

Legal Update

NO. 8 OF 2020 • SEPTEMBER 2020

When could paternity testing be deemed appropriate and/or necessary by a board to determine if a child qualifies as a dependant?

Introduction

1. In terms of section 37C of the Pension Funds Act ("the Act"), it is the duty of the board of trustees of a retirement fund to distribute any death benefits payable from such fund as prescribed in the Act. As part of the section 37C investigation, the first duty placed on a board of trustees is to identify the dependants and nominees of the deceased member.
2. The Act defines who will qualify as a dependant of a deceased member and creates three categories of dependants, namely legal dependants, non-legal dependants (that is, factual/financial dependants) and future legal dependants.
3. For a board to determine when paternity testing will be deemed appropriate and/or necessary, the board will have to
 - 3.1 determine into which dependant category the child falls;
 - 3.2 establish if there is a genuine dispute as to paternity which cannot be resolved by applying the normal rules of evidence; and
 - 3.3 balance a person's right to privacy and the right to know the truth versus the board's duty to act in the best interests of the child.

Determining into which dependant category the child falls

1. The child of a member could qualify as either a
 - legal dependant as a parent has a legal duty to financially support his or her children; or
 - non legal dependant in that the member voluntarily (thus no legal obligation) maintained or financially supported the child at the date of his or her death and the child was dependent on such maintenance or financial support.
2. The Pension Funds Adjudicator held in *Madubanya v Central Retirement Annuity Fund and Another* that a board of trustees should only resort to paternity testing if the evidence obtained by the board could not establish that the child was a non legal dependant of the member. The Adjudicator cautioned funds as follows:

"This Tribunal accepts that a paternity test is important to establish the veracity of a claim that a particular dependant was fathered by the deceased. However, it is important to caution the first respondent

that a biological relationship is not the sole factor to be considered in the distribution of a death benefit. The Act speaks of dependency, rather than a biological relationship, as a crucial factor in determining whether or not anyone should be allocated a death benefit. Therefore, whether or not the identified potential dependants are entitled to be allocated a portion of the death benefit does not hinge on their biological relationship with the deceased, but on their dependency on him and the extent thereof."

3. In *AJ Malinga v Ejoburg Retirement Fund, MMI Group Ltd and Pikitup Johannesburg Soc (Pty) Ltd*, the Pension Funds Adjudicator held that a child born two days before the member's death qualified to share in the death benefit. The complainant was the mother of the deceased member and contended that the deceased member was not married and did not have any children. The board requested the complainant to undergo a paternity test done to confirm her allegation that the child was not the deceased member's child. The complainant kept on being evasive as to whether/when she will go for the paternity test and eventually claimed that she did not have money for the test. However, when the fund offered to pay for the test, she refused to undergo the test, which left the board with no option but to accept that the child was the deceased member's child and to treat the child as a legal dependant. The Adjudicator held that although a biological relationship is not a determining factor in a section 37C allocation, the board was correct to establish the biological relationship between the deceased member and the child as there was no opportunity for the deceased member to maintain the child, thereby establishing factual dependency. She said the deceased would have been legally compelled to provide financial support to the child had he survived.
4. It is therefore clear that if there is not sufficient evidence for the board to establish that the child was a non legal dependant of the deceased member and the child had not been nominated by the deceased member to share in a portion of the death benefit, the board may request a paternity test to enable it to determine if the child qualifies as a legal dependant due to the child being the biological child of the deceased member. Another scenario where the board could potentially request a paternity test is if the child is born after the member's death and for the child to qualify as a dependant of the deceased member, he or she must be the biological child of the deceased member.

Establish if there is a genuine dispute as to paternity

1. In the Supreme Court of Appeal ruling of *Y D (now M) v L B*, the court held that scientific tests on a child to determine paternity should not be ordered where paternity has been shown on a balance of probabilities. In this case, the father of the child did not deny paternity, he simply sought scientific certainty/proof something to which he was not entitled. The court held that no doubt there are cases where there is genuine uncertainty as to paternity and a DNA test should be ordered for the child in question. In this regard it is within the inherent power of a court, as the upper guardian of children, to order scientific tests if this is in the best interests of a child. But this was not a case in which that inherent power had to be invoked given that paternity was not disputed.
2. In the High Court ruling of *M and Z v D and Setshaba Pension Fund*, the fund determined that the child was the deceased member's only dependant and decided to pay the R2 000 000 death benefit to the applicant in her capacity as mother and guardian of the child. The executrix of the deceased member's estate (and also the deceased member's mother) contended that as the child has not been dependent on the deceased member for some years before his death, it was of great importance that the paternity of the child was determined with certainty before the death benefit was distributed. The deceased member failed to designate a nominee and thus, if it was found that the deceased member was not the child's father, the death benefit would have to be paid into his estate. The applicant refused to submit herself and her child to paternity testing as she contended that there was no legal basis for her and her child to be subjected to paternity tests when the member himself had accepted the child as his child up until his death.

The question that needed to be determined by the court was if a genuine uncertainty as to paternity of the child existed, and if so, whether it would be in the best interests of the child to order paternity tests. The court held that the following important facts had to be considered to establish if there was a genuine uncertainty as to paternity of child: the applicant and the deceased member were in an intimate relationship and had been staying together since 2005; the child was born approximately one and a half years before the relationship between the applicant and the member ended; on the child's unabridged certificate, it showed the deceased member as the father; for the first two years of the child's life, the deceased member acknowledged him as his son and maintained him; and after the applicant and the member parted, he continued to sporadically support the child as he was not always employed. The court held that the executrix failed to demonstrate a genuine uncertainty as to the paternity of the child and that there was no substantial and substantiated doubt about his paternity which needed to be resolved.

3. It is therefore clear that only if there is a genuine dispute of paternity, which cannot be resolved by applying the normal rules of evidence, may a board request that a paternity test be conducted to establish paternity.

Acting in the best interests of the child, the right to privacy and the right to know the truth

1. As a general principle, the Children's Act of 2005 provides that in every matter affecting a child, the child's best interests should be of paramount importance. In this regard, it is within the inherent power of a court, as the upper guardian of children, to order scientific tests to determine paternity if this is in the best interests of a child.
2. In the Supreme Court of Appeal ruling of *Y D (now M) v L B*, the court concluded that the discovery of truth (as to a child's paternity) may prevail over a person's rights to privacy and bodily integrity but there cannot be a general rule to this effect and held as follows:

"It is clear, in my view, that the rights to privacy and bodily integrity may be infringed (by a procedure ordered by a court in the exercise of its inherent jurisdiction) if it is in the best interests of a child to do so. These rights, like others enshrined in the Constitution, may be limited where it is reasonable and justifiable.....However, whether the discovery of truth should prevail over such rights is a matter that should not be generalized. As Didcott J said in Seetal it is not necessarily always in an individual's interest to know the truth. In each case the court faced with a request for an order for a blood test or a DNA test must consider the particular position of the child and make the determination for that child only. The role of a court, and its duty, is to determine disputes in civil matters on a balance of probabilities. It is not a court's function to ascertain scientific proof of the truth."

3. In the *Setshaba Pension Fund*-high court ruling, one of the reasons why the applicant refused to submit herself and her child to paternity testing, was that the test would infringe her and her child's rights to privacy and that it was consequently not in the best interests of her child to be subjected to such test. The court found that the executrix's request for the paternity test was not about discovering the truth or what was in the best interests of the child but about money and that had it not been for the potential benefit due to the estate, the issue of paternity would not have been raised. The court thus found that to submit the minor child to paternity testing would not serve his best interests.
4. It is therefore clear that the board of a fund should also when conducting a section 37C investigation, consider the best interests of the deceased member's children. What is in the best interests of a child is a factual question in each case and the board needs to consider the specific facts of the matter to determine what is in the child's best interests.

What happens if a decision of the board that a child is the biological child of a deceased member is challenged?

1. Where a decision of the board of a fund that a child is the biological child of a deceased member is challenged by another person (e.g. another identified beneficiary), it will not be the duty of the board to prove that the child was that of the deceased member by procuring a paternity test to this effect. Rather, it is for the person questioning the decision to make out a credible case supported by relevant evidence rebutting the board's decision that the child is the deceased member's biological child.
2. Furthermore, the person questioning the biological status of the child will not be entitled to request the board of the fund to "order" the child to undergo a paternity test as the board is only allowed to "request" a paternity test in the limited circumstances referred to above. Such person will therefore have to approach the Pension Funds Adjudicator or a court to obtain an order directing the child to undergo a paternity test.

This principle was substantiated by the Pension Funds Adjudicator in *Kekana v Nedcor Defined Contribution Provident Fund*, where it was held that the alleging party needs to adduce evidence to prove that the child is not the biological child of the deceased member.

In summary

1. It is clear that the appropriateness of subjecting a beneficiary to paternity testing will depend on the facts of each case and will always be subject to acting in the best interests of the child and taking into account the competing rights to privacy and the right to know the facts to make an asset allocation. However, if one looks at relevant case law, it is clear that if there is not sufficient evidence for the board to establish that the child was a dependant and the child had not been nominated by the deceased member, the board may request that a paternity test be conducted to establish the blood relationship between the child and the deceased member.
2. Where the board feels that a request to a beneficiary to undergo a paternity test is appropriate and/or necessary to adhere to their duties in terms of section 37C, the fund should pay for the testing and the costs should form part of the section 37C investigation costs subject to the rules of the fund allowing for such deduction. In this regard, the rules of the FundsAtWork Umbrella Funds allow for such deduction. The costs should therefore not be borne by the potential beneficiary by deducting the costs from his or her benefit but rather be deducted from the death benefit in total before payment is made to the beneficiaries.