

Ombudsman's Determination

Applicant	Ms Y
Scheme	Phoenix Life Personal Pension (the Scheme)
Respondent	Phoenix Life (Phoenix)

Outcome

1. Ms Y's complaint is upheld and to put matters right Phoenix should reconsider its decision and inform her of its conclusions, with reasons.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Ms Y's complaint is that Phoenix rejected her application to receive a share of the death benefits arising from the Plan.

Background information, including submissions from the parties

4. The plan holder, Mr E, passed away on 8 August 2015. Phoenix was tasked with determining who should receive the Plan death benefits.
5. On 17 December 2015, the late Mr E's Solicitor wrote to Phoenix making the following points:-

"The deceased specifically appointed his two brothers and a partner in this firm to act as executors and trustees of the discretionary will trust [in July 2015] because he had separated from his partner, who is the surviving legal guardian of his children. At the time of his death, he had been involved in acrimonious maintenance proceedings and a Court order was made in his favour to reduce the maintenance to realistic levels.

The deceased specifically appointed the executors and trustees in his Will [dated 29 July 2015] because he trusted them to manage his children's inheritance responsibly.

He completed a Letter of Wishes [also dated 29 July 2015] stating that he expected all death in service benefits, pension nominations and life insurance

payable to his Will Trust. Unfortunately, although the deceased intended to contact the pension companies direct with regard to these nominations to his executors and trustees, he failed to do so as he did not have sufficient time to complete this before his hospital operation and subsequent death.

The deceased specifically did not trust the children's mother and legal guardian to manage their children's inheritance responsibly, hence she was not appointed as an Executor and Trustee in his Will.

The deceased had very specific wishes with regards to how the death benefits should be applied to benefit his children, particularly taking into account their education needs.

In support, we enclose a copy of the Will and draw your attention to the appointment of executors and trustees at clause 3, and also the Discretionary Will Trust at clause 10.

We enclose the relevant section in the deceased's Letter of Wishes [dated 29 July 2015], addressed to his executors and trustees in connection with the payment of all his death in service benefits and nominations. You will note that he intended for these to be paid to the Will Trust so that the executors and trustees could be responsible for ensuring appropriate child support maintenance payments are made for his sons".

6. The Solicitor also enclosed a copy of a signed letter from the late Mr E's mother waiving her nomination, which he had first made when he took out the Plan. This was on the condition that the Plan death benefits should be paid to the executors and trustees of the Discretionary Will Trust (**the Trust**), for the benefit of the late Mr E's children.
7. On 17 February 2016, a Phoenix decision-maker emailed a colleague suggesting that the Plan death benefits should be paid to the executors of the Trust for the benefit of Mr E's children. In response, the email trail is as follows:-

"Agree but we will need confirmation from the children's guardian that they agree to the money being paid to the Trust, as strictly speaking, this policy is not covered by the Will (the policy and number is not specifically detailed in the Will and these are not Death in Service benefits or a Life Assurance policy and as the Letter of Wishes is not signed or dated I would question its validity. [MD].

I agree with Jen's comments and assume if the children's guardian does not agree then we'd have to pay directly into either an account set up for each child or pay direct to the guardian? If so, then I think we should be clear on the options available when we contact the children's guardian, as she may not feel that payment to the Trust fund is the best outcome for the children, who we agree are the rightful beneficiaries. [DEB].

I agree with Jenny that the pension policy is not covered by the terms of the Will and I would disregard the document supplied by the solicitors that is said to indicate that the policy holder wished to have the funds paid into the Trust fund. If we go back to basics, the records indicate that the policy holder completed an Expression of Wish when he took out the policy, naming his parents as potential recipients – whilst we would normally disregard this as it was completed prior to the children being born, there is nothing in the Scheme Rules that prevents us from taking his expressed wishes into account. The rules state that we have absolute discretion to pay the monies to the nominated beneficiary, dependants, relatives or LPR and given we know the mother is alive (person named on Expression of Wish), I would propose to make the payment to her. I have attached a copy of the letter received from the Solicitor and disclaimer prepared by the Solicitor that the mother has signed indicating that she wishes the monies to be paid into the Trust fund – this I believe should be disregarded”.

8. On 14 April 2016, Ms Y wrote a letter to Phoenix asking to be considered as a beneficiary of the Plan death benefits. In support of her application, she said she had been in a relationship with Mr E for three and a half years, that they had been planning to build a home together and that they had pooled their resources during this time.
9. On 4 July 2016, Phoenix received a letter from the late Mr E’s former partner and mother of his three children, Ms N. Amongst other things, she stated:-

“From our separation in 2011, [the late Mr E] paid me £6,200 per month together with ad-hoc capital payments of between £25,000 and £60,000 per year. [Mr E’s] sad and untimely death has made for a very difficult financial period without this regular income, as probate has not been granted yet. The last 10 months have been stressful financially.

The beneficiaries of [Mr E’s] Will (a copy of which is enclosed) states myself and our three children as the beneficiaries, unfortunately though, this does not make any direct provision for me or for our children, with his estate being held in a Discretionary Trust. As such, the children and I are entirely dependent on the decisions of the Trustees of the Will Trust as to how much, if anything, we receive from [Mr E’s] estate. Given that we are the listed beneficiaries, and I am responsible for the day to day care and well-being and budgeting for the family, I believe it is in the boys’ best interest that these funds are paid directly to us”.
10. Based on these arguments, and since Ms N did not agree that the Plan death benefits should be paid to the Will Trust, in July 2016 the decision was taken to pay the benefits directly to her for the benefit of the late Mr E’s children.
11. Ms Y wrote to Phoenix to complain about this decision on 9 November 2016. Amongst other things, she said that Phoenix:-

“Failed to take into consideration the imbalance of the financial assets of the parties, with [Mr E] earning, over the aforementioned period, a salary in excess of £150K, whilst my earnings amounted to between €23K and €30K. My contribution to the household being significantly minor.

Failed to take into consideration that [Mr E’s] children are also amply provided for under the terms of his Will, in accordance with his wishes, and managed by trusted executors, of which expressly [Ms N] is not a party. Thereby indicating that he did not wish her to manage his children’s assets or funds, and thus by allocating such funds, the Trust now thwarts his intentions”.

12. On 20 December 2016, Phoenix responded that it was satisfied the decision to pay the Plan death benefits to Ms N was reasonable.

Adjudicator’s Opinion

13. Ms Y’s complaint was considered by one of our Adjudicators, who concluded that no further action was required by Phoenix. The Adjudicator’s findings are summarised briefly below:-

- Ms Y had testified that she pooled her resources with Mr E during their relationship and that his salary was significantly higher than hers. However, there was no record of Phoenix having made any assessment of her personal circumstances.
- Both the Solicitor and Ms Y had mentioned the maintenance proceedings started by Ms N. Furthermore, they had both testified that the late Mr E did not trust Ms N to manage the children’s inheritance responsibly and suggested that this was why Mr E did not appoint Ms N as an Executor or Trustee in his Will. However, there was no evidence that Phoenix took this testimony into account when reaching the decision to pay 100% of the Plan death benefits to Ms N.
- As a result, the Adjudicator concluded that there was relevant evidence that Phoenix failed to take into account when reaching its decision.

14. Phoenix did not accept the Adjudicator’s Opinion and the complaint was passed to me to consider. Phoenix provided its further comments, which do not change the outcome. I agree with the Adjudicator’s Opinion and I will therefore only respond to the key points made by Phoenix for completeness. In summary, these are:-

- It accepted that it could have documented, in more detail, the information it had considered and how it reached its decision.
- In light of this, it had carried out a review of the case. Having done so, it did not consider it could depart from its original decision, for the following reasons:
 - The Expression of Wish form was deemed to have no relevance, as the late Mr E had completed it when he took out the Plan, prior to the birth of his children. As a result, it did not need to take into consideration the fact that Mr

E's mother had waived her claim to any benefits on the condition that the monies were invested in the Trust.

- The Trust was not mentioned in the Will. Given the Plan death benefits are not Death in Service or Life Assurance benefits, which Mr E had directed should be paid to the Trust, the decision was taken to disregard the Trust as a potential beneficiary.
 - Ms N, as the children's guardian, suggested that paying the Plan death benefits to the Trust would not benefit them, since they were all minors.
 - The Letter of Wishes received from the Solicitor was not signed or dated by Mr E and, as such, it was considered that it was not a clear statement of his wishes and should be disregarded.
 - Provision was made for Ms Y in Mr E's Will, in the form of a number of household items and £25,000.00. As the Will was signed just two weeks before Mr E's death, it was considered if he had wanted Ms Y to receive more from his Estate and pension plans, he would have made specific provision for this.
 - The Solicitors informed it that Mr E did not cohabit with Ms Y. Furthermore, she indicated, on the claim form she completed as part of the assessment process, that she was living at a different address to Mr E shortly after his death.
- Due to these considerations, the decision was taken to pay the Plan death benefits to the late Mr E's children. Since they were all minors, it was agreed that the benefits should be paid to Ms N, as a person named in the Will as their Guardian, for the benefit of the children.
 - Phoenix acknowledged it received a letter from Ms Y on 9 November 2016 in which she said, amongst other things, that she was financially dependent on Mr E and that she was cohabiting with him at the time of his death. However, it was noted that she did not provide any supporting evidence.
 - Despite this, it had considered the points Ms Y made in her letter. Having done so, it was satisfied it had given all the potential beneficiaries the opportunity to submit supporting evidence and that the correct decision was made at the outset.

Ombudsman's decision

15. The Trust Deed and Rules (see the Appendix) provide that the Plan death benefits are payable at Phoenix's absolute discretion. Phoenix's role was therefore to determine, on the balance of probabilities, what the late Mr E's wishes are most likely to have been.
16. When I consider complaints of this nature, it is not for me to replace the decision reached by the respondent. What I look at is whether the decision was arrived at in accordance with the applicable scheme rules and any overriding legislation. I also need to be satisfied that all relevant evidence has been considered, and that no irrelevant evidence has been taken into account. Finally, I ask myself whether the decision made was perverse, in that it would not reasonably be arrived at by any other decision-maker, presented with the same evidence.
17. If I find that the decision has not been made in the correct manner, I explain why and direct the respondent to make the decision afresh. In the event that I determine that the correct procedures have been followed, even where I may not agree with the outcome, I will not make any directions.
18. I note that Phoenix provided detail which went beyond the discussions between the Committee members documented at the time Ms Y's claim was considered. However, I am unable to attach any weight to these comments, as they were submitted after the decision was made (and also after the Adjudicator had recommended the complaint should be upheld). I can only look at documents produced at the time the decision was made.
19. With respect to this, there is a passage in the email chain of the Committee's discussions which reads as follows:-

"I agree with Jenny that the pension policy is not covered by the terms of the Will and I would disregard the document supplied by the solicitors that is said to indicate that the policyholder wished to have the funds paid into the Trust fund. If we go back to basics, the records indicate that the policyholder completed an EoW when he took out the policy naming his parents as potential recipients – whilst we would normally disregard this as it was completed prior to the children being born, there is nothing in the Scheme Rules that prevents us from taking his expressed wishes into account – rules state we have the absolute discretion to pay the monies to the nominated beneficiary, dependants, relatives or LPR and given we know the mother is alive (person named on Expression of Wish), I would propose to make the payment to her – I have attached a copy of the letter received from the solicitor and disclaimer prepared by the solicitor that the mother has signed indicating that she wishes the monies to be paid into the trust fund – this I believe should be disregarded".

20. I note that the Committee member says they believe the letter from the late Mr E's Solicitor should be disregarded. However, they do not provide the reasons as to why they arrived at this conclusion. In my judgment, the letter from the Solicitor therefore constitutes relevant evidence that the Committee did not properly consider.
21. Furthermore, the comments made by this Committee member are inconsistent with those made by the other members, in that they suggest the Plan death benefits should be paid to the late Mr E's mother, in line with the Expression of Wish form. On the other hand, the rest of the Committee members were of the opinion that the benefits should be paid to Ms N, for the benefit of the late Mr E's children. Despite this, there is no record of how the Committee ultimately reached the decision to pay the benefits to Ms N and not the late Mr E's mother. This is a flaw in the decision-making process.
22. Turning to Ms Y's submissions, I note that on 14 April 2016, she sent Phoenix a letter, in which she made the following points, amongst others:-
- "Other plans included the possibility of getting married and building a new house together; we had indeed visited several land plots around Oxfordshire. Furthermore, having now returned to Ireland, I have also lost the income from the rental of the rooms in my house during the time I lived with [Mr E] in Oxford".
23. Ms Y therefore informed Phoenix that she had been living with Mr E during their relationship. However, there is no discussion of her letter in the Committee's email chain. In my judgment, this represents relevant evidence that the Committee did not properly consider in reaching its decision.
24. Moreover, in her letter dated 9 November 2016, addressed to Phoenix, Ms Y complained that:-
- "[The Committee] Ignored the fact I was in a long-term relationship with [Mr E] from 2012, living with him at [place of residence] and subsequently at [place of residence], until the time of his death, where [Mr E] provided for the rent, electricity, heat and food and many other benefits living in the household with him for me, including additional gifts and meals outside the home, as well as a gym subscription and a subscription to the Blenheim Palace Trust
- ...
- Failed to take into consideration the imbalance of financial assets of the parties, with [Mr E] earning, over the aforementioned period, a salary in excess of £150K, whilst my earnings amounted to between £23>30K. My contribution to the household being significantly minor.
- Failed to take into consideration that [Mr E's] children are also amply provided for under the terms of his Will, in accordance with his wishes, and managed by trusted executors, of which expressly [Ms N] is not a party. Thereby indicating

that he did not wish her to manage his children's assets or funds, and thus by allocating such funds the Trust now thwarts his intentions.

Failed to take into consideration that [Mr E's] Will designated Ms N simply as the "guardian" of his children and withdrew her from any ownership of the property he had purchased, re-designating her as a 'tenant' with the caveat that she leave the property at the first child turning 18 or upon marriage or co-habitation. Thereby indicating that he had no intention of providing for her in this regard.

Failed to take into consideration [Mr E's] wishes expressed in his Will in terms of his children's maintenance that sums would be used only for the useful benefit of the children for specific purposes and not allocated to Ms N to manage them

...

Failed to take into consideration [Mr E's] wish not to have Ms N involved in his life on any emotional level, including a Court super-injunction that she could not access or discuss or become anyway involved in his medical care. Thereby, ignoring the broken relationship with her and his intention of not providing for her in any way.

Failed to take into consideration my role and part in [Mr E's] life after the breakdown of this prior relationship, where he suffered from depression and was suicidal. Failed to take into consideration my emotional support of [Mr E] through all the bullying and consistent harassment for monies, including an uncalled for Court case, with the intention of, as Ms N stated, 'taking him to the cleaners'. My support of him during his time away on the race, his illness and his time in hospital was not considered by the Trust".

25. In my judgment, Ms Y made several substantive points in this letter, the most significant being that she had co-habited with the late Mr E and that they had pooled their resources. This creates the impression that there was some financial co-dependency between them.
26. Despite this, the Committee's records do not discuss any of Ms E's arguments. This is relevant evidence that the Committee did not properly consider. Accordingly, I find that there were flaws in the Committee's decision-making process.
27. Therefore, I uphold Ms Y's complaint.

Directions

28. Within 21 days of the date of this Determination, Phoenix shall reconsider Ms Y's application to receive the death benefits derived from the Plan and notify her of its decision, with reasons.

Karen Johnston

Deputy Pensions Ombudsman
16 March 2018

Appendix

The Phoenix Life Personal Pension Scheme Supplemental Deed Poll 2007

29. Section 6.6 ("Payment of lump sum death benefits") provides:-

"6.6.1 Where on the death of a Member or other beneficiary, an amount is stated to be paid in accordance with this Rule 6.6, the following provisions apply. For the avoidance of doubt, Rule 6.6.4 shall apply to any such lump sum unless it relates to Protected Rights or the Member's Policy provides otherwise.

6.6.2 Where any lump sum payable under this Rule 6.6 relates to Protected Rights or where the Policy requires this Rule to apply, the lump sum must be paid by the Scheme Administrator to the person or persons named in the most recent direction given by the Member or other beneficiary to the Scheme Administrator in relation to the payment of such lump sum death benefits and the following provisions apply.

(a) Any such direction must be in writing in such form as the Scheme Administrator may require and the Member or other beneficiary may withdraw, replace or amend that direction at any time.

(b) Where the Member or other beneficiary has not made a valid direction at the time of the Member's death, the Scheme Administrator shall pay the amount payable to the estate of the Member or other beneficiary.

(c) If the Scheme Administrator decides that it will be unable to exercise these powers within two years of the day on which the Scheme Administrator first knew of the death of the Member or other beneficiary, the Scheme Administrator may decide prior to the end of that two year period to hold the sum as a separate fund, outside the Scheme, or pay the sum to the personal representatives (or executors) of the deceased Member or other beneficiary, or if there are none, his statutory next of kin.

(f) The following provisions of this Rule 6.6 do not apply to the Protected Rights of a Member or other beneficiary and shall only apply to other rights under the Scheme where permitted under the provisions of the relevant Policy".