

**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR**

CASE NO: PFA/EC/309/00/NJ

In the complaint between:

**A D Wasserman**

**Complainant**

and

**Central Retirement Annuity Fund**

**Respondent**

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**INTERIM RULING IN TERMS OF SECTION 30J OF THE PENSION FUNDS ACT OF  
1956**

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1. This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act 24 of 1956 (“**the Act**”). The complaint relates to the payment of a death benefit in terms of section 37C of the Act, in particular, the exclusion of the complainant from sharing in the benefit.
2. No hearing was held in this matter. An investigation under my supervision was conducted by my investigator, Naleen Jeram. In handing down this interim ruling, I have relied on the documentary evidence and written submissions gathered during the course of our investigation.
3. The complainant is Mrs K D Wasserman, a widow, currently residing at the Aliwal North Old-Age Home, Eastern Cape. The complainant is represented by her son, Mr A F Keys.
4. The respondent is the Central Retirement Annuity Fund, a pension fund duly registered under the Act and falling within paragraph (a) of the definition of pension fund organization contained in section 1 of the Act (“**the fund**”). The fund is represented by Mr Leon Atterbury.

5. The complainant's deceased son, Mr R W Keys during his lifetime applied for membership of the fund. Mr Keys did not nominate a beneficiary for his pension benefit in the event of his death prior to his retirement. However, he made a last will, in which he bequeathed a legacy in the amount of R100,000.00 to his broker, who I shall (for the purposes of this determination) refer to as Mr X. The residue of the estate was bequeathed to other persons and organizations, which are not necessary to disclose for the purposes of this determination. On 8 October 1999 Mr Keys passed away. A death benefit of R111,507.39 payable by the fund became available for distribution.
6. The fund conducted an investigation and concluded that the deceased had no dependants and had not nominated a nominee to receive his pension benefit. Therefore, in accordance with section 37C(1)(c) the fund decided to pay the entire benefit into the deceased's estate.
7. Mr A F Keys, acting on behalf of the complainant was unhappy with the decision of the fund. He contended that his mother (also the mother of the deceased), a widow for the past 27 years, only income is a pension from the Police Widows Pension Fund, which is only sufficient to cover the costs of her lodging at the Aliwal North Old Age Home. She recently was seriously ill and underwent surgery and although she is a member of the Medi-Health Scheme, all of the medical costs are not covered by the said scheme. Furthermore, she is currently in arrears with her payment in respect of the old age home and is again in hospital for an operation in respect of a fractured femur. Once again, the medical aid will only be covering a portion of the costs and she will need assistance from other sources for the operation and her subsequent survival. The complainant seeks an order directing the fund to award a portion of the benefit to herself.
8. Mr A F Keys also raised several arguments in respect of the validity of the will and the nomination of Mr X as a legatee. However, for the purposes of this determination I

have ignored these arguments as this office does not have jurisdiction to deal with questions relating to the validity of wills.

9. The fund in its response unfortunately did not deal with all the allegations contained in the complaint. Mr Atterbury, submitted the following response.

The complainant is dissatisfied with the decision of the Board of Trustees to pay the full proceeds to the estate of the late member. The complainant also states that he cannot understand that the trustees of the fund are to decide to whom payment should be made, but contrary to that they mention that they are obliged to pay the proceeds to the estate.

As you are aware, section 37C of the Pension Funds Act of 1956 determines how the trustees of the fund should dispose of pension benefits upon the death of a member of the fund. Certain sections indeed give the trustees a discretion to exercise. However, in terms of Section 37C(1)(c) the trustees are obliged to pay the pension benefits to the estate of the member if the member did not have any dependants or nominees – as it was the situation in this particular case.

We have taken notice of the concerns that the complainant has expressed regarding the validity of the will. That problem, however, should be addressed in the appropriate manner. It could not be expected from the trustees to make payment outside the scope of the Pension Funds Act.

The member died without any dependants and did not nominate any beneficiaries. We are therefore satisfied that the fund acted in accordance with the Pension Funds Act in paying the death benefits to the estate of the member.

10. In terms of section 37C(1)(c) of the Act, where there are no dependants and nominees, the fund may pay the benefit to the deceased's estate. However, before paying into a deceased's estate, the fund is obliged to conduct an investigation to determine whether there are any dependants or other beneficiaries nominated by the deceased. Dependant is defined in 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 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, including a party to a customary union according to Black law and custom or to a union recognized as a marriage under the tenets of any Asiatic religion;
  - (iii) is a child of the member, including a posthumous child, an adopted child and an illegitimate child;
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died;

11. Definition of dependant creates three categories of dependants. The first set out in paragraph (a) requires the beneficiaries to be dependent on the member for maintenance, where such dependency is as a result of a legal duty, which may arise out of a statutory provision or the common law. Paragraph (b) regulates the position of beneficiaries dependent on the member where there is no duty of support in terms of the law, for example, a self-maintaining independent adult child. The third category outlined in paragraph (c) refers to persons who are currently not dependent on the member for maintenance, but in respect of whom the pension fund member would have become liable for maintenance at some future date had he not died.

12. *In casu*, the issue for determination is whether the complainant fulfills the criteria of a dependant set out in section 1 of the Act and therefore entitled to share in a death benefit distribution. With regard to paragraph (a) of the definition, there is no doubt that there is a legal duty on parents to pay maintenance in respect of their minor children. However, there is also a corresponding legal duty on a child to pay

maintenance in respect of his parents under certain circumstances. The existence, scope and extent of this duty has been fully canvassed by our courts (see *Stander v Royal Exchange Insurance Company* - 1962 (1) SA 454 (SWA)). Our courts have held that a mere existence of a parent-child relationship is in itself insufficient and there must be evidence as regards to the parents' need or necessity for support.

13. Therefore, in order for the complainant to fall within paragraph (a), she needs to establish that there was a need or necessity for support at the time of the deceased's death. In this regard, it is not necessary for the complainant's son to be actually maintaining her, but rather the mere need or necessity of support in itself is sufficient. From the limited evidence before me, it appears as if the complainant has been suffering medical and financial hardship for a considerable period of time. There appears to have been a definite need or necessity for support at the time of the deceased's death, which is ongoing. However, for reasons which appear below it is unnecessary for me at this stage to make a definitive ruling on this issue.
14. Whilst it is not entirely clear whether the complainant falls within paragraph (a), in my view there is no doubt that she falls within paragraph (c) of the definition of a dependant. In terms of paragraph (c), any person in respect of whom the deceased member would have become legally liable for maintenance had he not died would qualify as a dependant. Therefore, had the deceased been living today, in light of the complainant's dire need for financial, medical and probably emotional support, the deceased would have been legally liable to maintain his mother in terms of the legal duty arising out of the parent-child relationship. Therefore, I am satisfied that the complainant falls within paragraph (c) of the definition and is therefore entitled to share in the death benefit distribution. Furthermore, by virtue of being the only dependant, she is entitled to the entire benefit in terms of section 37C(1)(a) of the Act.
15. However, I believe it would be premature to make a final ruling in this matter for the following reasons. The executor of the deceased's estate has a substantial interest in the matter and has not been joined as a party to these proceedings. No final order can be made without affording the executor an opportunity to submit his views on the

distribution. In addition, the fund has not responded to all the allegations contained in the complaint, in particular, whether the complainant qualified as a dependant. Therefore, in the interest of procedural fairness, it would be prudent to make an interim ruling affording the parties to adduce further evidence and written submissions.

16. Accordingly, the interim order of this tribunal is as follows:

16.1. The executor of the deceased's estate (R W Keys) is joined as a second respondent to the complaint in terms of section 30G(d) of the Act.

16.2. The respondent fund is directed to serve a copy of the complaint, its response and this ruling upon the second respondent, within 7 days of the date of this ruling.

16.3. A rule *nisi* is hereby issued, in terms of which all the parties are called upon to show cause, if any, why the following order should not be granted:

16.3.1. The decision of the respondent fund to pay the deceased's estate R111,507.39 is contrary to section 37C of the Act and therefore unlawful.

16.3.2. The first respondent is directed to pay the complainant R111,507.39 together with interest thereon at the rate prescribed in the Prescribed Rate of Interest Act for a judgement debt from 8 October 2000 to the date of payment, within 6 weeks of the date of this ruling.

Dated at **CAPE TOWN** this 23<sup>rd</sup> day of February 2001.

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**John Murphy**

Pension Funds Adjudicator