

## Ombudsman's Determination

Applicant	Mrs F
Scheme	Old Mutual Directors Retirement Plan ( <b>the Plan</b> )
Respondents	Old Mutual Wealth ( <b>OMW</b> ) on behalf of Old Mutual Wealth Pension Trustee Limited ( <b>The Trustee</b> )

## Outcome

1. I do not uphold Mrs F'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. Mrs F is unhappy with the Trustee's decision in relation to the distribution of the late Mr F's lump sum death benefits under the Plan.

## Background information, including submissions from the parties

4. Death benefits are covered under Rule 12 of the Plan, the relevant parts of which are set out in Appendix.
5. In May 2015, Mr F sought advice from his independent financial adviser (**IFA**), with regard to the tax position on death benefits. In the email to Mr F, the IFA said that: -
 

"The 45% tax charge is income tax as such you will be liable to pay this on your tax return if you take the whole pension out regardless of whether your [sic] married or not. However, the residual capital that would now be in your estate will not be liable to [Inheritance Tax (**IHT**)] if you leave it to [Mrs F] as there is no IHT between spouses. But this route if [sic] still 45% worse than leaving the money in the pension if you die before age 75."
7. On 12 August 2015, Mr F wrote a very detailed Will. Under "Letter of Wishes" he said that: -
 

"I am writing to you as the people in my Will as my executors and the trustees of the trusts set out in my Will...Under my Will, my residuary estate (including my house subject to the outstanding interest only mortgage) is left on life interest trust for my wife [Mrs F], and I have included a number of overriding

powers which allow you to advance the capital to [Mrs F], or to my children. The main purpose of this Letter of Wishes is to allow me to give you guidance on how I would like you to use these powers.... after payment of the legacies set out in my Will, it is my ultimate intention that [Mrs F] should have the right to occupy my property... for a few years, but that my residuary estate should then be split equally between [Mrs F] and my two children... (1/3<sup>rd</sup> each) ...

#### LIFE INSURANCE POLICY (FOR [Mrs F])

"If [Mrs F] were to die within 7 years of the distributions, this would have adverse tax consequences on [Mrs F]'s estate and on my children. In order to mitigate the risk of such tax consequences, I would like you to obtain advice on the likely tax consequences, and if possible to arrange and pay for a suitable term life insurance policy (the "Policy") for [Mrs F] on her life... Under those circumstances the proceeds of the Policy should be used to meet such additional IHT whether it arises on [Mrs F]'s estate or on my children, and any remainder can be split equally between the three of them..."

8. Sadly, on 12 November 2015, Mr F passed away. Mr F had completed OMW's Expression of Wish form, in 1996, in relation to the benefits from the Plan, in which he nominated his former wife, Mrs P F.

9. On 24 November 2015, OMW sent a letter to Mrs F to say that following recent contact by her advisers, it was sorry to learn of the death of Mr F and sent her its condolences. It informed her that the Plan's proceeds are paid at the discretion of the Scheme's Trustee. It added that: -

"If a change to the nomination is requested, we would require sight of Mr F's Will and an explanation regarding the change for referral to the trustees. Consideration will be given to the information provided on the Death Benefit Distribution Request Form together with any previous nomination held on file."

10. On 9 December 2015, OMW sent Mrs F a letter thanking her for providing her husband's death certificate. It also enclosed a copy of the letter dated 24 November 2015, as she did not appear to have received it.
11. On 10 December 2015, Mrs F sent OMW a letter informing it that she was unable to complete the required form at that time. She first wanted to seek financial advice.
12. On 15 December 2015, OMW sent Mrs F a letter acknowledging her letter dated 10 December 2015. It added that: -

"Whilst there is a current death benefit nomination for Mrs P F [former wife], this nomination is not binding. Our Trustees have discretion over who to make payment to. They will require sight of a copy of the Will and an explanation for the request for the change."

13. On 26 February 2016, Mrs F's solicitor, sent OMW a letter informing it that they were representing Mrs F.
14. On 5 March 2016, Mrs F sent OMW a letter enclosing a signed form completed by three Executors of Mr F's estate. She also enclosed a copy of Mr F's Will and confirmed she would be happy to send more information if OMW required it.
15. On 14 March 2016, OMW sent Mrs F a letter informing her that following her letter, dated 5 March 2015, the change of nomination had been referred to the Trustee for its consideration, once it had received further information from the Executors, it would get back to Mrs F.
16. The same day, OMW sent a letter to Mrs F's solicitor saying that: -

"Our Trustees have requested confirmation that there is no earmarking or pension sharing agreement connected to the above Plan, as part of the divorce agreement with Mrs P F. I confirm that no decision has yet been made with regard to whom payment of the Plan should be made to, and we are awaiting further information and instruction from the Executors."
17. On 30 March 2016, OMW sent the Executors a letter enclosing a claim form from Mrs P F, completed with her details as beneficiary of the Plan. It added that: -

"Please also confirm that this is the nominee you wish the Trustees to consider making payment of the Plan to, or any others, as we have already received instructions from you previously to make payment to Mrs F."
18. The same day, OMW sent a letter to Mrs F confirming that it was in the process of obtaining all parties' information with regard to their interest as a possible nominee. This was, in order that the Trustees could fairly consider all requests.
19. On 6 April 2016, the Executors sent OMW a letter saying that they felt uncomfortable making any recommendations as to whom the death benefits should be distributed. They advised they would prefer to leave it to the Trustees to make a decision.
20. On 23 May 2016, OMW sent Mrs F a letter informing her that the Trustees had made a decision and that it had written to the Executors detailing to whom payment of the lump sum death benefits under the Plan is to be made to. The same day, the Trustee sent a letter to the Executors informing them that, the payment of the Plan should be paid in equal shares to Mrs F, and Mr F's two children.
21. On 1 June 2016, Mrs F's solicitor sent a letter to OMW that said: -

"We assume you to mean that you will pay 50% of the pension capital to Mrs F, but I would be grateful if you would please confirm that this is the case".
22. On 9 June 2016, OMW sent a letter to Mrs F's solicitor confirming that the Trustee's decision was to split the lump sum equally three ways between Mrs F, and Mr F's two children and not as implied in their letter.

23. On 15 June 2016, Mrs F's solicitor sent a letter to OMW saying that Mrs F was not aware that the Trustee was considering paying part of the death benefit to Mr F's children. Had she been aware, she would have provided further information explaining why the proceeds should be paid to her in their entirety. The solicitor provided further information in support of this claim. Mrs F's key points were:
- Mr F informed Mrs F that in case of his death, all of the death benefits should be paid to her;
  - Mr F and Mrs F always spoke openly about their finances and made decisions together;
  - During periods of Mr F being unwell, Mr F always asked Mrs F to help him manage his financial affairs for him, including aspects of his business;
  - Mr F was determined to leave the capital in his pension and ISAs untouched and separate to his estate. However, this decision had been made before the Will was written;
  - The Trustee's decision will affect Mrs F's ability to vacate her home in the timescale Mr F envisaged in his Will as she needed all the lump sum to purchase a suitable home in London. She would not be able to obtain a mortgage to do so due to her low income.
24. On 4 July 2016, OMW sent a letter to the Executors informing that it had received further information from Mrs F's solicitor. It advised that the Trustee is required to consider all information provided to it.
25. On 14 July 2016, Mrs F's solicitor sent OMW a letter saying that they would obtain further information from Mr F's IFA to try to corroborate Mrs F's explanation of what Mr F's wishes were.
26. On 9 August 2016, OMW sent a letter to Mrs F's solicitor informing that the Trustee had now reconsidered its decision and concluded that its original decision should stand.
27. In August 2016, Mrs F raised a complaint through the Plan's two-stage internal dispute resolution procedure (**IDRP**).
28. On 21 September 2016, OMW sent Mrs F a response under stage one of the IDRP. The letter said that: -
- "We are sorry that you feel you have been treated poorly in the handling of your case and offer our sincerest apologies. We are concerned that you may have incurred additional legal fees...With your agreement, we would like to pay for these additional fees ourselves...Having carefully considered the points raised in your letter and following further contact from the executors...we confirm that the current decision has been set aside. As you are aware, Mr F had made an expression of wish some time ago but clearly,

circumstances had changed materially...We were not convinced that Mr F's last wishes was for Mrs P.F [former wife] to receive the pension fund. We therefore, tried to ascertain Mr F's wishes from a number of sources. These include information provided by you (enclosing email correspondence between Mr F and his adviser), the executors of the estate, the Will, the 'summary of the last will and wishes' and 'letter of wishes'...We have now received correspondence from one of the executors, who explain that views expressed previously on their behalf, did not necessarily represent their views as a whole...We propose to ask [the IFA] to determine whether he can provide further information about Mr F's intention for the pension policy...We will also write to the other beneficiaries confirming that the current decision has been set aside..."

29. On 4 October 2016, OMW sent a letter to Mr F's children, asking whether they wish to receive a proportion of the remaining pension fund. Mr F's children subsequently confirmed to OMW that they wish to be considered for payment from Mr F's remaining pension account.

30. On 24 October 2016, the IFA sent a letter to OMW providing further information with regard to Mr F's wishes. He said that: -

"From my recollection and having read through the correspondence, it would appear that Mr F and I were talking in generic terms, as opposed to my providing specific advice to Mr F, as he was unmarried at the time. Furthermore, to my knowledge Mr F remained so up to the time of his death, as we were not informed of his marriage to Mrs F."

31. On 7 December 2016, OMW sent Mrs F a letter apologising that the case was still in the process of being re-assessed afresh. It also enclosed a cheque for £8,700 reimbursing Mrs F for the legal fees she had incurred.

32. On 29 December 2016, OMW sent Mrs F a response under stage two of the IDRP informing her that having reviewed all the information, it had concluded that there was not enough information to form a clear view as to whether Mr F had separate intentions for his pension fund. It added that: -

"It has been decided to exercise our discretion to make payment of the pension fund to Mr F's estate for his executors to distribute in accordance with instructions left by the late Mr F."

33. Mrs F provided further comments disagreeing with the OMW's decision. In April 2017, OMW sent her a letter in response, that said: -

"...you have stated that the Executors have not been left any specific instructions as to what to do with this pension fund. We agree that there is no instruction from Mr F...The pension fund is mentioned in communications between Mr F and his advisers, but the conclusion as to the ultimate beneficiary, is not...In the absence of any instructions...it is reasonable to

conclude that Mr F considered his pension fund to be one of his assets and that it would be paid to his Executors, for distribution in accordance with the provisions he had put in place...The payment to the executors does not form part of the estate at the point of payment and is paid free from any liability to Inheritance Tax... [OMW] understands that a charge to Inheritance Tax could arise in particular circumstances, if a capital distribution is made to [Mr F's two children]. This was recognised by Mr F, who has addressed this in his Letter of Wishes, by requesting that the Trustees of the Trust created by the Will, seek advice and if possible, arrange insurance to cover any future potential Inheritance Tax Liability."

34. In October 2017, Mrs F brought her complaint to this Office.

### **Adjudicator's Opinion**

35. Mrs F' complaint was considered by one of our Adjudicators who concluded that no further action was required by OMW. The Adjudicator's findings are summarised briefly below:-

- The Ombudsman's role is to examine the Trustee's decision-making process and decide whether the Trustee has, as far as possible, identified all potential beneficiaries; properly reviewed the merit of each one; and that their decision was within a range of decisions which was reasonable for the Trustee to have made.
- Under Rule 12(1), the lump sum death benefit arising in respect of Mr F's death is payable by the Trustee to one or more persons under its discretion. This means that no individual has any automatic entitlement to receive all or any part of the lump sum death benefit over another beneficiary. It is for the Trustee to decide upon one or more beneficiaries from the classes of potential beneficiaries listed in that rule.
- The Ombudsman will consider upholding a complaint only if he considers that the Trustee's decision was flawed, i.e. a decision that no reasonable set of Trustee could have reached, or that the Trustee has not followed due process.
- It is noted that Mr F had not updated his Expression of Wish form. Therefore, the decision must have been made by the Trustee taking into account all the other relevant factors and ignoring the irrelevant ones.
- The Adjudicator was therefore satisfied that OMW made sufficient enquiries to identify all the potential beneficiaries. The Trustee considered all relevant information, including the old Expression of Wish form completed by Mr F in 1996, a copy of Mr F's Will and any additional information provided by the Executors, Mrs F/her solicitor and Mr F's IFA.
- OMW's initial decision was to split the lump sum payment three ways between Mrs F and Mr F's two children. However, after Mrs F provided further information to the

Trustee, it took time to reconsider its initial decision and subsequently decided that the lump sum should be made to the Executors of Mr F's estate instead of individual beneficiaries. Essentially, under Rule 12(3)(e), the Trustee is permitted to make a payment to, "the deceased's personal representatives, to be held by them as an addition to his or her residuary estate for all purposes." OMW explained to Mrs F that in the absence of clear instructions from Mr F with regard to his wishes for his pension fund, it considered his pension fund to be one of his assets. In the Adjudicator's opinion, this was not an unreasonable conclusion to reach, and certainly could not be considered to be a flawed decision.

- Mr F made a sophisticated Will that created a Life Interest Trust and which also made provision for insurance to cover any future potential Inheritance Tax Liability. As Mr F made such detailed arrangements, it strongly suggests that he did not have any separate plans for his pension funds. Had he done so, the Adjudicator would expect this to have been specifically mentioned. Because the Plan is not separately mentioned, it led the Adjudicator to take the view that Mr F considered the Plan to form part of his estate.
- The Adjudicator was satisfied, from this account of OMW's decision making process, that it considered all the evidence and any additional information and reached a reasonable decision. There is nothing to suggest that irrelevant evidence was taken into account therefore the Adjudicator could not uphold Mrs F's complaint.

36. Mrs F did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs F provided her 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 Mrs F for completeness.
37. Mrs F said that the Adjudicator focused on the administrative process and had not even considered the OMW's administrative errors. Further, the Adjudicator did not consider the difficulties that will now arise because the Trustee has given the Executors a role in the distribution of the funds.
38. The Executors misread Mr F's wishes and are not currently in agreement. Consequently, the funds have been passed into the deadlocked estate.
39. Mrs F made an assertion that under the definition of a 'dependant' in the Plan rules, she was the sole dependant as Mr F's legal wife, and all proceeds should be distributed to her. Mr F's children are both over the age 40 and not dependant.

## **Ombudsman's decision**

40. The Trustee has absolute discretion in the allocation of the lump sum to any of the beneficiaries within the Plan's definition. It is expected to ask itself the right questions, take into account all the relevant evidence and no irrelevant evidence and not reach a decision that no reasonable person making the same decision would reach.

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41. I am satisfied that the Trustee made sufficient enquiries to identify the potential beneficiaries. Under the distribution rule, Mrs F is a potential beneficiary as are Mr F's children, as are the personal representatives. The Trustee may pay all or part of the sum to any one or more of the beneficiaries. There is no hierarchy within the rule.
42. I appreciate that Mrs F believes that as she was married to and dependant on Mr F, the lump sum should be paid to her. However, whilst the Trustee must consider all beneficiaries as defined in the Plan rules, it has a discretion over whom to award the death benefits. It is clear that the Trustee, in reaching its decision, has considered the potential beneficiaries.
43. I am satisfied that the Trustee considered all relevant information reasonably available to it, including Mr F's comprehensive Will, the fact that he did not update his Expression of Wish form, and sought evidence from his IFA in an attempt to ascertain whether Mr F had a specific plan in respect to his pension fund.
44. In the circumstances, I find that the Trustee's decision to distribute the funds to the Executors of Mr F's Will, was permissible under Rule 12(3)(e) and not unreasonable.
45. Therefore, I do not uphold Mrs F's complaint.

**Karen Johnston**

Deputy Pensions Ombudsman  
10 September 2018



## Appendix

### Rule 12

“(1) The Trustee may pay all or part of the sum to any one or more of the beneficiaries (specified in (3) below) or apply it for their benefit in any way it thinks fit. This may include giving an interest in any sum for any period, including a person’s life, or subject to any condition (e.g. attaining a certain age or being alive at a certain date) and subject to gifts over at the end of a period or if a condition is not satisfied. When applying any sum for the benefit of a beneficiary, the Trustee may impose any trusts, powers and provisions it thinks fit.

(2) If the lump sum is a life assurance lump sum or an uncrystallised funds lump sum death benefit and it is not paid or applied under (1) above within 2 years of the member’s or dependant’s death (as the case may be), it shall be held for the persons who would have taken it if the member or dependant had died intestate, solvent and domiciled in England. Those persons will take in the same shares and on the same terms as they would have taken if the relevant sum had formed the entire residuary estate of the member or dependant.

(3) The beneficiaries are:

(a) any of the descendants and step-descendants living at the time of the deceased’s death of any of the grandparents of either the deceased or his or her spouse or civil partner;

(b) the deceased’s dependants;

(c) any person entitled under the deceased’s will to any interest in his or her estate;

(d) any persons nominated by the deceased for the receipt of such a benefit; and

(e) the deceased’s personal representatives, to be held by them as an addition to his or her residuary estate for all purposes.

Where the lump sum arises under rule 11.4, “deceased” means the member if it arises under paragraph (1) of that rule, and the dependant if it arises under paragraph (2).

(4) The Trustee may exercise its power under (1) above by paying the sum (or a part of it) to the trustees of any settlement (so as to become subject to the trusts of that settlement), which contains trusts for the benefit of all or any of the persons specified in (3) whether or not it contains trusts for the benefit of other persons.

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(5) If any sum would devolve as bona vacantia under this rule, it shall be credited to the accounts of the members of the scheme under which the sum arose in such proportions as the founding employer directs.”