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## HOW ARE DEATH BENEFITS DISTRIBUTED?

Members of retirement funds often ask how their benefits would be distributed on death. The answer is easy on one level: fund trustees are compelled to distribute benefits in accordance with the applicable laws. On another level, namely putting the law into practice, things aren't always straightforward and further explanation is helpful.

*A specific section of the Pension Funds Act lays down the process that trustees must follow when distributing benefits after the death of a member.*

*There are a number of important aspects that members and trustees are not always aware of.*

*Members can, however, greatly assist trustees by completing a beneficiary form.*

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## THE IMPACT OF THE PENSION FUNDS ACT

On the death of a retirement fund member, the trustees have to decide how to distribute any lump sum benefit. In many cases, the benefit is the member's fund savings plus a multiple of salary.

In making their decision, the trustees are required to strictly apply the Pension Funds Act ("the Act"), which overrides any other law, the fund's rules and the deceased member's will.

*The Act specifically excludes lump sum death benefits from the deceased member's estate (subject to a couple of rare exceptions noted below). This is why the member's last will and testament has no force or effect on the fund benefit.*

These notes are aimed at:

- guiding trustees in implementing the requirements of the Act; and
- assisting members in understanding the process.

A whole book could be written on the topic, so this is just an attempt to provide a working overview – in any particular case it's important for trustees to consult the Pension Funds Act directly and/or seek expert advice.

We are only talking here about lump sum death benefits – any pension-type of benefits would be payable as set out in the fund's rules.

Some words that we believe are important in understanding the process have been emphasised by means of underlining.

## DEPENDANTS AND NOMINEES

The first step is to understand the meaning of “dependant” and “nominee”.

- DEPENDANT      In terms of the Pension Funds Act, a “dependant” is defined as:
- *anyone in respect of whom a member was legally liable for maintenance or would have become legally liable had they not died*
  - *anyone else who in the trustees’s opinion was in fact dependent on the member for maintenance*
  - *the member’s spouse*
  - *the member’s children of any age, including adopted, illegitimate, or posthumous children*
- NOMINEE      In terms of the Pension Funds Act, a “nominee” is defined as:
- *any person (other than a dependant) to whom the member wishes some or all of the death benefit to be paid and in respect of whom the member has indicated this wish in writing to the trustees after 30 June 1989.*

## WHAT THE ACT SAYS ABOUT DISTRIBUTING BENEFITS

The second step is to understand the actions that the trustees have to take in terms of the Act. These actions depend on the member’s situation with regard to “dependants” and “nominees” (as defined above) as follows:

- **MEMBER HAS DEPENDANT(S) BUT NO NOMINEES**

The full benefit must be paid to the dependant if there is only one, or divided amongst the dependants if there is more than one. If the benefit is to be divided amongst several dependants then this must be done in a manner that the trustees deem to be equitable (in other words, split between the dependants in a way that the trustees think is fair).

- **MEMBER HAS NOMINEE(S) BUT NO DEPENDANTS**

The trustees must first apply the benefit towards settling any net debt in the estate of the member. If there is any money left, then this must be paid to the nominee or nominees in whatever proportions the member has indicated in writing. In this case, the trustees have no discretion as to how the benefit is allocated. If there is any money left over then it must be paid into the member’s estate or if there is no estate, to the Guardian’s Fund.

- **MEMBER HAS DEPENDANT(S) AND NOMINEE(S)**

The trustees must divide the benefits between the dependants and nominees in a manner they deem to be equitable (in other words, split between the dependants in a way that the trustees think is fair).

- **MEMBER HAS NO DEPENDANT OR NOMINEE**

The benefit must be paid into the member’s estate or if there is no estate, to the Guardian’s Fund.

## POINTS OF INTEREST

There are many issues and implications arising from the above and some of these are now discussed.

- The term “dependant” is defined in the Act as set out above and it is thus a matter of fact whether any particular person is or is not a dependant. The trustees cannot just decide that someone is a dependant. Similarly you can only be a “nominee” if you meet the requirements set out in the definition above.
- If a member fills in a “beneficiary nomination” form and omits for example a spouse or a child, that does not mean that the spouse or child is not a dependant – *the Act’s definitions override everything*. The existence of a nomination form does not thus remove the need for the trustees to make a full and proper investigation into the member’s circumstances.
- Even if the member is living apart or separated from their spouse, the existence of a legal marriage contract means that the spouse is by definition a dependant. The trustees cannot decide to leave the spouse out of its deliberations just on such grounds. It is, however, perfectly acceptable for the trustees to allocate no money to the spouse as long as they deem that to be fair. If such a spouse was however the only dependant and there were no nominees, the trustees would have no choice but to follow what the Act requires of them and give all of the benefit to the spouse.

*In one of the more commonly encountered errors, trustees often spend time considering people who don’t meet either definition. The correct process is to list those people who factually meet the definition of “dependant” or “nominee” and then restrict all further discussions to these people, whilst applying the decision-making provisions of the Act as set out above. Trustees sometimes anguish over the details of particular cases when in fact the decisions are much easier than they think.*

- The Act gives the trustees a period of 12 months in which to establish the existence of dependants. Often this isn’t necessary, for example where the member’s affairs are straightforward and easily confirmed. If the trustees should have any doubts, however, they are well advised to allow the 12 month period to run its course in case any people who may be dependants come forward or can be traced.
- The definition of “dependant” does not include some people to whom the member may well wish some of the death benefit to be paid, for example parents, grandparents, siblings or grandchildren. It’s quite common for such people to come forward and seek to receive some of the benefit. If the member would wish any such people to be considered by the trustees when distributing the benefits (and assuming that they do not otherwise meet any of the criteria to be a dependant as defined) then he or she must make them “nominees” by indicating this in writing to the trustees. In the absence of such a written indication the trustees cannot consider them for any benefit. The nomination of beneficiary form can be used to indicate nominees.
- If the member would want anyone else to be considered by the trustees, for example friends, colleagues, clubs, churches or charities, then again they must make them “nominees” by indicating this in writing to the trustees. Again, the nomination of beneficiary form can be used to indicate such nominees.

- If the member is only survived by dependants then the trustees have complete discretion as to how the benefit will be divided amongst them. The member can, if he or she wishes, indicate in writing the degree of dependency of each dependant but the trustees are not obliged to divide the benefit in the way the member indicates. This is a common area of misunderstanding – the trustees are compelled to allocate the money in a manner that they deem to be equitable, although one would of course expect them to consider the member’s wishes in their deliberations.
- Being a dependant does not thus automatically mean that you will actually receive any money. For example, a spouse from whom the member has been separated for many years and with whom the member had no remaining financial links, is a dependant (by definition) but the trustees may not deem it fair to allocate any of the benefit to them if there are other dependants or nominees.
- If the member is survived by dependants and he or she has also indicated one or more nominees in writing to the trustees, they again have complete discretion as to how the benefit will be divided amongst the dependants and nominee(s). Again the member can indicate to the trustees the degree of dependency of the dependants and the proportion of the benefit that he or she would wish each nominee to receive, but the trustees are under no obligation to divide the benefit in that way. It’s quite in order, for example, for the trustees to allocate nothing to a particular person as long as that is fair in their eyes.
- The contents of a person’s will has no legal bearing on the trustees’ decisions. The benefit falls outside of the member’s estate and the trustees are, in terms of the Act, required to distribute the death benefit only to people who meet the conditions, and in the manner, set out above.

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## WHAT DOES THIS MEAN FOR YOU?

In order to assist trustees and members, the following actions should be pursued:

*Members should be strongly encouraged to fill in a form on which they can indicate their dependants. Such a form is available on the Robson Savage website.*

*If the member wishes anyone who is not a dependant (as defined in the Act) to be considered for payment of a portion of the death benefit then they should record them as nominees on the form.*

*The form should be given for safe keeping to whoever the fund has indicated.*

*Members should be encouraged to keep their forms up-to-date at all times. It is particularly important that members be encouraged to fill in a new form if their wishes or circumstances change.*

Your Robson Savage consultant will be glad to provide any further input or assistance that might be required.

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