary disposition, and therefore should comply with the formalities in section 9.⁴⁰

4.2. The Position of the Courts

The first case in which the applicability of section 9 was addressed in relation to a pension nomination was the High Court decision in *In re Danish Bacon Co Ltd Staff Pension Fund*.⁴¹ It is important to note that at the time of this case, it was not yet as common for trustees to have full discretionary powers over the distribution of death benefits, and nominations were generally binding on the trustees. In that case, the rules of a company’s staff pension scheme provided that the fund passed to the personal representatives unless the member appointed (in the approved form) a nominee. A member who had appointed his wife later wrote a letter to one of the trustees asking him to amend the original application form. The trustee complied with the instructions. Once the member had died in service, the question arose as to whether the original nomination was still valid or whether there was a later nomination in favour of the person mentioned in the letter. Megarry J

³⁶ The question as to the applicability of s 9 of the Wills Act 1837 has further arisen in relation to joint bank accounts: see *Young v Sealey* [1949] Ch 278 (Ch).

³⁷ As to why the phrase ‘any other testamentary disposition’ may have been included, see DD Oosterhoff, ‘Alice’s Wonderland: Authority of an attorney for property to amend a beneficiary designation’ (2002–03) 22 *Estates, Trusts & Pensions Journal* 16 at 23.

³⁸ In contrast, statutory nominations are expressly exempt from the scope of the Wills Act 1837: see *Parry and Kerridge* (n 4 above) 4.

³⁹ On the meaning of the terms ‘will’ and ‘testamentary disposition’, see G Elias, *Explaining Constructive Trusts* (Oxford, Clarendon Press, 1990) 87–95; J Ritchie, ‘What is a Will?’ (1963) 49 *Virginia Law Review* 759; and Oosterhoff (n 37 above). The issue has also arisen in relation to secret trusts: see P Critchley, ‘Instruments of Fraud, Testamentary Dispositions and the Doctrine of Secret Trusts’ (1999) 115 *Law Quarterly Review* 631, who reminds us that there may be more than one legal usage of the term ‘testamentary’.

⁴⁰ In *Cock v Cooke* (1866) LR 1 P & D 241 at 243, Sir JP Wilde stated that irrespective of the form ‘if the person executing [the instrument] intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary’. See also *Jarman on Wills*, 8th edn (London, Sweet & Maxwell, 1951) vol 1, 26.

⁴¹ *In re Danish Bacon* (n 34 above) 256.

held that in both the nomination and the letter, there was sufficient substantial compliance with the requirements of the scheme rules and that the nomination was, therefore, valid. He was further asked to address the question of whether the nomination represented a testamentary disposition requiring compliance with the formalities set out in the Wills Act 1837.

Megarry J concluded that the statute had no application. In the absence of relevant authority, he referred to case law dealing with statutory nominations, which although being testamentary,⁴² expressly fall outside the scope of the Wills Act 1837.⁴³ According to Megarry J, the reason why statutory nominations do not fall under section 9 of the Wills Act 1837 is that they take effect by force of the statute that regulates them. He was of the view that, although the pension nomination featured certain testamentary characteristics, these did not suffice to make it a testamentary document and thus did not trigger the application of section 9 of the Wills Act 1837. However, we were not told exactly what was missing save that the ambulatory nature and revocability of the nomination were considered to be insufficient.⁴⁴ In Megarry J's view, the pension nomination operated by force of the provisions of the trust deed and not as a testamentary disposition by the deceased.

Almost 20 years on, similar arguments were employed by the Privy Council in *Baird v Baird*, which dealt, however, with a different type of nomination.⁴⁵ Here a company established a pension scheme in which the funds were vested in trustees and the scheme was administered by a management committee. Under the rules of the scheme, the benefits were not assignable. On the death of a member of the scheme while employed by the company, payment would be made to such a person or persons as the member had nominated, or, in default, to the member's widow, widower or estate. Though binding, unlike in *In Re Danish Bacon Co*, the nomination, revocation and alteration required the management committee's consent. The member nominated a beneficiary and the nomination was approved by the company, but the nomination failed to comply with the provision relating to the execution of a will in section 42 of the Wills and Probate Ordinance (Law of Trinidad and Tobago) 1950.⁴⁶ The member subsequently married but died before retirement without having revoked or varied his nomination. Both his widow, as his personal representative, and the nominated beneficiary claimed the benefit payable under the scheme. At first instance, the High Court of Trinidad held that the nominated beneficiary was entitled to the benefit and the Court of Appeal of Trinidad upheld that decision. The case reached the Privy Council, which dismissed the appeal.

⁴² Hence, Farwell J in *In re Barnes* [1940] Ch 267 (Ch) felt that the doctrine of lapse applied to a nomination made under the Industrial and Provident Societies Acts 1893 to 1928.

⁴³ See text to n 38 above.

⁴⁴ For a similar critique, see WJ Chappenden, 'Non-Statutory Nominations' [1972] *Journal of Business Law* 20 at 24, who points out that had the nomination been attested, it would have been admitted to probate (as happened in *Re Baxter's Goods* [1903] P 12).

⁴⁵ *Baird v Baird* (n 27 above).

⁴⁶ Which prescribed the same requirements as s 9 of the Wills Act 1837.

Lord Oliver of Aylmerton, delivering the judgment for the Judicial Committee, declared that whether or not the provisions relating to wills applied to nominations made under modern pension schemes depended on the provisions of the individual scheme.⁴⁷ Like Megarry J, Lord Oliver was of the view that not every revocable instrument which creates interests taking effect on the death of the person executing the instrument, is necessarily a will, and like Megarry J, he did not clarify what renders a document a truly testamentary disposition. Instead, he drew an analogy between the power of a member of a pension scheme to make a nomination and a revocable power of appointment under a settlement *inter vivos*. He saw the analogy in the fact that the power to make a nomination 'disposes of no property of the appointor, for the proprietary interest of the estate of the appointor is one which arises only in default of appointment and in the event of there being no surviving widow'.⁴⁸ Thus, Lord Oliver saw the pension scheme just like any other lifetime declaration of trust or settlement containing provisions for the destination of the trust fund after the death of the principal beneficiary. For this reason, he rejected the analogy Megarry J saw with statutory nominations, on the basis that such nominations concerned the post-mortem disposition of funds which were the 'absolute property of the disponent and capable of being dealt with by him during his lifetime entirely, without reference to any nomination which he might have signed'.⁴⁹ In other words, the applicability of the formality requirements for wills was excluded because the member of the pension scheme could not freely dispose of the property during his lifetime,⁵⁰ as was the case in the Canadian Supreme Court decision in *Re MacInnes* (distinguished by the Privy Council).⁵¹

Finally, Lord Oliver added that, in any event, the nomination in *Baird v Baird* lacked the essential character of being freely revocable that is typical of testamentary dispositions, as the nomination required the consent of the management committee.⁵² Thus, the Privy Council's decision seems to have turned primarily on the types of powers that the member of the pension scheme had during his lifetime, while the fact that, in this instance, he could not freely revoke the nomination seems to have played only a secondary role.

What consequences thus ensue for other nominations? In *Baird v Baird* the Privy Council did not exclude the possibility that other pension nominations

⁴⁷ *Baird v Baird* (n 27 above) 561.

⁴⁸ *ibid* 557. This reasoning evokes the words of Megarry J in *In re Danish Bacon* (n 34 above) 255, where, while dealing with the question of the applicability of s 53(1)(c) of the Law of Property Act 1925, the judge stated that in the case of pension nominations, the deceased deals with something which *ex hypothesi* could never be his.

⁴⁹ *Baird v Baird* (n 27 above) 557.

⁵⁰ This was criticised by G Kodilinye, 'Pension scheme nominations and the Wills Act' (1990) 54 *Conv* 458 at 461, who favours focusing on the intention. The intention argument was employed also by Hughes J in *Re MacInnes* [1935] 1 DLR 401, who relied on *Cock v Cooke* (n 40 above) and *Robertson v Smith and Lawrence* (1870) 2 P & D 43, which dealt, however, with a codicil.

⁵¹ *Re MacInnes* (n 50 above) was not cited or referred to in *In re Danish Bacon* (n 34 above).

⁵² *Baird v Baird* (n 27 above) 558.

could fail, due to a lack of compliance with section 9 of the Wills Act 1837, where the member has a full power of disposition during his lifetime over the amount standing to his or her credit under the scheme. However, a member will hardly ever have a full power, given that section 91 of the Pensions Act 1995 imposes several restrictions on assignability (and surrender) of rights under occupational pension schemes, and that, in the case of personal pension schemes, similar restrictions can be imposed by the scheme rules.⁵³ In other words, by preventing assignability during lifetime, most pension nominations will automatically fall under the reasoning in *Baird v Baird*, and the application of section 9 of the Wills Act 1837 will be excluded.⁵⁴ Even where the interest is assignable, it is probably unlikely that a court would stray from the decision in *Baird v Baird*.

Moreover, since nowadays most pension schemes confer discretionary powers on the trustees, and nominations are treated as non-binding letters of wishes, in those cases it is not the member but the trustee who ultimately determines who receives the death benefit. In fact, this analysis undermines the analogy between pension nominations and wills and ‘solves’ the problem of the formality requirements.

4.3. Between Testamentary and *Inter Vivos* Dispositions

In the two decisions discussed above, the validity of the pension nomination was upheld despite them not complying with the Wills Act 1837. Although this article does not aim to solve the complex issue of what constitutes a testamentary disposition, the question remains as to whether the arguments employed by the courts to exclude the application of section 9 of the Wills Act 1837 are convincing.⁵⁵ We know that statutory nominations fall outside the Wills Act 1837 because specific legislation says so, but can a pension scheme attribute powers to distribute wealth on death without having to comply with the Wills Act 1837?⁵⁶

It is certainly true that in the case of pension nominations the benefits usually move directly from the fund to the nominee, without entering the estate of the deceased. This may be important when considering the position of creditors and

⁵³ In any case, an assignment under a registered pension scheme would be treated as an unauthorised payment: Finance Act 2004, s 172.

⁵⁴ To be on the safe side, David Pollard suggests that ‘any binding direction by the member compl[y] with the attestation requirements of the Wills Act’: D Pollard, *The Law of Pension Trusts* (Oxford, Oxford University Press, 2013) 137, fn 16.

⁵⁵ On the difficulty of reconciling the reasoning in *Re MacInnes* (n 50 above) with that in *In re Danish Bacon* (n 34 above), see R Atherton, ‘Nominations and testamentary dispositions’ (1991) 65 *Australian Law Journal* 49 at 52–53.

⁵⁶ For criticism, see Chappenden (n 44 above) 24 as well as WF Nunan, ‘The Application of the Wills Acts to Nomination of Beneficiaries Under Superannuation or Pension Schemes and Insurance Policies’ (1966) 40 *Australian Law Journal* 13. Both consider nominations under pension schemes to be testamentary dispositions, although the latter article was written prior to the decisions in *In re Danish Bacon* (n 34 above) and *Baird v Baird* (n 27 above).

the applicability of the family provision legislation, as well as inheritance tax. But it is not necessarily clear why this would be relevant to the consideration of whether to impose formality requirements for wills on nominations. Further, from the perspective of succession, rather than trust law, it is not self-evident why the nature of a member's powers over the pension fund during his or her lifetime, and thus whether or not the member can assign his or her interest in the scheme, should matter in determining the applicability of section 9 of the Wills Act 1837.⁵⁷

By definition, the member of a pension scheme has no claim to a death benefit that only crystallises once he or she is dead. That said, where the nomination is binding, the member has a power to dispose of it and, in the case of lump-sum payments, the benefit can be of significant value. The exercise of this power takes effect on death, and until then, can always be revoked. If we applied the reasoning of Sir JP Wild in *Cock v Cooke*,⁵⁸ a nomination of this kind would be testamentary in nature and section 9 would come into play, especially where, as in *In re Danish Bacon*, the nomination was also freely revocable. In other words, in *Cock v Cooke* the focus was placed on the time at which the disposition should take effect, and not on the nature of the right disposed of.

Given that binding nominations are functionally similar to wills, we should probably ask ourselves what the purposes of the formality requirements for wills are and whether the same goals need to be pursued in the context of pension schemes. This is not to say that the formalities applicable to wills should necessarily extend to pension nominations. Pension schemes usually require nominations to be in writing and signed by the member, although only few require attestation (which is essential for wills).⁵⁹ One could argue that these formalities suffice.⁶⁰ In fact, there may well be policy reasons for exempting pension nominations from the formalities required for wills, as is the case, for instance, with statutory nominations, even though the amount that can be disposed of through a pension nomination is usually higher than the amount disposable through a statutory nomination.

Such an approach would be in line with legislation in some Canadian provinces, which tend to impose a lower threshold of formalities for similar beneficiary

⁵⁷ The argument advanced by Scane (n 26 above), whereby a beneficiary designation is testamentary only where the beneficiary receives the identical beneficial interest, as the plan holder held immediately before death, seems equally unconvincing.

⁵⁸ *Cock v Cooke* (n 40 above).

⁵⁹ Although nowadays some schemes allow for electronic nominations to be made, the Electronic Communications Act 2000 makes provision for the use of electronic signatures.

⁶⁰ It is interesting to note that complaints to the Pensions Ombudsman in which undue influence or duress was alleged, or where doubts as to the capacity of the member expressing the nomination have been voiced, seem relatively rare. For exceptions, see *Goodland* (D12153), where the member had been seriously ill. In *Massie* (L00463/M00159/60) the complaint was rejected despite the fact that the form was in the partner's handwriting. In *McGovern* (J00031), the complainant (father) questioned the soundness of the death-bed nomination on grounds of incapacity, but the Ombudsman found there was insufficient evidence to prove it.

designations.⁶¹ The drafters of the American Uniform Probate Code also chose to regard pension plans, individual retirement plans, and employee benefit plans (and other ‘will-substitutes’) as non-testamentary for the purposes of formalities.⁶² They took the view that they were unable to identify policy reasons for applying the formalities applicable to wills to ‘will-substitutes’,⁶³ and, therefore, concluded that the Statute of Wills only requires probate transfers to comply with its formalities and does not require non-probate ones to do so. However, it is important to note that, for purposes other than formalities, the prevailing position in the United States is to treat pension nominations as the functional equivalent of wills.⁶⁴

In England and Wales, the question as to whether pension nominations are to be seen as testamentary for the purpose of default rules has not yet been addressed, and it remains unclear whether rules, such as those concerning capacity, lapse, forfeiture, automatic revocation, construction, and rectification, should apply, at least to binding pension nominations, as well as other ‘will-substitutes’.⁶⁵ Where trustees are provided with discretion in distributing the death benefit, some problems, such as those that arise in case of lapse or re-marriage, can easily be solved, as the nomination is not binding on the trustees and they can re-distribute the benefit. Still, the disadvantage of this approach is that each case is treated differently and that discretion creates the risk of uncertainty. And, in any event, the problem persists where nominations are binding on trustees such that the question of the conceptual nature of pension nominations remains an important one.

5. Non-Binding Pension Nominations: Advantages and Problems

In England and Wales, the reason why most private pension schemes provide trustees with discretion to choose the beneficiary of the lump-sum death benefit is to avoid any risk that the payment will be treated as part of the member’s estate for

⁶¹ See Scane (n 26 above) 193 and Smith (n 30 above). According to Oosterhoff (n 37 above) 32, this legislation was a reaction to the Canadian Supreme Court decision in *Re MacInnes* (n 50 above), and was intended to prevent future beneficiary designations from failing for non-compliance with the formality requirements for testamentary dispositions. In Australia too, formality requirements are usually lower, except where the nomination is meant to be binding: see Section 6 below.

⁶² Section 6-101 of the Uniform Probate Code (as amended in 2000).

⁶³ In the comment to s 6-101 UPC, at 726, it is reported that: ‘the evils envisioned if the statute of wills were not rigidly enforced simply do not materialize’. For details see Gallanis (n 7 above).

⁶⁴ As a consequence, certain default rules are now extended to ‘will-substitutes’. See Gallanis (n 7 above).

⁶⁵ For details, see Braun (n 5 above) III.C, 65. The common law rules on forfeiture applicable in case of unlawful killing would seem to apply to pensions, though there is little authority: see *Glover v Staffordshire Police Authority* [2006] EWCA 2414 (Admin), discussed by Ian Williams in Ch 3 of this volume. See further I Greenstreet, ‘Murder most horrid and other crimes and misdemeanours—what crimes do you have to commit to lose your pension?’ (2002) 93 *British Pension Lawyer* 15 at 16 ff.

the purposes of inheritance tax.⁶⁶ That said, providing trustees with discretion also has other advantages. For instance, it allows trustees to address instances where a pension scheme member has omitted to update his or her nomination,⁶⁷ which can lead to cases of ‘accidental succession’.⁶⁸ Nominations are often made when a person is first employed, and is not, therefore, focused on succession, and it is possible that with time the member forgets that he or she made a nomination and who the nominee was. Further, discretionary powers avoid problems created by invalid nominations and permit trustees to deal with instances in which the nominee predeceases the member of the scheme or has unlawfully killed the scheme member. Granting the trustees discretionary powers also avoids the question (much debated in Canada) of whether an attorney under a lasting power of attorney, or a court-appointed deputy, can revoke a nomination.⁶⁹ Nevertheless, providing discretion to trustees to distribute death benefits also creates a number of problems, which we will now consider.

5.1. Exercising the Discretion

5.1.1. *Range of Interests and Criteria to Consider*

When deciding how to distribute death benefits, trustees must act in accordance with the provisions of the pension scheme, which establish who falls within the category of potential beneficiaries. While some schemes allow trustees to choose only among a certain category of potential beneficiaries, many allow for a wider range of potential beneficiaries, including personal representatives, spouses and civil partners, ancestors/relatives, nominee(s) indicated by the member, those benefitting under the member’s will, anyone financially dependent on the member, and, sometimes, also any person entitled to an interest in the member’s estate.

In order to gain a full picture of those falling within the frame of potential beneficiaries, it is necessary for trustees to carry out investigations, although it is not always clear how extensive these must be. For instance, should the enquiry of the width of the class depend on the amount of money involved,⁷⁰ and should it

⁶⁶ Pollard (n 54 above) 137; R Kerridge, ‘Testamentary Formalities in England and Wales’ in KGC Reid, MJ de Waal and R Zimmermann (eds), *Comparative Succession Law, vol 1: Testamentary Formalities* (Oxford, Oxford University Press, 2011) 305 at 307; Miller (n 4 above) 335; R Kandler, ‘Occupational pension schemes. Lump-sum death benefits: Tax issues’, Linklaters, September 2013. Recent changes to the HMRC Manual indicate that any nomination that is binding triggers IHT, irrespective of who is the beneficiary: see n 21 above.

⁶⁷ For a good example, see *Wagenbichler* (83186/1).

⁶⁸ For the US, see E Sterk and MB Leslie, ‘Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession’ (2014) 89 *New York University Law Review* 2.

⁶⁹ Oosterhoff (n 37 above). See also the Final Report No 104 on ‘Beneficiary Designation by Substitute Decision Makers’ produced by the Alberta Law Reform Institute (ALRI).

⁷⁰ In *Wagenbichler* (83186/1), the Pensions Ombudsman found that investigations were proportionate to the sum involved and its value to the potential recipients.

perhaps be less extensive where the nomination is recent?⁷¹ Here general rules concerning the exercise of the trustees' discretion apply.⁷² Certainly, trustees should not make a decision until they are apprised of all the facts, nor should they have a pre-conceived idea of whom they are going to benefit. In other words, they should not limit themselves to following the nomination,⁷³ but must actively investigate and make reasonable enquiries.⁷⁴

Once it is established who counts as a potential beneficiary the next question is how to distribute the death benefit. Again there are no clear criteria, and general trust principles come into play. Trustees of pension schemes seem to be investigating whether there is anyone financially dependent on the deceased, but the determination of what constitutes 'financially dependent' can be difficult. For instance, it is unclear whether the fact that two persons were living together is in itself a sufficient criterion.⁷⁵ Also uncertain is the extent to which other sources of income of the potential beneficiary, such as a dependant's pension, should be taken into account.⁷⁶ According to the Pensions Ombudsman, trustees should refrain from guessing what the member's 'presumed wishes' might have been.⁷⁷ Also, they should keep a paper trail, as failing to give reasons for rejecting a claim may be seen as maladministration.⁷⁸

Whatever decision they take, trustees are required to balance the interests of all the potential beneficiaries, including those of potential future beneficiaries.⁷⁹ This does not mean that they have to produce equal benefits of equal value to all beneficiaries, or that their decision must be fair. As was stated by the Court of Appeal in *Edge v Pensions Ombudsman*, provided that the trustee's decision is made properly, the trustee can prefer some beneficiaries over others.⁸⁰ A decision is made properly if the trustees have acted in accordance with the relevant scheme provisions, taken into account relevant factors, and ignored irrelevant considerations.⁸¹ Further, they must not come to a perverse decision, ie a decision to which no reasonable

⁷¹ See text to n 87 below.

⁷² GW Thomas, *Thomas on Powers*, 2nd edn (Oxford, Oxford University Press, 2012) 482; *Beau D'Aulnay* (H00533), in which the trustees relied on *Re Gestetner* [1953] 1 Ch 672 (Ch).

⁷³ *Kemp* (84427/1); *Young* (PO-1758), *Earle* (76674/4). See also text to n 128 below.

⁷⁴ *Thomas on Powers* (n 72 above) 480; *Young* (PO-1758).

⁷⁵ One could be a dependant without ever living with the deceased: see *Stephens v Michelin Pension Trust* [2006] EWHC 1640 (Ch) [19].

⁷⁶ *Hendry* (85218/1).

⁷⁷ *Earle* (76674/4). See also *Blakeburn* (K00892).

⁷⁸ *Curran* (74746/1); *Moreland* (PO-2087); *Childs-Hopkins* (K00663); *Kennedy* (F00948/49/50); and *Pensions Ombudsman Annual Report 2001–2002*, 7 (D Laverick). See further D Hayton, 'Pension trusts and traditional trusts: drastically different species of trusts' (2005) 69 *Conveyancer and Property Lawyer* 229 at 235, and R Walker, 'Some Trusts Principles in the Pensions Context' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Oxford, Clarendon Press, 1996) 123 at 129–30.

⁷⁹ The content of the 'best interest' rule and the extent to which it emerges from the decision in *Cowan v Scargill* [1985] Ch 270 (Ch) 287–88 is, however, controversial: see GW Thomas, 'The duty of trustees to act in the "best interests" of their beneficiaries' (2008) 2 *Journal of Equity* 177. On the view that the rule should be avoided, see Pollard (n 54 above) ch 9.

⁸⁰ *Edge v Pensions Ombudsman* [2000] Ch 602 (CA).

⁸¹ *ibid* 627 (Chadwick LJ).

body of trustees could arrive or which is discriminatory.⁸² But it is not always clear what exactly is meant by relevant or irrelevant,⁸³ and what amounts to a perverse decision.⁸⁴

5.1.1.1. The Role of the Nomination

Where trustees have absolute discretion in the distribution of the death benefit, the nomination simply represents one of many factors that they must consider.⁸⁵ In practice, however, they will almost invariably follow a nomination,⁸⁶ especially if it is very recent.⁸⁷ This is good news for the members and nominees, though they can never be certain. Also, it potentially exposes trustees to complaints.⁸⁸ Even where the nomination is not recent, trustees cannot simply ignore it.⁸⁹

Trustees are less likely to abide by a nomination where the member's circumstances have changed after the nomination was signed. For instance, when someone has nominated their parents at a time when they were not yet married or before becoming a parent themselves, trustees might find it reasonable to think that the person had forgotten to update their wishes. The same is true when the member has nominated the spouse but later separates or divorces.⁹⁰ However, whether the lack of a new nomination should necessarily be read as an accidental oversight is unclear. After all, '[t]he member may have intended to leave the nomination form as originally completed and this should be borne in mind'.⁹¹

⁸² *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) 228–31. On the use of public law concepts in the pensions context, see J Evans, 'Challenging trustee decisions: differing approaches to the supervision of the exercise of trustee's powers' (2012) 26 *Trust Law International* 55. See further *Pitt v Holt* [2013] UKSC 26; [2013] 2 AC 108 at [11] and *Braganza v BP Shipping Ltd* [2015] UKSC 17; [2015] 1 WLR 1661.

⁸³ Irrelevant matters were considered in *Crisp* (D11512).

⁸⁴ In making these decisions trustees are afforded a wide margin of discretion: *Pitt v Holt* (n 82 above) [73]. See *Elson* (F00859) for an example of a case where the Pensions Ombudsman concluded that the decision was perverse because the trustees should have ignored the nomination. Conversely, in *Horwood* (J00013) the decision was considered perverse because the trustees failed to take into account an unsigned invalid will that the member had made in contemplation of his suicide.

⁸⁵ Exactly what weight trustees should give to the member's wishes is not much discussed in legal literature: D Pollard, 'Pension Trusts: The Position of Spouses and Dependants' (2002) 16 *Trust Law International* 74. In *Winterstein* (76288/1), the trustees thought that the starting point should be the nomination unless there was a good reason not to follow it, and that was considered to be wrong by the Pensions Ombudsman.

⁸⁶ Law Commission, *Second Report on Family Property: Family Provision on Death* (Law Com No 61, 1974) para 213; *Tolley's Pension Law* (n 19 above).

⁸⁷ *Dudley* (M00489) and *Montgomery-Di Vito* (K00020).

⁸⁸ See Section 5.2 below.

⁸⁹ *Wagenbichler* (83186/1); *Williams* (J00373).

⁹⁰ In *Askew* (PO-4823), the nomination was made at a time when the couple was not yet separated. In *Childs-Hopkins* (K00663), the member nominated her parents before becoming engaged. See also *McNee* (PO-2780/PO-4183), where the parents were nominated but the member had since had a son, and *Gilliland* (PO-4043) where the member had a son after the nomination was made.

⁹¹ Pensions Ombudsman, *How to avoid the Pension Ombudsman*, available online via: pipin.webplus.net/howtoavoidpo.pdf (last accessed 20 November 2015) 33. This problem arose in *McNee* (PO-2780/PO-4183), in which the Ombudsman held that the trustees wrongly assumed that the member's wishes had changed after the child was born. In *Redford-Gysemann* (J00400), the trustees assumed that as the

The answer to the question is particularly difficult where the scheme has sent out annual reminders to update the form.⁹²

Occasionally, trustees do not follow the nomination, despite the fact that the circumstances have not changed,⁹³ in which case the decision may well be found to be perverse. Thus, irrespective of whether or not the circumstances have changed, in certain instances, the decision of the trustees may go against the express wishes of the member and, where that is the case, a complaint is likely to be lodged by the nominee.⁹⁴

5.1.1.2. The Role of the Will

Another issue concerns the role of a will in the decision-making process of trustees. Wills cannot, in principle, dispose of pension death benefits, and they are not binding on the trustees.⁹⁵ However, a problem arises where there is a will in which the testator indicates who should take the pension death benefits, and that indication conflicts with an earlier or later pension nomination.⁹⁶ This raises questions as to whether or not the wish expressed in the will should be taken into account and whether or not it should prevail over the wish expressed in the nomination, especially when the nomination predates the will.

Although such cases are likely to be rare, similar problems can emerge when the will does not mention the pension death benefits. For instance, one issue that has arisen is whether the content of the will should guide the trustees' decision about the distribution of the pension death benefits. In other words, should the nomination be distributed in accordance with an existing will, so that those benefitting under the will receive the pension death benefits as well, or should trustees assume that the member intended for the person benefitting under the pension scheme not to take also under the will? A glance at Pensions Ombudsman determinations reveals that the position of trustees (and the Ombudsmen) on this point varies. While in some cases trustees take into account the fact that one person is benefitting from a will or another source⁹⁷ (such as a dependant's pension or property

nomination was made when the policy was taken out, that is to say many years prior to the death of the member, she had overlooked the need to update it when she got divorced.

⁹² *Dudley* (M00489).

⁹³ *Worseley* (J00280).

⁹⁴ See *Elson* (F00859) and *Montgomery-Di Vito* (K00020). In the latter case, the member had made two nominations, both times naming his second wife, and indicated reasons why he did not want other people to benefit. Notwithstanding that, the lump-sum was paid to the father, the former wife, and to a settlement for the son.

⁹⁵ *Dudley* (M00489).

⁹⁶ In *Batten* (L00054), the trustees followed a will which preceded a nomination on the basis that the will was legally binding and the nomination was not, even though it was not clear whether the will dealt with the pension and/or the lump-sum death benefit. In *Moreland* (PO-2087), the will was made after the nomination and the trustee followed the will. See also *Morton* (77828/2), in which there was a later will.

⁹⁷ *Askew* (PO-4823). For a case in which a court award under the family provision legislation had influenced the decision of the trustee, see *Bailey* (N00495).

jointly owned) as a reason for not awarding them a lump-sum death benefit, in other cases they completely disregard other sources of funding.⁹⁸ This can make estate planning very difficult.

5.1.2. *Asking Too Much of Trustees?*

We have seen that the exercise of discretionary powers of trustees over death benefits may lead to unwelcome results from the perspective of scheme members and their nominees. However, even for trustees the current situation is often unsatisfactory, as the exercise of discretion in this particular context is not an easy endeavour,⁹⁹ especially where the scheme is complex and the number of members, and thus the number of potential beneficiaries of the death benefits, is high. Exercising this discretion may involve posing delicate questions about the nature and solidity of the deceased member's personal relationships, as well as the financial situation of potential beneficiaries.¹⁰⁰ Sometimes it may even require scrutinising medical records. This is because trustees need to build up a picture of the member's life, as well as the lives of those eligible to receive the death benefit. Such enquiries are potentially intrusive and as such trustees might be reluctant to enquire.¹⁰¹

Complainants and potential beneficiaries usually have to supply details of how they hold properties, whether they have been made redundant, whether they are receiving a pension themselves, how they have contributed to the joint household, and what the member may have paid for on their behalf, and, at times, this information may conflict.¹⁰² Colleagues and friends too often present trustees with information that risks amounting to mere speculation and opinion,¹⁰³ and trustees must be careful not to rely on third-party hearsay or partial information.¹⁰⁴ It can be difficult to determine how to use this information and how to balance the need to provide information about their decision, at the request of the complainant, against the need to preserve the privacy of the persons who may be entitled to the benefit.¹⁰⁵

Thus, one question that the current state of the law raises is to what extent courts should require trustees to act as quasi-detectives to uncover facts relevant to the exercise of their power.¹⁰⁶ The Pensions Ombudsman has expressed the view that

⁹⁸ *Williams* (J00373).

⁹⁹ This is acknowledged in the *Pensions Ombudsman Annual Report 2005–2006* at 17 (D Laverick) and in the *Pensions Ombudsman Annual Report 2007–2008* at 17 (T King).

¹⁰⁰ *Pensions Ombudsman Annual Report 2007–2008* at 17 (T King). See *Horwood* (J00013), where the member's relatives were quite derogatory about the widow, alleging that she had had an affair.

¹⁰¹ *Earle* (76674/4). The Ombudsman held that it would not have been too invasive to enquire into the potential beneficiaries' financial circumstances.

¹⁰² *Kennedy* (F00948/49/50); *Crossan* (82784/1).

¹⁰³ *Ashe* (N00730).

¹⁰⁴ *Gooch* (PO-627).

¹⁰⁵ This is acknowledged in *R* (P00883).

¹⁰⁶ *Evans* (n 82 above) 65.

there is a limit to what can be expected from trustees,¹⁰⁷ and this was confirmed by Lindsay J in *Stephens v Michelin Pension Trust*.¹⁰⁸ Trustees cannot know at all times who is within and who is outside the class of potential beneficiaries. Where exactly the limit lies is difficult to tell, and trustees, keen not to expose themselves to Ombudsman criticism, might over-compensate with costly, time-consuming, and intrusive enquiries before making a decision.

That said, it would also seem that in some cases trustees simply reach their conclusions without following the appropriate procedure,¹⁰⁹ or without acquiring the full picture.¹¹⁰ In other words, sometimes trustees do not investigate whether or not a person falls within the category of beneficiaries,¹¹¹ or they base their decision entirely on oral evidence.¹¹² The good news for trustees is that it is actually quite difficult to challenge their decision successfully (though reputational damages are not excluded),¹¹³ but this leaves scheme members and potential beneficiaries in a vulnerable position. Moreover, it causes cost to the scheme in terms of legal advice and can postpone the ultimate decision for months, even years, whilst the Ombudsman process concludes.

5.2. Role and Powers of the Pensions Ombudsman

The Pensions Ombudsman may investigate and determine any complaints alleging injustice (in the form of financial loss or disappointment) as a result of maladministration by the trustees.¹¹⁴ Complaints can be brought by actual and potential members as well as actual or potential beneficiaries of a scheme, including a widow/widower, surviving civil partner, or surviving dependant of a member who has died.¹¹⁵ In principle, such complaints must be brought within

¹⁰⁷ *Childs-Hopkins* (K00663).

¹⁰⁸ *Stephens v Michelin Pension Trust* (n 75 above) [10].

¹⁰⁹ *Kennedy* (F00948/49/50).

¹¹⁰ *Miller* (G00545 & 6). Sometimes the trustees may not make proper enquiries because they know the member and his or her family personally: see *Smith* (D10683).

¹¹¹ *Ellaway* (80200/1).

¹¹² *Curran* (74746/1).

¹¹³ Generally speaking, only where there is compelling evidence that the decision was flawed will the Ombudsman intervene: see text to n 135 below.

¹¹⁴ The post of Pensions Ombudsman was created by the Social Security Act 1990, but is currently governed by ss 145 ff of the Pension Schemes Act 1993, as amended by the Pension Acts 1995 and 2004. Although s 146 of the Pension Schemes Act 1993 had provided the Pensions Ombudsman with the power to investigate cases in which trustees exercise discretion over the distribution of death benefits, until Dr Julian Farrand took office in 1994, the Pensions Ombudsman did not investigate such complaints: *Edge v Pensions Ombudsman* (n 80 above). Nowadays, the Pensions Ombudsman's competence extends to personal pensions as well. See the *Pensions Ombudsman Annual Report 2002–2003* (D Laverick). The Financial Ombudsman is also competent for some complaints, but anything concerning the administration and management of plans usually falls within the competence of the Pensions Ombudsman.

¹¹⁵ Pension Schemes Act 1993 s 146(7).

three years, although the Ombudsman has discretion to accept out-of-time complaints.¹¹⁶

In the absence of a definition of 'maladministration' in the Pension Schemes Act 1993, the term has been interpreted as having an open-ended meaning and as covering bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude and arbitrariness.¹¹⁷ However, as mentioned earlier, the Pensions Ombudsman may only intervene where it can be shown that the power was not exercised for the purpose for which it was given, that proper consideration was not given to relevant matters, or that irrelevant matters were taken into account. More specifically, in the words of Julian Farrand, the Pensions Ombudsman can interfere with the exercise of a discretionary power

if: (1) the wrong question has been asked; (2) the trustee has misdirected itself in law (ie made an incorrect construction of the rules); or (3) the decision was perverse (ie a decision which no reasonable trustee would have taken).¹¹⁸

Where that is the case, the Pensions Ombudsman can remit the decision to the trustees.

Generally speaking, death benefits are not an uncommon source of complaint to the Pensions Ombudsman.¹¹⁹ One reason for that might be the increased complexity of family arrangements. For example, for people who remarry for a second or third time, or who cohabit with a new partner, the cases show that problems can arise between the new partner and the children of the first marriage,¹²⁰ or the new partner and the separated or divorced spouse, or the estranged partner.¹²¹ In fact, in several Ombudsman determinations, the member was cohabiting with a new partner, but had not obtained a divorce from their previous partner.¹²² The determinations further reveal that disputes can develop between the estranged partner and the parents¹²³ or siblings of the deceased.¹²⁴

Complaints about maladministration in the exercise of discretionary powers are sometimes lodged when the nomination is not followed.¹²⁵ More frequently,

¹¹⁶ Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, reg 5(3). For an example see *Legal & General Assurance Society Ltd v Pensions Ombudsman* [2000] 2 All ER 577 (Ch).

¹¹⁷ *R v Local Commissioner for Administration for the North and East Area of England, Ex parte Bradford Metropolitan City Council* [1979] QB 287 (CA) 311 (Lord Denning MR); *Miller v Stapleton* [1996] 2 Pens LR 67; [1996] 2 All ER 449 (QB).

¹¹⁸ *Montgomery-Di Vito* (K00020).

¹¹⁹ *Pensions Ombudsman Annual Report 2001–2002* (D Laverick) at 38 and *Annual Report 2010–2011* (T King) at 17. In 2014–15, 7.3% of all closed investigations concerned death benefits.

¹²⁰ *Hughes* (L00713); *Holmes & Coulson* (P00664 & 5); *McElhaney* (F00125); *Evans* (Q00894 and Q00895); *Northmore* (N00436); *Massie* (L00463/M00159/60).

¹²¹ *Hendry* (85218/1); *Froggett* (N01351), and *Parsons* (P00184).

¹²² *Dewhurst* (H00527) and *Miller* (G00545 & 6).

¹²³ *Osborne* (Q00664). The *Pensions Ombudsman Annual Report 2003–2004* (D Laverick) also mentions determination no L00331/2.

¹²⁴ *Dudley* (M00489).

¹²⁵ See n 93 above. When the member filled in a new nomination form, there may be a conflict between the nominees of the earlier and the later nominations. See *Massie* (L00463/M00159/60) and *Friday* (M01138).

however, the Pensions Ombudsman is asked to investigate whether discretion was exercised in a careful manner.¹²⁶ Trustees are sometimes accused of: failing to undertake a reasonable enquiry;¹²⁷ overlooking more deserving beneficiaries;¹²⁸ failing to ask the right questions;¹²⁹ or basing their decision on insufficient information and evidence.¹³⁰ Occasionally, complaints also concern delays in the payment of the death benefit.¹³¹

Even though the percentage of cases was higher in the years 2010–14 than in previous years, overall comparatively few of the cases dealing with death benefits concern the exercise of discretion in relation to lump-sum payments.¹³² One reason for that may be that some of the problems are solved through internal dispute resolution procedures (IDRP).¹³³ In fact, the Pensions Ombudsman will generally only investigate complaints that have already been heard through the scheme's own IDRP, or from complainants who have sought the assistance of the Pensions Advisory Service. On the other hand, the relatively limited number of complaints may also indicate that the majority of pensions trustees are doing a good job. The overall low figures may further be a result of the fact that, although Pensions Ombudsmen sometimes criticise the behaviour of trustees, they do not necessarily remit the decision for reconsideration.¹³⁴

While the Pensions Ombudsman can direct trustees to review their decision, the Court of Appeal's decision in *Edge v Pensions Ombudsman* made it clear that the Pensions Ombudsman should not second guess the trustees' decisions and that, unless manifestly unreasonable, the trustees' decisions should not be disturbed.¹³⁵ Even if the Ombudsman remits the decision back to the trustees, the latter may not change their decision. In this context it is interesting to note that while in the early cases trustees were hardly ever required to reconsider their decisions, from 2006 the number of cases remitted back to trustees has increased. This might be due mostly to the fact that some Pensions Ombudsmen have been more

¹²⁶ A complaint that too much weight was placed on the nominations was raised in *Kennedy* (F00948/949/950), and *Elson* (F00859).

¹²⁷ *Hercberg* (82431/2); *Winterstein* (76288/1) and *Young* (PO-1758).

¹²⁸ See text to n 73 above; *Young* (PO-1758); *Hendry* (85218/1); *Lang* (F00092); *Miller* (G00545 & 6).

¹²⁹ *Kemp* (84427/1) and *Harrison* (PO-2759).

¹³⁰ *Ellaway* (80200/1); *Earle* (76674/4); *Gooch* (PO-627), *Crossan* (82784/1).

¹³¹ *Phipps* (80253/2); *Lang* (F00092); *Barnicoat* (PO-5763), and *Parizad* (82720/2). Where payment takes place after two years, it may be classed as an unauthorised payment and, therefore, subject to a tax charge.

¹³² Usually between two and nine determined cases a year, out of between 900 and 1,000 cases completed every year by the Pensions Ombudsman.

¹³³ Trustees or managers of an occupational scheme are required by law to put in place procedures for internal dispute resolution: ss 50, 50A and 50B of the Pensions Act 1995, as inserted by s 273 of the Pensions Act 2004 (as amended).

¹³⁴ For an example in which the Ombudsman did not change the decision, despite the fact that it seemed perverse, see *Montgomery-Di Vito* (K00020). Although the Pensions Ombudsman felt that the decision had made a 'mockery of the expression of wishes form' and that the trustees had not made extensive enquiries into the financial situations of the potential beneficiaries, he did not think there was evidence of maladministration.

¹³⁵ *Edge v Pensions Ombudsman* (n 80 above).

interventionist than others.¹³⁶ In addition to remitting the decision to the trustees, the Ombudsman can also award compensation for financial loss and distress, but the amount awarded is usually between £500 and £1,000, except in exceptional circumstances.¹³⁷ Thus, all in all, the Pensions Ombudsman's powers and the scope of his intervention are relatively limited.

If the Ombudsman adopts a decision in the complainant's favour, and the trustees do not carry out his instructions, the complainant can apply to court to enforce the decision. The decision of the Ombudsman can be appealed to the High Court, but only on a point of law.¹³⁸ An appeal may only be worthwhile if the benefit in question is of significant economic value. In any event, it would seem that a court could not make a decision in place of the trustees' decision, but that it could simply remit the decision back to the trustees.¹³⁹

6. The Australian Experience: Some Lessons?

At this point it is interesting to take a brief look at developments in Australia, where superannuation schemes are compulsory.¹⁴⁰ Unsurprisingly, therefore, pension schemes represent the primary 'will-substitute' in Australia.¹⁴¹

As is the case in England and Wales, in Australia usually superannuation benefits cannot be transferred through a will. However, since 1993 Australian superannuation schemes can include binding death benefit nominations.¹⁴² Although not all superannuation funds offer the possibility of making a binding nomination, where the fund provides this option, the member may give notice requiring the trustee to provide any death benefits (in the form of a lump-sum or income stream) to a nominated person, which can be either the legal personal representative or a dependant of the member. For this purpose, 'dependant' is defined as including 'the spouse of the person, any child of the person and any person with whom the person has an interdependency relationship'.¹⁴³ An interdependency relationship

¹³⁶ Tony King, who was Pensions Ombudsman between September 2007 and May 2015, was more likely to direct trustees to reconsider their decision. In about 74% of the cases he heard, the complaint was upheld.

¹³⁷ *Swansea City Council v Johnson* [1999] Ch 189 (Ch) [205] (Hart J). See also the recent *Pensions Ombudsman's Factsheet on Redress for Non-financial Injustice* of 3 July 2015, available online via: www.pensions-ombudsman.org.uk/2015/07/redress-for-non-financial-injustice/ (last accessed 20 November 2015).

¹³⁸ Pension Schemes Act 1993, s 151(4), as amended by Pensions Act 1995 s 157.

¹³⁹ Hayton (n 78 above) 243.

¹⁴⁰ For self-employed persons, there are self-managed super funds (SMSF) with slightly different rules.

¹⁴¹ N Peart and P Vines, 'Will-Substitutes in New Zealand and Australia', ch 5 in *Will-Substitutes* (n 2 above). Recent figures speak of \$1.94 trillion at the end of the December 2014 quarter: Superannuation Statistics, February 2015.

¹⁴² Section 59(1A) of the Superannuation Industry (Supervision) Act 1993 (Cth) (effective from 31 May 1999) (hereafter 'SIS Act').

¹⁴³ SIS Act 1993 s 10.

is usually described as a close personal relationship between two persons who live together, where one or both provides for the financial and domestic support and care of the other. This means that, at least as far as the choice of beneficiary of the lump-sum payment is concerned, the choice is more restricted in Australia than in England and Wales. The reason for that seems to be that the purpose of superannuation schemes in Australia is primarily to provide income on retirement to a member and his or her dependants.¹⁴⁴ As a consequence, it may be difficult, for instance, to benefit a partner who does not live with the member and who is, therefore, not considered to be financially dependent.¹⁴⁵

In order for a nomination to be binding, members must comply with certain formalities, which are similar to those required for wills. The nomination (including a revocation notice) must be in writing, signed and dated by the member in the presence of two witnesses (who are over the age of 18 and who are not nominated to receive a benefit in the notice). It must further contain a declaration signed and dated by the witnesses stating that the notice was signed by the member in their presence.¹⁴⁶ If a member completes a binding death benefit nomination in the correct form, the trustees must distribute the death benefits to the nominated beneficiary and they have no discretion to vary or override it. If no binding nomination is made, or the nomination is not made in the required form, the trustees can distribute the pension as they wish, so long as it is fair and reasonable, which is different from the criteria applied by trustees of English pension schemes.¹⁴⁷ Binding nominations only last for three years, or for a shorter period if the scheme specifies so, with the time period running from the day the nomination was first signed or first confirmed by the member.¹⁴⁸ After three years, the nomination is no longer binding and the trustees can distribute the superannuation to anyone they wish, as is the case with any non-binding nominations.

Among the advantages of the Australian approach, is the fact that where the member intends the nomination to be binding, the distribution is made according to his or her wishes and is potentially made more quickly. This way estate planning is easier and trustees do not have to make difficult decisions, which they may be ill-equipped to make. The fact that the member has to renew the nomination every three years also ensures that it is not outdated.¹⁴⁹ Also, because

¹⁴⁴ See Determination D13-14/076 [2013] SCTA 153.

¹⁴⁵ See Determination D13-14/144, where the trustees overturned a binding nomination on the grounds that the nominee had not lived with the deceased member.

¹⁴⁶ Superannuation Industry (Supervision) Regulations 1994 (Cth) reg 6.17A (hereafter SIS Regulations). In light of the decision of the Supreme Court of Queensland in *Munro v Munro* [2015] QSC 61, it would seem that the requirements for binding nominations do not apply to self-managed super funds (SMSFs).

¹⁴⁷ See the text to n 80 above.

¹⁴⁸ SIS Regulations reg 6.17A(7). The Australian Taxation Office has recently announced that the lapse of binding nominations after three years would not apply to self-managed super funds (SMSF), so that those binding nominations simply continue unless they are formally revoked by the superannuant.

¹⁴⁹ Pension schemes usually send out a reminder about updating the nomination and usually all the member has to do is to confirm it.

legislation establishes one set of formalities applicable to all binding nominations, there is less scope for uncertainty or mistakes. Moreover, if a member thinks their circumstances may change, a non-binding nomination remains still possible.

7. Conclusion

This chapter has shown how pensions can operate as a mechanism for benefiting others on the death of the member of a pension scheme. At the same time, it has also identified problems with the current state of the law that may render pension schemes less suitable as a reliable instrument for estate planning. We saw that pension nominations raise wider questions, such as what makes an instrument ‘testamentary’, and whether pension trusts should be treated like any other trust. However, the purpose of this chapter has been to focus on more specific issues dealing with the distribution of pension death benefits.

Most of the problems addressed stem from the fact that England and Wales lack a statutory framework to regulate pension nominations. Each scheme has its own rules with different sets of requirements and procedures, and this creates uncertainty as to the prerequisites for the validity of nominations and their revocation, the legal nature of such nominations, as well as their interaction with the law of wills, and with dispositions in a will.¹⁵⁰ In the absence of a statutory framework, such questions are tackled on a case-by-case basis. The problem with this approach is that the outcome can vary greatly in each case and is, therefore, unpredictable. It is submitted that if legislation were passed, along the lines of legislation in other common law jurisdictions, a number of these issues could be resolved.¹⁵¹ Legislation could establish standardised formality requirements for nominations, clarify their nature, and decide upon the applicability of default rules regulating succession, as well as the interaction with dispositions in wills.

In addition, legislation could be an opportunity to deal with the second set of problems discussed in this chapter, which is the widespread practice of paying death benefits at the discretion of the trustees. While discretionary powers of trustees have certain advantages, such as tax privileges and increased flexibility,¹⁵² it is questionable whether these outweigh the member’s lack of control over the distribution of the benefits and the lack of certainty created by the discretion, which affects, in particular, the distribution of lump-sum death benefits.

¹⁵⁰ A *donatio mortis causa* cannot be revoked by a subsequent will: *Jones v Selby* (1710) Pre Ch 300, 24 ER 143. The same is true of a statutory nomination: *Parry and Kerridge* (n 4 above) 5.

¹⁵¹ Interestingly, in the *Pensions Ombudsman Annual Report 2005–2006* at 4–5, David Laverick suggested developing a common approach through a limited number of model schemes, dealing also with other aspects of pension schemes.

¹⁵² See Section 5 above.

Although it is true that trustees tend to follow nominations, where nominations are not binding, members of a pension scheme cannot rely on the fact that the nominee will receive the death benefits, which ultimately affects their planning.¹⁵³ And even though a complaint can be presented to the Pensions Ombudsman, his powers are of a relatively limited nature. Might it not, therefore, be preferable to release trustees from having to ‘negotiate their way through a potential minefield of competing interests’¹⁵⁴ and to offer scheme members the option of making a binding nomination?¹⁵⁵ After all, on balance the current situation is unsatisfactory not just for members and their families, but also for trustees, with the potential that concerns about the correct distribution of benefits may lead to higher insurance costs for pension schemes. Although one could argue that other discretionary trusts, too, pose similar problems, pension schemes differ in that often the member does not choose the scheme and is not able to choose the trustees.

Making nominations binding of course has tax implications. But surely, if the government wishes to avoid the possibility of death benefit payments being subject to inheritance tax, this could be achieved in other ways.¹⁵⁶ After all in the Canadian provinces, where beneficiary designations are binding, they nevertheless enjoy tax-benefits, and the same is true of Australia.¹⁵⁷ Although the lack of flexibility in the case of binding nominations may give rise to other problems, many could be solved through specific provisions addressing, for instance, cases of lapse and forfeiture, and the consequences of marriage. And by requiring regular and express confirmation of the nomination, the risk of ‘accidental succession’ can be mitigated. Furthermore, distribution in accordance with the wishes of the member would be more in line with the principle of testamentary freedom, which underpins succession law.¹⁵⁸ This argument finds further support in the fact that the member has himself paid into the scheme, and has in a sense already provided consideration for the death benefit payments,¹⁵⁹ which represent some form of deferred remuneration.

¹⁵³ Jane Irvine, the Deputy Ombudsman Pensions Ombudsman, in *Oliver* (77373/1) stated: ‘A pension scheme member should not rely on the prospective award of a discretionary death benefit when making a will or other financial arrangements’.

¹⁵⁴ This was also suggested in the *Pensions Ombudsman Annual Report 2006–2007*, 4–5 (D Laverick).

¹⁵⁵ This is already the case with nominations made in the context of the NEST scheme: see n 23 above.

¹⁵⁶ *Pensions Ombudsman Annual Report 2005–2006* at 5 (D Laverick). The government has launched a consultation on whether there is a case for reforming tax relief on pensions: CM 9102 entitled ‘Strengthening the incentive to save: a consultation on pensions tax relief’ (8 July 2015).

¹⁵⁷ Campbell (n 30 above). For Australia, see Peart and Vines (n 141 above). However, in Australia, there is no estate tax imposed.

¹⁵⁸ And potentially the rule against non-delegation of testamentary powers to the extent to which it still exists after *Re Beatty (deceased)* [1990] 1 WLR 1503 (Ch). For a discussion of the principle, see Lionel Smith’s contribution in Ch 9 of this volume.

¹⁵⁹ As noted by Sir Nicolas Browne-Wilkinson VC in *Imperial Group Pension Trust v Imperial Tobacco* [1991] 1 WLR 589 (Ch) 597. See also *Finch v Telstra Super Pty Ltd* [2010] HCA 36.