Legal update Death benefits on retirement funds v living annuities

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There seems to be a lot of confusion when it comes to the way death benefits are paid on different investment vehicles. Firstly, it is important to note that retirement funds* are governed by the Pensions Fund Act 24 of 1956, whereas living annuities are defined in terms of the Income Tax Act 58 of 1962.

Death benefits on retirement funds

Sec 37C of the Pensions Fund Act directs what happens to a member's fund value on death. Members are allowed to nominate beneficiaries on their retirement funds but that does not create certainty as to who should receive the death benefits. Sec 37C grants the trustees of the retirement fund 12 months in which to identify **dependants** of the deceased fund member. This process will occur even if the member has nominated beneficiaries. The purpose of Sec 37C is to ensure that all dependants of the deceased member are left with equitable financial support after the member dies. The trustees have ultimate discretion in awarding the death benefits to identified dependants. The member's beneficiary nominations will act as a guideline, but will in no way override the trustees' duties in identifying dependants.

Who qualifies as a dependant?

In terms of the Act, a dependant is any person to whom the member is legally liable for maintenance, or any person that was factually or legally dependent on the deceased member for maintenance. Spouses and children are specifically made dependants in terms of the Act. A spouse is defined widely and includes parties to a customary union.

Trustees' duty to identify dependants

Trustees have 12 months to identify dependants and must do everything in their power to trace them. Once dependants have been identified, the trustees must assess their financial needs. This will inform their decision regarding how the death benefit is allocated.

How benefits are allocated

In the matter of Segal v Lifestyle RA Fund, the pension fund adjudicator (PFA) indicated that the trustees must consider the following factors in order to make an equitable distribution among dependants:

- The age of the dependants
- The dependants' relationship with the deceased
- The extent of the dependency
- The financial status of the dependants
- The future earning capacity of each dependant

The wishes of the deceased as stated in either the will or as a nominated beneficiary is but one factor that the trustees will consider. Often, however, the nominated beneficiaries on a retirement fund are the same as the legal or factual dependants of the deceased fund member.

In the recent determination of Maake v Old Mutual Superfund Provident Fund and Old Mutual Life Assurance Company Limited (OM) the PFA warned that trustees must not simply accept a claim at face value, even if the claim is supported by an affidavit.

In this case, Ms Kgatle claimed via affidavit that she had been married to the deceased fund member by customary union and that she and her three children were financially dependent on the deceased. This allegation was supported by a third party affidavit bearing the stamp of a traditional authority.

The PFA stated that by accepting the affidavit at face value, OM lost sight of the fact that the contents of the affidavit were not necessarily true. He also dismissed the supporting affidavit which contained contradictions.

The PFA therefore set aside OM’s decision to pay a portion of the deceased member’s fund value to Ms Kgatle and her three children. The lesson from this is that trustees cannot simply accept an affidavit as proof to a claim as a dependant in terms of Sec 37C. A thorough investigation needs to be conducted.

What happens if the trustees can’t find any dependants?

If the trustees are unable to find any dependants within a 12-month period then the benefit will be paid to the nominated beneficiary/ies. If no beneficiary was named then the benefit will form part of the deceased estate.

Death benefits on living annuities

A living annuity is not governed by the Pensions Fund Act and therefore Sec 37C does not apply. As with an endowment policy, a living annuity creates a contractual obligation between the owner and the life assurance company to pay out the death benefit to any nominated beneficiary. The trustees have no discretion in determining who should get the death benefits. If there are no nominated beneficiaries then the benefits will be paid out to the deceased estate.

* Pension funds, provident funds, pension preservation funds, provident preservation funds, retirement annuity funds.

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