



Legal Services

FINANCIAL SERVICES



## ON THE SCALES 12 OF 2019

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### At what date does a fund determine if a beneficiary was dependent on a deceased member?

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Retirement funds have typically assessed whether any potential beneficiary was dependent on a member as at the date of the member's death. However, in a recent Supreme Court of Appeal case of *Fundsatwork Umbrella Pension Fund v Guarnieri* the court ruled that the correct date to determine dependency is when the trustees decide on the allocation of the benefit.

#### Summary

- The trustees' investigation of financial dependency was based on the extent of financial dependency at the date of the member's death.
- The benefit was allocated to the deceased's wife, mother and two children.
- The deceased's mother died four days before the trustees made their decision and her allocation would have been paid into her estate and distributed in accordance with her will to her surviving daughter.
- The widow lodged a complaint requesting that the allocation to the mother be re-distributed to her and children.
- The matter was ultimately heard by the Supreme Court of Appeal.
- The definition of 'dependant' in the Pension Funds Act does use past, current and future tenses in different scenarios, which the Court concluded was done carefully and deliberately.

- Looking at the language, purpose and practicality of section 37C, the Court said that the time to determine dependency is when the distribution decision is made. Any beneficiary must still be a beneficiary when the decision is made.

### **Facts of the case**

After the member died, the trustees identified his dependants and allocated the benefit between his financial dependants as follows:

- Spouse – 37%
- Mother – 42%
- Son – 8%
- Daughter – 13%

The trustees' decision was based on an investigation as to the extent of financial dependency at the date of the member's death.

Unbeknownst to the trustees, the deceased's mother had died four days before the date of signing their resolution,

The mother's allocation would have been paid into her estate and distributed in terms of her will to her surviving daughter (who was not financially dependent upon the deceased member).

### **Pension Funds Adjudicator**

The late member's wife lodged a complaint with the Pension Funds Adjudicator, requesting that her late mother-in-law's allocation be re-distributed to her and her two children.

The Adjudicator instructed the Fund to re-investigate its distribution. The Fund reached the same decision.

### **High Court**

The widow and her children went on appeal to the High Court.

The High Court ordered that the amount allocated to the late mother-in-law be re-distributed to the spouse and children.

The Fund took that decision on appeal.

### **Supreme Court of Appeal**

The SCA considered when a person must be a dependent to be entitled to participate in a death benefit distribution.

*In other words, must trustees ascertain dependency at the date of the member's death OR when they decide on the distribution of the death benefit?*

## **Legal analysis**

The Supreme Court of Appeal examined the definitions of 'member' and 'dependant', as well as section 37C of the Pension Funds Act.

The court said that the definition of 'member' would include a deceased member until the death benefits have been paid out, albeit the deceased member would be represented by the executor.

The definition of 'dependant' does use past, current and future tenses in different scenarios, which the Court concluded was done carefully and deliberately. The court concluded that we cannot read into the definition of dependant the phrase "at the date of the death of the member".

The court took into account that 12 months, as set out in section 37C, could elapse between the date of death and the date of distribution. Much could happen in that period to change a potential dependent's situation, for example, winning the lottery, remarrying, getting a well-paying job, reaching the age of majority, dying or graduating from university.

## **Findings of the Supreme Court of Appeal**

The court said that section 37C is there to protect existing and potential dependents. The time to assess the present and future needs of the dependents is when the trustees make their decision.

The court said that this approach does not impose too great a practical burden on a fund. Trustees must carefully check the accuracy of the information they have when they make their decision and make sure that the intended beneficiaries will be the persons who benefit from the decision.

Looking at the language, purpose and practicality of section 37C, the time to determine dependency is when the distribution decision is made. Any beneficiary must still be a beneficiary when the decision is made.

### *Comment:*

*The signing of a resolution can take place well after the investigation is concluded, for example if the resolution is signed at the fund's next trustee or subcommittee meeting. During this time the status of the beneficiaries could change, resulting in the need to revise the resolution, as per this court ruling. Our recommendation is that trustees sign a death benefit allocation resolution as soon as possible after the investigation is concluded.*

*We further recommend that all potential beneficiaries be requested to advise the fund when there is any change in their circumstances, or that of another beneficiary in the case of death of the beneficiary.*

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***If you need more information, please contact your consultant.***

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