

PERSONAL FINANCE

Limited recourse on death benefit decisions

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If you do not agree with the trustees of a retirement fund when they decide who receives the benefits on the death of a member, there are limited grounds on which you can challenge their decision, a pension lawyers conference heard recently.

You won't get far questioning whether the decision by the board of trustees was the wisest, fairest or most generous. You can ask the Pension Funds Adjudicator or a court to review the decision only if you have grounds to believe that the board did not exercise its discretion properly, Naleen Jeram, a senior legal adviser at MMI and an adjunct professor at the University of Cape Town, told the Pension Lawyers Association conference in Cape Town.

The trustees of your pension fund are obliged in terms of the Pension Funds Act to distribute death benefits equitably among your dependants. They can consider any person you have nominated, but if you have nominated someone who is not a dependant, that person may not necessarily receive any of the benefits.

Many people ask for decisions on death benefits to be reviewed, and the distribution of these benefits has been the subject of more than 1 000 rulings by the Pension Funds Adjudicator over the past 16 years and numerous High Court cases, Jeram says.

Last year, the adjudicator's annual report revealed that 10 percent of the complaints to that office were about death benefits.

Jeram says the limited grounds for setting aside a decision made by a board of trustees was confirmed in a 2006 Gauteng High Court case in which the daughter of a fund member challenged a decision on the distribution of a death benefit by the board of the Alexander Forbes Retirement Fund. The adjudicator's office was also cited, as it had dismissed her complaint about the distribution of the benefits.

The daughter complained that the bulk of her father's death benefit had been awarded to her stepmother, the spouse of the deceased. She claimed her father had disinherited her stepmother and their relationship had broken down.

The fund awarded most of the benefit to the widow, as it took into account her age compared with the other beneficiaries, her earning potential and the fact that she did not inherit from the deceased member's estate.

The court dismissed the daughter's application to review the trustees' decision, finding that the board had exercised its discretion and, even though the court may have exercised its discretion slightly differently, or considered that a more equitable allocation could have been made, that alone was insufficient for setting aside the decision.

Jeram says when a board uses its discretion to determine who is entitled to death benefits, it must make a decision according to the criteria established in a series of rulings by the adjudicator.

He says when the adjudicator's office is asked to review the discretion exercised by a board of trustees on the distribution of death benefits, the decision must show that the board has considered all the relevant factors and discarded irrelevant considerations.

Jeram says the role of the board is very similar to that of a civil court judge or magistrate, who has to evaluate the credibility of witnesses and determine factual disputes and then draw legal conclusions on various issues relating to the distribution of the death benefits.

He says in a case that came before the adjudicator in 2001, *J v Protektor Pension Fund*, the former spouse of a deceased member complained that the allocation made to her children was less than the allocation made to the new spouse's children.

The board had taken into consideration that the former spouse earned a substantial income from her own business, whereas the new spouse was unemployed, stayed with her parents and had to pay for medical expenses as a result of injuries sustained by her two children in the same accident that killed their father.

The adjudicator dismissed the complaint, saying that the portion of the benefit to be accorded to each beneficiary was an exercise of the discretionary powers of the fund trustees.

The adjudicator's view on the trustees' right to determine the proportion and the weight attached to each factor it considers was later confirmed in a High Court and a Supreme Court ruling dealing with similar issues.

Jeram says that when a functionary, such as a board of trustees, is entrusted with discretion, it is for that functionary to decide the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, and provided it acts in good faith and rationally, a court of law cannot interfere.

If trustees decide not to distribute any benefits to a beneficiary, this also does not of itself constitute a ground for reviewing the decision, Jeram says.

However, he says, when the board believes it is equitable not to award a beneficiary a portion of the benefit, it is important to inform that person of the decision, otherwise an inference may be drawn that the board did not properly apply its mind to the matter.

Last year, the Pension Funds Adjudicator did find grounds to set aside a decision made by the trustees of a fund. The trustees had awarded larger amounts to the nieces and nephews of a deceased member than it awarded to her daughter. The adjudicator found that the trustees had failed to take into account their financial dependence on the member, the earning abilities of the nieces and nephews' parents, grants they were receiving and the fact that the daughter had only one remaining parent.

Jeram also told the Pension Lawyers Association conference that a recent amendment to the Pension Funds Act has given trustees the ability to delegate their functions, such as that of deciding to whom to award death benefits.

The amended Pension Funds Act states that trustees can, in writing and in accordance with a system set out in the rules of fund, delegate any of their functions, but must provide adequate checks and balances.

However, even before the power of delegation was added to the Act, there was no doubt that the sheer volume of death benefit cases funds receive, and the in-depth investigation of each case, made it necessary for trustees to appoint people to conduct investigations on behalf of the fund, Jeram says.

The amendment has, however, made it clear that the board can not only delegate the investigation of death benefit cases to a sub-committee but can also delegate its decision-making power to a sub-committee.

Jeram says a circular put out by the regulator of pension funds, the Financial Services Board, requires any sub-committee of the board of trustees to have an appropriate written mandate, which outlines its function, scope, authority and membership requirements.

He says that even if a board delegates its decision-making function, it retains responsibility for the decisions taken.

WHAT YOU SHOULD KNOW ABOUT DEATH BENEFITS

1. The decision on who gets your retirement fund benefits if you die in service is not yours to make, but rather one that, in terms of the Pension Funds Act, must be made by the trustees of your retirement fund.

You can and should nominate beneficiaries, but your retirement fund trustees are obliged to determine if you have dependants and to distribute your benefits to those dependants in a way that they determine is equitable (see point six).

2. Only if your fund cannot trace any dependants, can it pay your benefits to someone you have nominated. However, benefits can only be paid to the nominees if the estate is solvent. If there is a deficit in the estate, then that liability must be settled first, before the nominees can be paid.

3. Where there are no dependants and nominees and no estate is opened, then the benefit may be paid to the Guardians Fund or an unclaimed benefits fund.

4. The Pension Funds Adjudicator has held in several cases that the trustees of your fund are obliged by law to find your dependants and pay out the benefits within 12 months of your death. If it takes longer, dependants should complain to the adjudicator.

5. Your dependants can be legal in nature – such as spouses, children, parents (in certain circumstances) – or people you have no duty to maintain but who are factually dependent on you. This means the trustees could consider distributing your benefits to your spouse, children born in or out of wedlock, parents, grandparents and unborn children, as well as people who were factually dependent on you, such as common-law spouses, same-sex partners, and other people not related to you.

6. Determinations issued by the Pension Funds Adjudicator and the courts have stated that to determine what is an equitable distribution, the trustees must consider:

- * The age of the dependants;
- * Their relationship with you;
- * The extent of their dependency on you;
- * The amount available for distribution;
- * The financial affairs of the dependants;
- * The wishes of the deceased (as a guide only); and
- * The future earning potential and prospects of the dependants.

7. Your trustees can also decide how the amounts should be paid. Benefits cannot be paid to minor children (under the age of 18), so trustees must decide whether to pay a guardian, a trust or a beneficiary fund. Trustees must weigh up the costs, the size of the benefit and the ability of a guardian to manage the money.

Even where there is a legal and competent guardian, trustees must also take into account the possibility of the guardian using the money for other purposes and the problems that could create for the dead member's dependants.

Trustees can pay death benefits into beneficiary funds that are registered with the Financial Services Board, approved by the South African Revenue Service and regulated by the Pension Funds Act.

The trustees of the beneficiary fund have a fiduciary responsibility to invest the money – usually with an asset manager according to the dependant's needs. At age 18, when any minor dependants become majors, the capital can be paid to that dependant.

While in the beneficiary fund, the growth of assets and payments from these funds are not taxed.

8. If you leave the service of your employer and you die before the withdrawal benefit is paid to you, your beneficiaries are not entitled to a death benefit. Instead, the withdrawal benefit must be paid into your estate.

YOU SHOULDN'T NOMINATE YOUR ESTATE

If you want to follow the letter of the law, you should not nominate your estate to receive your death benefits from your retirement fund. The Pension Funds Adjudicator has held that an estate cannot be a nominee, Naleen Jeram, a senior legal adviser at MMI and an adjunct professor at the University of Cape Town, says.

However, if you don't have dependants and don't nominate anyone to receive your benefits, your benefits will be paid into your estate.

While the benefits can land up in your estate, the adjudicator ruling that your estate cannot be a nominee was made in a case in 1999, involving the Beka Provident Fund. A member had nominated his estate as the sole beneficiary of his benefit and then died without completing a valid will. His father was the sole intestate heir.

Jeram says there are several legal reasons why you cannot nominate your estate to receive the death benefits from your retirement fund.

What you need to do is to ensure that you provide the trustees of your retirement fund with as much information as possible, including details of those you regard as dependants and those who are not dependants but whom you would like to nominate to receive the benefits.

If you do not have any dependants or nominees and want the benefits to go into your estate, you can state this in a letter to the trustees.

However, remember your wishes or nominations are only a guide to the trustees, and the trustees are not obliged or bound to follow them. The trustees will still have to investigate whether there are dependants and if there are, the benefit cannot be paid to your estate, despite your stated wishes or nominations. Only if there are no dependants, are the trustees obliged to pay your estate.

On a related issue, Jeram says it is not possible for you to nominate an artificial person such as a private company or trust as your beneficiary because the relevant section of the Act is intended to protect your dependants.