

Legal Focus several determinations by the Pension Funds •! Adjudicators have brought to the fore, the rights of guardians to receive benefit payments on behalf of minor dependants. This article highlights two such determinations, illustrating that trustees should carefully consider all available options before depriving a guardian of the right to administer minor children's benefits. & minors' benefits Robyn Cowie Legal Director Fairheads Benefit Services Section 37C(1)(a) of the Pension Funds Act 24 of 1956 (the Act) governs the distribution of benefits upon the death of a fund member.

The Act creates three mechanisms for payment of a benefit to a minor:

1. Payment of the minor's share directly to the minor's guardian.
2. Payment to a trust, contained in section 37C(2).
3. Payment from the fund in instalments (section 37C(3)). Before the fund considers alternative modes of payment 2 and 3, there must be good reason for not paying the monies directly to the guardian. The cases below set out the circumstances when it would be appropriate for trustees to pay a minor's benefit into trust or directly to their guardian.

With the advent of beneficiary funds from 1 January 2009, following amendments to section 37C of the Act, there is little reason to believe that the future Adjudicator will deviate from the principles established in these cases when dealing with similar issues in the future.

In *Dhlamini vs Smith and Another* [2003] 7 BPLR 4894 (PFA) the facts were as follows:

- The deceased had married Mrs Dhlamini, and a son was born of their union.
- The deceased was also the father of two additional children.
- The deceased had passed away without completing a beneficiary nomination form indicating his wishes regarding how his benefit was to be distributed.
- The fund determined the deceased's dependents and allocated the benefit in 25% shares to Mrs Dhlamini and the deceased's three minor children, whose shares were paid into trust
- Mrs Dhlamini, who was gainfully employed as a nurse, complained that as the minor's mother, she was responsible for caring for him and was capable of handling his share of the benefit and therefore his funds should not have been placed in trust.

The Adjudicator responded, saying that "the payment of a minor's benefit to his/her legal guardian should be done in the ordinary course of events, andit should be displaced by the other two exceptional options only if there are cogent reasons for depriving the guardian of the natural consequences of guardianship, in this instance, the duty to take charge of the financial affairs of the minor, coupled with the right to decide how the funds due to a minor should be utilised in the best interests of the minor.

Where the board has decided to depart from the ordinary rule, it will have to show the existence of good grounds giving rise to an apprehension that the guardian will fail to fulfil his/her duties towards the minor".

In this case, no evidence was led to suggest that the trustees considered paying the minor's benefit to his mother.

In addition, reasons were not provided for depriving the legal guardian of her right to manage her minor child's financial affairs. Furthermore, the cost implications of placing the money in trust were not weighed up against other suitable options. The Adjudicator held that these considerations should have influenced the trustees' decision and found that the trustees had not exercised their discretion properly as required by the Act.

The fund was thus ordered to pay the minor's benefit directly to his guardian. Adjudicator Determination 2 In the case of *Ramanvelo vs Mineworkers Provident Fund* [2005] 1 BPLR 67 (PFA) the late husband of the complainant had been a member of the fund. The fund's trustees conducted an investigation and identified the complainant and her minor child as beneficiaries. They awarded the complainant 10% of the benefit and the child 90%.

The child's benefit was placed in a trust fund, from which a monthly payment would be paid to the guardian.

The guardian disputed the financial viability of placing the child's benefit into a trust fund.

Based on legal precedents, the Adjudicator summarised the factors to be considered by the trustees in determining whether a guardian should administer monies on behalf of his/her minor child as follows:

- the amount of the benefit;
- the ability of the guardian to administer the monies;
- the qualifications (or lack thereof) of the guardian to administer the monies; and
- the benefit should be utilised in such a manner that it can provide for the minor until he/she attains the age of majority.

There is an onerous duty on the trustees to carefully consider the facts of each case before depriving the guardian of the right to administer monies on behalf of their minor child.

The Adjudicator found the approach of the trustees in this matter left much to be desired. It was found that the trustees had fettered their discretion by adopting a rigid fund policy, whereby death benefits of R20 000 or more payable to a minor child would automatically be placed in trust regardless of the guardian's abilities to handle such monies.

The Adjudicator therefore set aside the fund's decision and the case was referred back to the trustees to properly exercise their discretion. In conclusion, case law favours the payment of a minor's death benefit to their natural guardian, where they are competent to manage these funds.

Unfortunately most cases presented to the trustees are not so straightforward.

The reality is that often both natural guardians have died and their minor children are living with relatives or caregivers. Often it is left up to the grandparents to accept this role.

Although they try their best, inevitably they are often old, sometimes illiterate, not necessarily financially astute and are battling to survive on a state pension or grant. In certain circumstances minors are not even living with their natural guardian as they have run away due to neglect or abandonment. Some of these children might even attend schools in different towns or countries for example their homes may be in Lesotho.

Zimbabwe or Mozambique but they attend schools in South Africa. Trustees need to bear in mind the age-old legal principle: what is in the best interests of the minor children taking into account their specific needs and circumstances?