Following the Office of Tax Simplification’s call for evidence into the proposed simplification of inheritance tax (IHT) professional bodies have been submitting their responses.

Many responses have called for the much disliked residence nil rate band to be replaced by an increase to the general nil rate band which, according to the Law Society, would now stand at £450,000 if it had risen in the usual way since it was frozen in 2009.

The Law Society’s response also highlights various difficulties arising around lifetime gifts, including some technical rules, the effects of which may be misunderstood by the general public. These complexities can perhaps be best illustrated by an example.

Anthony’s estate planning

Anthony is divorced with two children. He wishes to reduce the IHT liability on his £3 million estate and makes the following arrangements:

• In 2014 he makes an outright gift of £200,000 to his son, George, to enable him to buy a property.
• In 2016 he sets up a discretionary trust for his grandchildren with an initial gift of £125,000.
• In July 2019, he makes a gift of £200,000 to his daughter, Louise.

Anthony died in March 2020 leaving his estate equally between his two children. His brother and sister are executors of the estate.

Anthony believed that the gifts to his children would taper in value after he had survived them by three years. He has made no provision in his Will for the payment of IHT on any failed lifetime gifts and did not take advice before beginning his estate planning. He believed that he had treated his children equally.

The IHT position

Anthony has died within seven years of all of the gifts. Consequently, the two gifts to his children are failed potentially exempt transfers (PETs); the gift to the grandchildren’s trust was a chargeable transfer when made but this fell within his IHT nil rate band at the time so no immediate lifetime charge to IHT was due.

On Anthony’s death there is no IHT due on the gift to George as its value falls within Anthony’s IHT nil rate band. This is also the case with the gift to the trust. However, taper relief does not operate (as Anthony had believed) to reduce the value of these gifts. It in fact reduces the IHT payable on the gift and, as there was no IHT due on these first two gifts, they are brought into account at their full value when calculating the IHT on Anthony’s estate.
Lifetime gift rules cause confusion - continued

In addition, the grandchildren’s trust will be subject to IHT charges on every tenth anniversary of its creation and when capital leaves the trust. In calculating those charges the failed PET to George will be brought into account meaning that, as the trust fund grows in value, it is likely to become liable to pay IHT on those occasions.

By comparison if the trust had been set up before the potentially exempt transfers then there would be no failed PETs to take into account. Consequently the trust would be unlikely to pay IHT at any point (unless the value of its assets did very well and exceeded the IHT nil rate band in force when the charges are calculated).

Louise is alarmed to discover that, as Anthony’s nil rate band was fully used by the gifts to her brother and the trust, the gift to her is fully chargeable to IHT with a tax bill payable of £80,000, which she is liable to pay. As Louise has no children she feels that her brother has unduly benefitted from their father’s estate.

Gift and loan plans: what to do on death?

Gift and loan plans, or loan plans, are regularly used in estate inheritance tax (IHT) planning, particularly if an individual wishes to reduce the IHT liability on their estate but also wishes to retain the ability to receive any “income” from the amount gifted through repayments of the loan. In this article we look at what happens on the death of the person who has set up the gift and loan plan (the donor).

Gift and loan plans/loan plans: what are they?

Most readers will be familiar with this type of estate planning. In a gift and loan plan the individual wishing to save IHT gives a small amount (typically £3000, equivalent to the IHT annual exemption) to a discretionary trust. They then loan a much larger sum to the trustees of the discretionary trust who invest it in an investment bond, often held offshore. Repayments of the loan are subsequently made to the donor utilising the 5% tax free withdrawal facility. The expected capital growth on the amount invested takes place outside of the donor’s estate and the donor is free to spend the loan repayments as they wish. In a loan plan no initial gift is made.

The IHT position on the donor’s death

On the donor’s death the value of the investment bond in the trust is outside of their estate but any unspent loan repayments, and the balance of the undischarged loan, will be potentially subject to IHT in their estate. Some donors include provisions in their Will as to what is to happen to the unrepaid loan, and this is advisable as the loan is not then available to pay estate expenses; but what happens if the Will is silent?

If no specific provision is included in the donor’s Will, the benefit of the loan will fall into the residue of the donor’s estate. The burden of the loan will rest with the discretionary trust, the beneficiaries of which may differ from the residuary beneficiaries. If the executors of the estate or the residuary beneficiaries ask for the whole balance of the loan to be repaid, the discretionary trust trustees will have to surrender part of the investment bond to do this with a possible charge on income tax under the chargeable events legislation.

What other options exist on death?

In the absence of any specific provision in the will, if it is wished to avoid a forced surrender of part of the investment bond, the best course of action will inevitably depend on the individual circumstances of the particular estate and trust, but broadly there are three potential courses of action:

1. Leave the loan in place; the residuary beneficiaries would have to agree to this course of action but the loan could remain in place with the trustees making repayments to the beneficiaries in the same way as before the donor’s death. The loan would be appropriated to the residuary beneficiaries of the estate. The existence of the loan would continue to be a liability of the trust which could reduce any potential IHT periodic charges on the trust (see below). The loan would be an asset of the residuary beneficiaries’ estates, depreciating as repayments are made, provided these are spent.

We recommend that the Wills of clients with loan plans are reviewed to ensure that there is adequate provision.

2. The residuary beneficiaries could, once the loan has been appropriated to them from the estate, waive the benefit of the loan in favour of the discretionary trust: this would be a chargeable transfer for IHT purposes by the beneficiaries and so would need careful consideration.

3. A deed of variation could be drawn up within two years of the deceased’s death incorporating a gift into the donor’s Will, leaving the benefit of the loan to the discretionary trust trustees for the benefit of the trust. The gift would use some of the deceased’s IHT nil rate band but would mean that the loan would be outside of the residuary beneficiaries’ estates.

If the deceased had made substantial gifts in the seven years before their death then there may be insufficient of their nil rate band to use against the gift. As this would potentially give rise to an IHT charge on an estate (which might otherwise be free from IHT because of the spouse exemption) care would need to be taken in these circumstances.

The trustees and the beneficiaries will need to consider the comparative tax position of the above options and of all those involved in order to make the best decision. It should also be noted that if the assets in the trust exceed 80% of the IHT nil rate band then an IHT return will be required every ten years on the anniversary of the trust’s creation. If the value of the trust assets at that point exceeds the IHT nil rate band there will be an IHT charge at a maximum rate of 6%.

We are increasingly seeing cases where loan plans have not been considered during deceased client’s will planning nor during the administration of the estate. This is generally where the solicitors dealing with the wills or estates are unfamiliar with loan plans and the consequences of them.

The preferred course is for the Wills to make provision for the loan plans. This simplifies the administration of the estate and the taxation consequences for the loan plan and means that there is no need to disturb the underlying loan plan investments.

We recommend that the Wills of clients with loan plans are reviewed to ensure that there is adequate provision. If there is insufficient provision a codicil is a cost effective remedy if a full will review is not otherwise appropriate.
The importance of domicile

In English law domicile is a vitally important concept which can have important ramifications affecting the succession of assets, tax liabilities and whether an individual is entitled to pursue certain proceedings in the English courts.

Everyone is born with a domicile of origin which, if your father is alive and your parents are married at the time of your birth, will be determined by your father’s domicile. This domicile of origin can be displaced by a domicile of choice, although a domicile of origin has been said to be “more tenacious” than other types of domicile. A recent case in the Court of Appeal demonstrated how vital domicile can be in determining other rights and obligations, and reiterated the conditions that have to be established before being able to successfully claim the replacement of a domicile of origin with a domicile of choice.

A mobile marriage

Una Kelly was born to an Irish father in Ireland, where she lived until she was aged 23 when she moved to England to study for a Masters degree at the University of Manchester. After 18 months, in March 1997, Ms Kelly left England to take up an internship at the European Commission before becoming a permanent employee at the Commission. Ms Kelly subsequently worked abroad, apart from 11 months in 2001/02 when she returned to London on a temporary contract, successfully applying after four months in the UK for a job in Albania. She married John Pyres in Italy in 2005 and her only periods in London after 2002 were in 2006 to give birth to their first child and in 2009 to attend marriage counselling. The marriage broke down in 2015 and Ms Kelly claimed that she had acquired a domicile of choice in England, displacing her Irish domicile of origin, which would entitle her to bring divorce and financial remedy proceedings in the English courts.

The judge at first instance decided that Ms Kelly had “maintained strong practical, financial and fiscal links with the UK” and that London had been her “centre of gravity”. As such it was held that Ms Kelly had established a domicile of choice in England and thus was entitled to bring divorce and financial remedy proceedings in the UK. Mr Pyres appealed this decision.

The Appeal

The Court of Appeal stated that it is more difficult to prove that someone has abandoned their domicile of origin than to prove that they have abandoned a domicile of choice, and that the burden of proof was on Ms Kelly to show that she had lost her Irish domicile of origin. A domicile of choice can be acquired by a combination of residence and an individual’s intention to make the new country their permanent or indefinite residence. The court pointed out that the period of residence does not have to be long, what is important is the individual’s intention. Lady Justice King said “Residence without intention or intention without residence will not do to establish a domicile of choice”. In the court’s view the fact of residence and the intention to remain at least indefinitely must co-exist. As such, the court found that during her two periods of residence in England Ms Kelly did not have the requisite intention to remain. The court emphasised that an intention to retire to England in the future was not sufficient to establish a domicile of choice.

Ms Kelly did not marry in England, did not spend her holidays or maternity leave here and gave birth to her second child abroad. She had shown no “personal nexus” to this country. The court said, however, that another individual who worked extensively or exclusively abroad could establish a domicile of choice in a country “they regard as their home” but in Ms Kelly’s case this had not been demonstrated so she retained her Irish domicile.

In summary

- Domicile is a key legal concept; it affects many other rights and obligations and can determine a person’s tax position.
- A domicile of origin is harder to lose than a domicile of choice
- To establish a domicile of choice an individual must be resident in the country chosen (even for a short period), and, during that period of residence, they must prove that they had a clear intention to remain in the country, permanently or indefinitely.
- Working outside of the chosen country will not necessarily affect the establishment of a domicile of choice provided residence and intention at the same time can be shown, and the individual can prove that they regard the chosen country as their home.
Pension entitlements, co-habitants and death benefits

Two interesting cases were recently decided by the Pensions Ombudsman.

The first illustrates how the entitlements of a surviving co-habitant and a spouse can lawfully differ under a pension scheme; and the second shows that whether a death takes place when the member is in service or as a retired member can be crucial in determining the amount of a surviving spouse’s benefits.

The Teachers’ Pension Scheme and Mr R

Mr R was the partner of Dr K who was a member of the Teachers’ Pension Scheme (the Scheme). They had lived together for many years but had never married. The Scheme had provided for widowers’ pensions since April 1988 and for nominated partners’ pensions from January 2007. Dr K had nominated Mr R as her partner but the pension he was entitled to under the Scheme rules following Dr K’s death was calculated by reference to her service from 2007, unlike a widowers’ pension which would have been based on her full 38 years’ service.

Mr R complained in 2012 that he should be entitled to a pension based on Dr K’s full service; the complaint was not upheld. Following the Supreme Court decision in Brewster in 2017, Mr R made a new complaint arguing that Brewster established that pension schemes could not lawfully discriminate between married and unmarried couples so consequently he should receive a widower’s pension. Mr R also argued that a provision in the pension rules that required Dr K to pay increased contributions if she wished a partner to be eligible for a widower’s pension was also discriminatory.

The Ombudsman decided that neither the Human Rights Act 1988 nor the Brewster decision supported Mr R’s contention that discrimination had occurred. The Ombudsman in upholding Mr R’s complaint decided that Mrs Y had conveyed the change in her husband’s medical condition to the Council, and that it knew enough to make a decision about waiving the remaining notice period and bringing the pension into payment earlier, so entitling Mrs Y to a higher level of benefits.

Estate of Mr Y and Belfast City Council

In another recent case, Mrs Y in her capacity as administrator of her late husband’s estate complained to the Ombudsman about the handling of her late husband’s retirement which had left her with a substantially smaller lump sum and ongoing widow’s pension.

Mr Y had retired on the grounds of ill health with a 12 week notice period ending on 17 August. If Mr Y had died as a retired member, his widow’s entitlement would have been greater than if he had died in service. On 24 July Mr Y was given a medical diagnosis that his condition was terminal. Mrs Y contacted the Council to enquire about early payment of the lump sum due under the pension scheme. This was refused.

Mr Y died on 14 August, three days before his retirement, meaning that the lower death in service widow’s benefits were payable. Mrs Y argued that when she phoned the Council they should have advised her that the retirement date could be brought forward as had happened in other similar cases. The Council claimed that they were not made aware of how ill Mr Y was during the call but there was no call recording or contemporaneous notes to support this assertion.

The Ombudsman in upholding Mrs Y’s complaint decided that Mrs Y had conveyed the change in her husband’s medical condition to the Council, and that it knew enough to make a decision about waiving the remaining notice period and bringing the pension into payment earlier, so entitling Mrs Y to a higher level of benefits.

It should be remembered that the Ombudsman’s decisions are guidance and not binding precedents on the Pensions Ombudsman or its successor. However, both these decisions highlight the need for clients to check their pension entitlements and those of their partner carefully, consider the pension rules in the event of a terminal illness and ensure that they comply with the often complex rules.
Inheritance issues for the LGBT community

Statistics from the Office of National Statistics show that in 2017 there were 190,000 same sex families in the UK, of which over half were co-habiting couples rather than spouses or civil partners.

In some ways the law is still evolving to encompass the different forms of family that now exist and consequently same sex families and transgender individuals should be aware of their legal position under Wills and how they stand in relation to inheritance tax.

Same sex families who are co-habiting are faced with the same inheritance issues that affect opposite sex co-habiting families. A major consideration is that co-habiting partners do not automatically inherit assets held in their partner’s sole name and it is therefore very important that a suitable Will is made to ensure the surviving partner is not disinherited and is forced to apply to the court for financial provision.

Inheritance tax

As far as inheritance tax is concerned, there are no inheritance tax concessions for co-habiting couples and so the first £325,000 (the nil rate band) of an estate will be free from tax, but anything above that will be taxed at 40%. Unlike spouses and civil partners, co-habiting partners cannot transfer their unused nil rate band between them. This means that consideration should perhaps be given to using discretionary trusts to ensure that a surviving co-habitant can still benefit from their partner’s estate but the assets do not form part of their estate and so are potentially taxed twice.

For example:

Claire lives with Kate and they have a son Harry. Claire has assets of £600,000; if she leaves those assets to Kate this will incur an inheritance tax bill of £110,000. On Kate’s death nine years later inheritance tax will be payable again on the same assets. Claire could consider instead leaving her assets to a discretionary trust under which both Kate and Harry could benefit. This will not reduce the tax payable on Claire’s death but the assets in the trust will not be taxed on Kate’s death so avoiding a double payment of tax. There is a potential charge to inheritance tax on every ten year anniversary of the trust’s creation and when capital leaves the trust, but this is at a current maximum rate of 6%.

Same sex couples who are married or in a civil partnership enjoy the same inheritance rights as opposite sex spouses, including the right to inherit a certain proportion of their partner’s estate if they die without making a Will, and the ability to leave assets to their spouse or civil partner free from any inheritance tax liability.

Children, guardians and same sex couples

Many people appoint guardians in their Will to look after children aged under eighteen at the time of their death. In order to have the legal right to appoint a guardian, a person must have “parental responsibility” for the child. A child’s mother (ie the individual who carried the child) will always have parental responsibility. As far as the partner who is not the legal mother is concerned, whether or not he or she has parental responsibility will depend on the marital status of the couple, and on how the child was conceived; in particular whether the child was conceived as a result of treatment in a licensed UK fertility clinic.

If one of the couple does not have parental responsibility then he or she cannot appoint a guardian for the child. If the couple wish the partner without parental responsibility to care for the child following the death of the parent with parental responsibility then he or she can appoint the partner as guardian in their Will. This will confer parental responsibility on the guardian when the Will comes into effect if the child is under eighteen at that time.

Domicile

A person’s domicile is vital for determining tax liabilities, succession and other rights. As a general rule a person is born with a domicile of origin which, if the child is legitimate, will depend on their father’s domicile of origin. This rule causes potential difficulty when the child is legitimate but has no father, such as the child of two female parents or a child born via a surrogate with two male parents.

Transgender individuals

Since 2004 individuals have been able to apply for a gender recognition certificate which recognises their change of gender for legal purposes. Occasionally a Will might leave a gift to an individual identifying the recipient by their gender (for example, a legacy of £5000 to each of my nephews). If the Will was made before 4 April 2005 the Will is not affected by an individual acquiring a different gender, so a nephew who has acquired the female gender can still benefit from the £5000 legacy. If the Will was made after 4 April 2005 the acquisition of the new gender will affect the disposition of the estate but the court has the power on an application being made to it to alter the disposition of the estate as it sees fit, enabling the court to rectify a failed gift.
**Trustees: death, incapacity and investments**

It is common for investments and other financial products to be written in trust, particularly life insurance and investment bonds.

The trust will usually be set up at the time the investment is made and further thought might not be given to it until an event occurs such as the death of a life insured.

What happens though if one of the trustees wishes to retire from the trust, dies or becomes incapable, before that event occurs?

**If the trustee wishes to retire**

If the trustee no longer wants to act then they can retire provided that there will be two remaining trustees or a trust corporation in place and if the remaining trustees agree. The retirement should be evidenced by a deed partly because this will then vest most of the trust assets in the continuing trustees. According to the Society of Trust and Estate Practitioners some assets such as insurance based investments do not vest automatically in the continuing trustees even if the retirement is by deed, so in those cases a separate deed of assignment of those assets might be required.

If there will be fewer than two trustees remaining then a new trustee will need to be appointed, unless the remaining trustee is a trust corporation. This can be included in the same deed as the retirement. The trust deed should be checked to see if anyone is given the power to appoint new trustees, in which case that person (the appointor) should be a party to the deed to appoint the new trustees. If there is no appointor the Trustee Act provides that the continuing trustees can appoint the new trustee.

**If a trustee dies**

This is a similar situation to a trustee retiring in the sense that if fewer than two trustees remain either the appointor (if there is one) or the continuing trustee should appoint a replacement trustee by deed.

In some cases no action might be taken on the death of a trustee then, when another trustee death occurs, it is discovered that there are no longer any living trustees. In those circumstances, the executors of the last surviving trustee will have the power under the Trustee Act to appoint replacement trustees.

**If a trustee becomes incapable**

Incacity is becoming more common with increasing life spans and so this problem is being encountered more often. If there is no doubt as to the trustee’s incapacity (and it might be necessary to obtain a medical report to confirm this) anyone given the power to remove trustees by the trust deed can exercise this power to remove the incapable trustee.

If there is no-one with such a power the Trustee Act then provides that the continuing trustees can replace the incapable trustee. It should be noted that they must be replaced not just retired.

If, however, the incapable trustee has an interest in the trust fund then it will be necessary for the court of protection to consent to the replacement of the trustee. Medical evidence will be essential to support this application. A vesting order might also be required to transfer any assets not automatically vested in the new trustees.

If the only trustee remaining is incapable then it may be possible for the trust beneficiaries to give a direction to the incapable trustee’s attorney or deputy directing them to appoint a replacement. For this to be possible the beneficiaries must all be over eighteen, have capacity and together be absolutely entitled to the trust fund. If the trust provides, for example, that A has the income for life with remainder to B and C, then provided A, B and C are all over eighteen and have mental capacity they will be entitled to give a direction.

If no other option is available it will be necessary to make a court application to replace the incapable trustee.

**Top tips on replacing trustees**

- There should be at least two trustees at any one time, especially as trust deeds often provide that some powers can only be exercised if there are at least two trustees.
- Take action to replace retired or deceased trustees as soon as possible. The longer it is left, potentially the harder it gets.
- A couple taking out an investment or insurance policy written in trust should consider appointing a third younger trustee so that there is someone in place as the couple get older.
- Check the trust deed to see if anyone has the power to appoint and/or remove trustees before taking any action to replace a trustee or appoint a new trustee.
- Appointments and retirements should be by deed to ensure automatic vesting of most trust assets.
- To avoid the problems set out above consider appointing a trust corporation to act as trustee as it will not die or become incapable.
HMRC guidance on new IHT scheme disclosure regulations

The new disclosure of tax avoidance scheme regulations (DOTAS) for inheritance tax (IHT) came into effect on 1 April 2018. We summarise HMRC’s guidance on the new regulations with particular reference to products that save IHT and which are commonly issued by insurers, such as gift and loan schemes.

The new regulations

The new regulations describe the arrangements that have to be notified to HMRC. This description is known as the IHT “hallmark”. In addition to this new IHT specific hallmark two other hallmarks, the confidentiality and premium fee hallmarks, were extended to IHT from February 2016. This article concerns the new IHT specific hallmark only.

Under the new regulations an arrangement is notifiable to HMRC if an “informed observer” would conclude that both of two conditions have been met. An informed observer is someone who is independent, has all the information about the arrangement and sufficient knowledge to understand it. They are not deemed to be an expert.

If a promoter of a scheme considers that an informed observer could reasonably be expected to observe that the main purpose, or one of the main purposes, of the arrangements is to obtain a tax advantage listed in condition 1, and that the arrangements involve the use of one or more contrived or abnormal steps without which the tax advantage could not be obtained (condition 2), they will be under a duty to disclose the scheme to HMRC.

Condition 1

This condition sets out the tax advantages which are of greatest concern to HMRC. These are:

1. Avoidance or reduction of a relevant property entry charge; this was part of the previous regulations and concerns the avoidance of charges to IHT when setting up a relevant property trust.
2. The avoidance or reduction of any other relevant property charges (including the ten year charge), the charge on property leaving employee trusts or newspaper trusts and on close company transfers.
3. Avoidance of a reservation of benefit IHT charge when there is also no pre-owned assets income tax charge.
4. Avoidance of a chargeable transfer or potentially exempt transfer at the same time as a reduction in the value of a person’s estate.

Condition 2

Arrangements are only notifiable if they also meet condition 2. Condition 2 is that the arrangements involve one or more contrived or abnormal steps without which the tax advantage could not be obtained. According to HMRC, normal, straightforward IHT planning will not fall within condition 2. HMRC also takes the view that the use of trusts is not abnormal and neither are loans to trusts or companies to which the individual is connected or investing in assets which qualify for IHT relief. By comparison they state that if a gift is made but the donor is able to enjoy the property given in the same way as before the gift was made, this might be a disclosable scheme.

Established practice

Arrangements are not notifiable if a scheme has been sold and implemented before 1 April 2018, HMRC has previously indicated its acceptance of it, and it is sold and implemented again after the new hallmark came into effect. The product must be “substantially the same” as that implemented pre-1 April.

Pension providers should ensure they carry out all due diligence.

HMRC gives an example of a Discounted Gift Trust plan implemented before 1 April 2018. Its implementation after 1 April 2018, if in accordance with established practice, should not be notifiable (although the promoter would have to consider whether the confidentiality or premium fee hallmarks were applicable). If the insurance company were, however, to change some elements of the pre-1 April 2018 scheme, the established practice exemption would not apply on its implementation for the first time post-1 April and it would have to be tested against the above conditions. Changes to the scheme name or made for regulatory reasons are unlikely to cause the post-1 April implementation to be outside established practice.

If the product is altered so that it is not substantially the same, then this exemption will not apply. Differences in personal details, such as different amounts invested or in the amount of withdrawals from say a Discounted Gift Trust, will not mean that the post-1 April arrangements are not substantially the same as the pre-1 April arrangements.

HMRC examples of non-notifiable arrangements

HMRC gives a number of examples which are tested against the two conditions and determined to be non-notifiable arrangements. These include gift and loan or loan trusts, regular gifts out of income (whether outright or into trust), and a number of other arrangements as follows:

- Lifetime gifts to a spouse or civil partner
- Transfers of value equivalent to the IHT nil rate band repeated every seven years
- Lifetime gifts to bare trusts for minors
- Executing a Will, deed of variation or disclaimer giving rise to an IHT exemption
- Buying shares which qualify for business property relief after two years
- Gifting land and paying full consideration for continued occupation
- Gifting a share of a property where the donor and donee subsequently share occupation (but possibly not if the donor retains only a very small proportion of the property)
- Transfer of a sterling account by a non-domiciled, non-UK resident individual into a US Dollar bank account
- The transfer by a non-UK domiciled individual of non-UK property into an excluded property trust before they become UK domiciled
- Distributions from relevant property trusts just before the ten year anniversary
- Loans repayable on demand, or at a commercial rate of interest, to a company or other entity from which the lender cannot benefit.

By comparison, HMRC gives the creation of a reversionary lease and the use of employee benefit trusts to pass assets onto children as examples of notifiable arrangements.

Follow our blog at www.clarkewillmott.com/blog/

Great service... Great people...
A recent case before the Pensions Ombudsman showed the necessity for pension companies to make thorough investigations before distributing pension death benefits. The decision also illustrates how the deceased’s Will can be relevant in enabling the pension company to make an informed decision.

The complaint to the Ombudsman was made by Mrs T, the deceased’s spouse, about a decision by Zurich Assurance to allocate Mr T’s pension death benefits to another relative, Mrs Y. Mrs T was the nominee of the death benefits until November 2013 when Mrs Y contacted Zurich on Mr T’s behalf to say that she was now the nominated beneficiary and that all correspondence should be directed to her.

When Mr T died in September 2015, Zurich obtained a copy of his Will from Mrs Y. This included a statement that he had made no provision in the Will for his wife because of “substantial provisions already made during lifetime”. Zurich subsequently paid out the death benefits to Mrs Y. This decision was challenged by Mrs T on the grounds that she had been appointed as an interim deputy for her husband in January 2013, so her husband did not have capacity to change his nominee in November 2013; and that she had not in fact received substantial lifetime provision. Mrs T argued that, as the former nominee of the pension benefits, and the deceased’s spouse, at the very least Zurich should have contacted her.

Mrs T’s complaint was upheld by the Ombudsman which agreed with Zurich’s submission that the Will was relevant, even though the death benefits did not form part of Mr T’s estate. The Will provided information about possible additional beneficiaries and threw some light on the deceased’s wishes.

The Ombudsman, however, disagreed with Zurich’s conclusion that Mr T did not wish the death benefits to pass to his wife due to his lack of provision for Mrs T in the Will, and the statement in the Will about the lack of provision. It pointed out that, on the contrary, the reference to substantial lifetime provision could have referred to the nomination of the pension death benefits.

The Ombudsman found that further information and evidence should have been obtained by Zurich prior to making its decision and that Mrs T’s application to receive the death benefits should be reconsidered by them.

Pension death benefits can often amount to a substantial amount of money, so given the complexities of today’s family structures, and the increasing prevalence of dementia as the population ages, this case must be a warning to other pension providers to make sure that they carry out all due diligence and reasonable enquiries in these circumstances.