

Ombudsman's Determination

Applicant	Mrs T
Scheme	Zurich Flexible Drawdown Plan (the Plan)
Respondent	James Hay Partnership (JHP)

Outcome

1. I do not uphold Mrs T's complaint and no further action is required by JHP.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs T's complaint arises because JHP rejected her application to receive 100% of the Plan death benefits following the death of her husband, Mr T, who was the member.

Background information, including submissions from the parties

4. Mr T took out the Plan in October 2002 and nominated Mrs T to receive any benefits payable upon his death.
5. Mr T suffered a heart attack in December 2012, during a trip to Brazil.
6. On 16 November 2013, JHP received a letter instructing it to change the nominated beneficiary from Mrs T to Mrs N, a close family member. The letter also instructed JHP to send all correspondence to Mrs N's address going forward.
7. Sadly, Mr T died on 4 September 2015.
8. Mrs T wrote to JHP on 7 September 2015 enclosing a copy of a Court of Protection Order (**the Order**), dated 25 January 2013, which appointed an Interim Deputy for Mr T. On this basis, Mrs T argued that Mr T did not have sufficient capacity to change the nominated beneficiary in November 2013. Accordingly, the nomination form Mr T had submitted to JHP on 16 November 2013 should be disregarded, and she should be the sole beneficiary of the death benefits provisions of the Plan.
9. JHP requested a copy of Mr T's final Will from both Mrs T and Mrs N, in order to establish if its contents substantiated the nomination he had made on 16 November 2013.

10. At the end of September 2015, Mrs N provided JHP with a certified copy of Mr T's final Will, which was dated 7 July 2010. Whilst the Will made no reference to who should stand to receive death benefits from the Plan, JHP noted a passage which read:-

"I declare that I have made no provision for my wife, having regard to the substantial provisions I have already made for her in my lifetime and to the fact that she has substantial resources of her own".

11. Mrs T wrote to JHP on 8 October 2015 to make her case that she should receive the death benefits derived from the Plan. She made the following points:-
- The Order demonstrated that Mr T did not have sufficient capacity to nominate another beneficiary in her place in November 2013.
 - It was not true to say that she had been provided for and had substantial financial resources of her own, as Mr T had suggested in his Will.
 - She had been alienated from Mr T by his family prior to his death.
 - Mr T had made sizeable gifts of money and property to the other beneficiaries named in his Will before he died.
12. JHP acknowledged Mrs T's letter and advised her it would make further enquiries. JHP then wrote to the executors of Mr T's Will (**the executors**), and the Interim Deputy appointed on 25 January 2013, to request further information about Mr T's affairs.
13. In November 2015, JHP received a letter from the executors, in which they made the following points:-
- Under the Mental Capacity Act 2005, there is a presumption of capacity, and whilst a person may lack capacity to make some decisions, they will be able to make other choices. They enclosed a report from a Consultant Psychiatrist who carried out a private assessment of Mr T in August 2015 for the purpose of creating a Lasting Power of Attorney. The conclusion of the assessment was that Mr T had sufficient capacity and had not been placed under any undue influence. On this basis, the executors argued that Mr T is likely to have had sufficient capacity to change his nominated beneficiary in November 2013.
 - Mr T's marriage to Mrs T was strained and they mostly lived apart in the years leading up to the onset of his ill-health.
 - Further, that after Mr T became ill in 2012, he went into care and Mrs T was prevented from visiting him, in accordance with his wishes.
14. In order to obtain a fuller understanding of the facts, JHP issued follow up requests for information to the Interim Deputy.

15. In April 2016, the Interim Deputy responded through a representative. It was stated that Mr T was estranged from Mrs T and so she should not receive any death benefits. It was further declared that it was the Interim Deputy's understanding that Mr T's intention was that Mrs N should be the sole beneficiary of the death benefits provisions of the Plan.
16. JHP also obtained external legal advice, which was as follows:-
 - The appointment of the Interim Deputy does not necessarily mean Mr T did not have sufficient capacity to make decisions at any point thereafter. The law presumes that an adult has the right to make decisions, and has the legal capacity to do so, unless it is shown otherwise. Further, that the psychiatric assessment undertaken in August 2015 concluded that Mr T had sufficient capacity to create a Lasting Power of Attorney at that time.
 - The change Mr T made to his nominated beneficiary in November 2013, when read alongside his final Will, demonstrates that his intention was for another party to receive the death benefits arising from the Plan, and that Mrs T should not.
17. In order to gain a more complete understanding of Mr T's mental capacity and his affairs in the years before his death, JHP wrote to the executors again.
18. The executors responded by letter in November 2016, enclosing the following:-
 - A witness statement from a relative of Mr T, which set out the following:-
 - In the period before he became ill in December 2012, Mr T leased properties, with the objective of limiting the time he spent with Mrs T.
 - Mr T required extensive surgery in Brazil in 2012, for which Mrs T refused to pay, and as a result close personal friends of Mr T had to pay for it.
 - When Mr T recovered from his surgery and moved back to the United Kingdom, he went into care and never returned to live with Mrs T.
 - Finally, that in November 2013, Mr T freely chose to change his nominated beneficiary from Mrs T to Mrs N.
 - A witness statement from a personal friend of Mr T, which corroborated the points made by the relative in their witness statement.
 - A witness statement provided in support of the Order, dated 21 January 2013, which laid out the following:-
 - The marriage between Mr T and Mrs T had broken down and he preferred to live apart from her.
 - Mr T had expressed regret that he had transferred the ownership of some properties to Mrs T.

- Mrs T had upset some of the hospital staff caring for Mr T in Brazil in December 2012.
 - Mrs T refused to contribute towards Mr T's medical costs and these were covered by close personal friends of Mr T instead.
 - Mrs T was not concerned about Mr T's welfare, and only wanted access to his money.
 - It was in Mr T's interests to appoint an Interim Deputy to take control of his affairs, and Mrs T should not be afforded that opportunity.
 - A copy of Mr T's earlier Will, dated 28 March 2006, which set out the following:-
 - He wanted to leave Mrs T the sum of £500,000, free of inheritance tax, and for her to receive an amount, as was due to her from the Estate, under contract of partnership with a particular firm.
 - He had made substantial provision for Mrs T during his lifetime, and she had significant financial resources of her own.
 - A letter of wishes form written and signed by Mr T, dated 28 March 2006, which declared:-
 - He had decided that Mrs T would not benefit from any Trusts he had because he had made adequate financial provision for her throughout the course of his lifetime and in his Will.
 - That the £500,000 he had bequeathed to Mrs T in his Will was not the only resource she would benefit from, as he had already purchased a property for her, which was worth over £1 million.
 - Mrs T had substantial assets in the United States, worth approximately £2.5 million.
 - In his opinion, Mrs T had been generously provided for.
 - Tenancy agreements for properties leased by Mr T, dating from 2010.
19. On 10 January 2017, JHP wrote to Mrs T to tell her that she had not been identified as a beneficiary of the death benefits provisions of the Plan.
20. Mrs T wrote to JHP on 10 January 2017 to tell it that she intended to dispute its decision and to ask it to delay paying any of the Plan death benefits.
21. On 21 March 2017, JHP issued its final response to Mrs T, saying it was satisfied that it had taken into consideration all the evidence submitted by her, along with all the documentation provided by the other parties. JHP further pointed out that it had obtained a legal opinion on the matter. JHP stated that, as a result of its enquiries,

Mrs T was not identified as a beneficiary of the death benefit provisions of the Plan. JHP also said that it was satisfied that its decision was not perverse or unreasonable.

Adjudicator's Opinion

22. Mrs T's complaint was considered by one of our Adjudicators, who concluded that no further action was required by JHP. The Adjudicator's findings are summarised briefly below:-

- Following receipt of Mrs T's letter notifying it of the appointment of the Interim Deputy in January 2013, JHP sought to determine whether, on balance, he had sufficient capacity, in November 2013, to make the change to his nominated beneficiary.
- Amongst the evidence which JHP obtained was an external legal opinion that the appointment of the Interim Deputy for Mr T does not establish that he had insufficient capacity to change his nominated beneficiary from January 2013. The legal advice was that the law presumes that an adult has the right to make decisions, and has the legal capacity to do so, unless it is shown otherwise.
- The legal opinion also noted that the change Mr T made to his nominated beneficiary in November 2013, when considered alongside his final Will, strongly suggests that his wish was for another party to benefit from the death benefit provisions of the Plan.
- JHP also obtained witness statements from a relative and a close personal friend of Mr T. Both of these statements declared that Mr T leased properties, with the purpose of restricting the amount of time he spent with Mrs T; that Mr T had to undergo far-reaching surgery in Brazil in 2012, which Mrs T refused to pay for and as a result, had to be paid for by close personal friends of Mr T; and that Mr T freely chose to change his nominated beneficiary from Mrs T to Mrs N. The Adjudicator observed that these statements corroborated the testimony provided in the witness statement submitted to the Court of Protection. On the basis of this evidence, he concluded that, on the balance of probabilities, Mr T would not have wanted Mrs T to benefit from the death benefits provisions of the Plan.

23. Mrs T did not accept the Adjudicator's Opinion. She instructed Kingsley Napley LLP (KN), which made the following submissions, amongst others:-

- A psychiatric assessment carried out in August 2015 does not (and cannot) provide evidence of sufficient capacity to enter into a transaction in November 2013. That report came into existence for a different purpose (the only issue the psychiatrist was asked to address was whether Mr T had the capacity to create a Lasting Power of Attorney). Moreover, the psychiatrist explicitly stated that his assessment was task and time specific. Accordingly, this report should be disregarded, as it is irrelevant to the question of Mr T's capacity at the time he made the change to the nominated beneficiary.

- On the other hand, substantial weight should be attached to a psychiatric report written by Dr Jacoby and dated 11 September 2013, a copy of which KN provided. This report dealt with the question of Mr T's capacity to decide to divorce Mrs T. Dr Jacoby's assessment revealed information about Mr T's state of health a short time before he changed the nominated beneficiary. Dr Jacoby concluded:-

"In my opinion, Mr T still lacks the capacity to manage his property and affairs, bearing in mind these are relatively complex. He would have a little difficulty in recalling all the elements necessary to make decisions, and his judgment is impaired by reason of cerebral damage so that he would have difficulty in weighing up the factors necessary to make some of the decisions.

As regards the matter of divorce, and with due respect to the Court's sole prerogative, I have distinguished two separate mental capacities. First, the capacity to decide to end the marriage. This is a straightforward binary decision, analogous to the decision to get married, for which the information needing to be weighed in the balance is relatively simple. Secondly, there is the capacity to make a variety of decisions relating to the ancillary relief proceedings. The latter generally, and in this case almost certainly, require more complex information to be retained and weighed up.

In my opinion, Mr T *does* have the capacity to initiate and undertake divorce proceedings. He understands that he has made a decision to end his marriage. He fully understands what divorce entails, i.e. ending the marriage and dividing the assets. He has been consistent since before the strokes that he wishes to divorce Mrs T. Even if not before the strokes, as she avers, he has been consistent afterwards. He also understands that it is necessary for him to instruct his solicitor to help him with the divorce petition ...

Although Mr T has the capacity to undertake divorce proceedings, I consider that he does not have the full capacity to make decisions in the ancillary relief proceedings, and that for this he will need his Litigation Friend and legal advisers ...

In my opinion, by reason of cerebrovascular disease, Mr T lacks the capacity to manage his property and affairs, and to pursue proceedings in Chancery. In my opinion, he does have the capacity to undertake divorce proceedings, but will need his Litigation Friend to assist with division of the matrimonial assets".

- As such, it was considered that Mr T did not have sufficient capacity to make decisions about his property and financial affairs. Mrs N (who KN pointed out was one of the executors) knew about this report, but she appeared not to have provided JHP with a copy.
- The Interim Deputy commenced proceedings as "litigation friend" to Mr T against Mrs T in the Chancery Division of the High Court in London. This action was

ultimately abandoned, and Mrs T was awarded costs on an indemnity basis, which KN argued was an exceptional order illustrating the hopelessness of the action. Mrs T was paid damages on a cross undertaking given to obtain an injunction. However, despite this victory, JHP only obtained copies of evidence relied upon by the Interim Deputy and did not seek any of the evidence in response. Had it done so, an entirely different light would have been thrown on the matter. This was relevant evidence which JHP did not take into account when it reached its decision.

- Mr T did not change the nominated beneficiary of the Plan death benefits until after he lost capacity, despite having the opportunity to do so at annual reviews between 2002 and 2012. The Interim Deputy did not know about the Plan and Mrs N did not tell him about it, even though she knew he was the Interim Deputy.
- Mrs N did not consult with the Interim Deputy before she changed the nomination, and she did not tell him afterwards.
- JHP did not consider that Mr T may have been subject to undue influence by Mrs N, who was the sole beneficiary of the nomination change. This is relevant evidence which was not taken into account by JHP.
- The letter dated 28 October 2013 enclosing the change of nomination stated that all correspondence should be directed to Mrs N's address, even though Mr T was resident in a nursing home. This direction meant that all correspondence sent by JHP in relation to the Plan would only be opened by Mrs N. There is no indication on the letter that it was a "care of" address. It was a poorly drafted and phrased letter, which is not consistent with it having been drafted by Mr T, who was a Queens Counsel.
- It is also notable that, while Mr T had carefully balanced the competing interests in the Trusts within his Will, all four of his pension plans were amended so that Mrs N would receive 100% of the death benefits.
- It appears there were no witnesses to any of the discussions between Mr T and Mrs N, or to the signature of the letter instructing the change of nomination.
- There is no psychiatric evidence to confirm that Mr T had sufficient capacity to change the nomination at the time.
- Evidence relating to Mrs T's relationship with Mr T before his severe ill-health should be given substantially greater weight than evidence relating to the period after, since he had full capacity then. During 2012, Mr T and Mrs T had several holidays and short breaks together, including time spent in New York City; travel to Paris for several days to celebrate Mr T's birthday; further travel to New York City and Boston; a holiday in the south of France; a three week car tour of California; and a trip to Rome. No evidence was submitted by Mrs N disputing any

of these facts. JHP was therefore wrong to accept the statements made in this regard, without establishing Mrs T's position in response.

- On 9 December 2012 (the day before Mr T left for Brazil), he arranged a dinner with Mrs T to celebrate their fifteenth wedding anniversary. In this respect, Mrs T provided a photograph of them taken on that day. Furthermore, Mr T was making plans for Christmas, New Year and a holiday with Mrs T in early 2013. It was originally intended that Mrs T would accompany Mr T to Brazil, but this was changed because Mrs T needed surgery in New York City. The evidence for this is an email from Mr T to Mrs T, in which he says:-

"I was talking to [friend of Mr T] yesterday. He wants meetings in Rio and it looks as if the whole week of 10 December is possible. My suggestion would be that we travel out there together either from London or from NY if you want to hold off coming back for a few days, somewhere around 7/8 December and come back, say, on 17/18. That would give us a good break in the sunshine".

- This evidence is inconsistent with the accounts of the relationship between Mr T and Mrs T given by Mrs N and the Interim Deputy, and is relevant information that JHP should consider.
- Mrs T did not have the liquid funds to pay the bill for Mr T's hospital treatment in Brazil. Her testimony is that she did not refuse to pay them; she telephoned a friend of the couple, and he paid. Mrs T arranged for Mr T's repatriation to the UK using her insurance, and so she did not abandon him in Brazil.
- There is no evidence that Mr T took steps to instigate any divorce proceedings prior to his illness. Mr T expressed a wish to divorce Mrs T; but this was during his incapacity, after she was falsely accused by the Interim Deputy of refusing to pay for his medical care. Mrs T's position was that Mr T's apparent intention to divorce her was triggered by the hostility of his family towards her.
- In June 2013, the Interim Deputy's legal representative, Grosvenor Law, accepted that Mr T had signed a document which contained incorrect information (Mr T confirmed he had marked up an insurance schedule, when in fact he had not). Grosvenor Law recognised that this demonstrated Mr T did not understand what he was signing (as it was wrong on its face) and referenced his lack of capacity as raising a question as to what weight could be given to his comments). KN argued that this is a prior example of Mr T signing documents which he would not have signed if he had proper mental capacity.
- It is correct that Mr T did not make a specific bequest to Mrs T in his final Will. However, it must also be noted that Mr T declared, "I have made no provision for my wife, having regard to the substantial provisions I have already made for her in my lifetime". KN suggested that the nomination of Mrs T as the beneficiary of the Plan's death benefits was one such provision.

24. Overall, in light of these further submissions, the Adjudicator concluded that there was relevant evidence that JHP did not properly consider when it determined that 100% of the Plan death benefits should be paid to Mrs N. Furthermore, he considered that JHP took some irrelevant evidence into account, which needed to be disregarded (for example, the psychiatrist's report dated August 2015). The Adjudicator recommended JHP reconsidered the decision, taking into account all relevant evidence and disregarding all irrelevant evidence.
25. JHP reconsidered the matter and decided to pay 50% of the Plan death benefits to Mrs T and 50% to the Will Trust. It provided Mrs T with reasons for its revised decision, as follows:-
- Dr Jacoby's report concluded that on balance, Mr T was capable of binary decisions such as getting divorced, but was unable to handle the complex financial matters which followed this decision on his own.
 - By extension, it is reasonable to conclude that two months later, he was able to make a binary decision that he wanted to change his nomination to reflect that he did not want Mrs T to be the sole beneficiary of the Plan death benefits.
 - On the basis of the same report, JHP accepted that it is unlikely Mr T would have been in a position to weigh up the financial consequences of that decision. As such, he should have had assistance from his Interim Deputy or a solicitor to complete any change of nomination.
 - JHP accepted that Mr T lacked the capacity to determine the material consequences of the above actions in terms of the proportion by which each party should benefit. However, it considered it to be logical and reasonable to conclude that he did not want Mrs T to receive 100% and that other beneficiaries should be entitled to an unspecified proportion.
 - In the absence of a definitive numerical designation upon which it could rely, but understanding that the benefits should not be designated solely to one party, JHP took what it considered to be the only fair and reasonable option available. That is, to designate benefits equally between interested parties.
26. Mrs T remained dissatisfied and, through KN, submitted a further report from Dr Jacoby, dated 5 October 2017, in which he stated:-

"My instructions are as follows:

Whether [the late Mr T] had the capacity to change the nomination on a Zurich Flexible Drawdown Plan ("the Plan") administered by the James Hay Partnership;

Whether, if I had been in possession of the information now provided by Kingsley Napley, which gives more details of the events in the first nine months of 2013, which I did not have at the time of my first report, my opinion

on Mr T's decision to initiate and undertake divorce proceedings might have been different

...

iii. The change of nomination on the Plan

I am instructed that on or around 16 November 2013, Mr T is purported to have elected a change in nomination or beneficiary to the Plan, a substantial pension policy. Further, the Trustees of the pension have relied on my medical report dated 11 September 2013, in particular my opinion that Mr T did not have the capacity to initiate and undertake divorce proceedings (a decision I considered to be binary in nature). The James Hay Partnership have concluded that this would equally apply to a change of nominated beneficiary of a pension policy; namely that the decision is also binary in nature. Accordingly, they concluded that Mr T had the capacity to make the decision.

My letter of instruction from Kingsley Napley states that, "It would appear that the New Beneficiary attended Mr T in hospital and obtained a signature on four nomination forms in relation to insurance and pension policies taken out in Mr T's lifetime; and the new Plan nomination forms changed the beneficiary from Mrs T to the New Beneficiary (to the exclusion of all others). The New Beneficiary will say that these steps were taken at Mr T's instruction. Mrs T's position is that she does not accept that and, further, Mr T did not have the capacity to manage his property and affairs at that time. There were no witnesses to the transaction. The Court of Protection Deputy was not consulted and was unaware of these changes until after Mr T's death. It is not known for certain whether Mr T was asked to sign a blank sheet of paper or sign a letter which the New Beneficiary says she prepared on his behalf. It is the New Beneficiary's position, however, that Mr T had indicated he did not want Mrs T to benefit.

viii. Opinion

I do not wish to change my opinion on Mr T's capacity to decide to divorce. When I saw him in August 2013, I considered he was able to understand the nature of the information required to make the decision, and could retain it. He was able to weigh it up and communicate his decision. It turns out that my use of the term binary for the decision has been extended to other decisions, which I shall discuss below. In my opinion, at the time I saw him, Mr T required understanding of the contract of marriage and that it is possible to terminate the contract by means of divorce. I took the view that he had the capacity to understand the nature of divorce and to decide yes or no whether he should divorce Mrs T. However, I considered that he lacked the capacity to go any further than that, namely to proceed with the ancillary relief. It is my understanding and experience as an expert witness that the threshold for capacity to get married is relatively low. I do not know of any cases where the

threshold for getting unmarried has been decided, but this is clearly a matter for the Court and not myself.

Whilst standing by my opinion that Mr T's decision to divorce was binary, it is not my opinion that a person who has the capacity to make one binary decision is also necessarily capable of making other binary decisions. Mental capacity is task and time specific.

It follows, therefore, that I do not agree that changing the nominee on the Plan was necessarily a capacitous decision. It might be argued, for example, that all decisions are in some sense binary, i.e. one decides or not to do something. In the case of changing the nominee on the Plan, I presume that the information to be considered is more complex than deciding to get divorced, not least because this particular decision was being made in the context of divorce proceedings. Mr T would, therefore, have had to understand to what Mrs T might have been entitled from his total wealth as part of a divorce settlement. Although I have no financial expertise, I presume that there were other financial matters to take into account when changing the nominee. At the time I saw Mr T in August 2013, my opinion was that he lacked the mental capacity to manage his financial affairs. The matter was further complicated by the fact that he was prone to confabulation. As I understand it, his estate was relatively complicated and that he disposed of considerable wealth.

On the balance of probability, I consider that Mr T lacked the capacity fully to take into account all the information required to change the nominee on the Plan

...

xi. Summary of Conclusions

On the balance of probability, Mr T had the capacity to decide to instruct his lawyers to initiate divorce proceedings when I examined him in August 2013. In other words, my decision on that matter has not changed.

On the balance of probability, Mr T lacked the capacity to change the nominee of the Zurich Flexible Drawdown Plan in November 2013.

In my opinion, Mr T was vulnerable to undue influence when he allegedly changed the nominee on the Zurich Flexible Drawdown Plan. Whether he was so influenced is a matter solely for the Court to determine".

27. The Adjudicator shared Dr Jacoby's report with JHP and obtained its comments, which were as follows:-

- Professor Jacoby appeared to have based his findings and report on the notes and relevant documents he retained from his assessment of Mr T in 2013, as well as

documents provided by KN. However, it appeared to be the case that he was not provided with copies of the letters, witness statements and other documentation provided by other relevant parties. As a result, it cannot be concluded that Dr Jacoby had written his report with full knowledge of all events and opinions.

- Dr Jacoby pointed out that mental capacity is task and time specific. His assessment was carried out retrospectively, and he was not present when Mr T signed the letter to change his nominated beneficiary from Mrs T to Mrs N. Accordingly, it cannot be said to give a definitive indication as to Mr T's capacity at that date.
- Although Dr Jacoby provided his opinion in the report, he also said several times that his conclusions are given "*On the balance of probability*". As such, it cannot be said conclusively by any person not present, or qualified to comment, whether Mr T had mental capacity at the time he made the decision to change his nominated beneficiary.
- JHP gave serious attention to the letters received from Mrs T regarding her claim to be the beneficiary of the Plan death benefits and advising it that Mr T had limited mental capacity. As a consequence, JHP made extensive enquiries about Mr T regarding his personal circumstances, state of health and mental capacity prior to his death, as well as obtaining legal advice. JHP gave opportunity to all parties to provide evidence to support their claims, over a two year period.
- JHP's initial decision to pay 100% of the Plan death benefits to Mrs N was informed by the evidence it had been provided with up to that point. After KN provided additional evidence to JHP in August 2017, it became apparent that JHP had not previously been provided with all the relevant evidence. Despite this, JHP did not believe it was reasonable to hold it responsible for the actions of other parties in withholding this evidence. When JHP was provided with all the available relevant information and evidence, it was then able to make a fully informed decision, which it considered was reasonable in the circumstances.
- Mindful of the above, JHP considered Dr Jacoby's 5 October 2017 report. When considering this in the context of all the other evidence provided, JHP was still satisfied that paying the Plan death benefits in the proportions 50% to Mrs T and 50% to Mr T's Will Trust was the most reasonable decision in the circumstances.
- JHP also pointed out that that Mrs T had commenced proceedings against the late Mr T's Estate for provision to be made for her. It is therefore expected that a Court will eventually determine if Mr T had sufficient capacity to change the nominated beneficiary, and consequently, if Mrs T should receive some provision from the Estate. Since JHP paid 50% of the Plan death benefits to Mr T's Will Trust, it is possible that Mrs T may receive some, or all, of this sum via the proceedings she has instigated. JHP suggested that the Ombudsman should bear this in mind when reviewing the complaint.

28. The complaint has now been passed to me to consider. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs T / KN and JHP for completeness.

Ombudsman's decision

29. The first question for me to consider is whether the decision has been reached in accordance with the correct Plan rules and any overriding legislation. I will then look to see whether all relevant evidence has been considered, and that no irrelevant evidence has been taken into account. I will also need to be satisfied that JHP's decision was not perverse, in that it would not reasonably be arrived at by any other decision-maker presented with the same evidence.
30. In the event that I find that JHP's decision was not reached in the correct manner, I will not substitute it with my own. What I will do is explain why I have come to that conclusion and direct that the decision be made afresh by JHP. In the event that I determine that JHP followed the correct procedures, no directions will be made – even if I do not agree with the outcome.
31. Looking at JHP's original decision to pay the Plan death benefits solely to Mrs N; the Trust Deed & Rules governing the Plan (see the Appendix) are clear that JHP has absolute discretion to determine who should receive the Plan death benefits. It also has absolute discretion to decide what proportions should be paid to each beneficiary. So the issue for me to determine is whether JHP exercised that discretion reasonably.
32. With respect to JHP's decision-making process; I note that it did not simply accept the change of nomination in Mrs N's favour. After Mrs T wrote to it in September 2015 enclosing a copy of the Order, JHP sought further evidence to determine whether, on balance, Mr T had sufficient capacity to take the decision to change his nominated beneficiary.
33. As a result of its enquiries, JHP obtained the following evidence and testimony:-
- An external legal opinion that the existence of the Order is insufficient to determine that Mr T did not have sufficient capacity to make the decision to change his nominated beneficiary in November 2013. The legal advice was that:-
 - The law supposes that an adult has the right to make decisions, and has the legal capacity to do so, unless it is shown otherwise.
 - The psychiatric assessment Mr T had in August 2015 had concluded that he had sufficient capacity to create a Lasting Power of Attorney at that time.
 - The change to the nominated beneficiary, when looked at alongside the contents of Mr T's final Will, strongly suggests his intention was for another party to receive the Plan death benefits (and that Mrs T should not).

- A witness statement which was originally submitted to the Court of Protection in support of appointing the Interim Deputy. The statement testified that Mr T's marriage to Mrs T had broken down and he preferred to live apart from her. Accordingly, that Mrs T should not be appointed Interim Deputy.
 - Witness statements obtained from, respectively, a relative and a friend of Mr T. Both testified that:-
 - Mr T leased properties with the objective of limiting the amount of time he spent with Mrs T.
 - Mr T underwent far-reaching surgery in Brazil in 2012, which Mrs T refused to pay for and, as a result, had to be paid for by close friends of Mr T.
 - Mr T freely chose to change his nominated beneficiary from Mrs T to Mrs N.
34. As JHP saw it, this testimony corroborated the contents of the witness statement submitted to the Court of Protection. Looked at alongside the legal opinion that, on balance, Mr T had sufficient capacity to make the decision to change his nominated beneficiary, I find that this was a legitimate conclusion to reach.
35. Accordingly, I am satisfied that, in reaching its original decision to pay 100% of the Plan death benefits to Mrs N, JHP considered all relevant evidence available to it at the time. I also find that it did not take irrelevant evidence into account. It cannot reasonably be concluded that the decision reached was perverse.
36. After the Adjudicator issued his Opinion that JHP's decision was reasonable, Mrs T, now represented by KN, provided further submissions, as detailed in the Background section. After the Adjudicator shared this further evidence with JHP, it agreed to consider the matter afresh. The result of this exercise was the decision to pay 50% of the Plan death benefits to Mrs T and 50% to the Will Trust.
37. JHP provided Mrs T with an explanation of its decision, acknowledging Dr Jacoby's September 2013 report. JHP accepted that Dr Jacoby had concluded Mr T had sufficient capacity to make the binary decision to divorce Mrs T. It also recognised that Dr Jacoby considered Mr T would need the support of an Interim Deputy in order to handle the more complex (non-binary) financial judgments associated with the divorce proceedings, since they required substantial amounts of information to be retained and weighed up. For example, how the matrimonial assets should be divided.
38. JHP reasoned that, given Mr T had sufficient capacity to take the binary decision to divorce Mrs T, it was reasonable to infer that he had sufficient capacity to make the binary decision that he wanted to make a change to the nomination with respect to the recipient of the Plan death benefits. However, it would also follow from Dr Jacoby's opinion that Mr T was unable to determine what proportions each of the potential beneficiaries should receive, since this involved more complex reasoning. JHP noted that there was no definitive numerical designation upon which it could rely

in determining the appropriate proportions to pay to each interested party. Accordingly, the most reasonable course of action was to distribute the benefits equally between the interested parties, by paying 50% to Mrs T and the remaining 50% to the Will Trust.

39. I am satisfied, from this account of JHP's decision-making process, that it considered the additional evidence submitted by KN and reached a reasonable decision. There is nothing to suggest that irrelevant evidence was taken into account.
40. KN has subsequently provided a copy of a further report written by Dr Jacoby, dated 5 October 2017, which concludes that, on the balance of probabilities, Mr T did not have sufficient capacity to change the nominated beneficiary. However, JHP was not in possession of this document when it reached the decision to pay 50% of the Plan death benefits to Mrs T and 50% to the Will Trust. I can only consider whether JHP's decision was reasonable based on the information before it at the time; and I find that it was.
41. Therefore, I do not uphold Mrs T's complaint.

Karen Johnston

Deputy Pensions Ombudsman
16 March 2018

Appendix

The James Hay Personal Pension Plan Trust Deed & Rules Deed of Amendment made on 25 August 2011

42. As relevant, section 10 (“lump sum death benefits”) provides:-

“10.1 If a member dies in the circumstances described in parts 5, 8 or 9 of the rules then, except to the extent to which it is used otherwise under those rules, the scheme administrator shall, as soon as practicable, pay out the member’s fund as a lump sum:-

- (1) In accordance with any specific provision regarding payment of such sums under the terms and conditions of the *arrangement*; or
- (2) If (1) is not applicable and at the time of the *member’s* death the *scheme administrator* is satisfied that the *arrangement* is subject to a trust under which no beneficial interest in a benefit can be payable to the *member*, the *member’s* estate or the *member’s* legal or personal representatives, to the trustees of the trust; or
- (3) If (1) and (2) are not applicable, at the discretion of the *scheme administrator*, to or for the benefit of any one or more of the following in such proportions as the *scheme administrator* decides:-
 - (a) any person, charity, association, club, society or other body (including trustees of any trust, whether discretionary or otherwise, and including in the event of the *member’s* death aged 77 or more where he or she has no *dependants*, another *member’s arrangement* under the *scheme*) whose names the *member* has notified to the *scheme administrator* in writing prior to the date of the *member’s death*;
 - (b) the *member’s* surviving spouse or *civil partner*;
 - (c) the parents and grandparents of the *member* or the *member’s* surviving spouse or *civil partner* and any children and remoter issue of any of them (including, for the avoidance of doubt, any children or remoter issue of the *member*);
 - (d) the *member’s dependants*;
 - (e) any person, charity, association, club, society or other body entitled under the *member’s* will to any interest in the *member’s* estate;
 - (f) the *member’s* personal legal representatives, and for this purpose a relationship acquired by legal adoption is as valid as a blood relationship;

10.2 The *scheme administrator* will pay any lump sum under *rule* 10.1 within two years of being notified of the *member's* death (or, where required under the *finance act*, within two years of an earlier date from which the *scheme administrator* could have been reasonably aware of the *member's* death). If this is not practicable then, at the end of two years, the *scheme administrator* shall transfer it to a separate account outside the *scheme* until it can be paid.

10.3 Any lump sum payable under this part 10 of the *rules* in the event of the *member's* death before *pension date* is tested against the *member's lifetime allowance* and any funds in excess of the *member's lifetime allowance* will be subject to a tax charge of 55%. The *scheme administrator* will pay any such lump sum after deducting tax at 55%. The *scheme administrator* will pay this tax for the recipient to HM Revenue and Customs as required under the *finance act*.

10.3 Any lump sum payable under this part 10 of the *rules* in the event of the *member's* death whilst taking income drawdown is not tested against the *member's lifetime allowance*. The *scheme administrator* will pay any such lump sum after deducting tax at 35%, which it shall pay to HM Revenue and Customs as required under the *finance act*.

10.4 Different tax consequences may follow if any lump sum payable under this part 10 of the *rules* is paid to a *charity* by way of a *charity lump sum death benefit*, which are not described in these rules".