

## Legal update 6 of 2022: Dependency of estranged dependants, adopted children and nominees

### Introduction

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This update focuses on whether an estranged dependant qualifies for the death benefit which accrues due to the death of a member of a retirement fund, the position of adopted children and the requirements for a beneficiary to qualify as a nominee. Below is a summary and more details about the case.

### Summary

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**Case: Arnaud v Balanced Future Fund: Gauteng High Court, Pretoria (24757/2020) [2022] ZAGPPHC 286 (3 May 2022)**

- **The finding:** The court found that adopted children are expressly included in the definition of 'dependants'. It also found that estrangement does not disqualify dependants from being the beneficiaries of a death benefit from a retirement fund at the death of a member as they remain a dependant of the deceased member.

The court went on to clearly define the requirements for an individual to qualify as a nominee.

- **Practical application:** The trustees of a retirement fund may allocate a death benefit to an estranged dependant, as they still fall within the definition of dependants found in the Pension Funds Act.

The trustees must also ensure that the requirements to qualify as a nominee are met.

### More details about the case

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**Case: Arnaud v Balanced Future Fund: Gauteng High Court, Pretoria (24757/2020) [2022] ZAGPPHC 286 (3 May 2022)**

When Mr St Arnaud (the Deceased), who was a member of a provident fund, the Balanced Future Fund (the Fund) passed away, the trustees of the Fund allocated the entire death benefit to the Deceased's estranged adopted major son.

The Deceased's siblings wanted this decision set aside. They claimed that the Deceased's wish was for his surviving siblings to be the beneficiaries of the death benefit and not his estranged son. The siblings were the heirs of the

Deceased's estate.

The Fund responded that the estranged son was the only person to qualify as a dependant as defined in the Pension Funds Act (the Act). Since there was no written nomination of beneficiaries, section 37C of the Act left them with no alternative but to pay the benefit to the estranged adopted son.

The court confirmed that the definition of dependant in section 1 of the Act expressly included adopted children. The Deceased's son remained a dependant, regardless of his adoption and estrangement. The court further stated that where there is only one dependant or only dependants,

section 37C(1)(a) of the Act provides that the benefit should be paid to that dependant or those dependants only. Retirement funds must comply with section 37C of the Act and must not consider issues of fairness or equity.

In a similar matter heard by the Financial Services Tribunal (the FST), *Momentum Retirement Annuity Fund v VR KRZUS and Another* (PFA53/2019) [2020] Financial Services Tribunal (09 March 2020), where the deceased member and his spouse, who was a sole dependant, were estranged for several years, the FST found that the estrangement did not disqualify her from receiving the benefit.

The siblings claimed that the Deceased did complete a nomination form, but that it was lost or destroyed\*.

The court confirmed that 'nominee' was defined in section 37C of the Act and found that there were three requirements which had to be met for a person to qualify as a nominee. The person must:

- be designated by the member in writing to the Fund;
- not be a dependant, and
- be designated by the member to receive the benefit or a portion thereof in writing to the Fund.

This was confirmed in another determination by the Pension Funds Adjudicator, *Matlonya v FundsAtWork Umbrella Pension Fund and another* [2017] 2 BPLR 294 (PFA) at para 5.6, in which she stated:

*The term 'nominee' is not defined in the Act and for a beneficiary to claim to be a nominee, there must exist a valid nomination form. The nomination must be in writing and the beneficiary must not be a dependant. The nominee is distinguishable from a dependant in that, a nominee is not by virtue of having been nominated entitled to a death benefit. The board is not bound by the nomination form completed by the deceased; instead the nomination form serves merely as a guide to assist it in the exercise of its discretion (see Mashazi v African Products Retirement Benefit*

*Provident Fund [2002] 8 BPLR 3703 (W) at 3705I—3706C).*

The court confirmed that as a death benefit does not form part of a deceased fund member's estate, the Deceased's will cannot be used to contend that the siblings were entitled to the benefit.

The court found that since the siblings were neither dependants nor nominated beneficiaries, they did not qualify to receive the benefit.

The Application was dismissed with costs.

\*The same set of facts was also presented to the trustees of the Momentum Retirement Annuity Fund of which the Deceased was a member. In this matter however, the fund was presented with a nomination form dated 13 October 1980 wherein the Deceased nominated his estate as the beneficiary of the death benefit.

The fund pointed out that section 37C(bA) of the Act, which deals with the scenario where there is a dependant and a nominated beneficiary, specifically states that only nominations made on or after 30 June 1989 may be considered.

The siblings lodged a complaint with the Pension Funds Adjudicator, who found that the nomination was not valid as an estate cannot be a nominee; a nominee must be a natural person. In her determination of 29 January 2021, the Pension Funds Adjudicator came to the same conclusion as the one reached by the Court on 3 May 2022: Since there was only one person qualifying as a dependant, and no valid nomination of beneficiary, the trustees were correct in allocating the total benefit to the estranged adopted son.

**Note:** These cases once again confirm how extremely important it is to ensure that beneficiary nomination forms are completed correctly and updated regularly.

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