

Ombudsman's Determination

Applicant	Mrs Y
Scheme	The Maxwell Drummond Group Pension Scheme (the Scheme)
Respondent	Scottish Widows (SW)

Complaint Summary

Mrs Y's complaint against SW is about its decision to distribute death benefits under the Scheme. She believes it followed the wrong process and made the wrong decision.

Summary of the Ombudsman's Determination and reasons

The complaint should be upheld because SW failed to follow a correct and fair decision-making process. In particular, it failed properly to consider Mrs Y's marital status at the time of Mr Y's death, and failed to make a fresh decision, following its initial decision and Mrs Y's further submissions.

Detailed Determination

Material facts

1. Mr Y, Mrs Y's late husband, was a member of the Scheme. Under the Scheme, lump sum benefits were payable on his death. SW were Scheme trustees and administrators.
2. In November 2011, Mr Y made a will. No specific provision was made for Mrs Y. Nor did he make a written nomination regarding payment of death benefits.
3. From March 2013, Mrs Y lived with Mr Y, Mr Y's daughter from a prior relationship (**JR**), and Mrs Y's daughter from a prior relationship (**AA**).
4. In September 2014, Mr Y and Mrs Y married. Mr Y did not update his will following the marriage. Nor did he make a written nomination regarding payment of death benefits.
5. In July 2017, Mr Y died.

6. On 15 August 2017, a law firm called Burness Paull (**BP**), acting on behalf of Mrs Y, contacted SW, asking it to confirm it was Scheme trustee and that it had discretion over payment of death benefits.
7. On 20 September 2017, a phone call took place between representatives of BP and SW. According to a call note from the time, BP stated, "SW were very clearly minded to pay all of the pension benefits to [JR]". In the end, it was agreed BP would make submissions on behalf of Mrs Y and SW would consider them.
8. On 21 September 2017, BP provided its submissions to SW. Among other things, it stated: Mrs Y and AA were financially dependent on Mr Y when he died; Mr Y's will was not made "in contemplation of marriage" and was never updated; and, no divorce proceedings had been issued when Mr Y died.
9. In October 2017, SW wrote to BP. It said it had escalated the matter to its legal team, but believed its decision to nominate JR in full was the right one.
10. Shortly after, the death benefits were settled, with 100% being paid to JR. BP formally complained to SW about the decision.
11. In November 2017, after investigating the complaint, SW issued its final response. It said, it had reached the right decision as JR was named in Mr Y's will sole beneficiary of his estate (**the Estate**), it understood divorce proceedings had begun between Mr and Mrs Y, and it was reasonable to nominate JR in full as she was Mr Y's only child.
12. Dissatisfied with SW's response, Mrs Y referred her complaint to this Office.

Summary of Mrs Y's position

13. She, Mr Y, JR and AA lived together in one home. They acted like a family. JR and AA were treated as their own children (except for JR's and AA's spending some time each month with their other parents).
14. She and Mr Y had been having marital difficulties for some time, but they were trying to resolve them whilst continuing to live together. No divorce proceedings had been issued at the time of Mr Y's death. So, SW ought not to have relied on the Estate's lawyers' assertion that they had.
15. Mr Y's will was made some years before their marriage. It appeared not to have been made "in contemplation of marriage" and was not updated. If it had been updated, it is reasonable to expect Mr Y would have made "fair financial provision" for Mrs Y.
16. Mrs Y and AA were financially dependent on Mr Y at the time of his death.
17. Mrs Y contributed more to the joint home than Mr Y. This should have been, but was not, reflected in the title deeds.

18. Payment of the death benefits to JR, would cause Mrs Y and AA “immediate and significant hardship”.
19. SW should exercise its discretion appropriately, ask itself the right questions - taking into account only relevant information - and reach a rational decision.
20. SW did not ask the correct questions. Initially, it asked no questions at all; and, after reviewing submissions from the Estate’s lawyers, it requested no further comments from her to test those submissions, e.g. it carried out no investigation into Mr Y’s dependants.
21. SW also incorrectly relied on the Estate’s lawyers’ assertion that Mr Y intended that death benefits should be paid in full to JR, which was untrue.
22. So, SW reached a perverse decision, i.e. one which no reasonable body could reach.
23. There is no sign SW sought contemporaneous evidence of Mr Y’s wishes regarding distribution of the death benefits. Either written evidence or a sworn statement should have been obtained.
24. SW settled the death benefits in November 2017 when Mrs Y’s complaint regarding distribution was still ongoing. This showed that its investigation was “narrow” and “inadequate”.
25. Given the sensitive background, and contradictory submissions, payment of the death benefits should have been put on hold pending outcome of the complaint.

Summary of SW’s position

26. JR was named in Mr Y’s will as sole beneficiary of his estate.
27. Mr Y had lived with Mrs Y since March 2013, so there was enough time for him to amend his will and nominate Mrs Y, in full or in part, but he did not. Mr Y’s will left the proceeds of the Estate to JR, but this only assisted SW’s decision; SW did not have to follow the will and did not in fact do so.
28. Mr and Mrs Y’s life circumstances had changed significantly. According to lawyers acting for the Estate, they were separated at the time of his death and divorce proceedings had begun.
29. The Estate’s lawyers also confirmed that it was Mr Y’s “express wish” that JR be named beneficiary of the death benefits.
30. It was reasonable to nominate JR in full as she was Mr Y’s only child.
31. The death benefits under the Scheme were payable at its discretion.
32. Its “initial decision” was based on comments made during a telephone call with the Estate’s lawyers in August 2017. Their comments, about Mr and Mrs Y’s not only being separated but intending to divorce, and Mr Y’s wish for benefits be paid to JR,

were considered “credible” and “relevant” as the lawyers were professional and not acting for potential beneficiaries.

33. There was no expression of wish form for SW to consider.
34. Prior to release of the funds, SW reviewed BP’s further submissions and discussed them with its legislative support team. It still felt its decision was reasonable. BP’s letter confirmed there were marital problems at the time of Mr Y’s death, which was consistent with the Estate’s lawyers’ comments.
35. SW was also aware that AA was supported financially by her father.

Conclusions

36. Looking at all the available evidence, I do not find that SW followed a proper and fair decision-making process in this particular instance. Therefore, SW should consider the matter afresh.
37. There is no dispute that the Scheme rules give SW the power to decide the shares in which it distributes death benefits between potential beneficiaries. The Courts have made clear that, in exercising such a power, scheme trustees may decide to prefer some beneficiaries over others, provided that the decision is made properly.
38. But in this particular case, I find that SW reached its substantive decision without considering any evidence from an existing spouse who was within the class of potential beneficiaries, even though it knew she wanted to make representations about her own financial dependency and that of another minor child, AA.
39. SW failed to make the enquiries necessary for it to take account of all relevant factors, in particular the extent of any ongoing spousal dependency.
40. The reasoning SW gave for its final decision includes the fact that a divorce was in progress. That fact is disputed. Mrs Y’s spousal status was notified to SW from the outset, i.e. in BP’s email of 15 August 2017. SW have clarified that they did in fact understand Mrs Y’s spousal status, that they made enquiries about the wishes of the deceased with regard specifically to the pension benefit and ascertained that he was making financial support payments directly to JR. I accept SW’s submissions and explanation of the contemporaneous enquiries they carried out but do not consider that these demonstrate that they made the distribution decision fairly. While the factors above are relevant, they should not have precluded proper consideration of any evidence of dependency which Mrs Y wanted to put forward. A statement of wishes, no matter how clearly expressed, is no more than a factor to consider and financial dependency can be indirect. For example, it could take the form of reliance on someone else’s contribution to ongoing mortgage or other household costs. I find that, before distributing benefits, SW ought to have verified the current living arrangements of the family, and considered the full extent of any and all beneficiaries’ ongoing dependency on the deceased.

41. Because of these omissions I find that its decision was procedurally unfair.
42. I would not remit the matter if I were satisfied that the unfairness had been remedied by a proper review by the original decision maker, but in this case, I am not. SW's final decision of 20 November 2017 referred to, "the decision [SW] had previously made not to nominate your client" and went on to state that its lawyers had reviewed SW's decision in light of Mrs Y's representations, sent on 21 September 2017. However, there is no evidence that those representations reached the original decision maker. There is no evidence that SW's lawyers made the initial decision. Nor is there any evidence that any fresh decision was made. Therefore, there has been no remedy to the original procedural unfairness.
43. SW should have made - and should be able to show that it made - a fresh decision itself, including its reasons for why Mrs Y's submissions did not change its initial/preliminary decision.
44. SW should have made enquiries of all potential beneficiaries, and weighed their competing interests - bearing in mind any evidence of dependency, and the extent to which they had any alternative provision - alongside any evidence about the wishes of the deceased. Then, it should have made a conscious decision about whether it considered it appropriate to distribute death benefits in the way it ultimately did.
45. Lastly, I find that SW's failure to follow a proper decision-making process has caused Mrs Y significant distress and inconvenience in this instance, for which an award of £500 is appropriate. This is because Mrs Y has had to make a formal complaint to SW, and this Office, to secure a decision following a proper process. That should have been available to her as of right.
46. I find this matter should be remitted to SW for a fresh decision to be made. However, and for the avoidance of doubt, this is because of procedural errors and unfairness in the decision-making process; I am not the decision-maker, so my direction outlined below cannot predetermine the outcome of a proper exercise of discretion.

Directions

47. Within 28 days of the date of this Final Determination, SW should:
 - Re-consider its decision to distribute death benefits due under the Scheme rules.
 - In communicating its decision to the beneficiaries, SW should: state its reasons; highlight the Scheme rules used in making the decision; and highlight the information/evidence taken into account in order to reach the decision.

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- Pay Mrs Y £500 in recognition of the significant distress and inconvenience caused.

Karen Johnston

Deputy Pensions Ombudsman

18 December 2018