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Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, NO. 24 OF 1956 (“the Act”): A GERBER (“complainant”) v ABERDARE CABLES (PTY) LTD PROVIDENT FUND (“first respondent”) AND NBC FUND ADMINISTRATION SERVICES (PTY) LTD (“second respondent”)

[1] INTRODUCTION

1.1 The complaint concerns the manner of the allocation and distribution of a death benefit in terms of section 37C of the Act.

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act No, 1956 (Act No. 24 of 1956)

-The service offered by the Pension Funds Adjudicator is free to members of the public-

- 1.2 The complaint was received by this tribunal on 2 April 2009. A response dated 18 June 2009 was received from the respondents. On 19 November 2009 the matter was referred to conciliation to give the parties an opportunity to resolve it. However, the matter remained unresolved, so it was referred to adjudication.
- 1.3 After reviewing all the written submissions, this tribunal considers it unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

[2] BACKGROUND FACTS

- 2.1 The complainant is the surviving spouse of the late Mr. E. Gerber (“the deceased”) who passed away on 25 August 2008. The deceased was a member of the first respondent at the time of his demise.
- 2.2 At the time of the deceased’s death he was residing with the complainant and a minor child from a foster home, Ms. Angelique Lombaard (“Angelique”).

[3] COMPLAINT

- 3.1 The complainant is aggrieved by the decision of the first respondent to consider Angelique as a dependant of the deceased. The complainant submits that Angelique is a foster child who was placed in the care of the deceased and therefore does not qualify as a dependant of the deceased.
- 3.2 The complainant further states that foster care entails the following:
- Foster care is the placement of a child who needs to be removed from the parental home into the custody of a suitable family or person willing to be foster parents. The placement in foster care is a temporary

placement for a specified period, during which the foster care parents receive a grant to care for the minor;

- Foster care is defined as the temporary care of children by substitute parents. Foster care is supervised by governmental or charitable agencies. It is used to protect children from unhealthy or unsafe home situations, or to provide care when natural parents are unavailable;
- Foster care is different from adoptive care, where children become permanent members of a family. Foster parents have the obligation to maintain and care for the child and grant reasonable access to the child 's parents, whilst the child is temporarily in their care until such time as the foster placement (which is reviewable by the children's court every two years) is terminated;
- Placement in foster care gives foster parents custody over the child, which includes the right to discipline the child. However, this does not include the power to deal with the property belonging to the child, consent to the marriage of the child, or consent to an operational medical treatment of the child that involves serious danger to life or limb. Such placement does not, and in this instance had not, created a continuing maintenance obligation.

3.3 The complainant avers that it was at no stage the consideration of the deceased to continue maintaining Angelique indefinitely and/or until she becomes a major and/or until such time as she is self-sufficient.

3.4 The complainant contends that Angelique has been returned to her previous care as from 23 October 2008. It shall be unjust and inequitable if she receives a death benefit while factually having throughout been maintained by the Christian Social Service Council. Since the deceased's death she has been in the care of MTR Smith Children's Home.

[4] RESPONSE

- 4.1 The respondents state that in terms of the definition of a dependant in the Act, the trustees must satisfy themselves that the beneficiary was either legally or factually dependant on the deceased at the time of his death. A dependant does not have to be the biological child of the deceased in order to qualify for a benefit.
- 4.2 The respondents further state that in their investigation, the trustees established that Angelique was residing with the deceased at the time of his death and he was taking care of her. It was further established that she was registered as a dependant on the medical aid fund of the deceased.
- 4.3 The respondents submit that the trustees considered Angelique as a dependant of the deceased in terms of the definition in the Act, which includes, *inter alia*, a person in respect of whom the member (in this case the deceased) is not legally liable for maintenance, if such person was in the opinion of the board, upon the death of the member in fact dependant on the member for maintenance. The investigation showed that Angelique was financially dependant on the deceased at the time of his death.
- 4.4 The respondents refer to the case of *Coetzee v Toyota South Africa Pension Fund & Others (1)* [2001] 5 BPLR 2007 (PFA) at paragraph 20, where it was held as follows:
- “Moreover, the fact that the Complainant was still on the deceased’s medical aid and the fact that he provided her with a car *in lieu* of maintenance and paid the insurance of the car, made the Complainant financially dependant on the deceased to some degree.”
- 4.5 The respondents contend that the investigation revealed that the deceased had the intention of adopting Angelique, contrary to what the complainant stated. The trustees interviewed friends and family of the deceased and were told that the deceased treated Angelique as his own child and had the intention of adopting her.

- 4.6 The respondents contend that the trustees were also furnished the forms that the deceased completed when he applied to include Angelique on his medical aid scheme. The deceased stated in the form that adoption was in the process and that together with the complainant they were part-time parents since she was 9 years old for weekends and school holidays and now full-time foster parents until adoption is finalised.
- 4.7 The respondents submit that the complaint was lodged with this tribunal before the trustees could allocate and distribute the death benefit. The trustees decided to stay the distribution of the benefit until such time as this tribunal issues a determination.

[5] DETERMINATION AND REASONS THEREFOR

- 5.1 The issue for determination is whether or not Angelique was a dependant of the deceased in terms of the Act. The complainant submitted that Angelique is a foster child and therefore not a dependant of the deceased. The respondents contended that Angelique was factually dependant on the deceased and therefore qualifies as a dependant in terms of the Act. A “dependant” is defined in terms of section 1 of the Act as follows:

“dependant” in relation to a member, means-

- (a) A person in respect of whom the member is legally liable for maintenance;
- (b) A person in respect of whom the member is not legally liable for maintenance, if such a 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 a member;
 - (iii) Is a 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;" (Own emphasis)

- 5.2 The definition of a dependant creates three categories of dependants. The first category, set out in paragraph (a), requires the beneficiary to be dependent on the member for maintenance, where such dependency is a result of a legal duty arising out of a statute or common law. Paragraph (b) regulates the position of beneficiaries dependant on a member where there is no duty of support in terms of the law, for example, a self-supporting major child. The third category outlined in paragraph (c) refers to persons who are currently not dependant on the member for maintenance, but in respect of whom the pension fund member could potentially become liable for maintenance at some future date (see *Govender v Alpha Group Employees Provident Fund* [2001] 4 BPLR 1843 (PFA) at paragraph 14).
- 5.3 It was contended by the respondents that Angelique is a dependant of the deceased in terms of paragraph (b)(i) of the definition of a dependant in the Act because it is the trustees' opinion that she was in fact dependent on the deceased for maintenance upon his death. As regards whether or not the beneficiary is dependant on the deceased for maintenance is a factual inquiry and will depend on the facts of each case (see *Govender supra* at paragraph 15).
- 5.4 In light of the above, the factual inquiry as evidenced by the documentary submissions before this tribunal revealed the following: Angelique relied on the deceased for her maintenance needs even though she is not his child; the deceased was her primary care-giver; 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; the deceased treated her as his own child and he was intending to adopt her.
- 5.5 Therefore, the trustees correctly considered Angelique as a dependant of the deceased in terms of the definition in section 1 of the Act.

[6] ORDER

1. The complaint cannot succeed and is therefore dismissed.

SIGNED IN JOHANNESBURG ON THIS 7TH DAY OF JUNE 2010

CHARLES PILLAI
PENSION FUNDS ADJUDICATOR

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