

The complaint

Mrs S complains that True Potential Wealth Management LLP (“True Potential”) gave unsuitable advice to encash existing investments and set up a new investment bond which was placed into trust.

Miss S – Mrs S’s daughter – represents Mrs S by way of a court order. I will refer to them both throughout this decision.

What happened

The facts of this case are well known to both parties so I don’t intend to repeat them in detail. To summarise, in 2018 True Potential gave Mrs S advice – through Miss S – to invest for the purpose of mitigating potential inheritance tax (IHT). It advised Miss S – as deputy – to encash Mrs S’s existing investment bonds and invest the proceeds into one bond. That bond was to be written into a loan trust and Mrs S would receive a regular income. Miss S, along with one other, would be trustee and Miss S and her sister would be the beneficiaries.

The encashment of the existing bonds created a tax charge of around £60,000. Miss S complained about the following:

- The advice was unsuitable as Miss S wasn’t authorised by the court order to set up a trust.
- Miss S was both trustee and beneficiary as well as Mrs S’s deputy and feels that’s a breach of trust law
- True Potential didn’t suggest using funds from a general investment account or ISA, and this has meant Mrs S faced a large tax bill
- Mrs S lost her personal tax allowance which has caused additional tax charges
- True Potential used an absolute trust despite giving Miss S the impression that the beneficiaries could be changed

I sent out my provisional decision on 13 February 2023. My findings were as follows:

“The main issue being complained about is that True Potential advised funds to be placed into trust, when Miss S didn’t have the authority under the Court of Protection order. However, for completeness I’ll also address the actual investment advice.

The investment advice

True Potential reviewed Mrs S’s circumstances in 2018 and was asked to provide advice on tax planning and inheritance tax planning. The suitability report shows Mrs S was a higher rate tax payer on income she received from a trust and from her investments. The suitability report records Miss S as saying:

“I want the investments to be as well managed but cost effective as possible, I also need the investments to be as tax efficient as possible. The investment is for the long term.”

It’s recorded that Miss S wanted to reduce the overall IHT due on the total estate. It’s also recorded that True Potential would review the existing investment bonds. The suitability report explains why the existing bonds wouldn’t be able to meet the goal of

IHT mitigation as existing investments can't be placed into a Gift and Loan trust. It highlighted that to surrender the existing bonds, there may be a tax liability. True Potential included a tax calculation that highlighted there would be more than £60,000 tax payable as a result of accepting the advice.

Part of the complaint Miss S made was that the tax charge wasn't made clear, but I disagree. I can see from the evidence Miss S submitted the overall tax that was paid – albeit late – was around this amount. So, I think True Potential adequately informed her that to accept the advice would create this liability.

The bond recommended fell in line with Mrs S's recorded risk profile, and was similar to the risk of the bonds already invested in. True Potential outlined the savings in annual fees and charges to show that the new advice would meet Miss S's request of being as cost effective as possible. Overall, I'm satisfied the advice to invest into the one bond was suitable for the purposes of reducing costs and mitigating the potential IHT liability.

I'm also satisfied that the only way to provide the level of investment needed to continue the income Mrs S required was to encash the existing bonds. Mrs S's ISA was already tax efficient and if any funds in her general investment account were used, the assets would also need to be sold prior to placing into a trust so a tax liability would always have occurred.

The trust

I'll first address Miss S's complaint points that she shouldn't be a beneficiary, trustee and Mrs S's guardian as it may be a breach of trust law. Our Investigator set out his reasons as to why he didn't think this was the case and I agree. I've not seen any evidence to suggest this is an issue. Miss S was signing for Mrs S – who is the settlor here so Miss S is free to be both trustee and beneficiary. I also note that the wording is clear in True Potential's suitability letter that it is only a discretionary trust that can accommodate beneficiary changes and not the absolute trust so I don't think it misled Miss S in the way she set out in the complaint. I'll now turn to the main issue.

The crux of this complaint is about reinvesting funds into a bond which is held in trust. Miss S has now provided confirmation from the Office of the Public Guardian that the Court of Protection Order doesn't allow her to enter into a trust agreement on behalf of Mrs S. I need to decide what, if any, action True Potential must take because of this, and whether True Potential has caused detriment.

Miss S has explained that True Potential said it would check with the Court of Protection whether a trust would be allowed and it didn't do so. I can see that this is the case and I do think True Potential ought to have checked when it said it would. Ordinarily, it is the deputy's responsibility – Miss S in this case – to ensure she understands what she can and can't do legally. But, I accept that she went to True Potential for advice and True Potential said it would check and didn't do so.

True Potential was aware that the Court of Protection wouldn't allow IHT planning due to not being aware how much money Mrs S would need in the future for her care – this is recorded in the fact find. It said that by recommending a loan trust, the funds remained accessible to Mrs S, and were repayable on demand. It felt that this therefore allowed for some IHT mitigation whilst ensuring Mrs S could retain the funds and use as much as she needed. I can understand the logic in this. I've also read the court order appointing Miss S as deputy, and it's ambiguous as to whether a trust would be able to be set up – so whilst I do think True Potential ought to have done what it said it would and check, I can understand why it felt its advice didn't go against the court order.

We now know that a trust wasn't permitted to be set up. Miss S has said this means the trust must now be wound up as the advice was unsuitable – she also asks for a refund of the tax paid on bond encashment as well as fees and charges. I do understand why she feels this is the only solution but I'm not persuaded at this point that Mrs S has suffered any detriment.

The Office of the Public Guardian confirmed a trust wasn't permitted, but it's exact wording was:

"We can confirm that creating a trust of the persons property should not take place unless you have further court approval. This would entail re-applying to the Court of Protection in order to have the relevant permissions to do this."

Miss S says the Office of the Public Guardian also confirmed retrospective permission could be applied for. However, she says this isn't what the complaint is about – she says the advice shouldn't have been given. In this case, I agree True Potential should've done what it said it would and check, but at this point I can't agree that this means the investment and trust needs to be unwound.

Miss S clearly wanted to address her mother's IHT liability – and the advice True Potential gave was suitable for this objective. It enabled Mrs S to have full access to her funds, for the growth to be outside of the estate and, as Mrs S received a regular income which was intended to pay for her care costs, had to ability the reduce her estate because she'd be spending the money regularly.

Detriment

All of the above leads me on to thinking about detriment – that is whether Mrs S has lost out here. It's clear now that Miss S wasn't permitted to set up a trust – and I'd mention this has only become clear very recently as Miss S asked the Office of the Public Guardian after our Investigator's view. But it's also clear that she can apply for retrospective permission. There's not been any indication that permission would be declined – particularly because the funds are still entirely accessible by Mrs S. But I'm unable to speculate on what the court's decision would be. And until that decision has been made I can't conclude that there has been any detriment. If the court declines permission then it's likely action needs to be taken – but True Potential has said it would consider this complaint again if this was the case and I'd expect it to do so.

At this point, it doesn't feel fair or reasonable to ask True Potential to refund amounts paid for its advice and associated costs for the trust to be unwound when an application to the court may mean it can continue. And if permission is granted, the investment and trust is entirely suitable for the objectives Miss S set out.

Whilst I do think it is Miss S's responsibility to know what she can and cannot do as deputy for Mrs S, I also think True Potential ought to have carried out the check with the Court of Protection, but only because it said it would. As it didn't do this, it should ensure the costs of applying for retrospective permission are covered.

Going forward

I must make clear that this decision is based on the information available at present and the outcome is that True Potential should pay for the application Miss S needs to make for retrospective permission to create a trust with Mrs S's investment. Any outcome of that application would be material new evidence that would need to be considered by True Potential, and in doing so it should provide new referral rights to our service for the complaint relating to whether that permission is accepted or declined. In turn, this service would consider the merits of the complaint relating to what should happen if the trust is not permitted after application.

Putting things right

True Potential Wealth Management LLP must cover the application fee for Miss S – as deputy for Mrs S - applying to the Court of Protection for retrospective permission – this should be paid to Miss S following receipt of the application having been made.”

Responses to the provisional decision

True Potential accepted the provisional decision, but asked whether it would be able to review the application for retrospective permission as it has relevant information and wants to ensure the facts are listed correctly. Following this request I asked for Miss S’s comments as I was minded to say that was fair.

Miss S’s financial adviser made some additional points on her behalf. She said the following:

- No consideration has been given to the vulnerability of Miss S – Mrs S’s deputy.
- Any tax liability that may have been created by cashing in Mrs S’s general investment account hasn’t been quantified – without this the outcome that the surrender of the bonds was suitable isn’t justified.

Miss S didn’t provide any additional comments relating to True Potential seeing the application for retrospective permission before it’s submitted.

What I’ve decided – and why

I’ve considered all the available evidence and arguments to decide what’s fair and reasonable in the circumstances of this complaint.

Having considered the comments made by both parties, I’ve reached the same outcome set out in my provisional decision (relevant extract above which forms part of this decision). The only amendment I’m making is that I do believe it’s fair for True Potential to review the application to the Court of Protection for retrospective permission prior to it being submitted as it holds many of the facts the advice was based upon. I’ll now address the comments from Miss S.

Firstly, I had noted that Miss S’s financial adviser raised her vulnerability. I think it’s important to note that this complaint is about the advice given to Mrs S - with Miss S acting as her court appointed deputy. The advice was based on Mrs S’s circumstances at the time and I’ve seen nothing to suggest that advice was unsuitable. I note that Miss S trusted True Potential to give the right advice, and I’ve concluded that subject to retrospective permission being granted, that advice was suitable for the circumstances True Potential were given. I also concluded that it was Miss S’s responsibility as deputy to understand the limits of the Court of Protection order, however True Potential should’ve checked with the court as it said it would. It’s because of that omission that I’m directing True Potential to cover the cost of the application for retrospective permission.

The second point Miss S has made is that any potential tax charges from cashing in Mrs S’s general investment account (GIA) hasn’t been quantified – so we can’t conclude that this wouldn’t have been a better option. I agree this hasn’t been quantified but I don’t think it needs to be here. It’s likely that had the investments within the GIA made gains over the many years it had been in existence, that a tax charge would be inevitable. In any event, Mrs S needed an income – as she was already receiving one from her bonds. If she’d only encashed the GIA to place into a bond this wouldn’t have provided her with sufficient income nor would it have satisfied the IHT mitigation that Miss S had said was of high importance – this was only achieved with the creation of the loan trust – which may be permitted after an application for retrospective permission.

I’ve not been provided any additional evidence that has led me to conclude that the advice True Potential gave Miss S, on behalf of Mrs S, was unsuitable for her objectives based on

the current information we have. And I've explained above in detail (in the provisional decision extract) why, based on current evidence, I think the investment advice was suitable, and that I believed True Potential made it very clear what the tax consequences of that advice would be. The only remaining issue is whether retrospective permission is granted – and up until this is applied for, I can't say there's been any detriment.

Going forward

I must make clear that this decision is based on the information available at present and the outcome is that True Potential should review and pay for the application Miss S needs to make for retrospective permission to create a trust with Mrs S's investment. Any outcome of that application would be material new evidence that would need to be considered by True Potential, and in doing so it should provide new referral rights to our service for the complaint relating to whether that permission is accepted or declined. In turn, this service would consider the merits of the complaint relating to what should happen if the trust is not permitted after application.

Putting things right

True Potential Wealth Management LLP must cover the application fee for Miss S – as deputy for Mrs S - applying to the Court of Protection for retrospective permission. The following steps must happen before it is paid to Miss S:

- True Potential Wealth Management LLP should review the facts listed in the application for retrospective permission and an agreement should be reached on the content of the application between both parties before it is submitted.
- Miss S should provide a receipt showing the application has been submitted.

My final decision

For the reasons I've explained I partially uphold this complaint and direct True Potential Wealth Management LLP to carry out the instructions set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs S to accept or reject my decision before 24 April 2023.

Charlotte Wilson
Ombudsman