

## PRESENTATION FOR THE PLA CONFERENCE 2007

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#### HOW DOES THE NOTION OF A 'CARE-GIVER' IN THE CHILDREN'S ACT INTERACT WITH SECTION 37C OF THE PENSION FUNDS ACT?

1. Section 37C allows a Fund to pay a death benefit due to a minor as a lump sum or in installments to the guardian; or as a payment into trust. The Adjudicator has made clear that unless there are good reasons not to make payment to the minor's guardian, this should be the default option.
2. Difficulties arise for funds and for trusts who administer minors' benefits when there is no legal guardian caring for the child, or where the child is the head of or belongs to a child-headed household. The process of having a guardian appointed is a long and costly one and is not always an accessible process for care-givers, or a viable option for funds and trusts.
3. So to what extent does the notion of a care-giver in the Children's Act, which has not yet come into effect, help alleviate these problems and lend greater flexibility and practicality to the section 37C distribution process?
4. It is significant that s37C does not itself expressly require payment to the guardian as the default option. This requirement flows rather from the guardian's entitlement in law to administer moneys on behalf of the minor child, unless the guardian is not competent or qualified to do so. So if the law itself recognizes the ability of someone else, a care-giver, to administer a minor's money then in my view there is nothing in section 37C that expressly prohibits this.
5. The Children's Act defines a care-giver as any person other than a parent or guardian, who factually cares for a child and includes:
  - a foster parent,
  - someone who cares for the child with the implied or express consent of the child's parent or guardian;
  - someone who cares for the child while s/he is in temporary safe care;

- the person at the head of a child and youth care centre where a child has been placed;
  - the person at the head of a shelter;
  - a child and youth care worker who cares for a child who is without appropriate family care in the community; and
  - the child at the head of a child-headed household.
6. So what powers are given to these caregivers? Can they receive and administer benefits that are due and owing to the minor? To understand what powers given to the care-giver it is useful to first look at the powers and responsibilities given to a parent or guardian in s18. The most relevant for our purposes today is the express power to “*administer and safeguard the child’s property and property interests.*” Anyone who acts as a guardian then clearly has the power to receive and administer a death benefit paid to a child. So the Act does not change the law much with respect to guardian’s rights.
7. With respect to those who are **not** parents or guardians and so have no parental responsibilities but who care for the child voluntarily, s32 tells us that they must
- safeguard the child’s health, well-being and development; and
  - protect the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical, emotional or mental harm or hazards.
8. To do this s32 gives these caregivers the power to exercise any parental responsibilities and rights set out in s18 that are reasonably necessary for them to comply with this obligation. This could be interpreted as allowing the care-giver to receive and administer moneys on behalf of the child if this is reasonably necessary to safeguard the child’s health, well-being and development. So if it is necessary for the caregiver to have access to the money in order to provide food, shelter, education, medical care - essentially to provide for the child’s day-to-day and long term needs, then there seems to be nothing precluding the care-giver from receiving and administering a death benefit paid to a minor in terms of section 37C.
9. But this presents the Fund with certain challenges:
- 9.1. Firstly, the Fund must develop an appropriate system to ascertain and verify the identity of a care-giver where there is no legally appointed guardian. Some ways to do this may be:

- 9.1.1. to obtain an affidavit from the person claiming to be the care-giver attesting to this fact;
  - 9.1.2. to contact the Department of Social Development to determine if a social assistance grant is being paid in respect of the child and, if so, to whom.
  - 9.1.3. to contact the child's school to ascertain who the child is living with, who is paying school fees etc;
  - 9.1.4. to ask a social worker to investigate who the child is being cared for and to issue a report;
  - 9.1.5. the deceased member's Will may also provide some indication as to who s/he wants to care for the children, although there may not always be a Will.
- 9.2. Secondly, the Fund may then have to inquire into whether the care-giver is receiving any social assistance or other grants and has other financial means to care for the child. This is because the care-giver would only have the power to receive and administer money belonging to the child *if it is reasonably necessary to fulfill his/her duties and functions as care-giver*. It is not clear how strict an interpretation will be taken to what is "reasonably necessary."
- 9.3. I would suggest that a pragmatic approach needs to be taken to such inquiries. Much depends on the kind of care-giver one is dealing with. A person caring for a child who is in temporary safe-care or in a shelter is unlikely to be paid a substantial lump sum benefit that has been awarded to a child. This is because the child is likely only to be cared for by that care-giver on a temporary basis. It may be more appropriate to consider installment payments, or payments directly to educational institutions or direct payments in settlement of medical aid costs and so on.
- 9.4. However, when considering a care-giver who is caring for the child permanently or for an indefinite period, there is no reason why monthly payments to meet the child's on-going needs will not be appropriate in the same way that monthly payments may have been made to the child's guardian to assist with the care of the child.
- 9.5. In my view, given the fact that caregivers can change and there is no legal process regulating how and when this may occur it may be more prudent for a fund to pay the benefit into trust with the allowance for monthly payments to be made, or to itself pay the benefit in installments, so as to ensure the ability to monitor whether the

caregiver changes. Where payments are made to care-givers the Fund should still enquire into whether the care-giver is competent and qualified to deal responsibly with the money.

10. The legal recognition of the child-head of a household as a care-giver is an important development but a child-headed household will only be recognized as such by a provincial head of social development if

- the parent or caregiver of the child is terminally ill or has died,
- there is no adult family member to care for the child, and
- a child has assumed the role of caregiver to another child in the household.

And a child-headed household must function under the general supervision of an adult who is designated by the children's court, or by an organ of state or NGO determined by the provincial head of social development.

11. What is interesting is that the proposed amendment to the Act only empowers the organ of state or the NGO itself to collect and administer for the child-headed household any *“social security, or other grant or assistance to which the household is entitled”* and this organ of state or NGO is then *“is accountable to the provincial department of social development or the children's court for the administration of moneys received on behalf of the household.”*

12. These provisions raise the following challenges for funds:

12.1. Firstly, who must apply to the provincial head of social development to have a child-headed household recognized as such? Is this the Fund's responsibility? Must the Fund hold on to the benefit until such recognition has been given?

12.2. Secondly, any grant or “assistance” can only be paid to the organ of state itself or to the NGO and not to the adult designated to supervise the household. Presumably then the organ of state or NGO administers the money and makes payments as necessary to the adult or child who heads the household.

12.3. Finally, and most relevant for our purposes is whether the death benefit awarded to a minor child even qualifies as a *“social security grant or other grant of assistance to which the household is entitled.”* A death benefit is clearly not a social security grant.

It may, however, qualify as “other grant of assistance” on a loose interpretation but in my view the real problem is that the grant received has to be for and in respect of **the household**. A household is defined as “*the people of a house collectively*” (*Dictionary.com Unabridged (v 1.1)*); “*a domestic unit consisting of the members of a family who live together along with non-relatives.*” (*American Heritage Dictionary*).

- 12.4. It is doubtful whether a death benefit awarded to a specific child is a grant to a household. If the household consists of more than one child, the death benefit does not legally belong to them all. It vests in and belongs to the child to whom it was granted. If more than one child is awarded a share of the benefit, then each has ownership rights to a specific amount. As such it is doubtful whether a death benefit would qualify as a grant of assistance contemplated by the amendment because it is not awarded to the household. There seems to be no reason why a death benefit should have been excluded and it seems likely that it was an oversight rather than a deliberate exclusion.
13. So where does this leave a child-headed household as far as death benefits are concerned?
  - 13.1. If death benefit can be interpreted to be “assistance to the household”, and it is doubtful that it is, then a Fund can only make payment to the organ of state or the designated NGO who must then administer the money.
  - 13.2. If the death benefit is not “assistance to the household” then it may be possible to pay it directly to the child head of the household who is a defined care-giver and as such is entitled to exercise any parental right reasonably necessary to ensure the health, well being and development of the child – which may include receiving and administering moneys on behalf of a child.
  - 13.3. However, given that the legislature does not permit the payment of social assistance grants directly to the child head of the household, or even directly to the adult supervising the household, but only to the organ of state or NGO to administer, it seems the intention was not to allow payments directly to the child head of the household.
14. In my view, given the time and resources involved, it will probably be easier for the Fund to pay the benefit into trust where there is no guardian and have the trust conduct these

investigations which many trusts do in any event. The fact that there is no automatic entitlement on a caregiver to receive and administer the death benefit means that payment to a care-giver is not a default option unless there are good reasons to do otherwise – as is the case with guardian.

15. Finally, I would suggest that clarity is needed in the PFA itself as to what obligations, responsibility and liability the Fund carries when making such payments to care-givers.