

Ombudsman's Determination

Applicant	Mrs D
Scheme	Phoenix Life Personal Retirement Account (the Pension)
Respondent	Phoenix Life (Phoenix)

Outcome

1. Mrs D's complaint is upheld and, to put matters right, Phoenix shall (1) make a fresh decision regarding whom death benefits should be paid to and (2) pay Mrs D £500 in respect of significant distress and inconvenience.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs D's complaint is about Phoenix's decision not to pay her death benefits under her late husband's membership of the Pension and its handling of her enquires and complaint in relation to this.

Background information, including submissions from the parties

4. In 1981, Mr D and Mrs D married.
5. In April 1987, Mr D took out the Pension with Phoenix. It was governed by the "Supplemental Deed Poll of the Phoenix (RL) Personal Pension Scheme" (**the Rules**), which provide for payment of lump sum benefits in the event of the policy holder's death. Part 6.6 (Payment of lump sum death benefits) outlines who can receive benefits (see Appendix) The relevant part states:

"Where Rule 6.6.2 or 6.6.3 does not apply, the Scheme Administrator shall pay or apply any lump sum payable under this Rule 6.6 to or for the benefit of one or more of the Relatives, Dependants, personal representatives (or executors) or nominated beneficiaries of the deceased Member or any person who is entitled to an interest in the Member's estates (other than a trustee in bankruptcy or creditor), in such shares as the Scheme Administrator shall decide..." [6.6.4]

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6. Later, Mr D completed an Expression of Wish (**EOW**) form specifying that in the event of his death, his benefits under the Pension should be paid to Mrs D.
7. In 2007, Mr D and Mrs D separated.
8. In October 2015, Mr D completed a witnessed will (**the First Will**) in which he outlined the financial responsibilities/dependency between him and a third party - Miss Y. He said:

“I have two pensions which will provide a pension to my former and current partners following my death:

 - Essex Pension Fund - the surviving partners pension should go to [Mrs D]
 - Suffolk Pension Fund - the surviving partners pension should go to [Miss Y].

I give all my possessions, chattels and belongings to [Miss Y] to keep, use or divide of as she considers best.”
9. In April 2017, Mr D completed an updated but unwitnessed will (**the Second Will**), in which he elaborated on the instructions from the First Will. He said:

“The mortgage debt currently stands at about £130,000. To cover this outstanding sum I give all other funds including any monies in the bank, savings, proceeds from private pensions and shares at my death to [Miss Y].

I have two pensions which will provide a pension to my former and current partners following my death:

 - Essex Pension fund. The surviving partner’s pension should go to [Mrs D].
 - Suffolk Pension Fund. The surviving partner’s pension should go to [Miss Y].”
10. On 14 May 2017, Mr D died.
11. On 26 May 2017, Phoenix was informed of Mr D’s death by his executor - Mr Ellison.
12. On 28 June 2017, Phoenix wrote to Mr Ellison, saying Mr D wished Mrs D to receive the death benefits under the Pension, according to the EOW form, so she should complete and return the enclosed claim form.
13. On 14 July 2017, Mr Ellison provided the above information and form to Mrs D. Then, on 26 July 2017, Mrs D completed the claim form and returned it to Phoenix.
14. On 21 July 2017, solicitors acting for the estate of the late Mr D (**the Estate**) made a representation about how the death benefits should be distributed. In summary, they said the benefits should be paid to Miss Y.

15. Some days later, Mrs D contacted Phoenix for an update. It confirmed receipt of her claim form, but could not provide further details. On 2 August 2017, Mrs D contacted Phoenix again, but was still unable to provide a substantive update. She expressed her dissatisfaction, which Phoenix noted; it said it would prioritise the case.
16. On 5 August 2017, Mrs D sent a letter of complaint to Phoenix.
17. On 6 August 2017, Mrs D sent Phoenix details of her claim and provided a copy to the Estate's solicitors. She said: -
 - Funding for the policy came from a joint account held by her and Mr D;
 - They both contributed to, and were fully committed to, their mutual financial security;
 - She was not his "previous partner" as asserted by the Estate; she was his widow; and
 - Under the original documents, she was clearly the intended beneficiary; she strongly disputed the suggestion that Miss Y should benefit instead.
18. On 7 August 2017, the Estate's solicitors wrote to Phoenix again. They understood, from her email of 6 August 2017, that Mrs D had also made a claim on the Pension. They provided further information to make "the strongest case" as per "the spoken and written intent of [Mr D]" in accordance with their duties as executors. They said:

"The children of [Mr D & Mrs D] are now... adults with partners and family of their own, age 29 years, 42 and 44. They have no gain to be made were payment to go to [Mrs D], indeed the opposite would exist. [Mr D's] sons would need to contribute further to the estate mortgage debt of their father if payment were to be made to [Mrs D]. If the funds were to be paid to his partner [redacted, presumably Miss Y] as was our original and continued belief, she has agreed this would be paid against this debt..."

Whilst [Mr D & Mrs D] were still legally married, they ceased to live as husband and wife when they parted in 2007 and the comment made by [Mrs D] that "we both contributed and were fully committed to our mutual financial security for the duration of our marriage, which continued until [Mr D] died" is not correct. Having formalised the division of their estate the only mutual financial dependency was the voluntary payment by [Mr D] of a portion of his Essex County Council pension during his lifetime which he had then arranged to continue in [Mrs D's] name after his death.

Whilst [Mrs D] was the intended beneficiary at the time [the Pension] was taken out, this was clearly not his want [sic] in recent times as is clearly identified in a number of will [sic] written in recent years."

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19. On 11 August 2017, Phoenix decided to pay the death benefits to Miss Y. Its internal notes from the time say:

“Pay to partner as she has financial dependency & policyholder will shows he intended for her to benefit from his pension policy. EOW disregarded as it was for his former wife.”
20. On 17 August 2017, the Estate’s solicitors wrote to Phoenix again, re-iterating Miss Y’s claim.
21. On 21 August 2017, Mrs D contacted Phoenix requesting an update. She asked about its complaints process; it said there was none but it did log her concerns.
22. On 25 August 2017, Mrs D contacted Phoenix again, requesting an update.
23. On 30 August 2017, Phoenix emailed Mrs D with its decision. The key points were: -
 - The Pension was not a “life policy” as Mrs D had claimed, and Phoenix had discretion over whom death benefits were paid to. This could be someone other than the person requested by the policyholder.
 - It had decided not to make payment to her, as it considered someone else to be a “more appropriate” beneficiary.
 - It had recorded a complaint from her, and would send her as soon as possible a written response, covering how it dealt with her complaint and how long the decision took.
 - It was sorry this was not the outcome she was hoping for, and that it may have incorrectly told her that she would receive the benefits.
24. On 31 August 2017, Mrs D formally complained to Phoenix about its decision, and about how it handled her enquiries. She said she was the correct beneficiary, as Mr D nominated her in the EOW form and never altered this. Further, it was untrue, as Phoenix had claimed, that she was Mr D’s “former wife”.
25. On 29 November 2017, after investigating Mrs D’s complaint, Phoenix issued its final response. The key points were: -
 - It was sorry if it incorrectly informed her she could expect to receive the death benefits. However, it had been unable to obtain phone call recordings to substantiate this.
 - It was clear that it had failed to provide reasonable responses throughout this process. Mrs D had had made various enquiries, and it had not been sufficiently informative.
 - It should have provided a copy of its complaints process; whilst it did not usually do so in writing, it should have explained the process over the phone.
 - After receiving notification of Mr D’s death, Phoenix issued claim forms. This type of policy was payable at Phoenix’s discretion, and it had to consider information from all sides before distributing the benefits. Based on the information it received, it decided to

pay the benefits to someone else. The information was reviewed by four experts at Phoenix, and it was unable to change its decision.

- However, it upheld Mrs D's complaint based on the service it provided in phone calls and letters. To apologise for the "trouble and upset" caused, it offered Mrs D £200.
26. Following that, Mrs D's representative (**the Representative**) wrote to this Office on Mrs D's behalf. Regarding Phoenix's reasons for distributing the benefits to Miss Y, the Representative made the following key points: -
- Like Miss Y, Mrs D also had financial dependency on the deceased.
 - The only mention of a pension was "private pensions" in Mr D's unwitnessed will from 2017; he had several private pensions. Neither will specifically mentioned the Pension.
 - Mrs D was not, as Phoenix had claimed, Mrs D's "former wife"; they remained married until he died.
27. On 12 February 2018, Phoenix sent this Office its formal response. It said that whilst it could not locate the call recordings, it apologised if it led Mrs D to believe payment would be made to her. After it was notified of Mr D's death, and on the basis of all the information from the parties, it decided to settle the claim in favour of Miss Y. It had, however, followed the correct process.
28. On 19 February 2018, the Representative wrote to this Office with his comments on Phoenix's formal response. He said Mrs D did not receive Phoenix's final response of November 2017. He also re-iterated, Mrs D was incorrectly told that benefits would be paid to her. Moreover, none of Phoenix's experts questioned whether the information provided by the Estate's solicitors, regarding Mrs D, was true; they should have done so before making a decision. Specifically, Phoenix's notes wrongly described Mrs D as Mr D's "former wife" (in fact, she is his widow).
29. In October 2018, the Representative provided his further comments, as follows:
- "The fact that Phoenix did not contact [Mrs D] to establish whether the information provided by the executor about her and her marriage was actually true, led to Phoenix Life reaching a decision that was unfair. [It] did not perform due diligence and [Mrs D] was not given the opportunity to reply to statements made in [the Estate's] letters to Phoenix Life (of which she was unaware) before the decision which overturned Phoenix Life's previous undertaking to her, was made [e.g.] such statements as:
- "[Mr D's] marriage to his wife ended in 2007 when they formally divided up their estate and went their separate ways."
- "[Mr D's] sons would need to contribute further to the estate mortgage debt of their father if payment were to be made to [Mrs D]."

“[Mr D] and [Mrs D] made a clear and full division of their property and investments.”

“Any payment to his estranged wife [Mrs D] could only act as a windfall gain.”

All of these statements are untrue.”

Adjudicator’s Opinion

30. In January 2019, Mrs D’s complaint was considered by one of our Adjudicators, who concluded that further action was required by Phoenix Life. The Adjudicator’s findings are summarised below: -

- Mrs D submitted her claim on 16 July 2017. The Estate submitted a counterclaim on 21 July 2017 and Mrs D submitted further information on 6 August 2017, partly rebutting what the Estate had said. The Estate made two further submissions, on 7 and 17 August, but Mrs D had no chance to make further submissions, even though the information given to Phoenix by each of the parties was contradictory.
- Phoenix ought to have requested clarification, as well as evidence, to support the arguments being made by the Estate and Mrs D, before it reached a decision. For instance, Mrs D had made clear to Phoenix, she and Mr D remained married and “committed to their mutual financial security”, whereas the Estate’s letter of 7 August 2017 said they had made a full and clear division of their property.
- Phoenix made its decision on 11 August 2017. Its reasons were: “Pay to partner as she has financial dependency & policyholder will shows he intended for her to benefit from his pension policy. EOW disregarded as it was for his former wife.” It was unclear from the submissions whether Phoenix had received evidence of Miss Y’s dependency. There was no sign Phoenix satisfied itself that Mrs D was not also dependent on Mr D, as she claimed.
- Phoenix’s decision seemed to have been influenced by an unwitnessed will, though it may have received further information about Mr D’s wishes from the Estate’s solicitors. Even if it did, Phoenix failed to test the Estate’s counterclaim before deciding how to distribute benefits, so the decision-making process was procedurally unfair.
- The “undertaking” mentioned by the Representative referred to two phone calls, which apparently took place on 21 and 29 August 2017. Recordings of these were apparently unavailable. However, even if Phoenix did incorrectly suggest that Mrs D would receive the death benefits, there was no evidence she acted on this to her detriment. As such, an award for non-financial injustice (distress and inconvenience) was sufficient - and was justified on the facts.
- To resolve the complaint, the Adjudicator considered Phoenix should (1) make a fresh decision regarding distribution of death benefits, having obtained further clarification and evidence from Mrs D and the Estate and (2) pay Mrs D £500 for significant distress

and inconvenience resulting from (i) following an unfair procedure and (ii) poor handling of her enquiries in relation to this matter.

31. The Representative, on behalf of Mrs D, accepted the Opinion. However, he added that, contrary to the Adjudicator's point at paragraph 38 of his Opinion, there was evidence that Mrs D was wrongly informed she could expect to receive the death benefits.
32. Phoenix Life did not accept the Opinion and the complaint was passed to me to consider. I agree with the Opinion and I will therefore only respond to the key points made by Phoenix for completeness.

Ombudsman's decision

33. I note that two Opinions have previously been provided in this case. The summary above refers to the second of those Opinions. My findings are as follows.
34. I find that Phoenix made insufficient enquiries of Mrs D and Ms Y to ascertain the extent of their respective dependencies before deciding how to distribute the benefits due under the policy.
35. Phoenix has provided the bundle of evidence which the decision makers had to hand. I am satisfied that it had evidence of Mrs D's correct marital status. It also contains evidence of wills which support her assertion that the deceased intended to make some ongoing provision for her. It is unfortunately unclear from the record of decision what weight, if any, the decision makers gave to the extent of Mrs D's dependency. The stated reason for discounting Mrs D's claim is not consistent with the evidence which was before them. I am therefore satisfied that there was a procedural error in Phoenix' decision making which has caused Mrs D injustice.
36. It is not my role to substitute my decision for that of the decision maker and in making the direction below I do not intend to express any opinion as to the appropriate distribution of the benefit.
37. Before making a fresh decision Phoenix should acknowledge Mrs D's marital status and consider any additional evidence of financial dependency that Mrs D and Miss Y may wish to produce.
38. On the facts of this case, I agree that the distress and inconvenience would have been significant. Therefore, an award of £500 is justified.
39. Therefore, I uphold Mrs D's complaint.

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Directions

40. Within 28 days of the date of this Final Determination, Phoenix shall:

- Make a fresh decision about how to distribute death benefits due under the rules of the Pension.
- In communicating its decision to the potential beneficiaries, Phoenix should (i) state its reasons, (ii) highlight the Pension rules used to make the decision and (iii) highlight the information/evidence taken into account to reach the decision.
- Pay Mrs D £500 in recognition of the significant distress and inconvenience caused.

Karen Johnston

Deputy Pensions Ombudsman
26 March 2019

Appendix

6.6 Payment of lump sum death benefits

- 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.
 - (d) 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.
- 6.6.3 Where permitted by the Provider, a Member may appoint trustees to hold on discretionary trust any lump sums payable on the death of the Member. Provided such appointment is valid and effective, any amount payable under this Rule 6.6 shall be paid to the trustees appointed by the Member. Any such appointment must be by deed in such form as the Scheme Administrator may require and the Scheme Administrator must be informed of the appointment before the Member's death. The Scheme, the Provider and the Scheme Administrator shall be discharged from all liability in relation to that lump sum on payment to the trustees appointed by the Member.

- 6.6.4 Where Rule 6.6.2 or 6.6.3 does not apply, the Scheme Administrator shall pay or apply any lump sum payable under this Rule 6.6 to or for the benefit of one or more of the Relatives, Dependants, personal representatives (or executors) or nominated beneficiaries of the deceased Member or any person who is entitled to an interest in the Member's estate (other than a trustee in bankruptcy or creditor), in such shares as the Scheme Administrator shall decide. The following provisions apply to any such payment.
- (a) The Scheme Administrator may establish separate trusts for the benefit of any beneficiary mentioned in this Rule 6.6.4.
 - (b) The Scheme Administrator may make interim payments to any beneficiary in advance of its final decision as to the total benefits to be paid under this Rule.
 - (c) For the avoidance of doubt, the Scheme Administrator may use any amount held in accordance with this Rule to purchase an annuity for any Dependand of the Member.
 - (d) 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. Otherwise, where payment to that person is not made within two years the Scheme Administrator shall retain the sum as part of the Scheme or make such payment or provide such benefits in respect of the Member or other beneficiary as the Scheme Administrator shall, in its discretion, decide.
 - (e) The Scheme Administrator may have regard to any document signed by the Member or other beneficiary expressing his wishes for the disposal of the sum, and any person, charity or unincorporated association named in the document will be a "nominated beneficiary" for the purposes of this Rule.
 - (f) The Scheme Administrator may deduct from any sum payable under this Rule an amount equal to all or part of the costs and expenses relating to the funeral of the Member or other beneficiary and shall pay any such sum in settlement of those costs or expenses or to any person who has incurred these costs or expenses. For the avoidance of doubt the Scheme Administrator may make a payment under this paragraph (f) in advance of exercising its general discretion as to the payment of a lump sum under this Rule 6.6.4.
- 6.6.5 Where any lump sum has accrued interest in the period prior to payment under this Rule, the recipient of the lump sum shall be liable for any tax on that interest and the Scheme Administrator shall deduct any such tax from the lump sum.