

Jack Connah,  
Law Commission,  
Steel House,  
11 Tothill Street,  
London  
SW1H 9LJ

28 February 2010

Dear Jack,

**Intestacy and Family Provision Claims on Death**

On behalf of ILAG, I have pleasure in submitting the following comments on the Law Commission consultation No. 191.

ILAG is a trade body representing members from the Life Assurance and Wealth Management industries. ILAG members share and develop their practical experiences and expertise, applying this practitioner knowledge to the development of their businesses, both individually and collectively, for the benefit of members and their customers.

Our specific comments are in relation to Pension Sharing as discussed within Part 7 of the consultation and our responses to questions 8.43 and 8.44 are noted below

If you would wish to discuss our response in more detail we would be happy to do so.

Yours sincerely

Mark Searle  
Administration Team

**Q8.43: Would consultees favour reform of the Inheritance (Provision for Family and Dependants) Act 1975 to the effect that benefits from a pension fund, whether lump sums or periodical payments, could be the subject of family provision orders made by the court?**

We would not favour the proposed reform of the Act as we believe that such a move would introduce extra complexity into the administration of pensions with, in the vast majority of cases, no real benefit. To achieve the objective of Government and industry to encourage people to build up more pension provision we believe that more certainty is needed so they can plan for the future. We are concerned that if these proposals are adopted they will only add uncertainty and undermine efforts to achieve greater levels of saving for retirement. It should also be noted that while there are some large pension funds the vast majority are small.

Our experience is that where pension administrators (trustees) have discretion in the payment of benefits on the death of a member they take their responsibilities very seriously. Administrators do seek details of any spouse or civil partner of the deceased and try and discover any financial dependents, and although they would take account of the 'letter of wishes' sent to them by the member they would not be bound by these. For example, they would not follow the letter of wish if their investigations uncovered somebody else who they believe had a greater need and entitlement to the pension benefit.

If a spouse or dependant believes that the decision taken by the scheme administrator to pay some or all of the benefits is perverse, they may challenge it. They may also elect to take the matter to the Pensions Ombudsman to seek redress.

We wonder if the Commission feels that as the payee is decided upon by independent trustee boards, that their evidence suggests that some beneficiaries are not being considered and, or not receiving benefits on death.

There are some instances where the pension administrator does not have any discretion in the payment of any pension benefit. Currently Protected Rights, (due to be abolished in April 2012 and possibly not relevant by the time the Commission's proposals are implemented) are a substitute for State benefits and governed by strict regulations concerning the payment of pension benefits on the death of the scheme member (The Personal and Occupational Pension Schemes (Protected Rights Regulations 1996 [SI 1996/1537]).

It is permissible for a scheme member to put in place a trust to receive any lump sum or death benefits from the pension scheme. Fundamentally in terms of the member exercising their will, potentially at the expense of a dependent, this is no different from a policy owner putting a life policy into a trust. It is also the case that during their lifetime a person can put assets into trust.

When it comes to periodical payments after the death of a member, the Finance Act 2004 sets strict rules. Broadly, the payments must be made to a surviving spouse/civil partner, financially dependent in the member, a child under 23 or dependent due to disability. If a person is not deemed an eligible dependent under the legislation, any payment to them

would be deemed an unauthorised member's payment. As unauthorised member's payment such amounts would be subject to tax charges.

In view of the above, we feel that the efforts taken by pension administrators within current pension legislation already go a long way towards achieving the outcome the Law Commission desires. In the majority of cases, looking at the same facts we suspect that the courts will come to much the same decision as the scheme administrators would have done under the current regime.

We also feel that the proposals could result in delays in death benefits being paid out which would lead to the creation of unauthorised payments and IHT, should going to Court delay payments beyond two years.

***Q8.44: Do consultees foresee that legal or practical difficulties would result if benefits from a pension fund could be the subject of family provision orders and, if so, what might they be?***

If pension payments could be subject to a family provision order, the first practical issue would be around the timing of the payment. Currently pension administrators endeavour to complete their investigations in a timely fashion and pay out pension benefits. For example, if the main breadwinner has died, any surviving dependants may have a pressing need for the funds. It is also the case that as the pension funds are outside the deceased's estate, there is no need to wait for probate.

The majority of cases are straightforward and the scheme administrator will be able to pay a lump sum or commence a dependant's pension in a timely fashion. This could result in the pension scheme having paid out the benefits prior to any family provision order being put in place. Alternatively, the payment of benefits would need to be delayed to check that nobody is going to request such an order.

It is also a requirement that in order to be an authorised member, payment of any lump sum death benefits must be made within two years of the scheme administrator being notified of the death. We are concerned that in complex cases the need to wait for the court order will cause the eventual payment to be an unauthorised member's payment under Finance Act 2004 with tax penalties for the recipient and the scheme. If this was the case under the current legislation up to 70% of a lump sum payment would become payable to HM Revenue and Customs as tax charges.

As mentioned in our answer to the previous question, the Finance Act 2004 currently lays out strict rules about who is eligible to receive dependants' benefits pay out as periodic payments.

If the proposal was adopted, the pension legislation would need to be reviewed and updated to guard against unintended consequences. It would not be equitable if the recipients of the pension death benefits or pension scheme are subject to tax charges as a result of the process of a case going to court under this proposal.

There is also a need to explain to existing scheme members what would happen on their death. For example, that whilst it was previously possible to pay out any lump sum death benefit to an existing trust this may no longer be allowed. This would be a large and expensive exercise to administer and would not sit favourably with most pension scheme members.

For new members there would be a need to update literature to explain when there would no longer be any discretion as scheme administrators. This will again have a cost for the industry.

*Ends.*