

Ombudsman's Determination

Applicant	Mrs S
Scheme	Swansea City & County Pension Fund (the Fund)
Respondent	City & County of Swansea (the Council)

Complaint Summary

1. Mrs S' complaint concerns the Council's decision on the distribution of the death grant payable following the death of her husband, Mr S. She is unhappy that the Council decided to split the death grant equally between her and Mr S' three sons.

Summary of the Ombudsman's Determination and reasons

2. The complaint is upheld because:
 - 2.1. The Council made a flawed decision by incorrectly interpreting Mr S' Will (**the Will**).
 - 2.2. Furthermore, the Council did not make sufficient reasonable enquiries before deciding how the death grant should be distributed.
 - 2.3. This situation has caused Mrs S serious distress and inconvenience, for which she shall receive an award.

Detailed Determination

Material facts

3. The Council is the Administering Authority for the Fund. The Fund is part of the Local Government Pension Scheme. Mr S' benefits were governed by the Local Government Pension Scheme Regulations 2013¹ (the **2013 Regulations**). The 2013 Regulations gave the Council complete discretion on how the death grant could be distributed. Relevant extracts of the 2013 Regulations are set out in Appendix 1.

¹ <https://www.legislation.gov.uk/uksi/2013/2356/made>

4. It is for the Council's Pension Panel (the **Panel**) to decide to whom the death grant should be paid to following a member's death.
5. Mr S died on 17 November 2016. He was a pensioner member of the Fund at the time. He had not completed a nomination form (the **Form**) prior to his death and had three adult sons. At the time of Mr S' death his two older sons, from his previous marriage, were aged 42 (**Mr MS**) and 39 (**Mr IS**). Mr S' youngest son, whom he shared with Mrs S, (**Mr JS**) was aged 21, and in full-time education.
6. The Council was notified of Mr S' death on 21 November 2016. On 26 November 2016, the Council wrote to Mrs S and asked her to complete and return the relevant claim forms, along with the relevant certificates, to enable the Council to determine the benefits payable to her. Mrs S sent the Council the following documentation:-
 - 6.1. A copy of her marriage certificate.
 - 6.2. A copy of Mr S' death certificate.
 - 6.3. A copy of her birth certificate.
 - 6.4. A copy of the completed claim form for the widow's pension.
 - 6.5. A copy of the completed "BALCLAIM" form, which listed the potential beneficiaries who could receive payment of the death grant.
7. Between 10 and 26 January 2017, there were further exchanges between Mrs S and the Council, concerning whether the death grant formed part of Mr S' estate. During this period, the Council requested details of the funeral expenses and a copy of the Will, to assist it with its decision concerning the distribution of the death grant. The value of the death grant was £155,382.84.
8. On 25 January 2017, the Council sent an internal email concerning the distribution of the death grant. It said:

"...invoice for funeral expenses paid...there are three children, the older two appear to be from [Mr S'] previous relationship. Although the youngest child is still living at home, I would be inclined to reimburse [Mrs S] for the funeral expenses and then share the remaining [death grant] between all four. – any will which may inform decision making?...[sic]."
9. On 26 January 2017, after considering the Will, the Council sent a further internal email confirming its proposal to split the death grant equally between Mrs S and Mr S' sons.
10. On the same day, the Council emailed Mrs S and said:

"...the Pensions Panel has reached a decision with regards to the death grant which is payable from your late husband's pension.

The decision is that it will be split between you and his 3 children..."

11. On 2 June 2017, Mrs S appealed the Council's decision through stage one of the Fund's Internal Dispute Resolution Procedure (**IDRP**). She provided a copy of a letter from the solicitor who assisted her and Mr S in the drafting of their wills (the **Solicitor's Letter**). Mrs S said in summary:-
- 11.1. At the time of making its decision, the Panel did not have sufficient information concerning the drafting of the Will, the family circumstances which demanded that care be taken with the Will, and the reason Mr S did not complete the Form.
 - 11.2. When she was asked in January 2017 to provide a copy of the Will, she was not advised that she could have given additional supporting information to assist the Panel in its decision making.
 - 11.3. She and Mr S commenced drafting their respective wills in November 2014, in the presence of a solicitor. They were not mirror wills but were drafted at the same time so that they could be in agreement regarding the provisions for their children. At the time the wills were drafted Mr S was in good health.
 - 11.4. They had a long and happy marriage with no marital problems. They were inseparable. They had a modern family. It consisted of two sons from Mr S' first marriage and one son from their marriage of 25 years.
 - 11.5. Mr S became unwell in January 2015, and was scheduled for surgery in February 2015. The week prior to the surgery their wills were signed and Mr S did not amend the Will. He knew he was dying so his wishes were more pertinent.
 - 11.6. Throughout the 22 months he lived with his illness, Mr S retained mental capacity to make complex and difficult decisions.
 - 11.7. As part of their inheritance planning strategy, they transferred ownership of their home to "tenants in common". This was done to protect their asset and allow Mr S' 50% share of the property to be left to his sons.
 - 11.8. Mr S wanted her to receive all assets except for the 50% share in the property. He felt this was a sufficient amount from his estate to give to his sons. He also wanted her to have use of the house, as set out in clause 4 of the Will. Following her death, the intention is that the children will inherit Mr S' share of the property in equal shares.
 - 11.9. Their view was that the children were at a time in their lives where the inheritance of either the property, or the residual estate, would be detrimental to their wellbeing or financial position.
 - 11.10. She explained in detail why Mr S did not intend for his sons to benefit immediately on his death. And why his sons did not wish to receive a proportion of the death grant. She included details of Mr MS' current health issues, Mr IS' current marital situation and explained why she considered that

Mr JS lacked sufficient maturity to be considered for the death grant. She also explained that those circumstances were relevant at the time the Will was drafted in November 2014, when it was signed in 2015; and that it remained pertinent after Mr S' death.

- 11.11. Mr S made his intentions clear in the Will that the children should not benefit financially at the time of his death, and that any financial benefit should be deferred. Mr S intended for her to inherit his entire residual estate and retain an interest in the property as Trustee. This arrangement gave him peace of mind and removed any doubt from her stepchildren's minds about their inheritance should Mr S predecease her.
- 11.12. They had been in a relationship for 33 years and had looked after the children since 1989. They had nurtured and supported them all financially. They had discussed and agreed that she would continue to do so should he predecease her.
- 11.13. Mr S realised that at age 60 she would still have ambitions and would wish to follow and realise the dreams they held together for their retirement. He wanted her to have financial security to achieve those things.
- 11.14. He was aware that she had an ongoing cardiac condition which vastly increased her chances of a stroke and dementia. In the event of her health deteriorating, she would need practical help to remain at home.
- 11.15. This help would not be forthcoming from their sons. Mr S wanted the money in place so that she could invest and remain in her own home for as long as possible, with appropriate assistance. He wanted her to have no further worries added to her life as she tried to continue without him.
- 11.16. She supported Mr S through his career; and had he survived, they would have enjoyed his pension together as part of their retirement.
- 11.17. She also supported Mr S while he was studying for his O' levels and through to his master's degree, to the detriment of her own career. They wanted to achieve a good life together.
- 11.18. She could not see a valid reason why the Panel could form the view that the death grant should be divided four ways.
- 11.19. Mr S could have completed a Form and nominated each son for a quarter of the death grant. He did not do so as that was not his intention. Mr S, being fully aware of his children's personal circumstances, would be greatly concerned about the negative impact the Panel's decision would have on the lives of his children and grandchildren.
- 11.20. Mr S did not complete a Pension Nomination Form or the Form. Like so many other local authority employees she had spoken to, he sincerely believed that all benefits payable on his death would be awarded to his lawfully wedded

wife. And that the Form was intended to be used when nominating children or a “common law” spouse.

11.21. She informed him of the death grant, two weeks prior to his death. He genuinely died believing that she would be awarded this on his death. They were unaware of the discretionary nature of the death grant and that this could potentially upset his carefully thought out strategy. They were also not aware of the ongoing implication for his Will and for the distribution of his estate.

11.22. She wanted the Council to provide her with a reasonable settlement. Once Mr S became aware of the death grant and that it would be paid to her, he did not change the Will. He was happy with the arrangements he had put in place.

11.23. Her solicitor had informed her that it was normal for a wife to inherit the entire property and residual estate.

12. On 22 June 2017, the Panel met to discuss Mrs S’ IDRP stage one complaint (the **Meeting**). A summary of the Minutes of the Meeting (the **Minutes**) is set out in Appendix 2.

13. On 29 June 2017, the Council sent Mrs S its IDRP stage one decision but did not uphold her complaint. In summary it said:-

13.1. The Panel considered all the evidence and representations Mrs S had made. However, it decided to uphold the original decision to award the death grant to Mrs S and Mr S’ sons in equal shares.

13.2. Under the 2013 Regulations, the Council had a wide discretion as to how a death grant should be awarded, even where there was a completed Form. There was no Form in this case so the Panel took the Will into consideration.

13.3. The death grant falls outside of the deceased’s estate.

13.4. It is the Council’s established practice, particularly where there is no completed Form, to have regard to the interests of all family members where possible, including children from past relationships.

13.5. While it appreciated the difficult issues and concerns Mrs S had explained at length, having given careful consideration to the matter, the established practice should be followed in this case.

13.6. It was mindful that the Will stated that, after Mrs S’ death, the house was to be shared equally between Mr S’ sons. So, it believed that sharing the death grant, between Mrs S and his sons, was the fairest way of proceeding when exercising discretion.

14. On 8 November 2017, Mrs S appealed under stage two of the IDRP. In her submissions, she included a further copy of the Solicitor’s Letter and reiterated points she had made in her IDRP stage one complaint. She also made some additional comments and these are summarised below.

- 14.1. The Panel had fettered its discretion. It had given too much weight to the Council's established practice rather than to the particular circumstances of her case.
- 14.2. Mr JS had been struggling at university since his father's diagnosis and subsequent death. His substance abuse had increased because he was now receiving a dependant's pension from the Scheme and had more disposable income.
- 14.3. To have received a lump sum of over £38,000 would have undoubtedly jeopardised his undergraduate studies and he would have fallen short of his potential.
- 14.4. She considered Mr MS and Mr IS as her sons, having been closely involved in their upbringing. Mr S initially intended to make her the sole beneficiary of his Will. However, she was uncomfortable with this because she considered that his sons would have felt they had been overlooked by their father.
- 14.5. Mr S structured his estate so that the children would receive no immediate benefit on his death. He wanted to ensure that she would be financially secure and that the children would receive an inheritance on her death.
15. Between 22 November 2017 and 24 February 2018, extensions were agreed between Mrs S and the Council to enable Mrs S to provide further evidence, and for the Council to issue its IDRP stage two decision.
16. On 10 April 2018, the IDRP stage two decision-maker queried whether the death grant was discussed during Mrs S' meetings with the solicitor. Mrs S confirmed that it was not discussed.
17. On 18 April 2018, the decision-maker issued its IDRP stage two decision. A summary of its response is set out below.
 - 17.1. Its role was to determine whether: (i) the Council had made its decision in accordance with the 2013 Regulations; (ii) that all relevant evidence had been taken into account; and (iii) that the decision reached was reasonable in the circumstances.
 - 17.2. The Council had absolute discretion to pay the death grant to any of the persons named in Regulation 46(2) of the 2013 Regulations. This included an individual who appeared to have been a relative or dependant of the member. The 2013 Regulations, allowed for the payment of the death grant to the wife and children of the deceased.
 - 17.3. Although each case was considered on its own facts, when exercising its discretion in paying the death grant, the Council should have regard to its established practice and previous decisions.

- 17.4. It was the Council's usual practice, especially where the member had not completed a Form, to have regard to the interests of all family members, where possible. This included children from past relationships.
- 17.5. It noted that the Will made provision for the house to be shared equally between Mr S' sons after Mrs S' death.
- 17.6. In reaching its decision, it took into account all the evidence that had been provided to the Council. In particular:-
 - 17.6.1. The comments Mrs S made in her stage two IDRP appeal.
 - 17.6.2. The Will.
 - 17.6.3. The Solicitor's Letter.
- 17.7. The evidence, including the Will and the Solicitor's Letter, were available to the Council when it considered Mrs S' complaint at stage one of the IDRP.
- 17.8. After considering the evidence, it could not say that the Council's decision, regarding the distribution of the death grant, was unreasonable in the circumstances.
- 17.9. Concerning the Solicitor's Letter, it did not appear that Mr S mentioned the death grant during his discussion with the solicitor. Consequently, the letter could not be considered as direct evidence of Mr S' intentions at the time. Furthermore, Mrs S had subsequently confirmed that the death grant was not discussed at the meeting with the solicitor.
- 17.10. The difficulty was that Mr S did not complete a Form. The Will provided for both Mrs S and Mr S' sons. The Council had not heard from his sons regarding the payments to be made to them.
- 17.11. The Council was confident that the decision, to divide the death grant between Mrs S and Mr S' sons, was consistent with the relevant regulations. In coming to its decision, the Council made reasonable enquiries, gave Mrs S more time to provide information and took into account all the relevant information.

18. Summary of Mrs S' position

- 18.1. She was not given the opportunity to make representations to the Panel in person. Nor was she given the opportunity to answer any queries it may have had during its protracted decision-making process. The only information the Panel requested, was a copy of the Will and evidence that the funeral expenses had been paid.
- 18.2. The decision was made with undue reference to the established practice of the Council. At each stage of the IDRP, there was evidence that its established practice had been used to determine the outcome. For the Council's decision to be discretionary, it must not revert to an established norm. It must undertake

a full and proper examination of the facts, especially where a Form had not been completed by the member.

- 18.3. The Council misinterpreted the Will during the IDRP process.
- 18.4. Although it was agreed that the stage two IDRP decision should be delayed, the investigation was not being conducted in a timely manner.
- 18.5. On 8 November 2017, she submitted her IDRP stage one appeal, following advice from the Council's pension department, to prevent the distribution of the death grant. The IDRP stage two decision-maker allowed her to make a detailed submission which she submitted on 2 January 2018. These delays had caused her considerable distress and extended the appeal process beyond two years.
- 18.6. She had also suffered distress because of the Panel's decision to award a large sum of money to two vulnerable adults.

19. Summary of the Council's position

- 19.1. The Council invited Mrs S to disclose details of Mr S' children and their status/eligibility so it could determine if they were eligible for dependant's benefits. The Council subsequently requested a copy of the Will.
- 19.2. Where there is no Form, the Council will make its decision concerning the distribution of the death grant after making further reasonable enquiries. It considers information held on the member's record and any documentation that has been completed by a potential beneficiary. The Council will also consider the deceased member's will.
- 19.3. Following the Council's decision to make the apportionment it had originally determined, the Council sent claim forms to Mr S' sons. It did not make any further enquiries with the sons, as this could potentially have involved trying to elicit "highly personal information" to establish their circumstances and their wishes concerning the death grant. This may have caused a conflict between the beneficiaries.
- 19.4. Having revisited the decision following Mrs S' IDRP complaint, the Council considered that the evidence Mrs S presented did not change the original decision.
- 19.5. The Council's decision, to apportion the death grant equally between Mrs S and Mr S' sons, was in accordance with the Administering Authority's published Discretions, as required in the 2013 Regulations & the Local Government Pension Scheme (Transitional Provisions, Savings and Amendment) Regulations 2014.
- 19.6. Mrs S was awarded a spouse's pension; this was put into payment at the time.

- 19.7. The Council makes its decisions in accordance with its discretionary powers. It uses an impartial decision-making process when awarding discretionary benefits.
- 19.8. Following a reasonable evidence gathering process, the Council noted that Mrs S was the main beneficiary of Mr S' estate.
- 19.9. It was acknowledged that upon Mrs S' death, and provided that Mr JS was not in full-time education, the proceeds of the sale of the marital home would be shared 30% each between the surviving sons and 10% toward any grandchildren.
- 19.10. Having considered the information provided by Mrs S, including information concerning the personal circumstances of Mr S' two older sons, the Council decided that it would be unfair to exclude them from benefitting from a proportion of the death grant. This was because they were named as beneficiaries in the Will.
- 19.11. Regarding Mr JS, the Council understood that he had now left full-time education and was in employment. He is also named as a beneficiary.
- 19.12. The Council acknowledged that more than two years had elapsed since Mr S' death. However, the death grant had not yet been paid. So, payment of the death grant would now be deemed to be an unauthorised payment and would be subject to tax charges.
- 19.13. As the beneficiaries did not contribute to the delays, it would pay any tax charges that may arise on the late payment of the death grant.
- 19.14. The Council would have been in a position to pay the death grant within the two-year period. However, it suspended the payments while the IDR process was ongoing. Mrs S subsequently referred the matter to The Pensions Ombudsman (TPO).

Adjudicator's Opinion

20. Mrs S' complaint was considered by one of our Adjudicators who concluded that further action was required by the Council. It should reconsider its decision concerning the distribution of the death grant because it had failed to make reasonable enquiries before exercising its discretion. In summary the Adjudicator said:-
 - 20.1. The Council correctly identified Mrs S and Mr S' sons as potential beneficiaries of the death grant. However, the Council did not consider the circumstances of each potential beneficiary before it decided how it would distribute the death grant.

- 20.2. The Council said that it considered Mrs S' status as the widow. However, the Council's email on 25 January 2017, and the Minutes, supported the view that the Council did not consider Mrs S' financial circumstances and whether she was dependant on Mr S at the time of his death.
- 20.3. Although Mr S' sons were entitled to be considered as potential beneficiaries, his two older sons were in their 40s and were not financially dependent on Mr S at the time of his death. Mrs S had provided a detailed explanation to the Council concerning why she should be the sole beneficiary of the death grant.
- 20.4. The Adjudicator appreciated that Mrs S did not provide the Council with any evidence to support her submissions. However, the Adjudicator was of the view that it would have been reasonable for the Council to have contacted Mr S' sons, to establish if there was any merit in what Mrs S had said concerning their circumstances. There was no evidence that the Council had made further enquiries before it made its decision to pay them a proportion of the death grant. The Adjudicator noted that the Council did not ask them to disclose details of their financial circumstances.
- 20.5. The Adjudicator did not agree with Mrs S that the Council had fettered its discretion, or that it had placed too much weight on previous decisions.
- 20.6. However, it was the Adjudicator's view that the Council did not properly exercise its discretion. Instead, it based its decision on the contents of the Will. In the Adjudicator's view, the Council had failed to obtain and consider information concerning the financial status of the potential beneficiaries. Also, the degree of their financial dependency, age, and individual needs. So, the Council should reconsider its decision concerning the distribution of the death grant.
- 20.7. The Adjudicator noted that the Council had agreed to pay any tax charges arising from the late payment of the death grant. So, she did not consider this point further.
- 20.8. The Adjudicator was also of the view that this situation had caused Mrs S serious distress and inconvenience. She would have been dealing with this issue at a time when she was grieving for her husband, so, she should receive an award in recognition of the serious distress and inconvenience she had experienced.
21. The Council did not accept the Adjudicator's Opinion. It referred to case law where the courts had considered the proper exercise of administrative discretion in circumstances where statute permits, but does not require, consideration of certain matters². It also said in summary:-

² Details of Case Law the Council referred to are set out in Appendix 3.

- 21.1. The Adjudicator's Opinion was flawed. The alleged maladministration, that the Adjudicator had identified, related to the reasonableness of the Council's decision. This was not within the Pensions Ombudsman's jurisdiction.
- 21.2. It did not believe that the Council was under an obligation to make the enquiries the Adjudicator had referred to in the Opinion. Regulation 46 of the 2013 Regulations, did not impose this but gave the Council the broadest possible discretion.
- 21.3. The Adjudicator should have considered whether the additional information was "so obviously material" that it was irrational for the Council not to seek it. So, she had failed to apply the correct legal test.
- 21.4. The Adjudicator substituted her own view on how its discretion should have been exercised and did not respect the Council's "Wednesbury" discretion. This is very different from saying that the Council acted unreasonably by not making further enquiries.
- 21.5. If the Council were to undertake the investigation, that the Adjudicator had envisaged, this would be a time consuming and complex process.
- 21.6. It was unreasonable for the Adjudicator to conclude that, in enacting Regulation 46 of the 2013 Regulations, Parliament intended the Council to devote a considerable amount of its time and resources to carrying out investigations of this nature.
22. The complaint was passed to me to consider and I issued a preliminary decision (the **Decision**), upholding the complaint. The Council made further submissions in response to that Decision, which are summarised below.
 - 22.1. The Deputy Pensions Ombudsman (the **DPO**) based his Decision primarily on a different reasoning to that of the Adjudicator's Opinion. Mainly the Council's interpretation of the Will. The DPO had misunderstood both the basis of the Council's reasoning and Mr and Mrs S' understanding of how the death grant would be distributed in the event of his death.
 - 22.2. Mrs S initially explained that she and Mr S' sons were beneficiaries of the estate generally. In particular, that the Will was intended to operate in a way that would allow her to have use of Mr S' share of the property during her lifetime; thereafter his sons would each have a share. This was confirmed in the Solicitor's Letter.
 - 22.3. The Council's understanding of Mr S' intentions in making his Will was correct. The Will names Mrs S and Mr S' sons as the beneficiaries of the estate and makes provision for his adult children. The standard practice is for the Panel to use the member's will as an "aide memoir". However, it does not follow it rigidly: the will guides the Panel in relation to the deceased's wishes.

- 22.4. The Council believes that it has exercised discretion in a manner that is reasonable and fair. Given what Mr and Mrs S' solicitors had advised the Council, the Council's decision is in accordance with Mr S' intentions.
- 22.5. The DPO erred in law by expressing a view on how he would have decided the matter. He did not consider whether the Council had acted within its discretionary powers under Regulation 46 of the 2013 Regulations, which it clearly did. While the DPO focused on one clause in the Will, the Council considered it overall and Mr and Mrs S' understanding of what the Will was intended to achieve.
- 22.6. The DPO also erred regarding the Council's role as being that of a court in interpreting the meaning of the Will.
- 22.7. The DPO agreed with the Adjudicator's Opinion that the Council had failed to make reasonable enquiries concerning the particular circumstances of Mr S' sons. However, the Council considers that the Decision is also flawed for the same reasons it had provided in response to the Adjudicator's Opinion.

Ombudsman's Decision

- 23. Mrs S' complaint concerns the Council's decision to split the death grant equally between her and Mr S' sons.
- 24. My role is to consider whether the procedure the Council followed, in exercising its discretion, was reasonable. There are some well-established principles which a decision-maker is expected to follow in exercising its discretion. Briefly, it must take into account all relevant matters and no irrelevant ones. It must not make a perverse decision; that is, a decision which no reasonable decision-maker, properly directing itself, could arrive at in the circumstances.
- 25. A decision-maker must consider and weigh all the relevant evidence, but the weight to attach to any piece of evidence is for the decision-maker to decide. In fact, a decision-maker could, if it wished, attach no weight at all to a piece of evidence. The only requirement is that the evidence is considered.
- 26. If I am not satisfied that the decision has been taken properly, I may ask the decision-maker to look at the matter again. However, I would not usually replace the decision with a decision of my own or say what the subsequent decision should be.
- 27. The 2013 Regulations, determine the circumstances in which death grants may be paid, to whom they may be paid to, the conditions which potential beneficiaries must satisfy. Also, how the death grant is calculated, and the way in which decisions involving the exercise of discretion must be taken.
- 28. The 2013 Regulations, gives the Council discretion regarding the distribution of the death grant. This limits the extent to which I can interfere with its decision. My role is to ensure that the Council followed the correct decision-making process. I can only interfere with the decision if the decision-maker failed to take something relevant into

account or took something irrelevant into account. If it failed to ask the correct questions as determined by the 2013 Regulations; or failed to construe and follow the 2013 Regulations correctly. Or the decision-maker reached a decision no reasonable person could have reached.

29. Under the 2013 Regulations, the death grant can be paid to any person appearing to the Council to be a relative or dependant of the member.
30. For the decision to have been properly made, the Council must have made it, as set out in the 2013 Regulations. The decision to split the death grant equally between Mrs S and Mr S' sons was made by the Panel. The Panel has delegated authority from the Council to decide on the distribution of the death grant. So, the decision cannot be challenged on this basis.
31. Before deciding how to exercise its discretion, the Council had to identify the potential beneficiaries under the 2013 Regulations. I find that the Council correctly identified Mrs S and Mr S' sons as the potential beneficiaries, in accordance with the 2013 Regulations.
32. Once the Council had identified the potential beneficiaries, it had to decide to whom the death grant should be paid. The Council had to ask the relevant questions and consider matters, such as the financial status of the potential beneficiaries, the degree of financial dependency, and the age and need of the potential beneficiaries.
33. The Council must not limit or 'fetter' its discretion by applying a set list of requirements or order of priorities for awarding the death grant.
34. Where there is more than one category of potential beneficiaries, the Council must consider each category and decide whether to award the death grant to beneficiaries within that category, rather than considering only one class of potential beneficiaries.
35. The Council does not have to pay a portion of the death grant to all the potential beneficiaries or pay an equal share of the death grant to each potential beneficiary. Provided that the other requirements, such as considering all of the relevant information, have been complied with, the Council is permitted to prefer the interests of some beneficiaries over that of others.
36. The Council's decision on how the death grant should be allocated was primarily based on the Will, and how its interpretation of the Will should be applied in accordance with its "established practice." Mainly, that it considers the interest of all family members where possible. I find that the Council mis-interpreted the Will, when it made its decision concerning how the death grant should be distributed.
37. Contrary to the Council's interpretation, the Will did not name Mr S' sons as beneficiaries of Mr S' estate. The only beneficiary named in the Will is Mrs S. The Will provides that on Mrs S' death, any property held on trust would be shared between his sons.

38. The Council said that the Will provided for Mrs S and Mr S' sons. However, there is a trust period: Mr S' sons will not receive any share of the marital home, if this still forms part of the estate, until Mrs S' death. Clause 4(c) of the Will states:

“DURING the Trust Period my Trustees shall not (subject to the Beneficiary's reasonable compliance within the terms of (e) below) sell my House or the Contents except with the Beneficiary's written consent but they shall sell my House or the Contents at the Beneficiary's written request.” (Original emphasis).

39. I find that the Council misled itself on the meaning of Clause 4(c) of the Will. In the Minutes, the Council recorded “that the Will is effectively saying that Mrs [S] cannot sell the house and leave the money to anyone else.” The Minutes also say that: “The proceeds from the sale of the house (after Mrs [S'] death and allowing for the clause for the youngest son) would then be shared 30% to each of the sons and 10% to any grandchildren.”
40. The Council was of the opinion that Mrs S could not sell the marital home and it was partly for this reason that the Panel agreed to split the death grant equally between Mrs S and Mr S' sons. The Council said it took into account the fact that Mr S was in a second marriage at the time of his death, and it wanted to protect the children from his previous relationship.
41. Mrs S is the beneficiary of the Will. However, clause 4(c) makes clear that the trustees can sell the house at her request.
42. Clause 6 of the Will states:
- “SUBJECT AS aforesaid and to the payment of my funeral administration and testamentary expense Inheritance tax and debts I give the residue of estate wheresoever and whatsoever to my said wife [Mrs S] absolutely...” (Original emphasis).
43. I find that this clause shows, as confirmed by the solicitor who drafted the Will, that Mr S intended to leave all of his residual estate to Mrs S. The death grant does not form part of Mr S' estate. Nevertheless, the Will is useful as an indicator of Mr S' overall intentions in relation to his assets.
44. The Council made its decision based on an incorrect interpretation of the Will. I find that the Council disregarded the fact that Mrs S is the sole beneficiary of the Will. The error on the part of the Council amounts to maladministration.
45. In the correspondence it sent to Mrs S, the Council repeatedly referred to its “established practice.” Specifically, that the Council would take into consideration the interests of all family members where possible. This is also repeated in its correspondence to TPO.

46. The Council said that where there is no Form, the award of the death grant is based on any additional information it has gathered after making reasonable enquiries. For example, information held on the deceased member's record and the will.
47. However, prior to the Panel making its decision in January 2017, the Council did not request additional information and/or make reasonable enquiries, as it did not contact Mr S' sons until after it had made its decision. At the Meeting, it confirmed that Mr S' sons had not been contacted by the Council. In its IDR stage one decision, the Council said that it had carefully considered the matter. However, the decision only referred to the contents of the Will and the fact that the house would be shared between Mr S' sons after Mrs S' death. The IDR stage one decision confirmed that the Council had focused on three documents that it considered were of particular note (see paragraph 17.6 above).
48. Where a public body has discretion in exercising its public functions, it must not fetter that discretion by adopting an over-rigid policy. However, it is generally lawful, and can be desirable, for a public body to have a policy which allows for exceptions, so long as there is genuine flexibility in practice.
49. On balance, I do not consider that the Panel fettered its discretion by applying the Council's standard custom and practice. However, on reviewing the evidence, I find that it failed to make reasonable enquiries.
50. In its submissions, the Council comments that the Decision is primarily based on a different reasoning to that which is set out in the Adjudicator's Opinion, mainly the Council's interpretation of the Will. The Council did not expand on this point, but it did say that the Decision misunderstood both the basis of the Council's reasoning and evidence of both Mr and Mrs S' understanding. It provided quoted extracts from Mrs S' original representations to the Council, to support its position.
51. There is no dispute that the intention was that any share of the house was not to be made until after the death of Mrs S. However, I do not consider that the decision made by the Council reflects this. This is because the Council's decision concerning the distribution of the death grant immediately provides a share of the death grant to Mr S' sons. The intention, as controlled by and set out in Mr S' Will, was that his sons would not receive a share of his estate until the death of Mrs S. This intention is set out in Mrs S' submissions to the Panel.
52. The Council concludes from Mrs S' initial submissions that Mrs S herself states that she and Mr S' sons were intended to be beneficiaries of Mr S' estate generally. I find this to be an odd interpretation of a statement which makes it clear that the entire estate, less a 50% share of the house, to be held for the three children until after Mrs S' death, was to go to Mrs S.
53. The Council refers to the Solicitor's Letter, to support its position. But it makes no reference to an extract in this letter which states:

“At no point during our discussion did Mr S suggest that he wished to leave his cash, pension value or residue equally between his three children and Mrs S.”

54. The Council contends that the Decision errs in several ways.
55. The Decision addressed the 2013 Regulations, and I confirmed that the Panel had the delegated authority to make the decision. So, the Panel's decision could not be challenged on this basis. I find that it is the Council's use of discretion that has been applied incorrectly.
56. The Council argues that the Decision placed too much emphasis on the meaning of the Will. It asserted that it took a broader view including the unchallenged evidence of Mr & Mrs S. The difficulty I find with this is that the Council had ignored Mrs S' objections to its decision on the distribution of the death grant. The fact that she has made two challenges to its decision through the Fund's IDRP means that she is challenging the Council's interpretation of her evidence.
57. Interestingly, the Council said that it is standard practice for the Panel to use the Will as an "aide memoir". It does not follow it rigidly. It also said that it believes that it followed Mr S' wishes in a manner that was reasonable and fair.
58. Looking at the original decision made on 26 January 2017, when the decision was made on receipt of the Will, I consider that focusing on the incorrect interpretation of the Will, in the Decision, was not unreasonable. This is because this was the only information the Council had, that set out Mr S' wishes, at the time that it made its original decision on the distribution of the death grant.
59. In an internal Council email dated 13 June 2017, the comment is made that, "As the Will has featured heavily in the original decision I've attached a copy for the panel to read before the meeting". The emphasis on the Will is also recorded in the Minutes.
60. At the Meeting the Council recognised that Mr S' estate was to be shared between Mr S' sons after the death of Mrs S. The Council does not recognise that its decision provides Mr S' sons with a share of the death grant, prior to her death and against the wishes of Mrs S.
61. In its stage two IDRP response dated 18 April 2018, the Council noted that the Will of the late Mr S made provision that after Mrs S' death, the house is to be shared equally between the sons. Again, this highlights the fact that the Council recognised that any benefit was to be provided to the sons after Mrs S' death.
62. The Council said that in the Decision, I deemed the Panel's role as being that of a court in interpreting the meaning of the Will. Due to the apparent weight placed on the contents of the Will by the Council, I consider it reasonable to expect the Council to understand the Will and appreciate how it reflects the wishes of Mr S and Mrs S. The email correspondence on 25 and 26 January 2017, confirms that the Panel relied on the Will to support its decision.

63. The Council referred to its previous objections to the Adjudicator's Opinion and why it believes the Decision was flawed. Its objections focused on whether the Adjudicator had reached a decision on maladministration based on the actions that the Adjudicator had considered reasonable and necessary, rather than the actual actions of the Council. For this reason, the Council commented that it did not believe this was a matter which engaged my jurisdiction.
64. In the Decision, I focused on the actions of the Council and what it did and did not do, acts or omissions, that clearly fall within my jurisdiction. It is within my powers to expand on the Adjudicator's Opinion and make a Determination on alternative points where necessary.
65. In its response to the Adjudicator's Opinion, the Council said:
- “the fact that the complainant did not complain that further inquiries should have been made underlines the fact that [the Adjudicator] substituted [her] own view of what the Council should have done”.
66. I do not consider the Council's assertion is correct. In her application to TPO Mrs S said that she was not given the opportunity to explain the family circumstances. In her statement that she submitted to the Council in support of her IDRP stage one complaint, Mrs S clearly set out her complaint and how both her and Mr S wished his estate to be administered.
67. My findings in the Decision were based on a factual assessment of how the Council handled the claim, and I found that it did not obtain additional information from Mr S' sons. At the Meeting, the Panel discussed whether the three sons had been approached and it was recognised that they had not. This is confirmed in the Council's stage two IDRP decision as it said it had not heard directly from Mr S' sons in respect of the payment, and that it had no direct evidence as to the assertions set out in Mrs S' IDRP stage two appeal documentation.
68. I have seen no evidence that the Council sought any comments from the sons despite the concerns raised by Mrs S. As a consequence of not seeking this additional information and incorrectly interpreting the Will, the Council's decision was flawed.
69. I find that this situation had caused Mrs S serious distress and inconvenience for the same reasons detailed in paragraph 20.8 above. So, she shall receive an award in recognition of the serious distress and inconvenience she has experienced.
70. I uphold the complaint and the Council shall reconsider its decision concerning the distribution of the death grant.

Directions

71. To put matters right, within 28 days of the date of this Determination, the Council shall:-

71.1. Make further enquiries with Mr S' three sons; and

71.2. Pay Mrs S £1,000 for the serious distress and inconvenience this situation has caused her.

72. Within 28 days of it obtaining further information from Mr S' three sons, the Council shall:-

72.1. Reconsider its decision concerning the distribution of the death grant.

Anthony Arter CBE

Deputy Pensions Ombudsman
13 February 2023

Appendix 1

73. Relevant sections of the Local Government Pension Scheme Regulations 2013

“ ...

46.—(1) If a pensioner member dies before attaining the age of 75 an administering authority shall pay a death grant.

(2) The appropriate administering authority may, at its absolute discretion, pay the death grant to or for the benefit of the member's nominee, personal representatives or any person appearing to the authority to have been a relative or dependent of the member...”

Appendix 2

74. Summary of the Council's Pension Panel 22 June 2017 Meeting Minutes

The Will was discussed and it was confirmed that the Panel had based its initial decision concerning the distribution of the death grant on the contents of the Will.

They said that the Will was effectively saying that Mrs S could not sell the house and leave the money to anyone else and that she could continue to live there for her lifetime and, if, at the event of her death, the youngest son was still in full-time education, he could continue to live at the house until he completed his studies.

The proceeds from the sale of the house (after Mrs S' death and allowing for the clause for the youngest son) would then be shared 30% to each of the sons and 10% to any grandchildren. The Will also states that funeral expenses were to be met from the estate.

It was on this basis that the Panel had agreed to pay the death grant equally to Mrs S and Mr S' three sons. The reason behind the initial decision was that Mr S was in a second marriage. It was to protect the children from his previous relationship.

They discussed if the death grant formed part of the estate and if it were taxable. It was confirmed that it did not and that it was tax free.

They discussed that previously the death grant would have been paid through probate. However, this changed in 1997 when the Regulations allowed discretion.

They confirmed that Mr S' three sons had not been contacted at the time. The process was that the Council sends a letter to the person who notifies it of the death. This letter includes a Claim Form, for the person to complete.

In this case, the completed Claim Form referred to Mr S' three sons and other family members.

It appeared that Mr S thought the death grant would form part of his estate. There was no record that Mr S had ever completed a next of kin form.

Mr S may have assumed that as Mrs S would get a widow's pension, she would also receive the death grant.

The Solicitor's Letter was considered but it was noted that it was only the solicitor's opinion.

They referred to the 2013 Regulations and said that it needed to be consistent in looking after all dependants.

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It was agreed that the Panel's original decision should stand, and the death grant should be shared equally between Mrs S and Mr S' three sons.

Mrs S would have the right to appeal under stage two of the IDRP.

It was agreed that the death grant would not be paid out at that time.

Appendix 3

75. A list of the Case Law the Council referred to in its response to the Adjudicator's Opinion.

R v Local Commissioner for Administration, ex parte Eastleigh Borough Council [1988] 1 QB 855 at 863E-F

CREEDNZ Inc v Governor General [1981] 1 NZLR 172

In re Findlay [1985] AC 318

Friends of the Earth v Secretary of State for Transport [2021] PTSR 190

R (Transport Action Network Ltd) v Secretary of State for Transport [2021] EWHC 2095 Admin