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LEGAL UPDATE 1/2011: A FOSTER CHILD MAY BE CONSIDERED A FACTUAL DEPENDANT

In the Adjudicator's determination of *A Gerber (the complainant) v Aberdare Cables (Pty) Ltd Provident Fund (the Fund) and NBC Fund Administration Services (Pty) Ltd (the Administrator)*, the matter dealt with the way in which the death benefits were allocated and distributed in terms of section 37C of the Pension Funds Act (the Act).

Section 37C

Background

The complainant is the surviving spouse of the deceased member, Mr E Gerber who passed away in August 2008. At the time of Mr Gerber's passing away he was a member of the Fund. He was also living with the complainant and a minor child from a foster home, Ms Angelique Lombaard (Angelique) at the time of his death.

Minor foster child considered dependant

Complaint

The complainant is upset that the Fund considered Angelique as a dependant of the deceased, as she is of the view that Angelique is a foster child who was only placed in the care of the deceased and, as a result, cannot be seen as a dependant of the deceased.

Reasons the complainant alleges the minor foster child cannot be seen as a dependant

The complainant further alleges that –

- A foster child cannot qualify as a dependant, as foster care is only temporary;
- Foster care cannot be seen to give rise to continuing maintenance obligations;
- The deceased member never intended to continue maintaining Angelique indefinitely; and
- Angelique has been returned to her previous care as from 23 October 2008. It would be unjust and inequitable if she received a death benefit while in fact having been maintained throughout by the Christian Social Service Council. Since the deceased's death she has been in the care of MTR Smith Children's Home.

Response

The Fund and Administrator listed the following reasons for considering Angelique as a dependant of the deceased –

The Fund and Administrator's response

- The trustees must be satisfied that the beneficiary was either a factual or a legal dependant of the deceased at the time of his death. The dependant does not have to be the biological child of the deceased.
- Upon investigating the circumstances the trustees discovered that Angelique

lived with the deceased at the time of his death and she was a registered dependant on the deceased's medical aid fund.

- The investigation revealed that Angelique was financially dependant on the deceased in terms of the definition of *dependant* in the Act which includes a person in respect of whom the member (ie the deceased) is not legally liable for maintenance, if such person, in the board's opinion, is in fact dependant on the member for maintenance at the time of the member's death.
- The investigation also revealed that the deceased intended to adopt Angelique as he considered her to be his own child. This was revealed during interviews with friends and family.

The law

"Dependant", as defined in the Pension Funds Act, in relation to a member, means – **Definition of "dependant"**

- (a) *a person in respect of whom the member is legally liable to pay for maintenance;*
- (b) *a person in respect of whom the member is not legally liable for maintenance, if such person –*
 - (i) ***was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;***
 - (ii) *is the spouse of the member;*
 - (iii) *is the child of the member, including a posthumous child, an adopted child and a child born out of wedlock;*
- (c) *a person in respect of whom the member would have become legally liable for maintenance, had the member not died;*
(Their emphasis)

Application of the law

The above definition is divided into three categories.

Paragraph (a) requires a legal duty, arising from legislation, to be present before the beneficiary can be regarded as dependent on the member for maintenance.

Legal dependant

Paragraph (b) governs the position of beneficiaries that are dependent on the member in circumstances where there is no legal obligation on the member for maintenance, like a self-supporting major child (ie factually dependant).

Factual dependant

Paragraph (c) refers to persons who are presently not dependent on the member for maintenance but who might have become dependent on the member at some point in the future had the member not died.

Future dependant

Determination

The court held that factual dependency is a factual inquiry that is dependent on the facts of each case. The factors that the court took into account included the fact that the deceased was a primary care-giver to the minor child, the deceased included her as a beneficiary on his medical aid fund, the deceased provided her with shelter as she was residing with him at the time of his death and the deceased treated her as his own child and had the intention of adopting her.

Factors taken into account

In coming to the above conclusion the court also considered *Coetzee v Toyota South Africa Pension Fund and Others* where the Adjudicator ruled that although the parties were divorced the surviving ex-spouse was recognized as a “qualifying spouse” as she was still financially dependent on the deceased *and that the deceased was legally liable for her maintenance, albeit that the maintenance was in an unusual form.*

Coetzee v Toyota SA Pension Fund

The former spouse therefore qualified as a dependant in terms of paragraph (a) of the definition of “dependant”.

The court also considered the interim ruling of *Thabete v SACCAWU National Provident Fund and Others* where it was ruled that in excluding the factual dependant (an “informally adopted” child of the surviving spouse and regarded as a stepson by the deceased) from the distribution, the fund had failed to effect an equitable distribution of the lump sum death benefit.

Thabete v SACCAWU National Provident Fund

The trustees therefore correctly considered Angelique to be a dependant of the deceased in terms of the definition of *dependant* in section 1 of the Act.

Relevance For BenefitsAtWork

BenefitsAtWork should be aware of the different circumstances around *factual dependency*. As stated above, factual dependency is determined on a case by case basis and it is the duty of the trustees to investigate the circumstances of each case.

Factors to consider in determining factual dependency may include, amongst others, -

Factors to consider to determine factual dependency

- Reliance on the deceased for maintenance even though the person is not the biological child of the deceased;
- The deceased is regarded as the primary care-giver;
- The deceased included the person as a beneficiary on their medical aid fund;
- The deceased provided shelter for the person; and
- The deceased treated the person as their own child, with the intention of adopting the child.

Therefore the person must be able to prove a reliance on the member at date of

death for the necessities of life.

Examples of factual dependants can therefore be any of the following:

- A person with whom the member lived as man and wife, including same sex partners; and
- An indigent relative of the member, ie a brother, sister, uncle, aunt and the children or grandchildren of such relatives.

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