

Ombudsman's Determination

Applicant	Mr D
Scheme	Collective Retirement Account (the Scheme)
Respondent	Old Mutual Wealth (OMW)

Outcome

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

Complaint summary

3. Mr D complains that OMW has not followed his late father's intentions as set out in his will (**the Will**). He believes that his late father's pension benefits should be paid to him and his two brothers, rather than his late father's spouse.

Background information, including submissions from the parties

4. Mr D's late father (**the member**) was part of the Scheme. He left no expression of wish form, nor did he specifically mention how his pension benefits were to be distributed in the Will. However, the Will created a trust from which the member's estate could be distributed to his beneficiaries.
5. On 7 March 2017, OMW was sent a letter from the executors, outlining everyone's position on who should receive the pension benefits. The member's spouse stated that the member had told her that he was leaving his pension for her. Mr D's siblings believed that either the spouse should get all of the pension benefits, or 90% with the other 10% to go to Mr D. The executor of the Will agreed with the 90:10 split. Mr D did not know how he thought the pension should be distributed. However, he explained that he did not believe the member would want such an unequal division, and that he would reject the 10% if it was offered.
6. The executors' letter went on to say the following:

"All executors have signed the form but [...] we have not completed the allocation section and would request that the scheme trustees consider the above statements and make an appropriate decision under their discretionary powers.

I would like to make you aware that the widow has terminal cancer and her life expectancy is limited and to that end would appreciate this case be dealt with as a matter of urgency.”

The death benefit distribution request forms accompanied this information. However, these were not completed as the beneficiary details were left blank, “given that a common accord has not been reached amongst the executors”.

7. On 16 March 2017, after OMW’s enquiry to the executors, it received further information from them which explained Mr D’s financial dependency on the member, with the following list:
 - The member provided Mr D with basic financial support during his life to cover expenses such as car insurance and road tax. The member also bought a lot of his food and took him out for meals.
 - The member’s expression of wish in the Will was that the above arrangement was to continue during the life of the member’s spouse.
 - The spouse has terminal cancer and has been given a prognosis of less than 2 years life expectancy.
 - The spouse has a life interest to the income from the estate, and it was from this income, that Mr D’s basic financial needs were to be met.
 - The executors considered that if a payment was made from the pension to Mr D to cover these basic financial needs, the spouse would not be beholden to him financially and could enjoy her remaining days without this imposition.
 - The 10% was no more than a ‘finger in the air’ guess as to a fair value for Mr D’s needs for two years.

Included in this correspondence, was a further comment from Mr D relating to the following part of the member’s Will, “it is my express desire that during the lifetime of my said wife my said son [Mr D] shall be looked after and his basic financial needs be catered for in similar manner to the way they have been catered for during my lifetime”. The executor explained that Mr D had emailed to say that he was happy to defer this indefinitely, without expecting anything in return. However, he would keep receipts in case he ran out of money and needed help.

8. Following this, the Trustees of the Scheme made the decision that 100% of the claim value of the member’s pension was to be paid for the benefit of the spouse.
9. On 25 June 2017, Mr D contacted OMW to say that he wished to appeal against the decision made and OMW responded. On 21 July 2017, Mr D explained why he felt the Trustees had come to an incorrect decision. He argued that there was no evidence that the member wanted his pension to go to his spouse, and that there was information to show that it should have been paid into the trust created by the Will. Mr D said that had the member wanted his pension benefits to go to a specific

individual, he would have filed an expression of wish or mentioned it in the Will. In addition to this, the member's investment advisor had informed Mr D that the member had stated that his pension had been dealt with in the Will.

10. On 17 August 2017, OMW emailed Mr D to inform him that the matter had been referred back to the Trustees for review, and that the appeal was rejected. The same day, Mr D emailed OMW to ask for the reasons behind the decision.
11. On 9 Sept 2017, OMW responded to Mr D's query and explained that the Trustees have discretion and can decide who will receive the benefits. After reviewing the information provided by the executor, the Trustees decided to pay the benefit to the spouse. OMW also explained that this decision had been reviewed twice by the Trustees, but the conclusion remained the same. The next day, Mr D queried why the Trustees had not decided to pay death benefits into the trust created by the member in the Will for the distribution of his assets. OMW did not respond to this query.
12. On 2 January 2018, Mr D emailed OMW to ask it to look at the decision once again. He drew specific attention to section 3 of the member's Will, which stated that any sums not subject to inheritance tax, were to be divided amongst his three sons in equal shares. Mr D said that as the member's pension benefits were not subject to inheritance tax, the Trustees' decision should change. Mr D argued that the Will already made provision for the spouse.
13. On 15 January 2018, Mr D complained to OMW after having received no response to his email of 2 January 2018. OMW considered this and issued its response on 9 February 2018. It explained that section 3 of the Will did not stipulate the transfer of the pension, but rather that the sons were to receive lump sums from the executors. The Will goes on to say that after these lump sums, the spouse was to benefit from the residuary estate during her lifetime, which is what the Trustees took into account.
14. On 12 March 2018, Mr D complained to this Office. He explained how he believed the member's Will specified that any assets that were not subject to inheritance tax should be paid to his sons. He said that the pension benefits ought to be paid into the Trust or paid directly to the intended beneficiaries and not the member's spouse.

Adjudicator's Opinion

15. Mr D's complaint was considered by one of our Adjudicators who concluded that no further action was required by OMW. The Adjudicator's findings are summarised below:-
 - The Scheme rules allow the scheme administrator to pay all or part of the sum to any one or more of the beneficiaries. It can apply it in any way it sees fit, but it needs to take into account any expression of wish, or request made by the member or dependant, as well as all other relevant facts and circumstances.
 - The beneficiaries are:

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- any of the descendants and step-descendants living at the time of the deceased's death, of any of the parents and grandparents of either the deceased of his or her spouse or civil partner;
 - The deceased's dependants;
 - Any person entitled under the deceased's Will to any interest in his or her estate;
 - Any persons nominated by the deceased for the receipt of such a benefit;
 - The deceased's personal representatives, to be held by them as an addition to his or her residuary estate for all purpose; and
 - A charity registered with the Charities Commission nominated by the deceased for the receipt of such a benefit.
- It is for the trustees to decide how much weight to attach to any piece of evidence submitted by the potential beneficiaries. The Pensions Ombudsman can only ask a decision-maker to look at a matter again, if it was so irrational that no reasonable decision-maker could have reached the same decision.
 - Taking into account most of the beneficiaries and the executors suggested that the member's spouse should get the majority if not all of the benefits, the decision was not irrational. Mr D had also agreed to defer the additional support he was expecting to receive and demonstrated that he would not be willing to accept a 10% share of the member's pension benefits. This indicated that he was not looking for financial support at the time.
 - The Adjudicator was satisfied that the Trustees had exercised their discretion in accordance with the rules, and that OMW carried out the Trustees' decision.
16. Mr D did not accept the Adjudicator's Opinion as he felt the Trustees' decision was both irrational and perverse. Mr D raised the following points:
- The Will is the only document relevant to the Trustees' decision. The member had said that his pension had been dealt with in the Will, which states that any sum that could be transferred without being chargeable to inheritance tax should be split equally between his sons. Mr D stated that as the pension was not subject to the tax, this is what should have been done.
 - The decision goes against logic in that the member had already provided for his spouse and avoided leaving assets to his sons because of the inheritance tax that would be applicable. Therefore, the pension, not being subject to inheritance tax, should be given to the member's sons.
17. After consideration of Mr D's points, the Adjudicator asked for further information from OMW. However, this did not change the Adjudicator's position, as she could see that the Will had been reviewed by the Trustees as well as the potential beneficiaries'

physical and financial situations. The Adjudicator explained that whilst the Trustees' decision may not have resulted in the most advantageous tax situation, this did not in itself render the decision perverse. In addition to this, the Trustees' are not bound by the Will.

18. Mr D did not agree and so the complaint was passed to me to consider. Mr D provided his 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 Mr D for completeness. Mr D's comments are as follows:-

- There was no expression of wish form in this instance, so the Trustees take their instruction from the Will. As there were no exceptional circumstances in this instance, the member's sons should receive the money. This is because the member was aware of his spouse's ill health but did not alter the Will as it already provided for her.
- Payment to the spouse is preposterous as the member's pension is now at the discretion of the spouse, and it goes against the member's express wishes.
- The Trustees have exceeded their powers by not following the Will. They are required to abide by the Will with regard to the pension in the same way that executors have to abide by it in relation to estate assets.
- How dependent each beneficiary was on the member prior to his death is irrelevant, as the Will provides for all beneficiaries. Yet, the Trustees appear to be under the impression that the beneficiary had to have been dependent on the member when he died. This goes against the terms of the pension, OMW's terms of business and the Will. There is also nothing to suggest that this should be the case.
- The Will is clear in how capital and assets were to be distributed. The spouse was provided by income, with no housing costs to cover, so Mr D questioned why the pension should be paid to her. The Trustees should have followed the Will, meaning there was no decision to be made.

Ombudsman's decision

19. Mr D believes that trustees of a scheme are obliged to follow a member's Will. Whilst trustees may sometimes come to the same decision as the terms of the Will but this does not mean that they are bound by it. The Trustees are obliged to take into account all relevant facts and circumstances. From the information provided, the Trustees reviewed the member's Will, who this provided for, the potential beneficiaries as well as the financial dependency of Mr D on the member.

20. The ability to decide how the member's pension benefits are paid, is one of the reasons why death benefits are not usually subject to inheritance tax. It is separate from the Will, the benefits provided following a discretionary exercise, which mitigates

the inheritance tax Mr D has focused on, meaning trustees can consider Wills and expressions of wish forms, but they are not bound to follow these. Coming to a different conclusion does not mean that the Trustees have automatically done something wrong, nor does it mean they have exceeded their powers. This is because the Scheme rules allow for the exercise of the Trustees' discretionary power, provided that what the Trustees have reviewed is relevant. In addition to this, the Trustees need to consider any requests made by a dependant.

21. According to the Scheme rules, a dependant is described as:-

- A person who was married to, or was the civil partner of, the member at the date of the member's death or at the date the member's pension entitlement first arose under the scheme is a dependant of the member.
- [...]
- A person who was not the member's husband, wife or civil partner at the date of the member's death and is not a child of the member is a dependant of the member if, in the scheme administrator's opinion, at the date of the member's death-
 - The person was financially dependent on the member
 - The person's financial relationship with the member was one of mutual dependence; or
 - The person was dependent on the member because of physical or mental impairment.

22. It was therefore relevant for the Trustees to take into account any submission from the spouse, and given the provisions of the Will, those of Mr D.

23. I understand Mr D does not believe the submissions made by the other executors, which include his brothers, are relevant. However, had the Trustees decided to follow precisely what the Will had instructed, his brothers would have each been in receipt of a third of the benefits. Nonetheless, the other two brothers suggested that at least the vast majority of the benefits should go to the spouse, meaning that they were willing to deviate from the Will. Considering that these are two potential beneficiaries that the Trustees have to consider, I find this to be relevant as well.

24. Mr D believes that the extent of dependence of the beneficiaries on the member is irrelevant. I disagree as the Trustees need to reach a decision on which of the beneficiaries they should pay some or all of the benefits. In order to do so, these are necessary circumstances for the Trustees to take into account.

25. I do not find that the Trustees have taken into account anything irrelevant, but rather that they have fulfilled their obligations. They reviewed the initial available information and made further enquiries, which resulted in the further information provided on 16 March 2017. This demonstrates that the Trustees wanted to ensure their decision

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was being made following a careful examination of all the full circumstances and possible beneficiaries.

26. I have reviewed the information submitted to OMW and the Trustees, and I find the decision to be reasonable. It is not one that no reasonable decision-maker could have reached.
27. Therefore, I do not uphold Mr D's complaint.

Anthony Arter

Pensions Ombudsman
2 October 2018