DRN-4710952

The complaint

Mr B is unhappy that Aviva Life & Pensions UK Ltd refuses to accept his death benefit potential beneficiary nominations under the policy he has with Aviva.

What happened

The key facts and exchanges between the parties are well known, and not in dispute, and so I won't repeat them in detail here. Instead, I summarise below the events leading to this complaint being raised with our Service.

Mr B has a pension policy with Aviva, which provides death benefits should he pass away before taking retirement.

Mr B provided details of his nominated beneficiaries to Aviva, using Aviva's Expressions of Wish (EOW) form. In this, he recorded his wishes that the death benefits should be paid to all his surviving grandchildren alive at the time of his death, together with any conceived but as-yet unborn grandchildren ('*en ventra sa mare'*, which broadly translates as '*in the mother's womb*') at that time. Aviva didn't accept this as a valid EOW form, advising Mr B that he needed to specify names within the form. Further, he could update the EOW as and when new grandchildren were born.

Mr B disagreed with Aviva's stance on this matter. He felt there was no legal requirement for an EOW form to contain specifically named beneficiaries. It should be sufficient that the desired beneficiaries are identifiable from the description on the form – which he believed was the case here. He highlighted concerns about potential situations in later life that might compromise his mental capacity to make valid updated expressions that he would otherwise have wanted to make. He said the expression he'd made, and in the form that he'd made it, helped mitigate that possibility – and gave proper effect to his genuinely held wishes regarding these potential benefits.

Further exchanges between Mr B and Aviva took place. Aviva's position remained unchanged, so Mr B complained to Aviva. In response, Aviva said they'd consider potential beneficiaries named in Mr B's Will, named on his EOW form, and any other potential beneficiaries that might be identified. Aviva reiterated that an EOW form was not binding as they had discretion regarding where to pay the benefits (which Mr B had always accepted).

Mr B responded, saying that Aviva hadn't really addressed the key element of his complaint – why has Aviva rejected the wording of his EOW form, covering grandchildren born between then and his death, and those as yet unborn. Aviva explained, having consulted with their legal department, their EOW documents/process is not designed to accept expressions that do not contain specific beneficiary details, or the specific proportions in which the benefits are paid. The absence of this information would result in Aviva having to use their absolute discretion when deciding how to apply any such benefits.

Whilst accepting Aviva had (and was entitled to have) its own processes, Mr B questioned why they should be allowed to effectively defeat his clear and unambiguous wishes –

especially so when Aviva indicate they distribute benefits in a way that accurately reflects a policy-holder's wishes, which is effectively the exact opposite of what was happening here.

Mr B then brought his complaint to our service. Notwithstanding, and without prejudice, Mr B also completed and returned the EOW form which met Aviva's requirements, which they acknowledged. The completed form contained specific details of his grandchildren and share of benefits allocation (Part A), together with (in Part B – Optional) instructions regarding the share of benefits if any of the named beneficiaries died before Mr B, and that any grandchildren *"born after this date but before my death or en ventre sa mare before my death and born alive thereafter to receive an equal share with the named grandchildren".*

In response, Aviva confirmed they could accept the information in Part A in relation to the named beneficiaries, and they'd now also be able to consider the information contained in 'Section B' "*in relation to any grandchildren born post receipt of this form but prior to death".* However, they maintained they would not consider any grandchildren or beneficiaries as yet unborn at the time of his death (I agree with Mr B that Aviva's wording in this email appears mistaken, but the key message is as stated above).

One of our Senior Investigators considered Mr B's complaint, but didn't think Aviva had acted unfairly in reaching the decision they had. In summary, she concluded:

- We are not the regulator and can't tell Aviva to change their processes.
- Aviva had discretion who death benefits are paid to and are not bound by an EOW form.
- It's not unreasonable for Aviva to expect Mr B to complete their EOW form in a way they require. And Aviva weren't acting outside industry standards or accepted practices by requesting this information.
- Mr B did complete an updated form, shortly before complaining to us, in line with Aviva's requirements, using an additional commentary box to record his 'un-named beneficiary' wishes. Aviva accepted this, and that any grandchildren born post-completion of this EOW form and prior to Mr B's death will be considered by them.
- But they won't consider his other noted request, that the EOW extends to any grandchildren 'en ventre sa mare' (conceived, but as yet unborn). They would only consider grandchildren born at the time of his death.
- She acknowledged this sort of wording may be common in a Will, but an EOW is a different document – and is not a legally binding one. Trustees retain discretion, so it's fair for them to say they'll only consider beneficiaries born at the time of Mr B's death.

In response, Mr B confirmed the only point remaining at issue was the '*en ventre'* one. He repeated his view that the purpose of an EOW form is to give Aviva an indication of who should be considered as a beneficiary of his death benefits. He questioned why is it fair for Aviva then to ignore this provision and ignore his express wishes – and Aviva still hadn't provided a reasonable explanation why. He felt there'd be no hardship in Aviva retaining the funds for a maximum period of nine months after he'd passed away, before then distributing them using their discretion whilst also taking account of his EOW.

Our Investigator didn't change her opinion on the matter, and so the case has been passed to me to consider the complaint afresh and issue a Final Decision.

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.

Mr B's original complaint to Aviva referenced his unhappiness that they'd only recognise an EOW form that stipulated named beneficiaries. However, as explained above, since Aviva's final complaint response to Mr B, they've altered their position by confirming they'd consider named beneficiaries in the EOW form, together with any grandchildren born prior to his death - essentially amounting to Aviva agreeing to consider any living grandchild, at the time of Mr B's death, as a potential beneficiary. But Aviva remained steadfast that they would only consider potential beneficiaries that were alive at the time of his death. It's this issue that Mr B remains unhappy with. And he's confirmed this is the only matter that he wishes me to consider within this Decision.

I've thought very carefully about this and considered in detail the points that Mr B has made. I've also thought carefully about the extent to which my role allows me to interfere in the processes that underpin the way Aviva conducts its business. And having done so, I'm afraid I'll be disappointing Mr B here because I won't be upholding this complaint or asking Aviva to do anything further. I'll explain why.

There are two fundamental issues here that I think I need to address. The first centres around Aviva's process that requires a policyholder to provide beneficiary details that meet their accepted beneficiary criteria. However, this isn't something that is within my remit, or the Financial Ombudsman Service's generally, to consider.

It's up to Aviva (and any other business) what processes they choose to implement in how they run their business, taking account of relevant laws and regulations. There is nothing the Financial Ombudsman Service can do to censure Aviva for the processes or policies they've created or tell them to amend them.

Here Aviva have decided they want a policyholder (Mr B) to complete a form, providing specific information that will help inform their decision making when policy proceeds need to be paid out. Aviva says they want sufficient certainty regarding the potential beneficiaries, which is a business/process decision they are entitled to make – and generally a common one in relation to these types of policy. They've made a decision regarding what constitutes that accepted level of certainty – details of beneficiaries that are (hopefully) alive at the time of Mr B's death (later amended and expanded, as explained above). Again, that is a business/process decision they are entitled to make. The information Aviva requires in this regard is a matter for them. I can't tell Aviva whether their policies or processes, in asking for this information, are unfair or unreasonable.

However, if Mr B feels Aviva's processes and policies in this regard are unfair, or they fail to take account of valid and current legal principles, it remains open to him to make representations to Aviva's authorising bodies, the Financial Conduct Authority, and the Prudential Regulation Authority.

Which brings me on to the next issue, concerning Aviva's inherent discretion in how death benefits from Mr B's policy are paid out. This discretion is commonplace in policies and situations such as this – where death benefits may be awarded following the death of a policy holder. It allows the funds to be awarded outside of the deceased's estate, and so generally remain free of any Inheritance Tax implications. Mr B acknowledges and accepts Aviva has this inherent discretion to apply the funds as they deem appropriate in principle.

I do appreciate Mr B's point in highlighting that '*en ventre'* is a generally accepted common law principle, and particularly it being a generally accepted provision within a Will. However, a Will and an EOW are two fundamentally different documents, one providing direction and legal certainty regarding how a deceased estate should be shared, whereas the other merely provides (as the title says) an expression of wish regarding how a pension company should

apply death benefits due under a policy. So, I don't think it would be appropriate for me to tell Aviva that they must accept (and apply) that principle if and when death benefits from this policy become due to be paid.

I also acknowledge Mr B's attempts to propose a workable solution, suggesting Aviva retain the death benefits for a nine-month period after his death, and only then exercise their discretion (taking account of Mr B's EOW wishes) in deciding how to apply the benefits. I appreciate what lies behind this suggestion – any grandchildren conceived and 'in the womb' at the time of his death will have been born by time the nine-month period expires – providing Aviva with a clear and defined list of living grandchildren who can benefit from the policy proceeds.

I appreciate the logic behind this suggestion too (leaving aside potential questions about determining dates of conception that could become an issue), but I'm afraid that doesn't alter my opinion here either. Compelling Aviva to hold on to the funds for a minimum of nine months after Mr B's death and placing undefined obligations on them to undertake investigations in relation to grandchildren born after his death, I think amounts to me interfering with Aviva's inherent discretion – which as I've said is fundamental here.

That said, Aviva has acknowledged receipt of the EOW, which contains the *'en ventre'* wish. In theory, it remains open for Aviva to consider this element of the EOW if and when benefits become payable in the future – Aviva may change their mind or policy on this matter at some point in the future and be prepared to use their discretion to take account of this element of Mr B's wishes. After all, the accepted EOW does contain that clearly defined expression of wish, so it's *capable* of being considered by Aviva in the future. But that will be a matter for Aviva's discretion if and when the time comes and isn't something I can compel them to do in the future.

Conclusion

Whilst I have some sympathy with Mr B here, as I don't think his '*en ventre'* request is an unreasonable one in and of itself, that doesn't mean I can reasonably tell Aviva that they have to actively consider it if and when the time comes when policy death benefits become payable. Aviva retain, by virtue of the type of policy, inherent discretion in how they choose to apply the death benefit funds. Yes, they'll take account of Mr B's wishes, but only within the parameters of what they feel is a fair policy/process of theirs. And their discretion means they are entitled to insist that they'll only consider living beneficiaries if and when the time comes to pay benefits. There may be a reason for complaint if Aviva didn't exercise their discretion fairly or reasonably when paying out the benefits, which is something this Service may be able to consider, but that isn't a question for me, now – it would only be a potential matter at the time in question.

So, for the reasons explained above, I don't uphold Mr B's complaint regarding Aviva's refusal to accept his '*en ventre sa mere'* provision when assessing potential death benefit beneficiaries under his policy, and accordingly I won't be asking Aviva to do anything further in this regard.

My final decision

For the reasons set out above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 4 December 2024.

Mark Evans
Ombudsman