



Placing Death Benefits in Trust and the Change to the Age of Majority

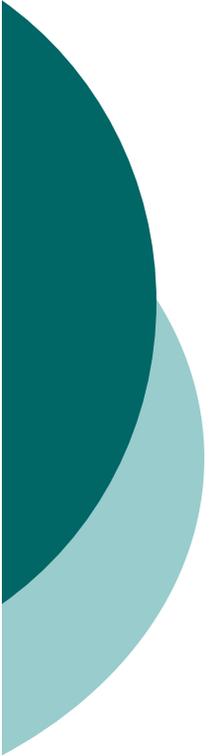
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EMPLOYEE BENEFITS LAW

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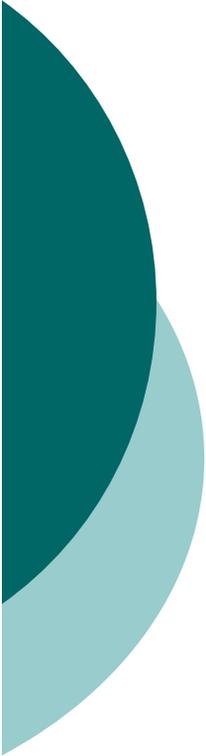


Termination dates of trusts for minor and major beneficiaries

- Can the board fix the termination date for trusts beyond the beneficiary's age of majority, or place benefit in trusts for majors without their consent?
- S37C regulates the distribution of death benefits:
 - (a) S37C(1) - identifying dependants and nominees, and distributing or allocating the benefit amongst them.
 - (b) S37C(2) - authorises payments into trust and provides that:

"For purposes of this section, a payment by a registered fund to a trustee contemplated in the Trust Property Control Act, 1988 (Act No. 57 of 1988), for the benefit of a dependant or nominee contemplated in this section shall be determined to be a payment to such dependant or nominee."





Termination dates of trusts for minor and major beneficiaries

- (c) S37C(3) - regulates installment payments to minors by a board and requires that

"any balance owing to such a dependant or nominee at the date on which he or she attains majority or dies, whichever occurs first, shall be paid in full."

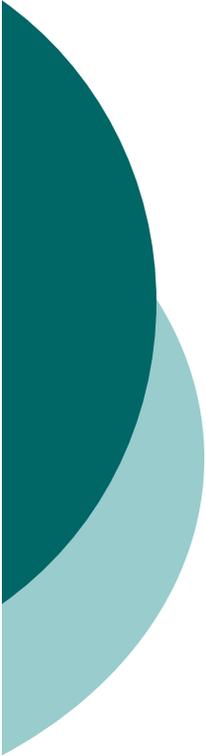
- (d) S37C(4) - regulates installment payments by the board to major beneficiaries.
- requires their consent
 - written agreement must disclose the amounts of the payment, intervals of the payment, interest and other conditions.
 - cancelled by either party on 90 days notice and the balance of the benefit owing must be paid in full.



Payment of major beneficiary's benefits into trust

- *Moralo v Holcim SA Provident Fund & others* (20 July 2007)
- “. . . before the board considers an alternative mode of payment there must be a good reason in law and fact as to why the option of direct payment should not be followed.”



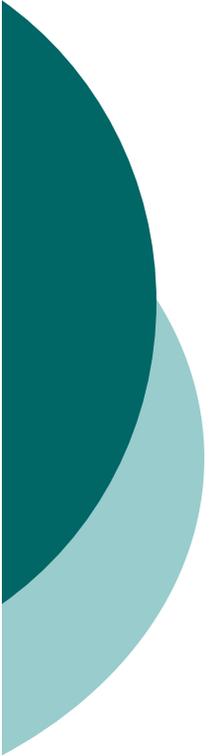


Payment of major beneficiary's benefits into trust (continued)

- *"the direct payment of a major beneficiary's benefit is the default position which should be adopted save for exceptional circumstances. It is needless to state that the facts of each case must be carefully evaluated in determining whether to depart from the default position. Circumstances which may warrant payment of a major beneficiary's benefit into trust may be in instances where the beneficiary is labouring under a legal disability such as (but not limited to) prodigality, insolvency or mental disability consistent with the Mental Health Act 18 of 1973. However, since the direct payment of the benefit to the major should be the norm, any deviation therefrom has to be justifiable on legal or factual grounds.*

Our Courts are reluctant to interfere with the right of the major to control his/her own affairs. It does so only in circumstances where s/he is found to be incapable of managing his/her own affairs (See Ex Parte Oppel and Another 2002 (5) SA 125 (C)) and authorities cited therein."

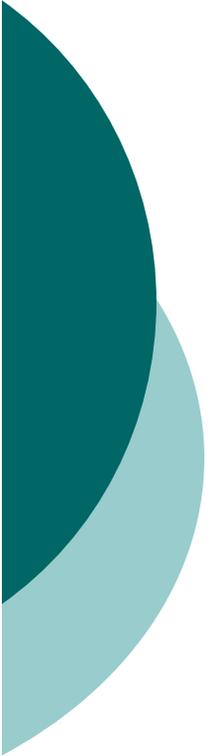




The board's ability to place benefits in trust for a minor beyond his/her age of majority – s37C

- payments in cash to guardians unless good reason to deprive the guardian of this right and pay the benefit itself in installments in, or pay it into trust
- S37C(3) – fund can retain and pay installments only until the minor reaches majority (or dies). No discretion to retain benefit beyond majority.
- When minor reaches majority, same treatment as major in terms of *Moralo*





The board's ability to place benefits in trust for a minor beyond his/her age of majority – s37C

- S37C(4) (installment payments) & S37C(2) (trust payments) – no indication that legislature intended that these sections grant different powers to the board
- S37C(2) - benefit can be paid “to a trustee contemplated in the Trust Property Control Act ... for the benefit of ” a dependant or nominee. Does this allow payments into trust for any period if this is in the interests of, or for the benefit of, the beneficiary?



The board's ability to place benefits in trust for a minor beyond his/her age of majority – s37C

- *Moralo* did not adopt this interpretation of s37C(2) wrt majors so cannot be the case wrt minors
- If this was the purpose of s37C(2) (trust payments), it should also have been clear wrt instalment payments and this is not so in s37C(4).
- Incongruous that legislature would limit board's powers to restrict beneficiary's right of access and control over his/her benefit (when it pays the benefit in installments) but allow the board to bypass limitations by paying into trust.

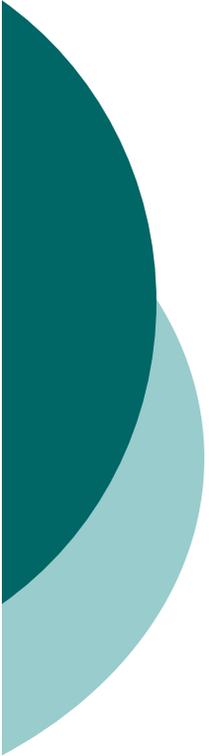


The board's ability to place benefits in trust for a minor beyond his/her age of majority – s37A

- Proviso to section 37A:

*"in the event of **the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate**, such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, **to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant** or dependants during such period as it may determine."*

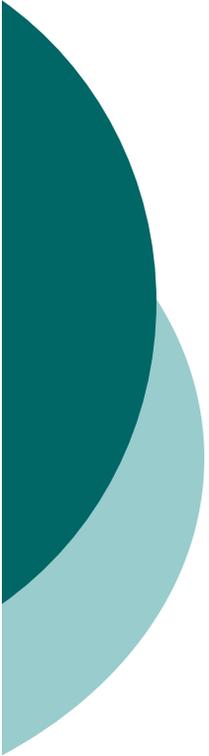




Practical Approach Going Forward

- New trusts terminate at age of majority.
- If beyond age of majority - legal disability must exist. If not, condition can only stand unless/until challenged by the major beneficiary. Board agrees to amendment. If challenged termination date taken to be amended by agreement.
- If board does not agree, condition can be treated as being of no effect because board has no authority to impose the condition.

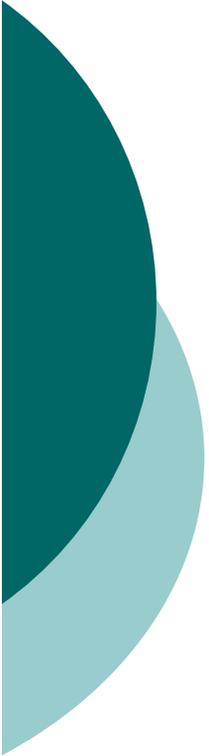




Impact of the change to the age of majority on benefits in trust

- 1 July 2007 - s17 of the Children's Act reduced the age of majority from 21 to 18
- Does this mean automatic termination of trusts already established for minors as at 1 July 2007 with a termination age beyond age 18?

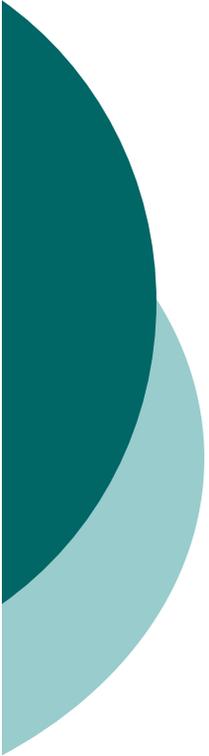




Impact of the change to the age of majority on benefits in trust

- View One: Yes - beneficiary is major in law so no basis to retain benefit in trust.
- Plausible if trust document referred expressly to “age of majority”
- But not necessarily so if trust document referred expressly to age 21



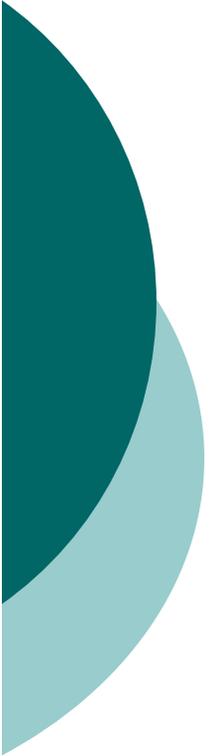


Impact of the change to the age of majority on benefits in trust

Trust already established at as 1 July 2007 with age 21 as termination date can only be changed if:

- it was unlawful at the time to fix age 21 as a termination age
- agreed variation of termination age;
- application to court to vary the termination age; or
- if the law has retrospectively or retroactively changed the age of majority

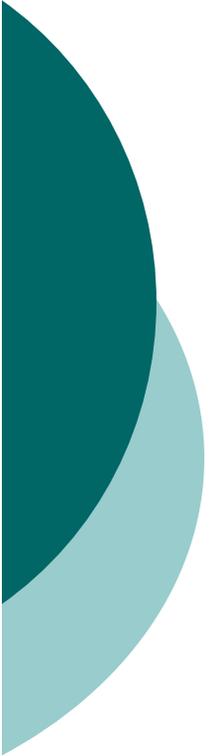




Impact of the change to the age of majority on benefits in trust

- “Retrospective” - effective from commencement date and changes the law for the future, but attaches new prejudicial consequences to a completed transaction.
- “Retroactive” - operates ‘backwards’. Makes the law different from what it was before the new law was enacted. Invalidates what was previously valid or vice versa.

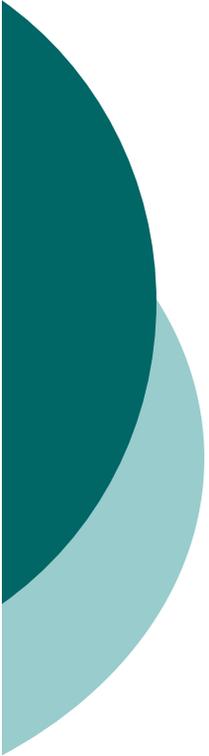




Impact of the change to the age of majority on benefits in trust

- General presumption against retrospectivity or retroactivity unless:
 - merely explains or confirms past legal position;
 - retrospective operation is provided for (either expressly or by necessary implication), or where legislation specifically deals with past matters and events;
 - statute deals with procedural matters;
 - debate, and conflicting case law, where legislation confers benefits.





Impact of the change to the age of majority on benefits in trust

- Nothing to suggest that the reduction in the age of majority operates retrospectively or retroactively.
- Where a trust has already been established, the change to the age of majority does not automatically bring forward the termination date to age 18.
- The termination date can only be amended by agreement or application to court.

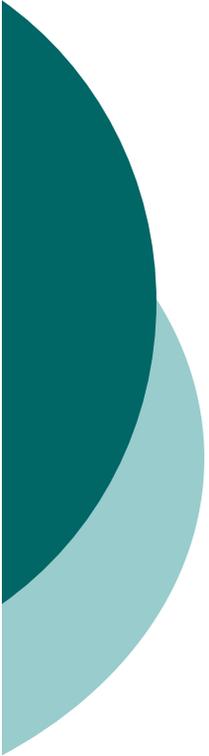




Impact of the change to the age of majority on benefits in trust

- If cannot place a minor's benefit in trust beyond majority, or place major's benefit in trust without consent how can the benefit be kept in trust until age 21 without beneficiary's consent if s/he becomes a major at age 18 and requests termination?
- In law prior to 1 July 2007 the board was empowered to place the benefit in trust until age 21 and nothing in law has changed this.
- Rule that benefits cannot be placed in trust for a minor beyond his/her age of majority only applies so long as there is no other law requiring or permitting the retention of these benefits beyond the age of majority.

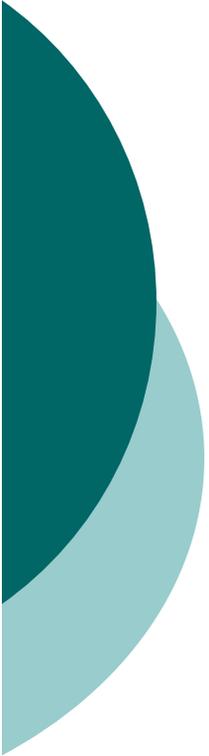




Payment of Children's Pensions

- No legislative requirement that fund pays child's pension
- Regulated by the rules and/or annuity
- "Eligible child" – change to age of majority matters only if definition refers to "age of majority"
- If stipulates age, no impact





Payment of Children's Pensions

- Payment of pensions – payable until age stipulated in rules and/or annuity
- If payable until “age of majority” then only until 18
- Rules cannot be changed to bring forward the date until when the benefit will be paid after payment has already commenced.

