

BUSINESS LAW & TAX REVIEW

contentious aspect of the death benefit process, because it may be disputed whether or not it is appropriate to pay the death benefit to a trustee of a trust or to the legal representative of the beneficiary. The third alternative, of a fund paying in instalments, is rarely utilised.

With the above as a guide, it would be defensible for the board to deal with each of the potential beneficiaries as follows:

Paul does not appear to have been dependent on Peter at the time of death. He was also not married to Peter. The only question to be asked is whether Peter would have been legally obliged to maintain him in the future. While the amendments required by the Constitutional Court to the Marriage Act will have the effect of conferring on spouses in a same-sex civil union a reciprocal right of maintenance, there does not appear to be any case in which a person to whom marriage has been promised has claimed the right to be treated as a future dependant.

Paul would need to demonstrate to the board that there would have been a union between him and Peter in the future (once the Marriage Act had been amended), and that he would likely have been the spouse dependant on Peter, and not vice versa. Unless Paul could demonstrate this the board would be entitled not to treat him as a dependant.

As for Petra, she was the only beneficiary nominated by Peter and accordingly the board must consider her as a beneficiary, even if there are other dependants. The occasional support that Peter gave her in the past may not be sufficient on this ground alone to treat her as a dependant. She is certainly not someone for whom Peter would have become legally liable for maintenance.

With regard to Sally seeking to benefit her son Sam, the situation is that in our law there is a rebuttable presumption that a child born during the subsistence of a marriage is the child of the husband. If this presumption is rebutted and it seems that it has been because a rare hereditary disease would prove that Peter was not the father, it would follow that he had no obligation in law to maintain Sam. But the fact that he did support Sam resulted in Sam being "in fact dependant on Peter".

As regards Zondi, if Peter had had the relationship with her while also in the relationship with Paul, so that the relationship with Zondi only ended at the time of Peter's death then, because Peter had maintained

Zondi, she too would be entitled to be categorised as a dependant because she was, on Peter's death, in fact dependent on him.

On the basis of the above it would appear that the beneficiaries of the death benefit would be Petra, Sam, and possibly Paul. The board would need to decide not only how the death benefit must be apportioned among them, but also what the best method of payment is. As Petra is likely to be a minor, the board must decide whether the death benefit payable to her, and in respect of Sam, would more appropriately be paid to a trust.

Though the Pension Funds Adjudicator has stated that as a matter of course the death benefit payable to a minor should be paid to his or her guardian unless there are sound reasons why this should not take place (*Maluleka & Another v Nehawu National Provident Fund*), many legal commentators consider that the more appropriate test is what is in the best interests of the minor.

Often the death benefit can be large sums of money, which parents may not have had any experience in managing, and the board should assess whether the lack of financial skills of a guardian is sufficiently material for the cost that will be incurred in having the minor's death benefit administered in a trust.

There are a number of trust companies specialising in administration of death benefits and, while there are costs associated with this, there is at least a degree of probability that the benefit will, in the hands of such trust companies, be properly invested and administered.

While a different board (or the adjudicator or a court) may arrive at a different result, what is particularly important from the board's perspective is that, for their decision as to who should benefit, the amount that each beneficiary should benefit and the method of payment, should be defensible. It will be defensible if the board can demonstrate that they have followed a thorough process in reaching their decision, and that they have taken account of all the relevant facts and disregarded irrelevant considerations (*Ditshabe v Sanlam Marketers Retirement Fund & Another*) and, in particular, understood the legal aspects which they are required to consider.

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