

# Section 37C and nominees

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In this article we will look at the wording of section 37C(1) of the Pension Funds Act No. 24 of 1956 ("the Act") in order to determine if it leaves room for the trustees to consider an artificial person as the nominated beneficiary of a death benefit.

The primary objective of Section 37C

As you know, if a member of a retirement fund dies before reaching retirement age (and if the rules of the particular fund permit) the lump sum benefit which becomes payable (hereinafter referred to as the "death benefit") must be paid to the member's dependants and/or nominees. Section 37C regulates the payment of death benefits with the primary objective of ensuring that those persons who were dependent on the deceased member are not left destitute after his/her death, irrespective of whether or not the deceased was legally required to maintain them.

Accordingly, death benefits do not form part of the deceased estate of the member (other than in the limited exceptions set out in the section) and the law of intestate succession does not apply (where the member died without a valid will).

"Nominees"?

As stated above, the main objective of section 37C is to ensure that those people who were dependent on the deceased are not left destitute after the member passes away. It is for this reason that the legislature intended to favour *dependants* over nominated beneficiaries. Beneficiary nomination therefore merely serves as a guide to the trustees - it can also assist the Board in identifying persons who could potentially qualify as dependants. The overriding factor will however always be the beneficiary's *dependence* on the deceased when he was alive.

Nominating an artificial person

We sometimes see the instance where a member wants to nominate his/her estate to receive the death benefit upon his/her death, which begs the question: can the trustees give effect to this nomination?

At the outset, one must remember that trustees are not bound by beneficiary nominations. They are however required to establish, as part of their initial investigation, whether or not the deceased had nominated any beneficiaries.

Although the Act does not define the concept of a “nominee”, the wording of section 37C as a whole provides clear guidance as to *who* may qualify as such. Section 37C(1)(b) reads as follows:

*“If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit ....”*

Clearly a deceased estate cannot, in law, be a person “*who is not a dependant of the member*”.

#### PFA determinations

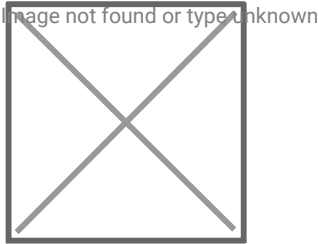
The interpretation of the concept of “*nominee*” has been tested in court. In the matter of *Martin v Beka Provident Fund* (2000) 2 BPLR 196 (PFA) the member had nominated his deceased estate as the sole beneficiary of his death benefit. The Adjudicator held that the deceased’s estate cannot be a nominee on the basis that Section 37C specifically excluded death benefits from a member’s deceased estate. Therefore, the nomination of the estate by the deceased should not have carried any weight at all in the trustees’ considerations. The benefits are only payable to the estate by “default”, i.e. in the circumstances set out in subparagraph (b) (*to the extent required to settle the unpaid debts of an insolvent estate, where a member has nominated a nondependant as a beneficiary and the trustees do not become aware of any dependants within twelve months, after which the nominated beneficiary receives any balance*) and subparagraph (c) (*where the fund is unaware of or cannot trace any dependants within twelve months of the member's death and no nomination has been made*).

Similarly, in the matter of *Muir v Mutual & Federal Pension Fund* (2002) 9 BPLR 3864 (PFA) the deceased had completed a nomination form in which she indicated that she wished the entire benefit to go into her estate. The Adjudicator held that a nomination in favour of the estate is in *fraudem legis* (i.e. in circumvention of the rules of law) and thus invalid. At paragraph 17 he held as follows:

*“Section 37C(1)(b) makes it additionally clear that an estate cannot be a nominee. The provision states that if there are no dependants and “the member has designated in writing to the fund a nominee who is not a dependant of the member”, then the benefit should be paid to the nominee. Clearly a deceased estate cannot, in law, be a person “who is not a dependant of the member”. While the trustees would have been obliged to bring into consideration any nomination of a person as a beneficiary, the nomination of the “estate” as beneficiary may not be treated in the same way as other nominations, since the Act refers only to nominees who are dependants and nominees who are not dependants, and an estate cannot be either. (my emphasis)*

## Conclusion

It is clear from the above cited case law (read together with the Act) that the member's deceased estate cannot be a nominee for the purposes of section 37C(1). Similarly, when applying the logic followed by the Adjudicator in both matters, neither can a juristic person such as a company or a non-profit organisation.



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