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"As a general principle, in instances where a major dependant's benefit allocation will not be paid as a lump sum, she must give written prior consent thereto."

MA Lukhaimane
Pension Funds Adjudicator

SECTION 37C DEATH BENEFIT - FUND'S DECISION TO PURCHASE AN ANNUITY ON BEHALF OF MAJOR BENEFICIARY, WITHOUT CONSENT, SET ASIDE

In a recent Pension Funds Adjudicator determination, the Adjudicator confirmed that as a general principle, in cases where a major dependant's benefit will not be paid as a lump sum, such dependant should give written prior consent thereto.

In this case, *Mahomed v Argus Provident Fund (2016)*, the Complainant's mother was a member of the Fund and had passed away. A death benefit became payable in terms of section 37C of the Pension Funds Act. The Fund identified two major dependants, namely the Complainant and her older sister. The Fund allocated the benefit equally between the two dependants, but made provision for a portion of the benefit to be transferred to an annuity to provide a monthly income.

The Complainant was dissatisfied with the Fund's mode of payment and she complained to the Adjudicator.

The Adjudicator had to determine whether or not the purchase of an annuity on behalf of the major dependant was lawful and equitable.

The Adjudicator confirmed that payment of a death benefit is regulated by section 37C of the Pension Funds Act. The board of a fund has a responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to thereafter decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit payable. When making an "equitable distribution" amongst dependants the board has to consider the age of the dependants; the relationship with the deceased; the extent of dependency; the wishes of the deceased placed either in the nomination form and / or his last will; and the financial affairs of the dependants including their future earning capacity potential. In making their decision, trustees need to consider all relevant information and ignore irrelevant facts. Further, the trustees must not rigidly adhere to a policy or fetter their discretion in any other way.

The law recognises three categories of dependants based on the deceased member's liability to maintain such a person, namely, legal dependants, factual dependants and future dependants.

A major dependant's benefit may be paid to him/her in cash or into a beneficiary or trust fund. The preferred method of payment must be duly cognisant of such beneficiary's best interests. There must also be a link between the preferred method of payment and the rationale behind such preferred payment. As a general principle, in instances where a major dependant's benefit allocation will not be paid in a lump sum, written prior consent must be given.

The Adjudicator held that the fund did not comply with the requirement of written prior consent and concluded that the death benefit was not properly allocated. The fund was ordered to reconsider its decision.

Lessons to be learnt from this case:

- Trustees should conduct a thorough investigation to identify the beneficiaries and the financial circumstances of each beneficiary in order to determine whether the preferred method of payment is consistent with the best interests of the beneficiary.

- The default option, in the case of major beneficiaries, should be to pay the benefit as a lump sum payment directly to the beneficiary. Another mode of payment may only be used if:

    - The beneficiary has agreed in writing to payment in instalments, as an annuity or to a Beneficiary or Trust Fund; or

    - There are compelling or exceptional circumstances justifiable on legal or factual grounds that show that the beneficiary is unable to handle his/her own affairs. Examples of exceptional circumstances would be prodigality, insolvency or mental disability; or

    - A person is appointed by a court of law to manage the beneficiary's financial affairs.