

PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

Applicants	Mr Mark Green and Ms S
Scheme	NHS Pension Scheme (the Scheme)
Respondent(s)	NHS Pensions The North West London Hospitals NHS Trust (the NWLH Trust)

Subject

Mr Green is making the relevant representations to my office, on behalf of himself and Ms S his co-executor, in relation to the late Ms C Anderson's estate. The complaint against NHS Pensions and the NWLH Trust is about the delay in payment of a death gratuity, in respect of the late Ms C Anderson, leading to a penal tax charge on the final amount paid as it was not paid within two years. Mr Green says that if details of the payment due had been brought to his attention earlier a claim for the payment could have been made in time to avoid the tax charge.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should not be upheld against the Respondents as they were not required to bring the death gratuity to Mr Green's attention under any statutory duty. It also was not maladministration to fail to mention this when he first called NHS Pensions in September 2012 to enquire about a different benefit.

DETAILED DETERMINATION

Regulations Governing the Scheme

- I. Ms C Anderson was a member of the 1995 section of the Scheme. The Regulations relevant to that section say:

“Part F

Lump Sum on Death

F1 Member dies in pensionable employment

(1) If a member dies in pensionable employment before reaching age 75 , a lump sum on death shall be payable in accordance with regulation F5.

(1A) A lump sum on death shall be payable in accordance with regulation F5 where, on the day they died, the member is-

- (a) under the age of 70;
- (b) In NHS employment;
- (c) no longer required to pay contributions from a date that falls before 1st April 2008 pursuant to regulation D1(3) or (4) (contributions by members); and
- (d) except where regulations E2(11) or R4(6) apply, not in receipt of a pension under any of regulations E1 to E5.

...

(2) Subject to regulation S4 (benefits on death in pensionable employment after pension becomes payable), the lump sum on death will be equal to twice the member's final year's pensionable pay.

...

F5 Payment of lump sum

(1) A lump sum under any of regulations F1 to F4 shall be paid in accordance with the following paragraphs.

(2) If a member dies without leaving a surviving partner and without having made a nomination in favour of another person, the lump sum shall be paid to the member's personal representatives.

...

(10) If the lump sum on death does not exceed the specified amount, the Secretary of State may pay it to any person claiming to be the member's personal representative or to be entitled to a share of it, without requiring proof of the title of the person concerned.

(11) In paragraph (10), the specified amount means £5,000 or any higher amount specified in an order made under section 6(1) of the Administration of Estates (Small Payments) Act 1965 as the amount to be treated as substituted for references to £500 in section 1 of that Act.

(12) In this regulation "surviving partner" means a-

- (a) widow; or
- (b) widower; or
- (c) civil partner; or
- (d) nominated partner,

who survives the member.

...”

Material Facts

2. Mr Green has brought his complaint as the legal personal representative of the late Ms C Anderson. She was a member of the Scheme and died, intestate, on 29 January 2011. At that time she had been employed by the NWLH Trust. Mr Green says he is complaining on behalf of his two daughters with the late member – Ms S and Ms J who at the time of applying to our service were aged 19 and 14 respectively. Ms S is also a personal legal representative for the estate and so has made her own application to our service (under reference PO-3661), but appointing Mr Green as her representative. They have a joint letter of administration and therefore both have the same standing in estate related matters. So with Ms S deferring the handling of her application to Mr Green they can effectively be treated as one application and dealt with in one determination.
3. Ms C Anderson completed a new starters' form on 27 November 2003 when joining the employment of the NWLH Trust on a fixed-term contract. On this form she put down Mr Mark Green as her next of kin. Her address at that time was also given as the same as Mr Green's.

4. Ms C Anderson was later made a permanent employee on 13 December 2004. A form she completed around that time has Mrs D, who is a blood relation of hers, down as her next of kin. Her address here was given as the same as Mrs D's.
5. A screen print provided by the NWLH Trust shows Mrs D as being the emergency contact as at 19 August 2006.
6. On 16 February 2011 a termination form was completed by the NWLH Trust. This recorded the death of Ms C Anderson, of which they were notified on 7 February 2011, and Mrs D as her next of kin. The relevant section noting these details said it was to be signed by the employee, but was unsigned. A second section for the employer was signed by a line manager.
7. Also on 16 February 2011 a letter was sent to Mrs D by the Pensions Manager at the Trust. This said that the late Ms C Anderson was a member of the Scheme and benefits may be payable. They said they understood the late member had no spouse or partner, but did have dependent children. They asked Mrs D to confirm the legal representative's details and then they would send the relevant claim forms. A handwritten note at the top of the copy retained said:

“...PA confirms no nomination. HR have partner as NOK, but said I should write to [Mrs D] as partner is estranged. Spoke [Mrs D] to confirm address...”
8. Mrs D responded on 21 February 2011. She said that she was the late member's legal representative. She also said that Ms C Anderson had two children and gave the details for Ms S and Ms J.
9. The NWLH Trust responded to Mrs D on 24 February enclosing claim forms for the lump sum and children's allowance.
10. NHS Pensions were first notified of Ms C Anderson's death on 12 April 2011 by the NWLH Trust via a return of a “Pension Choices” pack sent to her. They also say that her employer informed them that there were no nomination forms in place.
11. On 28 April 2011 her employer was asked, by NHS Pensions, to issue form AW11 (“Claim for a life assurance lump sum”) to her next of kin. The notes section on the first page of the form said:

“Do not delay your claim. The life assurance lump sum must be paid within 2 years of the member’s death or it will attract a tax charge of up to 40%”.

12. Under HMRC legislation if a defined benefits lump sum death benefit is not paid within what is known as “the relevant two-year period” it becomes an unauthorised member payment and is then subject to an unauthorised payments tax charge on the recipient(s) of the monies (where there is more than one recipient they are jointly and severally liable to the charge). “The relevant two-year period” means the period of two years beginning with the earlier of the day on which the scheme administrator first knew of the member’s death and the day on which the scheme administrator could first reasonably be expected to have known of it.
13. NHS Pensions received the completed forms to claim a death gratuity and a dependent children’s allowance from Ms C Anderson’s employer on 4 July 2011. The forms had been completed by Mrs D who declared that she was the legal personal representative of the deceased, her Mother and that she also had custody of a dependent child (Ms S).
14. The amount due to be paid was £44,056.12. NHS Pensions said that as the death gratuity was in excess of £5,000 they were required to see the appropriate documentation before they were able to authorise the payment. They wrote to Mrs D on 27 July 2011 to explain this requirement.
15. On 2 August 2011 the payment of a dependent children’s allowance was authorised to Ms S.
16. The death certificate for Ms C Anderson was registered on 4 August 2011. Her usual address was unique to her (i.e. not an address belonging to the other parties) but the place of death was given as the address for Mrs D.
17. Mrs D wrote to NHS Pensions on 22 August 2011 to say that she and her solicitors were of the view that it was not necessary to provide any documents showing that she was a legal personal representative. NHS Pensions responded to say it was a requirement of the Scheme’s Regulations for amounts in excess of £5,000.

18. As NHS Pensions did not receive the appropriate documentation from Mrs D they sent reminders to her on 13 September 2011, 31 January 2012 and 29 March 2012 as well as telephoning her on 27 July 2012. Twice they explained again the need for documentation before a claim could be authorised. Two of these letters also repeated that if payment was not made within two years of being notified of the member's death then it would be subject to a 40% tax charge and this was also pointed out during the telephone call.
19. The telephone note of 27 July 2012 noted that Mrs D was having problems with obtaining probate and was unable to provide documents that solicitors had requested of her. The NHS Pensions staff member notes saying that Mrs D could apply for probate herself and they would send her some information on this.
20. An email of 27 July 2012 from NHS Pensions to Mrs D provided links to the DirectGov and the Justice.gov.uk websites and said these might be helpful in obtaining probate.
21. Mr Green telephoned NHS Pensions on 13 September 2012 regarding a claim for children's allowance for his younger daughter Ms J and was sent a claim form. NHS Pensions say they were also contacted by the NWLH Trust around this time who are noted as saying that Mr Green lived with the late member and that they believed he was in some sort of dispute with Mrs D. The children's allowance claim for Ms J was authorised in October 2012.
22. Mr Green telephoned NHS Pensions again on 3 December 2012 to query the level of the children's allowance being paid to Ms J. NHS Pensions called back the following day. During the second call NHS Pensions' note of the call noted that Mr Green is the father of both children, with the younger Ms J living with him and Ms S living with Mrs D. Also Mrs D had no contact with Mr Green or Ms J. The NHS Pensions staff member then confirmed that a death gratuity was payable to the estate of Ms C Anderson. This would be paid to the person(s) named on probate. Mr Green asked that he be sent the forms for the gratuity and advised that he may apply for probate. He was also recorded as saying that he believed that both children should receive half the gratuity.
23. The telephone call of 4 December 2012 was also followed up by a letter from NHS Pensions setting out their requirements to process a claim such as the documents they required and a copy of form AWI I.

24. NHS Pensions wrote to Mr Green on 6 February 2013 asking him to advise if he was in a position to provide them with the relevant documentation. They repeated that they were notified of the member's death on 12 April 2011 and so needed to authorise payment before 12 April 2013. An identical letter was sent to Mrs D as well.
25. Mrs D wrote to NHS Pensions on 11 February 2013 to say that probate papers had been lodged the previous week. She said she would contact them again once the Letters of Administration had been granted.
26. On 12 February 2013 letters from NHS Pensions were sent to both Mr Green and Mrs D asking if a Grant of Probate or Letters of Administration had been obtained.
27. The High Court of Justice, Principal Registry of the Family Division granted administration of the late Ms C Anderson's estate on 16 April 2013 to Mr Green and Ms S.
28. NHS Pensions received the probate papers for Mr Green and Ms S on 17 April 2013. It appears however that form AW11 was not completed and provided. NHS Pensions wrote to Mr Green on the same day asking for the AW11 form to be completed, by both personal legal representatives, with a fresh copy of the AW11 form being provided in case the previous copy sent was misplaced.
29. NHS Pensions also wrote on 18 April 2013, to both legal personal representatives, to say that the payment due was deemed an unauthorised payment. They also asked that a mandate form be completed authorising them to deduct the tax charge from the gratuity. They could not make the payment until this form was completed and signed.
30. Payment of the death gratuity was made in June 2014. The letter advising of payment on 26 June 2014 said that the amount payable was £44,056.12 but had been reduced first, with the agreement of the parties, to recover an overpayment of the children's allowance of £3,280.48 to Ms S and then by a further 40% unauthorised payments charge of £16,310.26. The net payment was therefore £24,465.38.

31. NHS Pensions has provided my office with an extract from the version of the Employer's Guide that was in circulation in January 2011. Section 7 of this guide covers death benefits and what employers should do on the death of a member.

"If you are told about the death of a member whilst in membership, it will be necessary for you to administer the full Death in Membership procedure..."

Appendix 9B

Death in membership - single, widowed or divorced member

EA action

On being told of the death in membership, please

1. Read Part 7, Section 9 {Death Benefits} 'Life Assurance' and Part 7, Section 9 {Death Benefits} 'Child Allowance'.
2. Send to the next-of-kin or informant, claim forms
 - (i) AW11 'NHS Pension Scheme- Claim for a Life Assurance'
 - (ii) AW158 'NHS Pension Scheme- Application for payment of a child's allowance'..."

Disclosure Regulations

32. The Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 1996 say:

"5 Information to be made available to individuals

...

(8) Where a member of or a beneficiary under a scheme has died and rights or options may be exercisable by a person in consequence, the information mentioned in paragraphs 11 and 12 of Schedule 2 shall-

- (a) where the trustees are aware of his existence and he is at least 18 years old and his address is known to the trustees, be furnished as of course and as soon as practicable to that person and, in any event, within 2 months after the trustees receive notification of the death; and
- (b) on request (not being a request made within 3 years of the last occasion on which information was furnished under this paragraph to the same person in the same capacity) be furnished to any person who is a personal representative of the deceased person or who is authorised to

act on behalf of the person to whom rights or options under the scheme may be available in consequence of the death, as soon as practicable and, in any event, within 2 months after the request is made.

Schedule 2

11 (1) The rights and options (if any) on the death of the member or beneficiary and the procedures for exercising them.

...

12 The provisions (or, as the case may be, a statement that there are no provisions) under which any pension payable to a survivor of a member or beneficiary may or will be increased, and the extent to which such increases are dependent on the exercise of a discretion..."

Summary of Mr Green's position

33. Mr Green is the former partner of Ms C Anderson. Their relationship ended around 18 months before her death. Ms J lived with him and Ms S went to live with Mrs D, a relation of Ms C Anderson.
34. The problems had been caused by two things. The inept way that NHS Pensions had handled the case and the actions of Mrs D.
35. He was not aware of Ms C Anderson completing any nomination forms. He knew that she worked for the NHS but did not know that any benefits were potentially payable on her death. So he had not made any earlier contact with NHS Pensions.
36. There was no immediate move by him to take responsibility for his late and former partner's estate. He was stopped from having any involvement by Mrs D and he assumed that she had made said arrangements. Mrs D had, in effect, stopped him from applying to become the legal personal representative in this matter by failing to tell NHS Pensions of the existence of Ms J.
37. He first became aware of the possibility of death benefits being payable when he found out from his daughter Ms S, in July 2012, that she was receiving a children's allowance. He immediately contacted NHS Pensions. He learned of a child allowance amount possibly being due to Ms J from her mother's membership of the Scheme at that time. Although Mrs D had made a claim for child allowance

on behalf of Ms S she had failed to tell them about the existence of her sister. NHS Pensions dealt with Mrs D as guardian but when Ms S turned 18 she received some paperwork from NHS Pensions and made him aware of the dependent children's allowance she received. He first contacted them by telephone in July 2012.

38. While NHS Pensions have pointed to the notes on the AW11 form, sent in April 2011, warning of a possible tax charge that was actually sent to Mrs D. He did not receive that form until December 2012 and so he was unaware of this until then.
39. NHS Pensions knew of the existence of his daughter Ms J and her claim for an allowance in September 2012 when he called them. However they did not inform him about the death gratuity payable until 4 December 2012, this nearly three months after learning of an "inappropriate/ fraudulent claim" (he refers to an overpayment of child allowance to Mrs D on behalf of Ms S, which has seemingly occurred as a later claim was made on behalf of a further child, Ms J, affecting that award although I understand that matter is also subject now to an ongoing dispute). Had they not waited for this period his children would be some £17,600 better off financially. They should therefore be liable to pay any tax charge due. It was surprising that NHS Pensions did not contact him sooner.
40. He first contacted the Probate Office on 11 December 2012. They informed him that the only way he could obtain probate in the short time remaining was to swap his name with Mrs D on the application. He tried to contact Mrs D in relation to the matter but she refused to speak to him. Eventually, exasperated at her lack of a response, he employed a solicitor and on 20 February 2013, under threat of legal action, Mrs D acquiesced to his request.
41. He had telephoned the Probate Office repeatedly to try and hurry things along. The first available interview was on 12 April 2013 and he returned to the office to collect probate. He does not see how he could have acted any more expediently. NHS Pensions however could have helped the situation.
42. He first returned the completed AW11 form on 17 April 2013, along with the letters of administration. (In a very recent submission to our service Mr Green has instead said that the form was completed and returned on 16 April 2013 with the letters of administration and then NHS Pensions provided another copy

“to replace the one they had misplaced”. This is inconsistent with his earlier comments but my view is that nothing turns on this alleged misplacement of forms as they needed to be returned by 12 April in order to avoid the tax charge).

43. He found it difficult to believe that the human resources department of the Northwick Park Hospital did not know that Ms C Anderson had two children, especially as they were both born there. This fact should have been investigated. Moreover he was never contacted by her employer.
44. NHS Pensions also sent a number of letters to an incorrect address. However all these letters were sent after April 2013 and so this does not impact on the complaint regarding the tax charge.

Summary of NHS Pensions’ position

45. Where a member dies while in NHS employment their employer will issue death benefit claim forms to their surviving partner or, if single, to their next of kin. The lump sum payment is payable to a legal spouse, civil partner or nominee as of right. It is only paid to another person if they are able to provide a Grant of Probate of a will or Letters of Administration if the member died intestate, save where the sum is less than £5,000. The NWLH Trust had Mrs D recorded as the next of kin. They had not provided them with a copy of any such details (although NHS Pensions has now been provided with a copy of said details by my office during the investigation).
46. The rules of the Scheme are laid down in Regulations and there is no discretion given in these for lump sum payments on death. NHS Pensions must ensure that the regulations are adhered to and that payments are only made to those persons who are legally entitled to receive them. Where a nomination form has been completed NHS Pensions would hold this. There is no record of any such forms from Ms C Anderson.
47. At the same time that they received the completed AW11 form from Mrs D they also received a form AW158 (“Application for payment of child allowance”). There is no mention on here of a second child living with her father. NHS Pensions have not had a copy of the death certificate, but Ms C Anderson’s employer had confirmed that they had a copy of it.

48. When Mr Green contacted them in September 2012 it was regarding the payment of child allowance. There was no reason to suspect that the legal personal representative was not the person who had contacted them and so they continued to communicate with that person regarding the gratuity due. They add that they have been unable to find any record of a telephone call from Mr Green in July 2012 – the first contact that they have recorded was on 13 September 2012.
49. They disagree with the allegations made. There had been no maladministration on their part and their disclosure obligations had been fully met with regards to the possibility of any tax charge. They consider that every effort was made to notify the late Ms C Anderson's legal personal representative that the gratuity would become unauthorised if paid after the relevant two year period. They do this to safeguard both the recipient of the lump sum and the Scheme administrator, who also has a tax charge levied against them if a payment becomes "unauthorised".
50. Where there is more than one legal personal representative they ask all persons involved to complete a signed declaration confirming which person they want the payment to be sent to.
51. Where a member dies whilst still employed the employer is responsible for contacting the next of kin, often speaking with them direct. If an employer is unable to trace a next of kin then NHS Pensions will make enquiries and investigate further. Generally they try to obtain the death certificate and contact the informant detailed on the certificate. Where no nomination form is in place the employer would generally know whether the member had a surviving partner etc as these details would be kept locally by the human resources/ personnel department.
52. Where the person claiming to be the legal personal representative completes the necessary forms NHS Pensions, and the employer, would not continue to make further investigations. They were also unable to become involved in personal or family disputes. The nature of Mrs D's family relationship with Ms C Anderson supported their reasonable view that the information in the AWI I was correct.

53. My office wrote to NHS Pensions and asked if they ever stopped to question whether an individual who claims to be a personal legal representative, but over the course of many months is unable to provide any evidence of this, is actually engaged in that role. In response NHS Pensions said that it was not for them to question whether a person claiming to be a personal representative is engaged in this capacity. The application forms for the lump sum and children's allowance are received from the NHS employer. In completing the claim form the nominee is required to sign a declaration confirming that the information that they have provided is correct.
54. They consider that the question of whether they have an express or implied duty to seek out the correct recipient of a death gratuity is at the centre of the dispute. Regulation F5 provided no information regarding this. Also until 4 April 2014 a pension scheme administrator's duty to inform beneficiaries about their exercisable rights over a member's estate was found at Regulation 5 (8) of the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 1996. This says that where rights are exercisable by a person in consequence of the death of a member how to exercise those rights shall be furnished to (a) where the trustees are aware of his existence and he is over 18 years old be furnished to that person as of course and (b) person who is the personal representative on request as soon as practicable and, in any event, within two months after the request is made.
55. They also say that case law (NGN Staff Pensions Plan Trustees Ltd v Simmons [1994] OPLR 1; Hamar v Pensions Ombudsman [1996] PLR 1) has established that whilst trustees had no duty to advise beneficiaries how to exercise rights it did have a duty to advise beneficiaries what their rights are. They point also to an unpublished determination by our service. They say that this determination agreed that it was not NHS Pensions' responsibility to inform a beneficiary of tax consequences following a late application.
56. Their duties were discharged when it provided guidance to the NHS employer. They do not agree that they "failed to inform the correct beneficiary". Mr Green had a clear opportunity to advise NHS Pensions that he was considering becoming an executor of the estate.

Summary of the NWLH Trust's position

57. They have provided us with all the archive papers that they hold in relation to this matter and their human resource area could not locate their file. The initial starter form that they held recorded Mr Green as the next of kin. Members of staff are entitled to change their next of kin as often as they like either by going to their human resources department or to NHS Pensions. The pension staff at the Trust would not necessarily know who the next of kin is. In 2004 Ms C Anderson changed the details to record Mrs D as the next of kin when she became a permanent employee.
58. Details of next of kin are held by the human resources team on their NHS Electronic Staff Records (ESR) system and can only be altered at a member's request – a change would not otherwise be recorded. The pension team checked for any nomination with NHS Pensions after the death of the member who confirmed that none was in place. Their human resources team instructed the pensions area to write to Mrs D as they were privy to information that Ms C Anderson and Mr Green were estranged.
59. It was Ms C Anderson's then manager who informed the human resource area that the partner was estranged and that Mrs D should be written to and this was evident on the termination form she completed. Unfortunately that manager no longer works for the Trust.

Conclusions

60. Mr Green says that Mrs D did not make NHS Pensions aware that Ms C Anderson had a second daughter or of his existence. It seems that Ms C Anderson's employer was unaware of a second child and disregarded the former partner, or at least they did not detail this when they completed their section of the AW158 form (although there is clearly within the Trust's papers a letter from Mrs D providing that information in February 2011). However, as has been said to Mr Green by my office on previous occasions, Mrs D is not a party to this complaint nor could she be made a respondent to the complaint. My role is to focus on the actions, or inactions, of NHS Pensions and the NWLH Trust. I am happy to accept that NHS Pensions were not given any information about either Mr Green or Ms C Anderson's younger daughter, Ms J, by the other parties involved.

61. Further I would add that I do not view the fact that an overpayment of the dependent child's allowance was made to Mrs D, who only made a claim on behalf of Ms S (who was then a minor), makes any difference to the complaint against NHS Pensions over the payment of the death gratuity. They are quite separate matters with different qualifying conditions for payment.
62. While I note that Mr Green considers that his two daughters should benefit from the payments it was not actually the role of NHS Pensions to try and find children who might qualify for the lump sum payment. In these circumstances, and as detailed within the Scheme's Regulations, they were only able to pay the lump sum benefit to the personal legal representative(s). So that is who they needed to identify (and as minors at that time neither daughter could have been engaged in such a capacity, although Ms S did obtain the relevant papers shortly after her 18th birthday). It may well be that once the monies are paid to the personal legal representatives that the monies in the late member's estate will be split between his two daughters, but that was not a decision for NHS Pensions to make.
63. In relation to the role of the NWLH Trust I am satisfied with their reasons for writing to Mrs D in the first instance, now that they have provided paperwork to support their assertions (earlier in the investigation they struggled to provide evidence that anyone other than Mr Green was the recorded next of kin). Their responsibility under the Employer's Guide was to send the relevant forms to the next of kin and to return these to NHS Pensions, which they did. Also they were not required under the Scheme's Regulations to obtain the necessary evidence from the legal personal representatives. Their role had ended unless NHS Pensions had any further queries for them. I therefore do not uphold the complaint against them.
64. Mr Green says that he has not seen any signed or dated forms confirming a change of the next of kin. The change was made when Ms C Anderson switched to a permanent role with her employer and put down the details for Mrs D.
65. He has also pointed to the handwritten note on the letter of 16 February 2011, as detailed in the material facts section as evidence that he was the next of kin. As said above our service did initially have problems obtaining papers from the NWLH Trust. One of my investigators queried the initial information provided as

it only appeared to show Mr Green as next of kin and the handwritten note was pointed to as well. It appears that the pension manager had difficulty in obtaining papers from their human resource area. But in later correspondence they were able to provide further papers showing the details recorded on their staff records system as well as the form completed on becoming a permanent employee. It seems possible that the Trust employee had a similar issue with the human resource area in February 2011 when writing out. But anyway the available papers show that Mrs D was the next of kin and I would expect the employer to write to the most recently notified next of kin, not any former next of kin. I would add that at that time the member's own address was the same as that given for Mrs D. Added to the fact that she had split from Mr Green I see no reason to doubt the records, even given the wording of the note.

66. Turning to the role of NHS Pensions they point to a previous determination from our service but I do not consider that it is relevant. In that case NHS Pensions first communicated the need to obtain a Grant of Probate or Letters of Administration to the applicants in 2007. The applicants took no steps to apply to the courts until 2010. There was no mention until 2009 that the death grant would need to be paid within two years to avoid tax charges. The reviewing Ombudsman found that NHS Pensions had no duty to provide advice regarding taxation. I do not see that this has any relevance to the application on behalf of Ms C Anderson's estate as Mr Green's claim is that he should have been told that a lump sum was payable to the estate when he contacted them.
67. NHS Pensions also say that they would not perform any further investigation or searches for potential legal personal representatives, nor was there any need to, once someone had declared that they were acting in such a capacity. And that it was not for them to question whether said person was a legal personal representative. There is some room for debate on these points.
68. It is correct that Mrs D completed a declaration in June 2011 that she was the legal personal representative. But in my judgment NHS Pensions had reason to question whether this was in fact the case. From that time Mrs D was unable to provide *any* supporting paperwork that she was engaged in such a capacity (and indeed in her letter of 22 August 2011 she said, somewhat strangely, that she should not be required to provide any such papers to other parties). After telling her that this was a requirement of the Scheme's regulations NHS Pensions

subsequently chased her for evidence numerous times without response or sight of any papers. By the time that they spoke to and emailed Mrs D on 27 July 2012 with details of how to obtain probate (as she confirmed to them that she had no papers) I view that they should have known she was not in fact the legal personal representative and that her declaration was not accurate. At best she could be said to be applying for the relevant status. But they knew she did not have the relevant status and so could not qualify for payment under the Scheme at that time.

69. The main question then is whether NHS Pensions, at that stage, should have started to make further enquiries. The Regulations say that the lump sum shall be paid to the member's personal representatives. But there was no existing legal personal representative at that time (although after the events unfolded it was Mr Green, jointly with Ms S, who became the legal personal representatives). This begs the questions of whether NHS Pensions should have made enquiries to search for a legal personal representative or have brought the death gratuity to Mr Green's attention when he first called them in September 2012.
70. There was no statutory duty on NHS Pensions to make enquiries. Nor was there any such requirement within the Scheme's Regulations. This was not a circumstance where a discretionary death benefit was payable. And the disclosure regulations only required a legal personal representative to be furnished with details on request. No such request appears to have been made by any party.
71. The second question then is whether NHS Pensions should have told Mr Green about the death gratuity on 13 September 2012 when he called regarding payment of the children's allowance (while there was no statutory duty on NHS Pensions I could still find that it was maladministration not to do so). At that time NHS Pensions made no mention of the possibility of a lump sum payment. However when they spoke to him again in December 2012 they did bring that point up. (I will add here that there is no evidence of any contact with NHS Pensions from Mr Green in July 2012. I find that he first contacted them in September 2012).

72. In my view, and in the particular circumstances of this case, NHS Pensions did not need to bring the matter up with him. While they knew at that stage that Mrs D was not a personal legal representative, Mr Green had no greater standing than her. Mrs D was named as Ms C Anderson's next of kin. She was also a blood relative of the late member and in receipt of a children's allowance as the legal guardian of one of the children. I view that they were entitled to wait to see if she obtained probate. In my opinion Mr Green was a less likely candidate for the death gratuity (I say this despite him eventually becoming a co-executor). He was an estranged partner, and not married to her. He had not been made a nominated partner or a next of kin (although he had been recorded as a next of kin prior to December 2004).
73. In addition, Mr Green called specifically for a children's allowance claim. He did not introduce himself as a legal personal representative or say that he was applying to become one. So I do not see that NHS Pensions needed to say anything to him at that point or that it would constitute maladministration if they did not do so. It appears that it was only the realisation that a lump sum would be payable to Ms C Anderson's estate that triggered a move on his part to then apply for responsibility for the estate. NHS Pensions did tell him about the death gratuity in December 2012 which appears reasonable. Three months had elapsed with Mrs D still not obtaining probate and at that stage Mr Green provided further information about his status. It is a fine distinction and I can understand why Mr Green considers he should have been advised about the death benefit earlier. However, NHS are correct to highlight that they do not have a duty to investigate, they generally operate on the basis claims will be made to them and they could not have anticipated that Mr Green, not Mrs D would ultimately obtain probate.
74. So I accept that Mr Green would likely be unaware of the potential lump sum payment unless NHS Pensions had made him aware of it. But in the circumstances of the case they were entitled to wait for Mrs D's application for probate to run its course and not bound to advise Mr Green of the death benefit when he called in September 2012.
75. Mr Green says that the NWLH Trust should have shared information relating to him and Ms J with NHS Pensions. And also that NHS Pensions should have started an investigation into Ms S' child allowance claim once they knew this was

overpaid, by going back to the very beginning with the Trust to check their records, which would have revealed their existence. As detailed in the employer guide the Trust were only required to write to the next of kin in relation to the lump sum, not share all the information that they might have had in their possession with NHS Pensions (including that information which was outdated). And as I said earlier the children were not potential recipients of the lump sum payment.

76. They might have considered providing Mr Green's details to NHS Pensions and/or writing to him in relation to a possible child allowance claim for Ms J. But that is not the same as saying they or NHS Pensions should have alerted him to a potential lump sum payment at that time. By that point Mrs D had already said that she was the personal legal representative and she was down as the next of kin. Even if the Respondents had contacted Mr Green then it only would have been in relation to his role as the guardian of Ms J, not as a potential recipient of the death gratuity. That Mrs D only made a claim on behalf of one of the children for a children's allowance is not strange as she was only the guardian of one of the children (Ms S). I do not see why the later overpayment issue would trigger any wider investigation into the employer's records (although I note NHS Pensions did actually call the employer and had it confirmed that there were two children) and so this does not advance Mr Green's case (and anyway NHS Pensions were aware of his existence by then in September 2012).
77. When NHS Pensions found out that there was a second child they considered that claim. And with Mr Green not making any claim to be a personal representative when he was in actually contact with NHS Pensions in 2012; I do not think he would have done so at any earlier date even if they had gotten in touch with him sooner. And while Mr Green says that he is unhappy with the NWLH Trust for not providing details of the existence of Ms J to NHS Pensions, our service has not accepted any complaint about the payment of the children's allowances for investigation (and that was not the application made to us).
78. Finally Mr Green says that Ms S had a greater legal standing than Mrs D as a personal legal representative. However Ms S only became a personal legal representative after the relevant two year period had expired, having applied in conjunction with Mr Green. I see no reason why the Respondents would have brought the potential lump sum payment to her attention at any earlier point and

indeed she was a minor for much of the time in question. (It appears that Ms S was also unaware of the lump sum payable despite Mrs D being her legal guardian and residing at the same address).

79. For the reasons given I do not uphold the complaint against NHS Pensions.

Jane Irvine
Deputy Pensions Ombudsman

16 March 2015