THE DISTRIBUTION OF RETIREMENT FUND DEATH BENEFITS

AN ANALYSIS OF THE EQUITABILITY AND CONSTITUTIONALITY OF SECTION 37C OF THE PENSION FUNDS ACT 24 OF 1956

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DECLARATION

I hereby declare that the work on which this thesis is based is my original work (except where acknowledgments indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree at this or any other university. I authorise the University of Cape Town to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever.

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ABSTRACT

In 1976, the legislature introduced a far-reaching amendment to the Pension Funds Act. The amendment was the insertion of s37C into the Act. Section 37C effected a fundamental change to the law of succession and the principle of freedom of testation. It did so by removing what, for many, is their most valuable property, from the reach of the law of succession or any other law and subjecting it to a *sui generis* statutory regime. Under this regime, the power to control the devolution of death benefits has been transferred from the individual who 'owns' the benefit to the trustees of the pension fund. Trustees are, in turn, permitted to delegate their power. The result is that a stranger or a group of strangers have the power to select the beneficiaries of the deceased's principal asset from amongst the deceased's dependants, as defined, and any additional non-dependent nominated beneficiaries, with far-reaching and possibly life-changing consequences for those affected by the decision. The trustees are even permitted to make decisions that are contrary to, and arguably less equitable than, those of the individual, and yet their right to do so is recognised in law. Section 37C has been in existence for 40 years; its import, and impact, has increased significantly over the course of the past 20 years – yet most of those affected remain unaware of its existence. The study demonstrates that in its present form, s37C is both unconstitutional in its design and inequitable in its operation. As such, it is in urgent need of reform.

Table of Contents

ACRONYMS AND ABBREVIATIONS

AB	Alberta (Canada)
ALC	Australian Law Commission
AD	Appellate Division
AR	Annual Report
BC	British Columbia (Canada)
BGB	Bürgerliches Gestzbuch (German Civil Code)
BoR	Bill of Rights
BverfG	Bundesverfassungsgericht (German Constitutional Court)
Ca	Canada
CC	Constitutional Court
Ch	Chancery
Cth	Commonwealth
CRAF	Central Retirement Annuity Fund
DB	Defined Benefit Fund
DC	Defined Contribution Fund
DTC	Davis Tax Committee
EW	England and Wales
FC	Constitution of the Republic of South Africa, 1996
FSB	Financial Services Board
FST	Financial Services Tribunal
GEPF	Government Employees Pension Fund
Fund	Retirement fund
HC	High Court
HCA	High Court of Appeal
LJ	Law Journal

LR	Law Review
LRAF	Lifestyle Retirement Annuity Fund
LCEW	Law Commission (of England and Wales)
MEPF	Mine Employees Pension Fund
MSSA	Maintenance of Surviving Spouses Act
MW	Malawi
NS	Nova Scotia (Canada)
NSW	New South Wales (Australia)
NSWLRC	New South Wales Law Reform Commission
NT	National Treasury
NZ	New Zealand
NZLC	New Zealand Law Commission
OPFA	Office of the Pension Funds Adjudicator. The office of the Adjudicator was established in April 1996, by way of an amendment to the PFA. However, the first Adjudicator's term of office only commenced on 1 January 1998.
ON	Ontario (Canada)
PAJA	Promotion of Administrative Justice Act 3 of 2000
PELJ	Potchefstroom Electronic Law Journal
PF	Provident Fund or Pension Fund
PFA	Pension Funds Act (used in footnotes to refer to the Pension Funds Act 24 of 1956. When it forms part of a case citation, it stands for Pension Funds Adjudicator)
PO	Pensions Ombudsman (England & Wales)
QB	Queen's Bench
RAF	Road Accident Fund
RCMA	Recognition of Customary Marriages Act 120 of 1998
RDL	Roman-Dutch Law
RF	Retirement Fund

RPF	Registrar of Pension Funds
RSA	Republic of South Africa
rtw	read together with
s37C	Section 37C
SA	South Australia
SAJHR	South African Journal of Human Rights
SALC	South African Law Commission
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SALRI	South Australia Law Reform Institute
SAPS	South African Police Service
SARAF	South African Retirement Annuity Fund
SASSA	South African Social Security Agency
SC	Supreme Court
SCA	Supreme Court of Appeal
SCT	Superannuation Complaints Tribunal (Australia)
SISA	Superannuation Industry (Supervision) Act 1993 (Cth) (Australia)
SK	Saskatchewan
StatsSA	Statistics South Africa
Stell LR	Stellenbosch Law Review
UK	United Kingdom
V or Vic	Victoria (Australia)
WA	West Australia
ZA	South Africa (used in neutral judicial citations)

GLOSSARY OF TERMS

(the) Act: The Pension Funds Act 24 of 1956.

Adjudicator: The Office of the Pension Funds Adjudicator, established in terms of s30B of the Act.

Appellate Division: Former name of the South African Supreme Court of Appeal

Beneficiary: Dependant and/or nominees.

Complaint: Complaint lodged with the Adjudicator in terms of s30A of the Act.

Death Benefit: Any lump sum (i.e. not a pension) that is paid on the death of the member. The death benefit always consists of the member's own contributions and investment growth on those contributions (the savings portion) and it may also include the proceeds of a group life insurance policy taken out by the retirement fund (in the case of occupational funds).

Dependant: See the definition of dependant in the Pension Funds Act, which encompasses so-called legal dependants, financial dependants, spouses and children, and future dependants.

Determination: the word used to refer to decisions of the Adjudicator regarding the outcome of complaints. It has the status of a civil judgment under the Act.

Defined benefit fund: The fund promises to pay the member a fixed benefit on retirement that is calculated according to a formula, usually based on the member's final salary x years of service.

Defined contribution fund: The member's benefit consists entirely of savings (contributions paid by the member as employee and/or the employer) and whatever investment return those savings have yielded.

Insured portion: The part of the death benefit that is funded by the group life insurance policy taken out by the fund and payable only on the death of the member to the member's beneficiaries.

Member: an individual who joins a retirement fund, either voluntarily in the case of retirement annuity funds, or compulsorily in the case of occupational pension and provident funds.

Minimum Benefit: see ss14A and 14B of the Act. Essentially the member's and employer's contributions, plus investment return, less administration costs.

Nominated beneficiary: a person the member has designated, in writing addressed to the fund, as a person the member wants to share in the death benefit.

Nominee: A non-dependant whom the member has nominated, in writing, to receive the whole or part of the death benefit. Although a member can nominate a dependant, a person will only technically be a nominee if they are not also a dependant.

Occupational Retirement Fund: A retirement fund created by an employer for the benefit of its employees, and to which employees compulsorily become members by virtue of their employment with the employer.

Pension Fund: A retirement fund in which only one-third of the retirement benefit may be paid out as a lump sum, while the remaining two-thirds must be used to fund a monthly or yearly annuity/pension. The pension may either be provided by the employer, or by a separate insurance company, in which case the employer will purchase the pension on the employee's behalf.

Pension Funds Adjudicator: Any one of Adjudicators, deputy Adjudicators or assistant Adjudicators. Only one Adjudicator is appointed to office at a time, but the Adjudicator has a deputy and numerous assistants. There have been six Adjudicators to date: John Murphy (1 January 1998–31 May 2003); Vuyani Ngalwana (17 March 2004–28 February 2007); Mamodupi Mohalaha (1 June 2007–September 2009); Elmarie de la Rey (Acting Adjudicator, October 2009–1 April 2010); Charles Pillai (1 April 2010–5 November 2010); Elmarie de la Rey (Acting) (15 October 2010–30 May 2012); Muvhango Lukhaimane (1 June 2012–to date)

Pension Interest: A term that derives from the Divorce Act 70 of 1979. A spouse married in community of property or out of community of property subject to the accrual system ordinarily becomes entitled to share in the member's pension interest on divorce. It usually consists of the member's savings portion.

Pensions Ombudsman: Counterpart of the Pension Funds Adjudicator with jurisdiction in England and Wales.

Provident Fund: A retirement fund in which the member's entire benefit may be paid out in a lump sum on retirement.

Retirement Fund: A pension fund organisation as defined in the Pension Fund Act, i.e. one that includes a provident fund, a pension fund, and an annuity fund.

Road Accident Fund: A statutory body that provides financial compensation for injury or wrongful death arising from a motor vehicle accident caused by a third party.

Retirement Annuity Fund: A voluntary retirement fund into which individuals can make monthly contributions as savings towards their retirement. They are commercial funds. They are the only form of retirement funds available for employees who want to make additional savings towards their retirement, or for individuals who don't belong to occupational retirement funds. They are a pension rather than provident fund.

Savings portion: The monetary contributions that have been paid to the retirement fund by or on behalf of the member. In an occupational fund the member's employer pays the member's contributions to the fund on behalf of the employee, since the contributions are part of the member's salary. In a retirement annuity fund the members pay their own contributions.

Separate Group Life: a group life policy that is not taken out by the retirement fund, but by the employer. Section 37C therefore does not apply to any lump sum proceeds of such policies.

Stand-alone Fund: A retirement fund created by an individual employer for the benefit of only its employees. It therefore stands alone, separate from other funds. Standalone funds used to dominate the retirement fund industry, but they are gradually being replaced by umbrella funds.

Superannuation: term used in Australia to refer to retirement savings, which are usually paid as a lump sum rather than a pension.

Superannuation Complaints Tribunal: The Australian counterpart of the Pension Funds Adjudicator between 1993 and 2018. The Australian Financial Complaints Authority is the new counterpart as from 1 July 2018. The Superannuation Complaints Tribunal stopped

accepting new complaints as from 31 October 2018 and ceased operating as from 30 June 2020.

Survivor: Surviving spouse

Umbrella Fund: A retirement fund in which a number of employers participate, and the employees of all the participating employers will be members of the one 'umbrella' fund.

ANNEXURES

1. Extracts from the Pension Funds Act 24 of 1956

1. The definition of dependant
2. The definition of spouse
3. Section 37C(1)

2. Extracts from the Constitution of the Republic of South Africa 1996

3. Table reflecting the extent to which trustees and Adjudicators uphold or override member nominations.

1

CHAPTER ONE

INTRODUCTION

The legislature regards pension assets as a critical and essential component of any natural person's rights and therefore it has established a mandatory scheme (set out in section 37C) in terms of which a death benefit has to be distributed.[1]

1.1 INTRODUCTION

Section 37C of the Pension Funds Act 24 of 1956 (the Act) is a provision that is completely destructive of some individuals' fundamental freedoms. Despite the radical nature of the provision, its existence and import are not widely known. On its face it is simply one of three contemporary restrictions on an individual's freedom of testation. The first is a child's common law right to claim maintenance from a deceased parent's estate. The second, and most recent restriction, is the right of surviving spouses to claim maintenance from their deceased spouse's estate.[2] The third, section 37C (s37C),[3] governs the distribution and payment of so-called 'death benefits' that are payable by retirement funds. A death benefit is a monetary lump sum that a retirement fund is, in terms of its own rules, obliged to pay upon the death of any one of its members. This lump sum consists of savings the member has made towards her retirement by way of contributions to the fund. In many cases, these savings represent the largest source of savings, or even the most valuable asset, of the member.[4] In addition, a portion – often the greater portion – of the lump sum may consist of

[1] *Williams v FFE* [2001] 2 BPLR 1678 (PFA) [14].
[2] Maintenance of Surviving Spouses Act 27 of 1990 (MSSA).
[3] I have chosen this abbreviation in preference to the standard s (space) 37C, because the abbreviation is used so frequently and because the shortened form enhances visual clarity, particularly when the s and 37C appear on different lines as a result of the separation.
[4] Old Mutual *Comments on the Retirement Fund Reform Discussion Paper issued by the National Treasury of the Republic of South Africa December 2004* (29 March 2005), 50; National Treasury *Memorandum on the objects of the Pension Funds Amendment Bill 2007,* para 1.1. The same holds true in other jurisdictions, see eg Superannuation Complaints Tribunal (SCT) *Annual Report 2015–16*, 2. Similarly, 'According to the Wall Street Journal, 401(k)s and IRAs account for about 60% of the assets of

the proceeds of life insurance cover that the retirement fund has taken out on the life of the member.[5] The contributions to the fund and the insurance premium are part of the remuneration the member earns from her employer. Section 37C takes away the member's right to choose who amongst her kith and kin will share in her benefit and transfers it to the trustees of the retirement fund.

The value of death benefit lump sums can range from the seemingly paltry to the substantial, from a few thousand rand to many millions of rand.[6] Whether small or large, most members and beneficiaries care about the ultimate distribution of death benefits. Members show they care by completing nomination of beneficiary forms, in which they identify their chosen beneficiaries and how they wish the death benefit to be divided between them. Disappointed beneficiaries show they care through their frequent complaints to the Pension Funds Adjudicator. Who will receive what share of the death benefit therefore matters to members and beneficiaries alike.[7] This is hardly surprising, given that in 2015 almost R10 billion was paid by way of lump sum death benefits.[8] The comparable value of deceased estates in 2013 was roughly R9 billion.[9]

U.S. households investing at least $100,000', see <http://www.connorsandsullivan.com/Articles/Beneficiary-Designations-Getting-the-Right-Assets-to-the-Right-People.shtml>.

[5] Jeram 'Disposition of lump sum death benefits' in Hanekom (ed) *Manual on Retirement Funds and other Employee Benefits* 25ed (2018), §9.15.4.3. Writing in the 1930s already, Taylor 'Beneficiaries of Life Insurance Policies' (1944) 22 *Canadian Bar Review* 509, 517 observed that the proceeds of life insurance policies often represent the insured's 'main estate'. In the context of retirement fund group life policies, members are usually insured for a variable multiple of their salaries.

[6] The smallest benefit I have come across is R10 920 (*Esterhuizen v CRAF* [2013] 3 BPLR 355 (PFA)); the largest R7 125 118 (*Jacoby v Metal Industries* [2017] JOL 38735 (PFA)).

[7] Understandably, when the member has no separate estate to speak of or the estate is insolvent, for in these cases the only property that is available for the member's beneficiaries is the death benefit. Sometimes beneficiaries are aggrieved even where there is a significant separate estate and the benefit is negligible. See the long-running saga of *Smith v SAA* [2010] 3 BPLR 330 (PFA), in which the benefit was just under R800 000, but the value of death benefits payable by other funds was over R15 million, and the estate was of unknown value. The dispute between the parties led to arbitration in respect of the other benefits, and to extensive litigation before the ordinary courts (*Smith v Parsons* 2009 (3) SA 519 (D), reversed on appeal in *Smith v Parsons* 2010 (4) SA 378 (SCA). This was an exceptional case.

[8] Registrar of Pension Funds (RPF) 57th *Annual Report* (*AR*) *2015*, Table 13, note 6.1. The actual figure was R9.347 billion. In 2017, the figure was R10.027 billion. See RFP *AR 2017*, Table 3.3, note 6.1

[9] Derived from the Davis Tax Committee (DTC) *First Interim Estate Duty Report* (2015), which reports that R1.13 billion was collected in estate duty in 2013. Since estate duty was levied at 20% of the value of the dutiable estate, the total dutiable estate would have been R1.13bn x 5 (R5.65 billion), to which must be added the value of the statutory abatement (currently R3.5 million). The DTC analysed a sample of 659 estates, and the estate duty collected constituted 70% of the total estate duty received. Extrapolating

Applying the ordinary principles of the law of property, contract and succession, one would expect that members would be entitled to decide who should share in the death benefit, and in what proportion. After all, to the extent that the savings portion of the death benefit represents the fruits of the member's own labour, those familiar with the law of property and the law of succession would expect them to form an asset in the estate of the member and to be subject to the member's testamentary power. Similarly, in so far as insurers are contractually obliged to pay the proceeds of life insurance policies to the nominated beneficiaries of the policyholder,[10] one would expect the same to apply in the context of the life insurance component of death benefits.[11]

However, for the past 40 years, most retirement fund members have not enjoyed freedom of testation in respect of their death benefits.[12] The reason is because of the existence of s37C of the Pension Funds Act. Inserted into the Act by way of an amendment in 1976, s37C expressly deprives members of their testamentary power.[13]

Section 37C does so by stating, very simply, that death benefits will not form part of the assets in the estate of the deceased member if the member is survived by one or more dependants. As such, the benefits will not be subject to the testamentary control of the member.[14] Instead, where a member is survived by dependants, the authority and responsibility for allocating the death benefit falls to the management board (henceforth

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from this, the approximate number of deceased estates in 2013 was 1000, and the total abatement would thus have been roughly R3.5 billion. This, however, assumes that the value of each net estate would be at least R3.5 million, which is of course not the case. The estimated figures are thus a very rough approximation only. More recent figures on the numbers of deceased estates are not available. Estate duty of R2.2 billion was collected in 2017, meaning that the dutiable value of deceased estates was roughly R11 billion.

[10] *Pieterse v Shrosbree; Shrosbree v Love* 2005 (1) SA 309 (SCA).

[11] As unsuccessfully argued by the applicants in *Kaplan v Professional and Executive Retirement Fund* 1999 (3) SA 798 (SCA). Citing *Kaplan*, the Adjudicator has also held that trustees may not adopt a settlement agreement entered into between beneficiaries, see *Brummer v CSIR* [2005] 9 BPLR 797 (PFA).

[12] Life insurance nominations are described as 'will-substitutes', for their effect is the same as a testamentary bequest, although the proceeds bypass the deceased's estate. In the absence of a nomination, the proceeds will fall into the policy holder's estate and devolve on the legatee or heirs, subject to creditors' claims. For a comparative examination of will-substitutes, see Braun & Röthel *Passing Wealth on Death* (2016).

[13] Inserted by Financial Institutions Amendment Act 101 of 1976, s24.

[14] See also *Kaplan* (n11); *Igesund & De Lange v KwaZulu-Natal*, discussed in OPFA *AR 2013/2014*, 13.

'trustees') of the retirement fund. The trustees are obliged to allocate the death benefit between the member's dependants and nominees in the proportion that they, the trustees, consider to be equitable.

The Act provides no further guidance to trustees. The only guidance they do receive is from the determinations handed down by the Adjudicators in the Office of the Pension Funds Adjudicator (Adjudicator). Adjudicators hear complaints from beneficiaries aggrieved by the trustees' exercise of their s37C duties, and hand down written determinations in response to such complaints. It is these determinations that provide the lens through which to analyse s37C in practice. They provide insight into both trustee decision-making, and the role of the Adjudicators in shaping their decision-making.

The difficulties occasioned by s37C were highlighted by the first Adjudicator in one of his earliest determinations, 20 years ago, when he recommended that s37C be reformed, without articulating what that reform should be:[15]

> One thing is certain about section 37C, it is a *hazardous, technical minefield* potentially *extremely prejudicial* to both those who are expected to apply it and to those intended to benefit from its provisions. It creates *anomalies and uncertainties* rendering it most difficult to apply. There can be no doubt about its noble and worthy policy intentions. The problem lies in the execution and the resultant legitimate anxiety felt by those who may fall victim to a claim of maladministration in trying to make sense of it. Any successful claim for maladministration will be borne ultimately by the other members, the participating employer, or perhaps even the members of the board of management.

1.2 STATEMENT OF THE PROBLEM

In principle, s37C appears to serve an important social function.[16] A member's dependants are prioritised over the interests of creditors of the estate, and the only cost to the member is the loss of her own freedom to determine who her beneficiaries should be or in what proportion they should share in the death benefit. Trustees remain obliged to consider the

[15] *Dobie v National Technikon* [1999] 9 BPLR 29 (PFA) (emphasis added).
[16] *Mashazi v African Products* 2003 (1) SA 629 (W).

member's wishes, and to effect an equitable distribution between her dependants and nominees. In the absence of a comprehensive state social welfare system, it is left to individuals to fund their own retirement, and to make provision for surviving dependants should they predecease their dependants. The state has a legitimate interest in incentivising individuals to save towards their retirement, and in ensuring that, should a person with dependants die, their death benefits, which includes their retirement benefits, are utilised for the benefit of those dependants.

Although s37C serves an apparently clear and legitimate social purpose, it represents a significant restriction on individuals' testamentary freedom and, in consequence, on their rights to property and dignity. It mandates trustees, who can only ever hope to know the barest information about members and their 'circle of beneficiaries', to discount even the considered wishes of caring and conscientious members. It obliges trustees to substitute their view of what is equitable for the member's view of what is equitable, even where there is nothing obviously wrong with the member's own view.[17] It even permits trustees to delegate the collective exercise of their discretion to an individual third-party functionary.[18] Conversely, however, trustees can be held personally liable for any losses to the retirement fund arising from a distribution that an Adjudicator or court considers to have been improperly made.[19]

The social benefit of depriving members of the right to choose how their death benefits should be allocated, even when their choice is a rational and reasonable one, and even when their chosen beneficiary falls within the circle of eligible dependants, is questionable.

[17] Trustees are required to allocate the benefit as *they deem equitable*. Adjudicators have repeatedly emphasised that trustees may not 'follow' or attach 'undue weight' to the member's wishes, for in doing so they are failing to apply their own minds. Determinations suggest that Adjudicators draw a positive inference when trustee distributions depart from members' wishes, and a negative inference when they do not. See further §5.5.1 below.

[18] *Kaplan* (n11), confirming the decision of the High Court in *Kaplan v Professional and Executive RF* 1998 (4) SA 1234 (W), which held the delegation effective notwithstanding the delegee's 'relatively subordinate position and lack of qualification', 1239.

[19] *Sithole v ICS* [2000] 4 BPLR 430 (PFA); *Matene v Noordberg (2)* [2001] 2 BPLR 1610 (PFA); *Coetzee v Toyota South Africa Pension Fund* (1) [2001] 5 BPLR 2007 (PFA).

Equally, the social benefit of vesting trustees with the onerous responsibility of, and potential personal liability for, making choices for members (who have failed to make a choice), or of confirming that the member has made the 'right' choice, or of making better choices than the member has made, is also questionable. It is particularly questionable when the trustees have been given absolutely no guidance in the Act as to how they should exercise their discretion. They are told only that they should allocate the benefit amongst the beneficiaries in the proportion *they* consider to be equitable.

Section 37C does not only deprive members of their testamentary freedom. Section 37C has been interpreted as supplanting all laws that would otherwise apply.[20] The rights that spouses married in community of property would have had to share in the death benefit are expunged, as are any maintenance claims that they and the member's children may have had against the member's estate.[21] Their rights are sacrificed, in the expectation that trustees exercising discretionary powers will achieve more equitable outcomes, for all the member's dependants, than inflexible rules of law. This is a Herculean task for judges,[22] much less trustees untrained in law.[23]

1.3 AIM OF THE THESIS

This thesis seeks to interrogate this transfer of rights and responsibility from the perspective of all those affected by the transfer: from the perspective of the member, whose rights have been limited; the trustees, who have been tasked with the onerous responsibility; and those persons who have either been deprived of a benefit they would otherwise have received, or received a benefit to which they would otherwise not have been entitled. It seeks to investigate whether the extent of the limitation of the member's rights is proportionate to the objective the legislation seeks to achieve; and whether the responsibility on trustees, coupled

[20] Subject to the forfeiture rule for unlawful killing, see Jeram (n5) §9.15.5.7.
[21] See further §3.3, 6.4 & 6.5 below.
[22] See further §7.3 below, which discusses judicial limitations on testamentary freedom.
[23] See further §1.6.3 below.

with the potential personal liability they face for the erroneous exercise of their duties, exceeds the bounds of what can reasonably be expected of them. Ultimately, the dissertation seeks to address the question whether, from the perspective of members, trustees and beneficiaries, the extent of the wholesale transfer of right and responsibility is constitutional. If it is constitutional, the further question is whether s37C, as interpreted and applied by trustees and Adjudicators, yields outcomes that are equitable. If it is either unconstitutional or inequitable, a further question is whether it should be discarded altogether, or whether it should be reformed.

There are three aspects to s37C and its operation that I seek to analyse in the dissertation:

- Its inherent challenges. These challenges arise from the Act's definition of dependant. Trustees are expected to correctly identify who the member's dependants are, in accordance with the categories of dependants laid down in the Act. This imposes both an investigative and quasi-judicial role on trustees that they are ill-equipped to perform.

- Its applied challenges. These challenges arise from the wide discretionary power vested in trustees and the lack of accompanying guidelines. Trustees are simply enjoined to select the beneficiaries and apportion the death benefit as they deem equitable.

- Its constitutional implications. These implications arise from the breadth of the discretion vested in trustees and, in consequence, the extent of the restriction on the individual's dignity and freedom of property.

1.4 METHODOLOGY

The literature on s37C is limited. It has generated very little by way of academic commentary: the textbooks that exist provide a broad overview of the pension funds industry

and are aimed at practitioners within the industry;[24] the academic articles are relatively few. Their main focus has been a critique of select Adjudicator determinations in so far as the identification or treatment of dependants is concerned.[25] There is no literature that seeks to unpack the way in which trustees exercise their discretion, or that has seriously questioned s37C's constitutionality.[26]

My research has involved a desk-top analysis of Adjudicator determinations, domestic and foreign case law and relevant literature. I read approximately 400 determinations, handed down between 1998 and 2019. The main sources of the determinations are law reports and the Adjudicator's website, where most determinations are posted. Some determinations

[24] The three leading general texts are: Downie *Essentials of Retirement Fund Management* (2018); Hanekom (ed) *Manual on Retirement Funds and other Employee Benefits* (2018); Hunter et al *The Pension Funds Act, 1956: A Commentary* (2010). The leading general analysis of s37C is that by Jeram (n5) §9.15.

[25] Dyani 'Extending death benefits to cohabitants under section 37C of the South African Pension Funds Act: *Hlathi v University of Fort Hare Retirement Fund*' (2012) 56 *Journal of African Law* 296; Dyani & Mhango 'How could the Pension Funds Adjudicator get it so wrong? A critique of Smith v Eskom Pension and Provident Fund' (2010) 13 *PELJ* 162; Dyani & Mhango Reflections on recent South African pension jurisprudence on death claims (2011) 32 *ILJ* 2385; Dyani & Mhango 'Pension death benefits under the Malawi Pension Bill 14 of 2010: reflections from South Africa and Australia' (2012) 45 *Comparative & International LJ Southern Africa* 18; Manamela 'Chasing away the ghost in death benefits: a closer look at section 37C of the Pension Funds Act 24 of 1956' (2005) 17 *SA Mercantile LJ* 276; Mhango, Duty to investigate factual dependants: a comment on De Beers v Hosaf Fibre Provident Fund (2008) 29 *Indus LJ* 2439; Mhango & Dyani The duty to effect an appropriate mode of payment to minor beneficiaries under scrutiny in death claims (2009) 12 (2) *PEJL* 168; Mhango 'What should the board of management of a pension fund consider when dealing with death claims involving surviving cohabitants?' (2010) 13 *PELJ* 204; Mhango 'Examining the provision of pension death benefits to co-habitees or life partners under the South African Pension Funds Act of 1956' (2010) 15(3) *Pensions: An International Journal* 226; Mhango & Thejane 'The Malawi Pension Act: a general commentary on some of its core mandatory provisions with specific reference to sections 9, 10 and 15' (2012) 129(4) *SALJ* 758; Mhango 'Challenges in the distribution of death benefits under the Pension Funds Act: the extent of dependency considered' (2013) 46 *Comparative & International LJ Southern Africa* 474; Mhango 'Does the South African Pension Funds Adjudicator perform an administrative or a judicial function?' (2016) 20 *Law, Democracy & Development* 20; Mhango The Swaziland Retirement Funds Bill 2011: Reflections on parliament's override of the supreme court statutory interpretation of the definition of dependant for death benefits (2017) 38(1) *Statute Law Rev* 40; Nevondwe 'Death benefits and constitutionality: is the distribution of death benefits under the Pension Funds Act 24 of 1956 constitutional'? (2007) 15 *Juta's Business Law*164; Nevondwe 'The law regarding the division of the retirement savings of a retirement fund member on his or her divorce with specific reference to *Cockcroft v MEPF* [2007] 3 BPLR 296 (PFA)' (2009) 13 *Law Democracy & Development* 1; Nevondwe 'The distribution and payment of a death benefit in terms section 37C of the South African Pension Funds Act, 24 of 1956' (2010) 15(1) *Pensions: An International Journal* 38; Nevondwe 'South African social security and retirement reform: A long journey towards the redrafting of the new Pension Funds Act' (2010) 15(4) *Pensions: An International Journal* 287; Nevondwe 'Does freedom of testation supersede the powers of the board of trustees to allocate a death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956?' (2011) 16(4) *Pensions: An International Journal* 285; Nevondwe & Rapatsa 'Cohabitation: a nightmare on the allocation and distribution of death benefits in terms of s37C of the Pension Funds Act 24 of 1956' (2012) 27(3) *Pensions: An International Journal* 153; Nevondwe & Odeku 'An analysis of the role of Pension Funds Adjudicator in South Africa' (2013) 4 *Mediterranean Journal of Social Sciences* 817.

[26] Manamela 'Chasing away the ghost in death benefits' and Nevondwe 'Death benefits and constitutionality' (n25) do not so much question as conclude that s37C is constitutional.

appear in the published law reports but do not appear on the Adjudicator's website, and vice versa. Occasionally a determination appears in neither but is discussed in the Adjudicator's annual reports. Where a determination has been published in the law reports, the reported citation is provided. Where it is unreported, the reference used by the Adjudicator is provided. In every case before the Adjudicator the respondent is a retirement fund. In the interests of brevity and clarity have shortened the footnote citation to dispense with the reference to retirement fund/pension fund/provident fund/retirement annuity fund, but the full name appears in the bibliography.

The determinations are all relatively short. They are usually between four and 10 pages in length. When reading the determinations, I sought to extract the relevant findings of law and fact, the Adjudicators' interpretation of the law and how it should be applied, and the extent to which Adjudicators have influenced or expressed a view on the equitability of the actual distribution of the death benefit.

1.5 A VERY BRIEF HISTORY OF SECTION 37C

Section 37C is one of three contemporary restrictions on freedom of testation. All three are of relatively recent origin. The first, and original restriction, is that which children, irrespective of age, have to claim maintenance from their deceased parent's estate. This right was judicially-introduced in 1906, as a result of a court's misreading of the relevant Roman-Dutch authority.[27] Once the misinterpretation was discovered, the principle was so well-established that it had become an accepted part of the law.[28] The second was created by the legislature in 1990, with the introduction of the Maintenance of Surviving Spouses Act

[27] *Carelse v Estate de Vries* (1906) 23 SC 532. See Beinart 'Liability of deceased estates for maintenance' 1958 *Acta Juridica* 92. A minor child's right to maintenance now finds statutory expression in the Children's Act 38 of 2005, s18.
[28] *Hoffmann v Herdan* 1982 (2) SA 274 (T). In *Hoffmann,* the right was extended to adult children. A major child's right to maintenance cannot yet be accepted as an indisputably binding principle of law, however, since this is the only reported decision involving an adult child claiming from a deceased estate and the child suffered from ill-health.

(MSSA).[29] The third is s37C, which was introduced in 1976 and which is quite different from a child or spouse's right to claim maintenance. The latter is a restriction on the deceased's freedom of testation, but executors and courts do not have the freedom to disregard the deceased's wishes and allocate the deceased's property as they think fit. A spouse or child must apply for maintenance and must prove that they need maintenance, and the wishes of the deceased may be upset only to the extent necessary to make provision for their reasonable maintenance needs. Section 37C, on the other hand, gives trustees a power that is analogous to giving an executor or court the power to rewrite a deceased's will. Given the history of previous attempts to limit freedom of testation in South Africa, that s37C exists at all is surprising.

For a century, between 1874 and 1976, South African testators enjoyed near unfettered freedom of testation.[30] Only children were entitled to claim maintenance from their deceased parent's estate. The wide freedom enjoyed by testators was criticised by academic writers, who called for the law to be reformed, by reintroducing either the legitimate portion that had formed part of Roman-Dutch law or by allowing maintenance claims against a deceased estate.[31] In response to these criticisms and to legal developments in other jurisdictions,[32] the Law Review Committee in 1969 proposed a Family Maintenance Bill, in terms of which the same relatives towards whom a deceased had owed a duty of support while alive would have been able to claim maintenance from the deceased's estate. The Bill expressly conditioned a major child's, parent's and sibling's right

[29] Act 27 of 1990. Courts had previously refused to extend the common law duty of support to spouses. See *Glazer v Glazer* 1963 (4) SA 694 (A) 707.

[30] Prior to 1874, during the Dutch colonisation of the Cape, certain relatives were entitled to share in the deceased's estate as of right. Their right, often referred to as the legitimate portion, was smaller than what they would have inherited on intestacy. It served to protect them from complete disinheritance. These rights ceased as a result of the influence of English colonists and to reflect the laws of England then in force, in which the main restriction on freedom of testation, a widow's right to dower, was extinguished with the adoption of the Dower Act 1833. See further Du Toit 'The impact of social and economic factors on freedom of testation in Roman Law and Roman Dutch Law' (1999) 10 *Stell LR* 232; Lehmann 'Testamentary freedom versus testamentary duty: in search of a better balance' 2014 *Acta Juridica* 9.

[31] Beinart (n27); Hahlo 'The case against freedom of testation' (1959) 76(4) *SALJ* 435.

[32] The adoption of legislation that granted courts the power to award maintenance from a deceased estate to eligible applicants, which started in New Zealand with the Testator's Family Maintenance Act 1900. See further §7.3 below.

to do so on their being unable to support themselves by reason of age, infirmity or disability. The Bill was, however, rejected by a parliamentary select committee even before it could be presented to Parliament, on the basis that it resulted in too great an intrusion into freedom of testation.[33]

Yet only six years later, in 1976, the Pension Funds Act was amended by the introduction of s37C.[34] The amendment was approved by Parliament without debate, and no-one expressed any concern about the extent to which it intruded into freedom of testation.[35] There are two possible explanations for its ready passage through Parliament. One is that parliamentarians did not appreciate the extent of the intrusion. The other is that they were willing to approve it, without comment, fully realising its import. The first explanation is the more probable. The Minister of Finance, who presented the provision to Parliament, provided only a brief explanation of the rationale behind its introduction – that it was intended to protect retirement benefits from creditors' claims, to ensure that such benefits were available to dependants. The first iteration of s37C also suggests that the drafters assumed that identifying the member's dependants was a mere formality, one which a retirement fund could do readily as part of its routine business.[36] It is probable that the drafters and parliamentarians believed that the potential beneficiaries of a deceased's estate, and the beneficiaries of a deceased's death benefit, would be the same persons. The principal beneficiaries, both under testate and intestate succession,[37] are, after all, a deceased's

[33] Hahlo 'The sad demise of the Family Maintenance Bill 1969' (1971) 88(2) *SALJ* 201.
[34] Financial Institutions Amendment Act 101 of 1976, s24.
[35] Hansard House of Assembly Debates col 3241 (16 March 1976).
[36] The original wording in Act 101 of 1976, s24 simply directed that the benefit be paid to 'any one or more dependants of the member'. No mention was made of the basis on which it was to be allocated, such as equally or equitably.
[37] For a comparative discussion on the laws of intestate succession, see Reid, De Waal, Zimmerman (eds) *Comparative Succession Law Vol 2: Intestate Succession* (2015). For a comprehensive discussion of intestacy laws within Europe, see Ruggeri, Kunda, Winkler (eds) *Family Law and Succession in EU Member States* (2019). Studies into testamentary choices confirm that most testators choose their spouse and/or children as their beneficiaries. See further Douglas et al 'Enduring love – attitudes to family and inheritance law in England and Wales' (2011) 38 *Journal of Law & Society* 245, confirming that most individuals surveyed had included their children and spouse amongst their beneficiaries, while only a relatively small proportion had included other relatives or charities. The laws of intestate succession in some jurisdictions are designed to reflect the 'presumed' intention of the deceased, which are based on the preferences of the majority of testators as evidenced by such information as is publicly available. See eg Alberta Law Reform Institute *Reform of the Intestate Succession Act* (1999);

spouse and children.[38] The same of course was not true under customary law, given that the estate would have devolved on the nearest male relative.[39] However, there is no indication that the provision was drafted with an appreciation of, or concern for, the consequences of the customary law of succession.

The belief that Parliament did not appreciate s37C's true scope is bolstered by the investigation and deliberation that preceded the adoption of the MSSA in 1990.[40] Numerous bodies were opposed to the introduction of the MSSA, including the Association of Law Societies, Association of Trust Companies, and Clearing Bankers Association.[41] They felt that it represented too great an intrusion into an individual's freedom of testation. The General Council of the Bar was concerned that the exclusive focus on surviving spouses could prejudice other testamentary heirs and legatees, even when they had also been dependent on the testator in life, and towards whom the testator also owed a duty of support.[42] The Law Commission dismissed the various objections and concerns, and justified its exclusive protection of surviving spouses on the basis that it wanted to limit freedom of testation as little as possible.[43] Since s37C represents a far greater intrusion into freedom of testation than does the MSSA, the most plausible explanation for the lack of debate preceding its adoption is that parliament either did not fully understand its import, or that it did not anticipate that it would be, or become, so great a restriction on freedom of testation.

Reinhartz 'Recent changes in the law of succession in The Netherlands: on the road towards a European law of succession' in Van Erp & Van Vliet *Netherlands Reports to the Seventeenth International Congress of Comparative Law* (2006); Wright & Sterner 'Honouring probable intent on intestacy: an empirical assessment of the default rules and the modern family' (2017) 42 *ACTEC LJ* 431.

[38] The reference to spouse includes a registered civil partner, since most common law and civil law countries extend the legal consequences of marriage to civil partnerships. See §2.3 below.

[39] For a discussion of the principle of primogeniture in the customary law of succession, see *Bhe v Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC) [75-100] [declaring primogeniture unconstitutional]. The Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 provides that the intestate estates of individuals subject to customary law will devolve in accordance with the Intestate Succession Act 81 of 1987.

[40] Act 27 of 1990; SALC (Project 22) *Report on the introduction of a legitimate portion or the granting of a right to maintenance to the surviving* spouse (1987).

[41] SALC (Project 22) (n40) para 4.3 & 4.6.

[42] Ibid, para 6.26.

[43] Ibid, para 4.4.

1.6 THE RETIREMENT FUND INDUSTRY

Section 37C is part of the Pension Funds Act.[44] The Act regulates the retirement fund industry, which is responsible for investing and administering the retirement savings of millions of South Africans. The responsibility for applying s37C thus does not fall to courts or to those trained in the law; it falls to the trustees of each individual retirement fund. There are approximately 1 650 active retirement funds in South Africa.[45] Collectively they have almost 17 million members, of whom 11 million are 'active' members still contributing to a fund.[46] The remainder are pensioners or beneficiaries who are receiving benefits from the fund. It is the active members, and their dependants and nominees, to whom s37C will apply if they die before retirement. It is estimated that one in three employees die or become disabled before retirement.[47] Section 37C therefore affects the rights and futures of many millions of people.

Most individuals who contribute to retirement funds do so in the course and scope of their employment.[48] A smaller proportion voluntarily contribute to commercial retirement annuity funds, which is the only retirement savings vehicle available for the self-employed and for those whose employers do not provide retirement benefits. The total asset value administered by retirement funds, which represents the accumulated contributions of all members, is almost R4.3 trillion.[49] The assets held by retirement funds thus represent the future pensions of millions of South Africans.

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[44] Pension Funds Act 24 of 1956 (PFA).
[45] Financial Services Board (FSB) *Annual Report (AR) 2018*, 43. All organisations that meet the definition of 'pension fund organisation' in the PFA, s1 must register with the Registrar of Pension Funds (s4). There are over 5000 registered funds, but the majority are dormant funds.
[46] RPF 59th *AR 2017*, 17. A fund is active if it receives either contributions or pays benefits, but most do both.
[47] Sanlam *Benchmark Survey: Research Summary* (2017), 16.
[48] Contributions to employer-created retirement funds are usually a compulsory incident of an employee's contract of employment. Individuals may, however, voluntarily contribute to non-employer retirement annuity funds, which are offered by numerous firms within the financial services industry. Total contributions to all retirement funds in 2016 was about R227 billion, FSB *AR 2018*, 46.
[49] RPF 59th *AR 2017*, 19.

The essential object of each fund is to provide its members, or their beneficiaries, with an income once they are no longer in active employment and thus no longer in receipt of a regular salary.[50] All private retirement funds are regulated by the Pension Funds Act, which was enacted into South African law in 1956.[51] Public sector funds, which are created by statute for government and some parastatal employees, need not be registered in terms of, and therefore be subject to, the Pension Funds Act.[52] However, the only public sector pension fund with significant membership is the Government Employees Pension Fund (GEPF), which has roughly 1.2 million members and is the single-largest occupational retirement fund in South Africa.[53] The Pensions Fund Act, and therefore s37C, does not apply to it.[54]

In 2017, retirement funds paid benefits of R314 billion, either as pensions or lump sum retirement, death or withdrawal benefits.[55] Of that, about R120 billion was for retirement and death benefit lump sums.[56] Approximately 250 000 people between the ages of 20 and 65 died in 2015-2016.[57] The mid-year population estimate in 2016 was approximately 56 billion.[58] Assuming that employees are almost all in the 20 – 65 year-age-group, and that their mortality rate is the same as the general population, it would mean that about 75 000 employees died in 2016. The fates and fortunes of their dependants and nominees then turned on what trustees considered to be an equitable division of their death benefits.

1.6.1 The history of retirement funds

The Pension Funds Act does not create retirement funds – it merely regulates their creation, administration and dissolution. Occupational retirement funds existed long before

[50] PFA, s1 definition of 'pension fund organisation'.
[51] The Act commenced on 1 January 1958.
[52] Section 4A.
[53] Established by the Government Employees Pension Law 1996.
[54] Ibid, s22. The other public sector funds are listed in RPF 59th *AR 2017*, Table 1.1.
[55] RPF 59th *AR 2017*, Table 1.5.
[56] The figures are not disaggregated into retirement and death benefits.
[57] StatsSA *Mortality and Causes of Death in South Africa 2016* (PO309.3) Appendix D6.
[58] StatsSA *Mid-year Population Estimates 2016* (PO302) Table 1.

governments considered it necessary to provide general regulatory oversight of the retirement industry.[59] Early funds were typically created by the state for the benefit of state employees.[60] There is no record of the date on which the first private occupational fund in South Africa was created, but the first such fund in the United States of America (USA) was established in 1875.[61] By the early 1900s, employers in South Africa were regularly granting pensions to employees of long-standing,[62]although the pension was sometimes given as a gratuity rather than as a contractual entitlement.[63] Little is known about the nature of the funds that existed prior to 1956. The probability is that they were trusts, as their English, and some Australian, counterparts still are.[64] The members who serve on the management board of retirement funds are still referred to as trustees in the literature and retirement fund industry, and they are subject to much the same fiduciary duties as are the trustees of ordinary trusts.[65] They cannot operate as trusts, however, for the Act confers legal personality on retirement funds.[66]

[59] The PFA has been described as 'pioneering', for South Africa is said to have been the first country to adopt a single statute providing for the comprehensive regulation of the retirement fund industry. See Downie (n24) A.1.2. By comparison, the first comprehensive statute in the USA was, and remains, the Employee Retirement Income Security Act 1974 (ERISA).

[60] Their existence is recorded in the law reports. See *Crossley v Union Government* (1921) 42 NPD 114, for a discussion of the Natal Pensions Law of 1874 and the associated Police Superannuation Fund Rules of 1905; *Lyttle v Union Government (Minister of The Interior)* 1920 CPD 444 [Public Service and Pensions Act 29 of 1912]; *Fraser v Durban Corporation* (1922) 43 NPD 231 [Durban Corporation Provident Fund, established in 1920]; *Mills v Church* 1935 GWLD 24 [Railways Pension Fund]; *Ketteringham v City of Cape Town* 1934 AD 80 [Cape Town Municipal Pension Fund, established in 1919]; *Whelehan v Union Government* 1934 AD 123 [Act 12 of 1882 (Cape) re police pensions].

[61] -- *A timeline of the evolution of retirement in the United States* Workplace Flexibility 2010 Georgetown Law Center.

[62] Eg *Faustmann v GA Fichardt* 1910 ORC18; *Stevenson v Morum Bros* 1926 EDL 406.

[63] Ibid. Some modern funds still use the term gratuity to refer to a lump sum payment, even though the member is entitled to the sum as of right in terms of the fund's rules, see eg the definition of 'gratuity' in the Government Employees Pension Law 1996, s1.

[64] They were not, however, trusts as understood in English law, for the English conception of trust was never received into South African law. When South Africa became an English colony the terminology of trusts and trustees was in wide-spread use, but the legal nature of trusts in South African law only began to engage serious judicial attention with the decision of *Estate Kemp v McDonald's Trustee* 1914 CPD 1084. *Crookes v Watson* 1956 (1) SA 277 (A) held that an *inter vivos* trust is a *stipulatio alteri* between the founder and trustees for the benefit of the trust beneficiaries. Laverick, a former Pensions Ombudsman for England & Wales, considers it inappropriate that 'historic trust law' continue to apply to modern pension funds, see Pensions Ombudsman *AR* 2002-2003, 56.

[65] See PFA, s7.

[66] PFA, s4. Section 38 specifically exempts retirement funds from the application of the Trust Property Control Act 57 of 1988, which again suggests that but for the PFA, retirement funds would be considered trusts.

The number of occupational funds burgeoned during the 20th century. In 1976, when s37C was introduced into the Act, there were 10 175 private funds with some 3 million members.[67] By the end of 1999 that number had grown to 16 164.[68] Since then, the number has shrunk significantly because the Financial Services Board began a process of cancelling dormant funds, and because of the increasing preference, amongst employers and existing funds, for participating in commercial umbrella funds rather than retaining their stand-alone fund.[69]

1.6.2 Types of retirement funds

Section 37C applies to all retirement funds that fall within the definition of 'pension fund organisation' in the Act.[70] The essence of a pension fund organisation is that it is one that has been established with the object of providing lump sums or annuities to either or both members, when they retire, or to their dependants, should they die before retirement. The reference to 'lump sum' or 'annuities' indicates that pension fund organisations come in two forms: pension funds and provident funds.[71] These terms are not used in the Pension Funds Act. They derive from the Income Tax Act (ITA).[72] A fund is a pension fund if its rules require that at least two-thirds of a member's retirement benefit must be used to purchase an

[67] RPF 18th *AR 1976*, 2.
[68] FSB *AR 2000*, 18. Most of these funds were not active funds. By 2011 the number of registered funds had decreased to 10 032, of which 3 160 were active funds, see FSB *AR 2011*,70. As at March 2017 there were 5119 registered funds of which 1758 were active (FSB *AR 2017*, 34).
[69] FSB *AR 2015*, 71 and Hanekom (n24) §9.1. In a stand-alone fund the trustees are employees of the employer, and it is they who are responsible for every aspect of the fund's governance. Umbrella funds are established and administered by insurance companies and employers 'join' the umbrella fund. Although the umbrella has sub-funds for each participating employer, the trustees of the umbrella fund are responsible for the governance of the funds. Amongst the reasons for the increasing preference for umbrella funds is because of the increasingly complex and onerous regulatory burden.
[70] The definition includes pension and provident funds, which are funds established by employers, and retirement annuity funds, which are commercial funds established by insurers. Preservation funds are commercial funds into which employees, whose membership of an occupational fund terminated as a result of resignation, dismissal or retrenchment, could transfer, and thereby preserve, their accrued savings. They are no longer as essential since occupational funds are now obliged to permit former employees' savings to remain, and be preserved, within the fund if they so choose. See Pension Funds Final Default Regulations in GN 41064 of 25 August 2017.
[71] Retirement annuity funds are thus a sub-species of pension funds. However, they are not occupational retirement funds but commercial retirement funds to which members contribute voluntarily.
[72] Income Tax Act 58 of 1962 (ITA), s1. The definitions appear in the ITA because prior to 2016 they were subject to different taxation regimes.

annuity (pension).[73] A fund is a provident fund if the member is entitled to take her full retirement benefit as a cash lump sum.[74] The terms pension and provident fund thus describe the *form* in which the *retirement benefit* is payable.[75] Even under a pension fund, the full death benefit is usually payable as a lump sum, although some funds still provide pensions to the deceased member's spouse and dependent children.[76]

Pension and provident funds come in one of two forms: defined contribution funds and defined benefit funds. Pension funds are more often defined benefit (DB) funds, and provident funds are more often defined contribution (DC) funds, but that is not invariably the case.[77] The distinction between DB and DC funds pertains to the *nature and value* of the benefit that is payable on the member's retirement or death. In both DB and DC funds, employees and/or their employers make contributions to the retirement fund as part of the employee's remuneration package. In a DC fund, the value of the retirement benefit is the invested value of the accumulated contributions (savings portion).[78] In a DB fund, the retirement benefit is as defined in the rules of the fund, and it may be more or less than the value of the accumulated contributions. The benefit is usually defined by reference to the member's final salary and years of service.[79] For example, a member may be promised a benefit equivalent to 15% of her final salary multiplied by her years of service.[80] Calculating the value of a defined benefit is consequently more complex than calculating the invested

[73] Ibid.
[74] Ibid.
[75] These distinctions will gradually disappear if the legislature's intended retirement reforms are finally introduced, which will require that provident fund members also utilise two-thirds of their retirement savings to purchase a pension. The reforms were supposed to take effect on 1 March 2016, alongside the harmonised tax treatment of pension and provident funds. For an explanation of the reforms, see Sanlam 'T-Day – Retirement reform and tax changes' <https://seb-news.sanlam.co.za/consultant-toolkit/t-day-1-march-2016/>.
[76] In 2014, 98% of funds surveyed by Sanlam provided a lump sum, 19% a spousal pension and 14% a child's pension on the death of a member, see Sanlam *Benchmark Survey: Research Insights Report* (2014), 13. I have not found more recent information on point.
[77] Sephton, Cooper, Thompson *A Guide to Pension and Provident Funds* (1990), 5.
[78] Every member has an individual account within the fund, the value of which is determined by the contributions, the fund return (investment growth or loss on the contributions), and the member's share of the expenses incurred in the administration of the fund, see PFA, s14(B)(1).
[79] See further Glossary of Terms in Downie (n24).
[80] See eg the defined benefit promised to government employees in rule 14 of the Rules of the GEPF, contained in Government Employees Pension Law 1996 (as last amended by GN 919 in GG 36817 of 5 September 2013), Schedule 1.

value of the member's contributions.[81] In a DC fund, the member bears the risk that her accumulated contributions will not be sufficient to meet her retirement needs. The risk emanates both from the level of contributions she chooses to make, if she has a choice, and from the investment returns generated by her contributions. Members are therefore said to assume the 'market risk' in a DC fund. In a DB fund the employer bears the risk that the member's accumulated contributions will be insufficient to fund the promised retirement benefit. If the contributions are insufficient, the employer must make good the shortfall.

Historically, most pension funds were DB funds, while most provident funds were DC funds.[82] The distinction between DB and DC funds is of far less significance today outside the public sector.[83] Due to the financial risk that DB funds hold for employers, and for members should the employer or fund go insolvent, a 'dramatic shift' from DB to DC funds occurred during the 1980s and 1990s.[84] The result is that the majority of funds in South Africa today are DC funds, and most of them in turn are provident funds.[85]

Irrespective of these differences, in both DB and DC funds the member's savings portion is the minimum to which the member's beneficiaries are entitled by way of a death benefit. In both DC and DB funds it is common for the fund to promise that an additional sum will be payable should the member die before retirement. This additional sum is usually expressed as

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[81] The member's savings portion may be smaller or larger than the promised benefit. If it is larger, the savings portion is the minimum benefit to which members are entitled if they leave the fund prior to retirement, see PFA, s14A(1)(a) and 14B(2).
[82] Sephton (n77).
[83] The GEPF is a defined benefit fund, as are most other public-sector funds.
[84] National Treasury *Retirement Fund Reform: a discussion paper* (December 2004), 6; Editorial 'Now you see Benefits, now you don't' *Today's Trustee* (April 2005); George *Analysis of South African Pension Fund Conversion: 1988–2006: Developing a model for dealing with Environmental Change* (2006) Doctor of Business Leadership, University of South Africa. The shift was not unique to RSA but occurred fairly early in RSA following its start in the USA. European countries and the UK have been slower to commence the shift. For a more comprehensive discussion on the general demise of DB funds in the USA, see Ippolito *Tenuous property rights: the unravelling of defined benefit pension contracts in the USA* George Mason Law & Economics Research Paper No. 03–06. For an explanation of more recent conversions in the UK and EU, see Van Meerten & Borsje 'Pension rights and entitlement conversion (Invaren): Lessons from a Dutch perspective with regard to the implications of the EU Charter' (2016) 18 (1) *European Journal of Social Security* 46.
[85] National Treasury *Retirement Fund Reform* (n84) 6; George (n84), 20ff explains that pressure for the shift initially came from trade unions (1980s) and was then embraced by employers in the 1990s.

a multiple of the member's salary at the time of death,[86]and it is funded by the proceeds of group life insurance cover that the fund has taken out for the benefit of its members.[87] In a provident fund these proceeds are added to the member's accumulated contributions (savings portion) and both together make up the lump sum that is payable on the member's death. In a pension fund the insured portion is usually payable as a lump sum, while the savings portion is used to fund any pensions that are payable. In a provident fund the savings portion and insured benefit are combined into a single lump sum. All lump sums that are payable by a fund on the death of the member, whether they consist of the savings portions and/or the insured benefit, are governed by s37C of the Act. The further result is that s37C is thus of greater significance to beneficiaries today than it was in 1976, when it was enacted. In 1976 most funds were DB pension funds, in which only a proportion of the death benefit was paid as a lump sum and the balance used to pay a pension to the deceased's spouse and/or children. Today the majority are DC funds, in which the entire benefit is payable as a lump sum and is, therefore, apportioned at the discretion of the trustees.

1.6.3 Retirement fund governance

The Pension Funds Act provides that the operation of the fund is the responsibility of the board of trustees.[88] The Act does not use the word 'trustees' to describe the members of the board, but the term is accepted usage within the industry and legal fraternity, including the Adjudicator's office. The term reflects the trust-law origins of retirement funds and the fiduciary responsibilities associated with the office of trustee.[89] Notwithstanding that they are

[86] Sanlam *Benchmark Survey: Stand-alone survey* (2017), Q5.1.A,19, indicates that out of 81 funds surveyed, 14.8% promised a lump sum death benefit of x2 annual salary, 23.5% promised x3 annual salary, and 25.9% promised x4 annual salary. Only one fund surveyed did not offer any lump sum – the benefit would thus have been limited to the member's savings portion. There are, however, funds that subsume the member's savings within the promised lump sum, and do not provide payment of both the savings portion and the insured portion (see Q5.6 Sanlam *Benchmark Survey: Stand-alone Funds Databook* (2014), 24). See further Jeram (n5) §9.15.4.3.
[87] Jeram (n5) §9.15.4.3.
[88] Section 7A.
[89] See sections 7C and 7D.

responsible for the welfare of millions of retirement fund members and their families, members of the board are in the main lay rather than professional trustees.[90]

At least half the trustees must be elected by the members of the fund, while up to half may be appointed by the employer.[91] The employer is expected to use its power of appointment to ensure that the board has the necessary skills to fulfil its statutory and common law duties,[92]while the board is expected to ensure that trustees receive the necessary training to equip them for the role.[93] Although trustees are rarely legal or financial experts, they are expected to conduct themselves to the standard that would be expected of professional trustees. In particular, they are expected to take all reasonable steps to ensure that members' interests are protected at all times, to act with due care, diligence and good faith, to act independently and to be impartial.[94] They also have a general fiduciary duty to act in the best interests of members and beneficiaries.[95] An intentional or negligent failure to fulfil their duties or act to the required standard exposes the trustees to potential personal liability.[96] They may only be relieved of such liability if a court is satisfied that they acted 'independently, honestly and reasonably', or if the court feels it would be 'fair to excuse' the trustee having regard to all the circumstances of the case.[97]

[90] Jeram (n5) §9.15.11. This is true for stand-alone funds. One of the perceived advantages of umbrella funds is that the governance is entrusted to professional trustees who have the skills necessary to govern the fund without the need to rely on external service providers.
[91] Section 7A(1), subject to the limited exemptions contained in 7B.
[92] FSB 'Good governance of retirement funds' *Circular PF No. 130* (11 June 2007), para 23.
[93] Ibid para 30. See also PFA, s 7A(3), inserted into the Act in 2013. With effect from 10 July 2020, trustees are now required to complete a basic online 'trustee training toolkit' within six months of their appointment, see FSCA Conduct Standard 4 *Minimum skills and training requirements for board members of pension funds* in GN 53415 of 10 July 2020.
[94] Section 7C(2).
[95] Section 7C(2)(f); *Meyer v Iscor* 2003 (2) SA 715 (SCA), 730.
[96] See eg *Seymour-Smith v Maxam Dantex* 2008 JDR 0362 (W), in which the court awarded costs *de bonis propriis* on an attorney and client scale against the trustees for their discourteous treatment of the applicant and his attorney. The Adjudicator has also indicated that funds could recover financial losses from the trustees arising from their improper distribution of death benefits, see *Sithole* (n19); *Matene* (n19).
[97] Section 7F.

The requirement that at least half the trustees be elected by the members of the fund was introduced as a statutory requirement in 1998.[98] When retirement funds were predominantly DB funds, the boards of trustees were smaller and mostly appointed by employers.[99] As DC funds began to predominate it was thought fair that trustees representing the employees be given a voice in managing the fund, since it is the employees who will suffer the loss should there be a failure in governance.

The second Adjudicator considered the member-elected representation rule a 'laudable' but ineffective attempt to improve the administration and oversight of retirement funds, given that many trustee boards delegate their functions, in his words 'pass the buck', to third parties, notably life insurance companies.[100] When trustees exercise their power of delegation, the responsibility entrusted to them as a collective under s37C is in practice frequently exercised by a single individual, an employee within the insurance company responsible for the day to day administration of the fund.[101] The reason for such delegation is that trustees, particularly member-elected trustees, lack the 'legal, financial, and investment' skills needed to administer retirement funds and fulfil their onerous common law and statutory duties. [102]

In England, by contrast, the Court of Appeal has reasoned that:

[98] Section 7A was inserted into the Act by Act 22 of 1996, but only commenced on 15 December 1998. See George (n84), 4.
[99] Section 7A(1) provides that the board must consist of at least four trustees, and that members of the fund must have the right to elect at least 50% of the board.
[100] OPFA *AR 2004/2005*, 83. The Act expressly permits trustees to delegate their duties, although they remain responsible for the delegee's decisions (s7D(2)).
[101] See eg *Kaplan* (n11). Most boards do not delegate their s37C powers: see Sanlam *Benchmark Standalone Survey 2017*, which indicates that 82% of boards apply their mind to the distribution and do not simply follow the recommendation of the administrator (Q 12.3). The survey also indicates that 109 of 113 respondents believed that the distribution should either be made by the full board or a committee of the board, and only 4% were of the view that the administrator should make the decision (Q 12.8).
[102] George (n84). Section 7(2)(e) of the Act recognises that trustees may lack the knowledge and skills necessary to govern a fund. It therefore requires that trustees obtain expert advice on matters in which they lack expertise. The problem is that the legal and regulatory environment within which funds operate is so complex that lay trustees may not realise that a matter raises issues that require expert advice.

> … trustees are entrusted with the powers which they have under the scheme for just the reason that they are likely to be persons with the knowledge and experience relevant to the questions with which … they will, from time to time, be faced. [103]

If trustees are in the main lay people rather than experts, what justification is there for entrusting them with the power to distribute the member's death benefits? No other legislature has seen fit to do so, after all, even when its legal and social environment is considerably less challenging and the trustees more knowledgeable and experienced than their South African counterparts.

1.7 THE SOCIO-ECONOMIC CONTEXT

Most South Africans are economically vulnerable: they are either too young to work, too old to work, or they are not in work. The ability to work does not mean the ability to find work. South Africa's unemployment rate is high. Its youth unemployment rate is even higher.[104] Those in work are also vulnerable to the loss of their employment. The very young are dependent on others, and possibly the state, for support. The old may be self-supporting, dependent on others, or on the state. The unemployed also almost inevitably depend on others, unless they fall into a small pool of recipients of social grants or an even smaller pool of the independently wealthy. Vulnerability therefore stretches across South African society, and only a small minority of individuals will easily withstand the loss of their employment, or the loss of a breadwinner on whom they depend.

1.7.1 Unemployment

South Africa's current employment rate is 43%. In other words, only 43% of South Africans of working age population, aged 15–64, are employed – that is 16 million out of a total working

[103] *Edge v Pensions Ombudsman* [1999] 4 All ER 546 (CA), 569.
[104] It is so high that it has been described as a 'scourge', see StatsSA *Vulnerable Groups Series 1: The Social Profile of Youth 2009–2014* (2016), 76.

age population of 37 million.[105] A person is, however, considered to be employed if they worked only one hour in the previous week.[106] South Africa's official unemployment rate is almost 28%.[107] The extended unemployment rate, which includes discouraged jobseekers, is 37%.[108] Of the 43% who are employed, 30% work in the formal sector. It is they who are most likely to be contributing members of retirement funds.[109] The remaining 13% are employed in the informal sector, private households or agricultural industry. They are unlikely to be members of retirement funds. These statistics do not represent the extent of unemployment amongst the youth population, those aged 15–34. About 31% of youth, aged 15–24, are not in education, employment or training. Of those aged 15–34, 39% are not in education, employment or training. Over three out of every 10 young men, and over four out of every 10 young women, are unemployed.[110] Together they account for 70% of the officially unemployed.[111] The highest incidence of unemployment amongst the youth population is the 25–34 year age group.[112] The least qualified are the most likely to be unemployed: 50% of the unemployed do not complete their secondary schooling; 35% do have a matric qualification but no post-secondary education.[113] However, 8.3% of the unemployed do have some tertiary education.[114] Numerically, what these percentages mean is there are only about 11.3 million people employed in the *formal* sector at present – 20% of the total

[105] StatsSA *Quarterly Labour Force Survey: Quarter 3 2018* (PO211), Table A.
[106] Ibid, 16.
[107] Ibid, Table A.
[108] Ibid, Table 2.4.
[109] National Treasury *Strengthening Retirement Savings* (14 May 2012),3 reported that only about half of South African workers belong to a retirement fund. The term 'worker' is not defined in the report, but presumably includes workers in the informal sector, given that there are 11 million active members of retirement funds and approximately the same number of employees in the formal sector, meaning that almost all workers in the formal sector are members of retirement funds.
[110] StatsSA *Quarterly Labour Force Survey* (n105), Figure 9a & b. Cf *Dezius v Dezius* 2006 (6) SA 395 (T) [20], in which the judge stated that 'Both poverty and its twin, indigence, are gender-blind. They are non-sexist in their affliction.' Despite the higher unemployment and poverty rate amongst women, I agree with this sentiment when judged from the perspective of the individual.
[111] StatsSA *Vulnerable Groups* (n104), 1.
[112] Ibid, Figure 5.5.
[113] See StatsSA *Census 2011 Fact Sheet*, Tables 2 & 4, which indicate that most South Africans have not completed high school.
[114] StatsSA *Quarterly Labour Force Survey* (n105) Figure 8. The average unemployment rate for those with tertiary education is similar in OECD countries, see OECD *Education at a Glance Interim Report: Update of Employment and Educational Attainment Indicators* (2015),19.

population of 57.7 million.[115] The remainder are either employed in the informal sector, rely on their own savings, on those who are employed, or on the state for social assistance.

1.7.2 Savings

The savings rate in South Africa is low. The poorer the individual, the less able they are to save.[116] About 30% of income-earners do not save towards retirement.[117] This figure is explicable, in view of the relatively low average incomes, and the fact that savings is dis-incentivised for those who hope to access the state old age grant once they retire.[118] When individuals do save, their retirement savings represent their most significant form of savings.[119] National Treasury estimates that 60% of employees' savings goes towards retirement funding.[120] This is compulsory saving in the form of contributions made to an occupational retirement fund as part of the employee's remuneration. However, even amongst those who have retirement savings, the rate of savings is in most cases far below what they will need to meet their retirement needs. Only 6% of South Africans are likely to be able to maintain their standard of living after retirement.[121] About half of those who have saved towards their retirement will retire on less than 28% of their pre-retirement income.[122] It is these savings that make up either the whole, or part of, the lump sum death benefit that will be payable to a member's beneficiaries should they die before retirement.

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[115] StatsSA *Mid-year Population Estimates 2018* (P0302), Table 6.
[116] Old Mutual *Savings and Investment Monitor* (2015) indicates that 73% of those who earn less than R6000 per month, 37% who earn between R6000 and R14000 per month, 29% who earn between R14000 and R20 000 per month, 20% who earn between R20 000 and R40 000 per month, and 12% of those who earn over R40 000 per month do not contribute towards a retirement fund.
[117]Institute of Retirement Funds Africa *Dispatch* (10 March 2017), 4.
[118] There are perverse incentives not to save towards retirement that arise because the means test for the state old age grant penalises lower-income earners who have saved towards retirement, while the tax incentives on retirement savings benefit mainly higher-income earners, see National Treasury *Social Security and Retirement Reform: a second discussion paper* (February 2007), para 10.
[119] National Treasury *Memorandum on the Objects of the Pension Funds Amendment Bill, 2007*, para 1.1
[120] *Strengthening Retirement Savings* (n109), 4. They include employer and employee contributions, together with the premium paid to purchase long-term insurance, in their calculation of retirement savings (at 7).
[121] Lamprecht 'Why only 6% of South Africans can retire comfortably' *Moneyweb* (5 August 2015). This is despite the fact that for employees earning above the income tax threshold, contribution rates to retirement funds are high, and that the value of the assets managed by funds is amongst the highest in the world as measured against GDP, *Strengthening Retirement Savings* (n109), 6.
[122] *Social Security and Retirement Reform: a second discussion paper* (n118) para 21.

1.7.3 Social Assistance

Although a vital source of income for over 17 million South Africans, the reach of social assistance is limited.[123] The social grants landscape is complex. Individuals can potentially qualify for any one of seven different types of social grants. The grant-eligibility criteria are narrow, and the receipt of one grant usually excludes the recipient from eligibility for another.[124] Between April 2017 and March 2018, the South African government paid almost R150 billion in social grants.[125] The principal beneficiaries of social grants are the elderly,[126]followed by child support grants,[127]disability grants,[128]and then foster care grants.[129] The maximum value of the old age grant for 2017 was R1 600; for foster care R920, and for child support R380.[130] Most grants are means-tested, and the thresholds provide helpful indications of the income and asset levels the government considers so low as to entitle the recipients to support: for old age (above 60) and disability grants, individuals whose annual income exceeds R73 800, or who have assets in excess of R1 056 000, are not eligible for the grant.[131] The amount a recipient receives by way of a grant depends on her monthly income from other sources. In order to qualify for the maximum grant (R1 600 in 2017), the recipient's monthly income must have been below R2 250.[132] The amount of the grant is progressively reduced, and the lowest grant is R100 per month, for individuals with a monthly income of R5

[123] South African Social Security Agency (SASSA) *AR 2016*/2017, Table 1.
[124] Exceptions are Foster Care and Care Dependency Grants for severely disabled children. The seven social grants are: social relief of distress; grants-in-aid; child support grant; foster care grant; care dependency grant; war veteran's grant; disability grant; grant for older persons. (www.sassa.gov.za/index.php/social-grants).
[125] SASSA *AR 2017/2018,* Table 2.
[126] Eligibility for old age grants is age 60. R64 billion was paid to 3.4 million pensioners (SASSA *AR 2017/2018*, Tables 1 & 2).
[127] R56 billion for 12 million children.
[128] R20 billion for 1 million disabled persons.
[129] R 4.9 billion for 416 000 children.
[130] SASSA *You and Your Grants* 2017/2018. Slightly higher, at R1620, for those older than 75. The disability grant was also capped at R1600. These grants increase year on year.
[131] Ibid. Foster care grants are not means tested.
[132] The income an applicant receives as maintenance from any person legally obliged to maintain them is supposed to be included in the assessment of their means, see the Social Assistance Act 13 of 2004, Regulations relating to the application for and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance (GNR 898 GG 31356 of 22 August 2008), reg 19(1)(i).

750. The primary recipients of social grants are likely to be women – both by virtue of their role as primary carers of minor children eligible for child support or foster care grants and because the mortality rate amongst men is higher. For those aged above 60, the proportion of women significantly outnumber men.[133]

The single-most important feature of the social grants landscape is that it provides no assistance to the unemployed.[134] The most vulnerable in society are therefore arguably not the young or the old, from an income perspective at least. They have access to some measure of social assistance, albeit limited and insufficient to meet any individual's reasonable maintenance needs.[135] The most vulnerable are those who are unemployed, who have no private savings and who do not have access to any form of social assistance from the state – for it is they who are utterly dependent on the support of others. Those in employment and in receipt of social grants number roughly 33 million, out of a population of 57 million. That leaves 24 million who are either completely reliant on their own savings, on others, or a combination of both.

1.7.4 Dependency

The official dependency ratio in South Africa is in the region of 61%.[136] Dependency ratios simply measure the proportion of the non-working-age population to the working-age-population – in other words, the percentage of those younger than 15 and older than 64 to all those of the working age population.[137] The premise is that the working-age population is the productive part of the economy, and that the young and the old are part of the non-productive population. They are therefore dependent on the employed for support, both

[133] StatsSA *Mid-year Population Estimates 2018* (P0302).
[134] Retrenched employees are entitled to claim unemployment insurance for a maximum of 34 weeks, see Unemployment Insurance Act 63 of 2001, Schedule 2.
[135] *RAF v Mohohlo* 2018 (2) SA 65 (SCA). Cf *Thene v Bidcorp* (2008) PFA/GA/6863/05/LCM.
[136] Dependency ratio is the proportion of those younger than 15 and older than 64 divided by the working age population. See further UN explanation of 'Dependency Ratio' available online at <http://www.un.org/esa/sustdev/natlinfo/indicators/methodology_sheets/demographics/dependency_ratio.pdf>.
[137] 21 932 823 / 35 792 783 = 61.27%.

directly and indirectly via the state's social assistance programmes, which are funded through taxation. The higher the ratio, the greater the burden on those in employment. As with official unemployment rates, the official dependency ratio understates the true extent of dependency. In the absence of personal savings and social assistance, all those not in employment depend upon those in employment. Using this as the measure, the true dependency ratio is closer to 260%.[138] For every income earner, there are on average almost three additional people who depend on that person's earnings. Familial interdependency is high in South Africa.[139] Parents support adult children;[140] adult children their parents;[141] siblings each other.[142] The ongoing provision of support amongst family members is a consequence of economic circumstance, but it evidences the moral obligation family members accept they owe one another, quite apart from any legal obligation that they may be under.[143]

1.8 THE OFFICE OF THE PENSION FUNDS ADJUDICATOR

The Adjudicator's office is an administrative body with judicial functions.[144] It is modelled on its English counterpart, the Pensions Ombudsman, rather than Australia's Superannuation Complaints Tribunal.[145] The office was established in April 1996 to provide complainants, who

[138] 57.7 m–16 m = 41m/16m = 256%.
[139] Old Mutual *Savings and Investment Monitor* (2018), 12, indicates that over 20% of South Africans provide financial support to their parents, and 13% to their siblings. The degree of sibling dependence has increased significantly since 2013, when it stood at 5%.
[140] See eg *Radebe v Sosibo* [2011] JOL 26931 (GSJ).
[141] See eg *Seleka v RAF* [2016] JOL 35830 (GP); *RAF v Mohohlo* (n135).
[142] See eg *Fosi v RAF* [2007] JOL 19399 (C).
[143] The lack of litigation between family members, other than spouses and minor children, supports the view that family members support one another out of a sense of moral rather than legal duty. The probability is that they are unaware of the existence of an enforceable legal duty.
[144] See *Henderson v Eskom* [1999] 12 BPLR 353 (PFA); *Wolf v Cabris* [2001] 1 BPLR 1557 (PFA) and *Meyer v Iscor* (n95), in which the Adjudicator described her office as a quasi-judicial body. In *Old Mutual Life Assurance Co (SA) v Pension Funds Adjudicator* 2007 (3) SA 458 (C) [12] the High Court held that the Adjudicator performs 'a judicial function proper, and not merely a quasi-judicial function'. See further Mhango 'Does the South African Pension Funds Adjudicator perform an administrative or a judicial function?' (2016) 20 *Law, Democracy & Development* 20, who argues that because the Adjudicator performs a judicial function, its decisions should not be subject to review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).
[145] *Wolf v Cabris* (n144) *and Meyer v Iscor* (n95). Hanekom (n24) §9.24.1, explains that the nature and powers of the Adjudicator reflect a 'compromise' between the FSB's desire that a 'special court' with the power to hand down binding decisions be established, and the industry's preference for a conciliatory and mediatory body with the power to make non-binding decisions only. See further Murphy 'Alternative dispute resolution in the South African pension funds industry: An Ombudsman or a

'through lack of resources are generally denied access to courts',[146] with a 'procedurally fair, economical and expeditious' forum for the resolution of complaints against retirement funds.[147] The High Court has both concurrent jurisdiction to hear complaints against retirement funds,[148] and to hear appeals against Adjudicator determinations.[149] The overwhelming majority of death benefit complaints are taken to the Adjudicator[150] not the High Court,[151] and appeals against such determinations are very rare.[152] The recognition that complainants, and other affected parties, lack the resources to pursue their concerns in court is important. It underscores the need for the Adjudicator to resolve complaints correctly and fairly, not merely cheaply and quickly, for just as complainants cannot afford to commence legal proceedings in the High Court, so they and other aggrieved beneficiaries cannot afford appeals against Adjudicator determinations.[153]

The Adjudicator does not have the jurisdiction to determine any and every complaint against any and every retirement fund. It may decide complaints only as defined in the Act,

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Tribunal?' (2001) 7(1) *Journal of Pension Management* 28, who expresses a preference for the approach of the Australian Superannuation Complaints Tribunal (SCT). The SCT has been phased out. As from 1 November 2018 new death benefit complaints fall within the jurisdiction of the Australian Financial Complaints Tribunal. The SCT will cease operating entirely on 30 June 2020.

[146] *Till v Unilever* [2000] 11 BPLR 1297 (PFA) [30].

[147] PFA, s30D. It was established following the recommendations of the Mouton Commission, in order to relieve pressure on the FSB, see Murphy (n145).

[148] Section 30H(2).

[149] Section 30P. The appeal is one in the wide sense, and the court may decide the matter afresh. See *Meyer v Iscor* (n95). Some Adjudicators have expressed their unhappiness at the court's wide powers to decide complaints *de novo*. See Murphy (n145). The second Adjudicator was of the view that in allowing for a wide rather than ordinary appeal, s30 essentially consigned its office to the 'scrapheap'. See OPFA *AR 2004/2005*, 31.

[150] Roughly 10% of annual complaints concern death benefit disputes. In 2016/2017, the Adjudicator handed down about 3300 determinations in total. See OPFA *AR 2016/2017*, 9, and the comparable figures in previous years annual reports, all of which are available on its website at www.pfa.org.za.

[151] Those that have include *Kaplan* (n11); *Seymour-Smith* (n96); *Mashazi* (n16); *Ramoitheki v Liberty* [2006] JOL 18075 (W); *Makume v Cape Joint RF* [2007] 2 BPLR 174 (C); *Titi v Fundsatwork* [2011] JOL 28125 (ECM); *Guarnieri v Fundsatwork* 2018 JDR 0740 (GP).

[152] There are only a handful of reported appeals, which include *Hattingh v Murphy* [2006] JOL 17709 (C); *Pillay v Ngalwana* 2007 JDR 0588 (D); *Berge v Alexander Forbes* [2009] JOL 23698 (W); *University of Pretoria v Du Preeze* [2016] JOL 35014 (GP); *Maphothoma v Pension Fund Adjudicator* 2017 JDR 0909 (GP); *Letsoalo v Lukhaimane* 2018 JDR 0277 (GP). As of 1 April 2018, individuals aggrieved by a determination must first approach the Financial Services Tribunal before appealing to the HC, see Financial Sector Regulation Act 9 of 2017, s230.

[153] A point that was raised by the second Adjudicator when criticising the wide appeal powers given to courts in terms of s30P of the Act. His criticism is premised on his belief that appellants will in most cases be retirement funds and that complaints should sometimes be decided on equitable principles, which HC's are ill-suited to applying, rather than rigid rules of law. He proposed the formation of a specialist appeal court, OPFA *AR 2004/2005*, 31-35. A recent amendment to the PFA grants the Adjudicator equitable jurisdiction (s30D as amended by the Financial Sector Regulation Act 9 of 2017, Schedule 4, s290).

and only against funds registered in terms of the Act.[154] The Adjudicator receives thousands of complaints each year,[155]about 3000 of which result in formal determinations.[156] Over 80% of the determinations find in favour of the complainants.[157] Complaints related to death benefits account for the second highest percentage of determinations, roughly 10% in total.[158] In Australia, death-benefit complaints account for approximately 30% of all complaints to the Superannuation Complaints Tribunal (SCT), and are the second largest category of complaints (after administration).[159] By contrast, complaints to the English Pensions Ombudsman are only in the region of 5%.[160] The differences are probably accounted for by the different powers of the three bodies. The Adjudicator has interpreted its powers as limited to those of 'common law' review,[161] modelling itself on the English Pensions Ombudsman,[162] which is not permitted to substitute its conception of what is fair and reasonable for that of the trustees unless the decision was so perverse that it was one no reasonable body of trustees could have reached.[163] The SCT, on the other hand, is specifically required to scrutinise only the substantive merits of the trustees' decision – whether the allocation of the death benefit as between the beneficiaries was fair and reasonable.[164]

1.8.1 Complaints

[154] All private occupational retirement funds must register, PFA, s4.
[155] The exact figures are reported in the OPFA AR. By way of example, the reports indicate that the following numbers of new complaints were received during the relevant financial year: 5405 (*AR* 2013/2014, at 6); 7010 (*AR* 2014/2015, at 4); 9967 (*AR* 2015/2016, at 3); 7501 (*AR* 2016/2017, at 8).
[156] For example, 3651 (*AR* 2013/2014, at 7); 2879 (*AR* 2014/2015, at 9); 3475(*AR* 2015/2016, at 3); 3309 (*AR* 2016/2017, at 9).
[157] 83% (*AR* 2015/2016, at 6); 86% (*AR* 2016/2017, 'Key Figures').
[158] 9% (*AR* 2013/2014, at 8); 10.2% (*AR* 2014/2015, at 10); 10% (*AR* 2015/2016, at 10); 8.3% (*AR* 2016/2017, at 10).
[159] See Australian SCT *AR* 2016–2017 (2017) Figure 3.4, which records the percentage of death benefit complaints between 2012 and 2016.
[160] The Pensions Ombudsman (UK) Annual Reports for the years 2013–2014, 2015–2016 and 2017–2018 indicate that death benefit complaints accounted for 4.2%, 3.7% & 5% of total complaints respectively.
[161] *Schleicher v SARAF* [2002] 7 BPLR 3677 (PFA); Jeram (n5) §9.15.7.3.7.
[162] *Van Schalkwyk v MEPF* [2003] 8 BPLR 5087 (PFA).
[163] *Edge v Pensions Ombudsman* (n103); *Catchpole v The Trustees of the Alitalia Airlines Pension Scheme* [2010] EWHC 1809 (Ch) [35].
[164] Superannuation (Resolution of Complaints) Act 1993, ss14(2) & 37.

The Act defines a complaint as one 'relating to' the administration of a fund, the investment of its funds or the interpretation and application of its rules.[165] It further requires that the complaint provide greater particularity by specifying either that: a decision *purportedly taken in terms of the rules of the fund* was in excess of, or an improper exercise of, the decision-maker's powers; that there has been maladministration of the fund which is or may be prejudicial to the complainant; or that a dispute on a matter of fact or law has arisen between the complainant and the fund.[166]

Considering the rather tortuous definition, it is little wonder that the Adjudicator and courts have not always seen eye to eye on whether the Adjudicator has jurisdiction to determine a particular complaint. There have been cases in which the Adjudicator has declined to investigate a matter on the basis that it lacks jurisdiction, while a court has decided that it did have jurisdiction, and vice versa.[167] Many complaints are turned away by the Adjudicator on the basis that it lacks jurisdiction, with the complainant referred to other bodies.[168] The question of jurisdiction has also arisen in the context of death benefits, albeit rarely.[169] There was some doubt as to whether the Adjudicator has the jurisdiction to hear complaints pertaining to the distribution of the insured portion of the death benefit, or whether that falls under the jurisdiction of the Long-term Insurance Ombudsman. Since the insured portion forms part of the lump sum that is payable by a fund in terms of s37C, the Adjudicator has asserted jurisdiction, and the industry has accepted its jurisdiction.[170] For the most part, funds

[165] Section 1.
[166] Ibid. The fourth allegation, pertaining to investment, is not relevant to s37C. The allegation does not have to be made expressly; it is sufficient that the complaint sets out the essential facts. See *Mungal v Old Mutual Life Assurance Co SA Ltd* [2010] 1 BPLR 11 (SCA).
[167] *Mungal* (n166); *Grobler v Pension Funds Adjudicator* [2006] 1 BPLR 26 (T), which was reversed on appeal in *Joint Municipal Pension Fund v Grobler* [2007] 1 BPLR 1 (SCA). See also *Hoffmann v Pension Funds Adjudicator* 2011 JDR 1724 (WCC).
[168] In 2016/2017 about 30% of the new complaints received were held to be outside the jurisdiction of the Adjudicator, and about 10% were referred to other bodies, OPFA *AR 2016/2017*, 9. The second Adjudicator identified 13 *fora* with jurisdiction to hear complaints related to retirement funds in some way, OPFA AR *2004/2005*, 28.
[169] *Moir v Reef Group* [2000] 6 BPLR 629 (PFA).
[170] Ibid. Cf *Van Zelser v Sanlam* [2003] 2 BPLR 4420 (PFA), in which the complainant was referred to the Ombudsman for Long-term Insurance in respect of proceeds payable from a separate group life scheme, which are usually taken out by employers as an additional or alternative form of the group life cover purchased by the retirement fund. The legal basis on which the trustees of the fund had allocated those proceeds is not apparent from the determination.

and the Adjudicator today appear to accept that all decisions taken in terms of s37C may give rise to a complaint as defined. However, the determinations do not crisply locate the complaint within the appropriate part of the definition. Some determinations characterise the complaint as one involving either the improper exercise of power or maladministration of the fund,[171]without definitively deciding into which category it falls.[172] In others, determinations opt for one or the other characterisation,[173] or avoid doing so altogether.[174]

The Act does not define maladministration.[175] The first and second Adjudicators sought to give meaning to the concept. In *Pistor v Sanlam Preservation Pension Fund*, the first Adjudicator likened maladministration to a delict, stating further that 'the usual requirements to establish a delict must be satisfied; there must be an unlawful (wrongful), blameworthy act or omission causing damage or patrimonial loss.'[176]

While investigatory failures could quite conceivably constitute a delict, it is difficult to imagine the circumstances under which the honest and good faith exercise of a discretion could ever do so.[177] The second Adjudicator was nevertheless of the view that it could. He sought to provide greater content to the concept and proposed a considerably more expansive meaning of the term, that '[m]aladministration is essentially an administrative action that is unlawful, arbitrary, unjust, oppressive, unjustifiably discriminatory, or taken for an improper purpose.' [178]

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[171] These are also the only two bases for complaint in England. See Pension Schemes Act 1993, ss146(1)(a) & (1)(c).

[172] See eg *Van der Merwe v Southern Life* [2000] 3 BPLR 321 (PFA) [10}; *Chittenden v Estcourt Butchery* [2001] 5 BPLR 2001 (PFA).

[173] See eg *Gorrah v Metal Industries* [2014] JOL 31420 (PFA); *Cafun v Alexander Forbes* [2017] JOL 38730 (PFA).

[174] See eg *Gowing v LRAF* [2007] 2 BPLR 212 (PFA).

[175] It is a term drawn from its English counterpart, the Pension Schemes Act (n171), which similarly contains no definition.

[176] PFA/GA/1211/02/SM, quoted in Davidson 'Dispute resolution' in Hanekom (n24) §9.24.13.

[177] See eg the determinations of the English Pensions Ombudsman in *Dewhurst v Standard Life* (H00527, 15 June 1999) and *MacKay v Oban Times Scheme Trustees* (J00296, 22 February 2000). The first held that a failure to consider all the pertinent facts, which had been available to complainants, constituted maladministration. The second held that the decision to award the benefit to the nominated beneficiaries, in circumstances in which the trustees had considered all the relevant facts, could not be maladministration.

[178] OPFA *AR 2004/2005*, 66, which approves and expands upon the examples of maladministration identified by the English Ombudsman.

In finding pertinent examples to support his view — that the retirement funds industry acts with 'generally wanton disregard' for member's rights — he singled out the 'improper exercise of discretion' by trustees for particular criticism:

> Now, although in our statistics we do not have a category that shows the number of instances in which we have had to grapple with the issue of trustee discretion in the complaints we have received, I can confidently say this issue has come up (directly or indirectly) in most of the complaints.[179]

Trustees face the spectre of personal liability when their decision-making is held to constitute an improper exercise of their powers or maladministration.[180] The trustees of the GEPF, by contrast, are statutorily indemnified against all losses incurred by the fund, provided those losses have not been caused by the trustees' fraud, dishonesty or gross negligence.[181] Adjudicators are similarly exempt from liability for decisions taken in good faith in the exercise of their duties.[182] An unskilled body of trustees can therefore be held liable for exercising their powers in good faith in circumstances in which the GEPF trustees and the Adjudicator, making an identical decision, will be exempt.

1.8.2 Organisational structure

There have been six Adjudicators to date. The Adjudicator is assisted by a deputy Adjudicator, and numerous assistant Adjudicators. [183] The adjudicative function is performed by assistant Adjudicators who investigate complaints and prepare draft determinations for signature by the Adjudicator.[184] That this should be the case is unsurprising, given the large

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[179] Ibid, 68. The Adjudicator was particularly aggrieved when trustees decided to pay the benefit to a trust or beneficiary fund rather than to the major beneficiary or guardian of a minor beneficiary, as appears from the cases discussed in the report at 68–69.
[180] See *Sithole* (n19); *Morgan v SA Druggists* [2001] 4 BPLR 1886 (PFA).
[181] Government Employees Pension Law, 1996, Schedule 1, rule 4.5.1.
[182] PAJA, s10A.
[183] The OPFA *AR 2007/2008*, 35–36, exceptionally, details the names and qualifications of the professional staff responsible for investigating and drafting determinations. In 2007/8, the Adjudicator was assisted by a deputy, 9 senior and 12 assistant Adjudicators. The assistants were divided into seven teams, each one led by a senior Adjudicator.
[184] Murphy (n145), 36. The adjudicative team is supplemented by a conciliation team and a New Complaints Unit (NCU). The NCU does not adjudicate complaints or draft determinations. It processes

number of complaints. There has, unfortunately, been a high turnover amongst assistant Adjudicators.[185]

In 2008 the newly appointed fourth Adjudicator, Charles Pillai, expressed concern at the lack of institutional knowledge within the Adjudicator's office. He noted that almost the entire staff complement as at that date was new, and that the majority were either recent graduates or newly-admitted attorneys and advocates with little or no experience in practice prior to their appointment.[186] They were themselves thus in 'urgent need' of training.[187]

Charles Pillai's observations, coupled with the determinations that display a lack of understanding of fundamental aspects of the law governing death benefits, casts doubt on the claim that the Adjudicator's office is a 'repository of specialist knowledge in pension funds law' which resolves disputes economically and expeditiously while 'adhering to the rule of law'.[188] This is not to say that there is no one with specialist knowledge and experience, or that it does not perform an important role. There is, and it does. Its existence is extremely important in providing what it aims to provide – accessible justice for vulnerable individuals trying to enforce their rights against often-unsympathetic actors governed by opaque rules.[189] The Adjudicator has helped many individuals vindicate their rights or protect their interests.[190] Section 37C, however, imposes obligations on trustees that are distinct from the ordinary administrative responsibilities that governing a retirement fund entails. It requires that

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complaints and determines whether they are within the jurisdiction of the Adjudicator. It also endeavours to settle matters prior to the adjudicative stage.

[185] The exact figure is not known. *OPFA AR 2016/2017,*14, states that 10 individuals resigned because they were not 'meeting the required performance expectations' of the Adjudicator. The total staff complement was 58. A similarly high turnover is apparent in previous reporting periods. On the other hand, the senior Adjudicators had occupied that position for at least the four previous reporting periods.

[186] OPFA *AR 2009/2010*, 7.

[187] Ibid. Expenditure for staff training increased from R37 000 in the previous year to over R334 000 (at 52). Similarly, in the AR *2013/2014*, 9, mention is made of 12 staff members who received bursaries for additional training in different fields, including training in pensions law.

[188] OPFA *AR 2016/2017*,15.

[189] Examples include *Malatji v Gauteng Building Industry* PFA/NP/9447/2011/LPM; *Sekiti v Amplats* PFA/MP/21179/2007/TD; *Nodude v Bosele* [2013] 2 BPLR 241 (PFA).

[190] See eg *Kubeka v South African Local Authorities* PFA/GP/00023400/2016/MD; *Shongwe v South African Local Authorities* PFA/ LP/00024152/2016/UM; *Hlatshwayo v Iscor* [2016] 1 BPLR 58 (PFA).

trustees, and Adjudicators understand and apply laws that are uncertain, incomplete and in a state of flux. It requires that trustees understand the nature and bounds of discretionary decision-making, and that Adjudicators understand the extent of, and limits on, their authority to intervene in such decision-making. Just as it imposes different responsibilities on trustees, so it requires different adjudicative skills of Adjudicators. The variable quality of determinations suggests that not all Adjudicators are uniformly equal to the task. Any criticisms of the Adjudicator in this dissertation are specific to s37C decision-making and adjudication, and all flow from the nature of the rights and obligations contained in s37C itself.

1.9 THE CONSTITUTIONAL FRAMEWORK AND STRUCTURE OF THE THESIS

South Africa has, since 1994,[191] been a constitutional democracy.[192] The Constitution is the supreme law; all law, including pre-Constitutional legislation,[193] and all conduct that is inconsistent with it is invalid.[194] The Constitution contains an entrenched Bill of Rights (BoR).[195] The first provision in the BoR reveals its purpose and its boundaries. It is the 'cornerstone' of South Africa's democracy, enshrining the rights contained therein and affirming the Constitution's commitment to the democratic values of human dignity, equality and freedom.[196] The state is obliged to 'respect, protect, promote and fulfil' the enumerated rights.[197] The rights are, however, not absolute but may be limited in accordance with either the general limitations clause in s36 or a specific limitation contained within a right itself.[198]

[191] The Interim Constitution Act 200 of 1993 commenced on 27 April 1994, the date of the first democratic election, and the Final Constitution came into effect on 18 December 1996.
[192] Constitution of the Republic of South Africa, 1996 (FC), s1(c) & 2.
[193] Including pre-constitutional legislation, see *Ferreira v Levin* 1996 (1) BCLR 1 (CC) [27-28]. It remains operational until declared invalid by a court. Original legislation becomes invalid only once the CC has confirmed its invalidity, s172(2).
[194] FC, s2.
[195] FC, Ch 2. FC. s74(2) requires that any amendment to the BoR be approved by two-thirds of both houses of parliament (the National Assembly and National Council of Provinces).
[196] FC, s1(a).
[197] FC, s7(2).
[198] FC, s7(3).

Section 37C violates the Constitution in two ways: its direct impact on constitutionally guaranteed rights; its indirect impact on those same rights, as a result of the wide and legislatively unguided discretion it has conferred on trustees.

The rights implicated are the right to equality;[199] human dignity;[200] property;[201] parental care[202] and just administrative action.[203] From the perspective of members, it is their rights to dignity and property that are directly violated. For spouses, it is principally their right to property and equality, and for children, their right to parental care. The rights, in relevant part, read as follows:

> 9. *Equality* (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> 10. *Human dignity* Everyone has inherent dignity and the right to have their dignity respected and protected.
>
> 25. *Property* No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
> (2) Property may be expropriated only in terms of law of general application—
> (*a*) for a public purpose or in the public interest; and
> (*b*) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
> 28. *Children* Every child has the right—
> …
> (*b*) to family care or parental care, or to appropriate alternative care when removed from the family environment;
> (*c*) to basic nutrition, shelter, basic health care services and social services;
>
> 33. *Just administrative action* (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

Human dignity and equality are thus both foundational *values* of the Constitution and foundational *rights*. They are the first rights enumerated in the BoR. In order of importance, it is dignity that comes first. Dignity has been described as the most important right alongside the

[199] FC, s9.
[200] FC, s10.
[201] FC, s25.
[202] FC, s28.
[203] FC, s33. The Promotion of Administrative Justice Act 3 of 2000 gives effect to the right.

right to life,[204] the 'source' of all the other rights in the BoR,[205] and the 'touchstone' of South Africa's democracy.[206] All the other rights are, in essence, facets of the right to dignity.[207]

The rights to dignity and equality may only be limited in accordance with the general limitations clause contained in section 36:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (*a*) the nature of the right;
> (*b*) the importance of the purpose of the limitation;
> (*c*) the nature and extent of the limitation;
> (*d*) the relation between the limitation and its purpose; and
> (*e*) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

The limitations clause does not apply directly to the s25 right to property, which permits non-arbitrary deprivation of property. If the deprivation of the right to property, short of expropriation, is permitted, provided only that the deprivation is not arbitrary, while the deprivation of other rights must pass the more rigorous scrutiny of the general limitations clause, against which standard must s37C's constitutionality be assessed? The answer in this case is that it will not matter which is chosen, because the standard of scrutiny will be the same.

The reason is that the test for arbitrariness is not a static test. It lies on a spectrum, ranging from a limited rationality test to the rigorous proportionality analysis required under section 36. If the deprivation affects only the right to property, the test for arbitrariness may require only that the deprivation is rational. However, if the deprivation is 'of property closely connected

[204] *S v Makwanyane* 1995 (3) SA 391 (CC) [144].
[205] Ibid.
[206] Ibid [329].
[207] The right to equality is usually interpreted through the lens of human dignity. See *Weare v Ndebele* 2009 (1) SA 600 (CC). See also Cowen 'Can dignity guide South Africa's equality jurisprudence' (2001) 17 *SAJHR* 34.

to the other fundamental rights', the test for arbitrariness will be akin to the section 36 proportionality analysis.[208]

This thesis in its entirety is a limitations analysis. Space constraints do not permit me to engage in a separate analysis in respect of each right, nor is it necessary to do so. The rights are interconnected, and the more rights s37C violates, the greater its adverse impact, and the more compelling the justifications for its existence will need to be.[209]

The thesis is structured around the factors that are relevant to determining whether a limitation is reasonable and justifiable. Although I consider each factor in turn, they are not discrete but inter-related and part of a holistic enquiry.[210] My conclusion is that s37C is not saved by the limitations clause, however compelling its purpose. Its design is so flawed that it is not reasonably capable of consistently achieving its objective, while the extent of the limitation, and the impact on those adversely affected by its application, is such that its harm is disproportionate to its benefits.

Chapter two examines why freedom of testation – the right to choose who should benefit from one's property when one dies – is an important and indivisible part of the bundle of rights that individuals enjoy over their property. It considers the relationship between property and the 'advancement of human rights and freedoms',[211] and why it is that testamentary freedom is protected both by the constitutional right to property and by the right to human dignity.[212]

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[208] *First National Bank of SA Ltd t/a Wesbank (FNB) v Minister of Finance* 2002 (4) SA 768 (CC) [100]; *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape* 2015 (9) BCLR 1052 (CC) [79-80].
[209] *S v Manamela* 2000 (1) SACR 414 (CC) [33],[69]. See also Woolman & Botha 'Limitations' in *Constitutional Law of South Africa* 2ed (2018) para 34.8(c)(i).
[210] In *Dawood v Minister of Home Affairs* 2000 (8) BCLR 837 (CC), O'Regan J did not follow or separately address each factor. After describing the facts and the nature of the right, she first considered the scope of the limitation, then its purpose, importance and effect, and finally concluded with a brief proportionality analysis.
[211] FC, s1(a).
[212] FC, s25 & s10.

In chapters three and four I seek to establish s37C's purpose and, thereafter, the meaning of the term 'dependant'. These are related issues that ultimately speak to the same issue: its *raison d'être*. The limitation must be one that is rationally connected to its purpose.[213] The limitation's design is important to this enquiry.[214] A poorly designed limitation that is not reasonably capable of achieving its purpose is not a justifiable limitation.

At a minimum, a limitation must be for a 'sufficient purpose', failing which the limitation will be considered arbitrary.[215] When the limitation affects core rights, like the right to dignity, the purpose must be 'substantially compelling'[216] — one that 'relate(s) to societal concerns which are pressing and substantial' in a democratic society.[217] Establishing whether the limitation was enacted for a sufficiently compelling reason presupposes, however, that its purpose can be clearly discerned.[218]

Chapter three seeks to identify s37C's true purpose, the mischief it was intended to guard against. The standard explanation for s37C is that it was enacted to protect a member's dependants from the member. I ask whether this is its true purpose and whether there is a rational relationship between its purpose and the wide discretionary powers conferred on trustees.

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[213] *Minister of Justice & Constitutional Development v South African Restructuring and Insolvency Practitioners Association* [2018] ZACC 20 [55]: 'All that is required for rationality to be satisfied is the connection between the means and the purpose. Put differently, the means chosen to achieve a particular purpose must reasonably be capable of accomplishing that purpose. They need not be the best means or the only means through which the purpose may be attained.'

[214] *R v Oakes* 1986 CanLII 46 (SCC), 106: 'the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective'; *Sauvé v Canada (Chief Electoral Officer)* 2002 SCC 68 [27]: it must be demonstrated, 'by evidence or in reason and logic', that the measures are likely to promote the objective.

[215] *FNB* (n208) [100].

[216] *S v Manamela* (n209).

[217] *R v Oakes* (n214), 105.

[218] *Sauvé* (n214)[23-24]: '[T]he objective "must be accurately and precisely defined so as to provide a clear framework for evaluating its importance, and to assess the precision with which the means have been crafted to fulfil that objective" … To establish justification, one needs to know what problem the government is targeting, and why it is so pressing and important that it warrants limiting a *Charter* right. Without this, it is difficult if not impossible to weigh whether the infringement of the right is justifiable or proportionate.' See also *Lawen Estate v Nova Scotia (Attorney General)* 2019 NSSC 162.

Chapter four focuses on the definition of dependant and the inherent challenges trustees face in interpreting the definition. This discussion is relevant both to s37C's purpose, and to the relationship between the limitation and its purpose. Dependants lie at the heart of s37C. The entire section presupposes that trustees can and will correctly identify who is or is not a dependant. If the definition of dependant does not simply tell trustees who qualifies as a dependant, but requires that they first interpret the definition, against a fast-changing legal environment, creating considerable uncertainty as a result, can it be said that the limitation is 'rationally connected' to, or reasonably capable of achieving, its purpose?

Chapter five analyses how trustees exercise their discretion in practice, through the lens of Adjudicator determinations.[219] This discussion speaks to the nature and extent of the limitation. I highlight the regularity with which trustees override members' wishes, and the extent to which the Adjudicator's Office has shaped trustee decision-making. I consider whether s37C, as applied, yields consistently equitable outcomes, since the directive that they do what they 'deem equitable' is the only guidance the legislature has given trustees. Chapter five also provides context for my examination, in chapter six, of s37C's impact on fundamental constitutional rights.

Chapter six is the heart of the analysis. How harmful is s37C, and is that harm justified by its purpose? The extent of the limitation is measured both by its impact on the constitutional rights that have been limited, and on the persons 'deleteriously affected' by it.[220] The Supreme Court of Canada (SCC) considers this to be the most important stage of the analysis, [221] for it is only at this stage that one can properly assess whether the harm is proportionate or disproportionate to the benefit society obtains from the limitation. If the

[219] See *Dawood* (n210), in which O'Regan analysed the wide and unguided discretion granted to administrative officials under the head of the 'scope' (nature and extent) of the limitation.
[220] Woolman & Botha (n209) para 34.8(c)(iii).
[221] *R v KRJ* 2016 SCC 31 [77-79].

harm outweighs the benefits, the limitation is unconstitutional.[222] A benefit that is speculative or marginal is not sufficient when the deleterious effects are substantial.[223]

In chapter six I consider, firstly, whether s37C is constitutional in so far as trustees have been given the right, and responsibility, to distribute a member's property without having been provided with any direction as to how they should exercise their power. I then consider whether s37C violates the member's right to property and, in consequence, a spouse's right to property. As the final part of my analysis, I consider the impact that s37C has on the rights to dignity, equality and parental care, of members, spouses and children. My purpose is to demonstrate that s37C's deleterious impact, on the affected persons and the rights and the values of an open and democratic society, outweighs its social benefits.[224]

Chapter seven examines the treatment of death benefits and the judicial control of testamentary power in Australia, Canada, England, Malawi and New Zealand,[225] in order to determine whether their treatment of death benefits provides a useful comparator for South Africa, and to distil the elements of judicial control that I think speak specifically to the issues and tensions raised by the application of s37C.

Chapter seven does not provide a detailed comparison of the applicable laws and jurisprudence. Its aim is three-fold. Firstly, to demonstrate that there are less restrictive alternatives to s37C. Secondly, to highlight how courts in numerous jurisdictions, faced with an arguably easier task than that of the trustees, have nevertheless for decades grappled to identify the circumstances under which it is appropriate to interfere with a deceased's distributive choices. Thirdly, to see whether their experiences provide a basis from which a set of guidelines could be developed that promote equitable decision-making and that remedy the possible unconstitutionality of s37C. The countries have been selected because they all

[222] *S v Manamela* (n209); See also *R v KRJ* (n221).
[223] *R v KRJ* (n221) [92].
[224] The Canadian Supreme Court has identified the 'proportionality of effects', as the most important part of the limitations analysis, see *R v KRJ* (n221) [77-79].
[225] FC, s39(2) expressly allows courts to consider foreign law when interpreting the BoR.

have significant private occupational retirement funding,[226] they have a shared legal history as former English colonies, and they have all granted their courts discretionary powers to override a deceased's testamentary choices.

Chapter Eight concludes the dissertation and provides some suggestions for reform.

[226] OECD *Pensions at a Glance* (2017) Table 4.5. I do not examine the treatment of death benefits in New Zealand, because the retirement fund landscape is not comparable to that of the other jurisdictions. Occupational retirement funds account for less than 20% of retirement funding. The government has a voluntary funding scheme (Kiwisaver), but should a member die before retirement, their accumulated savings will be paid to their estate. See further Kiwisaver 'What happens if you die' available online at <http://www.kiwisaver.govt.nz/already/sit-change/change-personal/#06>.

2

CHAPTER TWO

SECTION 37C, PROPERTY AND HUMAN DIGNITY

THEORETICAL CONTEXT

2.1 INTRODUCTION

This thesis posits that s37C violates the constitutional rights to human dignity,[1] equality[2] and property.[3] The argument is essentially that s37C is a positive violation of each of these rights, independently of the other. Rights reinforce one another, and the violation of one right may implicate another. A violation of the right to equality is therefore usually analysed through the lens of the right to dignity.[4] A violation of the right to private property, as manifested by freedom of testation, is also considered a separate violation of the right to dignity.[5]

Therefore, had the Constitution not contained an express property right, the argument would still have been made that s37C violates the Constitution. The argument would then have focused on the violation of the common law rights in and to property, which encompass freedom of testation, and why depriving individuals of their testamentary freedom is in and of itself a violation of the right to dignity.[6]

If freedom of testation is protected by the right to dignity, why does it matter whether it is also a violation of the right to property? For two reasons. The claim has been made that death

[1] FC, s10.
[2] FC, s9.
[3] FC, s25.
[4] Cowen 'Can dignity guide South Africa's equality jurisprudence' (2001) 17 *SAJHR* 34.
[5] *BOE Trust Ltd* 2013 (3) SA 236 (SCA); *Harvey v Crawford* 2019 (2) SA 153 (SCA).
[6] The Nova Scotia Supreme Court recently held that freedom of testation was protected by the right to dignity under s7 of the Canadian Charter of Rights and Freedoms, which contains no constitutional property clause. See *Lawen Estate v Nova Scotia (Attorney General)* 2019 NSSC 162.

benefits are *not* property in the hands of the member.[7] If the claim is correct, a further argument could then be made that it is their inherent nature that places death benefits outside the individual's contractual or testamentary control, rather than that the legislature has deprived the individual of a right they would otherwise have had to dispose of their death benefits via a contract or a will.

In other words, the argument could be that the legislature has simply not given the individual the right to select beneficiaries, rather than depriving them of the right to do so.[8] My later analysis of the concept of constitutional property aims to refute this possible argument, by demonstrating that death benefits are property, in both the private law and constitutional sense, in the hands of the member.[9] Section 37C therefore does deprive individuals of their property, viz death benefits, and in consequence limits their freedom of testation and, in so doing, also impairs their right to dignity. In addition, unless death benefits are the member's property, spouses cannot obtain any proprietary rights to that property by virtue of their matrimonial property regime. In order to establish that s37C deprives some spouses of their proprietary rights, it is necessary to first establish that death benefits are property in the hands of the member.

The constitutional right to property serves another purpose. It is not simply that it protects property rights, but that it serves as a reminder of why it is important that property rights, including freedom of testation, be protected. Some constitutional and property scholars suggest that constitutional guarantees to property are no longer either important or necessarily desirable, because the role once played by property guarantees, as a 'bulwark

[7] See *Tek Corporation Provident Fund v Lorentz* 1999 (4) SA 884 (SCA) & *Mostert v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA). See further §6.3.1 below.
[8] In the USA courts have held that *inter vivos* property rights are part of natural law, but that rights of bequest and inheritance exist only because, and to the extent, states permit it. See eg *US v Perkins* 163 US 625 (1896), which held that the 'right to dispose of property by will has always been a creature of statute' and that 'we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition'. See also Brashier 'Disinheritance and the modern family' (1995) 45(1) *Case Western Reserve LR* 83, fn6; Scalise 'Public policy and antisocial testators' (2010-2011) 32 *Cardozo LR* 1315, 1318.
[9] See §6.3.1 below.

against the abuse of state power', is today more appropriately and as effectively fulfilled by the rights to dignity and equality.[10] They claim that the inclusion of the property clause is 'testimony to the strength of the utilitarian defence of property rights' and they appear to doubt the validity of the 'philosophical justifications for the right to private property … which still emphasise the connection between property rights and individual freedom, at least as one of several mutually reinforcing arguments'.[11] Their scepticism of the value of constitutionally-protecting property is due to their belief that such protection only serves the interests of those who already own 'significant property'.[12]

Section 37C belies this claim. Section 37C demonstrates how the state can readily interfere with the property rights of the poor as well as the wealthy, and how the constitutional protection of property is arguably a more important bulwark against state interference for those with limited property than for those with substantial property. The constitutional right to property is important precisely because it is a reminder of the role property plays in achieving, and securing, human dignity and freedom. Both the right to property, and many of the limitations on the right to property, aim to 'protect, promote and fulfil' the foundational values and rights of freedom, dignity and equality. The right to property helps anchor, and give meaning to, the right to dignity and equality.

2.2 FREEDOM AND DIGNITY

The most compelling justification for private property is that it is a necessary precondition for human dignity and freedom.[13] The relationship between dignity, freedom and property, is

[10] Roux & Davis 'Property' in Cheadle, Davis, Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2019), para 20.1; Nedelsky 'Reconceiving rights and constitutionalism' (2008) 7 *Journal of Human Rights* 139, 155 who believes that a constitutional right to property is not necessary because it is a second-order right - simply a means of securing first-order rights like dignity and security. Cf Coval, Smith, Coval 'The foundations of property and property law' (1986) 45(3) *Cambridge LJ* 457, who argue that property is as essential for securing freedom of action as the other civil and political rights that are usually found in constitutional texts.
[11] Roux & Davis (n10), para 20.1.
[12] Ibid.
[13] *Ferreira v Levin* 1996 (1) BCLR 1 (CC) [50]: '[F]reedom is indispensable for the protection of dignity.' See Barros 'Property and Freedom' (2009) 4 *New York University Journal of Law and Liberty* 36, esp fn1.

implicitly recognised in the Constitution. Section 1 of the Constitution provides that South Africa is a democratic state founded on the values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms.'[14] In so doing it locates the Constitution within a particular philosophical tradition, that of liberalism.

It is liberalism as shaped by the ideas of 17th to 19th century philosophers, particularly John Locke,[15] Immanuel Kant,[16] and John Stuart Mill.[17] Mill, the 'most influential' of the 19th century English-speaking philosophers,[18] has been described as the 'intellectual father' of modern liberalism.[19] He is the philosopher most cited by the Canadian Supreme Court,[20] whose comparative jurisprudence the CC frequently draws upon,[21] and he, together with modern liberal philosophers like Dworkin,[22] has similarly been cited by South African courts in cases involving individual freedom.[23] Mill provides the most compelling explanation of why

[14] Isaiah Berlin described the word freedom as so 'porous' and 'protean' that it could be interpreted in the service of almost any cause, Berlin *Two Concepts of Liberty* (1958) 1. Dignity has similarly been described as a 'slippery concept', see Du Bois 'Freedom and the dignity of citizens' 2008 *Acta Juridica* 112, 130. See further Cowen (n4).

[15] Particularly his *Two Treatises of Government* (1689, 1764).

[16] Kant has strongly influenced the CC's understanding of dignity as a constitutional value and right. Ackerman quotes Kant in his analysis of the relationship between freedom and dignity in *Ferreira v Levin* (n13). Woolman 'Dignity' in Woolman & Bishop (eds) *Constitutional Law in South Africa* 2ed (2018), para 36.1, is of the view that the CC's dignity jurisprudence is a direct derivative of Kantian ethics. Roux 'The dignity of comparative constitutional law' 2008 *Acta Juridica* 185, 189 also points to Kant's influence on Ackerman's conception of freedom. Other CC cases citing Kant include *Bernstein v Bester* 1996 (4) BCLR 449 (CC); *South African Police Service (SAPS) v Solidarity obo Barnard* 2014 (10) BCLR 1195 (CC). Kant's imperative that every individual be treated as an end and not merely as the means to an end has been described as the 'bedrock' of the right to dignity, see Lubbe 'Taking fundamental rights seriously: the Bill of Rights and its implications for the development of contract law' (2004) 121(2) *SALJ* 395, 421.

[17] Especially *Principles of Political Economy* (1848), *On Liberty* (1859) *Utilitarianism* (1861) and *The Subjection of Women* (1869). The dates are those on which the works were first published.

[18] See McLeod 'John Stuart Mill' in *Stanford Encylopedia of Philosophy*.

[19] Hill 'The father of modern constitutional liberalism' (2018) 27(2) *William & Mary Bill of Rights Journal* 431, 432, who concludes that Mill's views have frequently been relied on by courts but without proper attribution. See also Schapiro 'John Stuart Mill, pioneer of democratic liberalism in England' (1943) 4(2) *Journal of the History of Ideas* 127, 134.

[20] See McCormack 'When Canadian courts cite the major philosophers' (2017) 42(2) *Canadian LR* 9, 15.

[21] FC, s36 is modelled on the limitations clause in the Canadian Charter of Rights and Freedoms, see Cheadle 'Limitation of Rights' in *South African Constitutional Law* (n10), 11. See also Klug 'The Canadian Charter, South Africa and the Paths of Constitutional Influence' in Albert & Cameron (eds) *Canada in the World: Comparative Perspectives on the Canadian Constitution* (2017).

[22] Dworkin's views, especially those expressed in *Sovereign Virtue: The Theory and Practice of Equality* (2000), have been described as 'paradigmatically liberal' by Meyerson 'Three versions of liberal tolerance: Dworkin, Rawls, Raz' (2012) 3(1) *Jurisprudence* 37, 62.

[23] See eg *Oriani-Ambrosini, MP v Sisulu, MP, Speaker of the National Assembly* 2013 (1) BCLR 14 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] 3 All SA 26 (W); *Mandela v Falati* 1995 (1) SA 251 (W); *S v K* 1997 (9) BCLR 1283 (C); *Prince v Minister of Justice and Constitutional Development* [2017] 2 All SA 864 (WCC).

individual freedom and private property is deserving of recognition and protection, and this thesis draws extensively from his work.

At its core, liberalism is a philosophy of freedom.[24] It is a philosophy founded on the desire to liberate individuals from the repressive control of state and church regarding matters of belief and behaviour. It is a philosophy that believes in the inherent dignity and equality of all individuals. It advocates tolerance, respect, openness.[25]

It is from within this tradition that the constitutional values of 'freedom' and 'dignity' must be understood. Freedom is, in essence, the freedom to be the author of one's own life. Its basic premise is that individuals should be permitted to make their own life choices, free from the will of others.[26] It is the freedom to *be* and *become* oneself. In this sense it is intended, at a minimum, to safeguard individual autonomy from external interference from a community seeking to dictate to individuals what they should believe and how they should conduct themselves.[27]

Freedom lies at the heart of dignity,[28] but dignity explains why freedom matters.[29] Dignity's central claim is that everyone has the same inherent worth.[30] Every human is born equal.

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[24] The etymology of 'liberal' is the Latin '*liber*', meaning 'free'.
[25] See Russell's chapter on 'Philosophical Liberalism' in his *History of Western Philosophy* (1946).
[26] See eg *LS v RL* 2019 (4) SA 50 (GJ)[33] in which the court declared the customary law requirement for the validity of a customary marriage, that of the formal handing over of the bride from the bride to the groom's family, to be unconstitutional on the basis that: 'The autonomy and control over one's personal circumstances are fundamental aspects of human dignity'. Cf Nedelsky 'Law, boundaries and bounded self' (1990) 30 *Representations* 162, who considers individual autonomy claims 'wrong-headed and destructive'. She criticises liberalism for propagating an unrealistic and harmful ideal of the individual living in splendid isolation, rather than within a network of relationships. See also Nedelsky 'Reconceiving autonomy: sources, thoughts and possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7. The version of liberalism at which she directs her 'rage' (at 9) is not liberalism as formulated by Locke or Mill or as understood by the South African CC.
[27] Ackerman's acceptance of Berlin's 'negative' conception of liberty in *Ferreira v Levin* (n13) [52] has been criticised by several commentators. See Fagan 'Dignity and the political right to freedom' 2008 *Acta Juridica* 177; Liebenberg 'The value of freedom in interpreting socio-economic rights' 2008 *Acta Juridica* 149.
[28] See Ackerman in *Ferreira v Levin* (n13) [49]: 'freedom is indispensable for the protection of dignity'.
[29] Ackerman ibid [fn34], quoting Berlin (n14): '(T)hose who have ever valued liberty for its own sake believed that to be free to choose, and not to be chosen for, is an inalienable ingredient in what makes human beings human.'
[30] See O'Regan J's comment in *S v Makwanyane* 1995 (3) SA 391 (CC) [328]: 'The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity

What distinguishes humans from other sentient beings is our capacity for reason, our ability to make choices informed by moral considerations of how we ought to behave. When we make moral choices, charting a deliberate course through our life, we act as moral agents.[31] If every individual is inherently equal, then the choices each makes as a result of reasoned reflection is equally worthy of respect. [32]

The corollary is that individuals are responsible for their life choices.[33] Dignity recognises that as moral agents, individuals are both entitled to freedom of choice, and responsible for their choices. In *Barkhuizen v Napier* the CC accepted as much, stating that '[s]elf-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.'[34]

Dignity does not, however, merely require that the state not interfere with the individual's freedom of choice. It is a positive claim for those choices to be accorded proper respect.[35] As explained by Roux: 'Human dignity is … primarily a relational concept, which has less to do with keeping others out than it has with being properly understood and affirmed.'[36]

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is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern.' The etymology of 'dignity' is the Latin '*dignitas*', meaning 'worth'. For a discussion on dignity's historical association with status and rank, see Waldron 'How law protects dignity' (2012) 71 *Cambridge LJ* 200, 212ff.

[31] Du Bois (n14),132 writes: 'For Kant, human dignity is rooted in the capacity of humans to act autonomously in ethical matters, that is, their capacity to reflect critically on what is worthwhile and appropriate to pursue and to direct their own lives in accordance therewith, taking responsibility for how they do so, including the impact that they have on the lives of others.'

[32] *Ferreira v Levin* (n13) [49].

[33] See O'Regan 'The three R's of the Constitution: responsibility, respect and rights' 2004 *Acta Juridica* 86, 88: 'The South African Constitution asserts that human beings are morally responsible agents and it imposes obligations upon the State to foster the conditions of moral agency.' See also Schachter 'Human dignity as a normative concept' (1983) 77(4) *American Journal of International Law* 848, 850.

[34] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [57]. The case concerned a contract that contained terms detrimental to one of the parties. See also *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [94]: 'It is settled law that, shorn of unsightly excesses, contractual autonomy advances the constitutional values of freedom and dignity.'

[35] The CC continues to emphasise that constitutional rights, including socio-economic, impose predominantly negative obligations, which O'Regan in *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) [47] describes as the 'duty to respect'.

[36] Roux (n16), 189. See also Singer 'The reliance interest in property' (1988) 40 *Stanford Law* 611. See also Nedelsky 'Reconceiving rights' (n10) who argues that 'individual' rights should be reconceived as 'relational' rights, because rights 'construct relationships' (at 149). See further Underkuffler 'On property: an essay' (1990) 100 *Yale LJ* 127.

Liberalism's starting point is thus the need to respect the individual's dignity and autonomy, but it is not its end point. Classic liberal philosophy is not constructed in the 'atomistic' image of the individual as the only relevant actor in the world.[37] Liberalism accepts that the individual exists within society.[38] The relational nature of dignity is underscored by the recognition that courts have given to the communitarian concept of *Ubuntu* in several difficult cases involving competing interests.[39]

Despite the numerous justifications for freedom and autonomy, they are not inviolable. Freedom is not a licence to harm others.[40] As noted by Lord Acton: 'Liberty is not the power of doing what we like, but the right of being able to do what we ought.'[41]

That being the case, the obvious difficulty lies in delimiting the proper boundaries of individual freedom – what range of choices may a person make in the exercise of their

[37] In *Ferreira v Levin* (n13) [49-50] Ackerman J expressly rejected an atomistic account of freedom, despite which his understanding has been criticised as exactly that, see Haysom 'Dignity' in *SA Constitutional Law* (n10), para 5.1.

[38] A recognition that is explicit in Article 2(1) of the German Constitution, which states that 'Every person shall have the right to free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral law.' The provision has been interpreted by the German CC as follows: 'While freedom and individual dignity are fundamentally guaranteed, it cannot be overlooked that the image of man in the *Grundgesetz* is not that of an individual in arbitrary isolation but of a person in the community, to which the person is obligated in many ways.' Quoted in Lubens 'The social obligation of property ownership: a comparison of German and US Law' (2007) 24(2) *Arizona Journal of International and Comparative Law* 389, 402.

[39] See Mokgoro J's definition in *S v Makwanyane* (n30) [308], part of which reads: 'While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality.' See also *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC); *SAPS v Solidarity* (n16) [174]; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) [37]; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) [38]; *Bhe v Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC) [143]; *RAF v Mohohlo* 2018 (2) SA 65 (SCA) [12]. See further the extensive discussion by Victor AJ in *Beadica 231 CC v Trustees of the Oregon Trust* [2020] ZACC 13, in which he analyses *Ubuntu* in the context of public policy and contract law.

[40] In *Ferreira v Levin* (n13) fn56, Ackerman quoted the following passage from Karl Popper's *Open Society*: "Freedom, we have seen, defeats itself, if it is unlimited. Unlimited freedom means that a strong man is free to bully one who is weak and to rob him of his freedom. This is why we demand that the State should limit freedom to a certain extent, so that everyone's freedom is protected by law. Nobody should be at the *mercy* of others, but all should have a *right* to be protected by the State.' (emphasis in the original)

[41] From Wikipedia entry on Lord Acton, citing *The Rambler* (1860) 2, 146 in *The American Political Science Review* (1963) 56. This passage encapsulates Kant's philosophy, as explained by Du Bois (n14), 133, that 'respect-worthy moral deliberation is not *merely* a matter of determining for oneself what is right and wrong; it is *also* a matter of doing so correctly.'

individual freedom? The answer is encapsulated in Mill's 'harm principle'.[42] Mill's view was that freedom can legitimately be constrained when its exercise harms or threatens harm to others.[43] Harm is not limited to positive acts, but encompasses the failure to fulfil a moral obligation that causes harm to another individual or to society as a whole. In Mill's view, the protected sphere of individual autonomy extends to all matters of conscience, and all behavioural choices that affect only the individual. As soon as the individual's actions or inactions harm third parties, individual autonomy must give way to social duty.[44]

The challenge lies in giving content to the notion of 'harm', for that is the point at which right gives way to duty and the individual's freedom may appropriately be limited. Meyerson's elucidation of Mill's harm principle is helpful. She argues that the harm must be 'indisputably harmful' or a 'great evil' before a fundamental right may justifiably be limited.[45] She proposes an extended hypothetical reasonable person test, which asks whether every reasonable person in an open and democratic society founded on the values of freedom, dignity and equality, would, irrespective of their personal morality, agree that the conduct was harmful.[46]

What, however, distinguishes reasonable people from unreasonable people? The answer lies in how reasonable people arrive at decisions. Reasonable people consider issues objectively, recognising everyone's inherent dignity and equality, and therefore identifying the conduct as harmful based only on their common and shared values, rather than their own idiosyncratic values. If the harmfulness of the conduct is 'intractably disputed' by reasonable people, then the individual's right to engage in that conduct should not be limited.[47]

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[42] Inevitably, his principle has its critics. See eg Holtug 'The Harm Principle' (2002) 5(4) E*thical Theory and Moral Practice* 357; Alexander 'The social-obligation norm in American Property Law' (2008-2009) 94 *Cornell LR* 745,754.

[43] Mill *On Liberty* in Collini *On Liberty and other Writings* (1989) 21-22: 'The object of this Essay is to assert one very simple principle … [t]hat the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.'

[44] Mill *On Liberty* (n43), 13-15. Cf Singer (n36), 729.

[45] Meyerson *Rights Limited* (1997), 40.

[46] Ibid, 10-15.

[47] Meyerson (n45), 18. See also *Sweezy v New Hampshire* 354 US, quoted in Aleinikoff 'Constitutional law in the age of balancing' (1987) 96(5) *Yale LJ* 943, fn117: 'Striking the balance implies the exercise of judgment. … It must be an overriding judgment founded on something much deeper and more justifiable than personal preference. As far as it lies within human limitations, it must be an impersonal

This approach reflects that adopted by the Canadian Supreme Court. In *R v Butler*, [48] the SCC similarly stated that:

> [A] consensus must exist among the population on these claims. They must attract the support of more than a simple majority of people. In a pluralistic society like ours, many different conceptions of the good are held by various segments of the population. The guarantees of s 2 of the Charter protect this pluralistic diversity. However, if the holders of these different conceptions agree that some conduct is not good, then the respect for pluralism that underlies s 2 of the Charter becomes less insurmountable an objection to State action... In this sense a wide consensus among holders of different conceptions of the good is necessary before the State can intervene in the name of morality. This is also comprised in the phrase "pressing and substantial".'

2.2.1 Dignity, freedom and property

That respect for individual autonomy is a political and legal imperative, and that respect for individual autonomy requires respect for the individual's private property, is a well-established tenet of liberal political philosophy and legal theory.[49] Although liberal theorists are widely criticised for unduly emphasising individuals' rights without adequately acknowledging their social responsibilities,[50] this criticism, even true, which I do not consider it to be, does not invalidate the claim that a society that respects individual rights and freedoms must necessarily respect the individual's rights in and to property.

The relationship between property and freedom is extensive. Property is both a sword and a shield: it enables individuals to exercise choices that are central to freedom and autonomy, and it provides a 'bulwark' against state-interference with individual autonomy.[51] At the most essential level, property itself, rather than the rights associated with owning property, is necessary to satisfy basic human needs. The main impulse behind property ownership is to

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judgment. It must rest on fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed.

[48] 1992 CanLII 124 (SCC) 523-524. See also *Lawen Estate v Nova Scotia* (n6) [86-89]:

[49] See eg Rose 'Property as the keystone right?' (1996) 71(3) *Notre Dame LR* 329; Barros (n13). *See also* Coval (n10), who argue that property is as essential for securing freedom of action as the other civil and political rights that are usually found in constitutional texts.

[50] See eg Singer; Nedelsky & Underkuffler (n36). See also Alexander (n42).

[51] Cf Roux & Davis 'Property' (n10), para 20.1, who believe property has 'relinquished its status' as the 'principal bulwark' against state interference, and that the rights to dignity and equality now perform this function.

secure freedom from want – freedom from the hardships of poverty.[52] The CC has accepted that '[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.'[53]

Property also provides opportunity – the freedom to choose and pursue activities that fulfil individual aspirations. Property provides the material means for individuals to 'pursue broadly their own personal development and fulfilment and their own conception of the "good life"'.[54] Property is therefore an indispensable 'condition for the exercise' of freedom.[55] It is essential for human flourishing.[56] Those with property are better able to fulfil their needs and wants than are those without property. In states that do not have adequate social welfare systems, those without property lack the means to satisfy even their basic needs. By contrast, those with sufficient property are not only able to satisfy their material wants, they also have the freedom to make choices and engage in pursuits that allow greater possibility of individual fulfilment and self-actualisation.[57] It is, in this regard, 'capability' and 'freedom-enhancing'.[58]

From an instrumental or consequentialist perspective, property also promotes the general social good, since individuals who know that they will receive the fruits of their labour have

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[52] The association between poverty and lack of freedom has long been recognised, see Mill *On Socialism* in Collini *On Liberty and other Writings* (1989).
[53] *Government of RSA v Grootboom* 2001 (1) SA 46 (CC)[23]. Further at [44]: 'A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality'. For this reason, some scholars argue that the right to property, and the commitment to individual freedom more generally, should be construed as a positive right to claim certain property-entitlements from the state. See eg Liebenberg (n27). Ackerman in *Ferreira v Levin* (n13) shared Berlin's concern that a positive obligation on states to promote freedom could be used as a pretext for interfering with freedom. See also Pound 'The law of property and recent juristic thought' (1939) 25 *American Bar Association Journal* 993, 995 who observes that historically, rulers 'have been astute to justify their confiscatory activities with the public good'.
[54] *Ferreira v Levin* (n13) [50].
[55] IBerlin (n14), quoted by Ackerman in *Ferreira v Levin* (n13) [52].
[56] Alexander (n42), 748.
[57] The significance of the constitutional right to property in Article 14 of the German Constitution was explained as follows by the German CC: '[The property guarantee], according to its historical as well as its present significance, is a fundamental basic right which is closely linked with personal freedom. In the system of the basic rights as a whole, it has the task of guaranteeing the holder of the basic right a sphere of freedom in the financial area and therefore enables him to determine his life autonomously.' BVerfG 50, 339 (1979), quoted in Michalowski & Wood *German Constitutional Law* (1999),319.
[58] Sen *Development as Freedom* (1999); Nussbaum *Women and Human Development* (2000).

an incentive to be more productive, thereby increasing society's wealth;[59] it fosters creativity and entrepreneurship, which facilitates economic development.[60]

Individuals without property are not 'free'. Individuals with insecure property rights are vulnerable to the loss of their property and, consequently, their freedom.[61] They are also vulnerable to coercion through both the conditional promise and denial of property.[62] The constitutional right to property is important precisely in order to protect the holder from the loss of freedom that may arise as a result of expropriation or unjustifiable interference. The loss of property is likely to create hardship; reduce choice; restrict opportunity; impair dignity. It is for this reason that a state that wishes to expropriate property is expected to compensate the owner with different property that is of reasonably equal value. It is the right to compensation that legitimises the right to expropriation.

Despite the incontestable importance of property and secure property rights, most people in South Africa lack sufficient property to meet their basic needs, much less what is needed to pursue their conception of the good life. Can the protection of property nevertheless be justified, notwithstanding the tremendous inequality in wealth?[63] Liberal philosophers like Locke and Mill thought it could be, in so far as the property represented the fruits of the

[59] Locke (n15). See also Rose 'Property as the keystone right' (n49). For criticism of the view that contractual autonomy (as an incident of property ownership) is welfare enhancing, see Trebilcock *The Limits of Freedom of Contract* (1993).
[60] Mill *On Socialism* (n52), 265.
[61] For a critical analysis of the link between property and independence, see Harris *Property and Justice* (1996) 301-305. Harris argues that property today plays a minor, but nevertheless not insignificant, role in securing individual autonomy when compared with modern political rights.
[62] See the many examples in Reich 'The new property' (1964) 73(5) *Yale LJ* 733, especially the case of *Flemming v Nestor* regarding the loss of pension benefits (at 768). South Africans who live on communal land in rural areas are particularly vulnerable to coercion and the loss of their land because they do not have secure title. See Clark & Luwaya *Communal Land Tenure 1994-2017* Land and Accountability Research Centre. See also Card 'Against marriage and motherhood' (1996) 11(3) *Hypatia* 1 who, rightly, points out that the economic consequences of divorce can also entrap propertied spouses who face the threat of maintenance or property claims into remaining in 'emotionally disastrous' marriages.
[63] This is the central question troubling leading property law theorists in SA. See especially Van der Walt, whose numerous works on property law and theory in South Africa include his three part review of property theories and debates, see 'Unity and pluralism in property theory (1995) 1 *Journal SA Law* 15; 'Subject and society in property theory' (1995) 2 *Journal SA Law* 322; 'Rights and reforms in property theory' (1995) 3 *Journal of SA Law* 493.

individual's labour.[64] Mill subscribed to Locke's 'theory of labour',[65] which posits that individuals have a moral right to property that they either created or acquired through their own endeavour.[66]

Mill was nevertheless deeply concerned about the inequalities in society, and the role private property played in creating and sustaining inequality.[67] He decried the fact that the main determinant of an individual's wealth, and therefore their opportunity and autonomy, was the circumstance of their birth rather than their labour, and that there seemed to be an inverse relationship between labour and reward. The poor laboured endlessly for negligible reward, while the privileged were rewarded for being idle. He described impoverished workers who lacked independent means and were entirely dependent on wages as

> [C]hained to a place, to an occupation, and to conformity with the will of an employer, and debarred by the accident of birth both from the enjoyments, and from the mental and moral advantages, which others inherit without exertion and independently from desert.[68]

Mill thus agreed with his contemporary socialist advocates on the need for extensive social reform, including reform of the institution of private property. [69] He recognised that the rights of those fortunate enough to own property, including that acquired by their labour, were

[64] Locke (n15) Ch 5. See also Day 'Locke on property' (1966) 16(64) *Philosophical Quarterly* 207.
[65] See Mill *Principles of Political Economy* (1848 edition) Vol 1, Book 2, Ch 2.
[66] Locke's defence of individual rights to private property was that natural law required that individuals use their labour to appropriate property from the natural commons, since doing so enhanced the value of property for both the individual and society, and that they acquired ownership over the property by virtue of the fact that they had expended their labour on acquiring or improving it. See Snyder 'Locke on natural law and property rights' (1986) 16(4) *Canadian Journal of Philosophy* 723. See also Barros (n13) at 40. For a more detailed analysis of Locke's theory of private property, see Waldron *The Right to Private Property* (1988). For an analysis of Locke's views on property in the context of succession, see Waldron 'Locke's account of inheritance and bequest' (1981) 19(1) *Journal of the History of Philosophy* 39. Russell (n25) is of the view is that Locke's theory is impossibly flawed because the sources of wealth are no longer principally the individual's direct labour over the land and its resources, which Locke used as the basis for developing his theory. The essence of Locke's theory can be adapted to modern fruits, viz salary, and applies equally to death benefits.
[67] See Mill *On Socialism* (n52), 232: 'These evils, - great poverty, and that poverty very little connected with desert – are the first grand failure of the existing arrangements of society.'
[68] Mill *On Socialism* (n52), 227.
[69] He differed from them as to the best method to achieve reform. He advocated the continued protection of property rights within a market economy, while they advocated expropriation of land and productive resources. He was nevertheless very critical of abusive practices within the market.

circumscribed by the obligations they owed others.[70] In keeping with modern property theory and jurisprudence, he accepted that individuals owed a social obligation to society, which required that those who 'received the protection' of society were in turn required to shoulder an equitable proportion of the 'labours and sacrifices' required for defending society.[71] To injure one's property was, for example, to harm those who relied on it, 'directly or indirectly', for their support.[72]

The recognition that property is a precondition for freedom and human dignity, but that property entails obligation, is thus embedded within liberal philosophy and the Constitution. The CC has emphasised that:

> The fundamental values of dignity, equality and freedom necessitate a conception of property that allows, on the one hand, for individual self-fulfilment in the holding of property and, on the other, the recognition that the holding of property also carries with it a social obligation not to harm the public good.[73]

2.2.2 Private property and testamentary freedom

Amongst the recognised 'bundle of rights' that the owners of property enjoy, is the right to dispose of property.[74] The freedom to bequeath property is simply one manifestation of the

[70] In *Principles of Political Economy* (n65) Bk 5 Ch1 §6 he therefore advocated taxation of inheritance on a progressive scale, while cautioning that it should not be so high that people seek to avoid it by way of *inter vivos* transfers. Kant also believed in taxing wealth for redistributive purposes, see Du Bois (n14), 136.
[71] Mill *On Liberty* (n43), 75.
[72] Ibid, 80.
[73] *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape* 2015 (9) BCLR 1052 (CC)[50].
[74] *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* 2012 (6) SA 638 (SCA); *Willow Waters Homeowners Association (Pty) Ltd v Koka* 2015 (5) SA 304 (SCA). In *Harper v Crawford* 2018 (1) SA 589 (WCC) [27] the court held that 'the ius dispossendi (sic) is so central to the concept of ownership in our law that it forms part of the very definition of ownership.' Mill similarly identified the right of 'exclusive disposal' as the 'essential element' of private property, *Principles of Political Economy* Vol 1 Bk 2, Ch2 §6. See also Honoré 'Ownership' in Guest (ed) *Oxford Essays in Jurisprudence* (1961).

right of disposal.[75] *Inter vivos* and *mortis causa* dispositions are two sides of the same coin. The two cannot be severed without destroying existing conceptions of private property.[76]

Some commentators and scholars have, however, argued that the institution of inheritance should be abolished, without simultaneously arguing that private property be abolished.[77] Their concern is that the intergenerational transmission of wealth by inheritance has contributed to the widening inequalities in society, allowing the already-wealthy to become even wealthier.[78] They argue that the justifications that apply to protecting private property do not apply to inherited wealth, for it is 'windfall' wealth that the recipients have not earned through their own labour.[79]

Despite the validity of concerns regarding inherited wealth,[80] abolishing inheritance, without simultaneously abolishing *inter vivos* transmission of private property, and therefore private property as an institution, is more likely to increase rather than decrease existing inequalities in the concentration of wealth.[81] The reason is simply that the wealthy have the financial wherewithal to dispose of wealth while alive. They can do so through direct gifts or through

[75] In *Marckx v Belgium* 31 ECHR (ser A) 1 (1979) [73] the European Court of Human Rights stated that '[T]he right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property.'

[76] As a right that inheres in the individual, rather than family for example. Mill's description of the nature of the right enjoyed by individuals who do not have the freedom to dispose of property was a 'life interest'. See Mill *On Socialism* (n52) 276.

[77] Orgain 'Death comes to us all, but through inheritance the rich can get richer: inheritance and the Federal Estate Tax' (2011) 4 *Estate Planning and Community Property LJ* 173. See also Brassington 'On rights of inheritance and bequest' (2019) 23 *The Journal of Ethics* 119.

[78] Their concerns are certainly pertinent in some countries. See eg Kelly 'Millennials will become richest generation in American history as baby boomers transfer over their wealth.' *Forbes* (26 October 2019). Those who propose increased redistribution through extremely high taxation trust that the state will redistribute the wealth honestly and fairly. See eg Wilkinson 'Why not fund the welfare state with a 100% inheritance tax?' *Guardian* (24 July 2017).

[79] See also Nozick *The Examined Life* (1989). His proposals similarly do not fully address the tax avoidance mechanisms available to the wealthy if *inter vivos* wealth transmission is permitted.

[80] In *On Socialism* (n52) 231, Mill was scathing of inherited privilege. He noted: 'The most powerful of all the determining circumstances [of the lot of individuals] is birth. … Some are born rich without work, others are born to a position where they can become rich by work, the great majority are born to hard work and poverty throughout life, numbers to indigence.'

[81] Haslett 'Is inheritance justified?' (1986) 15(2) *Philosophy and Public Affairs* 122 accepts that *inter vivos* transmission by way of gift will also need to be abolished. He does not address other forms of wealth transmission, such as life insurance.

the creation of corporate entities or trusts.[82] It is the less affluent, those who rely on their property as capital assets and sources of income, who cannot afford to transfer their property until such time as they no longer have need of it. It is they and their beneficiaries who rely on inheritance to transmit however much of their property they may still own at the time of their death. Inheritance, as a means of intergenerational wealth transfer, is therefore a more valuable institution for the middle and working class than for the rich.[83]

Mill was also concerned about the inequalities that arise from intergenerational wealth transmission, but he distinguished between inherited wealth and land on the one hand, and movables and property acquired by the individual's labour on the other. Property rights in land were only justifiable when they served the public interest. The rights afforded landowners should be determined wholly by 'questions of general expediency.'[84] Rights in land that did not advance the public interest were 'unjust'.[85] He similarly thought that rights over inherited wealth could justifiably be limited 'on grounds of general expediency'.[86]

His views on property that had been produced by the individual was quite different. The institution of private property existed to protect the rights of producers, and those who acquired property directly from them. It followed from this that:

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[82] McMurray 'Liberty of testation and some modern limitations thereon' (1919-1920) 14 *Illinois LR* 96, 116 noted this 100 years ago already, pointing out that little would change in the transmission of wealth intergenerationally if testamentary bequest was abolished.

[83] Parkins 'A hated tax but a fair one' *The Economist* (23 November 2017) notes that all income brackets are hostile to death taxes in Britain and the USA, but the hostility is more acute amongst 'the poor' (a term that is not defined). This is hardly surprising given that taxes have a greater impact on the less wealthy. The Davis Tax Committee *Second Interim Report on Estate Duty for the Minister of Finance* (2016), 18 notes that the middle class (undefined, but the report suggests it refers to deceased estates valued at less than R15 million) in South Africa bears an 'excessive share' of the tax burden, and recommends a significant increase in the taxation of 'high net worth individuals', those whose net asset value exceeds US$1 million. There are, however, only an estimated 40 000 to 60 000 such individuals in South Africa (18). The report also proposes numerous mechanisms to address the pervasive use of trusts to avoid or limit income tax and estate duty liability.

[84] Mill (n65) Bk 2 Ch2 §6.

[85] He acknowledged that improving the land required considerable investment, and that it could take a long time, if not forever, for the investment to yield a profit. As such, owners who had invested in land should be protected, in order to incentivise such investment.

[86] Ibid (n65) Bk 4 Ch5 §3. His proposals included setting a limit on the amount that any individual could inherit, and taxing inheritance at a progressive rate. By contrast he thought that taxing those who produced property at a progressive rate was potentially to punish the 'prudent' for the benefit of the 'prodigal'.

> Nothing is implied in property but the right of each to his (or her) own faculties, to what he can produce by them, … together with his right to give this to any person if he chooses, and the right of that other to receive and enjoy it.[87]

Mill therefore believed that individuals had an absolute right to use and dispose of property that they had produced, provided, once again, that they did not do so in ways that were harmful to others.

> [W]ith property in movables, and in all things the property of labor … the owner's power both of use and of exclusion should be absolute, except where positive evil to others would result from it.[88]

Mill's view was that the right of bequest was thus an inherent part of private property, in so far as it was a right that vested in those who had either produced property, or acquired it by gift or inheritance from someone who had produced it. By contrast, no one enjoyed a concomitant right to inherit, contrary to the principles of civil law.

In formulating his arguments, Mill was distinguishing between intestate and testate succession. He was not claiming that a testator's nominated beneficiaries enjoyed no moral right to inherit. His view was rather that rights to inheritance flowed from bequest, and the only persons who could be said to have a right to inherit were testamentary heirs and legatees. Testate succession was therefore a facet of private property, while intestate succession was not.[89] Mill did not believe that even children, much less any other relative, had an absolute *right* to inherit contrary to the wishes of the testator,[90] and he thought that property should devolve to the state on intestacy if the deceased was only survived by

[87] Ibid Bk 2 Ch2 §6.
[88] Ibid.
[89] Ibid Bk 2 Ch2 §3. I do not consider this appropriate any longer, if it was then, for rules of intestate succession are often premised on the presumed intention of the deceased. The Netherlands has deliberately done so on this basis, in order to make succession easier. See §1.5 fn37 above.
[90] Ibid Bk 2 Ch2 §4. Cf Dyde (tr) *Hegel's Philosophy of Right* (1896) §180. Hegel believed children had a right to inherit 'family property', and was deeply suspicious of testamentary freedom, which he felt led to arbitrary dispositions, as exemplified by the 'eccentricity … folly and whimsicality of bequests' in England.

collateral rather than lineal relatives. Whether any relatives, including children, should inherit at all on intestacy was a political question unrelated to the institution of private property.[91]

Given his belief that property rights could legitimately be limited to prevent a 'positive evil' to others, what would he have considered to be such in the context of succession? In *Principles of Political Economy* his view that no one could claim an inherent right to inherit in the absence of a positive bequest was tempered by his belief that parents had a duty to provide for their children and dependants.[92] The duty was towards both society and children, and it required parents to provide children with such education and opportunities as would give them a proper start in life and enable them to become productive members of society. In *On Liberty* his views regarding a parent's obligation were expressed in even more forceful terms. To fail to provide for a child was to commit a serious harm to both the child and society:

> [T]o bring a child into existence without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind, is a moral crime, both against the unfortunate offspring and against society; …[93]

Mill's view regarding freedom of testation was thus in keeping with his general views regarding personal autonomy — that the individual's autonomy could legitimately be constrained when her choices were harmful.

2.2.3 The morality of testamentary freedom

Quite apart from the fact that freedom of testation is not severable from the freedom to dispose of property while alive, it is nevertheless worth considering why freedom of testation is

[91] Mill (n65) Bk 2 Ch2 §4.
[92] Ibid, §3.
[93] Mill *On Liberty* (n43), 105.

a valuable right.[94] Why should property not devolve according to completely fixed rules of inheritance that pre-determine the identity of heirs?

The answer is partly to be found in the reason freedom of testation first emerged as a principle of law in ancient Rome. It emerged in reaction to the perceived unfairness of the pre-existing 'fixed' rules of succession, in terms of which a *paterfamilias*'s agnatic family or members of his *gens* inherited in preference to his emancipated sons and married daughters.[95] Under the default order of inheritance, his children were his natural heirs only as long as they remained subject to his paternal power. Once they were no longer subject to his paternal power, they lost their right to inherit.

As originally conceived, freedom of testation was thus not understood as an expression of the individual's rights to property or to disinherit family, but was instead understood to be a mechanism through which a testator could make choices that best served the interests of his family.[96] Once freedom of testation emerged, individuals were under a moral duty to exercise their freedom, and the expectation was that they would do so for the benefit of their family.[97]

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[94] For a discussion of its social and economic benefits, see De Waal 'The social and economic foundations of the law of succession' (1997) 8 *Stell LR* 162; Hirsch 'Freedom of testation/freedom of contract' (2001) 95 *Minnesota LR* 2080, 2187, in particular that it incentivises saving. See also Kelly 'Restricting testamentary freedom: ex ante v ex post justifications' (2013) 82(3) *Fordham LR* 1125, 1135. Cf Harding 'Charitable trusts and discrimination: two themes' (2016) 2(1) *Canadian Journal of Comparative and Contemporary* Law 227, who does not consider the right of choice that inheres in testamentary freedom to be valuable in itself. Instead the value of the individual's testamentary choices must be determined by reference to the reasons for and consequences of those choices. Only if the testator's choices are valuable having regard to their 'expressive and teleological aspects' are they deserving of protection (at 241).

[95] Maine *Ancient Law* (1905) 71.

[96] Ibid, 70; Frier & McGinn *A Casebook on Roman Family Law* (2004), 323. Cf Zimmermann and Du Toit, who postulate that it developed to permit a testator to allocate land unequally amongst children, because the ongoing division of land as a result of children's equal entitlement jeopardised the viability of agricultural landholdings, see Zimmerman 'Compulsory Heirship in Roman Law' in Reid, De Waal, Zimmerman (eds) *Exploring the Law of Succession: studies national, historical and comparative* (2007), 29/30; Du Toit 'The impact of social and economic factors on freedom of testation in Roman Law and Roman Dutch Law' (1999) 10 *Stell LR* 232, 233.

[97] Maine (n95) 64, 70. Maine's explanation echoes that of Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549: 'The law of every civilized people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given.'

Freedom of testation was thus intended to promote justice, not injustice. It emerged for the same reason the Courts of Chancery and equitable discretion emerged in 14th century England — to ameliorate the harsh consequences that sometimes flow from the inflexible application of rigid rules.[98]

Freedom of testation is premised on the belief that it is testators who are best placed to share the benefit equitably. It further accepts that it is the testator's conception of what is equitable that is deserving of respect. It recognises that testators may justifiably discriminate between their beneficiaries for any number of reasons: from the strength of their affection, to their desire to express appreciation, to reward or sanction, out of greater concern for the welfare of some, out of a belief that some are better able to provide for themselves.[99] It recognises that most testators' choices are reasonable and defensible.[100] As was said in the oft-quoted judgment of Cockburn CJ in *Banks v Goodfellow*:[101]

> [T]he instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.

Testamentary autonomy acknowledges that testators have a moral right (over the fruits of their own labour at least) to decide who should share in, and derive the benefits of, their property on their death.[102] Their moral right does not derive simply from the fact that they own the property or created the property. It is because individuals have the capacity to

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[98] Brady 'Equity without equity lawyers' 1976 *Acta Juridica* 125.
[99] See Mill (n65) Bk 2 Ch2 §3. See also Hirsch (n94), 2189. For an illustration of the 'stereotypical' case of responsible and attentive siblings versus an indifferent 'wastrel', see *Phillips v James* [2014] NSWCA 4.
[100] Cf De Waal 'The law of succession and the Bill of Rights' para 3G7: 'Experience has shown, however, that the sense of justice, and even the common sense, of the individual testator or testatrix should not be over-rated'.
[101] (1870) LR 5 QB 549.
[102] See also *McCosker v McCosker* [1957] HCA 82 Kitto J [5]: 'But even if I felt sure that I understood the whole situation so well that I could deal with the estate more justly than the testator dealt with it, I should still not feel justified in asserting that when he decided to give the respondent no more than he had already given him, and to leave his estate to members of the family who had been closer to him and to whom he had his own reasons for being generous, he failed to recognise a moral duty which lay upon him.'

make morally responsible choices, and because most testators do make morally responsible choices. Individuals who lack mental capacity, who cannot reason and who are unable to act as moral agents, are in consequence denied the right to dispose of property.[103] A finding of testamentary incapacity implies that the testator was of such unsound mind that she lacked the capacity to make a 'rational, fair and just testament'.[104] To completely deny someone the right to choose to whom to dispose of their property is therefore to deny either that the property is actually their private property or to deny that they had the capacity for morally responsible decision-making at the time they executed their will.

South African law accepts that testamentary freedom is inherently a legal institution that serves the public interest.[105] As such, the 'golden rule' of testate succession is to ascertain, and thereafter implement, the testator's wishes.[106]

> Freedom of testation is considered one of the founding principles of the South African law of testate succession: a South African testator enjoys the freedom to dispose of the assets which form part of his or her estate upon death in any manner (s)he deems fit.[107]

[103] See Wills Act 7 of 1953, s4. Roman Law used the device of *querela inofficiosi testamenti* to void the terms of a testator's will when he disinherited his natural (intestate) heirs. The supposition was that a testator who behaved so contrary to his duty 'must have been mentally deranged', see Paulus 'Changes in the power structure in the family in the late Roman Empire' (1995) 70(5) *Chicago-Kent LR* 1505.

[104] *Banks v Goodfellow* (n101). Quoted with approval in in *M v Hugo* (1462/2012) [2013] ZAFSHC (28 November 2013). Leslie 'The myth of testamentary freedom' (1996) 38 *Arizona LR* 325 describes how courts in the USA are more likely to find that a testator lacked mental capacity by reason of undue influence when the testator's choices are considered to be incompatible with their moral obligation to family. Some jurisdictions, of which South Africa is not one, permit courts to authorise so-called 'statutory wills' for individuals who lack mental capacity, see further Harding 'The rise of statutory wills and the limits of best interests decision-making in inheritance' (2015) 78 *Modern LR* 945.

[105] *Bydawell v Chapman* 1953 (3) SA 514 (A): 'Roman Dutch law recognises as a matter of public interest, transcending the private interests of beneficiaries under a will, that effect should be given to the wishes of a testator, D. 29.3.5, or, as *Voet* states the proposition, 35.1.12, the 'interests' of the testator and the public interest demand that effect should be given to a testator's last wishes'. See also *Lawen Estate v Nova Scotia* (n6) [42] and authorities cited there.

[106] *Robertson v Robertson's Executors* 1914 AD 503.

[107] Du Toit 'The constitutionally bound dead hand? the impact of the constitutional rights and principles on freedom of testation in South African Law' (2001) 12 *Stell LR* 222, 224. See further Du Toit 'The impact of social and economic factors on freedom of testation (n96); Du Toit 'The limits imposed upon freedom of testation by the *boni mores*: lessons from common law and civil (continental) legal systems' (2000) 11 *Stell LR* 358.

Today, freedom of testation is not only a fundamental pillar of private law but is a constitutionally protected right.[108] It is, moreover, a right that is protected by both the right to property and the right to dignity.[109]

> The view that s 25 protects a person's right to dispose of their assets as they wish, upon their death, …. is, to my mind, well held. For if the contrary were to obtain, a person's death would mean that the courts, and the state, would be able to infringe a person's property rights after he or she has passed away, unbounded by the strictures which obtain while that person is still alive. It would allow the state, in a way, to benefit from someone's death.[110] … [N]ot to give due recognition to freedom of testation will, to my mind, also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away.[111]

Inherent in freedom of testation is that a testator has the right to select beneficiaries. This necessarily implies that testators have the right to choose whom to benefit and whom to exclude.[112] The decision of whom to include or exclude is the essence of testamentary autonomy.[113] As stated by the SCA in *Harvey v Crawford*:

> Freedom of testation, which is an important facet of the right to dignity, protects an individual's right not only to unconditionally dispose of her property, but also to choose her beneficiaries as she wishes. … No beneficiary has a fundamental right to benefit. We are concerned here with free gifts to which no person has any entitlement. Benefiting a class necessarily entails excluding persons who do not belong to that class.[114]

2.3 LIMITATIONS ON THE RIGHT TO PROPERTY AND FREEDOM OF TESTATION

If the right to property includes the freedom to dispose of property, and the essence of testamentary freedom is the right to select to whom to dispose of one's property, under what

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[108] See *BOE Trust* (n5); *Harvey v Crawford* (n5).
[109] Ibid. See also *Lawen Estate v Nova Scotia* (n6).
[110] *BOE Trust* (n5) [26].
[111] Ibid [27].
[112] Oughton *Tyler's Family Provision* (2ed) (1984): 'Testamentary freedom …. involves the principle of disherison'. See also Beckert *Inherited Wealth* (2008).
[113] *Harper v Crawford* (n74)[31]: 'Perhaps one needs to point out that, ordinarily, the process of selection of beneficiaries and the inevitable exclusion of other hopefuls is unavoidable.'
[114] *Harvey v Crawford* (n5) [64]. The issue before the court was whether the words 'children', 'issue', 'descendant' in a testamentary trust included adopted children. The court held not, having regard to both the meaning of the words when the trust was created, and the legislation in force at that time. It further held that their exclusion was not unfair discrimination or contrary to public policy. The decision is currently on appeal to the CC. See also *Cohen v Roetz* 1992 (1) SA 629 (AD).

circumstances could an owner's exercise of that right be sufficiently harmful to warrant limitation? This is the key question, for no reasonable person could reasonably contest that an individual's freedom of property and testation may not legitimately be limited to *some* extent, to protect *some* family or dependants, in *some* circumstances. This is, however, just an abstract claim. The law needs content, and the particular questions are, which family or dependants, to what extent, in what circumstances and in what manner? The answer is when, to use Roscoe Pound's turn of phrase, the testator had not made proper provision for the 'natural objects of her bounty'.[115] But this begs the further question – who today are the natural objects of the testator's bounty such that excluding them from a Will, or failing to make additional provision for them, is 'harmful'?[116]

Civil law countries have answered these questions rather more clearly and simply than their common law counterparts. They continue to follow the Roman Law tradition that balances individual freedom and familial obligation by placing absolute limits on the testator's ability to disinherit family. A testator's intestate heirs are guaranteed a 'compulsory portion' of the estate, which is typically half what they would have received on intestacy.[117] Around half the estate is therefore 'reserved' for family, while the other half is 'reserved' for the testator to exercise her freedom to bequeath her property in accordance with her personal wishes. The

[115] Pound (n53), 997.
[116] See also *Lodin v Lodin* [2017] NSWCA 327, which confirmed that the wide circle of eligible applicants in the family provision legislation distinguished between those who were the natural objects of the deceased's affection (spouses, children, partners) and those who were not (grandchildren, former spouses, financial dependant).
[117] This is the case in for eg Austria, Belgium, Croatia, Estonia, Finland, Germany and Sweden. Cf Czechoslovakia: ¾ if a minor, ¼ if a major child; Denmark: 1/8 estate for spouse, and 1/8 estate for all children, but only up to designated statutory maximum if deceased so stipulates – deceased may dispose of ¾ by will; France: up to ¾ deceased estate reserved if three children, while ¼ reserved for spouse but only if no descendants. See Ruggeri, Kunda, Winkler (eds) *Family Law and Succession in EU Member States* (2019).

protected heirs' entitlement to inherit is not dependent on need.[118] It derives exclusively from the familial relationship between the parties and the concept of familial obligation. [119]

Although the civil law approach appears to strike a reasonable accommodation between the interests of the individual, as a member of a family, and that of the individual's closest family members, those who champion greater freedom of testation think otherwise. The argument has, for example, been made that testators should be free to disinherit their adult children who are not in financial need.[120] This argument failed in the German Constitutional Court.[121] The court held that the compulsory portion is a manifestation of family solidarity and intergenerational responsibility:

> The structural characteristics of children's participation in the estate are an expression of family solidarity, which exists fundamentally and indissolvably between the testator and his or her children. Article 6.1 of the Basic Law protects this relationship between the testator and his or her children as a life-long community within which both parents and children are not only entitled, but indeed obliged, to take on both substantive and personal responsibility for one another. The right to a compulsory portion – like the right to maintenance – is linked to the family-law relationships between the testator and his or her children, and transfers this solidarity between the generations, which as a rule is founded on descent and in most cases cemented by family co-habitation, into the area of the law of inheritance.[122]

The family entitled to share in the compulsory portion are usually children and spouses and failing them, parents.[123] Almost all civilian countries extend the spousal entitlement to registered civil partners, but not to unregistered cohabiting partners.[124] The circle of eligible beneficiaries is necessarily small. If it were larger, either the entitlement of existing

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[118] Some also permit maintenance claims against the deceased estate, see eg: Austria - spouse (ibid, 17); Belgium – spouse, children, parents (ibid, 40). German law allows a claim by children for their educational costs against the surviving spouse, who is not also their parent, if the spouse received an additional share of the deceased's accrual, see Bürgerliches Gestzbuch [BGB] (German Civil Code), s1371(4).

[119] Civil law countries permit disinheritance for good cause. See the national entries in Ruggeri *Family Law and Succession in EU Member States* (n117).

[120] BVerfG 1 BvR 1644/00 & 1 BvR 188/03 (19 April 2005) [4].

[121] Ibid. Article 14(1) of the German Basic Law protects both the right to property, of which the right of bequest forms part, and the right to inheritance.

[122] Ibid [73].

[123] See Ruggeri (n117). The marital property regime of the spouses, coupled with the number of children, may also affect the spouse and children's intestate share and compulsory portion, as is the case in Germany (ibid, Germany, para 3.2.4).

[124] Ibid.

beneficiaries would need to be reduced, or the testator's residual freedom would largely be extinguished.

In civil law countries it is the legislature that has identified, and ranked, the claims of family members, and pre-determined the proportion of the estate to which they are entitled. The civil law system has the benefit of clarity and simplicity, while simultaneously reducing the opportunity for estate-related conflict by surviving relatives.[125] It balances the competing interests: autonomy and respect for the individual's moral preferences, and respect for the relationships entered into, or created by, the testator.[126]

Common law countries reject the compulsory portion approach on the basis that it constitutes too great an intrusion into freedom of testation.[127] Instead, eligible persons, which typically encompass more persons than is the case in civil law countries, have a statutory right to apply for maintenance from a deceased estate, and the decision as to whether the testator's choices should be set aside and maintenance awarded is left to the discretion of judges.[128] The identity of eligible applicants varies considerably amongst jurisdictions. Originally, in keeping with the civil law approach, beneficiaries were restricted to spouses (in the narrow sense, meaning married opposite-sex partners) and children.[129] Today, however, there is considerable variation between jurisdictions. Some still restrict eligible applicants to

[125] Cf the disputed will of the French singer Johnny Hallyday, who disinherited his two biological children contrary to French law, but who was resident in the United States, which permits disinheritance. See Chazan 'France claims jurisdiction in Hallyday inheritance dispute based on rocker's Instagram posts' *The Telegraph* (2 June 2019).

[126] See also Glendon 'Fixed rules and discretion in contemporary family law and succession law' (1985-1986) 60 *Tulane LR* 1165.

[127] See eg Atherton 'New Zealand's Testator's Family Maintenance Act of 1900 – the Stouts, the Women's Movement and Political Compromise' (1990) 7(2) *Otago LR* 202 (re New Zealand); Lehmann 'Testamentary freedom versus testamentary duty: in search of a better balance' 2014 *Acta Juridica* 9 (re England). See also SALC (Project 22) *Report on the introduction of a legitimate portion or the granting of a right to maintenance to the surviving* spouse (1987). Cf the USA, which, although a common law country, entitles spouses in non-community of property states to an elective share of the deceased's estate if they are not married in community of property. See Brashier (n8).

[128] See §7.3 below.

[129] See eg the Testator's Family Maintenance Act 1900 (New Zealand); Inheritance (Family Provision) Act 1938 (England).

spouses,[130] (including registered civil partners) and children.[131] Others permit claims by a far wider circle of potential applicants, including unregistered domestic partners,[132] grandchildren,[133] parents,[134] siblings,[135] stepchildren,[136] financial dependants,[137] persons in a close personal relationship[138] and even caregivers.[139]

The problem with an overly expansive circle of beneficiaries is that the broader the eligible circle, the less compelling the historic rationale for limiting freedom of testation becomes.[140] Discretionary limitations on testamentary freedom were originally justified on the basis that the individual's property rights had to give way to the individual's duty to family members. The paradigmatic case was thus that of a selfish testator who disinherited his spouse and children in order to prefer his 'mistress'.[141] Today, however, some jurisdictions include the very persons spouses and children were supposed to be protected against as eligible applicants.

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[130] Malawi still limits claimants to spouses in the strict sense (Malawi's Deceased Estates (Wills, Inheritance and Protection) Act 14 of 2011, definition of 'immediate family'), and does not recognise civil partnerships.

[131] Jurisdictions that permit claims by spouses and registered partners, but not unregistered cohabiting partners, include: Ontario – Succession Law Reform Act RSO 1990, s57 rtw Family Law Act RSO 1990, s1 (the definition of spouse does, however, include putative spouses); Nova Scotia – Testators' Family Maintenance Act RSNS 1989, s2 definition of 'dependant'; see also *Le Blanc v Cushing* 2019 NSSC 360 . Some Canadian provinces limit children to those who are not yet self-supporting or who cannot reasonably be expected to be self-supporting, such as minor or disabled children or those still in full-time education (see eg Alberta - Wills & Succession Act SA 2010, s72(b)(iii, iv, v).

[132] Many require a minimum period of cohabitation. *Two years*: Australian Capital Territory – Family Provision Act 1969, s7(9); England - Inheritance (Provision for Family and Dependants) Act 1975, s 1(1)(a) (EW); British Columbia - Wills, Estates and Succession Act SBC 2009, s2(1); Saskatchewan - Dependants' Relief Act SS 1996, s2(1). *Three years*: Alberta - Wills and Succession Act SA 2010, s72 rtw Adult Interdependent Relationships Act SA 2002, s3; New Zealand - Family Protection Act 1955, s4A rtw Property (Relationships) Act 1976. In some jurisdictions, courts can make provision for a partner in relationships of shorter duration if a child was born of the relationship or the survivor had made a substantial contribution to the other's estate.

[133] Eg Alberta (supra); Victoria - Administration and Probate Act 1958, s90; South Australia - Inheritance (Family Provision) Act 1972; Western Australia - Family Provision Act 1972, s7; Northern Territory - Family Provision Act 1974, s7; New South Wales - Succession Act 2006, s57.

[134] Eg Ontario (n131); Northern Territory (supra); South Australia (supra); Western Australia (supra).

[135] Eg Ontario (n131); Northern Territory (n133).

[136] England (n132); New Zealand (n132); Northern Territory (n133) - if an existing financial dependant; New South Wales (n133) - (if ever a member of deceased's household and ever financially dependent); Victoria (n133); Western Australia (n133).

[137] England (n132); New South Wales (n133).

[138] New South Wales (n133).

[139] England (n132); New South Wales (n133).

[140] The expansion has generated concern amongst some commentators in common law jurisdictions, see Croucher 'How free is free: testamentary freedom and the battle between family and property' (2012) 37 *Australian Journal of Legal Philosophy* 9, esp 18ff.

[141] *Tyler's Family Provision* (n112), 1. See also the parliamentary debates that preceded the adoption of family provision legislation in England, esp those of Miss Rathbone in Hansard *House of Commons*

The real tension and conflicts that inhere in systems that permit discretionary limitations on freedom of testation are not between property and family, or between right and obligation, or between the testator and disappointed claimant. They are between family and family, family and friends, friends and friends. They are between persons who all had close personal relationships with the testator. The problem is thus not that the testator has prioritised property over family, but that she has prioritised some within the family, in the extended sense,[142] over others.

The contemporary challenge of determining when a testator's failure to provide any or better provision for an eligible applicant is harmful is thus considerably greater than was the case when discretionary limitations on testamentary freedom were first introduced.

The broader the circle of eligible persons, the greater the likelihood that their interests and rights will come into conflict and the greater the possibility that the testator's testamentary choices could be wholly overridden when necessary to make provision for one or more eligible beneficiaries. Equally, the broader the circle, the less likely it is that there will be general agreement within the community that the individual's failure to make better provision for one or more eligible dependants was indisputably harmful.

2.3.1 Indisputably harmful testamentary choices

Applying Mill's principle of harm, a testator's failure to make better provision for a beneficiary would be harmful when it is unjust.[143] When will a testator's choices be unjust? When, in accordance with community perceptions of right and wrong, the testator owed a specific

Debates 20 February 1931 vol 248 cols 1635-1724 ; 27 April 1934 vol 288 cols 2015-2098 and Sir J Withers in 22 January 1937 vol 319 cols 491-544.

[142] For convenience I am using the term 'family' here to refer to all those within the circle of eligible beneficiaries. Much has been written on the changing nature of 'family' over the past decades. See eg Clark 'Families and domestic partnerships' (2002) 119(3) *SALJ* 634; Sloth-Nielsen & Van Heerden 'The constitutional family': developments in South African child and family law 2003–2013' (2014) 28 (1) *International Journal of Law, Policy and the Family* 100; Glendon 'The new family and the new property' (1978-1979) 53 *Tulane LR* 697.

[143] Mill *Utilitarianism* (1879) Ch 5.

person a legal or moral duty of support entitling that person to support *as of right*. It is not enough that the testator owed an 'imperfect' obligation of 'beneficence' to the person, or that providing support will be socially expedient. It must be a 'perfect' obligation, one which creates an absolute right to support.

> It seems to me that this feature in the case—a right in some person, correlative to the moral obligation—constitutes the specific difference between justice, and generosity or beneficence. Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right. … Justice is a name for certain classes of moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life; and the notion which we have found to be of the essence of the idea of justice, that of a right residing in an individual, implies and testifies to this more binding obligation.[144]

How, however, do we reliably distinguish between choices that are unjust and those that are merely inexpedient? Mill's view was that the former provokes such a sense of moral outrage that we decry the conduct and consider it deserving of punishment.[145] Mill identified five forms of conduct that were, by 'universal or widely spread opinion', characterised as 'Just or Unjust': we behave unjustly when we violate someone's legal rights, unless the person had forfeited the right or unless they should never have been given the right in the first place, in which case the law is a bad law that should be changed; when we withhold 'from any person that to which he has a moral right'; when we fail to give someone a benefit that they 'deserve', or give them one that they do not 'deserve'; when we fail to fulfil an express or tacit promise, or a legitimate expectation that we created by our conduct towards them;[146] when we are inappropriately 'partial', favouring or preferring one person over another in 'matters in which favour and preference do not properly apply'.[147]

Mill's understanding of justice is similar to that of the CC and SCA, which use the concepts of '*boni mores*' and 'public policy' as the standards against which to test the validity of interference in contractual and testamentary autonomy. Courts may intervene only when

[144] At 29, 34/43 (Project Gutenberg page numbering).
[145] The sanction need not be legal. It can consist of community disapproval. See also Waldron 'Rights in conflict' (1989) 99(3) *Ethics* 503, 504.
[146] English law permits interference with a testator's wishes in such circumstances, relying on the principle of 'proprietary estoppel'. See eg *Thorner v Major* [2009] 1 WLR 776.
[147] Mill *Utilitarianism* (n143), 25/43.

the testator's wishes are contrary to law, public policy or the Constitution.[148] The relevant legal limits are the testator's maintenance obligations towards a spouse and child.[149] When, however, would upholding the testator's freedom of choice be contrary to public policy?

As explained by the CC in *Barkhuizen v Napier*:

> Public policy represents *the legal convictions of the community*; it represents those values that are held most dear by the society. … Public policy imports the notions of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair. Public policy, it should be recalled "is the general sense of justice of the community, the *boni mores*, manifested in public opinion".[150]

The SCA has, however, long cautioned against importing general notions of 'fairness' into the law of contract.[151] Its concern is that fairness is a 'slippery concept', as evidenced by the diversity in even judges' views regarding whether a particular contract term is fair.[152] In the SCA's view, a standard that requires only that a particular provision be judged 'unfair' before it can be set aside will necessarily lead to inconsistent subjective decision-making.[153] As was stated in *Bredenkamp v SA Standard Bank*:

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[148] *Harper v Crawford* (n74); *Harvey v Crawford* (n5). See also *King v De Jager* 2017 (6) SA 527 (WCC). The content of public policy is informed by the Constitution. There is thus no bright line between conduct that is contrary to public policy and that which is unconstitutional, and courts could in many cases decide the matter under either head. When the law in issue is the common law, and the dispute between private persons, courts prefer to ground their decision on public policy, as interpreted through the lens of the Constitution, rather than on a direct violation of the Constitution. See also *Spence v BMO Trust Company* 2016 ONCA 196.

[149] See §1.5 above.

[150] 2007 (5) SA 323 (CC) [28, 73] (emphasis added).

[151] See Hutchison 'From bona fides to ubuntu: the quest for fairness in the South African law of contract' 2019 *Acta Juridica* 99. See also *Wingaardt v Grobler* [2015] JOL 34533 (ECG), in which the HC cautioned against conflating unreasonable and wrongful behaviour.

[152] *Bredenkamp v South African Standard Bank Ltd* 2010 (4) SA 468 (SCA) [74]. The CC's view on the appropriateness of a general standard of fairness is more equivocal. Some CC judges have emphasised that fairness is a core constitutional concept, while others are sceptical of its value as a general standard against which to judge the lawfulness of conduct. See eg the different views in the minority judgments of Cameron [100] against those of Van der Westhuizen [157-160] in *SAPS v Solidarity* (n16). In arguing that fairness is a core constitutional principle, Cameron cites O'Regan in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews* 2009 (6) BCLR 527 (CC). In this case, however, O'Regan was specifically discussing procedural rather than substantive fairness. Moreover, Cameron's defence of fairness is predicated on the fact that it is no more open-ended than the norms of 'reasonableness, proportionality, wrongfulness, negligence and public policy', and that its substantive content will also 'crystallise over time' through judicial precedent, which is an implicit acknowledgment that its core content has not yet crystallised.

[153] *Potgieter v Potgieter* 2012 (1) 637 SA (SCA)[34]: 'In addition, the reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty. That much has been illustrated by past

> A constitutional principle that tends to be overlooked, when generalised resort to constitutional values is made, is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law.[154]

It is for this reason that the SCA has only been willing to declare contract terms contrary to public policy when they are so manifestly unfair that enforcing them would be 'unconscionable'.[155]

> One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness... In the words of Lord Atkin in *Fender v St John-Mildmay:* "the doctrine should only be invoked in clear cases in which the harm … is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds."[156]

In *Barkhuizen*, the CC refused to strike out a contract term because it was not 'so unreasonable that its unfairness is manifest and therefore its enforcement … contrary to public policy'.[157]

More recently, in *Beadica 231 CC v Trustees of the Oregon Trust,* the CC reiterated that courts should use their power to invalidate contract terms 'sparingly, and only in the clearest of cases'.[158] A court is only permitted to intervene when the term, or its enforcement, is so unreasonable as to be contrary to public policy. It is not permitted to intervene merely because the term offends the judge's subjective sense of what is fair, reasonable or just, for

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experience. Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. Or, as Van den Heever JA put it in *Preller v Jordaan* 1956 (1) SA 483 (A), 500, if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge.' See also Fuller 'The form and limits of adjudication' (1978) 92 *Harvard LR* 353, 373: 'To demand of a court that it simply resolve such issues "fairly" is to ask the court to decide something about which the parties themselves could not agree and for the determination of which no standard exists.'

[154] *Bredenkamp* (n152) [37].

[155] *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A). Courts in England also ask whether a testator's failure to honour a promise was 'unconscionable', in the context of claims based on proprietary estoppel. See eg *Suggitt v Suggitt* [2011] EWHC 903 (Ch); *Ottey v Grundy* [2003] EWCA Civ 1176.

[156] *Sasfin* (n155), 9. The deleted phrase in the quotation is 'to the public'. In *Beadica* (n39) both the majority and minority emphasised that it is not a requirement in our law that there be 'harm to the public' [82] & [158].

[157] *Barkhuizen* (n34) [67].

[158] [2020] ZACC 13.

that would make the enforceability of contracts dependent on the 'idiosyncratic inferences of a few judicial minds'.[159]

In the context of testamentary freedom, courts already have the power to intervene when a testator fails to fulfil her legal obligations towards her spouse or child. Courts may, in addition, intervene when a testator's choices are contrary to public policy.[160] Testamentary choices that seek to give effect to the testator's legal *obligations* cannot, however, offend public policy. Public policy, which speaks to the legal convictions of the community, requires that maintenance obligations be enforced.[161] If, in the circumstances, enforcing those choices would nevertheless be 'manifestly unjust', it is the law that should be changed, until which time the testator's choices must be enforced.[162]

Public policy in the context of testamentary freedom is thus most relevant to the testator's moral obligations. A testator's failure to include a beneficiary in their will, or to make better provision for them, may be a breach of the testator's moral duty towards that person. This alone would not be reason enough to intervene with the testator's wishes. Intervention should be permissible only when the testator's failure is so manifestly unjust in the circumstances that all reasonable people would agree that it is indisputably harmful.

2.3.2 Discretionary limitations of testamentary freedom

[159] Ibid [81].
[160] See eg *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C).
[161] See *ST v CT* (5) SA 479 (SCA), in which the court declared a term of an ante-nuptial contract, in which the wife waived any claim to future maintenance in the event of divorce, contrary to public policy.
[162] Mill *Utilitarianism* (n143). See O'Regan J in *Mazibuko* (n35) [73] that when a law exists, a claim must either be founded on the law or the law must be shown to be unconstitutional. An applicant cannot construct a claim that simply seeks to avoid the law. See also *Du Toit v Greyling* (78173/2014) [2016] ZAGPPHC 892 (23 September 2016).

The same principles should inform the exercise of discretionary powers by judicial or administrative officers who have been expressly authorised to override testators' wishes.[163] Before overriding a testator's autonomous choices, a discretionary decision-maker should be satisfied both that the deceased owed a particular beneficiary a legal or moral obligation,[164] *and* that the obligation is so pressing that it justifies overriding the deceased's selection of a different beneficiary.[165] The second step is a vital part of the enquiry. The interests of all affected parties must be part of the enquiry into whether the testator's wishes are manifestly unjust.[166]

What, however, is the source of the testator's moral obligation? Is it merely that she was in a relationship with the person, or related to the person, or that she had displayed acts of kindness and generosity towards that person? Or is something more required? Must there be some moral blameworthiness on her part for failing to make better provision, because, for example, she by her conduct caused or contributed to the financial need, or because she expressly or tacitly promised, or created a legitimate expectation, that she would continue providing support even after her death?

I suggest that something more is required. The current legal convictions of the community do not place a general duty on a testator to make posthumous provision for anyone other than a needy spouse or child.[167] There is certainly no community consensus that a testator must in

[163] Canadian courts have similarly emphasised that a court may only interfere with a testator's choices to correct a 'manifest wrong'. See eg *Garrett v Zwicker* 1976 CanLII 1981 (NS CA), 343; *Lawen Estate v Nova Scotia* (n6) [107].
[164] See also *Tyler's Family Provision* (n112), 41 who argues that the purpose of family provision should be to extend testators' *inter vivos* maintenance obligations after death. However, he also suggests that in exceptional circumstances it may be appropriate to include other persons.
[165] Cf Singer (n36), who believes that '[w]e should encourage people to rely on relationships of mutual dependence by making it possible for everyone to form such relationships and by protecting those who are most vulnerable when those relationships end.' Why, however, should 'vulnerability' create an entitlement to support, if the vulnerability is not attributable to the relationship or deceased partner?
[166] For a discussion on the need to balance competing interests, see *Port Elizabeth Municipality v Various Occupiers* (n39); *Weare v Ndebele* 2009 (1) SA 600 (CC).
[167] See MSSA 27 of 1990 and *Carelse v Estate De Vries* (1906) 23 SC 532.

every case make provision for a non-needy child[168] or even a needy cohabiting partner,[169] parent, sibling, grandchild or financial dependant.[170]

The existence of any such *general* moral duty, the perception that the individual's failure to make provision for such person whenever able to do so, will be one that is 'intractably disputed'.[171] For the duty to exist, it must be one that derives from the particular history and circumstances of the relationship between the testator and the eligible beneficiary. It will be specific to the individual and that person, and cannot be generalised across all such

[168] Many jurisdictions, including South Africa, do not permit claims by adult children who are not in financial need. See also *Lawen Estate v Nova Scotia* (n6), which held that legislation permitting a non-needy adult child to claim provision from a parent's estate is an unconstitutional infringement of the individual's right to liberty under the Canadian Charter of Rights and Freedoms.

[169] See eg *Volks v Robinson* 2005 (5) BCLR 446 (CC). See also *Quebec (Attorney General) v A* 2013 SCC 5; *Nova Scotia (Attorney General) v Walsh* 2002 SCC 83; *Le Blanc v Cushing* (n131), which similarly held that laws that did not extend the consequences of marriage to unmarried partners were not discriminatory. Cohabiting partners generally have no right to inherit on intestacy in civil law countries, see eg Austria; Belgium; Czech; Estonia; Finland, Germany, Greece, Hungary, Sweden, United Kingdom – all restrict the right to married or registered partners, not unregistered cohabiting partners. In some countries, cohabitants can inherit on intestacy provided there are no other intestate heirs, such as in Austria and Croatia, so they are only inheriting in preference to the state. See Ruggeri (n117).

[170] Few jurisdictions recognise duties of support towards siblings. A greater number allow claims by parents, but their entitlement is increasingly controversial. British Columbia for eg repealed its parental support obligation in 2016, although its Law Institute had recommended that it be done in 2007 already. See British Columbia Law Institute *Report on the parental support obligation in Section 90 of the Family Relations Act* (2007). Van Houtte & Breda 'Maintenance of the aged by their adult children: the family as a residual agency in the solution of poverty in Belgium' (1977-1978) 12 *Law & Society Review* 645 argued that children's duty of support should be abolished in Belgium, but it remains law. Most European countries impose duties of support on children. Those that do not include Finland, Hungary, Ireland, Netherlands, Norway, Romania, Sweden and the United Kingdom, see Herlofson et al 'Intergenerational family responsibility and solidarity in Europe' Norwegian Social Research (Nova) (April 2011). Numerous US states have repealed children's statutory duty of support, and its continued existence in other jurisdictions is controversial, particularly when it permits parents' creditors to claim payment of maintenance-related costs, like healthcare, from adult children. See Pearson 'Filial support laws in the modern era: domestic and international comparison of enforcement practices for laws requiring adult children to support parents' (2013) 20(2) *The Elder LJ* 269; *Health Care & Retirement Corporation of America v Pittas* Pa Super Ct No 536 EDA 2011.

[171] The majority decision in *Volks v Robinson* (n169) has been roundly criticised by academics, see the minority judgment of Froneman J in *Laubscher v Duplan* 2017 (4) BCLR 415 (CC), esp fn74, detailing some of the critical commentary. Woolman & Botha 'Limitations' in *Constitutional Law of South Africa* 2ed (2018) at 34.8(e) decried the judgment as 'grounded both in traditional mores and rather outré metaphysical views about 'individual freedom'. Meyerson similarly criticised its 'moralistic disapproval' of unmarried partnerships and characterised its treatment of unmarried partners as 'second-class citizens and less worthy of respect', see 'Who's in and who's out: inclusion and exclusion in the family law jurisprudence of the Constitutional Court of South Africa 2010 (3) *Constitutional Court Review* 295, 310. This is the same Meyerson who emphasised that all reasonable people must agree that conduct is indisputably harmful before limitation of an individual's fundamental rights is permissible. There is, however, clearly considerable diversity of opinion globally and within South African society, as reflected in the views of the judiciary and the legislature, even if not within academia. The legislature has yet to adopt the recommendations of the Law Commission proposing the adoption of legislation that would confer many of the legal consequences of marriage on domestic partners (see SALRC (Project 118) *Report on Domestic Partnerships* (2006).

relationships.[172] Only if the testator's selection of her beneficiaries, or apportionment of her estate amongst them, provokes such a sense of moral outrage that her choices will readily be described as manifestly unjust by all reasonable people,[173] will it be reasonable and justifiable to interfere with those choices.[174]

What, however, if the individual owes obligations to more than one person, in circumstances in which they cannot all be fulfilled? When there is a conflict between legal rights and moral rights, the former must surely trump the latter. To grant a decision-maker the discretion to disregard the testator's legal obligations and to instead prioritise the testator's moral obligations or social obligations as and when the decision-maker considers it equitable to do so, is contrary to the rule of law.[175]

But what if the conflict is only between legal and other legal obligations or between moral and moral obligations? On what basis should priority be given to one legal or moral obligation over the other? These questions do not ask why an individual should have the right to support any person. They do, and should, have the right to do so. The question is why they should be denied the right to do so. In other words, why their right to prefer one should be trumped by their obligation towards another. There is no clear answer to this problem.

Mill acknowledged that the 'knotty' problem of conflicting obligations was inevitable.

> There exists no moral system under which there do not arise unequivocal cases of conflicting obligation. These are the real difficulties, the knotty points both in the theory of ethics, and in the conscientious guidance of personal conduct.[176]

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[172] See *Port Elizabeth Municipality v Various Occupiers* (n39) [23], in which the CC held that courts deciding on the equitability of an eviction order were required to 'balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.'
[173] See *Lawen Estate v Nova Scotia* (n6) & Meyerson (n45).
[174] See eg *David v Beals Estate* 2015 NSSC 288.
[175] See *Beadica* (n39) [81] 'The rule of law requires that law be clear and ascertainable.' See also Woolman & Botha 'Limitations' (n171) para 34.7: 'Laws may not grant officials largely unfettered discretion to use their power as they wish'.
[176] *Utilitarianism* (n143), 15/43.

Mill's theory of utilitarianism, which is quite distinct from that of Jeremy Bentham and the conventional understanding of the term,[177] posits that each person should receive what they 'deserve', that the individual's 'duty [is] to do to each according to his deserts'.[178] Justice requires that we return 'good for good' and 'evil for evil', and that we treat all 'equally well … who deserve equally well of us'.[179] The return should therefore be commensurate with the general contribution that the person made to the individual's well-being, or with the express or tacit promises made to that person. To commit a 'breach of friendship or a breach of promise' by disappointing 'expectation' ranked high on the scale of 'human evils and wrongs'.[180] To give to each his just deserts was the 'highest abstract standard of social and distributive justice'.[181] To wrongfully deprive someone of that which is due to them and which they had a reasonable expectation of receiving, Mill considered to be amongst the 'most marked cases of injustice'.[182]

The only way to resolve the problem of conflicting duties is thus by ranking the individual's relationships having regard to their nature, strength, depth, duration, contribution to the individual's well-being and the like. In the context of testamentary freedom, the need to engage in such ranking should only arise once it has already been established that the individual has failed to fulfil a moral obligation of support, and the question that then arises is whether the circumstances are such as to require that the testator's distributive choices be overridden.

In order to justify overriding a testator's wishes, there must have been a positive obligation on the testator to make a different choice *and* it must be one that is so compelling that the cost of satisfying that obligation effectively be borne by an innocent third party, viz the testator's

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[177] Which Van der Westhuizen describes as 'blunt utilitarianism' in *SAPS v Solidarity* (n16) [173], meaning the greatest good for the greatest number. See further 'John Stuart Mill: Ethics' in *Internet Encyclopedia of Philosophy* <https://www.iep.utm.edu/mill-eth/>.
[178] *Utilitarianism* (n143), 36/43
[179] Ibid.
[180] Ibid 35/43. See also Raz 'Liberating duties' (1989) 8(1) *Law and Philosophy* 3, 19, who agrees that friendship creates duties.
[181] Mill *Utilitarianism* (n143) 36/43.
[182] Ibid 35/43.

nominated (or intestate) beneficiary.[183] A testator can surely only be in breach of a moral duty to make (better) provision for one beneficiary if the testator's provision for other beneficiaries was unjustifiably generous. Setting aside a testator's choices, when those choices are reasonable and justifiable, is to commit an injustice against both the testator and the testator's chosen beneficiaries.

If the relationships and the obligations that arise from them are equally compelling, and the circumstances such that they cannot all be satisfied, hard choices must be made.[184] If hard choices must inevitably be made, and there is nothing that objectively makes one choice obviously 'just' and the other 'unjust', it is surely the individual's preference and conception of justice that should prevail.[185]

The fact that a person, who is not amongst the deceased's chosen beneficiaries, has no right to inherit is a reasonable justification for denying that person a share in the deceased's property.[186] The fact that a person, who is amongst the deceased's chosen beneficiaries, may also have no right to inherit is not a reasonable justification for denying them their intended share of the deceased's property. A nominated beneficiary may well have no right to inherit, but they do have a legitimate expectation that the deceased's wishes will be upheld.

As Mill wrote regarding a parent's *right* to make better provision for a child than required by her moral obligation towards that child:

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[183] See *David v Beals Estate* (n174).
[184] See Waldron 'Rights in conflict' (n145) who illustrates this point using the example of two persons drowning, only one of whom can be rescued. The problem of competing claims is increasingly coming to the fore as individuals enter into multiple overlapping relationships. See eg *Mayelane v Ngwenyama* 2013 (8) BCLR 918 (CC), an estate dispute involving a surviving spouse under customary law and a second spouse of a putative marriage. The CC prioritised the surviving spouse's claim to the exclusion of the putative spouse.
[185] Du Bois (n14), 141: 'The reason for this is that, when no right answer is available, it is always arbitrary to insist on one's own particular view and therefore a denial of the "innate equality" which Kant sees as an aspect of "innate freedom".'
[186] *Harvey v Crawford* (n5); *King v De Jager* (n148).

> I would not, however, be supposed to recommend that parents should never do more for their children than what, merely as children, they have a moral right to. In some cases it is imperative, in many laudable, and in all allowable, to do much more. For this, however, the means are afforded by the liberty of bequest. It is due, not to the children but to the parents, that they should have the power of showing marks of affection, of requiting services and sacrifices, and of bestowing their wealth according to their own preferences, or their own judgment of fitness.[187]

These arguments apply with equal force to any person with whom the individual enjoyed a close personal relationship.

2.4 CONCLUSION

This thesis is not a critique of the existence of limitations on testamentary freedom. It is simply a critique of wide and unguided discretionary powers that permit third parties to override an individual's testamentary autonomy in circumstances in which the individual's choices are not manifestly unjust. It argues only that greater respect be accorded to the individual's freedom of choice, and that her choices be overridden only when they are indisputably harmful. Although the grant of wide discretionary powers is intended to ensure that individualised justice is achieved, the wider the discretion the greater the risk that the decision-maker's idiosyncratic values and conceptions of harm will determine the outcome.[188]

Eighty years ago, Roscoe Pound expressed his concern at the state's increasing encroachment on individuals' rights to liberty and property, which were so intertwined that they had 'for a long time' been regarded as 'one conception':[189]

> From the time when men began to think about rights and formulate declarations of liberties or assertions of rights, they have put property and exercise of liberties in acquiring and controlling property along with liberty in the forefront. … It is significant that the current of thought which is giving up the idea of property is also giving up the idea of liberty.[190]

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[187] Mill *Principles of Political Economy* (n65) Bk 2 Ch 2 §3.
[188] See Ackerman J, quoting *Callins v Collins* 114 S Ct 1127, 127 L Ed 435 (1994) (Blackmun J), in *S v Makwanyane* (n30) [161], in the context of the death penalty.
[189] Pound (n53), 995.
[190] Ibid, 994-995.

Pound wrote these words in 1939, prompted by his fear that his contemporary political and legal philosophers were rejecting the liberal values of the 19th century. They were 'rejecting the idea of rights, making light of liberty, treating rules not as devices to maintain rights but as threats of exercise of state force creating duties, and so thinking of restraint rather than of freedom.'[191]

The main manifestation of this legal and political shift from rights to restraint was the rise of the bureaucratic state, which supplanted the individual's freedom and autonomy with 'bureaus and boards and administrative agencies', that rule by 'discretion rather than law', and which were free to impose 'their views of expediency … in what they take to be in the general welfare or public interest.'[192]

Pound, like the liberal philosophers to whose values he subscribed, was not a proponent of unlimited property rights. He accepted that restrictions were justified, including restrictions on testamentary freedom, in order to protect those who should be the 'natural objects' of the testator's 'bounty'.[193] His concern was that the powers and liberties that the individual should be permitted to exercise over his property was being subjected to the 'discretion of an administrative official given authority to apply an undefined standard with no principles to guide him and free … to determine for himself what some not legally formulated policy requires or makes expedient for a case in hand.'[194]

Section 37C validates Pound's concerns. What s37C does is deprive the individual of her right to dispose of her property to the natural objects of her bounty. What it does not do is limit the individual's right to select the objects of her bounty only when she has made an 'unnatural' selection.

[191] Ibid.
[192] Ibid, 996.
[193] Ibid.
[194] Ibid, 997.

Kenneth Culp Davis, in his influential writings on administrative law, argued that discretionary power must be carefully crafted to achieve the 'optimum' point between absolute rules of law and absolute discretion.[195] It is the legislature's responsibility to identify that point and formulate rules that appropriately 'confine, structure and check' administrative decision-making.[196]

Whatever choices a legislature makes when developing rules that restrict freedom of testation, or a decision-maker makes when applying those rules, one or other party will be adversely affected by the choice. It will either be the nominated beneficiary if the testator's wishes are not respected, or it will be the other party if the testator's wishes are not overridden. Those rules should not reduce the conflict to one between the testator and aggrieved beneficiary, as though the restriction is simply a financial cost to be borne by an impersonal estate. Restrictions on freedom of testation that permit *post hoc* intervention pit the living against the living, not the dead against the living.

As the next chapters seek to demonstrate, s37C is not a carefully designed limitation on testamentary freedom, which limits the individual's right only to the extent required. It simply deprives the individual of the right to decide how her property should be divided amongst those naturally entitled to her bounty and transfers her right to quasi-administrative officials, free of the legal constraints to which testators are themselves subject. The cost of their intervention is inevitably borne by the persons who would otherwise have benefited – the member's nominated beneficiaries or intestate heirs.

[195] Davis 'Discretionary Justice' (1970) 23(1) *Journal of Legal Education* 56, 59.
[196] Pound 'Legislation as social function' (1913) 18(6) *American Journal of Sociology* 755, 765-766 argues that in devising laws, the legislature must firstly identify the varied interests that arise in a given context, identify those in which the individual interest aligns with the social interest, since the legislature's purpose is ultimately to advance the latter, and, in cases of conflict between different individual interests that are also social interests, select that which secures the 'greatest number' of interests with the least sacrifice of other interests.

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CHAPTER THREE

SECTION 37C'S PURPOSE & TRUSTEE POWERS

Powers are not conferred in the abstract. They are intended to serve a particular purpose. That purpose can be discerned from the legislation that is the source of the power and this ordinarily places limits upon the manner in which it is to be exercised.[1]

3.1 INTRODUCTION

Section 37C has two distinct consequences. On the one hand, retirement benefits are removed from the estate of the member and, in the process, protected from the claims of creditors. On the other, control over the devolution of those benefits is placed in the hands of the trustees of the fund. The legislature could have made provision for either one or the other – they need not be conjoined. I know of no jurisdiction that has transferred the right to select beneficiaries to a third party while preserving creditors' claims to those benefits, although it is notionally possible. There are, however, jurisdictions that have removed the benefit from the member's estate in order to protect the benefit against creditors' claims without simultaneously depriving members of the right to select their beneficiaries.[2] Section 37C is unique in statutorily divesting members of control over their death benefits while transferring the right to select beneficiaries to third parties.

Its purpose in doing so is not, however, discernible from the provisions of the Act. The preamble to the Act states only that it has been enacted 'to provide for the registration, incorporation, regulation and dissolution of pension funds and for matters incidental thereto.'

[1] *Pharmaceutical Manufacturers Association of SA, In Re: Ex Parte Application of President of the RSA* 2000 (3) BCLR 241 (CC) [76].

[2] See eg Australia, Bankruptcy Act 1966, s116(2) (Cth) and the case of *Stock v NM Superannuation Proprietary Limited* [2015] FCA 612, confirming that the benefit does not form part of the member's estate. See also Malawi's Pension Act 6 of 2011, s73. In England death benefits similarly do not form part of the estate, but binding nominations are rare because of the tax implications, see further Braun 'Pension Death Benefits: Opportunities and Pitfalls' in Häcker & Mitchell (eds) *Current Issues in Succession Law* (2016).

Section 37C itself contains no explanation. It simply tells trustees what they must do, not why they must do it.

What then is its purpose? The accepted explanation is to protect members' dependants. This view finds support in the Act's definition of 'pension fund organisation', which is any organisation established with the object of providing benefits to members upon their retirement *or to their dependants* in the event of their death.[3] This definition, with its explicit mention of dependants, was inserted into the Act at the same time as s37C.[4] The legislature's purpose was thus clearly to protect dependants.

Cast this broadly, its purpose undoubtedly appears to be substantially compelling. Simply asserting that a law is intended to protect dependants is an inadequate justification, however, for it does not identify the actual mischief s37C is intended to guard against.[5] Without a clearer identification of its specific objective, it is impossible to assess either whether the means chosen are reasonably capable of achieving that purpose, or whether the purpose is so compelling that it justifies the limitation.

3.2 SECTION 37C'S PURPOSE

3.2.1 Protection from the member?

If the purpose behind s37C is to protect the member's dependants, the question is against whom, from what, and why? The obvious answer is to protect dependants from the member; more particularly, to protect them against avoidable hardship arising from the member's

[3] PFA, s1.
[4] Act 101 of 1976, s21(c).
[5] See eg *Lawen Estate v Nova Scotia (Attorney General)* 2019 NSSC 162 [84], in which the court held that the Attorney-General's argument, that family provision legislation was intended to fulfil testators' moral obligation to make adequate provision for their dependants, did not explain what its objective was in permitting a court to override a testator's wishes in order to make provision for a financially independent, non-needy adult child.

failure to make appropriate or proper provision for them.[6] The protection afforded in such cases is against a malevolent or indifferent or injudicious member, one who could have, and should have, made better provision through the death benefits for specific dependants, but failed to do so.

This explanation dominates pension fund discourse.[7] In his early determinations, the first Adjudicator variously stated that:

> Section 37C specifically restricts freedom of testation to ensure that *no dependants* are left without support.[8]
>
> The purpose of s37C is to protect *dependency* over the wishes of the deceased, which may be expressed in the nomination form or last will of the member.[9]
>
> [W]here there are needy dependants [a nomination] should … be ignored or given minimal consideration. That is precisely why section 37C was enacted, otherwise members would be free to dispose of their benefits in terms of their wills.[10]

In characterising s37C's as a deliberate restriction on members' freedom of testation, the implication is that members may exercise their freedom wrongfully, by failing to make provision for someone they should have made provision for. The emphasis, therefore, is on protecting dependants from financial hardship attributable to their complete or partial 'disinheritance' by the member. Disinheritance, however, implies that the deceased has

[6] See eg *Mahomed v Argus PF* PFA/KN/00013780/2015/UM. The member nominated her younger daughter as the sole beneficiary of her R2.4 million benefit. She was also survived her older daughter, who suffered from an intellectual disability and was unable to work. The fund overrode the nomination and allocated the bulk of the benefit to the elder daughter (R1.8 million) to be administered in a trust for her benefit. *Prima facie* this appears to confirm that s37C is necessary to protect vulnerable dependants from the member. However, the mother is more likely to have nominated her younger daughter to provide her with the means to look after her older daughter, rather than to deprive the elder daughter of protection.

[7] In *Fundsatwork Umbrella Pension Fund v Guarnieri* (830/2018) [2019] ZASCA 78 (31 May 2019) [5], the SCA explained that s37C removes the allocation of death benefits from the member's 'unfettered choice' (whether expressed in a will or nomination) for the 'social purpose of providing some protection for dependants'. See also Nevondwe 'Death benefits and constitutionality: is the distribution of death benefits under the Pension Funds Act 24 of 1956 constitutional'? (2007) 15 *Juta's Business Law* 164; Dyani & Mhango 'Reflections on recent South African pension jurisprudence on death claims' (2011) 32 *ILJ* 2385.

[8] *Van Vuuren v CRAF* [2000] 6 BPLR 661 (PFA) [35] (emphasis added). In *Van Vuuren*, the dependant (an estranged spouse) was not receiving financial support from the member.

[9] *Sithole v ICS* [2000] 4 BPLR 430 (PFA) [23] (emphasis added). In Sithole, the dependants (spouse and children) were wholly financially dependent on member.

[10] *Morgan v SA Druggists* [2001] 4 BPLR 1886 (PFA) [25], in which he held that the trustees' allocation of the greater share of the benefit to the non-needy nominee amounted to maladministration. In *Morgan*, the dependant (a disabled adult son living in a state-subsidised care home) was partially financially dependent on the member.

excluded a person who would otherwise have inherited. The only persons who can be 'disinherited' are the members' intestate heirs, who are ordinarily their spouses and children, and their testate heirs.[11] Yet trustees override member wishes and select beneficiaries who were not at any risk of becoming destitute and who were not persons capable of being disinherited, since they were neither the member's testate nor intestate heirs.[12] Trustees do so even when the member's nominated beneficiaries *are* spouses and children.[13]

In one of the few judicial decisions on s37C, *Mashazi v African Products Retirement Fund*,[14] the High Court, relying on these earlier Adjudicator determinations, similarly stated that:

> Section 37C of the Act was intended to serve a social function. It was enacted to protect *dependency*, even over the clear wishes of the deceased. This section specifically restricts freedom of testation in order that no *dependants* are left without support. Section 37C(1) specifically excludes the benefits from the assets in the estate of a member. Section 37C enjoins the trustees of the pension fund to effect an *equitable discretion*, taking into account a number of factors.

Adjudicator determinations regularly cite *Mashazi* as authority when they explain s37C's purpose.[15] The problem is that *Mashazi*, like the earlier determinations, identifies three potentially-competing purposes: to ensure that no dependants are left without support, to protect dependency, and to grant trustees the power to distribute the benefit equitably.

Dependants and dependency are not synonymous. The internal contradiction in the passage is apparent in Adjudicator determinations. Dependants are regularly left without support by the member, and in turn by the trustees. The absence of existing dependency is used to justify the dependant's exclusion.[16] Conversely, trustees sometimes override a

[11] If the member bequeathed the benefit in her will and made a contrary nomination.
[12] *Kirsten v Allan Gray* [2017] 3 BPLR 566 (PFA).
[13] *Van Schalkwyk v MEPF* [2003] 8 BPLR 5087 (PFA); *Koekemoer v Macsteel* [2004] 2 BPLR 5465 (PFA); *Marais v Sasol* [2017] 3 BPLR 615 (PFA).
[14] 2003 (1) SA 629 (W), 632 (emphasis added), citing the Adjudicator's earlier determinations in *Sithole* (n9) and *Kipling v Unilever* [2001] 8 BPLR 2368 (PFA).
[15] Adjudicator determinations regularly cite *Mashazi* (n14) as authority when they explain s37C's purpose. See eg *Berge v Alexander Forbes* [2009] JOL 23698 (W), 10*; Smith v MM* PFA/GA/5229/2005/RM [5.7]*; Esterhuizen v CRAF* [2013] 3 BPLR 355 (PFA) [4.3]; *Mohlomi v Evergreen* [2014] JOL 31440 (PFA) [5.8].
[16] See eg *Segal v LRAF* [2001] 1 BPLR 1519 (PFA); *Legoko v Soweto* [2011] 1 BPLR 101 (PFA); *Naidoo v Coca Cola* [2019] JOL 46217 (FST).

member's clear wishes by including dependants who were not financially dependent on the member and not likely to become so.[17] They do so even when the member's nominated beneficiary was financially dependent on the member, or at risk of becoming so, or in greater financial need, than the selected beneficiary.[18]

Recently, in *Fundsatwork Umbrella Pension Fund v Guarnieri*,[19] the SCA, also citing Mashazi, explained that s37C removes the allocation of death benefits from members' 'unfettered choice (whether expressed in a will or nomination) for the social purpose of providing some protection for dependants.'. The SCA made no mention of dependency, but only that s37C was intended to protect needy dependants.

Increasingly, however, the interpretation attached to the passage from *Mashazi* by Adjudicators is that s37C's purpose is to 'protect dependency',[20] to 'protect those who were financially dependent on the member' while she was alive,[21] and 'to ensure that those who were financially dependent on the member are not left destitute by his death'.[22]

The definition of dependant is a wide one, and nowhere in the definition of dependant or in s37C are 'financial dependants' singled out for special mention. Similarly, nowhere does s37C enjoin trustees to ensure that dependants are not left without support or to protect 'dependency'. Section 37C only enjoins trustees to effect an equitable distribution amongst the member's dependants and nominees. Equity requires that trustees consider factors other than the dependant's financial need, or the existence and extent of financial dependence.[23]

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[17] *Williams v FFE* [2001] 2 BPLR 1678 (PFA); *Tsele v Bidvest* [2016] 1 BPLR 146 (PFA).
[18] Ibid; *Nduku v VWSA* PFA/EC/14187/2007/NVC; *Makume v Sentinel* [2014] 2 BPLR 244 (PFA); *Kirsten* (n12).
[19] (830/2018) [2019] ZASCA 78 (31 May 2019) [5].
[20] *Mohlomi* (n15) [5.8); *Ramoroka v SARAF* [2017] 2 BPLR 349 (PFA) [5.10].
[21] *Kgapola v Fidelity* [2007] JOL 20987 (PFA) [4.1]; *Kouassi v Tiger Brands* [2010] 2 BPLR 129 (PFA) [5.2]; *Mitchell v Alnet* [2014] JOL 31439 (PFA) [5.2]; *Van Jaarsveld v OVK Aftreefonds* [2015] 2 BPLR 303 (PFA) [5.2]; *Whitcombe v Momentum* [2016] 2 BPLR 290 (PFA) [5.2].
[22] *Malindi v British American Tobacco* PFA/GA/4233/05/VIA; *Gorrah v Metal Industries* [2014] JOL 31420 (PFA) [5.8]; *Kirsten* (n12).
[23] See further §5.3 – 5.5.

Rather than restricting freedom of testation to protect members' dependants, which is s37C's ostensible purpose, what it actually does is to impose a positive obligation on members to make however much provision, for whichever of their dependants, the trustees feel should have been made.[24]

3.2.2 Protection of the fiscus?

Allied to the primary purpose of protecting dependants is protecting the fiscus,[25] by 'prioritis[ing] need and dependency in the distribution of death benefits and thereby reduc[ing] dependency on the state.'[26] In one early determination setting aside the trustees' decision, the Adjudicator said:

> Moreover, in accounting for the fact that James's government grant may be in jeopardy should too great a portion of the benefit be awarded to him, the Board has misdirected itself. The social desirability of reducing his dependence on the state should have been a reason to award a greater portion of the benefit to him.[27]

The justification for utilising death benefits to reduce dependency on the state is that it is the quid pro quo for the favourable income-tax treatment the member had received from the state, which had enabled her to save more towards retirement than she would otherwise have been able to save. In *TWC v Rentokil*,[28] for example, it was said:

> The aim of section 37C is to limit a pension fund member's freedom of testation in relation to his pension benefits. Pension benefits accumulate favourably as a consequence of

[24] Section 37C is akin to family maintenance legislation in other jurisdictions, which permit courts to override the deceased's will or intestacy laws when the deceased failed to make proper financial provision for an eligible applicant. See §7.3. In *Fundsatwork v Guarnieri* (n7) [22] the SCA stated that s37C's 'established purpose is to provide maintenance to those who have need of it'. I have not come across any Adjudicator determinations that explain s37C's purpose in these terms. If this were its purpose, trustees would surely be required to respect the member's wishes except to the extent that she had failed to provide for the dependant's reasonable maintenance needs.
[25] *Mashazi* (n14).
[26] *Van den Berg v Durban* [2003] 3 BPLR 4518 (PFA); *TWC v Rentokil* [2000] 2 BPLR 216 (PFA). This view was also endorsed by the SCA in *Fundsatwork v Guarnieri* (n7) [5].
[27] *Morgan* (n10) [17].
[28] [2000] 2 BPLR 216 (PFA), 223; *Martin v Beka* [2000] 2 BPLR 196 (PFA), 211; *Musgrave v Unisa* [2000] 4 BPLR 415 (PFA), 424.

> advantageous tax treatment of contributions to the fund. In return the state hopes to ensure that there are fewer persons dependent on it for social security.

Do these explanations withstand scrutiny? I believe not. The tax concession that members receive is that a proportion of their retirement contributions are tax-exempt,[29] which considerably enhances the eventual value of their retirement savings. This is undoubtedly an incentive the state uses to encourage people to save towards retirement.

However, the tax-savings is, for many retirees, only a deferred tax benefit. Income tax is levied on retirement benefits that are taken as cash lump sums. The first R500 000 is tax-exempt.[30]Anything above R500 000 is taxed at a progressive rate of 18–36%.[31]The maximum tax rate of 36% is payable on so much of the retirement benefit as exceeds R1 050 000.

The same tax tables apply to death benefits taken as cash lump sums. It is here that the tax-justification argument breaks down. In most cases, the death benefit consists of both the member's savings *and the insured portion*. The insured portion is funded by an insurance premium, which the fund usually deducts from the member's contribution. The premium is such a small part of the member's contributions that any tax concession on this sum is negligible.[32] Yet income tax is also levied on the insured portion. It is only when the death benefit consists of the savings portion alone, which is the case with retirement annuity funds, that the tax-justification is plausible (though not necessarily justifiable).

Tax can be avoided or reduced if the benefit is used to purchase an annuity. This applies both when a member uses her retirement savings to purchase an annuity, and when beneficiaries use the death benefit to do so. In most cases, annuities are purchased by those with large lump sums – in other words, the more-affluent, who would not be at risk of

[29] Currently the lesser of R350 000 or 27.5% of gross taxable income per annum. See Income Tax Act 58 of 1962, s11F. The Estate Duty Act 45 of 1955, s3(2)(*bA*) provides that contributions in excess of this amount will form part of a deceased's gross estate for estate duty purposes.
[30] This is a lifetime allowance and is reduced by any prior tax deduction the member received were she to have withdrawn any of her retirement benefits while alive, eg when changing employment.
[31] Income Tax Act 58 of 1962, Second Schedule, s 3(b)(iii).
[32] In most funds it is between 0.5% and 2.5% of the member's salary. See Sanlam *Benchmark Survey: Standalone Funds Databook* (2017) Q4.4A.

becoming dependent on the state in any event.[33] They are therefore granted tax concessions on their contributions and on their 'lump sum' benefits. It is beneficiaries who receive smaller lump sums who overwhelmingly withdraw the benefit as cash and are taxed on the lump sum – in other words, poorer beneficiaries for whom the capital is too small to make the purchase of a lifelong annuity a meaningful choice.[34]

The concessional tax treatment is therefore contingent on the behavioural choices of the member or beneficiaries. For the less affluent, the choice is often theoretical rather than real, because both the retirement and death benefit lump sum is too small to finance a regular income through the purchase of an annuity. It is they who are most likely to commute their benefit for cash. It is therefore the poor(er) who are most likely to suffer adverse tax-consequences because they are poor.

Compared with the taxation of death benefits, the taxation of deceased estates is considerably more favourable to beneficiaries. Deceased estates only pay estate duty on however much of the net estate exceeds R3.5 million.[35] If the net estate is between R3.5 million and R30 million, tax is levied at 20%.[36] Tax increases to 25% on so much of the net estate that exceeds R30 million.[37] Prior to 1 January 2009 death benefits did fall into the estate for estate duty purposes.[38] The lump sum benefit would therefore have been subject to both income tax and estate duty. Individual life insurance proceeds, by contrast, are an asset in a deceased estate, so *prima facie* death benefit lump sums appear to attract more favourable tax-treatment. The opposite is true, because income tax is levied on the insured

[33] At July 2020 annuity rates, R1 million will buy a single life annuity of circa R5000 – R6000 p/m for a beneficiary aged 60 with a 5% income escalation per annum. See <https://www.masthead.co.za/annuity-investment-rates/>.
[34] Even when the lump sum is large enough to fund an annuity, once divided amongst multiple beneficiaries their individual share is likely too small to warrant purchasing an annuity. The first Adjudicator held that trustees are obliged to make separate allocations to each beneficiary, making the division of the lump sum inevitable, and the likelihood of its taxation greater. See *Thema v Metal Industries* PFA/NP/3008/2001/NJ.
[35] Act 45 of 1955, s4A(1).
[36] Ibid, First Schedule, s1.
[37] See www.sars.gov.za/TaxTypes/EstateDuty/Pages/default.aspx.
[38] Estate Duty Act 45 of 1955, s3(2)(*i*); Davis Tax Committee *First Interim Report on Estate Duty for the Minister of Finance* (2015), 10.

portion. Had income tax been levied on the savings portion only and estate duty on the insured portion, most of those currently paying tax on the death benefit would not have paid tax at all. The savings portion would probably be below the R500 000 tax-free limit, and the insured portion would rarely reach the R3.5 million estate-duty threshold.[39]

Ironically, therefore, the poorer are now taxed when they would previously not have been, because their estates would have been below R3.5 million, even including the death benefit. The wealthier receive a double tax advantage if they choose to purchase annuities, for they pay neither income tax nor estate duty on the death benefit.

Even assuming that the total amount paid by way of death benefits saves the fiscus the equivalent amount, the proportion saved will only be in the region of R10 billion[40] out of total government spending of R1.58 trillion (0.006%)[41] and R139 billion (7%) on social grants.[42] More importantly, this savings is a notional savings only, for it presupposes that the beneficiaries of death benefits would otherwise become social grant recipients, or if they are already recipients, that they would cease to be recipients. That is not the case. Awards are made to recipients of social grants, notably minor children and old age pensioners, but the awards are too small to disqualify them from receipt of social grants.[43] In many cases none of the beneficiaries are at risk of becoming dependent on social grants if their present circumstances remain unchanged.[44] In some cases persons not at foreseeable risk of becoming social grant recipients are favoured over those who are at greater risk.[45] Social grants are, in addition, only available to a very restricted circle of eligible applicants. Beneficiaries between the ages of 18 and 60 are ordinarily not eligible for social grants. If they

[39] If a death benefit was exactly R3.5 million and it was taken as a cash lump sum, tax would be R1012 500. If the death benefit had formed part of the estate and had pushed the value of the net estate to R7 million, so that the whole death benefit was subject to estate duty, the tax would be R700 000. This is particularly unfair given that for most people, their death benefit is their most-valuable asset. The tax tables are available at www.sars.gov.za.
[40] RPF 57th *AR 2015*, Table 13. Even if the figure is higher, the combined lump sum retirement and death benefits paid by all retirement funds in 2017 was R120 billion.
[41] StatsSA *Financial statistics of consolidated general government 2016/2017* (P9119.4), 3, Table A.
[42] SASSA *AR 2016/2017*, Table 2.
[43] *Thene v Bidcorp* (2008) PFA/GA/6863/05/LCM.
[44] *Jones v National Technikon* [2002] 1 BPLR 2960 (PFA); *Smith v SAA* [2010] 3 BPLR 330 (PFA).
[45] Eg *Musgrave* (n28); *Nduku* (n18); *Makume v Sentinel* (n18); *Masuku v Liberty* [2014] 3 BPLR 390 (PFA).

are eligible, by reason of disability for example, the provision made for them by way of a death benefit is unlikely to be so much that their income and assets will exceed the means-testing thresholds.[46] And even when it is, these beneficiaries represent a fraction of total beneficiaries.

The tax-and-dependency justification for s37C is thus not convincing.[47] It also does not inform trustee decision-making when allocating death benefits, or the basis on which Adjudicators usually intervene. If protecting the state was s37C's true purpose, trustees' roles would be much simpler: identify who amongst the eligible beneficiaries are most likely to become recipients of social grants and pay the death benefit to them. If there are none, trustees could simply follow the member's wishes.

3.2.3 Protection from creditors?

Neither of the afore-going two explanation aligns with the original intention of the legislature, which was simply to protect dependants from the member's creditors.[48] That this was the original intention is apparent from the submission made by the Minister of Finance in 1976, when presenting the proposed amendments to the Act to Parliament:

> The object of a pension fund is to provide pension benefits to its members and their dependants. The Act does not protect the benefits from alienation and attachment, nor does it exclude them from the insolvent and deceased estates of members in order to ensure that they in fact accrue to members or their dependants. This deficiency is now being remedied.[49]

The purpose was also explained in the preamble to the amending Act as being to provide for the 'protection of pension benefits'.[50] That this is both the original, and remains the actual, purpose behind s37C is supported by the interpretation that the SCA has attached to the equivalent provisions in the Government Employees Pension Law 1996. In adopting a

[46] See §1.7.3 above.
[47] See also *Vigolo v Bostin* [2005] HCA 11 [12], in which the Australian HC similarly expressed the view that family provision legislation was not 'merely, or even primarily' intended to relieve the state of the burden of supporting needy dependants.
[48] In *Varachia v SAB* [2015] 2 BPLR 310 (PFA) [5.12], the Adjudicator, unusually, expressed the same view.
[49] Financial Institutions Amendment Bill 2nd Reading Tuesday 16 March 1976 (2R, 3241).
[50] Act 101 of 1976. Section 37C was inserted by s24.

'purposive' and expansive interpretation of dependant quite at odds with the literal wording of the statute,[51] the SCA held in *Government Employees Pension Fund (GEPF) v Buitendag*:[52]

> [T]he stated purpose of the Law is to benefit inter alia dependants of a member not his or her estate. In addition, … a gratuity payable to a dependant is deemed not to be property in the estate of the member and is accordingly protected from estate duty.

More recently, in *Greyling v GEPF*,[53] the High Court explained the purpose of the law as follows:

> In my judgment it is clear that the purpose of section 22 of the proclamation is to allow a member of the Pension Fund to nominate a beneficiary and that upon the death of the member any benefit be paid directly to such nominee without the intervention of the executor of the deceased's estate. In that way the benefit cannot be eroded by payment to creditors of the deceased's estate and [will] be utilized for the exclusive benefit of the deceased's dependant or nominee. That purpose is also clear from other provisions of the proclamation. See for example section 21 (prohibition on session and attachment of benefits). Section 23 (benefit not an asset in the insolvent estate), and section 28 (benefit not property for purposes for estate duty).

Protecting the member's beneficiaries from the claims of creditors is simply a natural and logical extension of the restrictions that apply to the member herself during her lifetime. The member is herself prevented from accessing and utilising the funds for as long as she remains a member of the fund; her creditors are similarly prevented from doing so.[54] A member is, to some extent, therefore protected from her own profligacy and misfortune for as long as she remains a member of the fund. Once she is no longer a member of the fund, should she choose to take her retirement savings out of the fund, she loses this protection. Her retirement savings form part of her estate, and her creditors can access those benefits.[55] Similarly, once

[51] On a literal reading the definition encompassed only minor children and major children who were not self-supporting.
[52] [2006] 4 BPLR 284 (SCA) [6].
[53] [2015] JOL 32876 (GP) [12], quoting from *Jordaan v GEPF* Case No. A565/2004 (TPD) (unreported). *Greyling* has been criticised by Jeram 'Disposition of lump sum death benefits' in Hanekom (ed) *Manual on Retirement Funds and other Employee Benefits* 25ed (2018), fn293.
[54] Section 37A prohibits the member from transferring, alienating, ceding, pledging or hypothecating her retirement benefit and prevents creditors from attaching the benefit, while s 37B provides that it will not form part of the member's insolvent estate.
[55] A lump sum that is payable to a member whose estate was sequestrated while still a member does not form part of her insolvent estate. If she is sequestrated after her membership ceases and her lump sum has been paid to her, the lump sum will form part of her insolvent estate. See PFA, s37B, which stipulates that a benefit that is still to be paid by a fund will not form part her already-insolvent estate. See further *Foit v Firstrand Bank* 2002 (5) SA 148 (T).

the death benefit leaves the protective shelter of the retirement fund and becomes part of the beneficiary's estate, the beneficiary's creditors can lay claim to those benefits.

A further explanation is that these changes to the Act simply harmonised the treatment of retirement and death benefits in public sector funds and private sector funds. The rules of public sector funds, which were creatures of statute, had long provided that a member was not free to deal with her benefit while a member of the fund, and that the benefit did not form part of her insolvent estate.[56] However, the provisions governing the distribution of lump sum death benefits allowed the member greater freedom: the circle of eligible beneficiaries typically included spouses, minor children and step-children, financially-dependent adult children, parents and siblings and the member was free to alter the default order of preference in writing.[57] The lump sum was, moreover, excluded from the deceased member's estate if it was paid to one of the above beneficiaries.[58]

The restriction on freedom of testation was thus an incidental consequence of s37C; it was not an inevitable consequence. It was certainly not its primary purpose. Section 37C, as originally worded, could have been interpreted to retain the member's freedom of testation in so far as the member had nominated dependants to receive the benefit, with interference permitted only to the extent the member nominated non-dependent nominees to receive the benefit rather than dependants.[59] In fact, the early determinations of the Adjudicator indicate that this is how s37C may have been interpreted initially, for the early determinations reveal a greater deference on the part of trustees to the wishes of the member than the Adjudicator considered permissible.[60] Current determinations also demonstrate that members rarely prefer non-dependants over dependants. As a result, when trustees interfere with a member's wishes, it is usually to include non-nominated dependants or to exclude

[56] See eg the Railways and Harbours Service Act 28 of 1912, ss78 & 79.
[57] Ibid, s50.
[58] Ibid, s51.
[59] Reading between the lines, this seems to be argument made in *Kaplan v Professional and Executive RF* 1998 (4) SA 1234 (W), which speaks of the history of s37C as presented by counsel but doesn't say what the historical argument was.
[60] *TWC v Rentokil* (n26); *Sithole* (n9); *Moir v Reef Group* [2000] 6 BPLR 629 (PFA); *Williams v FFE* (n17).

(completely or virtually-so) nominated dependants, and sometimes, it is simply to effect a *re-allocation* of the benefit as between the nominated dependants.[61]

The original wording of s37C suggests that its drafters thought giving effect to s37C would be a *pro forma* mechanical exercise, a simple matter of paying the benefit to one or more dependants:

> Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund any benefit payable by such a fund in respect of a deceased member, shall not form part of the assets in the estate of such a member but shall be paid to any one or more of the dependants of the member, if there is such a dependant or are such dependants, or to a guardian or trustee for the benefit of such dependant or dependants: Provided that if such dependant or dependants cannot be traced by the fund concerned within a period of six months after the death of the member, or if no claim is received by that fund from such dependant or dependants within the said period, the benefit may be paid over to the estate of the member.

The preliminary and more difficult step, the need to first allocate the death benefit as between dependants, was not initially mentioned, but the need for this step was recognised in 1980 already, when the person responsible for managing the fund was entrusted with the task of allocating the death benefit equitably as amongst the member's dependants.[62]

3.2.4 Achieving equitable outcomes?

The key consideration in s37C today is not the need to protect the fiscus. It should also not be the perceived need to protect dependants from the member. This is an interpretive gloss adopted by the Adjudicator, which has informed, and led to a distortion of, its application of s37C. After all, implicit in the regular disregard for member's wishes is that most individuals do not make appropriate choices. If that is true in relation to death benefits, then the same must hold true for the distributive choices that most individuals make in relation to their estate. If that is the case, respecting the principle of freedom of testation is surely indefensible in all

[61] See cases at §5.4 below. See also *Brummelkamp v Babcock* 4 BPLR 1811 (PFA); *Ramanandh v Alexander Forbes* PFA/KZN/19520/07/CN.
[62] Financial Institutions Amendment Act 99 of 1980, s41.

cases. Similarly, if individuals cannot be trusted to make appropriate distributive choices, why should a third party be trusted to do so?

That s37C overrides a member's freedom of testation is clear. The key consideration today, however, is equity. The original purpose was to protect the estate from creditors for the benefit of the member's dependants. Having chosen, albeit inadvertently, to transfer wholesale control from the member to the trustees, trustees are enjoined to effect an equitable distribution. It is the equitability of the distribution that should be the key guiding consideration for trustees, not the need to protect dependants and the fiscus from the member. The perceived need to do so introduces an *a priori* distortion into decision-making by trustees and the Adjudicator, and one which results in an unnecessary disregard for the member's own wishes.

3.3 NATURE AND RATIONALITY OF TRUSTEES' POWERS

Section 37C does not only remove death benefits from the member's estate, it confers wide discretionary powers on trustees that either permit, or require, that they ignore the laws that would otherwise be applicable. It does so by stating that trustees must distribute any benefit that becomes payable upon the death of a member to the member's dependants and nominees as they deem equitable, *notwithstanding anything to the contrary contained in any law*.

Section 37C therefore appears to supplant all other laws that would otherwise apply. It has been described as the supreme law, overriding *all other laws* 'to the extent that they are contrary to' s37C.[63] It has been held to override common law,[64] customary law[65] and legislation.[66]

[63] See Jeram (n53), para 9.15.2.
[64] *Makume v Cape Joint RF* [2007] 2 BPLR 174 (C) [matrimonial property law].
[65] *Sithole* (n9).
[66] *Jacobs v CRAF* [2001] 1 BPLR 1488 (PFA) [Maintenance of Surviving Spouses Act 27 of 1990].

Section 37C removes the death benefit from members' estates and testamentary control. In this regard s37C is, potentially, a direct violation of the member's constitutional rights to property and dignity. Section 37C does not explicitly deprive in-community spouses of their half share of the benefit or children of their right to maintenance. This is, however, its effect, in so far as those rights are only enforceable against property that falls into the member's estate.

What s37C does not explicitly *require* is that trustees ignore those laws when allocating death benefits; it does not state that those laws are *irrelevant* to the equitable exercise of their discretion. The Adjudicator has, however, done so. Trustees have been chastised for distributing benefits in ways that appear to give effect to the member's wishes or matrimonial property law, or which prioritise the member's biological children over children towards whom the member did not owe a duty of support.[67]

May trustees safely ignore these laws? I suggest not. If trustees are exercising a public power when allocating death benefits, it means that they are organs of state within the meaning of s8 of the Constitution and bound by the rights contained in the BoR.[68] It also means that their decisions constitute administrative action which are reviewable in terms of the Promotion of Administrative Justice Act (PAJA).[69] Every death benefit allocation can be set aside if it was, inter alia, influenced by a material error of law, was based on irrelevant considerations or failed to take relevant considerations into account, was taken arbitrarily or capriciously, was so unreasonable that it was one no reasonable person would have made, or was *otherwise unconstitutional or unlawful*.[70]

[67] See §5.5.1; 6.3.2 & 6.4.2 below.
[68] FC, s8(1).
[69] Act 3 of 2000. See *Titi v FundsatWork* [2011] JOL 28125 (ECM); *Guarnieri v Fundsatwork* 2018 JDR 0740 (GP). Cf *Fundsatwork v Guarnieri* (n7), in which the SCA was silent on the applicability of PAJA.
[70] Act 3 of 2000, ss6(2)(d),(e)(*iii*),(e)(vi);(h),(i).

If s37C confers public power on trustees, there must, moreover, be a rational relationship between the power that has been conferred on them, and the purpose for which they have been granted that power.[71] Absent a rational relationship, the section is unconstitutional.

Are trustees exercising a public power? If they are, is there a rational connection between the wide discretionary power they have been granted and the purpose for which it has been granted?

Trustees' power to distribute the death benefit derives from the legislature. There must be a prior contractual relationship between the members and the fund, but the source of their power is not the contract, it is s37C. The power to choose some beneficiaries over others, and to determine what share of the death benefit they will receive, has profound effects for the successful and unsuccessful beneficiaries, both in relation to their material well-being and prospects and their emotional well-being.[72] Those affected by their power are the dependants and nominees of the majority of South Africans in formal employment. The power they are exercising is not a power that is traditionally associated with the exercise of governmental power – they are exercising what is quintessentially a private power. The legislature has, however, seen fit to transfer that power from the member to the trustees and subject the trustees to onerous responsibilities when doing so.

In *AAA Investments v Micro Finance Regulatory Council*,[73] O'Regan J in her minority judgment identified three elements that are characteristic of the exercise of a public power: that 'the rules apply generally to the public or a section of the public'; that 'they are coercive in character and effect'; that 'they are related to a clear legislative framework and purpose'. Her approach has recently been approved and applied by the CC in the majority

[71] *Pharmaceutical Manufacturers Association of SA, In Re: Ex Parte Application of President of the RSA* 2000 (2) SA 674 (CC); *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC).
[72] Commenting on the slow pace of some death benefit distributions, the Adjudicator commented that belated payment can be a matter of 'life or death' for the beneficiaries. This is just as true for those selected and not selected to share in the benefit. See OPFA *Annual Report 2016/2017*, 10.
[73] 2007 (1) SA 343 (CC) [119].

judgment in *Amcu v Chamber of Mines of South Africa*,[74] in which the CC held that what appear to be private contractual arrangements, namely collective agreements entered into between employers and trade unions, actually involve the exercise of a public power, because the legislature has given the contracting parties the power to bind non-parties to the terms of that agreement. In *Amcu*, the CC found that there was a rational relationship between the power and the purpose for which it was granted, which is to promote effective collective bargaining.[75]

Having regard to the three characteristics of public power identified by O'Regan J, trustees' powers are clearly public in character: they apply to a large section of the general public; they are coercive in character; they are part of a clear legislative framework.

The next question then is whether their power is rationally connected to the purpose for which it was granted? The Act contains no clear statement of s37C's purpose. It explains the purposes served by retirement funds, but not how s37C in its current form relates to those purposes. Whichever of the three possible purposes are ultimately found to be the legislature's true purpose, none satisfies the rationality requirement. Whether the purpose is to protect dependants from penury, to protect the fiscus from the additional drain on its resources, to protect dependants from the claims of creditors or to promote equitable outcomes, each is arguably a legitimate purpose, but none requires that the member's freedom to select beneficiaries be completely extinguished.

Trustees do not make choices with a view to protecting the fiscus any more than do members. They do not simply select the poorest and the neediest, or those who have the greatest potential to become a future drain on the fiscus.[76] The protection against creditors' claims does not require that trustees be vested with the power of selection. Members are as capable of making equitable distributions as are the trustees. Trustees are as capable of

[74] 2017 (3) SA 242 (CC).
[75] See paras [43], [44], [71].
[76] *Musgrave* (n28); *Williams v FFE* (n17); *Makume v Sentinel* (n18).

erring in their identification of dependants,[77] and of making inequitable distributions, as are members.[78]

The same purposes could have been achieved by preserving the member's freedom of choice and instead subjecting the *equitability* of their decision to scrutiny. In other words, by limiting the member's freedom of testation or choice, rather than by depriving the member of that freedom and transferring it to trustees who are entitled to substitute their view of equitability for that of the member.

Section 37C's primary benefit is that it places an obligation on trustees to seek out a member's dependants and to investigate their personal and financial circumstances.[79] In other words, it creates a mechanism whereby members' choices are, in effect, subject to automatic review. If it was designed in a way that gave trustees the power to correct inequitable distributions rather than the power to make distributions, with sufficient guidance as to how to distinguish between them, its purpose would be both legitimate and properly calibrated to the power that has been conferred.

3.4 CONCLUSION

Pension fund organisations are established with the object of providing pensions or lump sum payments to their members or their dependants. The provisions in the Act that preserve members' savings in the fund, excluding them from members' insolvent estates and

[77] In *Lombard v CRAF* [2003] 3 BPLR 4460 (PFA), the trustees paid the benefit to the deceased's estate, having concluded he was survived by neither nominees nor dependants. The Adjudicator, however, held that his former wife was his legal dependant because the terms of their divorce settlement obliged him to pay for her medical expenses and enrol her on his medical aid, albeit that he had failed to do either. In *Perry v Momentum* PFA/WC/00002342/2013/TCM, the fund identified the mother as a nominee rather than a dependant and thus considered itself obliged to wait for proof that the estate was solvent before paying her the benefit. The adjudicator held that the mother was a future dependant under para (c) of the definition.

[78] I consider each of the decisions in (n18) inequitable and, in the case of *Makume v Sentinel*, wrong in law.

[79] Trustees are expected to be proactive and to conduct a 'thorough investigation' into both the existence of dependants and the extent of their dependency. See eg *Zikhali v Metal Industries* [2001] 12 BPLR 2895 (PFA); *Kitching v CRAF* PFA/KZN/33168/2009/RM; *Kouassi* (n21); *Thompson v SAMWU* [2012] 1 BPLR 118 (PFA).

preventing them from accessing those funds, are intended to ensure that members have a source of income when no longer in employment. The provisions protect members against their own profligacy or misfortune. Section 37C extends that protection to dependants, ensuring that the benefits remain beyond the reach of members' creditors should they die while still members of the fund.

Protecting dependants from creditors' claims is a compelling reason to remove death benefits from the member's estate. Removing the benefit from the member's estate in order to place them beyond the reach of creditors does not, however, require that the benefit simultaneously be placed outside the member's testamentary control. It certainly does not require that the right to select beneficiaries be transferred to the trustees of the fund and that they be given a wide discretion to decide how the benefit should be apportioned amongst the member's beneficiaries.

The breadth of their discretion is also related to the wide definition of dependant and to s37C's structure, which permits trustees to exclude dependants and include non-dependants in their distribution if they deem it equitable to do so. The circle of eligible beneficiaries is thus as wide for trustees as it would have been for the member. They have, in effect, been given the testator's testamentary power. The only justification for this transfer of the right to select beneficiaries is if members cannot be trusted to identify their dependants and apportion their death benefit equitably, while trustees can be trusted to do so.

Section 37C's proper operation is premised on the supposition that trustees will exercise their discretion equitably, having first correctly identified the member's dependants. It presupposes that who qualifies as a dependant is readily and easily ascertainable. As the next chapter demonstrates, who qualifies as a dependant is rarely obvious from the definition alone, with the exception of spouses and children. It is also not clear whether there is an order of preference amongst dependants. If the definition is difficult to interpret and

apply, with the result that some persons are erroneously identified as (non)dependants, and their interests (de)prioritised as a result, s37C is not reasonably capable of fulfilling its purpose.

4

CHAPTER FOUR

DEFINING AND IDENTIFYING DEPENDANTS

Trustees' first task is to identify the member's dependants[1]

4.1 INTRODUCTION

'Dependant' is the cardinal concept in s37C. It is their possible existence that is the section's *raison d'être* - it's animating force. When they exist, the laws of succession, marriage and maintenance are displaced,[2] in favour of a *sui generis* regime that presupposes that third parties, applying their mind to the specific facts of a case, will achieve more equitable outcomes than would have been the case had the ordinary principles of law applied. The entire section is premised on the supposition that trustees will correctly determine who, amongst the deceased's kith and kin, is a dependant.

On its face, the definition of dependant appears relatively straightforward. The reality is quite the opposite. In 2002 already, the Financial Services Board commented that:

> This section [37C] was introduced to ensure that death benefits were properly paid to dependants and non-dependant nominees of deceased members. With the introduction of the definition of dependant in section 1 of the Act, section 37C has created many uncertainties.[3]

Those uncertainties have not lessened with the passage of time, despite the fact that the current definition has been in force for almost 30 years.[4] Recently the SCA, in *Fundsatwork v*

[1] *Van Schalkwyk v MEPF* [2003] 8 BPLR 5087 (PFA) [15]; *Maji v Cape Joint* [2004] 4 BPLR 5624 (PFA) [15].
[2] All laws have been held to be displaced, apart from the *bloedige hand* principle. See Jeram 'Disposition of lump sum death benefits' in Hanekom *Manual on Retirement Funds and other Employee Benefits* 25ed (2018) §9.15.2.
[3] FSB *AR* 2001, 22.
[4] Farlam JA's quotation in *National Director Public Prosecution v Carolus* 2000 (1) SA 1127 (SCA) [36] is apposite: 'Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.'

Guarnieri,[5] set aside the trustees' distribution of a death benefit on the basis that their interpretation of the definition was contrary to its clear language and purpose. It held that the trustees' interpretation involved a 'considerable rewriting' and 'substantial adjustment' of the definition,[6] which was inconsistent with its 'careful and deliberate' language.[7]

The SCA's interpretation is cause for considerable concern. Its interpretation is at odds with how the definition has been interpreted for the past 30 years by the retirement fund industry, Adjudicators and commentators.[8] If the SCA's interpretation is correct, it means that those meant to correct trustee errors, the Adjudicators, cannot be relied upon to recognise and correct fundamental errors of law. If the SCA's interpretation is wrong in law, which I believe it to be, it means that the second highest court in the land struggled to make sense of a definition that lay trustees are expected to interpret and apply correctly.

If trustees cannot readily and with confidence accurately identify who the member's dependants are, then s37C cannot fulfil its purpose of protecting dependants. Members and beneficiaries should also be able to determine, with reasonable confidence, who, within the member's circle of family, friends and acquaintances, will be considered a dependant within the meaning of the Act. The Constitution's commitment to the rule of law requires that laws be sufficiently clear, certain and predictable:

> [The rule of law] requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. … The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly.[9]

Members cannot regulate their affairs properly if they do not know whether their former spouse, partner, parent, sibling, stepchild, foster child or another relative is an eligible dependant, entitling the trustees to override the member's nomination if they deem it

[5] (830/2018) [2019] ZASCA 78 (31 May 2019).
[6] Ibid [12].
[7] Ibid [19].
[8] The SCA cited only a handful of cases, little academic authority, and appeared to be unaware of its substantial departure from Adjudicator determinations on point.
[9] *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) [108].

equitable to do so. They similarly need to know whether their acts of generosity or charity may render the recipient an eligible dependant. Beneficiaries similarly need to know whether they or others are eligible dependants within the meaning of the Act.

In this chapter I seek to highlight some of the definitional uncertainties and complexities. It is not a comprehensive analysis of the meaning of dependant, which is beyond the scope of this chapter. My purpose is simply to show that the definition is difficult to interpret and apply, and that the existing complexity is unnecessary, such that it could readily be simplified in the way proposed in chapter eight without undermining s37C's central purpose.

4.2 THE DEFINITION

The current definition, with one difference, was inserted into the Act in 1989.[10] Prior to 1989, the only dependants protected by s37C were financial dependants.[11]

> Dependant means
>
> a) a person in respect of whom the member is legally liable for maintenance;
> b) a person in respect of whom the member is not legally liable for maintenance, if such person
>
> (i) was, in the opinion of the board, upon the death of the member in fact dependent upon the member for maintenance;
> (ii) is the spouse of the member;
> (iii) is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock;
>
> c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.[12]

The definition encompasses so-called 'legal', 'factual' and 'future' dependants. The three categories of dependant are mutually exclusive: a paragraph (a) dependant is someone who *is* owed an existing duty of support; a paragraph (b) dependant is someone who *is not*

[10] Financial Institutions Second Amendment Act 54 of 1989, s 20. The exception is that (b)(iii) was only inserted by Pension Funds Amendment Act 22 of 1996, s 1(b).
[11] Financial Institutions Amendment Act 101 of 1976, s21(a). Spouses and children who were not financially dependent on the member were eligible dependants only if the fund rules made specific provision for them.
[12] PFA, s1.

owed a duty of support; a paragraph (c) dependant is someone who *is not (yet)* owed a duty of support, but would probably have been owed one in the future, had the member remained alive. The typology is frequently used imprecisely or incorrectly. Spouses and children, for example, are typically referred to as legal dependants even when they might not be.[13] If they were invariably legal dependants, their express inclusion under paragraph (b) would be redundant. The term 'factual' to describe all paragraph (b) dependants is similarly misleading, for spouses and children may not, in fact, have been dependent on the member. Some commentators therefore suggest that the term 'non-legal' instead be used for paragraph (b) dependants.[14] While preferable, it may also create the misleading impression that spouses and children are invariably *not* legal dependants, when they frequently will be. I therefore use the term 'financial dependant' to refer to paragraph b(i) dependants, and the term 'statutory' to refer to paragraph b(ii) spouses and (b)(iii) children.

One might reasonably ask whether it matters that dependants are not correctly classified, provided they are correctly identified as dependants. In most cases it will not make a difference to the outcome. Nevertheless, it matters for at least three reasons. In the first instance, identifying a dependant as one type of dependant when they are another is an error of law. If the trustees' decision is subsequently set aside because of the error, there may not be sufficient facts on which to identify the person as a dependant under a different category.[15] Incorrect classification may also matter if there is an order of preference, or ranking, amongst dependants. If a ranking exists, spouses and children towards whom the member owed a legal duty of support should surely rank ahead of other dependants,

[13] *Peete v SACCAWU* [2016] 3 BPLR 420 (PFA); *Whitcombe v Momentum* [2016] 2 BPLR 290 (PFA); *Marais v Sasol* [2017] 3 BPLR 615 (PFA). See also *Van Jaarsveld v OVK Aftreefonds* [2015] 2 BPLR 303 (PFA), in which the deceased's minor and major children and spouse were classified as 'legal dependants' in terms of paragraph (b)(iii) and (b)(ii) respectively, which specifically apply to spouses and children who are *not* legal dependants.

[14] Nevondwe 'Death benefits and constitutionality: is the distribution of death benefits under the Pension Funds Act 24 of 1956 constitutional'? (2007) 15 *Juta's Business Law* 164,165.

[15] In *Maake v Old Mutual* [2015] 1 BPLR 45 (PFA), a person whom the fund had identified as a spouse was held not to be such by the Adjudicator. There was insufficient evidence to establish whether she had been a financial dependant. See also *Matlonya v Fundsatwork* [2017] 2 BPLR 294 (PFA), in which the fund was criticised for accepting a partner's claim that she was a spouse under customary law on the available evidence. In this case there was sufficient evidence to show that she was a financial dependant.

including spouses and children towards whom no duty of support was owed. Even if there is no ranking, it is still of concern that Adjudicators, tasked with correcting trustee errors, may perpetrate or perpetuate such errors, adding to the existing uncertainty and complexity, to the potential detriment of affected beneficiaries.[16]

Dependants are not the only potential beneficiaries of a member's death benefit. Nominees are also eligible beneficiaries.[17] The existence of, and distinction between, nominees and dependants is central to s37C's proper application. Section 37C gives the trustees a broad discretion to decide how the death benefit is to be shared amongst the member's dependants and nominees,[18] but their discretionary powers arise only if the member is survived by at least two beneficiaries, one of whom must be a dependant.[19]

4.3 DISTINGUISHING BETWEEN NOMINEES, DEPENDANTS and NON-DEPENDANTS

Section 37C contemplates four different scenarios, each of which places a different duty on trustees: that a member is survived by neither a nominee nor a dependant; one or more nominees only; one dependant; at least one dependant and another beneficiary (who can be a nominee or dependant). The trustees' discretionary powers arise only in the fourth scenario.

If the member is survived by neither a dependant nor a nominee, the trustees must pay the benefit to the member's estate.[20] If a member is survived by nominees only, the trustees are bound by the member's wishes. Trustees must pay the benefit to the nominee(s), in the

[16] Another example is if spouses married in community of property are entitled to share in the death benefit as of right. See §6.4 below.
[17] A 'beneficiary' is defined in PFA, s1 as 'a nominee of a member or a dependant who is entitled to a benefit, as provided for in the rules of the Fund.'
[18] PFA, s37C(1)(a); *Minnaar v CRAF* [2015] 2 BPLR 236 (PFA).
[19] PFA, s37C(1)(bA).
[20] PFA, s37C(1)(c); *Mokele v SAMWU* [2002] 12 BPLR 4175 (PFA).

proportion stipulated by the member, *provided the estate is solvent*.[21] The trustees have no equitable discretion to override the member's wishes.[22] They are bound by the wishes as expressed in the nomination of beneficiary form and any unallocated surplus must be paid to the member's estate: for example, if the member apportioned the benefit equally between three nominees, one of whom has since died, the trustees cannot reapportion the benefit between the remaining nominees or pay the predeceased nominee's estate. It must be paid to the member's estate.[23] The practical effect of s37C and testate succession are, in these cases, then much the same: creditors have first claim to the benefit, to the extent the assets in the member's estate are insufficient to pay the member's debts.

However, when the member is survived by a dependant, trustees may *not* pay the benefit to the member's estate. They must pay the full benefit to the dependant, if there is only one. If there are two or more dependants, they must apportion the benefit between them as they deem equitable.[24] Similarly, if the member is survived by both dependants and nominees, they must also apportion the benefit between them as they deem equitable.[25]

Correctly identifying the member's dependants is thus trustees' first and most important task. It is also their most difficult task. The Act contains an extensive definition of dependant, but none of nominee. Members are entitled (but not obliged) to nominate beneficiaries, who may be both dependants and non-dependants, and it is the trustees' responsibility to distinguish between them. What then is the difference? Simply that a nominee is a nominated beneficiary *who is not* a dependant.[26] A beneficiary cannot be both.[27] Before trustees can correctly determine that a nominated beneficiary is a nominee, they first need

[21] PFA, s37C(1)(b). In *Perry v Momentum* PFA/WC/00002342/2013/TCM, the fund identified the mother as a nominee rather than a dependant and was waiting for proof that the estate was solvent before paying the benefit. The Adjudicator held that the mother was a future dependant. In *Jacoby v Metal Industries* [2017] JOL 38735 (PFA) the fund's decision to pay the benefit to the estate rather than the nominees was set aside, because it had not first established whether the estate was solvent or insolvent.
[22] See *Van Heerden v Fundsatwork* [2017] 3 BPLR 706 (PFA) [4.5].
[23] *PPS Insurance Company v Mkhabela* 2012 (3) SA 292 (SCA).
[24] PFA, s37C(1)(a)
[25] PFA, s37C(1)(bA).
[26] *Nieuwenhuizen v SAB* [2000] 12 BPLR 1413 (PFA) [21]; *Grieseel v SARAF* [2019] 3 BPLR 703 (PFA) [5.9].
[27] *Perry v Momentum* (n21) [5.7].

to determine that they are *not* a dependant. Trustees must, in addition, conduct a thorough investigation to determine whether the member is survived by additional dependants who have not been nominated. A non-nominated parent may, for example, be a dependant in one set of circumstances, and a non-dependant in another.[28]

Should trustees erroneously characterise a nominated dependant as a nominee rather than a dependant,[29] or vice versa, the error may have a material impact on the affected beneficiaries and third parties who have, or would otherwise have, benefited. The error could also prove costly to the fund. For example, if a member is survived by only one nominated beneficiary, and the trustees decide that the beneficiary is a nominee rather than a dependant, they may only pay the nominee once they have satisfied themselves the estate is insolvent.[30] If they do so and the Adjudicator or a court were subsequently to decide that the beneficiary was a dependant rather than a nominee, the fund would be obliged to pay the benefit a second time.[31]

Similarly, if the member died without a nominated beneficiary and the fund decided that no person met the definition of dependant, the fund would be obliged to pay the full benefit to the estate.[32] Once again, the fund would be obliged to repay the benefit to a person subsequently held by the Adjudicator to have been a dependant.[33] Conversely, if the member died without nominating a beneficiary, and the fund erroneously identified a beneficiary as a dependant and made payment to them, the member's executor, heirs, legatees or creditors could have a claim against the fund.[34]

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[28] See §4.7 below.
[29] See eg *Perry v Momentum* (n21); *Ramoroka v SARAF* [2017] 2 BPLR 349 (PFA).
[30] Eg *Grieseel* (n26).
[31] Eg *Perry v Momentum* (n21) [determination handed down before payment].
[32] See *Dobie v National Technikon* [1999] 9 BPLR 29 (PFA) 19 [benefit paid to estate, although survived by an elderly mother who arguably a dependant, but who was fortunately also heir to the estate].
[33] *Lombard v CRAF* [2003] 3 BPLR 4460 (PFA); *Wasserman v CRAF* [2001] 6 BPLR 2160 (PFA).
[34] *Swanepoel v CRAF* [2001] 6 BPLR 2153 (PFA) [mother as executor son's estate unsuccessfully contested fund's identification of fiancée as a dependant]; *Fourie v CRAF* [2001] 2 BPLR 1580 (PFA) [testate heir unsuccessfully contested fund's classification of mother as a dependant].

Having regard to the definition alone, can it confidently be said in each of the following cases that the beneficiary's identity as a nominee or dependant or non-dependant was clear, certain and predictable?

- A nominated cohabiting partner who was enrolled on her partner's medical aid. She was believed to own a business.[35]
- A nominated 24-year-old 'former' cohabiting partner who worked as a part-time model, owned a property and an annuity, both bequeathed to her by her late father, from which she earned an income.[36]
- A nominated 77-year-old mother living in an old age home. The member was not supporting her financially.[37]
- A nominated 62-year-old father and 51-year-old mother. The father had retired, and the mother had never worked. They owned their own home, were living on his modest pension, and both suffered unspecified chronic illnesses. The member was not supporting them financially.[38]
- A nominated financially independent father.[39]
- A non-nominated financially independent mother.[40]
- A non-nominated 80-year-old mother with probable financial need.[41]
- A non-nominated 81-year old mother in declining health. She lived independently, owned the flat she lived in, and earned a modest income on fixed deposit.[42]
- A non-nominated mother in receipt of a small (probably state) pension, who claimed to be receiving financial support from the member.[43]

[35] *Morgan v SA Druggists* [2001] 4 BPLR 1886 (PFA) (nominee).
[36] *Musgrave v Unisa* [2000] 4 BPLR 415 (PFA) (Trustees: nominee; Adjudicator: dependant).
[37] *Perry v Momentum* (n21) (future dependant).
[38] *Musgrave* (n36) (nominee).
[39] *Grieseel* (n26) (nominee).
[40] *Greyling v GEPF* [2015] JOL 32876 (GP) (Trustees: non-dependant; HC: legal dependant). PFA did not apply, but definition dependant similar to s37C.
[41] *Dobie* (n32) (non-dependant).
[42] *Wellens v Unsgaard* [2002] 12 BPLR 4214 (PFA) (future dependant).
[43] *Thene v Bidcorp* PFA/GA/6863/05/LCM (Trustees: dependant; Adjudicator: non-dependant).

- A non-nominated former spouse who had renounced any claim to maintenance in her divorce settlement, on condition the member bought her a car, failing which he was obliged to pay her monthly maintenance. He had fulfilled his obligation and bought her a car.[44]
- A non-nominated former spouse whom the member had retained on his medical aid. He was not obliged to do so under the divorce settlement.[45]
- A non-nominated former spouse whom the member had undertaken to enrol on his medical aid, and to pay for her medical expenses until then. He had done neither.[46]

It is important that funds, and members, fully understand the implications of being survived by a dependant, and the breadth of the concept. For example, a dependant has been held to include a foster child;[47] an ex-spouse who had renounced any maintenance claim, but whom the deceased had undertaken, but failed, to enrol on a medical aid;[48] a fiancée, even though the couple were not cohabiting and the survivor was not financially dependent on the deceased;[49] an unborn child of the deceased's cohabiting partner, even though the deceased may not have been the child's biological father;[50] a non-cohabiting fiancée, to whom the deceased was contributing about R1000 per month to assist with the payment of medical expenses, car maintenance and textbooks;[51] a partner and her son who had been cohabiting with the deceased for approximately two months.[52]

In each of the above cases, if the person identified as a dependant had been the member's only dependant, then in the absence of a nomination of beneficiary the trustees would have been obliged to pay the entire benefit to that dependant, irrespective of the extent of their

[44] *Coetzee v Toyota* [2001] 5 BPLR 2007 (PFA). (Trustees: non-dependant; Adjudicator: legal dependant).
[45] Ibid (Trustees: non-dependant; Adjudicator: financial dependant).
[46] *Lombard* (n33) (Trustees: non-dependant; Adjudicator: legal dependant).
[47] *Gerber v Aberdare* [2010] 3 BPLR 275 (PFA).
[48] *Lombard* (n33) [trustees identified as non-dependant and paid to estate].
[49] *Van Zyl v Delta Motor Corporation* PFA/EC/698/04/Z/CN.
[50] *Koopman v Municipal Gratuity Fund* [2010] 1 BPLR 100 (PFA).
[51] *Van der Walt v Fugro* PFA/NW/3487/2005/RM.
[52] *Makume v Sentinel* [2014] 2 BPLR 244 (PFA).

dependency, the member's wishes as expressed in their will, or the identity and circumstances of the member's intestate heirs.

Since the word nominee in s37C has a technical meaning that differs from its ordinary meaning and given the importance of the distinction between dependants and nominees, its use should be reserved for nominated beneficiaries who are *not* dependants. Unfortunately, the word nominee is often used imprecisely or improperly. In some cases Adjudicators refer to the nominated beneficiary as a nominee, without first explaining why they are not a dependant, in circumstances in which it not self-evident that the person is 'only' a nominee.[53] In some cases the term nominee is used in its ordinary rather than s37C-specific sense, as a short-hand for nominated beneficiary, even though the beneficiary is also identified as a dependant.[54] In *Masuku v Liberty Provident Fund*,[55] the member's adult daughter was characterised as a legal dependant, a factual dependant and a nominee – a definitional impossibility.[56]

The incorrect usage creates confusion, even amongst Adjudicators. In *Grieseel v SARAF*, the Adjudicator states, correctly, that '[n]ominees are not by virtue of being nominated entitled to a death benefit.'[57] This statement was made in circumstances in which there was a single beneficiary, who was identified as a non-dependant nominated beneficiary and therefore a nominee. Their entitlement was therefore dependent on the solvency of the estate.[58]

However, when Adjudicators use the term nominee incorrectly, to refer to a nominated dependant, without appreciating that it is incorrect, they need to find an alternate explanation for the difference between a 'nominee' who is a dependant and one who is

[53] *Musgrave* (n36).
[54] See *Maji* (n1) [16]; *Nduku v VWSA* PFA/EC/14187/2007/NVC [3]; *Kgapola v Fidelity* [2007] JOL 20987 (PFA); *Kitching v CRAF* PFA/KZN/33168/2009/RM.
[55] [2014] 3 BPLR 390 (PFA).
[56] She was a nominated beneficiary. She was considered a legal dependant simply because she was the deceased's child, and a financial dependant because she was sharing accommodation and living expenses with her mother.
[57] *Grieseel* (n26) [5.6].
[58] The nominated beneficiary was the member's father, and the estate was insolvent.

not. In cases in which the member was survived by a nominee and a non-nominated dependant, Adjudicators have modified the explanation as follows: '[A] nominee is distinguishable from a dependant in that, a nominee is not entitled by virtue of having been nominated to the death benefit.'[59]

Implicit in this statement is that dependants *are entitled* to the benefit, which is only the case if there is a single dependant and no nominee. The result is that, instead of engaging in a careful consideration of the relative circumstances of the competing beneficiaries, the fact that a beneficiary is a dependant or nominee serves as a proxy for equitability, for how the benefit *should* be distributed. Nominees are frequently excluded from consideration, if there are dependants, because they are nominees.[60] The Act, however, contains no *de jure* hierarchy of dependants over nominees, or some dependants over other dependants. Nevertheless, Adjudicator determinations suggest that there is a *de facto* hierarchy that favours dependants over nominees,[61]and, increasingly, financial dependants over other dependants.[62]

The reason for this near-automatic privileging of dependants over nominees is that Adjudicators have repeatedly emphasised that s37C's purpose is to protect dependants from hardship.[63] The hardship is attributed to the member's freedom of testation, i.e. her freedom to select her beneficiaries and divide her benefit as she thinks equitable.[64] The implicit message is thus that her exclusion of the dependant was wrong, and that equitability favours dependants.

[59] *Kirsten v Allan Gray* [2017] 3 BPLR 566 (PFA) [5.7]; *Matlonya* (n15) [5.6].
[60] Ibid. See also *Ackermann v LRAF* [2013] 3 BPLR 295 (PFA).
[61] *Van der Merwe v Southern Life* [2000] 3 BPLR 321 (PFA). Prior to 1989, nominees were only eligible beneficiaries in the absence of nominees. See also *Hattingh v Hattingh* [2003] 4 BPLR 4539 (PFA), in which the trustees erroneously identified the member's adult children as nominees and not dependants. This influenced their decision to award the full benefit to the surviving spouse, whom they identified as the only dependant.
[62] See §4.8 below.
[63] Eg *Makume v Sentinel* (n52); *Gorrah v Metal Industries* [2014] JOL 31420 (PFA) [5.8]; *Kirsten* (n59).
[64] Ibid. See also *Musgrave* (n36); *Morgan* (n35).

Despite the absence of a *de jure* hierarchy in s37C, dependants and nominees thus do not enter the circle of beneficiaries on equal terms. In the absence of strong countervailing considerations,[65] trustees' and Adjudicators' starting premise appears to be that the benefit should be awarded to the dependants, without the need for a close examination of the beneficiaries' respective means and needs.[66] While it might reasonably be argued that whether a beneficiary is a nominee or a dependant is relevant to equitability, it should not be dispositive of equitability. More importantly, however, it illustrates how important it is that trustees and Adjudicators correctly determine the beneficiary's status as a dependant or nominee, given that the classification itself influences their perception of the equities.

In *Wellens v Unsgaard*, for example, the member had nominated his partner as his sole beneficiary.[67] The trustees identified the member's mother as a future dependant, and allocated half the benefit to her. In upholding the trustees' decision, the Adjudicator stated that because the member's cohabiting partner was his nominated beneficiary, there *was no need to consider whether she was a dependan*t. The focus of enquiry was exclusively his non-nominated mother's means and needs, in order to justify her inclusion as a dependant. There is no information, in the determination, of the partner's relative means and needs.

In *Musgrave v Unisa*,[68] the member had nominated his parents, sister and partner as his beneficiaries. The trustees identified the parents and sister as nominees, and simply excluded the partner from consideration altogether, on the basis that she and the member were estranged. As a nominated beneficiary the trustees were not entitled to exclude her, *unless* they identified the parents as dependants and the partner as a nominee, which they had not done. The Adjudicator thus correctly set aside the trustee decision. The Adjudicator

[65] Eg *Gowing v LRAF* [2007] 2 BPLR 212 (PFA) & *Karam v Amrel* [2003] 9 BPLR 5098 (PFA), in which the members' nomination of their sibling was upheld even though the member was survived by children (minor and major, respectively).
[66] Eg *Hattingh v Hattingh* (n61) ('nominee' children v spouse); *Nduku* (n54) (nominee mother & brother v husband); *Makume v Sentinel* (n52) (nominee sister v partner); *Ackermann* (n60) (nominee sister v husband); *Masuku* (n55) (nominee brother v nominated daughter).
[67] [2002] 12 BPLR 4214 (PFA).
[68] *Musgrave* (n36).

accepted the trustees' classification of the parents as nominees, notwithstanding their age, limited income and medical needs. He, however, characterised the 24-year-old partner as a dependant.[69] As such, the member's wishes were not binding. He accordingly overrode the member's wishes and allocated her a greater share than the member had wished her to receive.[70] Had he identified her as a nominee, the member's wishes would have been binding.

These examples illustrate that whether someone is classified as a dependant or nominee influences the eventual decision. They also demonstrate that the classification itself depends in some measure upon the outcome that the trustees or Adjudicator consider equitable. In these examples a case could just as reasonably be made for the opposite view – that the member's partner in *Wellens* was his dependant and his mother a non-dependant, while the parents in *Musgrave* were dependants and the partner a nominee. The affected beneficiary does not always incontrovertibly fall into one category or the other. The classification of dependants and nominees is thus not only relevant for s37C's proper operation, but also influences its equitable operation.

IDENTIFYING DEPENDANTS: LEGAL UNCERTAINTIES

4.4 LEGAL AND FUTURE DEPENDANTS

For the past 20 years, paragraph (a) of the definition of dependant has been understood to refer to those persons to whom the member owed an *inter vivos* duty of support.[71] In other words, any person the member should have been maintaining while she was alive,[72]

[69] They had been living apart for two months. She was 24, a part-time photographic model, with an income similar to that of the sister and of the parents, and she owned a valuable inherited property which she was letting. The value of her property (R350 000) was then almost the average price for a large house in South Africa, see 'Average House Prices in South Africa: 1995-2015' *BusinessTech* (17 April 2016).
[70] Forty per cent instead of 30%.
[71] See Jeram (n2), for a detailed discussion of duties of support in the s37C context.
[72] See Maintenance Act 99 of 1998, s6(1) which obliges a maintenance officer to determine whether a person is 'legally liable' to support another. See also the Canadian case of *Petrowski v Petrowski Estate*

irrespective of whether she was doing so or not. The relevant date for determining the existence of the duty was understood to be the date of the member's death.[73] Paragraph (c) complements paragraph (a). It looks to a hypothetical future, recognising that, although the member's duty towards a person had not yet crystallised into an enforceable duty while she was alive, the circumstances suggest that the duty would probably have arisen in the future, had she not died.

Inter vivos duties of support arise from multiple sources in South African law, namely common law;[74] customary law;[75] maintenance orders;[76] and contractual undertakings to provide support.[77]

Historically, the most important source was the common law, which derives from Roman and Roman-Dutch law.[78] Under the common law, the duties are an expression of family obligation. They are duties that arise '*ex pietate*', from 'natural affection' and the 'dutifulness' that family members feel, or should feel, towards one another.[79] Duties grounded in customary law have increasingly been recognised by the courts, particularly since the

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2009 ABQB 196 [445-472], where, in determining whether a deceased father owed his son a 'legal obligation' of support while still alive, the court had to assess whether the son would have succeeded had he claimed maintenance from his father while the father was still alive.

[73] *Wasserman* (n33); Jeram (n2).

[74] Voet 25.3 esp: 25.3.14(a); 25.3.15 & 25.3.18 in Gane (tr) *The Selective Voet* (1955); Van Heerden et al *Boberg's Law of Persons and the Family* (1999), 249.

[75] *Kewana v Santam Insurance* [1993] 4 All SA 339 (TkA)*; Metiso v Padongelukfonds* 2001 (3) SA 1142 (T); *Maneli v Maneli* [2010] JOL 25353 (GSJ)*; Seleka v RAF* [2016] JOL 35830 (GP).

[76] Specifically, those granted in terms of the Divorce Act 70 of 1979, s7. Ordinary maintenance orders handed down by the Maintenance Courts are based on common law and customary law duties of support, see Maintenance Act (n72), s2. See also *Rubinstein v Rubinstein*1992 (2) SA 709 (T); *Santam Bpk v Henery* [1992] All SA 2 312 (A); *Van Schalkwyk v MEPF* (n1); *Lombard* (n33); *Smith v Media 24* [2017] 2 BPLR 365 (PFA). Cf *Muller v CRAF* [2014] 2 BPLR 265 (PFA).

[77] *Du Plessis v RAF* 2004 (1) 359 SA (SCA); *Odgers v De Gersigny* 2007 (2) SA3 305 (SCA); *MB v NB* 2010 (3) SA 220 (GSJ); *Paixão v RAF* [2012] 4 All SA 262 (SCA). Cf *Marais* (n13) in which the Adjudicator interpreted the terms of a cohabitation agreement as disavowing the existence of a duty of support, and as limiting the possible extent of a partner's financial dependency.

[78] *Boberg's Law of Persons* (n74); Lawrie 'The reciprocal duty of support between parent and child' (1938) 55 *SALJ* 286.

[79] *Ford v Allen* 1925 TPD 5, 7. See also *Barnes v Union & SWA Insurance Co Ltd* 1977 (3) SA 502 (E). *Jacobs v RAF* 2019 (2) SA 275 (GP) [22] stated that duties of support between relatives 'is one of those areas in which the law gives expression to the moral values of society.'

advent of the Constitution.[80] They are based on the principle of *ubuntu*, which also encompasses the ideals of family solidarity and responsibility.[81]

The circumstances under which the duty of support arises are well-established in principle, but difficult to apply in practice. The accepted principles are that reciprocal duties arise as between eligible relatives when one is in need of support and the other has the means to provide support.[82] There are thus three distinct requirements: eligibility, need and means.

4.4.1 Eligibility

Under the common law and customary law, the eligible relatives are *spouses, parents and children,*[83] *siblings,*[84] *grandparents and grandchildren and all further direct ascendants and descendants in the vertical line*.[85] In respect of parents and children the duty arises irrespective of whether the relationship is established by biology[86] or adoption.[87] Under the common law paternal grandparents did not owe a duty of support to a grandchild born out

[80] FC, s211(3) obliges courts to apply customary law when it is the applicable law. Courts could face a potential dilemma should a duty of support that forms part of the common law not be recognised in customary law. For eg, in customary law a natural father was not under an obligation to maintain a child born out of wedlock, since the child belonged to the mother's guardian, see Dlamini 'Maintenance of minor children: the role of the courts in updating customary law to meet socio-economic changes' (1984) 101(2) *SALJ* 346, 351. While a parent's duty of support is now confirmed in the Constitution and Children's Act 38 of 2005, other differences may remain. However, should this be the case, courts will develop customary law in accordance with s39 of the Constitution. In *Fosi v RAF* [2007] JOL 19399 (C) [24], Dlodlo J held that he was 'constitutionally enjoined to develop customary law to bring it to the same level reached by common law.' In *Seleka v RAF*, the court developed Tswana customary law by recognising that the contemporary duty fell on daughters and not only sons, as was traditionally the case.

[81] See *Fosi v RAF* (n80); *RAF v Mohohlo* 2018 (2) SA 65 (SCA).

[82] *Oosthuizen v Stanley* 1938 AD 322.

[83] The duty also attaches to minor children, see *Re Knoop* (1893) 10 SC 198.

[84] *Union Government (Minister of the Interior) v Warner* 1916 CPD 436.

[85] Voet (n74) 25.3.5; *Boberg's Law of Persons* (n74). See also *Ford v Allen* (n79); *Spencer v Minister of the Interior* (1929) 50 NPD 175.

[86] A woman is regarded as the mother of a child born to her as a result of artificial insemination, while her husband is regarded as the father of the child, provided he consented to the insemination. No rights or duties arise as between the donor of the gamete and the child. See Children's Act (n80), s40. Parental rights and duties arise as between commissioning parents and a child born as a result of a surrogacy agreement, while no such rights and duties arise as between the child and surrogate mother or her family, Children's Act, s297.

[87] Children's Act (n80), s242(3) provides that: 'An adopted child must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adoptive child.' See also *Watson v Watson* 1978 (3) SA 126 (E). Whether the same holds true for adoptive grandparents and grandchildren is not clear.

of wedlock, and vice versa, but this exception was held to be unconstitutional in 2004.[88] The duty does not extend to more distant relatives in the horizontal line, such as uncles/aunts, nephews/nieces, cousins.[89] It also does not extend to stepfamily or in-laws.[90] Under customary law, the duty of support may be owed to a more extensive family circle. It may, in particular, extend to the children of siblings – to nephews and nieces.[91]

Duties of support are always contingent until such time as one relative is in need and the other has the means to provide support, at which juncture the duty arises automatically, by operation of law. However, not every relative within the circle of eligible relatives is jointly and severally liable to support every other relative. There is an order of obligation, such that the duty falls on the nearer relative first, [92] and on a more distant relative only if the nearer is unable to provide support.[93] So, for example, a child's duty of support arises only to the extent the parent's spouse is unable to provide support;[94] a grandchild's only if and to the extent all the children are unable to provide support;[95] a grandparent's only if the child's parents are unable to provide support,[96] in which case both the paternal and maternal grandparents will be under a duty to support the grandchild to the extent of their respective means.[97] A sibling's duty to support a sibling should arise only if the sibling has no spouse, parent, child or grandparent able to provide support.[98]

[88] The exception, in so far as it applies to grandparents, was held to be unconstitutional in *Petersen v Maintenance Officer, Simons Town* 2004 (2) BCLR 205 (C). It is not clear whether a child born out of wedlock owes her father or paternal family a duty of support.
[89] *Ford v Allen* (n79). See also *SS v Presiding Officer of the Children's Court, District of Krugersdorp* [2012] JOL 29302 (GSJ).
[90] Ibid. See also *Boberg's Law of Persons* (n74).
[91] See *United Building Society v Matiwane* 1933 EDL 280; *RAF v Mohohlo* (n81). See also Submissions by Mr Manyosi during the parliamentary committee meeting to discuss the Reform of the Customary Law of Succession Bill on 01 September 2008, Parliamentary Monitoring Group.
[92] Ex *Parte Pienaar* 1964 (1) SA 600 (T); *Barnes v Union* (n79); *Pillay v Pillay* 2004 (4) SA 81 (SE).
[93] See eg *Miller v Miller* 1940 CPD 466 and the cases discussed in *Boberg's Law of Persons* (n74), 273 & fn93. Cf Voet (n74), who says this a matter for the discretion of a 'fair minded' judge (25.3.11).
[94] *Smit v Smit* 1946 WLD 360.
[95] *Barnes v Union* (n79).
[96] *De Klerk v Groepie* (31156/2012) [2012] ZAGPJHC 205 (28 August 2012); *N v B* (6573/14) [2014] ZAWCHC 112 (19 June 2014). See also *Williams v Lester Algernon* [2001] 2 BPLR 1687 (PFA).
[97] *Petersen v Maintenance Officer* (n88).
[98] See *Barnes v Union* (n79).

This means that to properly determine whether a legal duty of support was owed or likely to be owed, trustees would also need to ensure that there was no closer relative able to provide support.[99] The duty is also shared by all relatives of that class, proportionate to their means. The duty thus falls on both parents,[100] all children,[101] or both paternal and maternal grandparents.[102] From a practical perspective, this means that trustees should, in appropriate cases, investigate the financial circumstances of not only the member and surviving relative, but the financial circumstances of all the relatives who also owe the survivor a contingent duty of support, to determine whether and the extent to which the member and/or other relatives owed the survivor a duty of support.[103] If a member is survived by a financially dependent step-child, partner or parent, for example, the fact that there are other relatives who owe the dependant a duty of support is surely relevant to the equitable distribution of the benefit also.[104]

Amongst the additional uncertainties facing trustees today is whether the duty is extinguished in some circumstances. Under Roman-Dutch Law the duty of support was near absolute. Parents remained liable to support children whose need was attributable to their own profligacy or self-created misfortune,[105] while children remained liable to support 'bad

[99] See eg *Williams v Lester Algernon* (n96), in which the grandparents' legal duty would have been contingent on the inability of the child's parents to provide support. The grandchild was held to be a factual dependant.
[100] *Farrel v Hankey* 1921 TPD 590, 596.
[101] *Fundsatwork v Guarnieri* 2019 (5) SA 68 (SCA). In *Norris v UKZN* [2019] 3 BPLR 812 (PFA), the trustees classified the member's mother as a future dependant and awarded the full benefit to her, contrary to the member's wishes. The Adjudicator remitted a matter to the trustees for further investigation, because they had not satisfactorily investigated the financial means of either the mother or the member's siblings, which was relevant to the scope of the member's duty of support.
[102] *Petersen v Maintenance Officer* (n88).
[103] In *Sefularo v Political Office-Bearers* [2013] 2 BPLR 265 (PFA), siblings were held not to be legal dependants because either they, or their spouses, were employed at the time of the deceased's death. While there is some information regarding the siblings' employment status and occupation, there is no information regarding their spouses' financial means, which is particularly pertinent to the financial need of the unemployed sibling. The fact that a person is employed does not mean they are not indigent, or in need – their income may be insufficient to meet their reasonable maintenance needs.
[104] See §5.5 fn84 below.
[105] Voet (n74) 25.3.5.

parents'.[106] The duty was extinguished only in the same circumscribed circumstances that rendered an heir unworthy to inherit.[107]

Today, the main ground that renders a person unworthy to inherit is if they wrongfully and culpably caused the decedent's death, which is expressed in the maxim '*de bloedige hand er neemt geen erffenis*.'[108] The principle has been applied to death benefits also. In *Makhanya v Minister of Finance*, the HC set aside the trustees' decision to allocate a death benefit, payable by a government retirement fund, to the member's widow, who had been convicted of murdering her husband.[109] More recently, the Adjudicator stated that the principle applies equally to s37C death benefits.[110] Section 37C, however, explicitly states that it applies 'notwithstanding' anything to the contrary in any other law. The Adjudicator's justification for excluding unlawful killers, despite s37C appearing to override all other laws, is that it would be contrary to public policy to allow them to benefit from their crime, and that it is unlikely that the legislature intended s37C to override public policy.[111] This begs the question, why does public policy not require that a spouse's proprietary rights, or a minor child's right to maintenance, be similarly respected?

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[106] Ibid 25.3.8.

[107] The duty is extinguished if the relative has committed an act of 'ingratitude' meriting disherison, Voet (n74) 25.3.18. The grounds warranting disherison are set out in Justinian's Novel 115 'Disinheritance for Just Cause' (translated by Scott *The Civil Law* (1932)), which entitles a parent to disinherit a child for more reasons than the reverse. See also Botha 'The duration of the duty to maintain and of a maintenance order' (2008) 125(4) *SALJ* 715.

[108] Literally translated as 'the bloody hand takes no inheritance' (my translation). In South African law those who inherit through the unworthy heir are not debarred from inheriting. See *Ex Parte Steenkamp* 1952 (1) SA 744 (T).

[109] 2001 (2) SA 1251 (D). The member was also survived by a child, but the definition did not include self-sufficient major children. The court overturned the trustees' decision to award the benefit to the spouse and ordered that the benefit instead be paid to the member's estate, of which the child was the intestate heir.

[110] *Nel v Netcare* [2018] 3 BPLR 747 (PFA); *Van Rhyn v UTI* [2018] 3 BPLR 777 (PFA). In *Nel* the murderer was the deceased's stepdaughter, who, together with her two-year-old child, was living with the member and her mother at the time of their deaths. She and her partner, the minor child's father, murdered both the member and his wife. She was excluded from consideration as a result, but the fund identified her minor son as the member's sole surviving financial dependant and awarded the entire benefit to him. The member's siblings contested their decision. The matter was remitted to trustees for further investigation into the child's dependency.

[111] *Nel v Netcare* (n110)[5.8].

The *bloedige hand* principle applies to both intentional and negligent killing.[112] There is academic debate as to whether it should automatically apply in the latter instance also, or whether some element of moral blameworthiness should, in addition, be required.[113] In England courts are entitled to relax the equivalent forfeiture rule with regard to the assets in the deceased's estate when it is in the interests of justice to do so,[114] while statutory tribunals have the authority to decide whether retirement and other social security benefits should be forfeited.[115] Moreover, even when the rule is not relaxed, surviving dependants are entitled to claim maintenance from the deceased's estate under family provision legislation.[116] The only exception to these permitted relaxations of the forfeiture rule apply when the dependant has been convicted of murdering the deceased.[117]

Under the established principles of duties of support in South Africa, the duty seemingly survives no matter how badly the member was treated by the eligible relative, provided only that the relative was not convicted of the member's murder or culpable homicide. Why, however, should a child be liable to support a parent who had not supported the child, either financially or emotionally,[118] or a sibling be liable to support another whose need is attributable to their own life choices? Conversely, why should dependants automatically be deprived of any right or hope of sharing in the benefit in cases of culpable homicide?

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[112] See *Casey v The Master* 1992 (4) SA 505 (N), in which the court held that it was for parliament rather than the judiciary to change the rule.

[113] See eg Skeen 'Unworthiness through negligence' (1993) 110(3) *SALJ* 446, who posed the question with reference to the high incidence of motor vehicle accidents in South Africa.

[114] Forfeiture Act 1982, s2.

[115] Ibid, s4.

[116] Ibid, s3. See Inheritance (Provision for Family and Dependants) Act 1975, which enabled a court to order family provision for a son convicted of his mother's negligent killing in *Land v Land* [2006] EWHC 2069 (Ch). The sad facts of *Land v Land* illustrate why it is sometimes in the interests of justice that forfeiture rules be relaxed.

[117] Ibid, s3.

[118] The question has arisen in jurisdictions in which the duty of support is statutory in origin. British Columbia changed its family provision legislation to preclude claims by parents in 2011, see *Anderson v Anderson* 2013 BCSC 129. In various US states children are in very limited circumstances excused from fulfilling their duty of support. See eg *State of Connecticut v Berglund* 4 Conn Cir Ct 644, 238 A2d 450 (1967), in which a mother's neglect of and estrangement from her son, which started when he was about 10 years old, was considered not to be sufficient reason to excuse him from his obligation to provide support, since her neglect was not 'wilful desertion' but due to addiction (Conn Gen Stat § 17-326, now replaced by Conn Gen Stat 46b-219). In *Pelletier v White* 33 Conn Supp 769; 371 A2d 1068, a son was excused from supporting his father because the latter had failed to provide financial support to the son during his minority, when able to do so.

If trustees have been given discretionary powers in order to ensure that death benefits are distributed more equitably than would be the case if the law of succession applied, should that discretion not extend to overriding both the strict application of duties of support and the *bloedige hand* principle, when applying them would yield inequitable results? I would go so far as to argue that the inflexible nature of these rules is also open to constitutional challenge, although I cannot develop the argument further within the scope of this thesis. Suffice it to ask whether it is consonant with the individual's right to human dignity to remain liable to support a relative who has abused or rejected them;[119] or whether it is consonant with public policy to deny an unlawful killer all inheritance and maintenance rights when the killing occurred as a consequence of longstanding abuse at the hands of the member. These are important considerations given the high levels of domestic violence in South Africa, particularly against women and children.[120]

Apart from these longstanding uncertainties, courts have recently recognised that duties of support can arise as between persons who fall *outside* the established circle of eligible relatives. Examples include a biological aunt and nephew whose *de facto* relationship for 28 years, the duration of the child's life, was that of mother-and-son;[121] a foster parent and foster child, where the relationship had subsisted from the child's infancy to the foster father's death when the child was 10 years of age;[122] a biological father and daughter, even after the daughter had been adopted by her paternal grandparents;[123] same-sex and opposite-sex life partners, where they have voluntarily undertaken duties of support towards one

[119] See *Jooste v Botha* 2000 (2) 199 SA (T), in which a father provided financial support to his son born outside his marriage, but whom he otherwise refused to acknowledge as his son.
[120] *Gender based violence in South Africa* (2020) Saferspaces; *Gender-based violence in South Africa: a brief review* (2016) Centre for the Study of Violence and Reconciliation; *The Optimus Study on Child Abuse, Violence and Neglect in South Africa* (2015) Centre for Justice & Crime Prevention.
[121] *RAF v Mohohlo* (n81). The aunt had not adopted her nephew, so the definition of 'descendant' in the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, s1, might not have applied either. This would have meant that she would not have been entitled to inherit from him under the Intestate Succession Act 81 of 1987.
[122] *Fortuin v RAF* 2015 (5) SA 532 (GP).
[123] *JT v RAF* 2015 (1) SA 609 (GJ). He continued to provide financial support and maintained a father-daughter relationship with her.

another.[124] These cases did not involve the distribution of death benefits, but wrongful death claims arising from the death of a breadwinner. They are all fact-specific and have not resulted in a general change to the common law. A maintenance officer, for example, would be hard-pressed to find that a foster parent was legally liable to support a foster child, or an aunt her nephew.[125] Magistrates' Courts do not have the inherent power to develop the common law, unlike High Courts.[126] Moreover, in each of these cases, the deceased had in fact been financially supporting the claimant, which means they would have been eligible as financial dependants under s37C.[127]

Nevertheless, what these cases do demonstrate is that the legal context within which the common law duties of support operate is becoming more complex. If the courts have found that legal duties of support can, in specific circumstances, arise between individuals who fall outside the family circle of eligible relatives, what should trustees do if a similar case were to come before them in circumstances in which the member had not been providing financial support? Can they simply confine themselves to pre-constitutional common law duties of support, regardless of judicial developments and social realities?[128]

4.4.2 Need and Means

The duty is always a 'facultative' one: it arises only if and to the extent that one relative is in need of support and the other has the means to provide support.[129] As a general principle,

[124] *Du Plessis v RAF* (n77). In *Paixão* (n77) & *Jacobs v RAF* 2019 (2) SA 275 (GP) the deceased was still married while cohabiting with his partner [5 & 6 years respectively]. In *Paixão* the deceased had expressly assured the partner of his intention to support her and her children, and in *Jacobs* his partner and her minor children had been wholly dependent on him for the duration of their relationship.
[125] See (n121 & 122). Maintenance officers must interpret legislation in light of the spirit, purport and object of the BoR, but do not have the power to develop common law or customary law.
[126] Constitution of the Republic of South Africa 1996, s173.
[127] The court in *Jacobs v RAF* (n124) held that it would be contrary to public policy to deny the existence of a duty of support in circumstances in which the deceased had voluntarily assumed the duty. The deceased and claimant were, however, father and son, and the claim was against the *RAF*.
[128] For eg, Hall & Sambu 'Demography of South Africa's Children' in *South African Child Gauge* (2017) Child Institute, University of Cape Town, 101, state that South Africa is 'unique in the extent of parental absence from children's daily lives'; almost a quarter of African children do not live with either parent, and fewer than a third live with both parents. To what extent do de facto parent-child relationships emerge between such children and their caregivers?
[129] *Oosthuizen v Stanley* (n82). See also *Riches v Riches* 1910 EDL 247.

an eligible relative is in need if they are unable to meet their reasonable maintenance needs from their own resources.[130] Maintenance encompasses the 'necessities of life': accommodation, food, clothing and medical care.[131] In addition to these basic necessities, the duty of support towards children includes education and even recreational activities.[132]

The scope of the duty is said to differ depending on the 'status' and 'station in life' of the affected relatives.[133] The duty that is owed to spouses and children is considered to be more extensive than that owed to other relatives, but the difference, if any, has not been definitively established.[134] The principle difference appears to be that the scope of the duty owed to spouses and minor children is determined by reference to the standard of living and station in life of the partner or parent subject to the duty,[135] while that owed to other relatives arises only if and to the extent that they are indigent.[136] The scope of the duty, in contested cases, must always be decided by the courts, having regard to the above principles. There are no statutory formulae that apply, even in relation to the scope of a parent's duty towards minor children.[137]

Minor children are, nevertheless, usually legal dependants. Few minor children will have the means to provide for their own maintenance.[138] In many cases major children who have not yet completed their education, including tertiary education, will also be.[139]

What, however, of post-educational adult children who cannot afford to maintain themselves through no fault of their own, such as an inability to find employment? This is a question of considerable importance in South Africa, given the high unemployment rate,

[130] *Oosthuizen v Stanley* (n82); *Van Vuuren v Sam* 1972 (2) SA 633 (A).
[131] Ibid. See also Van Zyl (updated by Clark) 'Maintenance' in *Family Law Service* (2019), para C1.
[132] 'Measure and quantum of support of children' in Family Law Service, para C8 (n131).
[133] *Oosthuizen v Stanley* (n82); *Wigham v British Traders* 1963 (3) SA 151 (W).
[134] Cf the views of *Boberg's Law of Persons* (n74) and Spiro *Law of Parent and Child* 4ed (1985), 403.
[135] *Herfst v Hefst* 1964 (4) SA 127.
[136] *Oosthuizen v Stanley* (n82); *Volkenborn v Volkenborn* 1946 NPD 76.
[137] Cf Canada's Federal Child Support Guidelines, SOR/97-175 and New Zealand's Child Support Act, 1991.
[138] A successful maintenance claim nevertheless requires that the child's maintenance needs be proven. See eg *Mgumane v Setemane* [1998] JOL 1757 (Tk).
[139] *Ex Parte Pienaar* 1964 1 SA 600 (T) 607; *Mentz v Simpson* 1990 (4) SA 455 (A).

particularly amongst the youth, the lack of general social assistance, and the widespread poverty within the country.[140] There is no clear answer. There are very few reported cases involving maintenance claims by adult children, and those that exist are not recent.[141] In principle the duty continues, and revives, for as long as a child is in need and the parent has the means to maintain them, although the standard appears to be lower than that to which minor children are entitled.[142]

Spouses may be legal dependants, but they are not necessarily such.[143] It is, as always, a question of need and means. Since the question of whether a duty was owed to a spouse almost invariably arises on the termination of the relationship, whether by death or divorce, it is more difficult to delineate the scope of the *inter vivos* duty. The Divorce Act empowers a court to order such maintenance as it considers just in the absence of a maintenance agreement between the parties.[144] Courts increasingly award only rehabilitative maintenance.[145]

The Maintenance of Surviving Spouses Act entitles a spouse to reasonable maintenance from the deceased spouse's estate to the extent she is in need,[146] and the benchmark appears to be the marital standard of living.[147] There is, unfortunately, very little case law on the point. In

[140] See §1.7 above.
[141] The last reported case is *Gliksman v Talekinsky* 1955 (4) SA 468 (W), in which the court held that a widowed adult daughter with six children was entitled to the necessities of life from her father, but was not entitled to luxuries, even though her father could afford them.
[142] Ibid. See also Botha 'The duty to maintain' (n107).
[143] In *Masango v RAF* (2014/42370) [2017] ZAGPJHC 221(3 August 2017), the HC held that the deceased wife had not owed her husband a legal duty of support, even though he was unemployed and she was the main breadwinner at the time of her death, given his employment history and prospective earning potential. Cf *Ndlhovu v Mr Price* [2015] 3 BPLR 410 (PFA), in which the Adjudicator held that the spouse was the member's only legal dependant merely because she was unemployed, without regard for her qualifications and prospects.
[144] Act 70 of 1979, s 7(2).
[145] For a discussion on the judiciary's attitude to post-divorce maintenance, see Sinclair *The Law of Marriage* (1996); Clark 'Maintenance' in Family Law Service (n131).
[146] Act 27 of 1990, s2. See also *Friedrich v Smit* 2017 (4) SA 144 (SCA).
[147] *Oshry v Feldman* 2010 (6) SA 19 (SCA); *Van Niekerk v Van Niekerk* [2011] 2 All SA 635 (KZP).

only one case has a court been required to decide on the quantum of the claim, and the court awarded the full disposable estate to the surviving spouse.[148]

The duty towards parents and siblings only arises when they are 'indigent'. How poor must a parent or sibling be before they are considered indigent? There is no definitive answer. Some cases have equated indigence with absolute poverty – the relative must be so poor that they are unable to afford even the most basic necessities of life.[149] The majority adopt an apparently less exacting standard, that of 'comparative indigence'.[150]

There are very few reported cases involving direct maintenance claims by parents or siblings. Most cases are decided in the context of wrongful death actions. The most recent reported decision involving a direct claim is that of *Volkenborn v Volkenborn*,[151] in which the Court set aside a magistrate's maintenance order. In *Volkenborn* the Court accepted that the appropriate threshold was 'comparative' rather than 'absolute' indigence. It also accepted that the 'elderly and infirm' mother's basic needs far exceeded her income and that she went hungry 'many a morning'.[152] She had reached such a state of impecuniosity that she had been obliged to sell her furniture 'bit by bit', even though her income was supplemented by renting out almost every room in her house. The Court nevertheless held that she was not yet indigent. The reason was that she owned a capital asset, her house,

[148] *Oshry v Feldman* (n147). The affected testamentary heirs were the deceased's adult children, and their argument that the surviving spouse was not in financial need, since she had adult children of her own able to support her, was rejected, since the duty of support rested on her husband and had been transmitted to his estate. Children are only liable if and to the extent one spouse, or their estate, cannot support the other. However, prior to her husband's death her children were providing her with financial support, because her husband could no longer afford to do so fully on his means. Assuming therefore that her children had owed her an *inter vivos* duty of support whilst the husband was alive, his death apparently extinguished their obligation while the estate became liable for her full maintenance needs, subject only to the size of the available estate. If this decision is correct, the duty is in effect transmitted to the deceased spouse's children rather than the surviving spouse's children. The marriage had lasted for 18 years, but it was a second marriage for both spouses, entered into late in life, when the husband was 70 and his widow 60, and was out of community of property, presumably in order to ensure the assets acquired during their first marriages devolved on their own children.

[149] *Smith v Mutual & Federal Insurance Co Ltd* 1998 (4) SA 626 (C) 632 said that it is not enough that parents are so poor that they 'have few things or nothing', and that they must be in 'extreme need or want of the basic necessities of life'. As pointed out in *Jacobs v RAF* 2010 (3) SA 263 (SE) [17], it will be very difficult for someone to prove that they have 'less than nothing'.

[150] *Oosthuizen v Stanley* (n82); *RAF v Mohohlo* (n81).

[151] 1946 NPD 76.

[152] At 77.

which she could realise or mortgage to provide additional income. The Court acknowledged that she might, in the future, having depleted her capital asset, be entitled to support, but considered her application to be premature.

It is likely that the inclusion of future dependants in the Act is due to the *Volkenborn* court's stringent test for even comparative indigence.

4.5 STATUTORY DEPENDANTS

4.5.1 Factual (Financial)

The concept of factual dependant is unique to the Pension Funds Act in South African law. The term factual dependant is used in two senses by Adjudicators – to refer to a person who is only eligible because they are a factual dependant under paragraph (b)(i) of the definition, and to refer to any person who was financially dependent on the member, even if they were also a legal dependant, spouse, child or future dependant.

In the first sense, by definition, no legal duty of support is owed to factual dependants. They are eligible only because they were 'in fact dependent on the member for maintenance'. What does this mean, however? If read literally, it suggests that the recipient was not merely receiving monetary payments or contributions from the member, but that the member was providing *financial assistance* to the recipient, to enable them to meet their maintenance needs.

The Adjudicator has applied this literal reading to applicants claiming to be factual dependants who are not the member's cohabiting partner. The Adjudicator has attached a

different 'purposive' interpretation to the definition as it pertains to cohabiting partners, which is discussed below.[153]

For the first category, Adjudicators have held that there are two essential requirements that are necessary to render a person a financial dependant: *need* on the part of the claimant, and the *regular* provision of financial support on the part of the member. The two go together, however, so regularity of support is indicative of the recipient's need.[154] Financial support that the recipient does not need to meet her maintenance needs is simply generosity on the part of the member.[155]

The question of whether a claimant satisfies these two requirements rarely arises for direct consideration in determinations. The fact of dependency is usually self-evident, although there are determinations that suggest that sometimes claims of financial dependency are not given the consideration that they should, and applicants fail because they are unable to prove that they received regular contributions from the member, or that they were sufficiently needy.[156] The need for and nature of proof is a particular problem, given that many recipients receive payments in cash or through methods of payments for which there is no record,[157] and because different Adjudicators have different views on the sufficiency of affidavit evidence. The result is that the claims of some dependants are, arguably, too-readily dismissed, whereas others, who might not even have been receiving financial support from the member, are too-readily accepted as such, merely on the basis of their own assertion.[158]

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[153] See §4.8 below.
[154] *Govender v Alpha* [2001] 4 BPLR 1843 (PFA); *Govender v Alpha* (2) [2001] 8 BPLR 2358 (PFA); *Gunpath v Momentum* PFA55/2019 08 October 2019 (FSB).
[155] *Gunpath* (n154).
[156] *Makume v Sentinel* (n52); *Maake* (n15).
[157] Many South Africans do not have bank accounts. They send and receive money using payment systems that allow for the cash purchase of money vouchers, which are then sent to the recipient via mobile phone and redeemable for cash. Most of these transfers happen via supermarkets. See eg SPAR 'How to send and receive money' <https://www.spar.co.za/Services/Instant-Money#send-money>.
[158] Cf *Maake* (n15) with *Tsele v Bidvest* [2016] 1 BPLR 146 (PFA).

The persons who most frequently claim financial dependency, other than cohabiting partners, are parents and siblings. Financial support of unrelated third parties occurs more rarely.[159] The question then is, if need is a common requirement to establish eligibility both as a legal and as a financial dependant, are there different thresholds of need that must be satisfied? After all, if the threshold of need is the same, then the fact that the recipient is receiving financial support is irrelevant other than as confirmation of the existence of need. The fact that parents have been found to be financial dependants in cases in which the Adjudicator has expressed doubt that they are necessarily legal dependants, suggests that the level of need required for financial dependence is not as great as is required for legal dependence.[160]

This means, for example, that although parents may have similar financial need and both have a child with similar means to provide support, one will be a dependant and the other not. It also means that a partial financial dependant, whose need is less than a parent's or sibling's for example, could be entitled to the full death benefit if they are identified as a financial dependant, while the needier relative has not yet reached the higher threshold of need required to establish legal dependence. This, once again, is an area of uncertainty and inequitable treatment of potential beneficiaries.[161]

4.5.2 Children and spouses

Spouses and children are always eligible dependants, irrespective of whether they were owed a legal duty of support, and irrespective of whether they were financially dependent upon the member.

[159] See eg *Govender v Alpha* (n154) (mistresses' daughter) and *Gorrah* (n63) (neighbour).
[160] In *Jacobs v RAF* 2019 (2) SA 275 (GP), a wrongful death action, the court held that it would be invidious to hold that a deceased son did not owe his father a legal duty of support, when he had in fact been supporting his needy father.
[161] I have previously made this argument in Lehmann 'Death and Dependency: The Meaning of 'Dependant' (2009) 126(4) *SALJ* 650.

The challenge for trustees is not whether spouses and children are eligible dependants, but whether a potential beneficiary *is* a spouse or child. The challenges arise because of the frequent absence of documentary proof of the marriage or of paternity.[162] The marriage rate in South Africa is very low.[163] Most children are in consequence born outside marriage.[164] Many birth certificates do not disclose the identity of the child's father,[165] and many children do not bear their father's surname.[166] Many mothers also choose not to disclose the identity of the father to the child.[167] The majority of children do not live with in the same households as their fathers.[168] This phenomenon is most prevalent in poorer households.[169] Paternity disputes are common,[170] even after the death of the purported father.[171]

When the child was a financial dependant, they are eligible even if they are not the member's biological child.[172] When they were not, the child's only basis for eligibility will be their biological relationship.[173] Trustees therefore need to determine whether there is sufficient

[162] Eg *Maake* (n15).
[163] StatsSA *Marriages and Divorces 2017* (PO307) records the crude rate of marriages concluded by a marriage officer as 2.4 per 1000 (at 2); customary marriages as 0.05 per 1000 (at 4). The data does not record non-registered religious or customary marriages. The former is likely to be quite small, since most religious marriages are ceremonial and are nevertheless solemnised by marriage officers; the principal exception pertains to Islamic marriages, which are regulated by Islamic Law.
[164] See StatsSA *Cohort Fertility in South Africa* Report No. 03-00-03 (2019), which indicates that there is near parity between children born within and outside marriage, but it includes women in cohabitation relationships in the definition of married.
[165] Cf *Mthiyane v Fedsure Life* [2002] 5 BPLR 3460 (PFA), where a mother was able to provide birth certificates reflecting the member as the father.
[166] StatsSA *Recorded live births 2018* (PO305), 8, notes that almost 63% of birth certificates do not contain information regarding the child's father. See eg *Kgapola v Fidelity* (n54); *Pandlev v South African Authorities* [2015] 3 BPLR 440 (PFA).
[167] Up to 30% of children may not know the identity of their biological fathers. See Nduna 'Factors that hinder paternity disclosure to children: South African mothers' perspectives' (2014) 26(4) *Journal of Feminist Family Therapy* 218, 219.
[168] Hall & Sambu (n128), 101. This may simply be attributable to historic differences between the nuclear conception of the family that underpins common law duties of support, and the extended kinship relationships that are part of traditional African custom and customary law. See Dlamini (n80).
[169] Ibid.
[170] Courts can order a child to undergo a paternity test but will only do when it is in the best interests of the child. See Children's Act (n80), s37; *YM v LB* 2010 (6) SA 338 (SCA).
[171] See *M v Setshaba* (A5020/2016) [2018] ZAGPJHC 602 (24 October 2018); *Cele v Alexander Forbes* [2010] 1 BPLR 35 (PFA); *Kekana v Nedcor* [2010] 3 BPLR 295 (PFA); *Tlou v Amplats* [2011] 3 BPLR 439 (PFA); *Nsibande v Alexander Forbes* [2015] 3 BPLR 423 (PFA).
[172] Cf *Koopman* (n50) [deceased survived by two minor children and pregnant girlfriend. Adjudicator awards bulk to unborn child on basis future 'financial' dependant when paternity disputed].
[173] Eg *Maake* (n15), [Adjudicator did not accept partner's claim regarding the paternity of the children or their financial dependence]. In *Ngcobo v Telkom* PFA/GA/6386/2005/FM the fund withdrew a child's pension (not subject to s37C) when the results of a paternity test (done by member) revealed he was not the father. As a financial dependant, he was still eligible to share in the death benefit.

evidence that the child was the member's child,[174] or whether to require a paternity test.[175] These are difficult and delicate, but unavoidable, decisions facing trustees. A further consideration in the case of contested paternity, is, once again, the fact that biological parents have a paramount obligation to support their minor children.[176] What weight should trustees attach to the moral claims of undisputed biological children, and the claims of children who might not be the member's children, albeit that the member was supporting them as part of the household?[177]

A further challenge is that adoptions under customary law are not registered, unlike their civil law counterparts.[178] Customary adoption is a family and community-based process. The essential element is that the adoption be publicised within the community by way of a traditional ceremony.[179] Children are, however, commonly raised, permanently or temporarily, by relatives other than their biological parents. Determining whether a child has been adopted or simply raised by a relative as part of her household is therefore a difficult enquiry.[180]

A spouse is defined as follows in the Act:[181]

> "spouse" means a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act, 1961 (Act No. 68 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 68 of 1997), or the Civil Union Act, 2006 (Act No. 17 of 2006), or the tenets of a religion;

Determining whether someone is a spouse under the Marriage Act and Civil Union Act is relatively uncomplicated. Each is solemnised by a state-appointed marriage officer, who

[174] By way of affidavit evidence from family and friends, eg *Mthiyane* (n165). In *Pandlev* (n166), the Adjudicator accepted a girlfriend's affidavit evidence, even though paternity was contested by the widow.
[175] Trustees cannot order a child to undergo a paternity test, but they may refuse to include the child in the absence of one if there is insufficient alternate evidence.
[176] Cf *Magongo v Municipal Councillors PF* [2011] JOL 27010 (PFA) [Adjudicator dismissed complaint that minor biological child was wrongly excluded, because complaint made two years after death and there was no evidence of financial dependence, but without investigating truth of claimed paternity].
[177] Eg *Legoko v Soweto* [2011] 1 BPLR 101 (PFA) [major needy son vs minor stepson].
[178] See Children's Act (n80), s228, which requires the approval of a Court to finalise an adoption.
[179] See *Kewana v Santam* (n75); *Maswanganye v Baloyi* [2015] JOL 34005 (GP).
[180] See eg *Maswanganye* (n179).
[181] PFA, s1.

must register the marriage, provide the couple with an original marriage certificate, and transmit details of the marriage to the relevant government department for registration.[182] There will thus ordinarily be documentary proof of the marriage. Although a document does not prove its authenticity, courts, and therefore trustees, are entitled to accept a certificate as *prima facie* proof of the marriage,[183] in the absence of countervailing evidence that it is fraudulent or has been obtained by fraudulent means.[184]

What, however, are trustees to do in the absence of documentary proof; or when the authenticity, or sufficiency, of the documents provided is challenged; or when the marriage is alleged to be invalid for want of compliance with the substantive requirements of marriage?

These questions have most often arisen in the context of customary marriages.[185] The Recognition of Customary Marriages Act (RCMA)[186] conditions the validity of a customary marriage on four requirements: that the spouses are over the age of 18; that they have both consented to be married under customary law; that the marriage has been negotiated and entered into or celebrated in accordance with customary law;[187] that no spouse may enter into a civil marriage with a different spouse while married under customary law, or vice

[182] Marriage Act 25 of 1961, s29A; Civil Union Act 17 of 2006, s12.
[183] Civil Union Act, s12(4); *RAF v Mongalo, Nkabinde v RAF* [2003] 1 All SA 72 (SCA); *Murabi v Murabi* [2014] 2 All SA 644 (SCA) [14]; *PSC v LPM* [2013] JOL 29847 (GNP).
[184] See *Nkwanyana v Mbambo* [2008] 1 All SA 375 (D) in which the deceased's partner fraudulently obtained a marriage certificate with the collusion of the marriage officer.
[185] The definition also encompasses religious marriages that have not been solemnised by a marriage officer in accordance with the Marriage Act 25 of 1961, notably Muslim marriages. Although Muslim marriages are not yet recognised as legal marriages for all purposes, they have been recognised as such for the purpose of wrongful death actions (see *Amod v Multilateral Motor Vehicle Accidents Fund* 1999(4) SA1319 (SCA)); intestate inheritance and posthumous maintenance claims (see *Daniels v Campbell* 2004 (5) SA 331 (CC)); maintenance claims on divorce (see *R v R* (14770/2011) [2015] 2 ALL SA 352 (WCC)). Each case involved a monogamous marriage. Proposed statutory reform has yet to be adopted. See also Breslaw 'Muslim marriages: are they equally married?' 2013 *De Rebus* 246 for a discussion of other pertinent cases. See further Amien 'South Africa's failure to legislate on religious marriages leaves women vulnerable' *The Conversation* (16 June 2020), for a discussion of recent developments.
[186] Act 120 of 1998, which commenced 15 November 2000.
[187] RCMA, s3(1)(a). In *Sibiya v Palabora* [2005] 6 BPLR 543 (PFA) the trustees assumed that the first marriage was not properly concluded under customary law; since the spouse was not a financial dependant, she did not share in the distribution. The Adjudicator accepted the evidence presented by the spouse and held that she was married under customary law. Upon further investigation the fund obtained evidence confirming their initial belief that she had not been married under customary law – a fortunate happenstance for them in the circumstances.

versa.[188] Polygynous marriages must thus all be customary marriages. The Act places a duty on spouses to register their marriage, but a failure to do so does not invalidate the marriage.[189]

The key substantive requirement is that the marriage have been entered into in accordance with customary law.[190] Trustees may not rely on a person's *ipse dixit* that they are married under customary law.[191] The first Adjudicator emphasised that if the basis on which trustees wished to include a beneficiary was as a customary-law spouse, it was incumbent on them to satisfy themselves that the legal requirements of the marriage had been satisfied, and that the marriage was still in existence when the member died.[192] As emphasised by the Adjudicator, this requires that trustees draw 'legal conclusions'. It is not a 'factual enquiry' entitling them to do no more than obtain, and rely on, the statement of even the 'local headman'.[193]

Determining whether a marriage is valid under customary law requires that the trustees ascertain the content of customary law. As Ncgobo JA pointed out in *Bhe v Magistrate*, Khayeltisha,[194] the fact that customary law is 'living law' means that even this first step is no easy matter:

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[188] RCMA, s3(2). This means that a fund cannot rely on a marriage certificate as *prima facie* proof of the validity of the civil marriage, when another person claims to be a spouse under a prior customary marriage. See *Maphothoma v Telkom* [2016] 1 BPLR 117 (PFA).

[189] RCMA, ss4(1) & 4(9). In principle the marriage may even be registered after the death of one spouse, see *Maloba v Dube* [2010] JOL 25852 (GSJ). Some studies suggest that the practice of the DHA is to refuse registration unless both spouses are present, and surviving spouses are thus often obliged to apply to the HC to recognise the validity of the marriage and compel the DHA to register the marriage. See Law, Race and Gender Unit Factsheet 'The Recognition of Customary Marriages in South Africa: Law, policy and practice' (2012) University of Cape Town. Letters confirming agreement or payment of lobola, affidavits from family members, and letters from traditional authorities, are usually the primary forms of documentary evidence.

[190] RCMA, s3(1)(b). Section 1 defines customary law as the 'customs and usages traditionally observed among the indigenous African peoples' of South Africa and which form part of the culture of those peoples.

[191] *Maubane v Municipal Gratuity Fund* [2015] 3 BPLR 364 (PFA) [5.8].

[192] See John Murphy PLA Quarterly Briefing 14/15 May 2002, para 114-116. Given the evidential difficulties facing trustees, the Adjudicator recommended that trustees treat the spouse as a financial dependant when possible. Since all monogamous or first customary marriages are now by default in community of property, this is not in the survivor's interests if my argument in §6.4.1 below is correct.

[193] Ibid.

[194] 2005 (1) SA 580 (CC) [152].

> The evolving nature of indigenous law and the fact that it is unwritten have resulted in the difficulty of ascertaining the true indigenous law as practised in the community. This law is sometimes referred to as living indigenous law. Statutes, textbooks and case law, as a result may no longer reflect the living law. What is more, abuses of indigenous law are at times construed as a true reflection of indigenous law, and these abuses tend to distort the law and undermine its value. The difficulty is one of identifying the living indigenous law and separating it from its distorted version.

Once the content of the law has been established, in other words once the requisites of a valid customary marriage have been determined, the trustees are expected to engage in a 'fact-intensive enquiry' to determine whether those requirements have been met in the particular case.[195]

The validity of marriages concluded under customary law is increasingly being contested, both before the courts[196] and the Adjudicator.[197] The cases demonstrate that identifying the requirements for validity, and establishing whether they have been satisfied, is far from straightforward.[198] Courts and the Adjudicator have been obliged to obtain (sometimes conflicting) expert evidence.[199] Courts have held different views on whether the traditional requirements of customary law must be present in every case,[200] or whether some can be dispensed with in particular circumstances.[201] Some courts emphasise that customary law is a 'dynamic and evolving' system of law, one which has always responded 'flexibly and pragmatically' as the circumstances of a case dictate.[202] Others are more essentialist in their

[195] *Southon v Moropane* [2015] JOL 33203 (GSJ).
[196] *Mayelane v Ngwenyama* 2013 (8) BCLR 918 (CC); *Marai v Rasello* [2015] JOL 34564B (FB); *None v Tshabalala* [2016] JOL 36713 (GSJ); *Fungisani v Minister of Home Affairs* [2017] JOL 38091 (LT).
[197] *Mabetlela v Progress PF* [2003] 7 BPLR 4915 (PFA); *Sibiya*(n187); *Tshetshe v Vodacom* [2005] 5 BPLR 459 (PFA); *Maphothoma v Telkom* (n188).
[198] See the critique of the courts' jurisprudence by Nhlapo 'South Africa's courts and lawmakers have failed the ideal of cultural diversity' *The Conversation* 14 February 2018. See also Nkosi 'Customary marriage as dealt with in Mxiki v Mbata'2015 *De Rebus* 67; Moore & Himonga 'Customary marriage: is the law working?' *Groundup* (1 March 2016).
[199] *Southon v Moropane* (n195); *Moshidi v Kimberley-Clark* [2003] 7 BPLR 4947 (PFA).
[200] *Fanti v Boto* [2008] 2 All SA 533 (C) (consent bride, her father or guardian, payment of lobola and handing over of the bride all essential requirements); *Ndlovu v Mokoena* [2009] JOL 23452 (GNP) (handing over of bride essential); *Rasello v Chali* [2013] JOL 30965 (FB) (handing over of bride essential).
[201] *Mabuza v Mbatha* 2003 (7) BCLR 743 (C) (handing over of bride can be waived). See also *Ramoitheki v Liberty* [2006] JOL 18075 (W). The SCA has recently similarly held that handing over of the bride is not an indispensable requirement and can be waived by the parties – see *Mbungela v Mkabi* 2020 (1) SA 41 (SCA). There must, however, be sufficient evidence to establish that the requirement has been waived.
[202] *Mabena v Letsoalo* [1998] JOL 3523 (T); *Mabuza v Mbatha* (n210); *Ramoitheki v Liberty* (n201).

approach and more readily declare marriages invalid for want of compliance with traditional formalities.[203]

Determining whether a marriage was still in existence or had been properly dissolved at the time of the member's death is also challenging.[204] Different requirements apply, depending on the alleged date of the dissolution. Prior to 1988, a subsequent civil marriage automatically terminated a customary marriage.[205] However, if the civil marriage later dissolved and the husband had continued or resumed living with his customary law spouse, the marriage revived.[206] Since 1988, a civil marriage is invalid if a spouse is already married under customary law.[207] In respect of alleged dissolutions that occurred before the RCMA commenced, other than as a result of a subsequent civil marriage, trustees must determine whether the customary law requirements for dissolution were satisfied.[208] Since the RCMA commenced, customary marriages can only be dissolved by a decree of divorce granted by the HC.[209] This clear legislative requirement notwithstanding, Adjudicators have in some cases continued to apply customary law to determine whether the marriage has been properly dissolved.[210]

The inconsistent decisions that have been handed down by the courts and the Adjudicator confirm the view expressed by Nhlapo, a leading scholar on customary law, that the requirements for the validity of customary marriages is in 'total disarray'.[211]

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[203] *Fanti v Boto* (n200); *Ndlovu v Mokoena* (n200)*; Rasello v Chali* (n200).
[204] See Nkosi 'The ending of a customary marriage - What happens to the ilobolo?' 2013 *De Rebus* 222
[205] See the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.
[206] See eg *Netshituka v Netshituka* [2011] 4 All SA 63 (SCA).
[207] Ibid. See also RCMA, s3(2).
[208] See eg *Thembisile v Thembisile* 2002 (2) SA 209 (T); *Makgwale v Khwinana* [2004] 3 BPLR 5510 (T); *Fungisani v Minister of Home Affairs* (n196).
[209] RCMA, s8. See also *Manyepao v Ledwaba* (Case no 1368/18) [2020] ZASCA 54 (27 May 2020), in which a husband and wife married under customary law separated after less than a year of marriage. Both entered into subsequent civil marriages. On the death of the husband his second marriage was declared a nullity because they had not obtained a formal divorce, which meant that his first wife inherited his R3.5m estate, since her second marriage was also a nullity.
[210] See eg *Tshetshe* (n197), in which the outcome was the same since the Adjudicator held that the requirements for a customary law dissolution had not been satisfied.
[211] Nhlapo 'South Africa's courts and lawmakers have failed the ideal of cultural diversity' *The Conversation* 14 February 2018. See also Nkosi 'Customary marriage as dealt with in Mxiki v Mbata' (n198).

Even when a marriage appears to have been celebrated in accordance with customary traditions, such as payment of *lobola* and handing over of the bride, it is not necessarily valid under customary law.[212] In *Mayelane v Ngwenyama*, the CC held that a second marriage was invalid because the first wife had not been informed of the impending marriage, which it found to be a prerequisite for validity under Tsonga customary law.[213] The CC went further, however, and developed Tsonga customary law. It held that merely informing the first wife of the planned marriage would no longer suffice, and that her consent to the second marriage would hitherto be necessary.[214]

Ascertaining the 'true' customary law, in these circumstances, is not merely an 'onerous' task for trustees – I suggest it is an impossible task, both for trustees and Adjudicators.[215] It is one only a court can properly perform. No change to the definition of spouse or dependant will assist trustees in this regard. The changes that are necessary are to the law of marriage, rather than laws specific to the retirement fund industry. Fortunately, these changes may soon be forthcoming as a result of the proposed reforms, which may result in the introduction of a single statute governing civil, customary and religious marriages.[216] One of the key proposals is that all customary marriages be registered, and that traditional leaders be recognised as marriage officers for the purpose of effecting such registration. If this change were to be introduced, determining whether a potential beneficiary is a spouse would be significantly easier than it is today.[217] Trustees would not be called upon to perform a quasi-

[212] *Mayelane v Ngwenyama* (n196)).
[213] Ibid.
[214] It is not clear what the position would be with regards to third and subsequent marriages, or whether the consent of second and later spouses must also be obtained.
[215] See eg *Moshidi v Kimberley-Clark* (n199), in which the first wife challenged the validity of a second marriage, in part because she had not been informed of the marriage. No consideration was given to this aspect of her complaint. The Adjudicator dismissed the other basis of her complaint, relying on a telephonic conversation with a lecturer to establish the content of 'contemporary' Sepedi customary law. The Adjudicator therefore accepted that the second marriage was valid.
[216] See SALRC *Single Marriage Statute* Issue Paper 35 Project 144 (2019),
[217] As noted in the SALRC Project 144 Issue Paper (n216), 29, South Africa is a party to a number of international instruments that mandate the registration of marriages. Documentary proof of a marriage is important in enabling women to secure the rights to which they are entitled as spouses.

judicial task for which they are ill-equipped, and the possibility that spouses may not be properly identified as such will be considerably reduced.

4.5.3 Life Partners

The potential dependant that has proven the most difficult to categorise, and which has yielded the greatest inconsistency in treatment, is unmarried partners. No *ex lege* duty of support arises as between unmarried partners.[218] There is no concept of 'common law' marriage, even though Adjudicator determinations have used the term.[219] When the Adjudicator's Office began operating as from 1 January 1998, the Act contained no definition of 'spouse', which was only inserted into the Act in 2007 following the adoption of the Civil Union Act in 2006.[220]

Nevertheless, in the years immediately following the establishment of the Adjudicator's Office, a steady stream of cases came before the courts which incrementally extended certain of the financial benefits of marriage to same-sex partners.[221] However, in each case it was only partners who had *undertaken reciprocal duties of support towards one another* who were held entitled to the financial benefits accorded to married couples.

In *Satchwell v President of RSA*,[222] the CC was at particular pains to emphasise that not all same-sex partners were automatically entitled to the same benefits as spouses (a spousal pension in this case) – only those who had undertaken reciprocal duties of support.[223] Whether they have undertaken the duty is a question of fact, to be decided having regard

[218] *Butters v Mncora* 2012 (4) SA 1 (SCA).
[219] Eg *Ditshabe v Sanlam* [2001] 10 BPLR 2579 (PFA); *Mthiyane* (n165) (they may have been customary law wives); *Brummelkamp v Babcock* [2001] 4 BPLR 1811 (PFA).
[220] Act 17 of 2006.
[221] The first, *Langemaat v Minister of Safety and Security*1998 (3) SA 312 (T), was handed down one month after the Adjudicator's office became operational. See especially *Satchwell v President of RSA* 2002 (9) BCLR 986 (CC); *Gory v Kolver* 2007 (3) BCLR 249 (CC); *Du Plessis v RAF* (n77).
[222] (n221).
[223] Para 24 and 34. The CC specifically amended the HC order, which had read into the definition of spouse the words 'or partners in a permanent same-sex life partnership' to instead read as 'partners in a permanent same-sex life partnership who have undertaken reciprocal duties of support.' (para 37(2.2))

to all the circumstances of their relationship.[224] Facts that point towards the existence of the duty include: the duration and stability of the relationship; joint home ownership; joint bank accounts; nominating each other as the beneficiaries of life insurance and investment policies; appointing each other the heir of their estates; including the partner as a dependant on a medical aid.[225] These are all factors that point towards a couple having made a lasting commitment to each other both emotionally *and financially* – who have expressly or tacitly assumed the same invariable financial commitments that married spouses undertake towards one another.

Opposite sex life partners, who have always had the right to marry, have been held not to be similarly entitled to the benefits extended to married couples and same-sex life partners. In *Volks NO v Robinson*[226] the majority of the CC rejected a life partner's argument that the Maintenance of Surviving Spouses Act[227] was unconstitutional in allowing only heterosexual married couples to claim maintenance from their deceased spouse's estate, while not permitting heterosexual life partners who had undertaken reciprocal duties of support to do so.[228] The majority reasoned that the MSSA statutorily extends the pre-existing marital duty of support, which arises automatically as an invariable consequence of marriage; cohabiting partners are not owed an *ex lege inter vivos* duty of support, and it would be anomalous to recognise a posthumous duty when none had existed during the life of the deceased. A further consideration was that opposite-sex partners have the freedom to choose whether to marry, and their right to dignity requires that their choice be respected.[229]

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[224] The CC thought it probable on the facts that the partners had undertaken the duty of support but did not need to decide the matter, (para 25).
[225] *Langemaat* (n221), 444; *Satchwell* (n221) [5].
[226] 2005 (5) BCLR 446 (CC).
[227] Act 27 of 1990.
[228] See [57] in particular. The decision was applied in *Du Toit v Greyling* (78173/2014) [2016] ZAGPPHC 892 (23 September 2016) and in *McDonald v Young* [2011] ZASCA 31, in which the SCA refused a heterosexual partner's claim for maintenance since the facts clearly established that no such contractual agreement to provide support had been concluded between the parties (para 240).
[229] Many commentators have called for the legal recognition and protection of all domestic partnerships. See eg Clark 'Families and domestic partnerships' (2002) 119(3) *SALJ* 634; Goldblatt 'Regulating domestic partnerships: a necessary step in the development of South African family law' (2003) 120(3) *SALJ* 610; Heaton 'Striving for substantive gender equality in family law: selected issues' (2005) 21 *SAJHR* 547; Heaton 'An overview of the current legal position regarding heterosexual life partnerships' 2005 *THRHR* 662; Kruuse ''Here's to you, Mrs Robinson': peculiarities and paragraph 29 in

The minority disagreed. In her minority judgment O'Regan J held that the law is unconstitutional, in so far as it discriminates against heterosexual life partners *who have undertaken reciprocal duties of support and who are in financial need on the dissolution of the relationship.*[230]

However, O'Regan J also emphasised that duties of support between unmarried life partners arise only if voluntarily assumed by the parties. She acknowledged that there are cohabiting relationships that the partners do not intend to be permanent, and there are also permanent life partnerships in which the parties have deliberately chosen not to marry in order to avoid the consequences of marriage.[231] As such, to visit the legal consequences of marriage on permanent life partners, there must be facts which clearly demonstrate that the parties have voluntarily undertaken those consequences. The longer the relationship, the more intertwined the partners' financial affairs, and the more clearly the partners have provided financial and emotional support to one another, the more likely it is that they will be found to have undertaken reciprocal duties of support. The duration of a relationship is particularly relevant, for the longer it endures the more likely that it will give rise to 'patterns of dependence'.[232] Maintenance claims are, however, conditional on the deceased partner having failed to make equitable provision for the survivor from the deceased's estate.[233] Where such provision has been made, no maintenance claim will lie. In *Volks*, O'Regan was of the view that the R300 000 bequeathed to the surviving partner was 'adequate equitable provision'.[234]

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determining the treatment of domestic partnerships' (2009) 25 *SAJHR* 380; Sloth-Nielsen & Van Heerden 'The constitutional family: developments in South African child and family law 2003–2013' (2014) 28 (1) *International Journal of Law, Policy and the Family* 100; Bonthuys 'A duty of support for *ALL* unmarried intimate partners Part 1: the limits of the cohabitation and marriage based models' (2018) 21 *PELJ* 1. The SALC has similarly proposed that domestic partners obtain the same rights as married partners. See SALRC (Project 118) *Report on Domestic Partnerships* (2006) and the consequent Domestic Partnership Bill in GN 30663 of 14 January 2008. The legislature has not (yet) adopted its recommendations, which would give courts wide discretionary powers to re-allocate assets and award maintenance in the event of the dissolution of a domestic partnership.

[230] *Satchwell* (n221) [35].

[231] Para 120 and 134.

[232] Para 133.

[233] Para 139,

[234] Para 141-142. In *Oshry v Feldman* (n147) a bequest of R150 000 was considered insufficient for a 75-year-old spouse, whose additional maintenance needs were assessed at R10 000 per month. More

O'Regan's view was thus that the definition of survivor in the MSSA be read as including permanent life partners who have undertaken reciprocal duties of support in circumstances in which the survivor has not received an equitable share of the deceased partner's estate.[235]

The s37C definition of spouse refers simply to permanent life partners, without reference to sexual orientation. Adjudicators have, appropriately, accepted that it applies to both same-sex and opposite-sex life partners.[236] It similarly does not expressly refer to life partners 'who have undertaken reciprocal duties of support'. Nevertheless, I suggest that it is implicit that life partners are only those persons who have undertaken reciprocal duties of support. In every case involving the existence of a disputed life partnership, the courts, including the CC, have emphasised that the essence of a life partnership is that the partners have undertaken reciprocal duties of support.

THE DEFINITION APPLIED

4.6 SPOUSES AND CHILDREN: legal or statutory dependants?

Since spouses and children are always amongst the member's dependants, identifying whether they are legal or statutory dependants is not strictly necessary. In many cases it will not be, or should not be, important. It may, however, be important in some circumstances. For example, in deciding whether members' wishes should be overridden when they have excluded a spouse or child. Whether spouses and children are legal or statutory dependants may also be relevant to the equitable distribution of the benefit, particularly when the benefit is a small one and there are competing beneficiaries.

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recently the SCA in *Friedrich v Smit* (n146) overturned an executor's generous maintenance provision because there was no evidence that the surviving spouse was unable to support herself.

[235] Para 2 of the order. See also *Laubscher v Duplan* 2017 (4) BCLR 415 (CC), in which the CC suggests that it may be appropriate to revisit the majority's decision in *Volks v Robinson* (n226).

[236] In the context of wrongful death claims against the Road Accident Fund, courts are starting to hold that opposite-sex partners were owed a legal duty of support when the deceased had voluntarily undertaken to support them. See *Paixão* (n77); *Jacobs v RAF* 2019 (2) SA 275 (GP).

Despite the fact that spouses and children are not inevitably legal dependants, funds and Adjudicators almost invariably classify them as such.[237] Because the classification is routine (and clearly incorrect with regard to spouses and adult children who are not in need of support), no particular value is attached to their *status* as such. It is not a factor that weighs in their favour when the competing beneficiaries are also dependants.[238]

It does, however, operate to the detriment of nominees. In a number of determinations, the trustees' decision to include a non-nominated spouse within the distribution has been justified on the basis that the spouse was the member's (only) legal dependant, even though this was contrary to the member's wishes,[239] the spouses were estranged,[240] and without any enquiry into the spouse's financial circumstances relative to those of the nominated beneficiaries.[241]

In *Ackermann v Lifestyle Retirement Annuity Fund*, the Adjudicator concluded, without more, that the deceased's husband fell within the definition of legal dependant, without examining whether the deceased had owed a duty of support to him in the circumstances of the case.[242] He may well have been a statutory rather than legal dependant.[243] In *Tshetshe v Vodacom* the spouses were married for less than a year before the husband left his wife.[244] At the time of her death they were no longer living together, and neither was financially supporting the other. The trustees nevertheless awarded him a third of the death benefit, even though her parents were her nominated beneficiaries. The only explanation provided in

[237] *Peete v SACCAWU* (n13); *Whitcombe* (n13); *Marais* (n13). Cf the early determination of *TWC v Rentokil* [2000] 2 BPLR 216 (PFA) [the member's adult children considered to be statutory and not legal dependants, even though they were experiencing financial hardship].
[238] Considerable weight is attached to age and minority, which by and large is indicative of a duty of support towards biological children. When the competing claimants are minor children, the member's biological children do not, however, automatically rank ahead of other minor children. See *Koopman* (n50); *Baloyi v PPWAWU* PFA/NP/11689/2006/LTN [member's children and sister's children].
[239] *Nduku* (n54); *Ackermann* (n60); *Tshetshe* (n197).
[240] *Tshetshe* (n197)
[241] *Nduku* (n54), *Ackermann* (n60), *Tshetshe* (n197).
[242] [2013] 3 BPLR 295 (PFA) [5.8].
[243] In *Mashego v SATU* [2007] 2 BPLR 229 (PFA), the Adjudicator simply characterised the spouse as a paragraph (b)(ii) (statutory) dependant, although the trustees had categorised him as a legal dependant. No information was provided as to his need and means. See also *Ndlhovu* (n143*)* in which the spouse may well, given her means and earning potential, have been a statutory rather than legal dependant.
[244] (n197).

the determination is that he was her 'legal dependant', although this conclusion is doubtful on the facts.

In an inexplicable decision, in light of the clear wording of the Act and the many determinations confirming that spouses are always dependants, it is impossible to make sense of the recent decision of *Naidoo v Coca Cola Shanduka Beverage Provident Fund*,[245] in which the trustees paid the benefit to the member's estate, even though she was survived by her estranged husband. They justified their decision on the basis that he had not been financially dependent on the member. The Adjudicator upheld the trustees' decision. Following an appeal to the new Financial Services Tribunal (FST), the Tribunal remitted the matter to the Adjudicator for further enquiry into the equitability of the decision, even though the husband was the member's *only* dependant and therefore entitled to the benefit as of right. The fact that the parties were estranged and in the process of obtaining a divorce, that the member had died from unnatural causes, and that her parents were her testamentary heirs, appears to have influenced the trustees' decision, even though there was no evidence implicating the husband in his wife's death.

More recently, in *Momentum v VR Krzus*,[246] the member was again survived by an estranged spouse. He had not nominated beneficiaries, but his siblings were his testamentary heirs. The trustees awarded the full benefit to the spouse, since she was his only (statutory) dependant. Following a complaint from the member's sibling, the Adjudicator overturned the trustees' decision and ordered that the benefit be paid to the member's estate. The Adjudicator's justification for doing so was that the spouse had not been financially dependent on him. The decision is again clearly incorrect in law, and in this instance was overturned on appeal to the FST.

[245] [2019] JOL 46217 (FST).
[246] *Momentum v VR Krzus* PFA 52/2019, 9 March 2020 (FSCA).

Had the definition expressly included parents and siblings as eligible beneficiaries, it would not have been necessary for the trustees and Adjudicator to reach a decision that is clearly wrong in law, however equitable it may be in the circumstances.

4.7 OTHER RELATIVES: legal, financial or future dependants?

The relatives for whom the categories of legal and future dependant are most important are parents, siblings, grandchildren and grandparents. They are not statutory dependants, and unless the member was already supporting them financially, the only basis on which they would be eligible to share in the death benefit is on the basis that the deceased owed them an existing, but unfulfilled, duty of support, or that the duty is one that would probably have arisen in the future. Of these relatives, it is parents who most regularly feature in Adjudicator determinations,[247] followed by siblings.[248] The high level of poverty and unemployment in South Africa means that many, if not most, parents and siblings are in need.[249] The same is true of grandparents and grandchildren, but they feature more rarely in Adjudicator determinations. This may be because parents and siblings are more often amongst the member's nominated beneficiaries. Although Adjudicators have acknowledged that both are potential legal dependants, they have only exceptionally held that a parent is a legal dependant,[250] and have never done so in respect of siblings.

The principal reason is the continued uncertainty regarding the point at which a parent or sibling becomes sufficiently 'indigent' to qualify as a legal dependant. Some Adjudicators have adopted the strict test for indigency. In *Thene v Bidcorp*, the Adjudicator held that 'in

[247] Eg *Musgrave* (n36) *Wasserman* (n33) ; *Fourie v CRAF* (n34) ; *Wellens v Unsgaard* (n42); *Van Drimmelen v CRAF* PFA/GA/1227/02/KM; *Van der Walt v Fugro* (n51); *Nduku* (n54); *Hamnca v Alexander Forbes* [2011] JOL 28026 (PFA) ; *Grieseel* (n26); *Thene* (n43); *Ndlhovu* (n143).
[248] Eg *Nduku* (n54); *Ackermann* (n60); *Gowing* (n65); *Sefularo* (n103); *Makume v Sentinel* (n52); *Masuku* (n55).
[249] See §1.7 above.
[250] In *Koekemoer v Macsteel* [2004] 2 BPLR 5465 (PFA) the Adjudicator classified a mother as both a paragraph (a) legal and paragraph (b)(i) factual dependant.

our law to be indigent means to be in extreme need or want',[251] and thus questioned whether a parent in receipt of a state pension could be considered indigent. Similarly, in *Hamnca v Alexander Forbes*, the Adjudicator held that a mother was a nominee rather than a dependant because she was in receipt of 'some income' by way of a pension and was thus not indigent.[252]

By contrast, in *Fourie v CRAF*,[253] the Adjudicator held that the member's mother was probably a legal dependant but that should he be wrong, she was in any event a financial dependant. The member had been living with his mother, but there was no mention of capital assets. She was in receipt of a modest private pension and belonged to a medical aid. In *Wasserman v CRAF*,[254] the trustees had held that the mother was a non-dependant, even though her financial need was indisputable. She was elderly and infirm, and in receipt of a modest pension that was insufficient to cover the cost of her retirement home or medical expenses. Although the Adjudicator accepted that she appeared to have been suffering 'medical and financial hardship' for a considerable period of time, on the limited evidence he felt it was not clear that she had been owed a duty of support at the time of the member's death. He was, however, satisfied that she was a future dependant. In both these cases there were no competing nominees or dependants, and the heir to the member's estate was an unrelated third party.[255]

In *Wellens v Unsgaard Pension Fund*, the member's 83-year-old mother did have sufficient income to satisfy her present needs, and a capital asset in the form of immovable property, namely the flat in which she lived. The trustees classified her as a future dependant, and awarded her half the death benefit, overriding the member's wish that the full benefit be paid to his cohabiting partner. The Adjudicator upheld the trustees' decision on the basis

[251] PFA/GA/6863/05/LCM. She nevertheless accepted that the cohabiting partner was a factual dependant without any further enquiry into her existing and future financial means and prospects.
[252] *Hamnca* (n247) [5.5 & 5.6]. The benefit was a miniscule R26 000 and the other dependants were the deceased's minor children, so the allocation nevertheless appears to be equitable.
[253] *Fourie v CRAF* (n34). See also *Van Drimmelen v CRAF* (n247).
[254] [2001] 6 BPLR 2160 (PFA).
[255] The member's former cohabiting partner in *Fourie*, and broker in *Wasserman*.

that there was a 'more than even chance'[256] that the member would have become legally liable to maintain her in the future, in light of the high costs of medical and frail care which he thought it probable she would incur. No consideration was given to the fact that were the mother to move out of her home, it could be sold to provide additional income. Similarly, no consideration was given to the fact that she had a daughter, who would also be liable to maintain her mother to the extent she could afford to do so.[257] The determination made no mention of the mother's probable longevity, or of the partner's relative means and needs.[258]

The category of future dependant thus provides trustees and the Adjudicator with the opportunity to bring an eligible relative within the circle of beneficiaries even though they had not yet reached the level of need required to make them an existing dependant.[259] It appears, however, that unless parents can demonstrate existing need or a very high probability of future need, they will not be considered future dependants.[260]

All these cases stand in sharp contrast to that of the HC in *Greyling v GEPF*,[261] which held that the member's financially independent mother was his legal dependant. The relevant legislation was the Government Employees Pension Law, which contains provisions similar to s37C and the definition of dependant. Its definition does not, however, include future dependants. There was no mention of the mother's actual means and needs. The Court nevertheless held that the definition included 'self-supporting and non-dependent' parents, on the basis that parents and children owe one another a contingent duty of support, and that the legislature's objective in excluding benefits from the member's estate was to secure the benefit from creditors' claims.[262]

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[256] Para 16.
[257] She gave her mother R500 once a year. But no assessment was made of her means.
[258] Cf *Fundsatwork v Guarnieri* (n101), discussed at §4.7.1 below.
[259] In *Ndlhovu* (n143) & *Norris v UKZN* (n101) the trustees had identified surviving parents as future dependants. In both the Adjudicator was not satisfied that the information clearly demonstrated that they were probable future dependants and remitted the matter to the trustees for further investigation.
[260] *Grieseel* (n26).
[261] [2015] JOL 32876 (GP).

An unduly restrictive approach that excludes needy parents (or siblings) on the basis that they are not yet sufficiently indigent is undesirable. It is more likely to operate to the detriment of vulnerable nominated beneficiaries and contingent dependants, undermining s37C's purpose as a result.[263] In almost all cases parents should be eligible dependants, even if they are earning an income or in receipt of a state or private pension.[264] The reason is simply that for the overwhelming majority of South Africans, meeting even their basic maintenance needs is a struggle. The same holds true for siblings, given the high unemployment rate and the fact that working-age individuals do not qualify for state welfare grants. Most South Africans, and therefore most surviving relatives, are poor or struggling financially.[265] Their poverty and vulnerability will increase with age, particularly if they do not have other relatives able to support them. Parents and siblings should thus in every case be included within the ambit of dependant. They are, after all, always contingent dependants,[266] and although the future is uncertain, South Africa's high unemployment and poverty makes it more likely than not that all eligible surviving relatives will suffer future financial hardship.

Whether they ultimately share in the distribution of the death benefit is a different question, but their inclusion and exclusion in the distribution should rather be determined by a consideration of the equities, having regard to the member's wishes, their relationship with the member, and all the beneficiaries' existing and prospective needs and means. If need is what underpins legal duties of support, and if the legislature's purpose is indeed to protect dependants from hardship, it makes little sense that the concept of dependant be interpreted in a way that benefits the comparatively secure and affluent to the detriment of

[263] See also Jeram (n2) 9.15.5.1.2.
[264] 'Millions of South Africans retire on 20% or less of their salary' *Personal Finance* (8 November 2018).
[265] Unemployment and poverty have increased significantly as a result of the economic impact of the Covid-19 lockdown regulations. See further Bell 'Actuaries warn Ramaphosa of a humanitarian disaster to dwarf Covid-19 if restrictive lockdown is not lifted' *Daily Maverick* 5 May 2020.
[266] Cf *Mokele v SAMWU* (n20), in which the member's sister was held to be neither a legal nor a financial dependant. The benefit was as a result paid to his estate. No mention was, however, made of the sister's means and needs, although her address indicates she was living in a township and had claimed to be financially dependent on the member.

the poorer or less affluent, particularly when doing so is contrary to the member's own wishes.[267]

If all parents and all siblings are automatically eligible as dependants, it will not impact the fiscus unduly.[268] When the estate is insolvent creditors will be adversely affected, but in enacting s37C the legislature has already made the policy decision to protect the death benefit from creditors' claims when a dependant exists; which, in the case of eligible relatives, depends on the point at which they cross the required threshold of 'need', an uncertain concept at best. It will be exceptional that affluent parents and siblings benefit, and the complexities and potential inequitability that may arise from excluding a relative who is facing present or future need, but is not yet quite needy enough, does not warrant the retention of a definition that creates such difficulties in application.

4.7.1 Addendum: *Fundsatwork Umbrella Pension Fund v Guarnieri*

The preceding discussion reflected the established interpretation of paragraph (a) and (c) of the definition prior to the recent decision of the SCA in *Fundsatwork v Guarnieri*.[269] The backdrop to the case was that trustees allocated the largest proportion of a member's death benefit to his aged mother, to the financial detriment of his spouse and children. He had not nominated a beneficiary. He and his spouse were separated. His children were young adults who were still living in the family home with their mother and were still partially dependent on both parents.

The member's mother died a few days prior to the trustees' exercising their discretion, a fact of which they only became aware some months later, after the benefit had been paid and

[267] As happened for eg *in Nduku* (n54); *Ndlhovu* (n143); *Kirsten* (n59).
[268] See §3.2.2 above.
[269] 2019 (5) SA 68 (SCA).

was probably no longer recoverable from the mother's beneficiary.[270] The member's spouse had informed his employer of his death, but the information had not been transmitted to the fund. The widow was understandably upset that her mother-in-law, who was now dead, had been allocated the largest share of the benefit, and successfully challenged the distribution before both the Adjudicator and HC.[271]

The fund took the matter on appeal, arguing that the mother had been a legal dependant, since the member was under a duty to support her when he died, and that their allocation could therefore not be impugned. The SCA disagreed. It did not, however, do so on the basis that she did not meet the threshold of indigence required to give rise to the duty, or that the allocation was one no reasonable board of trustees could reasonably have reached in the circumstances.[272]

Instead, it quite unnecessarily adopted a novel interpretation of the definition, at odds with its established interpretation. It held that the relevant date for determining eligibility under paragraph (a) is the date on which the trustees exercise their discretion and allocate the benefit, rather than the date of the member's death. In support of its conclusion it relied on the fact that paragraph (a) uses the present tense, 'is liable', coupled with the definition of member in the Act. It held that a member remains such until the full benefit has been paid, no matter that they have died.[273] Duties of support that are owed to relatives other than children and spouses terminate on death, while only those owed to children and spouses

[270] The mother had elected to purchase an annuity, the beneficiary of which was her daughter, who was living in Australia.
[271] The Adjudicator's determination is unreported, and her reasoning must be gleaned from the HC decision. It appears that both the Adjudicator and HC accepted that the mother was a financial dependant, but set the trustees' decision aside on the basis that her death was a relevant factor that they should have considered when exercising their discretion. See *Guarnieri v Fundsatwork* 2018 JDR 0740 (GP).
[272] See Promotion of Administrative Justice Act 3 of 2000, s6(2)(h). See also *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[273] Section 1 defines a member as 'any member or former member … but does not include a person who has received all the benefits owed to them by the fund and whose membership has thereafter been terminated in accordance with the rules of the fund.' On the SCA's interpretation, since every person whose benefits had not yet been fully paid remained a member, the inclusion of 'former member' in the definition is meaningless. A person could only become a former member once all their benefits had been paid, at which point they cease to be a member as defined.

survive their death. Since the only relatives that the member 'is' still liable to support at the time the trustees exercise their discretion are spouses and children, the SCA held that the legislature had deliberately enacted paragraph (a) in order to protect spouses and children. It opined that limiting paragraph (a) dependants to spouses and children would not cause hardship, because other relatives would still be eligible if they were in fact financially dependent at the time of death, or if the member had owed them a future duty of support. Beyond this bald statement, the SCA did not consider the definition of future dependant any further. Whereas paragraph (a) has for the past 30 years been understood to refer to *inter vivos* duties of support, on the SCA's reinterpretation it refers to posthumous duties of support.

The SCA's decision is understandable. The equitability of the trustees' decision to award the larger share of the benefit to the dependant's mother, in circumstances in which she was not a nominated beneficiary and received minimal financial support from the member, is questionable. Had the benefit formed part of the member's estate, only the spouse and children would have inherited on intestacy or would have been entitled to claim maintenance from his deceased estate.

Nevertheless, the SCA's reasoning is flawed. Firstly, the definition expressly includes spouses and children. If paragraph (a) is specifically intended to apply to them, it is redundant. The only other persons towards whom a member could possibly owe a posthumous duty of support are former spouses, provided their divorce order entitles them to maintenance from the deceased's estate.[274]

Secondly, the SCA's view that it was intended to apply to spouses who are owed a posthumous duty of support under the MSSA must be wrong. The definition of dependant

[274] Other contractual undertakings to provide posthumous maintenance would probably be invalid *pacta successoria*. See *Volks v Robinson* (n226) [136].

was adopted before the MSSA was enacted.[275] Prior to the MSSA, spouses could not claim maintenance from a deceased spouse's estate.

Thirdly, the SCA fails to appreciate the complementarity between paragraphs (a) and (c). The eligible relatives are the same under both.[276] On the one hand, it says that the member's death extinguishes an existing duty of support that was already owed to a parent or sibling or grandchild or grandparent. On the other hand, it says that any one of these relatives, towards whom a duty of support would have arisen in the future, is an eligible dependant. The wording of the definition 'is legally liable' versus 'would have become legally liable' makes it clear that these are distinct bases for eligibility. A duty cannot both already be owed, and simultaneously be one that will only be owed in the future. Relatives towards whom a duty was already owed are therefore excluded, while relatives towards whom a duty would only arise in the future are included. It cannot have been the legislature's intention to place those already owed a duty of support in a worse position than those towards whom a duty of support was not yet owed.

It could be argued that the SCA's decision could readily be circumvented, by identifying every needy relative as a future rather than existing dependant, especially since this already largely accords with Adjudicator practice *vis a vis* parents. While this may be a practical response to the anomaly created by the SCA decision, it should not be necessary for trustees to adopt disingenuous reasoning. It will also not be possible in every case. Consider the following hypothetical but possible scenario: a maintenance court orders a grandparent to provide financial support to a grandchild, but the grandparent is in breach of the maintenance order. The grandparent clearly owed the grandchild a legal duty of support at the time of her death, which on the SCA's reasoning terminated on her death. Trustees could

[275] Spouses were included as statutory dependants in 1989, see Act 54 of 1989, s20. The MSSA was enacted by Act 27 of 1990 and commenced on 1 July 1990.
[276] The only real differences are that paragraph (a) includes former spouses obliged to pay maintenance in terms of their divorce order, while paragraph (c) may include fiancées. See *Van Zyl v Delta* (n49).

surely not characterise the grandchild as a future rather than existing legal dependant in these circumstances.

The SCA also held, rather cursorily, that a person who was, initially, correctly identified as a dependant, ceases to be such when they die. This applies not merely to deaths that occur before trustees exercise their discretion, but death that occurs in the period after allocation and prior to payment. [277] Equally, a person who was not a dependant when the member died could become one in the period prior to the trustees' allocating the benefit, or could cease to be one, if their circumstances changed materially for better or worse. The SCA's decision introduces even more uncertainty into the practical application of s37C. Trustees must not only determine that the beneficiary is still alive on the date that payment is made, they must ensure that the beneficiaries' respective circumstances have not changed materially in the intervening period. Trustees have been given 12 months to investigate the member's and beneficiaries' personal and financial circumstances precisely because obtaining the necessary information is time-consuming. As the SCA points out, much can change during that 12-month period. How, then, can trustees verify that the information is still accurate on the day they exercise their discretion or make payment? The expectation that they do so requires that trustees have perfect information at all times – which is impossible.

The SCA's interpretation of dependant and of the s37C process, cannot be what the legislature intended. It again confirms that section 37C, and the definition, are both in need of urgent reform.

[277] Paras 25-26. A number of Canadian jurisdictions adopt the same approach with regard to family provision claims. See eg *Wetzel v National Trust Company* 1956 CanLII 194 (SKCA); *McMaster Estate (Re)* 1957 CanLII 238 (ABQB); *Neyedley Estate v Neyedley* 2004 SKQB 79 ; *Petrowski v Petrowski* (n72). Cf the approach adopted in British Columbia, in which claims against a deceased estate survive the death of the claimant, although the death of the claimant remains a relevant factor that the court must take into consideration in making an award. See *Barker v Westminster Trust* 1941 CanLii 251 (BCCA), discussed and applied in *Currie v Estate Bowen* 1989 CanLii 2690 (BCSC). See further *Pelletier v Erb Estate* 2002 BCSC 1158; *Enns v Gordon Estate* 2018 BCSC 705. The approach adopted in British Columbia is, I suggest, the preferable approach. The deceased dependant's own dependants could be prejudiced by the approach adopted in *Guarnieri*, as appears to have been the case in *De Beers v Hosaf*, discussed in Mhango 'Duty to Investigate Factual Dependants: A Comment on De Beers v Hosaf Fibre Provident Fund' (2008) 29 *Indus LJ* 2439.

4.8 FINANCIAL DEPENDANTS AND COHABITING PARTNERS

The category of dependant that receives the most sympathetic treatment from trustees and the Adjudicator is that of factual dependants, more specifically financial dependants.

In one of his earliest determinations the first Adjudicator stated:

> In examining the relationship between the deceased and the claimants, the board of a fund should avoid unduly fettering its discretion by favouring legal dependants above factual dependants without a compelling justification for doing so.[278]

Whether the first Adjudicator intended that financial dependants be favoured over legal dependants is not clear, but that is seemingly how the passage has been interpreted, for trustees and the Adjudicator today focus their enquiry almost-entirely on whether a particular beneficiary was financially dependent on the deceased.[279] If they were, priority is given to their claims. If they were not, their claim is subordinated to that of financial dependants. Financial dependants are thus prioritised over both other dependants and nominees. It is Adjudicator determinations that have directed trustees to prioritise financial dependants, and whether they have done so has by and large become the yardstick by which equitability is measured.

There is nothing in the wording of s37C or the definition of dependant that warrants this prioritisation of financial dependants. The legislature's original concern was to protect financial dependants,[280] but this changed in 1989, when legal and future dependants, and

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[278] *Van der Merwe v Southern Life*(n61), 10 and repeated in numerous subsequent determinations, such as *Segal v LRAF* [2001] 1 BPLR 1519 (PFA), 1522.

[279] See eg *Makhubele v Rand Water* [2018] 1 BPLR 114 (PFA) [5.8]: 'This Tribunal has always maintained a view that the litmus test in issues relating to distribution death benefits is whether or not a party was financially dependent on the deceased member and if by reason of his death that party stands to suffer financial prejudice.' See also §3.2.1 above.

[280] The original version of s37C, inserted into the PFA by Act 101 of 1976, s21(a), limited the eligible beneficiaries to financial dependants and, provided the rules of the fund made provision for them, spouses and children. That this was the legislature's intention was confirmed by a slight rewording of the section by the Financial Institutions Amendment Act 80 of 1978, s10 and by the RPF *18th Annual Report 1976*, para 20.

spouses as statutory dependants, were included in the definition.[281] This was also when trustees were given the discretion to apportion the benefit between all the eligible beneficiaries, including nominees.[282] It is thus far from clear that there is an *a priori* hierarchy in the legislative scheme that favours either dependants over nominees, or financial dependants over other dependants.[283]

If there is a hierarchy, the natural order would logically be that those towards whom the member owes an existing duty of support would rank ahead of other dependants. The way the definition of dependant in the Act is structured supports this interpretation. The order of dependants is legal, then financial, then statutory, and then future dependants. Moreover, while members are still alive maintenance orders can be enforced against their retirement benefits. The terms of a maintenance order can oblige a fund to deduct the stipulated maintenance from the member's benefit and pay it to the dependant.[284] This is an exception to the general rule that the benefit is not capable of attachment or reduction.[285] Courts can, however, only grant maintenance orders when one person has defaulted in their *legal duty* to maintain another.[286] While the member is still alive therefore, the only dependants who can potentially access the member's benefit are those whom the member is legally liable to maintain. It is anomalous that after the member has died, the persons towards whom she owed an existing and enforceable duty of support are supplanted by persons towards whom no duty of support was owed. This prioritisation is inherently inequitable and contrary to the explicit instruction given to trustees in s37C – to distribute the benefit as they deem equitable.

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[281] Act 54 of 1989, s20. The amendments were made shortly after the release of the SALC (Project 22) *Report on the introduction of a legitimate portion or the granting of a right to maintenance to the surviving spouse* (1987). The recommendations in the report led to the adoption of the Maintenance of Surviving Spouses Act 27 of 1990. Children were only inserted as statutory dependants through the Pension Funds Amendment Act 22 of 1996, s1(b).

[282] Act 54 of 1989, s21.

[283] Although the definition of pension fund organisation in the Act requires that a fund must be established with the objective of providing benefits to members or dependants, this goes to the criteria it must satisfy to be registered as a fund. It does not suggest that there is an automatic hierarchy in favour of dependants. The definition was also inserted into the Act in 1976, when the only dependants were financial dependants and trustees did not have the broad discretion they have had since 1989.

[284] Section 37D(1)(d).

[285] Section 37A(1).

[286] Maintenance Act 99 of 1998, s2.

The inequity of automatically preferring financial dependants is exacerbated by the construction that the Adjudicator has attached to the concept. The wording of the Act clearly envisages that, but for the financial support provided by the member, the beneficiary would have been unable to meet their (reasonable) maintenance needs.[287] This interpretation finds support in English jurisprudence. In *Simmonds v White Brothers*,[288] the English Court of Appeal held that to be 'dependent' the recipient:

> [M]ust be dependent in the proper sense of that term and it is not sufficient if he was merely deriving benefit from the earnings of the deceased; he must be to some extent dependent upon him for the ordinary necessaries of life having regard to his class and position in life.[289]

This passage was quoted with approval by the Pensions Ombudsman in *Ellaway v IBC Pension Trustees Ltd*,[290] in which the tribunal stated that the mere fact that two persons were living together, and that one was deriving a financial benefit from the arrangement, did not mean that that person was necessarily dependent on the other.[291]

This 'literal interpretation' of the Act was rejected by the first Adjudicator in one of his earliest determinations, *Van der Merwe v Southern Life*,[292] in which he adopted a 'purposive and contextual interpretation' to include couples who 'demonstrated mutual dependence and

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[287] In *Govender v Alpha* (n154) the Adjudicator appears to accept that need is a requirement. It states that the beneficiary must have depended on the support to meet their maintenance needs, which meant also that the payments had to be regular and not merely ad hoc.
[288] [1899] 1 QB 1005. The Inheritance (Provision for Family and Dependants) Act 1975, s1(3) was amended in 2014 to clarify that in order to qualify as a financial dependant, the deceased had to have been making a *substantial* contribution to the beneficiary's *reasonable* maintenance needs.
[289] The court was interpreting the term as used in the Workmen's Compensation Act 1897.
[290] PO 80200/1 (15 February 2011).
[291] Paragraph 81. It was also applied in *Wild v Smith* (1996) OPLR 129, in which the Ombudsman overturned the trustees' identification of a person as a financial dependant merely because she had lived with the deceased for some time, during which he had paid all the household bills. The court upheld the tribunal's determination. Cf the Australian decision of *Faull v SCT* [1999] NSWSC 1137, which found that a son's payment of board and lodging to his mother made her a financial dependant, even though she did not need the money. The reason the court adopted a liberal interpretation was because it wanted to give effect to the member's wishes and prevent the benefit from falling into his estate. He had nominated his mother as his beneficiary, but she was not eligible unless she could be brought within the statutory circle of beneficiaries. Cf SCT D14-15\135 (19 December 2014), in which a mother whose son lived with her, and who contributed to her expenses by buying her cigarettes, takeaways and petrol, was held not to be his financial dependant. He had, however, not nominated any beneficiaries.
[292] [2000] 3 BPLR 321 (PFA) [13-14].

ran a shared and common household'.[293] While the Adjudicator's aim was to bring unmarried cohabiting partners within the ambit of the Act, his interpretation was described as doing 'violence to the plain language'[294] of the Act and set in motion a practice that essentially deems every cohabiting partner to be financially dependent on the other.

The Adjudicator's explanation for adopting this purposive interpretation was that the legislature deliberately included financial dependants in the definition in order to:

> … broaden the category of persons entitled to share in death benefits by including persons involved in relationships which the law traditionally does not accept as constituting legal dependancy. The provision has the progressive aim of recognising that modern society is tolerant of relationships besides the nuclear family arrangements sanctioned by the common law.[295]

Section 37C's history does not support this interpretation, however. The original dependants were financial dependants and they remained the primary dependants until 1989. It was only then that the definition was broadened to include legal and future dependants and spouses as statutory dependants. It was also only in 1989 that trustees could include nominees within their distribution alongside dependants. It was only in 1996 that children were included within the ambit of statutory dependants. The definition was thus broadened not to include unmarried partners, but to include those towards whom the deceased owed an existing or contingent legal duty of support, and to better safeguard the interests of spouses and children.

This definitional change was undoubtedly necessary given that the unfortunate, and probably unintended, consequence of the legislative scheme prior to 1989 was that a member's death benefit could be utilised to continue supporting a person to whom the deceased owed no duty of support in life, while those towards whom he did owe a duty of support, *including* his spouse and children, could continue to be deprived of support

[293] Ibid.
[294] *De Wilzem v SARAF* [2005] 2 BPLR 180 (PFA) [10].
[295] *Van der Merwe v Southern Life* (n61), 13.

precisely because he had been in default of his duties during his lifetime. Had the member been fulfilling his duties, they would have qualified as financial dependants.[296] The irony is thus that s37C could, in practice, operate as a form of legislated disinheritance of a member's closest family. Injustices committed by the deceased during his lifetime would thus be perpetuated after death, and this was so *even if* the deceased tried to remedy his past neglect by nominating them as his beneficiaries.

The real difficulty that the Adjudicator sought to address by his liberal interpretation of factual dependant was not that the definition did not include cohabiting partners. It was that the definition as worded did not encompass cohabiting life partners who were economically self-sufficient and thus quite capable of surviving on their own resources.[297] The definition operated to the particular detriment of economically equal or self-sufficient same-sex partners who, prior to the adoption of the Civil Union Act,[298] could not marry and would not otherwise have been eligible as financial dependants, irrespective of the nature and duration of their relationship.[299] Given the lack of social acceptance and legal recognition accorded same-sex partners at the time, it would have been difficult even for a financially-dependent partner to come forward and lay claim to the benefit, particularly had the member not nominated them as a beneficiary.

Unfortunately, in seeking to include cohabiting partners within the circle of eligible beneficiaries, the Adjudicator adopted an interpretation of financial dependant that requires only that a couple 'ran a shared and common household'.[300] Once the fact of their cohabitation is established, they are presumed to be financially 'interdependent' or

[296] They were, however, also entitled to consideration provided the fund rules expressly included them. See the definition of dependant in Act 101 of 1976, s21(a).
[297] *Van der Merwe v Southern Life* (n61); *Muir v Mutual & Federal* [2002] 9 BPLR 3864 (PFA). An example of a partner who was financially dependent in the literal sense, and whose dependency was attributable to the relationship, is *Grobler v Penkoop* PFA/NP/2153/2005/RM.
[298] Act 17 of 2006.
[299] See eg *TWC v Rentokil* (n237); *Martin v Beka* [2000] 2 BPLR 196 (PFA); *Till v Unilever* [2000] 11 BPLR 1297 (PFA).
[300] *Musgrave* (n36); *Swanepoel* (n34); *Thene* (n43); *Mitchell v Alnet* [2014] JOL 31439 (PFA).

'mutually dependent'.[301] Living together, sharing expenses or simply being financially generous has sufficed in case after case to bring almost all cohabiting partners within the fold of financial dependant. No distinction is drawn between relationships of short[302] and long duration.[303] The inclusion of all cohabiting partners as *ipso facto* financial dependants,[304] would not be so problematic if the Adjudicator did not perceive s37C's primary purpose as being to protect financial dependants,[305] and that the only meaningful way to equitably distribute a benefit is to base the distribution on the extent of a beneficiary's dependence.[306] The extent of a partner's dependency is calculated by reference to the extent of the partner's contribution to the common household, and the assumption is that the partner will be 'financially worse off' commensurate with the loss of that contribution.[307]

More recently, Adjudicators have begun to conclude that cohabiting partners are for that reason alone also life partners, and therefore spouses, and therefore legal dependants.[308] In none of these determinations has the Adjudicator sought to establish whether the partners had undertaken reciprocal duties of support towards one another.

The Adjudicator's characterisation of cohabiting partners as financial dependants and/or life partners results in significant legal anomalies, both with regard to the treatment of death benefits, and with regard to the treatment of death benefits versus the ordinary assets in the

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[301] *Van Vuuren v CRAF* [2000] 6 BPLR 661 (PFA); *Swanepoel* (n34). Cf *Van der Merwe v CRAF* [2005] 5 BPLR 463 (PFA). Dependants in Australia include those in interdependency relationships, but the legislation contains clear criteria and guidelines. See Superannuation Industry (Supervision) Act 1993 (Cth), s 10A; Superannuation Industry (Supervision) Regulations 1994 (Cth), reg 1.04AAAA.

[302] *Minnaar* (n18) (unstated); *Whitcombe* (n13) (< 24 months); *Marais* (n13) (22 months); *Kirsten* (n59) (18 months); *Esterhuizen v CRAF* [2013] 3 BPLR 355 (PFA) (6 months); *Makume v Sentinel* (n52) (2 months).

[303] Examples of comparatively long relationships include *Van der Merwe v Southern Life* (n61) (9 years), *TWC v Rentokil* (n237) (5 years), *Mitchell v Alnet* (n300) (6 years); *Till v Unilever* (n299) (25 years); *Hlathi v University of Fort Hare* [2009] 1 BPLR 46 (PFA) (9-year cohabitation, 17-year relationship).

[304] Unless, it seems, the deceased is also survived by a spouse. In *Hubner v Tesuco* [2015] 2 BPLR 208 (PFA) the Adjudicator dismissed a complaint by a cohabiting partner, of about one year, on the basis that she had not demonstrated that she was in fact financially dependent on the member during his lifetime. The partner had supported and nursed the member through his illness. Her claim that she was a 'common law' spouse was also given no consideration. However equitable the decision may be, it does not accord with the sympathetic treatment generally afforded cohabiting partners.

[305] *Gorrah* (n63) [5.3]; *Winnan v MEPF* PFA/KZN/12789/07/MQ [5.1]; *Varachia v SAB* [2015] 2 BPLR 310 (PFA) [5.3]; *Maubane* (n191) [5.4].

[306] *Malan v Preservation PF* [2017] 2 BPLR 256 (PFA) [5.10].

[307] See eg *Kirsten* (n59) & §5.5.3 below.

[308] *Minnaar* (n18); *Whitcombe* (n13); *Esterhuizen* (n302); *Makume v Sentinel* (n52).

member's estate. For the purpose of a death benefit even comparatively affluent cohabiting partners, who are not dependent in the literal sense, are presumed to be financial dependants.[309] Their actual need is irrelevant,[310] although it remains relevant for other relatives and third parties claiming financial dependence.[311] It means that the mere act of moving in with someone creates an almost immediate 'entitlement' to share in their death benefit, which may be the deceased's most valuable property.

Cohabiting partners in relationships of long duration have no right to share in their deceased partner's estate. They similarly have no right to claim maintenance from the estate. In order to succeed in a proprietary claim, they need to prove that they and their partner had entered into a universal partnership.[312] The requirements for establishing the existence of a universal partnership are onerous and success uncertain.[313] In order to succeed in a maintenance claim, which could yield a similar outcome to a proprietary claim, same-sex partners must prove that they and the deceased had undertaken reciprocal duties of support, which is the defining characteristic of a life partnership. Opposite-sex partners have no such claim, even if a life partnership existed between them and the deceased.[314] Need is, moreover, an essential requirement for a maintenance claim against a deceased estate, even for spouses.[315]

[309] *Kirsten* (n59). See also *Minnaar* (n18); *Van der Merwe v Southern Life* (n61); *Muir* (n297).
[310] Ibid. Cf *Marais* (n13) (cohabitation agreement interpreted as evidence of lack of need).
[311] See §4.4 & 4.5.1 above.
[312] See eg *Ponelat v Schrepfer* 2012 (1) SA 206 (SCA); *Butters v Mncora* (n218). Cf the facts of *Steyn v Hasse* 2015 (4) SA 405 (WCC), in which the claim was unsuccessful. The applicant in *Steyn* might well have been considered a financial dependant.
[313] See further Bonthuys 'Exploring universal partnerships and putative marriages as tools for awarding partnership property in contemporary family law' (2016) 19 *PELJ*.
[314] In *Volks v Robinson* (n226), the majority intimated that an opposite-sex partner would enjoy only such right to maintenance as the deceased had expressly undertaken to provide. O'Regan's minority judgment points out that a contractual undertaking that binds the estate is an invalid *pactum successorium*. Maintenance claims by opposite-sex partners following separation have all been unsuccessful. See *McDonald v Young* (n228), *Du Toit v Greyling* (n228). Cf *Paixão* (n77), in which an opposite-sex partner successfully argued that a legal duty of support had arisen, but this was a loss of support claim against the Road Accident Fund arising from the wrongful death of the claimant's partner, rather than a direct claim against the partner or his estate.
[315] *Friedrich v Smit* (n146).

It is doubtful that the legislature intended to prioritise the claims of financial dependants, as understood by the Adjudicator, to death benefits, while denying spouses married in community of property their matrimonial property rights in respect of the death benefit. It is also doubtful that cohabiting partners in relationships of short duration were intended to enjoy a virtual entitlement to the death benefit when spouses and life partners, with a stronger legal and moral claim, do not have the right to share in the member's estate.[316]

The result of this disparate treatment is that the level of protection afforded to similarly-situated spouses and life partners is not determined by their personal circumstances but by happenstance, namely the nature of the property in issue — death benefits or ordinary assets. It is similarly doubtful that the legislature intends to subordinate the death benefit claims of legal dependants, future dependants, spouses and children to those of recent, and potentially short-lived, financial dependants. The automatic privileging of financial dependants in relation to death benefit distributions is inherently inequitable *vis a vis* the member's other dependants, nominees and heirs.

4.9 CONCLUSION

The definition of dependant is broad and imprecise. It requires that trustees undertake extensive investigations into the personal and financial circumstances of potentially eligible beneficiaries, and that they thereafter make difficult findings of fact and law to determine who, within the member's circle of family, friends and acquaintances, is properly speaking a dependant. The definitional imprecision increases the likelihood of erroneous identification. It also, however, gives trustees the opportunity to interpret the definition 'purposively' or literally, liberally or restrictively, to include or prioritise beneficiaries in ways that accord with their own sympathies and preferences. Section 37C cannot fulfil its purpose, of protecting

316 On the limited rights of cohabiting partners and putative spouses, see also Bonthuys 'A duty of support for *ALL* unmarried intimate partners Part 2: developing customary and common law and circumventing the *Volks* judgment' (2018) 21 *PELJ* 1.

dependants or ensuring that the benefit is distributed equitably, if trustees fail in their first task – correctly identifying the member's dependants.

Equally importantly, members need to be able to identify which of their kith and kin is a dependant within the meaning of the Act. Members cannot regulate their financial affairs, or make informed testamentary or life choices, if they do not know whether their plans and wishes might ultimately be frustrated because they failed to make any, or better, provision for a person they did not realise was a 'dependant'.[317]

The rule of law requires that laws be rational, reasonably clear, and reasonably certain as to their consequences. Laws that are unclear and unpredictable violate a foundational principle of the rule of law: that those subject to the law be able to understand its meaning and its legal consequences.[318] Without the necessary certainty and clarity, individuals do not know that the choices they make will yield the outcomes they desire.

Section 37C does not satisfy these requirements. Its precise purpose is not readily discernible. Its rationality is doubtful. Its *raison d'être* is seemingly the protection of dependants. Yet, despite its expansive definition of dependant, the exact requisites of each category are unclear and difficult to apply in practice. The Adjudicator's interpretation of the definition, and understanding of s37C's purpose, has led to significant inconsistencies in the treatment of similarly situated dependants and beneficiaries. These inconsistencies increase the potential for the inequitable application of s37C at the point at which trustees exercise their distributive discretion.

The next chapter analyses how trustees exercise their discretion, and how Adjudicators have influenced trustee decision-making: the factors they take into consideration, the extent to

[317] 'People rely on certainty of the law in settling their affairs, in particular in making contracts or settlements.' - Lord Reid 'The judge as law maker' (1972-1973) 12 *Journal for the Society of Public Law Teachers* 22, 23.
[318] *Dawood v Minister of Home Affairs* 2000 (8) BCLR 837 (CC) [47]; *Affordable Medicines Trust* (n9) [108].

which they override members' wishes, and whether they apply s37C in ways that promote equitable outcomes as between beneficiaries. The chapter is the first part of the analysis of the nature and extent of s37C's limitation on members', spouses' and children's constitutional rights. Its focus is the nature of the limitation, the grant of wide discretionary powers on the trustees.

5

CHAPTER FIVE

A CRITICAL APPRAISAL OF TRUSTEE DISCRETION AND ADJUDICATOR OVERSIGHT

The allocation of death benefits must without a doubt be the most emotional and time-consuming task for trustees. … Section 37C in its present form is inflexible and does not provide sufficient guidance on the distribution of death benefits.[1]

5.1 INTRODUCTION

Section 37C confers a 'wide discretion' on trustees to decide who, amongst the beneficiaries, will share in the benefit and by how much they will share.[2] The only consideration is fairness. Despite the breadth of their discretion, trustees have frequently been castigated for exercising their discretion improperly.[3] The second Adjudicator's rather damning opinion was that '[m]any trustees [including attorneys] appear not to have a clue what discretion is'.[4]

Such criticisms are cause for concern.[5] Discretion lies at the heart of s37C. Yet the criticism implies that members and beneficiaries cannot trust the s37C process – that either trustees are too-often not equal to the task of performing their duties properly, or that the task required of them exceeds what can reasonably be expected of them.[6]

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[1] Sanlam *Benchmark Survey: Research Summary* (2017), 5.
[2] *Government Employees Pension Fund v Buitendag [2006]* 4 BPLR 284 (SCA) [6].
[3] See *Sithole v ICS* [2000] 4 BPLR 430 (PFA); *Muir v Mutual & Federal* [2002] 9 BPLR 3864 (PFA); *Morgan v SA Druggists* [2001] 4 BPLR 1886 (PFA); *Seymour-Smith v Maxam Dantex* 2008 JDR 0362 (W).
[4] OPFA *AR 2004/2005*, 68: 'Now, although in our statistics we do not have a category that shows the number of instances in which we have had to grapple with the issue of trustee discretion in the complaints we have received, I can confidently say this issue has come up (directly or indirectly) in most of the complaints.'
[5] For members, beneficiaries and stakeholders such as government, for enacting s37C, employers, for establishing retirement funds that provide for the payment of approved death benefits, when those benefits could equally be provided by the employer directly through group life insurance, in which case they would not be subject to s37C and the discretionary power of trustees.
[6] See eg *Broodryk v Die Meester* 1991 (4) SA 825 (C), in which the court held that the Master could not be expected to resolve factual disputes between creditors, interested parties and the estate. See also *Jewaskewitz v Master of the High Court, Polokwane* [2013] ZAGPPHC 118 (16 May 2013) in which the court similarly held that it was not in the interests of justice to require the Master, who is not a judicial

This chapter describes and critiques how s37C operates in practice, relying on Adjudicator determinations to illustrate the breadth of the trustees' discretion, the frequency with which trustees override members' express or tacit wishes, the justifications they offer when doing so, and the extent to which Adjudicators have shaped their decision-making. It seeks to demonstrate that trustees do not intervene only in circumstances in which the member's choices are 'indisputably harmful', in the sense that all reasonable people would agree that giving effect to the member's wishes would be unconscionable in the particular circumstances.[7] This chapter also provides the context for my analysis, in chapter six, of s37C's impact on the rights to property, dignity and equality, which is the heart of my examination into the nature and extent of S37C's limitation on constitutional rights.

5.2 THE NATURE OF TRUSTEES' EQUITABLE DISCRETION

Trustees, when performing their s37C duties, have been described as administrative bodies wielding considerable quasi-judicial power.[8] How are these various descriptions relevant to assessing what *equitable discretion* means within the context of s37C, and what it requires of trustees?[9] Simply that the equitable discretion conferred on trustees has been conferred for the same purpose it is conferred on the judiciary, which is to ameliorate the harsh consequences that might otherwise arise from an application of rigid rules of law.[10] In the

officer, to adjudicate disputed maintenance claims. Are trustees better placed to do so than the Master?

[7] See *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A), 9, and §2.3 above.

[8] *Mashazi v African Products* 2003 (1) SA 629 (W); *Titi v Fundsatwork* [2011] JOL 28125 (ECM); *Letsoalo v Lukhaimane* 2018 JDR 0277 (GP); *Guarnieri v Fundsatwork* 2018 JDR 0740 (GP); *Seymour-Smith* (n3) [19].

[9] Note Willis J's complaint in *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers of the Newtown Urban Village* [2012] JOL 29675 (GSJ) [33]: 'The words "just and equitable" glide from the tongue with facility. Their precise meaning eludes easy description'.

[10] See Brady 'Equity without equity lawyers' 1976 *Acta Juridica* 125. Jonathan Law (ed) *Dictionary of Law* OUP 8ed (2015) defines 'quasi-judicial' as: 'Describing a function that resembles the judicial function in that it involves deciding a dispute and ascertaining the facts and any relevant law, but differs in that it depends ultimately on the exercise of an executive discretion rather than the application of law.'

s37C context, it is to prevent or remedy wrongs that would otherwise arise if the laws of testate and intestate succession were invariably applied.[11]

As such, I believe that s37C requires that the trustees' decision be *more* than a procedurally fair and substantively reasonable decision.[12] It must be an equitable decision.[13] Equitability is about individual justice.[14] Just as reasonable people may reasonably differ on the reasonableness of a decision, so too may reasonable people differ on the equitability of a decision.[15] The line between equitable and inequitable is, perhaps, somewhat easier to draw and the margin of discretion somewhat narrower than establishing whether a decision falls outside the 'range of reasonableness'.[16] For equitable decisions are just decisions, and justice requires that the decision renders unto each his due.[17] Since trustees' discretion only arises

[11] *White v Vandervell Trustees Ltd (No 2)* [1974] EWCA Civ 7: 'Every unjust decision is a reproach to the law or to the Judge who administers it. If the law should be in danger of doing injustice, then equity should be called in to remedy it. Equity was introduced to mitigate the rigour of the law.'

[12] As required under PAJA, especially ss3 and 6(2)(h).

[13] The fact that the two are not synonymous is apparent from the bases on which tribunals can intervene in trustee decisions in England and Australia. In the former they may do so if the decision was procedurally unfair or substantively unreasonable. They may not, however, intervene because they consider it unfair. See *Edge v Pensions Ombudsman* [1999] 4 All ER 546 (CA). In Australia, trustees may *only* intervene if they consider the decision substantively unfair *or* unreasonable. See Superannuation (Resolution of Complaints) Act 1993, s14(2). A decision that excludes a financially self-supporting child may be reasonable but unfair when assessed against the contributions the child made to the parent's welfare. A decision that excludes a financially needy child may be fair but unreasonable when assessed against the parent's ability to provide support and the absence of competing beneficiaries.

[14] As explained by Satchwell J in *Botha v Botha* 2009 (3) SA 89 (W) [46] 'What is thought to be a "just" order in the context of the Divorce Act must contain a moral component of what is thought to be "right" and "fair". Fairness envisages that the order is "appropriate" as between the parties and when measured against all the factors specified in section 7(2) and those others which a court decides should also be taken into account. What is "appropriate" brings one back full circle to the moral consideration that the order must be "deserved". Of course, any "just" order must be "well founded" on fact and reflect relevant and proper legal principles.' See also Froneman J in *Beadica 231 CC v Trustees of the Oregon Trust* [2020] ZACC 13 [173, 293]: 'Public policy takes into consideration the necessity to do simple justice between individuals and is informed by the concept of ubuntu'.

[15] See Brand 'The role of good faith, equity and fairness in the South African Law of contract' (2009) 126(1) *SALJ* 71, who provides examples of cases in which judges reached opposite conclusions as to the reasonableness of standard suretyship contracts. One example involved the same judge, who concluded in one case that it was reasonable and in another that it was unreasonable. Cf *Koekemoer v Sanlam* [2015] 1 BPLR 25 (PFA) [5.6]: 'It is no coincidence that the first and second respondents' allocations are virtually the same. It would have been an anomaly if the two boards relying on the same information and applying the same principles were to come to two diametrically opposing conclusions.'

[16] In *Graham v MEPF* PFA/EC/10/98/JM [22] the Adjudicator upheld the trustees' decision on the basis that if fell within the 'range of reasonable' decisions. In *Schleicher v SARAF* [2002] 7 BPLR 3677 (PFA) [14] the decision was upheld on the basis that it was not so 'illegitimate' that a reasonable board of trustees could not have reached it.

[17] See Van Zyl 'The significance of the concepts of justice and equity in law and legal thought' (1988) 105(2) *SALJ* 272, fn4 quoting Ulpian's three fundamental principles of law: *Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*

when there are competing beneficiaries, it must strive to be just *as between* the beneficiaries.[18] Each beneficiary should receive their 'just deserts', what they are entitled to as of moral right.[19]

How, however, does one determine what is morally right, other than by one's own, intuitive sense of fairness?[20] Trustee decisions must be based on something other than their own subjective preferences, otherwise s37C would simply entail that their subjective view of the equities is substituted for the member's.[21]

The answer is that their decision must be informed by, and align with, generally-accepted conceptions of fairness.[22] Trustees must be conformist, not maverick – unless the generally-accepted conception is inequitable, in which case they should explain why they think that this is so and why their conception is more equitable.[23] Courts have consistently held that the only way to arrive at an equitable decision is for the decision-maker to objectively consider all relevant facts,[24] to do so in accordance with established legal principle,[25] and to carefully balance the parties' competing interests.[26]

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[18] See also *Botha v Botha* (n14).

[19] See *Media Workers Association of South Arica v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) 795, explaining that judicial discretion involves a 'value judgment as to what is right, reasonable, fair and equitable.' See also *Sidumo v Rustenberg Platinum Mines* [2007] 12 BLLR 1097 (CC) [61-64]. See further Brady 'Equity without equity lawyers' 1976 *Acta Juridica* 125 for a discussion of the origins of equitable discretion.

[20] See Kennedy 'Equitable remedies and principled discretion: the Michigan experience' (1997) 74(4) *University of Detroit Mercy LR* 609: 'All writers on the subject of equity, regardless of their philosophical persuasion, agree that the terms "equity" and "equitable" are difficult to define. A decision that rests solely on "equity" is an analytically naked, and analytically suspect, decision. It is a decision that rests on nothing more than the judge's subjective feelings of what is fair under the circumstances.'

[21] See *Numsa v Vetsak Co-operative Ltd* 1996 (4) SA 577 (A), with regard to the assessment of the fairness of dismissals.

[22] See *Tataryn v Tataryn Estate* [1994] 2 SCR 807, 18 on relying on community standards in deciding on the existence and scope of a moral obligation to provide support. See also Lord Denning: 'Justice is the solution that the majority of right-minded people would consider fair', quoted in Stephens *The Jurisprudence of Lord Denning: A study in legal history* Vol 3 (2009), 2. See also Ch 2.3.

[23] See also Parkinson 'Constitutional Law and the limits of discretion in Family Law' (2016) 44 *Federal LR* 49.

[24] See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) [23 & 30].

[25] See *Baloyi v Ellerine* [2005] 7 BPLR 606 (PFA), in which the second Adjudicator quoted from the English case of *Sharp v Wakefield* (1891) AC 173 (at 179) in explaining how trustees were expected to exercise their discretion: '"Discretion" means when it is said that something must be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion: according to law and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular.' See also Fuller *The Morality of Law* (1969) and the eight principles that

Do trustees exercise their discretion in accordance with these principles? What are the relevant factors and established legal principles that should inform their discretion, and do they successfully balance the competing interests of the affected beneficiaries?

5.3 THE RELEVANT FACTORS

Given the absence of legislative guidance, the first Adjudicator stepped into the void and identified a 'basket of factors' that he considered relevant when deciding on an equitable allocation of benefits.[27] The factors, coupled with Adjudicator determinations, are the only guidelines available to trustees, and Adjudicators do expect trustees to be 'guided' by them.[28]

The relevant factors are:[29]

- the age of the beneficiaries
- their relationship with the deceased
- the extent of their dependency
- their respective financial affairs
- their future earning potential and prospects
- the wishes of the deceased
- the amount available for distribution.

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embody the 'inner morality of law': generality, prospectivity, clarity, stability, consistency, feasibility, constancy, prospectivity and congruence and so on whose observance is bound up with the basics of legal craftsmanship'.

[26] See *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (1) BCLR 1 (CC) [712-713]; *Sidumo* (n19) [64]; *Port Elizabeth Municipality v Various Occupiers* (n24) [23&30]. See also *Johannesburg Housing Corporation* (n9) [39-50] and the cases discussed therein.

[27] *Van der Merwe v Southern Life* [2000] 3 BPLR 321 (PFA) [8].

[28] Although determinations do not constitute formal precedent, as acknowledged by the second Adjudicator (see *Ngalwana 'A large hole is filled'* (Book Review) *Today's Trustee* (July/September 2010) they nevertheless constitute a form of quasi-precedent for trustees, for some Adjudicators, albeit incorrectly, consider them to be binding on all funds and not merely on the parties to the dispute. See OPFA *AR 2008/2009*, discussing the determination in *Barnard v Municipal Gratuity Fund* PFA/GA/24186/2008/SM, in which the Adjudicator rejected the fund's argument that its determinations do not constitute binding precedent. The Adjudicator misconstrued the meaning of s30O, on which it relied for this view.

[29] *Van der Merwe v Southern Life* (n27); *Musgrave v Unisa* [2000] 4 BPLR 415 (PFA); *Ruiters v Telkom* [2003] 3 BPLR 4501 (PFA).

These seven factors can, I suggest, more helpfully be grouped into three heads: the wishes of the deceased; the beneficiary's relationship with the deceased; and the financial circumstances of the beneficiary. The seventh factor, the amount of the death benefit, is not routinely mentioned as a relevant factor.[30] Factors three to five all speak to the beneficiary's financial circumstances.

The Adjudicator has stated that all these factors are always relevant to the determination of what is equitable, but that they do not represent a closed list.[31] The trustees must discern what other factors are relevant on the specifics of a case.

These factors only tell trustees what they should consider. They do not tell them what the relative importance of each factor is.[32] It is how individuals weigh the evidence, what they consider more, or less, important in the circumstances, that informs their sense of what is equitable.[33] The weight to attach to each factor is, Adjudicators have emphasised, the trustees' prerogative.[34] They have been assured that it is their sense of the equities that matters, provided only that they have applied their minds properly. Despite these assurances, the early Adjudicators readily overrode and substituted their decisions for the trustees', on the basis that the trustees had either not considered all the relevant factors or

[30] The first six factors are referred to in almost every determination, while the last factor receives sporadic mention, even when it is highly relevant. It was identified as important in *Masoabi v CRAF* PFA/FS/6859/06/CN and *Uys v Private Security* Unreported PFA/WE/11138/2006/LN and *Bolsiki v Private Sector* PFA/EC/10538/2006/LN but was seemingly considered irrelevant in *Baloyi v PPWAWU* PFA/NP/11689/2006/LTN.
[31] *Ruiters* (n29).
[32] Glendon 'Fixed rules and discretion in contemporary family law and succession law' (1985-1986) 60 *Tulane LR* 1165, 1196: 'A list of factors with no indication of relative weight and no over-arching guideline other than the vague admonition to be fair is virtually the same as providing no factors.'
[33] These same concerns have been made in England regarding the absence of guidelines to assist courts weight the relative importance of the factors they are expected to consider when deciding family provision claims against deceased estates. See *Ilott v The Blue Cross* [2017] UKSC 17 [61].
[34] *Jordaan v Protektor* [2001] 2 BPLR 1593 (PFA) 1597. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism* 2004 (4) SA 490 (CC) [49], in which the CC confirmed that the 'equilibrium' to be struck between relevant factors is 'best left' to the discretion of the adminstrative decision-maker.

had not applied their minds properly.[35] When doing so Adjudicators were clearly animated by their own sense of the equities.[36] Adjudicator perceptions of what is equitable, having regard to these factors, have thus been influential in shaping trustee decision-making. Have they, however, consistently guided trustees towards outcomes that are objectively equitable?

In the section that follows, I consider the equitability of trustees' allocative choices and Adjudicator determinations in a selection of cases. The cases were selected because they demonstrate how often members' reasonable wishes are overridden, in circumstances in which the trustees' or Adjudicators' choices are not obviously more equitable, and are arguably less equitable, than those of the member; how often decisions are taken on the basis of incomplete information; and how the principles laid down by the Adjudicators are often inconsistent. These are not the only pertinent cases, but space constraints do not permit an analysis of all such cases.

5.4 A SELECTION OF CASES[37]

As the cases will show, most disputes involve spouses and cohabiting partners, either as complainants or respondents. This is equally true of other jurisdictions.[38] In my critique of the selected cases I first provide a synopsis of the stated facts, evaluate whether the decision was based on a consideration of all the relevant facts, and then try to discern what principle

[35] As Baxter *Administrative Law* (1984) 509 observes, the opportunity to decide that a factor, or fact, was relevant or irrelevant gives a reviewing body considerable scope to intervene if it is so inclined.
[36] See eg *TWC v Rentokil* [2000] 2 BPLR 216 (PFA); *Morgan* (n3); *Magwaza v BB Cereals* [2002] 1 BPLR 2978 (PFA), in which the Adjudicator's sense of the equities led him to conclude that the trustees had not applied their minds properly when deciding to divide the benefit in equal portions amongst the dependent children, given the large differences in their ages.
[37] Adjudicator determinations are usually short. When I use phrases and expressions as they appear in the determinations, I do not cite the relevant page or paragraph unless they are a statement of principle. I round the value of the death benefit and allocations.
[38] See §7.3.4 below.

trustees are likely to extract from each determination.[39] In each of the selected cases, the member's wishes were overridden.

Since trustees performing their s37C duties are organs of state, bound by the BoR, they should surely intervene to override the member's wishes only when there is a compelling reason to do so. Their intervention should, therefore, be limited to those instances in which the member's choice is manifestly unjust. As discussed in chapter two, whether the member's choices are manifestly unjust should be determined by reference to the legal and moral convictions of the community. It should, therefore, firstly be determined by reference to the member's existing legal obligations and the outcome that would have resulted had the death benefit formed part of the member's estate. If trustees intervene in circumstances in which the member's choice was not manifestly unjust, is their own decision not arguably unconstitutional? If trustees fail to take into consideration the existence and scope of members' legal obligations towards a particular beneficiary, are they not failing to consider factors relevant to the exercise of their discretion?

Even if s37C does provide trustees with the discretion to substitute their judgment for that of the member even when the member's own wishes were not unreasonable or inequitable, are trustee decisions any the more reasonable or equitable than the member's? Are trustees correcting injustices perpetrated by the member, or simply committing their own injustices, based on their subjective sense of what is equitable?

5.4.1 Competing claimants: spouses and partners

[39] In almost every determination Adjudicators explain that the only grounds of review are whether trustees considered all relevant factors, ignored irrelevant factors, and did not fetter their discretion. See eg *Van Schalkwyk v MEPF* [2003] 8 BPLR 5087 (PFA) [14] and the determinations cited in this chapter. Trustees' undue respect for member nominations has been characterised as a fettering of their discretion, as has their failure to consider relevant factors. See eg *Williams v FFE* [2001] 2 BPLR 1678 (PFA); *Nayager v Tesuco* [2013] 2 BPLR 224 (PFA).

5.4.1.1 Van Vuuren v Central Retirement Annuity Fund

In *Van Vuuren*,[40] the member had nominated his cohabiting partner of two years as the sole beneficiary of his modest, R203 000, death benefit. He was also survived by his widow (the complainant) of almost 30 years, to whom he was married out of community of property and against whom he had initiated divorce proceedings, and two adult children, a medical doctor and qualified psychologist respectively. The trustees divided the benefit 50/50 between the partner and widow.

Their reasons for including the widow in the distribution was that she was in financial need, that the marriage had been a very long one, and that she had made tremendous financial and other contributions to the marriage and raising the children. Their reasons for including the partner was that she and the deceased had been financially inter-dependent for 2½ years, had bought a house together, she was experiencing greater financial difficulty than the widow, she was the only nominated beneficiary and she was the sole heir to his estate, which was insolvent. In deciding to divide the benefit equally, they also took into consideration that the deceased and widow were married out of community of property. They thus thought it unlikely that she would share in his pension interest on divorce.

The Adjudicator upheld the widow's complaint and set aside the trustees' decision. He varied their allocation, awarding 67% to the widow and 33% to the partner. His reasons were that the trustees had failed to consider a material fact, which was that the partner had received R23 000 under a different policy; that the widow would probably have obtained a redistribution order on divorce, entitling her to share in the deceased's pension interest;[41] that the widow was 53-years-of-age, in a temporary job earning R4300 per month, with no medical aid or pension scheme, while the partner was age 45, in a permanent job earning R5700 per month, with medical aid and a pension scheme. He thus concluded that the

[40] [2000] 6 BPLR 661 (PFA).
[41] Courts may grant a redistribution order when spouses had entered into a marriage out of community of property prior to 1 November 1984, which is when the accrual system was introduced. See Matrimonial Property Act 88 of 1984, s2 rtw Divorce Act 70 of 1979, s7(3).

partner's financial circumstances were 'far more favourable' than those of the wife.[42] He also felt that the long duration of the marriage, during which the wife had made 'immense contributions', both financial and other, to raising the children, was deserving of special recognition.

The Adjudicator nevertheless held that although nominations are 'important but not decisive', 'the wishes of the deceased are clear, and some recognition must be given thereto'.[43] In this case, the Adjudicator understood 'some recognition' to mean an entitlement to share in the benefit. The 'poor relationship' between the deceased and his children, who were in any event self-sufficient, justified their exclusion.

The determination suggests that it is inequitable not to make reasonable provision for a financially-needy surviving spouse of a marriage of long duration, even though she was not financially dependent on the deceased at the time of death, even though they were estranged and even though she had adult children who appeared financially able to support her. A nominated cohabiting partner should, nevertheless, also be included in the distribution.

In this case the deceased appears to have made no provision for his widow, so s37C did perform an ameliorating function. The outcome aligns with other protections for the widow, viz the possible redistribution order on divorce and potential maintenance claim against the

[42] Although their salaries were similar, her job was a permanent one, and she was a member of a medical aid and pension fund. She had also been the beneficiary of a life policy worth R22 000. No mention was made of the fact that the widow's assets and liabilities were roughly equal, while the partner's liabilities exceeded her assets (R315 000 v R192 000). The widow's temporary employment was with the Western Cape Education Department, and she was also registered with Health Professions Council SA, and that her qualification (not mentioned) was the source of her (modest) part-time income; there was no further mention of her qualifications or employment history. There was no mention of the partner's qualifications, the nature of her current occupation or employment history. All these factors are relevant to the parties' future prospects. There was also no mention of the size of the deceased's estate.

[43] Para 36.

estate, had the death benefit formed part of the estate.[44] The duration of the marriage and widow's direct and indirect contributions were highly relevant to the scope of the deceased's moral obligation. The decision accords with the legal convictions of the community, as reflected in contemporary legislation and case law, which prioritises the interests of spouses over unmarried partners.[45] In a number of recent cases the courts have affirmed the rights that a spouse enjoys on intestacy, to the exclusion of putative spouses, even though the latter believed that their marriage was properly celebrated in accordance with either civil or customary law.[46]

Was the trustee allocation so unreasonable that it was one no reasonable person could have made, warranting Adjudicator intervention? The R22 000 did not materially improve the partner's financial circumstances on the facts. They awarded the widow half the benefit, notwithstanding their incorrect legal premise. The Adjudicator's re-allocation appears to have been informed by his sense of the equities and the appropriate weight to be attached to the relevant factors.

5.4.1.2 Van Schalkwyk v Mine Employees Pension Fund

In *Van Schalkwyk*,[47] the benefit was again a very modest R204 000. The member was survived by his ex-wife, a minor son, two adult children and his cohabiting partner. He and his ex-wife had been married for 24 years and had cohabited for a further two years after their divorce. He was obliged, under the divorce agreement, to pay maintenance of R1000 to his former wife, who was also a dependant on his medical aid. She was his only nominated beneficiary. He had been cohabiting with his new partner, who was still married but estranged from her husband, for about 18 months prior to his death. She had lived with the deceased in

[44] Had his estate been solvent, she would have been entitled to maintenance under the Maintenance of Surviving Spouses Act 27 of 1990 (MSSA), which would have taken priority over the cohabiting partner's entitlement as the testamentary heir.
[45] See *Volks v Robinson* 2005 (5) BCLR 446 (CC).
[46] See *Mayelane v Ngwenyama* 2013 (8) BCLR 918 (CC); *Manyepao v Ledwaba* (Case no 1368/18) [2020] ZASCA 54 (27 May 2020).
[47] [2003] 8 BPLR 5087 (PFA).

accommodation subsided by his employer. The financial circumstances of his ex-wife and cohabiting partner were similarly disadvantageous, although it appears that his partner was marginally better-off.[48] His two major children had waived any entitlement to the benefit, in the expectation that their portion be allocated to their mother. The minor son was unemployed and had had to give up his studies. His ex-wife was in a new cohabitation relationship.

The trustees allocated 50% of the benefit to the cohabiting partner, 30% to the ex-wife, and 20% to the minor son. In justifying their allocation, the trustees highlighted the following: there was no indication that the cohabitation relationship between the deceased and partner would not have continued, and there was even some indication that they might possibly have been contemplating marriage; a cohabiting partner was constitutionally entitled to the same treatment as a *de jure* spouse;[49] they were not obliged to allocate so much of the benefit to the ex-wife as was required to replace the value of the maintenance she had been receiving.

In upholding the trustees' decision, the Adjudicator dismissed the nomination as 'superfluous' on the basis that the ex-wife qualified as a dependant regardless of the nomination. The 50% allocation to the partner was the minimum equitable amount given her status as a *de facto* surviving spouse. Had any share been allocated to the adult children, it would most equitably have been made by reducing the 30% allocated to the ex-wife.

Unlike the *Van Vuuren* determination, no apparent weight was attached to the duration of the marriage or the former spouse's contributions to the household and raising the children.

[48] The ex-wife earned R500 p/m selling jewellery. The partner was unemployed, living with family but received R700 p/m from an unstated source. The ex-wife claimed the partner received R3000 monthly rental on a plot but could not substantiate the claim, and the partner claimed that the rental was paid to her husband. The ex-wife had inherited about R19 000 from the deceased's estate. She was his sole testamentary heir.

[49] This view was doubtless informed by earlier Adjudicator determinations. See *Van der Merwe v Southern Life* (n27), *Musgrave* (n29). It was decided before *Volks v Robinson* (n45).

There was no mention of the spouse and partner's assets and liabilities; no mention of their respective qualifications and employment histories; no mention of the marital regime of the partner and her husband, and what she might therefore be entitled to on divorce; no mention of the adult children's ages, occupations, means or ability to support their mother. There was similarly no mention of the terms of the divorce order, and whether the member had expressly bound his estate to continue paying maintenance.[50] If he had, she would have been entitled to maintenance from his estate, but no mention is made of the value of that estate. His cohabiting partner would have had no such claim.

The determination suggests that a cohabitation relationship of short duration is more important than a marriage of long duration that has already terminated through divorce. The deceased's wishes, the nature and duration of the relationship with, and ongoing maintenance obligation towards, the ex-wife and minor child, are less important than the existence of a cohabitation relationship. There is no need to carefully consider the parties' future prospects. Adult children can safely be excluded from consideration where they have waived their entitlement and there is no evidence to suggest that they are not self-supporting.

In this case s37C does not appear to have performed an ameliorating function. The deceased's wish to make provision for his former wife of a marriage of long duration was neither unreasonable nor inequitable. It was far from manifestly unjust. The ex-wife had contributed to the marriage just as much as the wife in *Van Vuuren* had. She was in financial need. She was financially dependent on the deceased, who was under a legal obligation to continue maintaining her. The trustees assumed that the cohabitation relationship would be permanent simply because there was no evidence to suggest that it would not be. The only difference between *Van Vuuren* and *Van Schalkwyk* was that in one the parties were not yet

[50] Although the Divorce Act s7(3) provides that a court may award maintenance until the death or remarriage, and although divorce orders typically replicate that language, the obligation is personal to the payor-spouse and terminates should they die prior to the payee's death, unless the settlement agreement clearly indicates that the payor intended to bind their deceased estate. See *Hodges v Coubrough* 1991 (3) SA 58 (D); *Kruger v Goss* 2010 (2) SA 507 (SCA); *Els v Jagga* 2016 (6) SA 554 (FB).

divorced, in the other they were. In all other respects they are virtually identical, except that the children in *Van Vuuren* appeared to be better able to provide financial support to their mother. The member's wishes were not manifestly unjust. The member was not exercising his testamentary freedom capriciously, without regard for his moral or legal obligations. The choices he made reflected his legal and moral obligations towards his former spouse and minor son, since she now became wholly responsible for her son's maintenance needs.

In this case the trustees and Adjudicator did not respect the member's wishes; did not respect the legal claim that the former wife and minor child might have had against his estate; were indifferent to the moral obligations that arise from a marriage of long duration; sought to protect a partner who was still married and, therefore, legally entitled to seek maintenance from her husband, and who enjoyed no right to maintenance from the member's estate. His cohabiting partner was not financially dependent on him for any reason attributable to the relationship, or as a result of any contribution she had made. His moral obligation towards her was surely considerably less than that owed his former wife and his son.

Neither the trustees nor the Adjudicator provide a satisfactory justification for an allocation that appears, in consequence, to be an unreasonable and unjustifiable limitation of the member's testamentary freedom.

5.4.1.3 Muller v Central Retirement Annuity Fund

In *Muller,*[51] the Adjudicator upheld the trustees' decision to award 32% of a R230 000 benefit to the deceased's 62-year-old ex-wife, to whom he was obliged to pay maintenance of R850 per month. The deceased was also survived by two adult, self-supporting children, and his 60-year-old surviving spouse of a seven-and-a-half-year marriage. His widow was his only

[51] [2014] 2 BPLR 265 (PFA).

nominated beneficiary. The trustees' reasoning in this case appears to have been the opposite to that of the Adjudicator in *Van Schalkwyk*: that the 32% award to the ex-wife was the *minimum* to which she was entitled, given the deceased's ongoing maintenance obligation towards her.[52]

However, there was no detailed consideration of the surviving spouse's financial circumstances other than that she was employed,[53] or of her assets/liabilities, nature of employment, or whether she too had children. There was also no mention of his sons' personal and financial circumstances or whether they were able to support their mother.

This determination, contrary to *Van Schalkwyk*, suggests that the existence of a maintenance order is sufficient to entitle an ex-wife to one-third share of a modest death benefit, notwithstanding: the deceased's wishes, that they were divorced for 15 years, that the deceased was also survived by two adult self-supporting sons who could possibly help maintain the ex-wife, that he was married to his surviving spouse for seven-and-a-half years, and that the financial and personal circumstances of the surviving spouse, and consequently her future prospects, were unknown, other than that she was employed. There was once again, as in *Van Schalkwyk* above, no mention of whether the member had agreed that his maintenance obligation would survive his death.

There is nothing on the facts that suggests the deceased's nomination was either inequitable or unreasonable. His legal and moral obligation to his surviving spouse, given her age and the duration of the marriage, was surely greater than the moral obligation he owed his ex-wife, particularly since she had two adult sons who could potentially support her.[54] In *Kruger NO v Goss*,[55] the SCA recognised that the maintenance claims of a former spouse could

[52] See [3.3].
[53] She was also bequeathed a usufruct on the deceased's house and the residue of his estate, but the bulk of the assets were bequeathed to the children and grandchildren. However, the estate was embroiled in a legal dispute and the identity of the eventual beneficiaries was uncertain.
[54] Accepted as a relevant consideration in *Ruiters* (n29) and *McLean v Aunde* PFA/KZN/6204/05/NS.
[55] 2010 (2) SA 507 (SCA).

potentially compete with those of a surviving spouse and minor child, which is amongst the reasons it held that the obligation terminates on the payor's death, in the absence of a clear intention to the contrary. This determination is difficult to reconcile with that of *Van Schalkwyk*. There a nominated ex-wife in a marriage of longer duration, entitled to a higher sum by way of monthly maintenance, with a minor son she still had to support, was allocated a similar share, but a smaller sum, than a non-nominated spouse in a marriage that was of similar duration, but which had dissolved some 15 years before the member's death.

5.4.2 Competing claimants: children and spouses/partners

5.4.2.1 Williams v FFE Minerals South Africa Pension Fund (1)

In *Williams*,[56] the member's only nominated beneficiary was his surviving spouse. The member was also survived by three adult children, aged 28, 26 and 25. The trustees awarded the full R149 000 benefit to the spouse.

The factors the trustees considered important were that the spouse worked as a secretary, earning an annual income of R78 000. They had been married for three years, although she had moved out of the common home two months before his death because of marital difficulties. The spouse was the sole testamentary heir, but the estate was insolvent. The three children had returned to England with their mother, following their parent's divorce 20 years earlier. Their contact with their father was sporadic, and he had never fulfilled his maintenance obligation towards them. Each child was employed, earning £22000, £9000 & £8500 per year respectively.[57] The trustees also noted that they had respected ('abided by') the deceased's last wishes.

[56] [2001] 2 BPLR 1678 (PFA).
[57] Exchange rate on 1 Jan 1999 = 9.9791, therefore roughly R220 000, R90 000 and R85 000 then. Adjusted for inflation, this would be roughly R657 000, R268 000 and R253 000 today.

The Adjudicator set aside the trustees' decision and allocated the children and spouse 25% each of the benefit, on the basis that the trustees had failed to consider a material fact, and that they had fettered their discretion. The Adjudicator discovered that the spouse had been paid the sum of R 800 000 under a separate life policy,[58] of which the trustees weren't aware when they allocated 100% of the benefit to her. The Adjudicator considered this payment a material fact since, relative to her income, it 'considerably enhance[d] her financial status and future earning potential'. The trustees' statement, that they had 'abided by' the deceased's nomination, was taken as evidence that they had both 'over-emphasised' its importance and 'rigidly' followed it.[59] Although the Adjudicator accepted that the children did not have a right to share in the death benefit simply because the deceased had failed to pay maintenance, he felt the fact they would not be able to claim from the estate, given that it was insolvent, was a relevant factor.[60] In summary he concluded that he would ideally have liked the children to receive the full death benefit, but that 'some recognition' had to be given to the fact that the spouse was his only nominated beneficiary.

There was no mention of the spouse's age; the marital regime; the beneficiaries' respective assets and liabilities, qualifications, employment history and future prospects, other than that the spouse was employed as a secretary.

The determination suggests that where a spouse receives a significant financial benefit from the member's death relative to her existing financial position, it is inequitable to exclude adult, self-supporting, largely-estranged children from sharing in the benefit, notwithstanding that they were not financially-dependent on the member and that that they were not

[58] R800 000 in July 1998 (date of death) is roughly equal to R2.5 million in mid-2019, and R78 000 about R241 000. Calculations done using: <https://inflationcalc.co.za/>.
[59] See [19].
[60] Cf *Minnaar v CRAF* [2015] 2 BPLR 236 (PFA), in which the trustees awarded 50% of a modest death benefit to the deceased's partner, notwithstanding that he was in arrear with his maintenance obligations towards his student daughter, notwithstanding that his partner was not financially dependent on him at the time of his death and that she earned a monthly income of almost R30 000. The decisive factor for the trustees was that his daughter had just completed a degree in chartered management accounting, which they believed meant her future prospects were considerably better than the partner's.

nominated beneficiaries, and notwithstanding that the benefit is unlikely to be sufficient to meet the spouse's full maintenance needs for the remainder of her lifetime.[61]

The deceased's nomination was not unreasonable, much less manifestly unjust. The trustees' decision to abide by it was therefore also not inequitable or unreasonable. The children would have had no claim as creditors against the estate, since their maintenance claims had long since prescribed. They would similarly not have succeeded in claiming maintenance in the absence of existing financial need. The Adjudicator's intervention was based on his subjective sense of fairness. If s37C's purpose is also to prevent dependants from becoming reliant on state support, paying a portion of the benefit to self-supporting adults who live abroad is directly contrary to that purpose.

5.4.2.2 Segal v Lifestyle Retirement Annuity Fund

In *Segal*,[62] the deceased had wanted his surviving spouse and the three adult children of his first marriage to share equally in his modest death benefit, of R177 000. The trustees overrode the nomination and awarded the full amount to the spouse. The only relevant fact that was mentioned was that the widow 'was not working at the time' of the member's death, while the children were self-supporting adults. Once again, there was no mention of the respective ages of the beneficiaries; duration of the marriage; marital regime; estate size and beneficiaries' employment histories and future prospects; assets and liabilities. The Adjudicator accepted the trustees' reasoning that the widow was the member's only factual dependant, and that the children were younger and better able to secure their own futures.

This decision suggests that a 100% allocation to a spouse is equitable even when it overrides the deceased's wish to include his adult children, and even when there is no other information on which to form an opinion as to the reasonableness or equitability of either the

[61] Cf *Whitcombe v Momentum* [2016] 2 BPLR 290 (PFA); *Marais v Sasol* [2017] 3 BPLR 615 (PFA).
[62] [2001] 1 BPLR 1519 (PFA). Cf *Van Jaarsveld v OVK Aftreefonds* [2015] 2 BPLR 303 (PFA), which on similar facts was remitted for re-investigation.

member's wishes or the trustees' allocation. The treatment of the member's nominated adult children stands in stark contrast to the treatment of the member's non-nominated adult children in *Williams*.

5.4.2.3 Selomo v The Personal Provident Fund

In *Selomo*,[63] the member had carefully apportioned his death benefit of R325 000 between his spouse (53), minor child (10) and four adult children (23, 26, 30, 31), possibly of a previous marriage. He had allocated 20% to his spouse, 10% to each of his adult children, and 40% to his youngest daughter. The trustees overrode the nomination and allocated each adult child's share to the surviving spouse. The only reason given by the trustees was that the spouse and minor child were the only persons who were living with, and thus being financially supported by, the deceased, while the children were all employed and self-supporting. Once again, no further facts were given.

This determination again suggests that it is equitable to disregard a deceased's nomination of adult self-supporting children when the deceased is survived by a spouse and minor child who were financially dependent on him, even in the absence of any other information as to the spouse's financial circumstance. The decision may well have been equitable in the circumstances, but in the absence of additional information the Adjudicator could not have made a proper assessment of the equities. The deceased's wishes, in wishing to make some modest provision for all his children, were entirely reasonable. The facts are not sufficient to suggest that, in the particular circumstances, the trustees' intervened to prevent a manifest injustice.

5.4.2.4 Hattingh v Murphy NO

[63] PFA/GA/4894/2005/RM.

Compare the determinations discussed above to that of the HC in *Hattingh*.[64] The deceased had nominated his three adult children as his only beneficiaries, but the fund overrode the nomination and awarded the full benefit, of R138 000, to his surviving spouse of a six-year-marriage. The trustees, again, based their decision on the fact that the children were all financially independent adults, albeit with very modest means and incomes, while the wife was unemployed and financially dependent on the deceased. The wife was, however, receiving a spousal pension (R4 200) and had been paid R180 000 under a separate group life policy.

In upholding the trustees' decision, the Adjudicator agreed with their view that the widow's future earning-prospects were virtually 'nil' on account of her 'advanced' age (51), the fact that she was white and had only ever worked as a post office cashier. The Adjudicator also accepted that her age meant it likely she would soon face decreasing health and increasing medical expenses.

The HC overturned the decision on appeal, on the basis that there was no indication that the deceased had not made adequate financial provision for his spouse. On the contrary, the widow was the recipient of a pension and the proceeds of other policies. The trustees' and Adjudicator's conclusions as to her future earning potential and likely medical expenses were pure surmise.

The focus of the HC enquiry was on the surviving spouse's means rather than the children's means. The HC's view was that if s37C is supposed to restrict freedom of testation in order to ensure that no dependants are left without support, allocating the benefit to the widow did not achieve that purpose, since she had been left with adequate support. The HC thus held

[64] [2006] JOL 17709 (C).

that the 'only equitable distribution' was that the benefit be shared equally between the children,[65] in accordance with the deceased's wishes.

5.4.2.5 Ellis v Mine Employees Pension Fund

In *Ellis*,[66] the affected children were the deceased's three minor children, who had been living with him, his second wife and his stepson at the time of his death. The member and his former spouse had divorced about five years previously. He had remarried at some stage during the intervening five years. His minor children were his only nominated beneficiaries and his only testamentary heirs. His gross death benefit was about R2.2 million. The trustees used 50% of the gross death benefit to purchase the surviving spouse a lifetime pension. This pension was discretionary, because the deceased had not notified the fund of his marriage as was required under the fund rules. Tax and the former wife's pension interest was then deducted from the remaining 50%, leaving a lump sum of only R700 000 for distribution. Of this remainder, the widow was awarded 35%, two children 20% each and the third, 25%. The surviving spouse was employed as an assistant manager at a BP Garage. There is no mention of the widow's age, means or needs. It is not clear what the deceased's children inherited from the estate, other than R50 000 cash. There is also no information as to their ages, or their mother's means and ability to provide support.

This determination suggests that surviving spouses are entitled to priority consideration, notwithstanding that the deceased is survived by minor children who are his nominated beneficiaries, and the absence of clear evidence showing that the spouse's needs are demonstrably greater than the children's.

The trustees' distribution not only overrode the member's wishes, but, in doing so, appear to have given no consideration to the scope of the deceased's relative legal obligation

[65] See [20].
[66] [2014] 1 BPLR 36 (PFA).

towards his children versus his surviving spouse. The trustees awarded a discretionary pension to the spouse, utilising half the gross benefit to do so, and then awarded her the largest single share of the remaining lump sum. They did so notwithstanding the relatively short duration of the marriage, which must have been less than five years; notwithstanding the deceased's primary legal and moral obligation towards his minor children;[67] and notwithstanding the fact that the surviving spouse was gainfully employed. However inequitable the trustees' original decision, it could not be corrected by the Adjudicator because the complainant was the surviving spouse, not the children.[68] Section 37C thus operated to the clear detriment of the deceased's minor children. Had the death benefit formed part of the estate, it is doubtful that the surviving spouse would have been awarded so large a share by way of maintenance. Her needs would almost certainly have been more closely interrogated. Far from performing an ameliorating function, s37C effectively empowered the trustees to partially 'disinherit' the deceased's minor dependent children, the very situation that it is supposed to help guard against.[69]

5.4.3 Competing claimants: relatives and children/partners/spouses

[67] See also *Baloyi v PPWAWU* (n30), in which the trustees were berated for awarding the deceased's three minor children 90% of the death benefit, of R73 000, and allocating only 10% to the deceased's financially dependent sister, since she had four children of her own to support. The matter was remitted to the trustees to do a proper investigation into the extent of the three children's dependency. If they had any maintenance needs, which they likely would have, those needs should enjoy priority over the competing claims of nephews and nieces.

[68] Cf *Jordaan* (n34). The deceased was similarly survived by three minor children of a first marriage, aged 13, 15 and 18, who were living with their mother. He was also survived by his second spouse of a 2-year-marriage, their 2-year-old child and 8-year-old stepson. His wife was his only nominated beneficiary, while the three children of his first marriage were his only testamentary heirs. Their mother was a successful businesswoman and owned valuable property, though her exact means are not stated. The spouse, though younger, was unemployed, in a 'dire financial' situation and had returned to live with family. The deceased was killed in a car accident that severely injured the 2-year-old and the stepson, who were both still receiving treatment. The trustees awarded 30% of the benefit to the three oldest children, and the remaining 70% to the surviving spouse. The benefit was R355 000. The sum awarded to the three children (R110 000) was a little less than that required to fulfil the deceased's monthly maintenance obligation towards them for roughly five years, until the youngest turned 18. No mention was made of the surviving spouse's prior employment history and likely future prospects, other than the observation that she was younger and still able to establish herself. No information was provided as to the value of the deceased's estate that he had bequeathed to his oldest children.

[69] Cf *Van Zelser v Sanlam* [2003] 2 BPLR 4420 (PFA) (greater portion awarded to minor child, overriding deceased's desired allocation to cohabiting partner).

5.4.3.1 Musgrave v Unisa Retirement Fund

In *Musgrave,*[70] the trustees overrode the member's nomination, that his (possibly estranged) partner be allocated 30% of the benefit, and awarded the full benefit to the member's other nominated beneficiaries, his parents and sister. The Adjudicator in turn overrode both the trustees' decision and allocated the 24-year old partner 40% of the benefit (of an unstated amount), even though the parents' and sister's existing financial circumstances were significantly worse than those of the partner.

The partner earned a monthly income in the region of R5000, principally from part-time modelling and the rental she earned on a townhouse, worth R350 000, that she had inherited from her father. In contrast, the deceased's parents, aged 62 and 51, had a joint income of only R4500 per month, in the form of the father's pension. They, too, owned a house, on which they had an outstanding bond of R20 000. They were said to suffer from 'unspecified chronic illnesses. The sister's age and income were similar to the partner's, but she had no assets and no mention was made of her future prospects.

The Adjudicator attached less weight to the member's wishes than to the apparent practice, within the pension funds industry, of awarding surviving spouses 50% of the benefit, and his view that cohabiting partners are entitled to the same treatment as surviving spouses. The Adjudicator nevertheless reduced this to 40% on the basis that she was 'not entirely without resources.'[71]

The determination suggests that cohabiting partners are entitled to the greater share of the death benefit when the competing beneficiaries are parents and siblings, irrespective of the member's wishes and the beneficiaries' relative means and needs. This is another instance in

[70] [2000] 4 BPLR 415 (PFA).
[71] At 429.

which the member's allocation, which was entirely fair and reasonable, was overridden on questionable grounds.

5.4.3.2 Nduku v VWSA Provident Fund

In *Nduku*,[72] the member's nominated beneficiaries included her brother, age 30, whom she wished to receive 30% of her benefit, and her mother. Her brother was intellectually disabled and was receiving a state grant. The member had completed the nomination about six years prior to her death, and prior to her marriage. The trustees identified the mother, brother and a niece as financial dependants. They identified her husband as her primary dependant, and allocated 76% of the benefit to him, while allocating 6% (R20 000) to the brother and 9% (R30 000) each to the mother and niece. The husband and deceased had bought a house together, and he wished to use the death benefit to pay the outstanding loan amount. There was no further information as to the deceased's estate, if any, or the spouse's age, duration of the marriage, means, employment history or future prospects.

The only basis on which the deceased's nomination appears to have been overridden was that, since she was married, her spouse was automatically her 'primary dependant' and thus entitled to the largest share of the benefit. There is nothing on the facts to suggest that the deceased's nomination was inequitable, notwithstanding her subsequent marriage. This determination again suggests that a surviving spouse is always entitled to priority consideration, irrespective of need and however compelling the competing claims of the other dependants.[73] This once again does not accord with established legal principle. In the

[72] PFA/EC/14187/2007/NVC.

[73] Cf *Koekemoer v Macsteel* [2004] 2 BPLR 5465 (PFA), in which the deceased's only nominated beneficiary, the complainant, was her 26-year-old husband of an 18-month marriage. He worked as a panel beater earning a modest salary (R3000 p/m). The trustees overrode the nomination, which had been completed after the marriage, and awarded his unemployed mother 50% of the R288 000 benefit, on the basis that her age (46) and race (white) meant it would be difficult for her to find employment in the future. The mother was living with her son, and no mention was made of his means and ability to support his mother. The deceased had been providing her with R500 a month, which she claimed was her only source of income although her monthly expenditure was R2300. The only distinguishing feature was that the mother was the deceased's sole testamentary heir, but the estate

absence of proven need, the surviving spouse would not have succeeded in overturning the deceased's wishes by way of a maintenance claim against the estate.

5.4.3.3 Masuku v Liberty Provident Fund

In *Masuku*,[74] the member had nominated her brother (63) and daughter (36) as equal beneficiaries of her R1.2 million benefit. She had done so 12 years prior to her death, when her brother was aged 51 and her daughter 24. The trustees allocated 90% of the benefit to the daughter, and 10% to the brother. They justified their decision on the basis that the brother was not a financial dependant, while the daughter, who was employed, was a financial dependant because she was living together with the deceased and sharing household expenses. There was no mention of the daughter's income, qualifications, nature of her employment, or of the brother's financial circumstances. There was also no mention of the deceased's estate, of which the daughter was probably the sole heir. The Adjudicator upheld the trustees' decision, praising them for departing from the nomination on the basis that it demonstrated that they had applied their minds to the allocation.

The determination suggests that no consideration should be given to a nominated sibling who is not a financial dependant when the deceased is survived by a child. No investigation need be done to determine the sibling's financial circumstances if the sibling was not financially dependent on the deceased at the time of death. No consideration needs to be given to the fact that the sibling may have been or become a legal or future dependant. The relative means and needs of the child and sibling are irrelevant.[75]

There is nothing to suggest that the deceased's nomination was inequitable. On the available facts is appears unlikely that her daughter would have succeeded in claiming

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was insolvent. Based on her age the member's estate would at best have been very modest, had it not been insolvent.

[74] [2014] 3 BPLR 390 (PFA).

[75] Cf *Gowing v LRAF* [2007] 2 BPLR 212 (PFA), but the circumstances were exceptional.

maintenance from her mother's estate, given that there is no indication that her mother was under a legal duty to maintain her. Given the frequency with which siblings are nominated beneficiaries, seeking to make provision for an elderly sibling is not 'indisputably harmful', such that honouring the deceased's wishes would be unconscionable in the circumstances.

5.4.3.4 Makume v Sentinel Mining Industry Retirement Fund

In *Makume*,[76] the member had nominated his mother and, failing her, his sister, as his beneficiaries, only nine months before he died. His mother predeceased him. The trustees overrode his nomination and awarded 60% of the R212 000 benefit to his cohabiting partner, 20% to her son and 20% to his sister. The trustees did so notwithstanding: that the partner had also received a spousal pension following his death; that she was 'gainfully' employed by the South African Police Service; that she and the deceased had been cohabiting for only two months prior to his death; and even though they acknowledged that the deceased had owed his partner neither a legal nor a moral duty of support.

The Adjudicator dismissed the sister's complaint on the basis that she had not demonstrated financial need or financial dependency. The Adjudicator discounted the sister's claim that the deceased had been providing her with financial support, since on her evidence she earned an income of R3 500 per month while her expenses were only R1 200 per month. The sister's financial information was highly implausible, yet it was accepted at face value, despite the real possibility that she may have found it difficult to complete the documentation or to provide documentation in support of her claim.

The determination suggests that the mere fact of cohabitation, however brief, and irrespective of need, entitles the cohabiting partner to greater consideration than a nominated sibling whose means and prospects appear to be appreciably poorer. There is

[76] [2014] 2 BPLR 244 (PFA).

nothing on the facts that justifies the trustees' overriding the deceased's wishes. Had the benefit formed part of the estate, the sister's claim would have been unassailable by the cohabiting partner. His sister was both his nominated beneficiary and she would have inherited on intestacy. Our courts do not yet recognise maintenance claims by unmarried opposite-sex partners, but if they did, it is highly unlikely that a court would have found that the couple had entered into a life partnership in which they had undertaken reciprocal duties of support. The partner was appreciably more financially secure than the nominated sister. Can it plausibly be claimed that there is community consensus that his failure to nominate his partner was indisputably harmful, entitling the trustees to override his wishes? That is highly doubtful. It is the member's wishes, rather than that of the trustees, that accords with the legal convictions of the community.

5.4.4 Interim conclusion

Determinations do shape trustee decision-making – as the Adjudicators expect them to.[77] To the extent that determinations lay down principles, they are not equitable principles. Nominated beneficiaries rarely receive equitable consideration by trustees, even when they are amongst the deceased's closest relatives who are owed a contingent duty of support and towards whom the deceased felt a clear moral obligation. The deceased's wishes are overridden without any consideration as to whether those wishes were reasonable and equitable. No consideration is given to the interplay between the relevant factors and the appropriate weight to accord to each in the specific circumstances. Broad, but conflicting, principles now serve as a substitute for careful consideration and evaluation of the factors. Most significantly, trustees do not seek to limit their intervention to those circumstances in which the member's wishes were so indisputably harmful that giving effect to them would be manifestly unjust. Instead they intervene as a matter of course, with scant regard for either

[77] OPFA *AR 2008/2009*. See *Ruiters* (n29) (explicit guidelines on the relevance of age), but cf *Robinson v CRAF* [2001] 10 BPLR 2623 (PFA), which discounted age differentials between children as a relevant factor.

the members' rights or obligations: the constitutionally protected right to select their beneficiaries, and the legal or moral obligation they owed the respective beneficiaries. On the basis of the available evidence, it appears rather that it is the trustees' (or Adjudicators') interventions that constitute an unreasonable and unjustifiable limitation of the member's testamentary freedom.

5.5 A GENERAL ANALYSIS OF ADJUDICATOR DETERMINATIONS

The Adjudicator has provided the trustees with a checklist of factors. The factors are, however, incommensurable – there is no natural order of priority among them. They are supposed to be considered holistically, with no single one decisive to the outcome. The weight to attach to the factors is said to be the trustees' prerogative.[78] However, for the factors to function as more than a checklist,[79] there must be a starting point or guiding principle, a lens as it were, through which to identify and order the pertinent facts. For example, should the deceased and her view of her relationships, as evidenced by her wishes, be the starting point, or should the beneficiaries and their needs be the starting point? Are some relationships more important than others? Are the claims of surviving spouses more deserving of recognition than those of self-supporting children?[80]

[78] *Van Schalkwyk* (n39); *Jordaan* (n34).
[79] See Parkinson (n23), 65, noting (with concern) that courts appear to be using the factors as a check-list in Australian cases involving the division of property on divorce, because while they set out the facts in some detail, they don't explain how the facts translate into their award.
[80] The determinations discussed in the previous section suggest that they are. See also *De Klerk v Fundsatwork* PFA/GA/13722/2007/CMS: the trustees awarded the full benefit to the surviving spouse of a 4-month marriage and 18-month relationship. The member's adult children complained, alleging that they and the spouse earned similar incomes and were thus similarly situated financially. Without any further information as to their respective financial positions, the Adjudicator dismissed their complaint. The spouse was held to be partially financially dependent (presumably by virtue of the fact that they lived together). In the circumstances, it would clearly have been equitable to include the children. After all, under the law intestate succession, they would have shared in the benefit, and the member had not nominated a beneficiary. However, the fact that including them would have been equitable does not mean that excluding them was necessarily inequitable. Many individuals choose to benefit a spouse over children; some the reverse; and many nominate both. There is thus nothing to assist trustees balance competing claims in such cases. No particular consideration was given to the nature and duration of the relationships, eg, or to the possible moral claims of the children.

The factors do not only lack a starting point, they are also incomplete. Without a starting point or guiding principle, how can they discern what other facts are relevant and what weight to accord to them?[81] For example, is estrangement, or lack thereof, between a deceased and spouse relevant to assessing a cohabiting partner's claim?[82] Is the deceased's marital regime relevant?[83] Is the existence of others able to provide a beneficiary with financial support relevant?[84] Is the degree of emotional and financial support the beneficiary provided to the deceased relevant? Is the deceased's conduct towards the beneficiary relevant, and vice versa? Is estrangement and lack of contact[85] or separation due to marital difficulties[86] relevant? Are cultural considerations relevant?[87]

When decision-makers are statutorily vested with broad discretionary powers, relevance must be determined having regard to the purpose of the statutory provision.[88] The purpose behind

[81] The current Adjudicator has expressed concern at the extent to which trustees 'misdirect themselves by considering irrelevant information' in s37C decision-making. See OPFA *AR 2014/2015*,11. See also Ngcukaitobi 'The recognition of error of fact as a ground for judicial review in South African administrative law' 2013 *Advocate* 30, who is also of the view that identifying relevant facts is straightforward, 33.

[82] See eg *Van Vuuren v CRAF* [2000] 6 BPLR 661 (PFA); *Hubner v Tesuco* [2015] 2 BPLR 208 (PFA); *Mofana v MEPF* [2015] 3 BPLR 372 (PFA).

[83] The Adjudicator and courts have said not. See §6.3 below.

[84] Some determinations say it is, some say it is not, and others make no mention of it even though it appears relevant. In *Nayager* (n39), the Adjudicator held that trustees had improperly excluded the deceased's stepchildren and improperly included the deceased's biological daughter because they took into consideration that the stepchildren's biological father was still alive and well able to support them, which the Adjudicator held was irrelevant to the equities. This is clearly wrong. In *Strydom v SARAF* PFA/GA/11378/2006/VPM, the fact that a widow aged 60 did not have children of her own to support her was considered relevant. See also *Ruiters* (n29) and *McLean v Aunde* (n54), where parental claims were dismissed on the basis that they had adult children capable of supporting them. In others it receives no consideration, even when it is potentially relevant. See eg *Whitcombe* (n61), in which a deceased partner in a relationship of short duration, who professed to be wholly dependent on the deceased, was awarded the greater share of the death benefit, even though the facts indicate she had adult children. No apparent consideration was given to their means and ability to support her by the trustees. If they did have the means, the trustees' decision effectively transferred the cost of supporting her from her children to the deceased's children. See also *Owen v Metal & Engineering Industry Bargaining Council* [2016] 1 BPLR 136 (PFA).

[85] Compare *Williams v FFE* (n39) and *Khulu v Mangxola* PFA/GA/8012/2006/SM, which considered it irrelevant to both major and minor children's claims, with *Oosthuizen v Mercedes Benz* [2000] 3 BPLR 287 (PFA) and *Karam v Amrel* [2003] 9 BPLR 5098 (PFA), which did consider it relevant.

[86] *Dickson v ABSA Fund* [2001] 6 BPLR 2062 (PFA) simply said not, but the husband was the nominated beneficiary. *Bester v CRAF* [2003] 11 BPLR 5253 (PFA) also said not but discussed the reasons behind the estrangement, since the complainant was the non-nominated widow in an (abusive) relationship of long-standing.

[87] See eg *Sithole* (n3), in which the trustees paid a benefit to the deceased's mother rather than spouse and children in the belief that they were acting in accordance with customary law.

[88] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic* of *South Africa* 2000 (3) BCLR 241 (CC) [76]. See also *Tower Hamlets London Borough Council v Chetnik*

s37C, in the Adjudicator's view, is to restrict freedom of testation to ensure that no dependant is left without support, thereby reducing the financial demands on the state.[89] If the Adjudicator's view regarding the purpose is correct (which I do not believe it to be), how do the relevant factors form the bridge between s37C's purpose and the need for equitability in allocations? The *relationship between* the factors and s37C's ostensible purpose has never been explained. This is arguably because there is no relationship. The general purpose and the specific factors pull in opposite directions. The former speaks to the public interest, the latter to the interests of beneficiaries. A decision can only be 'equitable' *inter partes*. The public interest simply does not help determine what is equitable as between the parties. If beneficiaries' interests are assessed through the lens of the public interest, the enquiry is not about equity but about expediency. Trustees must inevitably select and prefer some beneficiaries over others, and they will almost always *all* be 'deserving' beneficiaries.[90] That is the essential difficulty facing trustees.[91]

In the next section, I analyse Adjudicator determinations to see how the relevant factors are applied in practice, what weight is accorded to the different factors, and what broad principles, if any, emerge from the determinations. The aim is to establish whether Adjudicator determinations lay down clear guidelines for trustees, and whether those guidelines do promote the equitable allocation of death benefits.

5.5.1 The deceased's wishes

Developments Ltd [1988] 1 All ER 961 and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40.

[89] See eg *Morgan* (n3). See also *Mashazi* (n8).

[90] See *University of Pretoria v Du Preeze* [2016] JOL 35014 (GP) [13]. See also South Australia Law Reform Institute *Distinguishing between the Deserving and the Undeserving: Family Provision Laws in South Australia* Report 9 (2017) on the difficulty courts face in distinguishing between deserving and undeserving claimants seeking provision from a deceased estate.

[91] See *MEPF v Murphy* 2003 JDR 0005 (W) [39], quoting Isaiah Berlin on the inevitability of sacrifice when making choices: 'How do we choose between possibilities? What and how much must we sacrifice to what? There is, it seems to me, no clear reply. … So we must engage in what are called tradeoffs – rules, values, principles must yield to each other in varying degrees and specific situations.'

If a starting point or guiding principle is needed to provide direction in trustee decision-making, the obvious one is the wishes of the deceased.[92] After all, the reason freedom of testation exists in law is *not* to permit individuals to disinherit their dependent relatives at will. It is to allow the testator to override the default rules of intestate succession to allow for more nuanced dispositions to kith and kin, taking account of both their needs and her relative affection. [93] The very fact that freedom of testation is recognised as a fundamental principle of law therefore suggests that good reason should exist before a deceased's wishes are overridden – notwithstanding that death benefits do not form part of the deceased's estate. A nomination of beneficiaries is no less an expression of a deceased's considered wishes than is a last will and testament.[94] This is not, however, the view of Adjudicators. Consider the following statements that Adjudicators have made *apropos* the deceased's nomination:

- The deceased's view is 'largely irrelevant';[95]
- It serves 'merely as a guide';[96]
- It 'is an important factor but not a decisive one'.[97]
- 'At very best, it is only one of a number of relevant considerations to be taken into account.'[98]
- 'The wishes of the deceased are clear … and some recognition must be given thereto';[99]
- '[W]here there are needy dependants it should be ignored or given minimal consideration'.[100]
- 'Ignoring' this 'highly relevant' factor is 'an improper exercise of discretion'.[101]

[92] Whether express (in a will or nomination) or tacit (in accordance with the rules of intestate succession). Intestacy laws are modelled on the presumed intention of the deceased. See Law Commission of England and Wales *Intestacy and family provision claims on death* (Consultation Paper No 191, 2009) para 1.38.
[93] Maine *Ancient Law* (1905), 72. See also *Banks v Goodfellow* (1870) LR 5 QB 549.
[94] Nomination forms are referred to as 'will-subsititutes' in the USA. See Braun 'Pension Death Benefits: Opportunities and Pitfalls' in Häcker & Mitchell (eds) *Current Issues in Succession Law* (2016), 194.
[95] *Morgan* (n3) [16].
[96] *Mashazi* (n8), 632. See also *Ruiters* (n29) [12]; *Ackermann v LRAF* [2013] 3 BPLR 295 (PFA*)* [5.8]; *Kirsten v Allan Gray* [2017] 3 BPLR 566 (PFA) [5.7].
[97] *Van Vuuren* (n82). See also *Moir v Reef Group* [2000] 6 BPLR 629 (PFA), 640.
[98] *Bester v CRAF* (n86) [13].
[99] *Kipling v Unilever* [2001] 8 BPLR 2368 (PFA) [21]. See also *Williams v FFE* (n39) [21].
[100] *Morgan* (n3) [25].

- The 'nomination is superfluous' (apropos dependants).[102]
- The 'board's decision to divert from the nomination form … is an indication that the board actually applied its mind to the allocation and had not rubber stamped the nomination'.[103]
- '[W]here possible, [trustees) should take cognisance of the intention manifested in the nomination.'[104]

What principle are trustees expected to discern from these inconsistent statements? After all, a nomination cannot be superfluous, even in respect of dependants, if it is a relevant consideration. If it is to serve as a guide to trustees, it is more than merely a relevant consideration. Similarly, if some recognition must be given to the member's wishes, it is surely more than a guide? These are not linguistic quibbles. Some statements are clearly contradictory. The predominant message, however, is that the wishes of the deceased are of little consequence.[105]

Trustees routinely override the member's wishes.[106] The reason they do so is not, I suggest, because they are satisfied that the deceased's allocation is inequitable, or that theirs' is the more equitable. It is that they are more likely to be found to have exercised their discretion improperly if they are perceived as having 'followed' the nomination. In a number of determinations handed down in the formative years of the Adjudicator, trustee decisions were set aside on the basis that they had been so 'unduly' or 'overly' influenced[107] or

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[101] *Schleicher* (n16) [25].
[102] *Van Schalkwyk* (n39), 16. See also *Maji v Cape Joint* [2004] 4 BPLR 5624 (PFA), 5625; *Kgapola v Fidelity* [2007] JOL 20987 (PFA) [4.4].
[103] *Masuku v Liberty* [2014] 3 BPLR 390 (PFA) [5.4]. See also *Moshidi v Kimberley-Clark* [2003] 7 BPLR 4947 (PFA) [24].
[104] *Gowing* (n75) [10.5].
[105] Cf *Paxton v Sentinel* [2014] 2 BPLR 290 (PFA) and *Chibi v Eqstra* [2017] 2 BPLR 215 (PFA), in which the Adjudicators drew adverse inferences from the fact that the complainants were not nominated beneficiaries, to support their finding that they were not a cohabiting partner and fiancé as they had respectively claimed.
[106] See Annexure 3 below.
[107] *Kipling* (n99); *Morgan* (n3).

'blinded' by the nomination,[108]that they had failed to give proper consideration to other relevant factors.

With one exception, I have found no decision that has been set aside on the basis that they failed to attach too little weight to the nomination.[109] The explicit message to trustees was thus not that they were entitled to attach such weight to the nomination as they thought fair in the circumstances, but that in amongst the basket of relevant factors, the wishes of the deceased is of tangential significance. Trustees have acted in accordance with that message. The problem is not only that trustees do, and are expected to, override the deceased's wishes. It is also that there is no consistent principle that they should follow when deciding what distribution would be more equitable than that of the deceased.

The trustees' decision to override the deceased's wishes has been a frequent source of complaint to the Adjudicator. Many beneficiaries are understandably aggrieved when they discover that the trustees have the power to override the deceased's wishes, given that S37C is such a radical departure from the fundamental principle of freedom of testation.[110] It is the individuals who would otherwise have benefited, the member's nominated beneficiaries or intestate heirs, who have the most cause to feel aggrieved.

In view of the above, is respect for the deceased's perception of the equities not the more appropriate course of action, especially since the deceased's knowledge of the beneficiaries and their individual circumstances will almost inevitably be better than that of the trustees,[111] unless circumstances have changed materially between the date of

[108] *Williams v FFE* (n39).
[109] *Gowing* (n75).
[110] See *Jones v National Technikon* [2002] 1 BPLR 2960 (PFA), in which a widow's rage that trustees could override her husband's wishes, and the combative stance she consequently adopted towards trustees, led the Adjudicator to make a costs order against her. The decision is somewhat unfair, I suggest, because s37C's existence was largely unknown before the Adjudicator's Office was established and started handing down determinations.
[111] As was stated in *Banks v Goodfellow* (n93). See also *Carusi-Lees v Carusi* [2017] NSWSC 590 [104], quoting *Stott v Cook* (1960) 33 ALJR 447: 'There is, in my opinion, no reason for thinking that justice is better served by the application of abstract principles of fairness than by acceptance of the judgment of a competent testator whose knowledge of the virtues and failings of the members of his family

nomination and date of death.[112] The starting premise must be to treat the nomination with due respect.[113] The rules of the Government Employees Pension Fund (GEPF) appear to accept that this is the correct approach, for they expressly allow the trustees to pay the benefit in accordance with the member's wishes, 'notwithstanding anything to the contrary' contained in any other law.[114] The wishes of employees in the public sector are thus accorded a degree of respect that is denied their counterparts in the private sector. There is no justification for such discordant treatment.

In 2004, a Task Team appointed by the South African Treasury recommended that nominations be binding on trustees, unless there are 'compelling reasons' for trustees to override the nomination.[115] The Task Team also proposed that in the absence of nominated beneficiaries, the benefit should devolve in accordance with the member's will.[116] In a similar

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equips him for the responsibility of disposing of his estate in far better measure than can be afforded to a Court by a few pages of affidavits sworn after his death and which only too frequently provide but an incomplete and shallow reflection of family relations and characteristics. All this is, of course, subject to the proviso that an order may be made if it appears that the testator has failed to discharge a *duty* to make provision for the maintenance, education or advancement of his widow or children. But it must appear, firstly, that such a duty existed and, secondly, that it has not been discharged.' See eg *Malindi v British American Tobacco* PFA/GA/4233/05/VIA. The deceased had nominated his four minor children in equal shares, stipulating that the benefit be paid into a trust and to whom the income should be paid in respect of each child (his two wives and mother, since she was caring for one child). The trustees overrode the nomination to include the member's two spouses, the mothers of the children. The determination provides no information as to their financial circumstances, other than that they were financially dependent on the deceased. Given his specific directions, the deceased obviously believed he was making choices that were in the best interests of his children.

[112] *De Beer v Nissan* PFA/GA/5557/2005/SM (the member had nominated his sister nine years before he died and before he entered a relationship with his cohabiting partner); *Govender v Santam* PFA/GA/6041/05/LCM (subsequent marriage). A change in circumstances is an established reason in Australia and England for overriding the deceased's nomination, particularly when the trustees believe that it no longer reflects the true intention of the member. See *D v Kier Group Pension Scheme* (PO11670, 15 June 2017), *Childs-Hopkins v Electronic Data Systems* (PO K006633).

[113] As is the case in England. See Braun (n94) para 5.1.1.1. See also *Hercberg v Wolverhampton City Council* (82431-82835, 10 November 2011) [5], in which fund documentation stated that trustees would 'normally' pay a death benefit to the nominated beneficiaries unless they considered it inappropriate in the circumstances. See further *Dudley v Chubb Security* (M00489, 24 March 2004) in which the Ombudsman held that the trustees' decision to pay the nominated beneficiary, the member's brother, rather than his cohabiting partner was not perverse since the nomination was the only indication they had of the member's wishes, even though the nomination had been made nine years previously, prior to his relationship. In *Williamson v Zurich Financial Services UK Pension Trustee Limited* (N00119, 11 October 2005) [26], the Ombudsman stated that he thought trustees should first consider payment to a spouse and children and thereafter to the nominated beneficiaries, before considering other eligible beneficiaries. For Australia see *Faull v SCT* [1999] NSWSC 1137 [23], in which the court held that 'the deceased's wishes should be given great weight'.

[114] Government Employees Pension Law 1996, s22(2).

[115] National Treasury *Retirement Fund Reform: a discussion paper* (December 2004) para 3.18.3.1 & Annexure 3 para 3.4.1.4.

[116] Paragraph 3.16.5.3.

vein, a previous English Pensions Ombudsman called for a change in the rules of, and the law governing, the payment of death benefits in England and Wales, to remove trustee discretion so that the benefit either be allocated according to the member's wishes or the rules of intestate succession.[117] As he correctly remarked, '[f]or the trustees to reach their decision is hard enough. Explaining that decision to the parties is even harder'.[118]

The countervailing arguments, which is a view that is held by many within the retirement fund industry, is that s37C does perform an important social function.[119] While this is undoubtedly so,[120] s37C has also been applied in circumstances in which the trustees' allocation is less equitable than either the member's preferred allocation,[121] or than would have been the case had the rules of intestate succession applied.[122] In most, however, their decision is neither obviously more nor less equitable than the deceased's.[123] Both their preference, and that of the deceased, fall within the range of reasonable decisions.[124]

If s37C exists to allow trustees to override a member's wishes when those wishes are inequitable rather than when they are equitable, trustees should be expected to justify why their wishes are more equitable than the deceased's. The fact that they have departed from it should not be taken as evidence that they have properly applied their minds, and that their decision is *per se* more equitable than that of the member herself.

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[117] Without incurring adverse tax consequences, which is the reason most funds do not permit binding nominations. See Pensions Ombudsman *Annual Reports* (PO *AR*) 2002-2003, 6 and 2005-2006, 5.
[118] PO *AR* 2005-2006, 17. See also *Jones v The Barclays Bank UK Retirement Fund* (N00036, 13 April 2005) [32].
[119] See National Treasury *Retirement Fund Reform*(n115), para 3.18.1.
[120] See eg *Bakumeni v Old Mutual* [2001] 2 BPLR 1573 (PFA*)*; *Diergaardt v KWV s* [2001] 11 BPLR 2703 (PFA); *Kruger v CRAF* [2002] 7 BPLR 3643 (PFA); *Phashe v Metro Group* [2003] 9 BPLR 5123 (PFA); *Tlou v Amplats* [2011] 3 BPLR 439 (PFA); *Coetzee v CRAF* [2007] JOL 20902 (PFA); *Monoko v Firestone* [2007] JOL 20414 (PFA) All involved cases in which the deceased had not included a minor child, or dependent spouse, in the nomination.
[121] See *Ellis* (n66), *Nduku v VWSA* PFA/EC/14187/2007/NVC and *Makume v Sentinel* [2014] 2 BPLR 244 (PFA). See also *Marais* (n61) [overridden to detriment of children in favour of cohabiting partner]; *Tsele v Bidvest* [2016] 1 BPLR 146 (PFA) [overridden to detriment of minor child in favour of apparently self-supporting adult brothers who had falsely claimed dependency].
[122] See *Whitcombe* (n61) and *Cafun v Alexander Forbes* [2017] JOL 38730 (PFA).
[123] See eg *Kitching v CRAF* PFA/KZN/33168/2009/RM; *Brummelkamp v Babcock* [2001] 4 BPLR 1811 (PFA); *Koekemoer v Macsteel* (n73); *Schoeman v Rentmeester* [2003] 9 BPLR 5145 (PFA); *Winnan v MEPF* PFA/KZN/12789/07/MQ.
[124] As a former English Pensions Ombudsman (PO) noted, 'Given that range of discretion, there is unlikely to be only one answer that is to be regarded as "right" with all others being wrong'. See PO *AR* 2005-2006, 17.

5.5.2 The beneficiary's relationship with the deceased

The relationship between the member and the beneficiary should be an important consideration when assessing the equities. It is, after all, only the existence of that relationship which entitles the beneficiary to consideration in the first place. Once the fact of the relationship has been established in identifying the beneficiary as a dependant or nominee, other aspects of the relationship should become relevant to the trustees' exercise of their discretion. Yet the 'relationship' factor has received little attention as a self-standing factor and has been accorded little weight by trustees and Adjudicators. It is not even clear what is meant by the phrase 'the relationship with the member'? Does it refer to the *nature* of the relationship, for example a parent-child relationship; or to the *state* of the relationship, which goes to the degree of affection and closeness between the member and individual beneficiaries?[125] Does it even include the duration of the relationship?[126]

Dissatisfaction with the trustee distributions appears to be almost inevitable whenever the family composition is other than the conventional nuclear family. Disputes are common whenever the circle of beneficiaries encompasses step-families, blended families,[127] multiple families or partners,[128] unmarried partners,[129] extended family members (nephews and nieces),[130] and unrelated nominees.[131]

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[125] See eg *Oosthuizen v Mercedes* (n85) and *Karam* (n85), which did attach importance to the close relationship between a mother and son and two sisters respectively in weighing up the competing claims of the deceased's children.

[126] The nature and duration of the relationship is identified as a relevant factor in many statutes governing the provision of maintenance from a deceased estate. South Africa: MSSA 27 of 1990; Australia: Family Provision Act 1969 (ACT), s8; Succession Act 2006 (NSW), s60(2). England: Inheritance (Provision for Family and Dependants) Act 1975, s3(3). Canada: Wills and Succession Act SA 2010 (AB), s93.

[127] *Jordaan* (n34); *Olivier v CRAF* PFA/GA/4378/2005/ZC; *Visser v CRAF* PFA/WE/16057/07/KM; *Fouche v CRAF PFA/GA/11993/2007/EMD; Legoko v Soweto* [2011] 1 BPLR 101 (PFA); *Ngele v Online PF* PFA/GP/00001755/2013/TN; *Van Jaarsveld v OVK Aftreefonds* (n62)*; Owen* (n84).

[128] *Bakumeni* (n120)*; Esterhuizen v CRAF* [2013] 3 BPLR 355 (PFA) [ex-fiance of 9 years, the sole nominee; wife (of one year, from whom separated but not divorced); current cohabiting partner (of 6 months].

[129] See eg *Van Schalkwyk* (n39); *Minnaar* (n60); *Whitcombe*(n61)*; Cafun* (n122); *Marais* (n61)*; Kirsten* (n96); *Hubner* (n82); *De Wilzem v SARAF* [2005] 2 BPLR 180 (PFA); *Van der Merwe v CRAF* [2005] 5 BPLR 463 (PFA); *Mitchell v Alnet* [2014] JOL 31439 (PFA).

[130] *Makume v Sentinel* (n121); *Mokhema v Investec* [2014] 1 BPLR 80 (PFA).

Complaints about inequitable allocations are not simply about money; in most cases they are about relationships.[132] Complainants are understandably aggrieved when they feel that their relationship with the deceased has not been accorded the appropriate recognition and respect. It is the fact, or their perception, that the nature of another beneficiary's relationship with the deceased was of less significance than their own that informs many complaints. Their perception of the relative importance of the contested relationship is informed both by subjective and objective factors: their personal feelings, but also the nature and history of their relationship, the duration of the relationship, and the deceased's view of the relationship (as evidenced by the deceased's wishes).[133]

Having identified the deceased's relationship with the beneficiary as a relevant factor, some content should be given to it if it is to assist trustees in their decision-making. In many cases there is a natural alignment between the wishes of the deceased and the relationship between the parties. One such example is the relationship between a parent and child. Parents frequently include even their self-supporting adult children amongst their nominated beneficiaries. Sometimes they do so to the exclusion of their spouse or partner, but when they do so it is usually only when this relationship is of relatively short duration. The significance of the relationship between a parent and child is affirmed by the law of succession of almost every country: children are included amongst the intestate heirs of deceased parents.[134] In many countries, children are entitled to a statutory share of their parent's estate and cannot

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[131] *Kruger v CRAF* (n120); *Khulu* (n85); *Gorrah v Metal Industries* [2014] JOL 31420 (PFA).
[132] For a further example, see *Smith v SAA* [2010] 3 BPLR 330 (PFA).
[133] Unless a complaint is entirely mercenary, I believe all complaints are animated by this concatenation of circumstances. However, they are more explicitly stated in some determinations. See eg *Berge v Alexander Forbes* [2009] JOL 23698 (W) esp [11] [daughter v estranged spouse]; *Hattingh v Hattingh* [2003] 4 BPLR 4539 (PFA), esp [10] [children v surviving spouse who remarried three months after member's death]; *Whitcombe* (n61), esp [3.2] & [3.11] [children v cohabiting partner of short duration]; *Makume* (n121) [sister v cohabiting partner of very short duration].
[134] Reid, De Waal, Zimmermann (eds) *Comparative Succession Law Vol 2: Intestate Succession* (2015); Van Erp 'New developments in succession law' (2007) 11(3) *Electronic Journal of Comparative Law* 1; 'General Reports to the XVII International Congress of Comparative Law' *Electronic Journal of Comparative Law*.

be completely disinherited.[135] A recent investigation into the reform of the law of intestate succession by the Law Reform Commission for England and Wales confirmed that most parents would like their children to inherit a portion of their estates.[136] The question that had informed the enquiry was whether the law of intestate succession in England should be changed, such that a surviving spouse would inherit the entire estate to the exclusion of the deceased's children. The law, in other words, recognises the special significance of the parent-child relationship. The relationship explains, and justifies, why it is that adult children are often also nominated beneficiaries.

Conversely, parents are also included in many nominations, even when the member is survived by a spouse or partner and children.[137] The relationship is, after all, not a one-way relationship. The duty a child feels towards, or legally owes, a parent is also recognised in many legal systems,[138] and is particularly significant in customary law.[139] Relationships differ in form and substance – it is, however, usually the qualitative aspects of a relationship, the value that the deceased places on that relationship, that informs the wishes of the deceased. Estrangement or lack of close contact has thus sometimes been held to justify excluding an eligible beneficiary from consideration.[140] In others, it has been considered irrelevant.[141] The duration of the relationship, and the fact that the beneficiary and member

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[135] *Comparative Succession Law* (n134). See also Ruggeri, Kunda, Winkler (eds) *Family Law and Succession in EU Member States* (2019).
[136] See §7.3.6 below.
[137] *Musgrave* (n29); *Ruiters* (n29); *Sithole* (n3); *Masoabi* (n30); *Chittenden v Estcourt Butchery* [2001] 5 BPLR 2001 (PFA); *Van der Walt v Fugro* PFA/NW/3487/2005/RM; *Sesinyi v Amplats* PFA/GA/6587/2006/LTN; *Phahlane v Sasol* PFA/KZN/2182/2006/NVC.
[138] *Aboderin* 'Conditionality and 'limits' of filial obligation' *Working Paper Number WP205* (January 2005, Oxford Institute of Ageing) <http:www.ageing.ox.ac.uk>; Moskowitz 'Adult children & indigent parents: intergenerational duties of support in international perspective' (2002-2003) 86 *Marquette LR* 401; Rickles-Jordan 'Filial responsibility: a survey across time and oceans' (2007-2008) 9 *Marquette Elder's Adviser* 183; Klaus 'Why do adult children support their parents?' (2009) 40(2) *Journal of Comparative Family Studies* 227; Herlofson et al 'Intergenerational family responsibility and solidarity in Europe' Norwegian Social Research (Nova) (April 2011) <http://www.multilinks-project.eu/uploads/papers/0000/0038/herlofson_deliverable.pdf.>
[139] *Fosi v RAF* [2007] JOL 19399 (C); *RAF v Mohohlo* 2018 (2) SA 65 (SCA).
[140] *Moir* (n97); *Karam* (n85) [estranged son vs nominated sister, neither of whom was financially dependent].
[141] *Williams v FFE* (n39); *Khulu* (n85).

enjoyed a close and mutually supportive relationship, is rarely accorded similar importance.[142]

Adjudicator determinations suggest that once the fact of a relationship has been established, little further significance is attached to the nature and status of a relationship. In one of the earliest and most influential determinations,[143] *Van Der Merwe v Southern Life Association*,[144] the Adjudicator stated that when considering the relationship between the beneficiaries and the deceased, the trustees should not favour legal dependants over financial dependants unless they have a compelling reason for doing so. Absent a compelling justification, doing so would amount to fettering their discretion.[145] The passage was handed down in the context of a complaint concerning the trustees' decision to allocate the deceased's cohabiting partner of 9 years a one-third share of the benefit, with the balance allocated to his two adult children. The facts suggest that the decision was entirely equitable. The passage has, however, had a considerable influence in shaping trustee decision-making. It is recited in numerous determinations as part of the justification offered by funds for including or favouring financial dependants above other beneficiaries.[146]

The duration of the relationship, which is generally recognised as one of the most important considerations when evaluating the existence and scope of a deceased's moral obligation towards a beneficiary, particularly a spouse or partner, appears to play a very small part in trustee decision-making. *In Chittenden v Estcourt Bakery*,[147] the Adjudicator held that the duration of a relationship is not relevant to the fact of dependency, but at most to the extent

[142] *Khulu* (n85). Cf *TWC v Rentokil* (n36), but this was in the context of an intimate same-sex relationship at a time when same-sex relationships did not enjoy legal recognition and protection; *Karam* (n85), but the deceased's estrangement from her son, who was a major and self-supporting, was as important as the deceased's close relationship with her sister.
[143] It has been described as setting out the 'most important principles' governing allocation of death benefits under s37C - Olivier et al *Understanding Social Security Law* (2009), 192.
[144] [2000] 3 BPLR 321 (PFA).
[145] Repeated in *Segal* (n62) *apropos* a spouse.
[146] *Cafun* (n122); *Marais* (n61); *Mokhema* (n130); *Malan v Preservation PF* [2017] 2 BPLR 256 (PFA).
[147] [2001] 5 BPLR 2001 (PFA).

of dependency. The CC by contrast has recognised that duration is important, for the longer a relationship, the more likely it is to give rise to 'patterns of dependence'.[148] Duration is relevant both to creating dependency and to the extent of dependency.[149] Its importance as a relevant factor is recognised in claims under the Divorce Act[150] and the Maintenance of Surviving Spouses Act.[151] The duration of a relationship is not only relevant to determining the existence and degree of dependency. It is also relevant to equity. A relationship of five months is not the same as one of five years; one of five years is not the same as one of fifty years. Decisions that do not factor in these differences cannot be equitable decisions.

Despite the importance of the nature and duration of the beneficiary's relationship with the deceased, it receives almost no meaningful consideration from trustees or the Adjudicator. Instead it is the actual or presumed financial circumstances of one or all the parties that usually proves to be the decisive factor.

The principle laid down in *Van Der Merwe v Southern Life*[152] explains, in part, why trustee decisions, and Adjudicator determinations, have become reductive, focusing almost exclusively on financial considerations to the near exclusion of non-financial considerations. The deceased persons' wishes and the tangible and intangible aspects of their relationships with their various beneficiaries, pales into insignificance against the fact of dependency.

5.5.3 Financial circumstances

[148] *Volks v Robinson* (n45) [127, 133] O'Regan J.
[149] See also *Yemchuk v Yemchuk* 2005 BCCA 406 (Canada) [67], and the important role that duration plays in creating a 'merger over time' of both the financial and non-financial aspects of a marriage. The duration is highly relevant to determining the appropriate quantum of a maintenance award. See further §7.3.3 below.
[150] 70 of 1979, s7(2).
[151] Act 27 of 1990, s3. See also *Oshry v Feldman* 2010 (6) SA 19 (SCA). It is specifically mentioned in family provision legislation abroad, eg: Inheritance (Provision for Family and Dependants) Act 1975, s3(2)(a) (EW); Wills and Succession Act SA 2010 (AB), s93; Rogerson & Thompson *Spousal Support Advisory Guidelines 2008* (Canada).
[152] (n144).

The deceased's wishes are a reflection of the ties that bound the deceased and the beneficiary – a mirror into the deceased's subjective feelings and lived relationship with the beneficiary. Nominated beneficiaries are not strangers.[153] They are persons who mattered to the deceased, which is why the deceased wants the beneficiary to derive a financial advantage in the event of her death. In almost every case, the benefit would make a significant difference to the beneficiary's lifestyle, opportunities and future prospects. In almost every reported case, trustees override her wishes and award all, or a greater share, to a different beneficiary. Trustees justify their decision on the basis of the included beneficiary's actual or presumed future 'financial dependency' on the deceased, or, conversely, on the basis that the excluded beneficiary was not financially dependent on the deceased.[154] Their reasoning is summed up in the following quotation:

> It is an established principle that the litmus test in terms of section 37C of the Act is whether or not a beneficiary or a dependant was financially dependent on the deceased member at the time of his/her demise.[155]

Consider the following trustee decisions by way of illustration:

- A woman nominates her sister as the beneficiary of her R 350 000 benefit. She bequeaths an immovable property and a car to her 68- year-old husband, and the residue of her estate to her two sisters. There is no further financial information regarding either the husband or sister's means and needs. The trustees award the full death benefit to the husband on the basis that the sister was not a financial dependant.[156]

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[153] Of the hundreds of death-benefit determinations I have read, I have not come across one in which the deceased had nominated a stranger. In just a few the deceased had nominated her estate, but her heirs and legatees were similarly not strangers.
[154] See eg *Ackermann* (n96), *Kirsten* (n96), *Van der Walt v Fugro* (n137).
[155] *Kirsten* (n96) [5.11]. See also *Winnan* (n123) [5.1]; [5.3]; *Varachia v SAB* [2015] 2 BPLR 310 (PFA) [5.3]; *Maubane v Municipal Gratuity Fund* [2015] 3 BPLR 364 (PFA) [5.4]. See further *Makhubele v Rand Water* [2018] 1 BPLR 114 (PFA) [5.8]: 'This Tribunal has always maintained a view that the litmus test in issues relating to distribution death benefits [*sic*] is whether or not a party was financially dependent on the deceased member and if by reason of his death that party stands to suffer financial prejudice.'
[156] *Ackermann* (n96). The Adjudicator upheld the allocation.

- A man nominates his best friend as the beneficiary of his R77 000 death benefit. She is aged 45, works as an administrator, and has had a close platonic friendship with the deceased for many years. Nothing further is known about her financial circumstances, other than that she appears to be significantly poorer than that of the successful beneficiary. The trustees award the benefit to his cohabiting partner of 18 months. She is 29 years of age, owns two properties from which she derives rental income, has a total income of R720 000 per annum, and has monthly expenses of R54 000. The fact that she and the deceased cohabited and contributed to household expenses is sufficient to establish her as his financial dependant.[157]

In each of these decisions, the nominated beneficiary was excluded because they were not financially dependent on the deceased. The fact that their means may have been less, and their need greater, than the supposed financial dependant was simply not considered relevant by either the trustees or the Adjudicator. In not one of these determinations was any meaningful consideration given to the deceased's wishes, the nature of the relationship with the excluded beneficiary, the beneficiaries' respective ages, incomes, qualifications, occupation, assets or future prospects.[158]

There are other determinations in which Adjudicators have emphasised that trustees must not only establish the fact of dependency, but the extent of that dependency:

> In actual fact, the most important consideration is the extent of such [financial] dependency as this is the only factor that can ensure an equitable allocation of the death benefit.[159]

In these determinations Adjudicators adopt the position that when trustees allocate a share of the benefit to a financial dependant contrary to, or greater than, the wishes of the deceased, the amount they allocate should not exceed *the extent of the recipient's actual*

[157] *Kirsten* (n96). The Adjudicator upheld the allocation.
[158] *Van Drimmelen v CRAF* PFA/GA/1227/02/KM is an exception, in which the parties' comparative financial circumstances were set out in some detail.
[159] *Malan* (n146) [5.10].

dependency. The maximum sum they award should thus be what the dependant requires to replace the support they had been receiving from the deceased. While these determinations seek to cap the claims of non-nominated dependants, the focus of concern remains the financial dependant.[160]

Contrast the following cases with the previous cases:

- A father nominates his two adult children as the beneficiaries of his R4m benefit. The fund uses R3m to purchase his 50-year-old cohabiting partner (of unknown duration, unknown occupation, unknown qualifications and unknown means) a monthly pension of R14 000. The fund then pays his former wife a lump sum of R735 000 to satisfy his maintenance obligation towards her. The balance of R268 000 is paid to his children in equal shares.[161]
- A father nominates his two adult sons (ages 34 and 37) as the beneficiaries of a R267 000 retirement annuity policy, and his unemployed cohabiting partner (age 60) of 14 years as the beneficiary of a different policy of R343 000. The trustees of different funds consolidate the policies, and award 60% to the partner, 30% to her 7-year-old grandson who shared their household, and 10% (R61 000) to his two sons. His will entitles his cohabiting partner to continue living in his house for two years following his death.[162]

- A father dies without nominating beneficiaries for his R6.8 million death benefit. He bequeaths his comparatively modest estate of R1.5 million to his three children (aged 31, 25 and 15). The trustees allocate R3 million of the death benefit to his 51-year-old cohabiting partner of 22 months; R1 215 000 to his 15-year old daughter; and R887 000 to his two sons. The trustees arrive at these figures by first establishing the extent of the partner and daughter's 'financial dependency' (R2 315 000 and R1 100 000 respectively), assigning an

[160] Cf *D v Kier Group Pension Scheme* (n112), in which the trustees of an English fund divided the benefit equally between a cohabiting partner of 30 years and the deceased's three adult children, albeit that the partner was the only nominated beneficiary and the children were not in financial need.
[161] *Marais* (n61).
[162] *Malan* (n146).

arbitrary value to the children's status as legal dependants (R115 000) and dividing the 'surplus' of R 3 million amongst the four beneficiaries (R767 000 each).[163]

- Again, a father dies without nominating a beneficiary. The trustees allocate 80% of his R1.1million benefit to his unemployed 49-year-old cohabiting partner of either 3 or 6 years; 8.3% to her 15-year-old daughter who had shared their household for approximately one year; 4.8% to his 29-year-old daughter; 3.4% to his 25-year-old son and 3.4% to his 30-year-old son (all of whom appeared to be studying). He was still obliged to pay maintenance for his two youngest children but did so irregularly. His partner received maintenance from the father of her child, but it was insufficient to meet her full maintenance needs.[164]

In each of these cases the Adjudicator remitted the matter to the trustees for reconsideration. The direction given to them was that the financial dependants' allocation should not exceed the extent of their actual dependency. *Prima facie*, this approach appears more equitable than that in which the whole or greater part of a benefit is awarded to a non-nominated financial dependant, without proper regard for their actual financial needs, to the detriment of those who would otherwise have benefited.

However, two further considerations flow from the trustees' focus on financial dependency: first, whether it is possible to calculate the extent of dependency; secondly, whether it is equitable that financial dependency be the decisive factor in trustee decision-making?

5.5.3.1 Calculating dependency

It is extremely difficult to calculate existing and future dependency. It is particularly difficult in South Africa, given the extreme inequalities that exist within society. In Australia and England, for example, there are widely available estimates of the average cost of raising a child to the

[163] *Whitcombe* (n61).
[164] *Cafun* (n122).

age of majority,[165] and trustees know that beneficiaries have access to national health services. Primary and secondary education is free in England. In South Africa, by contrast, there is extreme variation in the costs of education, access to private health care, type and cost of accommodation, general standards of living and prospects of employment. There is no meaningful 'average' to any of these costs.[166] The specific inputs required to calculate a beneficiary's maintenance needs are difficult to obtain. And using a beneficiary's existing standard of living to calculate future maintenance needs is often not appropriate. In some, equity requires that the trustees endeavour to improve a beneficiary's present standard.[167] In others, there is no justification for seeking to maintain that standard at the expense of the nominated or intestate beneficiaries.[168]

In practice, allocations are usually based on 'guesswork' and 'gut feeling',[169] sometimes on actuarial calculation, and occasionally an awkward combination of both. The specific sums awarded reflect that determining the extent of dependency is not simply a matter of dispassionate calculation.

Consider the following illustrations:

- The Adjudicator sets aside a decision of the trustees on the basis that they have failed to properly consider a dependent daughter's maintenance needs. The Adjudicator accepts that the sum of R165 000 is required to satisfy those needs. The sum has been calculated based on the daughter's current expenses and the cost of tertiary education. The daughter had received R109 000 from an endowment policy taken out by the deceased. The shortfall

[165] Hirsch 'The Cost of a Child in 2018' Child Poverty Action Group (August 2018) (England). Saunders & Bedford 'New estimates of the costs of children' Family Matters 100 (May 2018) (Australian Institute of Family Studies, Australian Government).
[166] See the estimate in *How much does it really cost to raise a child in South Africa* Financial Planning Institute, which suggests R9 000 per month. This figure cannot assist trustees when they need to distribute a benefit amongst multiple dependants when the deceased did not earn R9 000 per month and the death benefit will similarly not yield a monthly income close to that amount.
[167] See in this regard the important observation in *RAF v Mohohlo* (n139) [22] that it is inconsistent with our constitutional values to limit the quantum of a wrongful death award to only the bare sum needed to keep the dependant 'in the same deprived circumstances as she was forced to endure for most of her life.'
[168] *Whitcombe* (n61), *Marais* (n61).
[169] *Southern Insurance Association Ltd v Bailey* [1984] 1 All SA 360 (A).

was thus R56 000. The deceased's death benefit was R83 000, and the trustees had allocated her R33 000. There was thus still a shortfall of R23 000. The Adjudicator berates the trustees for not having awarded her the full sum she requires. The daughter is 16 and lives with her mother, who is employed by a firm of attorneys. The trustees had awarded the balance of R50 000 to the deceased's widow and their two children, aged 3 and 5. The widow had received R770 000 (later discovered to be R613 000) from other policies. This is the only financial benefit they will receive, for the deceased's estate is insolvent. With no information as to the widow's means and prospects, the Adjudicator is satisfied that the sum received by the widow is 'substantial' and more than adequate to cater for the existing and future maintenance needs of the widow and children.[170] The Adjudicator rejected the trustees' submission that the lump sum would not be sufficient to cover the widow's household costs, which she now bore alone, and that it could legitimately assume that the amount needed to provide for the children's future maintenance was greater on account of their young age.[171]

- One year later, the Adjudicator holds that the sum of R800 000 allocated to meet the educational needs of a 12-year old child is not 'unduly generous' given the duration of his maintenance needs and ever-rising educational costs.[172]

The disparate decisions indicate the extent to which decisions are based on the trustees' (or Adjudicators') subjective valuation of both the dependant's needs and of the value of money. One thinks the sum of R770 000 is a substantial sum for three dependants, including two very young children. Another thinks the sum of R800 000 is not unduly generous for one child's future educational needs.

[170] *Robinson v CRAF* (n77).
[171] Cf *Ruiters* (n29), which adopted the opposite view. See also Malawi's Deceased Estates (Wills, Inheritance and Protection) Act 14 of 2011, s17(1)(e), which explicitly provides that younger children should receive a greater share of an intestate estate than their older siblings, unless the interests of the children require otherwise.
[172] *Van Zelser* (n69) [26]. Cf *Williams v FFE* (n39), in which R800 000 was considered a substantial sum for the widowed dependant.

One factor that does receive explicit mention in numerous determinations is the beneficiary's age. In the case of minor children, the presumption is that the younger the child, the greater her future dependency on the deceased.[173] Even this principle, as seen in the discussion above, has not been consistently applied.[174] In the case of adults, the supposition is usually that the older the adult, the more likely she is to become dependent,[175] to remain dependent[176] or to become increasingly dependent as a result of reduced employment opportunities and/or increased medical expenses.[177]

Age-related presumptions work to the particular detriment of the deceased's adult children. They are regularly excluded from consideration because they are thought to be 'more able to secure their own future' than are the deceased's other financial dependants, even when the determination is devoid of any further information regarding their respective financial circumstances.[178]

There are also decisions in which funds base their assessment of means and needs on actuarial calculation. In *Dickson v ABSA Group Pension Fund,*[179] the method of calculation used by the fund, and accepted by the Adjudicator, was to combine the household income prior to the deceased's death, and then to assign that income in the ratio of 2 parts for each parent and 1 part for each child. This division works on the assumption that each parent utilises and needs an equal share of the household income, and that it is twice that of each child. So, for example, in a household consisting of two parents and one child and a total income of R3 000, each parent's share would be R1 200, and the child's share would be R600. Although this method of calculation is still used, the Dickson-division reveals its flaws.

[173] *Magwaza* (n36); *Ruiters* (n29); *Sefularo v Political Office-Bearers* [2013] 2 BPLR 265 (PFA); *Mavovana v BP* [2017] 2 BPLR 304 (PFA). In *Mavovana*, the deceased's three minor children each had different mothers. The benefit was apportioned only on the basis of the children's ages, without regard to the respective mothers' means and ability to support her child.
[174] *Robinson v CRAF* (n77).
[175] *Wellens v Unsgaard* [2002] 12 BPLR 4214 (PFA); *Koekemoer v Macsteel* (n73).
[176] *Whitcombe* (n61).
[177] *Hattingh* (n133). Unless the younger adult is dependent by reason of a disability, in which case the younger they are the longer the duration of their dependency. See eg *Taljaard v Corporate Selection* [2016] 2 BPLR 271 (PFA).
[178] *Segal* (n62); *De Klerk v Fundsatwork* (n80).
[179] [2001] 6 BPLR 2062 (PFA).

The dependants in this case were the deceased's husband, her nominated beneficiary, and their very young daughter. The joint household income prior to the member's death was roughly R4 000. The husband's share of the former household income was thus calculated as R1 577 and the child's as R788, giving a combined total of R2 366. The income needs of the household following his wife's death were then presumed to shrink from the previous total household income of R4 000 to R2 366. Since the household income after her death was greater than R2 366 (but less than R4 000), the trustees concluded that the income exceeded the expenses. On this basis they justified allocating none of the benefit to the husband since he had no future maintenance needs. The lump sum was thus wholly allocated to the daughter, to be held in trust.[180] Notwithstanding the obvious flaws in this methodology, which fails to appreciate that fixed household expenses, like accommodation costs, may not diminish or be capable of ready reduction after the death of a contributing adult, the Adjudicator accepted the fund's methodology.

Funds continue to use the-share-of-household-income methodology but have adjusted it to take account of the fact that fixed household costs will remain the same after the deceased's death. The new methodology therefore assigns one part of the household income to the deceased, three parts to the main dependant (usually the surviving spouse or partner) and one part per child (if any). In the recent decision of *Kirsten v Allan Gray*,[181] the fund used this methodology to calculate the capital sum required to provide the cohabiting partner with the same level of financial support she had been receiving from the deceased. Since she was 29, and their combined household income was R1.47 million, her supposed loss, over the remainder of her lifetime, was assessed at R8 million! The partner in her

[180] The father would have access to the trust for her maintenance and educational needs, and payment would be at the discretion of the trustees. The second Adjudicator was extremely critical of the practice of paying minors' benefits to trusts or beneficiary funds as a matter of course, since it is part of parents' rights and responsibilities to administer their children's property. Trustees were only permitted to do so if there was good reason to believe the parent incapable of administering the child's benefit. See eg *Baloyi v Ellerine* (n25); *Ramanyelo v Mine Workers* [2005] 1 BPLR 67 (PFA); *Malatjie v Idwala* [2005] 1 BPLR 45 (PFA). In *Mafifi v Orion* PFA/MP/11299/2006/LTN, on the other hand, trustees were berated for paying a minor's portion to a parent who subsequently squandered it on himself instead of using it to maintain his children. It is not clear how trustees are able to ascertain how responsible a parent is likely to be in advance.

[181] *Kirsten* (n96). See also *Kew v Allan Gray* [2017] 3 BPLR 545 (PFA).

submission to the fund had stated that the deceased's contribution to her living expenses was R10 000 a month – not the R30 000 the fund notionally assigned to her.[182] No attempt was made to ascertain whether she was in need of such support, or whether her expenditure, of R54 000 per month, was reasonable.[183] This decision is no more grounded in her reality, either present or future, than are the decisions that were made on 'gut feel'. Based on this calculation the trustees justified their decision to award the full lump sum, R78 000, to the partner rather than to the poorer nominated beneficiary, for whom the sum might have made an appreciable difference.

In *Whitcombe v Momentum Provident Preservation Fund,*[184] the fund assessed the present value of the 51-year-old cohabiting partner's future maintenance needs as R2 315 000, while his 15-year-old daughter's future maintenance needs were assessed as R 1 110 000 – a sum the trustees considered 'generous', because it made provision for an additional two years living expenses following her predicted graduation from university. His sons, since they were self-supporting adults, had no maintenance needs. The Adjudicator explained that the 'value placed on dependency' should be determined by considering the dependant's monthly expenses, income, future earning capacity, and the amount of financial support provided by the member.[185] The facts suggest that the partner was considered to have been wholly dependent on the deceased for all her maintenance needs, and that the R2.3 million lump sum was calculated to meet those needs over her projected lifespan.

The disparity in the assessed maintenance needs of different dependants confirms that it is impossible to assess an individual's future maintenance needs with any degree of accuracy.

[182] R 147 000 (combined salary of R750 000 + R720 00)/4 x 3 = R 1 102 500 – R 720 000 = R382 500 p/a (R31 875).
[183] Cf *Friedrich v Smit* 2017 (4) SA 144 (SCA), in which the SCA set aside the executor's decision to award the surviving spouse over half of the deceased's R8 million estate to meet her maintenance needs. The executor, the Master, the court of first instance and the full bench on appeal had all accepted that she was entitled to maintenance under the MSSA, although they were unable to decide on the quantum because she furnished no evidence of her actual income and expenditure. The SCA rejected her claim, on the basis that she had not provided any proof that she was in need. What was required was that she demonstrate that she was 'unable to make ends meet' – and to furnish documentary evidence in support of her claim.
[184] [2016] 2 BPLR 290 (PFA).
[185] Para 5.14.

The calculators are built on assumption, and if those assumptions are flawed, the result will be flawed. The major flaws in these calculators is to suppose that the dependant was a beneficiary of the deceased's income to the extent assumed; that the beneficiary required that support to meet her maintenance needs; that the deceased would have continued to provide that support for the whole of the beneficiary's lifetime; and that the beneficiary would have continued needing that support for the duration of her lifetime.

How can it be equitable that a partner, married or unmarried, in a relationship of short duration is considered entitled to however much of the lump sum is needed to satisfy her maintenance needs for the rest of her lifetime? What the calculators really do is to draw attention to financial considerations and distract attention from the non-financial consideration. The focus of concern is money, not fairness.

5.5.3.2 Calculating equitability

The calculator used in *Kirsten v Allan Gray* approximates the loss of support calculations used in dependants' actions for wrongful death.[186] Given the wholly different contexts, the methodology is unsuited to s37C distributions. Trustees are required to divide a fixed sum amongst a number of eligible beneficiaries, having regard to financial *and* non-financial considerations. The purpose of s37C is not to compensate a beneficiary for the maintenance 'loss' they have sustained. Moreover, courts assessing damages for wrongful death acknowledge that precise calculation is impossible because the future is uncertain.[187] They recognise that the assessed loss is only a starting point and should be adjusted to account for some of the vagaries of life. As was said in *Hodges v Coubrough*, '[t]he calculation of the

[186] Boberg 'Fact and fantasy in the assessment of damages for wrongful death' (1963) 80(4) *SALJ* 538.
[187] *Hodges v Coubrough* 1991 (3) SA 58 (D). See also *Anthony v Cape Town Municipality* 1967 (4) SA 445 (AD), 451.

amount is guesswork, however, once contingencies like the person's death, remarriage and changing circumstances necessarily enter the reckoning'.[188]

Contingencies, in the wrongful death context, are generally used by courts to reduce a wrongful death award rather than to increase the sum awarded. Courts do so because the 'vicissitudes of life' make it impossible to accurately calculate future financial loss.[189] The further in time one projects, the more speculative the loss becomes. As such, in deciding what sum it would be equitable to award, courts 'try to steer a course between generosity at the expense of the defendant and niggardliness at the expense of the [plaintiff].'[190]

What relevance does future uncertainty have for s37C decision-making? Simply this – that the principle that informs a court's award of damages is also fairness. Courts have a wide discretion to decide on the amount that they consider to be fair and equitable in the circumstances of a case.[191] It is considerations of equity that cause them to depart from strict mathematical calculations. If fairness between the parties is the ultimate consideration, s37C distributions should also factor in future uncertainty when balancing the interests of competing beneficiaries, particularly non-nominated financial dependants and nominated non-financial dependants.

In prioritising the existing, and therefore presumed future, needs of financial dependants, as though their need will remain constant over their lifetimes, trustees fail to consider that the fortunes of all beneficiaries are uncertain. Their decisions are not based on probability, or even reasonable possibility, but on assumption. They assume, for example, that a cohabiting partner, of even short duration, would have remained a financial dependant for the duration

[188] (n187), 65. For criticism and a comparative discussion of remarriage as a contingency, see Van der Nest & Nienaber 'The good, the bad and the ugly: contingency deductions for remarriage in the light of *Ongevallekommissaris v Santam*' (2001) 26(2) *Journal for Juridical Science* 23.
[189] *Southern Insurance v Bailey* (n169), 372.
[190] Ibid, 366. For criticism of the practice of using contingencies at all in the assessment of damages for wrongful death, see Boberg 'The assessment of damages for death' (1972) 89(2) *SALJ* 147.
[191] Deductions for contingencies is based on 'subjective impression or estimation rather than objective calculation', see *Shield Insurance Company Ltd v Booysen* 1979 (3) SA 953 (AD), 965.

of her lifetime. They factor in neither the possibility, which is closer to probability, that the relationship may well have ceased before then; or that the partner may still enter another relationship in the future; or that the partner may improve her fortune by her own endeavours. Conversely, they assume that a child is safeguarded against future misfortune – that their path will follow a predictable pattern in which they will complete schooling and then tertiary education, enter the labour market, and become permanently and sufficiently self-supporting.

The fallacy of these assumptions is illustrated by the case of *Cafun v Alexander Forbes Preservation Fund.*[192] The trustees awarded R1 million of the deceased's R1.14 million death benefit to his 49-year-old cohabiting partner of three years and her 16-year-old daughter. They awarded the balance to the deceased's three children aged 25, 28 and 30. The deceased had been unemployed for some years and had thus been defaulting on his obligation to pay for their tertiary studies. He had nevertheless provided support as and when he could. The trustees justified their allocation on the basis that his children were not financially dependent on him, while his partner and her daughter were, notwithstanding the fact that the daughter's father was paying maintenance towards her support. In setting aside the trustees' decision, the Adjudicator pointed to the uncertain state of the economy, the high unemployment rate and the fact that even graduates struggle to find work. The deceased's own daughter had had to return to university to obtain a different qualification, because she had been unable to find work for two years after obtaining her first degree. The Adjudicator also felt that the cohabiting partner, although unemployed, was 'presumably qualified' and thus able to re-enter the labour market at age 49.

Cafun is a rare determination in recognising that the future is uncertain for all beneficiaries. Notwithstanding this recognition, the pivotal issue in *Cafun* remained the extent of the partner's dependency rather than equity. The Adjudicator remitted the matter to the trustees for a proper investigation into the extent of the partner's and her daughter's dependency on

[192] [2017] JOL 38730 (PFA).

the deceased. In *Whitcombe*, the Adjudicator stated that the trustees would have been entitled to award the full lump sum to the deceased's partner, and thus nothing to the children, had the partner's maintenance needs exceeded the death benefit.[193] Financial dependency continues to take centre stage, even though it is impossible to calculate the extent of such dependency with any degree of accuracy, and even though it alone cannot determine what is equitable. Why it is thought more equitable to secure a financial dependant's 'good fortune' (in finding someone willing and able to support them) than to safeguard another dependant, or nominee, against the possibility of future misfortune, has yet to be explained.

The prioritisation of 'financial dependency' focuses on the present, ignores the past, and presumes that the present is a mirror into the future. Consequently equity, which lies at the heart of discretionary decision-making, has been replaced by convenience. It is far more difficult to make, and justify, decisions that are based on contested claims to fairness that require decision-makers to weigh incommensurable factors like wishes and relationship, than it is to make decisions based on one seemingly simple determination: whether someone was, or, more rarely, was likely to become, a financial dependant.

Courts in South Africa, as elsewhere, recognise that the financial circumstance of the parties is only one of the factors relevant to fair and equitable distributions of property.[194] Trustees and the Adjudicator should follow suit.

5.6 CONCLUSION

Adjudicator determinations have played a significant role in shaping trustee decision-making. Despite the hundreds of death-benefit determinations that have been handed

[193] *Whitcombe* (n61) [5.15].
[194] *Botha v Botha* (n14); *Re Harrison (Deceased) Thomson v Harrison* [1962] NZLR 6; *White v White* [2001] 1 All ER 1.

down, they do not, collectively, contain a set of principles that are 'clear, consistent,[195] certain and predictable'[196] enough to guide trustees towards achieving consistently-equitable allocations of death benefits. As recently stated by the CC in *Beadica 231 CC v Trustees of the Oregon Trust*, 'The rule of law requires that the law be clear and ascertainable'.[197]

Some broad principles have become established principles. Unfortunately, they prove the truth of the proposition that '[d]ecisions can be "consistently wrong and consistently unjust"'.[198] They include the following:

- That a spouse married in community of property 'loses' her entitlement to share in even the member's savings portion of the benefit;[199]
- That the wishes of the deceased *should* be given little weight;
- That legal obligations, and the enduring relationships from which they arise, are not more important than factual dependence;
- That the extent of dependency is the most important consideration;
- That cohabitation, however brief, is enough to establish a partner as either a financial dependant, an interdependent, or a spouse, irrespective of need.

These broad principles are not equitable, and do not provide meaningful guidance. Trustees need comprehensive and just guidelines. Those guidelines are best provided by the

[195] On the importance of consistency as an essential element of fairness, see *Dawood v Minister of Home Affairs* 2000 (8) BCLR 837 (CC) [47]; *Johannesburg Housing Corporation* (n9) [28]. For cases from other jurisdictions that make the same point, see *White v White* (n194), 16; *Merchandise Transport Ltd v British Transport Commission* [1961] 3 All ER 495, 507 (England); *Drake v Minister for Immigration and Ethnic Affairs (No 2)* [1979] AATA 179 (Australia); *Altus Group Limited v Calgary (City)* 2015 ABCA 86 (Canada). See further Bosch 'Consistency as an element of fairness in dismissal' (2014) 35 *Industrial LJ Juta* 898; Lord Reid 'The judge as law maker' (1972-1973) 12 *Journal for the Society of Public Law Teachers* 22,3.
[196] *De Kock v Van Rooyen* [2006] 2 All SA 227 (SCA) [18].
[197] [2020] ZACC 13 [81].
[198] Johnson 'Should 'inconsistency' of administrative decisions give rise to judicial review?' (2013) 72 *AIAL Forum* 50,57 quoting *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 51 FLR 325, 335 (Deane J).
[199] See §6.4 below, for a discussion on s37C's impact on spouses married in community of property.

legislature, not the Adjudicators.[200] The purpose of guidelines is to prevent idiosyncratic, arbitrary and capricious decision-making[201] without stultifying discretion. The challenge is formulating guidelines that achieve this purpose. Judges are often loath to provide judicial guidelines in matters 'involving an infinite variety of circumstance',[202] for they do not wish to usurp a lower court's authority or restrict its ability to meet the exigencies of a case.[203] Some judges do consider it their responsibility to provide guidelines, but they consider it such because they are judges of the highest appellate courts.[204] Trustees are not junior judges capable of exercising their discretion unguided, and Adjudicators are similarly not senior judges equipped to provide the necessary guidance.

Senior judges have themselves expressed a need for legislative guidance. In a recent decision of the United Kingdom Supreme Court for instance, involving a maintenance claim against a deceased estate by an adult child, Lady Hale lamented the 'unsatisfactory state of the present law', which provides no guidance as to the factors the courts must consider when distinguishing between 'deserving' and 'undeserving' claimants.[205] She considers the need for guidelines to be particularly acute given the 'wide range of public opinion' that exists regarding whether adult children should be entitled to share in their parents' deceased estate, and that the same diversity of views likely exists amongst judges.[206] Lady Hale expressed this view even though the applicable legislation contains a more extensive list of relevant factors than that provided by the first Adjudicator.[207]

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[200] Canada has adopted mandatory child-support guidelines and non-binding spousal support guidelines. See *Yemchuk v Yemchuk* (n149) [62]; Rogerson & Thompson *Spousal Support Advisory Guidelines 2008* Presented to: Family, Children and Youth Section, Department of Justice Canada (July 2008). The Law Commission of England and Wales (LCEW) has proposed the adoption of property division guidelines to promote consistency in the awards made by divorce courts across the country. See LCEW *Report on Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014).
[201] *White v White* (n194), quoting Bridge (ed) *Family Law Towards the Millennium: Essays for P M Bromley* (1997), 393.
[202] *Beaumont v Beaumont* 1987 (1) SA 967 (A) 990 G-H, which was approved in *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA).
[203] Ibid. See also *Johannesburg Housing Corporation* (n9) [28 – 30].
[204] *White v White* (n194) (Lord Cooke); *Piglowska v Piglowska* [1999] UKHL 27 (Lord Hoffmann).
[205] *Ilott v The Blue Cross* [2017] UKSC 17 [66].
[206] Para [58].
[207] See the Inheritance (Provision for Family and Dependants) Act 1975, s3.

When allocating death benefits, trustees already have the benefit of the factors identified by the Adjudicator. Any attempt at reforming s37C by simply enacting the same factors in legislative form will thus provide trustees with no more guidance than they have received to date. The greater complexity and potentially 'pernicious effects' of s37C decision-making,[208] and the even greater diversity of opinion amongst trustees and Adjudicators, makes the need for comprehensive guidelines imperative.

The legislature ultimately bears the responsibility for any flaws that inhere in s37C as well as those that are attributable to its application by trustees and Adjudicators. As O'Regan J remarked in *Dawood v Minister of Home Affairs*,[209] it is 'the legislature that [must] take care when legislation is drafted to limit the risk of an unconstitutional exercise of the discretionary powers it confers.'

[208] See Nkabinde J's minority judgment in *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC) [182]: '…any power that can have pernicious effects should be better and more extensively circumscribed to the person tasked with administering that power'.
[209] 2000 (8) BCLR 837 (CC [48].

6

CHAPTER SIX

RIGHTS, RESPONSIBILITY, RESPECT: SECTION 37C'S CONSTITUTIONAL IMPLICATIONS

6.1 INTRODUCTION

Scholars and industry actors appear to accept, without question, that s37C is constitutional. Only one article on the subject has been published. The author, Lufuno Nevondwe, an assistant Adjudicator at the time of publication, had no hesitation in concluding that s37C's limitation on freedom of testation *is* constitutional.[1] The article does not so much question, as conclude, that s37C is constitutional.[2] If no one has yet questioned its constitutionality, is it because the answer is self-evidently that it is constitutional?[3]

I propose that if it is constitutional, it is not self-evidently so. It merits far closer constitutional scrutiny than it has received to date. Section 37C takes power away from the member and gives that power to the trustees. Both the taking and the giving require scrutiny. The taking implicates members' rights to property and dignity, spouses' rights to property and equality and minor children's rights to parental care. The giving arguably violates the legislature's obligation to provide guidance to administrative officials entrusted with broad discretionary power.

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[1] Nevondwe 'Death benefits and constitutionality' 2007(15) *Juta's Business Law* 164.
[2] Manamela 'Chasing away the ghost in death benefits: a closer look at section 37C of the Pension Funds Act 24 of 1956' (2005) 17 *SA Mercantile LJ* 276 similarly accepts that s37C is constitutional.
[3] The High Court and Supreme Court of Appeal have also not expressed any concern when s37C matters have come before them. Most have instead been rather dismissive of the beneficiary's complaint, though none placed s37C's constitutionality in issue. See *Kaplan v Professional and Executive Retirement Fund* 1999 (3) SA 798 (SCA); *Mashazi v African Products* 2003 (1) SA 629 (W); *Berge v Alexander Forbes* [2009] JOL 23698 (W). Cf *Hattingh v Murphy* [2006] JOL 17709 (C), which was more sympathetic to the applicants.

O'Regan identifies 'respect, responsibility and rights' as the building blocks of the Constitution.[4] Section 37C is about responsibility and rights. Respect is the missing ingredient. It respects neither the member's right, nor her responsibility, to make provision for family. It does not respect her right to have reasonable preferences amongst beneficiaries. It does not respect spouses' proprietary rights, or children's maintenance rights. It gives the trustees nearly unconstrained power in the expectation that they will do a better job of distributing the benefit fairly than will the member.

If s37C's impact on constitutional rights is as significant as I believe it to be, why has no court or commentator expressed similar concerns? There are, I believe, a number of inter-related reasons.

First, there has been no prior analysis of the legal nature of death benefits and whether they are property in the hands of the member, or whether they are deserving of protection as constitutional property. They are simply accepted as being non-disposable assets because s37C explicitly provides that they will not form part of the member's estate. The curtailment of the member's property rights is not obviously extraordinary because the member's retirement savings also do not form part of the member's estate while the member is alive, but are instead part of the assets of the fund.[5] The insured portion of the benefit only materialises after the member's death. Both components are then aggregated into a single death benefit which becomes payable to the member's dependants and nominees. Since the very purpose for which the pension fund organisation was created was as a vehicle to provide retirement and death benefits for members and their dependants, s37C appears to do no more than facilitate that purpose.

[4] O'Regan 'The three R's of the Constitution: responsibility, respect and rights' 2004 *Acta Juridica* 86.
[5] See §6.3.1 below.

Secondly, I believe that the regularity with which trustees override members' wishes is not generally known. There is no prior research that has sought to analyse s37C determinations to the extent undertaken in this dissertation.[6] There is therefore little appreciation of s37C's actual impact on testamentary freedom. Allied to this is s37C's oft-stated purpose: to restrict the member's testamentary freedom to ensure that no dependants are left without support. Implicit in this explanation of s37C's purpose is that when trustees intervene, they are doing so to correct the members' failure to make proper provision for dependants. This immediately suggests that s37C, both in its design and operation, is a reasonable and justifiable limitation of members' testamentary freedom.

Section 37C is thus simply accepted as being a socially desirable limitation on a member's testamentary freedom. The gain, the protection of dependants, is seen as significant; the cost, the restriction of the member's freedom of testation, is seen as limited, since freedom of testation is not unbridled in any event and the limitation applies to death benefits only. The member in principle retains their testamentary freedom in respect of their ordinary assets. Because the focus is inevitably on the member's testamentary freedom, no consideration has been given to its impact on spouses' and children's constitutional rights.

In this chapter, I consider s37C's constitutional implications more deeply, focusing on: the legislature's failure to provide guidelines to trustees; whether s37C limits a member's right to property, and whether the limitation affects both the member's savings portion and insured portion; whether s37C deprives spouses married in community of property of their matrimonial property rights vis a vis the death benefit, and whether the limitation affects both the savings portion and the insured portion; the extent of s37C's impact on spouses' and children's varied rights to equality, dignity and parental care; and, finally, s37C's impact on the member's right to dignity.

[6] See Annexure 3 below, which contains a table of cases that illustrates how regularly trustees override members' wishes.

6.2 THE RULE OF LAW AND THE LACK OF LEGISLATIVE GUIDANCE

The complete absence of any guiding criteria is amongst s37C's most striking features.[7] The absence of legislative guidance has proven disconcerting to the retirement fund industry. Trustees want greater guidance.[8] Many are not comfortable with the vague instruction to do with another's property what they think is fair.[9] How is it possible, one might reasonably ask, that a legislature could strip an individual of one of their most personal rights, the right to choose who amongst their loved ones will share in their bounty after their death, and transfer so intimate a right to a stranger – and do so without providing that stranger with any meaningful direction? Given recent Constitutional Court (CC) jurisprudence emphasising that the legislature is constitutionally obliged to provide sufficient guidance to public officials exercising wide discretionary powers,[10] it is difficult to imagine that s37C would pass constitutional muster.

The first decision on point, *Dawood v Minister Home Affairs,*[11] contains the most comprehensive explanation of *why* the grant of such wide powers may be constitutionally problematic. In *Dawood*, the CC struck down sections of the Aliens Control Act for conferring overly-broad discretionary powers on immigration officials who were given the authority to issue extensions of temporary residence permits to foreign spouses, of South African citizens or permanent residents, applying for permanent residence in South Africa, but without any

[7] Cf the Divorce Act 70 of 1979, s7(2) and the Maintenance of Surviving Spouses Act 27 of 1990, s3. The Inheritance (Provision for Family and Dependants) Act 1975, s3 (UK), contains an extensive list of factors courts are required to consider when making a family provision order from a deceased estate. See further Succession Act 2006 (NSW), which contains a list of 15 criteria the court must consider, and which permits the court to consider any other relevant factor; Deceased Estates (Wills, Inheritance and Protection) Act 14 of 2011, s17, which lays down principles that should guide the courts when exercising their power to distribute a deceased's intestate estate. All these factors are no less relevant to a distribution of death benefits.

[8] *Dobie v National Technikon* [1999] 9 BPLR 29 (PFA) 19.

[9] Ladouce & Swanepoel 'Allocation of death benefits – quo vadis' *Sanlam Benchmark Survey 2017: Research Summary,* 17. Fifty percent of trustees surveyed feel that s37C needs reform because of the lack of guidance, *Standalone Summary*, Q12.6, 59.

[10] Amongst others *Dawood v Minister of Home Affairs* 2000 (8) BCLR 837 (CC); *Janse van Rensburg v Minister of Trade and Industry* 2001 (1) SA (CC) 29; *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC).

[11] *Dawood* (n10).

guidance as to when it would be appropriate for them to approve or refuse an extension.[12] If the extension was refused, the foreign spouse was required to leave the country, preventing them from fulfilling their marital obligations towards one another and impairing their right to dignity.

The CC's reasoning in *Dawood* is particularly relevant to s37C. The nature of the power and its impact on affected individuals is similar. The Aliens Control Act, like the Pension Funds Act, did not provide even cursory criteria to assist officials when exercising their discretion. The legislation thus authorised officials to make decisions that would impair fundamental constitutional rights, without circumscribing their authority to ensure that it was only exercised in circumstances justifying the impairment. The CC emphasised that when a statute confers broad discretionary powers, the legislature should at least identify the factors the decision-maker should take into consideration.[13] The failure to identify the relevant factors may be excusable in a few limited instances – when the missing criteria are 'indisputably obvious', or 'so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance', or the decision-maker possesses sufficient expertise in relation to the decision rendering guidance unnecessary.[14] None of these exceptions applied in *Dawood*, particularly since the discretion was vested in administrative officials 'untrained in law', who had neither the knowledge, skill nor time to consider the constitutional implications of every decision they made.

The concerns raised in *Dawood* apply foursquare to s37C. The factors trustees are required to consider are not indisputably obvious. If they were, it would not have been necessary for the first Adjudicator to identify them. The factors he identified are those that are invariably relevant, they are not an exhaustive list. But how should trustees discern which of the additional facts are relevant? The factors relevant to their decision may well be so numerous as to make it difficult to enumerate in legislation, but other jurisdictions have succeeded in

[12] Act 96 of 1991. The facts were a little more complicated.
[13] Paragraph 47. See also *Affordable Medicines Trust* (n10) [121].
[14] Paragraph 53.

providing a more comprehensive set of criteria.[15] Moreover, despite the lack of guidance, trustees, most of whom are similarly 'untrained in law', are required to fathom what it means to exercise their discretion 'equitably', when even judges trained in law have struggled to do so.[16]

Dawood raises further concerns pertinent to s37C. The first is that conferring such broad discretionary powers places an 'unduly onerous burden' on the decision-maker.[17] The second is that those affected by the decision have nothing against which to judge whether it was properly taken.[18] The result is that improper exercises of discretion are more likely to 'go unchallenged and unremedied'.[19] The existence of administrative law remedies for those aggrieved by a decision thus does not relieve the legislature of its obligation to provide guidelines that 'limit the risk' of unconstitutional exercises of discretionary power.[20]

That s37C places an onerous burden on trustees was acknowledged in one of the earliest Adjudicator determinations.[21] Trustees nevertheless face potential personal liability for exercising their discretion improperly.[22] By contrast, administrative officials[23] and judicial officers[24] exercising the same powers, with the benefit of greater knowledge and expertise, enjoy immunity from personal liability. What of the concern that erroneous or inequitable decisions may go uncorrected? Aggrieved beneficiaries do have two potential avenues of redress. They can institute proceedings in the High Court or lodge a complaint with the

[15] See (n7).
[16] See the appeal from Willis J for 'clear, certain, implementable guidelines' to assist judges determine whether granting an eviction order would be 'just and equitable' Willis J in *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers of the Newtown Urban Village* [2012] JOL 29675 (GSJ) [28].
[17] Paragraph 50.
[18] Paragraph 47.
[19] Paragraph 50.
[20] Paragraph 48.
[21] *Dobie* (n8), 36. See also *University of Pretoria v Du Preeze* [2016] JOL 35014 (GP) [13].
[22] PFA, s7F; *Sithole v ICS* [2000] 4 BPLR 430 (PFA); *Morgan v SA Druggists* [2001] 4 BPLR 1886 (PFA).
[23] Promotion of Administrative Justice Act 3 of 2000, s10A.
[24] See *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority of SA* 2006 (1) SA 461 (SCA) for a helpful discussion of judicial immunity. See in particular para 17 quoting Voet, whose explanation for why judicial immunity is important applies four-square to trustees: 'It would be a bad business with judges, especially lower judges who have no skill in law, if in so widespread a science of law and practice, such a variety of views, and such a crowd of cases which will not brook but sweep aside delay, they should be held personally liable to the risk of individual suits, when their unfair judgment springs not from fraud, but from mistake, lack of knowledge or [lack of skill].'

Adjudicator.[25] Beneficiaries rarely approach the High Court directly. There are only a handful of reported High Court decisions, all of which were handed down after the Adjudicator's office was established.[26] Alternatively, they can lodge a complaint with the Adjudicator, and if dissatisfied with the Adjudicator's determination they can appeal to the High Court.[27] Thousands of complaints have been lodged with the Adjudicator since inception, confirming that there was clear need for a more accessible and affordable alternative to litigation.[28] However, in the absence of proper guidelines there is little concrete evidence that beneficiaries can base their complaint on. Amongst the most common complaints is that the trustees did not adhere to the deceased's wishes.[29] The lack of guidelines, and the fact that beneficiaries are not privy to all the facts that informed the trustees' decision, means that this is often the only concrete ground on which to base a complaint. As seen in the previous chapter, the Adjudicator does not consider this a legitimate basis for complaint. Therefore, if it is the only basis for their complaint it is unlikely to succeed.

Another common complaint is that a beneficiary is not an eligible dependant, meaning that the trustees made an error of fact or law. The complaint also seldom succeeds, given the wide definition of dependant, its inherent complexities and the Adjudicator's generous interpretation of financial dependence.[30] The final ground of complaint is that the decision is not equitable in the circumstances of the case. This is the form of complaint most likely to succeed. When decisions are set aside it is usually on the basis that the trustees failed to properly apply their minds to the relevant facts. The Adjudicator then either substitutes its decision for that of the trustees or, more often, remits it to them for reconsideration. What the

[25] PFA, ss30A and 30H.
[26] See eg cases (n3). This suggests that the Adjudicator's criteria have at least given beneficiaries some principles against which to test trustee decisions, confirming how vulnerable they were to arbitrary decision-making in the decade prior to its establishment when s37C and the definition of dependant were amended, thereby broadening the trustees' discretion and responsibility considerably.
[27] PFA, s30P. *Meyer v Iscor* 2003 (2) SA 715 (SCA) held that it was an appeal in the wide sense. *Hattingh v Murphy* (n3) exercised its wide appeal powers to set aside the decision of the trustees, which the Adjudicator had upheld, to give effect to the member's nomination of his children as beneficiaries.
[28] OPFA *AR 2016/2017* indicates that 7501 were received in that period alone.
[29] See §5.5.1 above and Annexure 3 below.
[30] Which has influenced retirement fund practice also. See *University of Pretoria v Du Preeze* (n21) for an example of Adjudicator 'overreach' in ordering a fund to recognise a financial dependant as a spouse.

Adjudicator cannot do, however, is revisit the decision and effect a wholly new distribution merely because it considers the distribution unjust. It can only consider the complaint. It can thus at most remedy an injustice towards the complainant, but not one towards the other beneficiaries.[31] All the Adjudicator can do, if the complainant benefited from an inequitable distribution, is dismiss the complaint. Should a disappointed beneficiary take the determination on appeal, the High Court is empowered to consider the original complaint *de novo*. It has wide appeal powers and can substitute its judgment for that of the Adjudicator. It steps into the Adjudicator's shoes, not those of the trustees. It too cannot revisit the original distribution except to the extent the complaint allows it to.

When deciding complaints, Adjudicators display varying levels of deference towards trustee decision-making. For the most part, Adjudicators apply the grounds of common law review.[32] Adjudicators have yet to apply PAJA and engage in a direct merits review, even though trustees' s37C decision are considered administrative action.[33] Once again, in the absence of guidelines, both courts and the Adjudicators are simply not equipped to engage in a meaningful merits review. There is nothing against which they can test the equitability of the decision except their subjective sense of fairness, albeit one informed by the relevant factors.[34]

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[31] For decisions I consider manifestly unfair on the available facts, see eg *Nduku v VWSA* PFA/EC/14187/2007/NVC; *Ellis v MEPF* [2014] 1 BPLR 36 (PFA); *Makume v Sentinel* [2014] 2 BPLR 244 (PFA).

[32] In *Euijen v Nedcor* PFA/GA/27/98 the Adjudicator accepted the fund's argument that it only had review and not appeal powers (the matter did not concern s37C). See further Jeram 'Disposition of lump sum death benefits in terms of section 37C: an analysis of the case law' in Hanekom (ed) *Manual on Retirement Funds and other Employee Benefits* 25ed (2018).

[33] In his earliest determinations the Adjudicator did appear to engage in merits review, although he did not explicitly identify it as such. He nevertheless readily substituted his judgment of the equities for that of the trustees. See eg *TWC v Rentokil* [2000] 2 BPLR 216 (PFA);
Musgrave v Unisa [2000] 4 BPLR 415 (PFA); *Morgan* (n22); *Williams v FFE* [2001] 2 BPLR 1678 (PFA). In *Schleicher v SARAF* [2002] 7 BPLR 3677 (PFA) he reconsidered the appropriateness of merits review. This was shortly after PAJA came into effect. The standard basis on which most decisions are now set aside is that trustees did not correctly identify the relevant factors.

[34] Cf the Australian Superannuation Complaints Tribunal's (SCT) powers. The only basis on which it may intervene in trustee decisions is if it is satisfied that the decision was not a fair and reasonable one. See Superannuation (Resolution of Complaints) Act 1993 (Cth), s14(2). The SCT formulated a set of comprehensive guidelines to assist trustees. See SCT *Key Considerations that apply to death benefit claims* (2006).

Trustees have specifically been empowered to make decisions that override the member's legal obligations, even against the member's wishes. They do not even have to recognise the primacy of the duty of support when it is owed to minor and wholly dependent children.[35] They do not have to consider the implications that their decision might have for the beneficiary's fundamental rights, including the rights to dignity, equality and property. They are permitted to prefer a beneficiary towards whom the member owed neither a legal nor a moral duty of support, even when doing so overrides the member's wishes to benefit someone towards whom he owed at least a moral duty of support.[36]

The trustees' decisions may well be justifiable and reasonable on the facts of a case. But they are making decisions with potentially life-altering consequences for the affected beneficiaries. As has been emphasised on numerous occasions by the CC, the greater the potential repercussions of a decision for those affected by it, the greater the need for direction. In the words of Goldstone J:

> …it is inappropriate that the [decision-maker] should be able to exercise an unfettered and unguided discretion in situations so fraught with potentially prejudicial and irreversible consequences to [those] who may be affected.[37]

6.3 THE MEMBER'S RIGHT TO PROPERTY

6.3.1 The components of lump sum death benefits

Lump sum death benefits commonly consist of two parts: the savings portion and the insured portion.[38] The savings portion derives from of the member's contributions to the fund. The

[35] See eg *Ellis* (n31); *University of Pretoria v Du Preeze* (n21), in which the deceased had nominated his children as his beneficiaries, a son aged 17 and a 19-year old mentally disabled daughter. The value of the full death benefit is not stated, but the fund awarded R1.3m to the deceased's intimate but non-cohabiting partner of 12 years. It did so on the basis that she was a partial financial dependant because he had provided her with occasional financial assistance after her business failed and she was placed under debt review. Even though they had maintained separate homes, kept their assets and estates strictly separate, were financially independent, and had no intention of marrying, the Adjudicator upheld the partner's complaint that she was entitled to a spousal pension from the fund. The Adjudicator's determination was set aside on appeal.
[36] *Makume v Sentinel* (n31).
[37] *Janse van Rensburg* (n10) [29].

contribution is usually directly paid to the fund by the member's employer, and forms part of the member's overall remuneration package. Many occupational retirement funds promise to pay an additional sum, the insured portion, should the member die before retirement while still in the service of the employer. This additional sum is usually expressed as a multiple of the member's annual salary and it is often the larger share of the death benefit.[39] The obligation to pay this additional sum rests on the fund, but it is not usually funded directly by member contributions. Instead, most funds insure themselves against the obligation to pay by taking out group life insurance on behalf of their members. The premiums payable under this insurance policy are funded by the member, whether as a deduction from the contributions paid to the fund or as a separate deduction from the member's salary. Members may be permitted to select the multiple of salary that will be paid out under the insurance portion on their death.[40]

In some funds, the member's death benefit consists only of the savings portion. These funds do not provide additional insured benefits.[41] In those that do, the death benefit sometimes consists only of the insured benefit.[42] The amount payable as a death benefit may, however, never be less than the savings portion.[43] In most funds, the death benefit consists of both the savings portion and the additional insured portion.[44]

Even though the member, directly or indirectly, funds her own savings portion and the premium on her life insurance policy, she does not legally own her accumulated savings, and she is not the owner-holder of the life insurance policy.[45] The contributions constitute an

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[38] See Jeram (n32) §9.15.4.3.
[39] Savings accumulate and grow over time. The younger the member, the greater the value the insured portion will be relative to the savings portion. The average insured portion was 3.33 the member's annual salary in 2017 – Sanlam *Benchmark Survey: Standalone Summary* (2017), Q5.1A.
[40] *Benchmark Survey* (n39) Q5.1.A.
[41] Ibid. Only 1.2% of funds provided no insured benefit in 2017.
[42] Sanlam *Benchmark Survey: Stand-alone Funds Databook* (2014), Q5.6. See eg *Pii v Grain Industry Provident Fund* PFA/FS/10812/2006/PM, discussed in Jeram (n32) §9.15.4.3, which illustrates the importance of clearly defining the benefit.
[43] Sections 14A and 14B of the Act.
[44] Jeram (n32) §9.15.4.3; Sanlam *Benchmark Survey* (2014) (n42) Q5.6 indicates that 60.5% of funds paid both, as part of the death benefit.
[45] PFA, ss5(1)(a) and (b).

asset of the fund. In *Tek Corporation v Lorentz*,[46] the SCA held that it is the fund, rather than the member or employer, who 'owns its assets in the fullest sense of the word "owns"'.[47]

The fund's duty to pay the savings portion arises only when the member exits the fund, which, in occupational funds, they are only allowed to do when they stop working for the employer that made their membership of the fund a mandatory condition of their employment. With regards to the insured portion, the insurer is under a contractual obligation to pay the proceeds of the policy to the fund on the death of the member, while the fund is under an obligation to pay the proceeds to the member's beneficiaries or estate under the rules of the fund and s37C of the Act.[48]

When the member dies, the savings portion and any additional insured portion is aggregated into a single lump sum that becomes payable by the fund. It is this aggregated lump sum that is subject to s37C of the Act. Can either one or both the components of the death benefit be characterised as 'property', to which the provisions of s25 of the Constitution apply? If the answer is yes, are they property only in the hands of the member, or also in the hands of spouses to whom members are married in community of property or subject to the accrual system?

6.3.2 The savings portion as 'property'

The Constitutional Court (CC) has not had occasion to decide whether a member's rights to her savings portion constitutes 'property' in the constitutional sense. It has, however, recognised that personal rights to performance, whether founded in contract or in unjustified enrichment, can constitute property, without laying down, as a general principle, that they

[46] 1999 (4) SA 884 (SCA).
[47] Para 15. See also *Mostert v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) [49-50].
[48] Some funds make their obligation to pay conditional on the insurer admitting the claim, Jeram (n32) §9.15.4.4.

will do so in all cases.[49] The CC has to date recognised real rights in corporeal property, personal rights in incorporeal property,[50] and so-called 'new property' to be constitutionally protected property.[51] I consider it a given that it will include a member's savings portion within the ambit of constitutionally protected property.

However, in its recent judgment, *Shoprite Checkers (Pty) Ltd v Member of the Executive Council*,[52] the majority of the CC stated that ']each decision on whether to protect a particular property interest or not rests on some assumption as to why it merits, or does not merit, constitutional protection'. The CC thought it important that the reasons a particular interest is treated as property within the meaning of s25 of the Constitution, be clearly articulated.

At common law there can be little doubt that members' accumulated savings are private property in the hands of the member.[53] Even though the fund is a *universitas* with legal personality separate from its members,[54] and even though it is said to be both the legal and beneficial owner of its assets,[55] it receives, holds and invests the contributions only for the benefit of its members.[56] The reason it is important that funds have separate legal personality is to shield members from predatory employers who would otherwise have access to their benefits.[57] Retirement funds started out life as trusts, and they retain some of the hallmarks of a trust.[58] The management board of the fund is still referred to as the trustees of the fund. The

[49] *National Credit Regulator (NCR) v Opperman* 2013 (2) BCLR 170 (CC).
[50] In *NCR v Opperman* (n49), the claim was for repayment of a loan. Van der Walt 'Constitutional Property' 2013 *Annual Survey of SA Law* 224, reads *Opperman* as laying down a general principle that the Court recognises contractual rights for claims sounding in money as property.
[51] *NCR v Oppermann* (n49); *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape* 2015 (9) BCLR 1052 (CC).
[52] (n51) [39].
[53] For a discussion of promised pensions in the context of a defined benefit fund as giving rise to property rights, even though the members do not 'own' the property, see Nobles 'Pensions as Property' (1994) 14 *Legal Studies* 345.
[54] *Mostert* (n47) [49]. See also *Mercedes Benz v Mdyogolo* 1997 (2) SA 748 (E).
[55] *Mostert* (n47) [47].
[56] *Mostert* (n47) [49], and as appears from the definition of pension fund organisation in PFA, s1.
[57] *Mostert* (n47) [13].
[58] They were not trusts in the English law sense, in which trustees are the legal owners of the fund property while members are the beneficial owners, but were nevertheless recognisably trusts in which a

trustees owe fiduciary duties towards the members.[59] The fund does not own and utilise its assets for its own benefit. It does so only for the benefit of its members, and their beneficiaries.[60]

In defined contribution funds, the fund is funded entirely by contributions received by or on behalf of its members. These contributions are either paid to the fund directly by the member, or they are paid by, or supplemented by, the employer. In both cases they form part of the members' overall remuneration package. For convenience, they will be referred to as the member contributions, even if they are paid by the employer in respect of the member. All contributions are credited to a member's account in the fund.[61] In defined contribution funds, a member's eventual retirement benefit consists almost entirely of the *invested value* of that member's contributions paid to the fund.[62] The same sum is payable irrespective of whether the member retires, resigns or is retrenched. Whether the contributions are funded wholly by the member or partly by the employer, the accumulated contributions today form part of the *minimum benefit* to which a member is statutorily entitled.

Even prior to the adoption of the Act in 1956, or the introduction of the *minimum benefit* provisions in 2001, a member's entitlement to be refunded her own contributions had long

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founder (the employer) created the fund with the object of providing retirement and death benefits to the members and their beneficiaries, in which the trust property consisted of the contributions made to the fund, over which trustees exercised control and in which they were subject to fiduciary duties. In the United Kingdom funds are generally still constituted as trusts, as are many in Australia, in which members hold a beneficial interest. See Braun 'Pension death benefits: opportunities and pitfalls' in Häcker & Mitchell (eds) *Current Issues in Succession Law* (2016); Hill 'The true nature of a member's interest in a superannuation fund' (2002) 5 *Journal of Australian Taxation* 1.

[59] PFA, s7C(f), inserted by Act 45 of 2013. *PPWAWU v CEPPWAWU* 2008 (2) SA 351 (W). Prior to s37C's amendment there was some uncertainty as to whether trustees owed fiduciary duties to the fund only or also to its members. See Marumoagae 'Do boards of trustees of South African retirement funds owe fiduciary duties to both the funds and fund members? The debate continues' (2012) 15 *PELJ* 569.

[60] *Ex Parte Trans-African Staff Pension Fund* 1959 (2) SA 23 (W) 27 held that the only persons who have a beneficial interest in the fund are its members, not the employer, albeit that the trustees own the 'bare dominium' of the assets. Although the SCA in *Mostert* (n47) [50] compared its view to that of *Trans-African*, the purpose of both judgments was to deny the employer and its creditors a claim based on their supposed beneficial interest or ownership of the fund's assets.

[61] PFA, s14A & 14B, inserted by Act 39 of 2001.

[62] An employer can, when establishing the fund, undertake to pay members an additional sum if fund returns fall below a stipulated percentage, as was the case in *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2017 (6) BCLR 750 (CC).

been accepted. In *Simon NO v Wiehman,*[63] the HC characterised the defendant's right to reclaim his contributions from the fund as the only asset in his estate. In *Administrator, Cape Province v Xabanisa*,[64] a member, who had been dismissed for misconduct, was held entitled to the return of his own contributions. The court dismissed the contention that the member was not entitled to the return of his contributions in the absence of a rule providing for reimbursement, holding that the fund rules had to expressly provide for forfeiture of contributions, otherwise reimbursement was required.[65]

Prior to the adoption of the minimum benefit provisions, the obligation to return employer contributions depended on the individual fund rules. The rules could provide for the forfeiture of the employer's contributions in certain circumstances. Nevertheless, *Fraser v Durban Corporation Provident Fund*,[66] a defined contribution fund, illustrates that long before the enactment of the Pension Funds Act, individual fund rules already contained provisions entitling members to payment of both their own and their employer's contributions when they exited the fund for any reason, including the death of the member. Employer contributions were then already recognised as part of the member's remuneration, to which they were, in the ordinary course, entitled upon leaving the fund.[67]

The distinction between employee and employer contributions is no longer relevant, for the rules of the fund may no longer disentitle employees to the employer's contributions if they

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[63] 1938 CPD 400.
[64] 1940 EDL 198.
[65] The fund was a public fund governed by statute rather than rules. Cf *Whitnall v EP Guardian Company* 1930 EDL 172, in which the court held that the fund rules did not entitle the member to any pension as a result of his retrenchment after many years of service but before reaching retirement age. Members made no contributions towards their retirement. The court held that the pension promised under the rules was not a form of deferred pay. It described the fund rules as 'unusual and unscientific', in failing to make some provision for employees who were retrenched prior to retirement, whether in the form of the return of contributions or payment of a gratuity or some other form of compensation, (at 182-183). See further PFA, s30D for the circumstances under which a fund may lawfully make deductions from a member's retirement benefits.
[66] (1922) 43 NPD 231.
[67] Courts have also recognised that defined pension benefits create rights in the hands of the member. In *Mokoena v Administrator, Transvaal* 1988 (4) SA 912 (W) (917D-E), Goldstone J held that the summary dismissal of an employee without a hearing was unlawful because it deprived her of her right to the pension to which she had been contributing for 15 years, but which was only payable if she was still in the employer's service at age 60. Although she was entitled to the return of her own contributions, this was 'cold comfort' given the lifetime nature of the pension and the ravages of inflation.

were paid to the fund for the benefit of the individual member.[68] Both now form part of the *minimum benefit* to which a member is entitled in terms of the Act, which may never be less than the invested value of the contributions made by or on behalf of the member, less reasonable expenses.[69]

Defined contribution retirement funds are therefore essentially long-term savings vehicles, in which the saving is ring-fenced for the specific purpose of providing members with an income during their retirement. While they are members of the fund, their savings are protected from both the member and third parties, and will not fall into a member's insolvent estate.[70] Members are, nevertheless, allowed to claim payment of their savings portion should they resign, be retrenched or dismissed prior to retirement.[71] Although the member does not technically own her own savings once they have been paid to the fund,[72] the member has a contractual and statutory right to be paid her savings.[73] It is simply that her right to enforce payment crystallises (matures) on her resignation, retrenchment, retirement

[68] Cf Canada, in which an employee is always entitled to her own contributions but not to employer contributions until they have vested. The rules of the fund will determine when that is. The rules will similarly determine whether her own contributions can be returned as a cash lump sum or must take the form of a pension. See Government of Canada *Digest of Benefit Entitlement Principles* Chapter 5 – Section 3.

[69] PFA, s14B (1). The invested value consists of the total contributions plus fund return. The fund returns may, however, be 'smoothed', which means that the full fund return does not vest in the member immediately when it is earned. Instead, only a proportion vests immediately, while a proportion is held back and will vest on a future date to be determined by the fund. The purpose behind smoothing is to provide the member with some protection against poor or negative market returns. The fund then uses the reserves to provide the members with a higher return than they would otherwise have received from their market-returns alone. Smoothing therefore protects the member against some of the volatility, and consequent losses, that usually occurs when investing in the market.

[70] PFA, ss 37A & 37B. Section 37D contains limited exceptions.

[71] National Treasury has proposed the compulsory preservation of retirement savings, but their initiatives have failed to date due to opposition from labour unions. Employees are nevertheless encouraged to preserve their savings, and recently published regulations require funds to establish default preservation portfolios. See National Treasury *Strengthening Retirement Savings* (14 May 2012); *Final default regulations* in GN 41064 (25 August 2017).

[72] PFA, s5(1). Whether the member would own the accumulated contributions absent s5 is not clear. In *Fraser* (n66), Tatham J expressed the view that a lump sum paid to a fund by an employer and placed to the credit of the member 'belonged' to the member and not to the fund. See further Van Meerten & Borsje 'Pension rights and entitlement conversion ('Invaren'): lessons from a Dutch perspective with regard to the implications of the EU Charter' (2016) 18(1) *European Journal of Social Security* 46, 54, who are of the view that one of the advantages of the conversion from defined benefit (DB) to defined contribution (DC) funds in the EU means that members now 'unambiguously' own the assets in the fund, which in turn means that their 'property rights are now clear'.

[73] That the rules constitute a contract between the member and the fund was confirmed in *Coetzee v Moreesburgse Koringboere Koöperatief Bpk* [1997] 9 BLLR 1167 (LC) and *Shell & BP South Africa Petroleum Refineries (Pty) Ltd v Murphy* [2000] JOL 6373 (D).

or death. The member's benefits are in all cases an integral part of the member's overall remuneration package, for which reason they are commonly described as 'deferred pay'.[74]

The member's rights to be paid her savings portion or other benefits predates the Act. The Act simply confirms that the benefit payable to the member may not be less than the member's savings. If the rules of the fund promise benefits in excess of the savings portion, the fund is obliged to provide those benefits as well.[75]

A member's right to payment of her savings portion, or any additional benefit promised in the rules of the fund,[76] is a vested right.[77] It is an existing right to claim future performance.[78] It is not a contingent or conditional right, because there is no uncertainty about whether payment is or will become due to the member. The only uncertainty is when it will become due. Rights are, by definition, vested.[79] As explained by Selke J in *In Re Allen Trust*:[80]

> The question of whether rights are vested or not arises most frequently in relation to rights conferred by will, and when employed in that relation the expression 'vested right' usually denotes a right whose actual enjoyment, although it may be deferred, is not dependent upon any contingency. Normally, though not invariably, such a right is transmissible on death.

The word 'vested' is used in contractual and statutory settings to distinguish rights, in the proper sense, from protected interests, such as contingent interests, which are often referred

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[74] *Atkinson v Southern Field* [2000] 4 BPLR 367 (PFA). See also *Younghusband v Decca Contractors* [2000] 1 BPLR 88 (PFA) 105, approved by the High Court in *Resa Pension Fund v Pension Funds Adjudicator* [2000] 4 BPLR 355 (C) [15].

[75] See eg *Crossley v Union Government* (1921) 42 NPD 114.

[76] See the somewhat confusing discussion of benefits versus rights, and vested versus conditional rights, in *Joint Municipal Pension Fund v Grobler* [2007] 1 BPLR 1 (SCA) [10ff]. Its essential conclusions are the same, viz that a member has a right to accumulated benefits. This was apropos a DB Fund.

[77] On the nature of vested rights, and the difference between vested and contingent, see further: *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 175*; Stern and Ruskin v Appleson* 1951 (3) SA 800 (W); Cowen 'Vested and contingent rights' (1949) 66(4) *SALJ* 404; Hutchison 'Isolating the pactum successorium' (1983) 100(2) *SALJ* 221, 228; Van Zyl 'The theory of judicial practice' 1889 *Cape LJ* 135, 150-151.

[78] *Dies cedit* versus *dies venit* in Latin. English law uses the terms vested in interest and vested in possession. When a right has vested, and the holder is entitled to enjoyment, the right is both *dies cedit et venit*. See Cowen (n77) 412.

[79] Austin's view is that it is 'tautologous or superfluous' to speak of 'vested' rights, because a right is, by definition, vested. Austin *Lectures on Jurisprudence* quoted in Cowen (n77), 407.

[80] 1941 NPD 147, 156.

to as 'rights' because they attract a measure of legal recognition and protection.[81] Contingent interests, or rights, are rights-in-the-making. They lie on the spectrum between a hope, or *spes*, and a (vested) right. They are conditional rights, in that the right will come into fruition on the happening of an uncertain future event. The right must, however, already be in bud or in blossom, so to speak. A person cannot be said to have a contingent interest in a fruit if the tree has not yet been planted, or while it stands dormant. As was said by Millin J in *Stern & Ruskin v Appleson*:[82]

> The term "contingent interest" is used in contradistinction to a vested interest. It is something which may ripen into a vested interest on the happening of an event, but it must be such that the happening of the event, without more, gives the vested interest. A person cannot be said to have a contingent interest in something which another may or may not choose to give him in the future.[83]

The argument that a member does not enjoy an existing, or vested, right to her savings portion is therefore incorrect.[84] It is based on a misunderstanding of the nature of the right enjoyed by the member. The member's right to claim payment of her vested retirement benefit is an asset in her estate.[85] That rights are assets has long been recognised. It matters not that the member will only be able to enforce her right at a future date. The distinction between rights that are immediately enforceable, and rights that are enforceable only in the future, has long been recognised. Provided that they are, or will with certainty become, enforceable, they are rights.

Older authorities used the terms *dies cedit* and *dies venit* to distinguish between rights that have vested, and those that have not. In 1889 already, while describing what property fell

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[81] Cowen (n77) 408; Hutchison (n77).
[82] (n77).
[83] Ibid. It is clear, from Cowen's explanation, that a number of conditions may need to be satisfied before the right vests. It nevertheless remains a contingent right. The important point is that its fruition must not be subject to someone else's discretion or power.
[84] The South African Law Commission in its original investigation into the sharing of pension benefits on divorce concluded that a member's interest is more than a mere *spes*, and that it is a personal, albeit conditional, right. See SALC (Project 41) *Report on the investigation into the possibility of making provision for a divorced woman to share in the pension benefits of her former husband* (1986) ('1986 Report') para 3.4 & 3.6.
[85] This is also the position in the USA, where courts have accepted that 'pension rights constitute a current asset that the individual has a contractual right to receive', albeit that payment may only be due in the future. See Brinig 'Marital property' 2016 *International Survey of Family Law* 509, 521.

into an insolvent estate, CH van Zyl included the vested right (*dies cedit*) to receive future payment (*dies venit*) of a salary or pension:

> A person may have a future right to a thing, but he cannot claim it until after the lapse of a certain time or event or as it is technically called the dies cedit and the dies venit. If he has the dies cedit, that is if his right to the thing has already vested though his claim to its use and possession is postponed, he can do with that right what he pleases, subject to the conditions of the dies venit, and whatever rights he has are vested also in his creditors, upon insolvency, or in execution. If it is doubtful whether the right can be described as a movable or immovable thing, then obtain a special order of the Court to arrest the thing, or the right to it, as for instance usufruct, or a fideicommissum present or future; a pension or salary …[86]

If it is necessary for personal proprietary rights to be vested rights before they meet the constitutional conception of property,[87] then members rights to their savings portion clearly meets this requirement.[88] Members are entitled to receive payment of whatever benefits they have been promised in terms of the rules of their retirement fund.[89] Those benefits are funded either wholly or in part by contributions paid by the member. The essence of a defined contribution fund is that members fund their own retirement benefits, whether directly or indirectly.[90] As the SCA stated in *Tek Corporation*,[91] in the context of defined contribution schemes, 'members are entitled to whatever the fruits (be they sweet or bitter) of the investment of their defined contributions may prove to be'.

It is little wonder then that commentators and courts, in South Africa and abroad, accept that the member's right to a retirement benefit funded by her own and her employer's contributions constitutes property in the hands of the member.[92] In *Atkinson v Southern Field*

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[86] Van Zyl 'Theory of judicial practice' (n77).
[87] Cowen (n77), 416, uses the term 'proprietary rights' in his article to refer to personal rights which have a monetary value. He says that ordinarily, for a right to be a proprietary right, it must satisfy three requirements. However, none is an absolute requirement. He accepts, as do others, that some rights are proprietary even though the holder may lack one or all of the following powers: transferability *inter vivos*; transmissibility on death to heirs and legatees; availability to satisfy claims of creditors.
[88] Moseneke DCJ raised vesting as an issue in *Shoprite Checkers* (n51), but he did so in the context of 'new property' only. He accepted that rights considered property under common law would fall within the scope of constitutional property.
[89] *Tek Corporation* (n46).
[90] Directly, as part of their cost of employment, or indirectly, through contributions made on their behalf by their employers. However structured, the contribution is still part and parcel of remuneration. For the ways in which DC versus DB funds are funded, see *Tek Corporation* (n46) [4-5].
[91] (n46) [5].
[92] *Atkinson* (n74); Currie & De Waal *The Bill of Rights Handbook* 5ed (2005), at 25.3(b). The issue is less obvious in respect of state pension benefits, particularly when the scheme is not directly funded by the

Staff Defined Contribution Pension Fund, the Adjudicator stated that '[p]ension benefits as well as additional benefits like withdrawal benefits … are deferred pay and therefore property. This is more so in the case of a defined contribution fund, which is a different animal from the defined benefit fund…'.[93]

In the context of a defined benefit fund, in *Younghusband v Decca Contractors (SA) Pension Fund*, the Adjudicator similarly stated that 'pension rights amount to deferred pay, rather than gratuities', and that 'they are part of the remuneration which labour receives for services rendered'.[94] The benefits to which members are entitled are often their most valuable property, as the Adjudicator observed in *Sligo v Shell Southern Africa Pension Fund*:[95] 'Pension rights build up over a period of years and represent the most significant property entitlements of a vulnerable sector of society.'[96]

In *National Credit Regulator v Opperman*,[97] the CC accepted that an individual's right to payment of a monetary sum, whether based on contract or unjustified enrichment, was protected by the constitutional property clause. In reaching this conclusion, the CC reasoned that the fact that the claim was an asset in the individual's estate, had monetary value and could be disposed of or transferred by the individual, pointed towards its status as property.[98]

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individual's contributions. See *Müller v Austria* (1975) 3 DR 25 and *R v Secretary of Pensions ex parte Carlson* [2005] UKHL 37 para 12, which questioned the analogy between private contributory funds and public contributory funds. Cf *BverfG* 53, 257 (289) (1978), in which the German Constitutional Court accepted that even state pension benefits are constitutionally protected property, particularly since they are funded by contributions from the pensioner. See further Carss-Frisk *The right to property: a guide to the implementation of Article 1 of Protocol No. 1 of the European Convention on Human Rights* Human Rights Handbook No. 4 (2001, Directorate General of Human Rights Council of Europe).

[93] (n74) [45].

[94] [2000] 1 BPLR 88 (PFA), 105, approved by the HC in *Resa Pension Fund* (n74). Conversely, when the contributions paid to the fund exceed the benefit promised to the member and therefore generate an amount that is 'surplus' to the fund's obligation, the members are nevertheless entitled to share in this surplus unless the rules of the fund allow the surplus to be used to reduce or suspend the employer's obligation to pay contributions for a period of time. See the discussion of contribution holidays in *Tek Corporation* (n46).

[95] [1999] 11 BPLR 299 (PFA), 309.

[96] The determination was overturned on appeal in *Shell v Sligo* [1999] JOL 5043 (C), but the correctness of this statement was not in issue.

[97] (n49).

[98] [58]. See also *Opperman v Boonzaaier* 2012 JDR 0619 (WCC).

The right to payment of the savings portion is not an asset in the member's estate until it has accrued; it cannot be disposed of or transferred. It does, however, have monetary value. The reason that it is not a freely disposable asset is only because of the provisions of the PFA.[99] But for those provisions, it would be a disposable asset. Once the savings portion has been paid to the member, it does become a disposable asset. As such, the member's inability to deal with the portion while a member of the fund does not point towards it not being property; after all, it is these very restrictions that require justification for limiting the member's right to property. Cowen describes proprietary rights as those which have a monetary value. He identifies the following three characteristics as typical of proprietary rights, while emphasising that a right may nevertheless be proprietary even absent some of the characteristics: that it can be transferred during the life of the holder; that it can be transmitted to the holder's heirs or legatees on her death; that it is available to the holder's creditors.[100] By way of example, he identifies a usufruct as a proprietary right that cannot be transmitted to the holder's heirs or legatees, and a government employee's right to a pension as one that could not be disposed of *inter vivos* in terms of the legislation then in force.[101] But for s37C, lump sum death benefits would be freely transmissible.

The savings portion in private retirement funds is not 'new property' in the sense understood by Charles Reich and about which Moseneke ACJ expressed concern in *Shoprite Checkers*.[102] It is not a social welfare benefit granted by the state, nor is it dependent upon the largesse of the state. It is also not a revocable benefit. It is instead a contractual right, often of significant monetary value, which lies against a private actor. It is incorporeal

[99] PFA, s37A & s37B.
[100] Cowen (n77), 416.
[101] Union Government Service Act 32 of 1936, s76.
[102] (n51) [103 ff]. See further the Adjudicator's discussion of new property in *Atkinson* (n74). Cf Sonnekus 'Pensioenverwagtings en onderhoud na egskeiding in versorgingsregtelike in plaas van vermoenregtelike konteks' 1989 *TSAR* 202, who applies Reich's conception of new property to private pension rights.

property of the type that falls squarely within modern day conceptions of private property.[103] Cowen, in 1949, used the already-accepted phrase 'rights of a proprietary nature' to describe rights 'which have a money value'.[104] Certain pension entitlements may well constitute 'new property', such as when they form part of social welfare payments by the state and are viewed as a form of largesse, even though the recipient has contributed to funding the welfare programme through contributions levied by way of taxation. It is 'new property' that is a site of contestation, and which requires careful scrutiny to determine whether they fall within the constitutional conception of property.[105]

The fund's obligation to pay the member her savings portion would have existed independently of the Pension Funds Act. But for s5 of the Act, it is the member who would have owned her own contributions, and perhaps even those of the employer.[106] After all, to the extent that a fund is a purpose-specific savings vehicle, savings held by the fund are similar to savings in a bank, or to a collective investment scheme.[107] It is the Pension Funds Act that places ownership and control in the hands of the fund, subject to a statutory obligation to pay the member her savings portion. The loss of ownership and control is intended to be temporary and is only in order to protect the member from dissipating her savings before retirement. The member's benefits are not a gratuitous addition to a member's salary, to be bestowed at the beneficence of an employer. They are part and parcel of income the member has already earned.[108] As early as 1910, a pension promised to an employee after retirement was already understood to mean 'remuneration for past

[103] In *Peacock v Peacock* 1956 (3) SA 136 (A), Hoexter JA recognised contractual rights to possession of a farm as an asset that fell into the joint estate.
[104] Cowen (n77).
[105] See especially Moseneke ACJ's minority decision in *Shoprite Checkers* (n51) [108ff].
[106] *Fraser* (n66); Van Meerten (n72).
[107] See Collective Investment Schemes Control Act 45 of 2002, ss 2 & 70(1)(i), which recognise that the assets under management are the assets of the investor and owned by the investor.
[108] The ECJ has also emphasised that benefits promised under occupational retirement schemes form part of an employee's remuneration, to which the principle of equal pay for equal work thus applies. See *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889 and Directive 2006/54/EC of the European Parliament and Council of 5 July 2006. See also *Thomson v NHS Pension Scheme* (K00472, 22 May 2002).

services' and 'deferred payment of salary – something that has been earned'.[109] This was said in the context of a post-employment promise by an employer to pay a former employee a stipulated annual sum as a pension, which the court held created an obligation on the employer to pay the pension for the duration of the retired employee's lifetime. The promise was not part of the employment contract and the employee had not been a member of a retirement fund. If a post-employment promise can create a binding obligation that will endure for the lifetime of a former employee, the rights of members who have effectively funded their own retirement benefit must enjoy even greater recognition and protection.

That the member's accumulated savings is a right in and to property is further confirmed by the fact that prior to 1976 and the introduction of s37C, the member's accumulated savings, when payable in the form of a lump sum on the death of the member, did constitute property in the estate of the member.[110] Absent s37C, this lump sum would today still be property in the member's estate and would have devolved in accordance with the law of succession. The lump sum was also considered to be property for which the member was liable to pay estate duty, and it remained property in the member's estate, for this purpose only, until 2008.[111]

[109] *Faustmann v GA Fichardt* 1910 ORC 18, 21. *Leyds v Commissioner for Inland Revenue* 1929 TPD 148, 153 accepted that '… the word 'pension' usually implies a payment in respect of services rendered or work done', but held that the intention of the legislature in the instant case was not to reward the appellant for work done but to compensate public officials for the loss of office they had suffered as a result of the Anglo-Boer War. *S v Commissioner of Taxes* 1959 (3) SA 455 (SR) [458F–G]: 'Although pensions may take different forms the essential of a pension – to my mind – is that it is a money payment usually of periodic sums which the ex-employee receives not as an earning from existing service but after the termination thereof and in consideration or in respect of or as a reward for past service.'

[110] As appears from the speech of the Minister of Finance when proposing the introduction of ss37A & 37C to Parliament. See Financial Institutions Amendment Bill 2nd Reading Tuesday 16 March 1976 (2R, 3241). See also *S v Commissioner of Taxes* (n109), in which the employer promised to pay a fixed pension for a fixed period and if the employee died before or after retirement the unpaid portion of the pension would be paid to the employee's estate as a lump sum.

[111] See Estate Duty Act 45 of 1955, s3(2)(i), inserted by Act 60 of 2008, s2(1)(a). See also GEPF Pension Law 1996, s28, which states specifically that the lump sum is deemed not to be property for estate duty purposes.

During life, absent s37A and earlier legislation to the same effect,[112] both the member's pension and any lump sum payable by the fund, even in excess of savings, would similarly have been property in a member's estate and as such transferable or capable of attachment by creditors.[113]

6.3.3 The insured portion as 'property'

Although there is little doubt that the member's right to her savings portion is constitutionally protected property, it is less clear that the insured portion is also property in the hands of the member. The reason for this uncertainty is two-fold. First, since this portion is only payable on death, s37C inevitably applies. The member thus has no right to determine who the ultimate beneficiaries will be. Secondly, the fund's obligation to pay the benefit is secured by a group life 'fund policy' between the fund and insurer.[114] The fund is the owner of the policy, and the beneficiary is also the fund.[115] The life insured is that of the member. Fund rules usually make their obligation to pay conditional on the insurer recognising the claim.[116] Any property right that arises from the policy thus appears on the face of it to be exclusively that of the fund against the insurer rather than the member against either the fund or the insurer. Is it nevertheless possible that the member too, has acquired a constitutionally protected right to property vis a vis the insured portion?

The difficulties facing members is that they neither own the policy, nor do they have vested rights in or to payment of the insured portion. The right to receive payment of the proceeds cannot be a vested right, since payment is conditional/contingent on the member dying

[112] See eg *Schierhout v Union Government* 1926 AD 286, applying s71 of the Public Service Act 27 of 1923; *Swanepoel v South African Railways*1935 OPD 2 and *Hewitt v Hewitt* 1927 CPD 183, applying s21 of Act 24 of 1925

[113] *Foit v FirstRand Bank* 2002 (5) SA 148 (T) notes that s 37A changes the common law, but only to the limited extent stated therein. Therefore, once the benefit has been paid out, it does form part of the former member's estate and is liable to attachment, set-off etcetera. See also *Estate Barry v Barry* 1928 WLD 250; *Pick v Insolvent Estate of Neylan* (20 CTR 475) reported in Index and Annual Digest (1910) 27(4) *SALJ* 18 & 192.

[114] As defined in the Long-Term Insurance Act 52 of 1988, s1.

[115] Reinecke & Nienaber 'A suggested template for beneficiary nominations' (2009) 21 *SA Mercantile LJ* 1, 13 are critical of the general practice of describing policyholders as 'owners' of the policy.

[116] See eg Consolidated Rules of the University of Cape Town Retirement Fund, rule 6.8(1).

while in service. Currie and De Waal suggest that for a 'right to constitute property, it must be a vested right'.[117]

I suggest that whatever rights the member and beneficiaries have against the fund is an extension of the rights they have, or would have had, against the insurer directly. Had the benefit been secured by an individual life policy, the member would have been the holder, or owner, of the policy.[118] What are the nature of the rights acquired under individual life policies, and are they comparable to the rights the member acquires against the fund in respect of the insured portion?

Individual life policies come in different forms.[119] The one which matches the group life cover most closely is a 'term' life policy, which is payable only if the insured dies during a specific period.[120] It is the 'original' form of life insurance, dating as far back as the 17th century.[121] Under prevailing case law, individual life insurance is regarded as a *stipulatio alteri* for the benefit of a third party.[122] The nominated beneficiaries, if any, acquire only a *spes* until such time as the member dies.[123] The reason is that the nomination is freely revocable until the insured's death, at which time it becomes an offer to the beneficiary, which the beneficiary (or trustees in an insolvent estate) is free to accept or reject. Upon acceptance, a binding contract comes into existence between the beneficiary and the insurer.[124]

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[117] *Bill of Rights Handbook* (n92) para 25.3. The interpretation of vested is somewhat confusing, since it conflates vested with accrued.
[118] *PPS Insurance Company v Mkhabela* 2012 (3) SA 292 (SCA) [2].
[119] Van Niekerk 'The nature of life insurance contracts: a matter of death or life' (2007) 19 *SA Mercantile LJ* 302.
[120] For a discussion of the different types (term, whole-life, pure endowment and life endowment), see Van Niekerk (n119).
[121] Havenga 'The classification of life insurance contracts (Part 1)' (1994) 27 *De Jure* 213.
[122] *Wessels v De Jager* 2000 (4) SA 924 (SCA); *Pieterse v Shrosbree; Shrosbree v Love* 2005 (1) SA 309 (SCA); *Oshry v Feldman* 2010 (6) SA 19 (SCA).
[123] *Shrosbree* (n122); *PPS Insurance* v *Mkhabela* (n118). Cf Reinecke & Nienaber (n115), who would prefer to conceptualise it as a contingent interest. For an interesting historical discussion on the nature of a beneficiary's right in Canada and the USA, which has long-since been resolved by legislative enactment in those jurisdictions, see Taylor 'Beneficiaries of Life Insurance Policies' (1944) 22 *Canadian Bar Review* 509.
[124] *Shrosbree* (n122).

The nature of the beneficiary's right after the insured's death but prior to acceptance is best-characterised as a contingent right.[125] Upon the beneficiaries' acceptance of the benefit, they acquire a vested right to the proceeds.[126] Absent a nominated beneficiary, the proceeds vest in the policy-holder's estate.[127] The estate is in all cases the default beneficiary. The member, through her estate, therefore always has a contingent right to the proceeds.[128]

Life insurance contracts thus create personal rights of a proprietary and non-proprietary nature. The holder's rights, as owner, encompass both. The right to nominate beneficiaries, cede or assign the policy, are personal rights of a non-proprietary nature. The contingent right to the proceeds is a proprietary right.

Group life policies were first devised in the late 19th century in the USA, and quickly gained popularity.[129] An important feature of group life policies in the USA from their inception,[130] and more recently elsewhere,[131] is that even though the member/insured is not a party to the contract, both the member and her beneficiaries have standing to sue the insurer directly,

[125] *Warricker v Liberty Life Association of Africa Ltd* 2003 (6) SA 272 (W) [11]. Cf Reinecke & Nienaber (n115), who identify three possible ways to explain the nature of a beneficiary's right to acceptance. The approach they prefer is that beneficiaries have contingent rights from the moment of nomination. Their right is then subject to two conditions: a resolutive condition, that the holder does not revoke the nomination; a suspensive condition, that they accept the nomination. The problem with this approach is that it does not assist in deciding whose rights take preference in cases of possible conflict. The better view is that it is a *spes* until death, then contingent, then vested (post acceptance).

[126] *PPS Insurance v Mkhabela* (n118); Wood-Bodley 'Life policies and marriages in community of property – who owns the proceeds on the insured's death: *Danielz v De Wet* (2010) 127(2) *SALJ* 224. In the cases discussed by Wood-Bodley, the estate of the deceased or insolvent insured tried to claim the proceeds, despite there being a nominated beneficiary who had accepted the benefit. In each case, they correctly failed in their attempt.

[127] Reinecke & Nienaber (n115) describe the policyholder as the 'principal beneficiary' (absent a nomination, of course).

[128] Even when dealing with the cession of a life policy, the cedent is considered to have a contingent reversionary right. See eg *Barclays Bank v Riverside Dried Fruit Co (Pty) Ltd* 1949 (1) SA 937 (C).

[129] Hanft 'Group life insurance: its legal aspects' (1935) 2 *Law & Contemporary Problems* 70.

[130] Hanft (n129), 85.

[131] Members' and beneficiaries' standing to enforce the contract has received statutory recognition in, for eg, Canada and England. See Insurance Act RSA 2000, ss665, 671; Insurance Act RSBC 2012, ss64, 70; Insurance Act RSO 1990, ss195, 201 (Canada). I have not surveyed other provinces. For England, see Contracts (Rights of Third Parties) Act 1999, prior to which even the beneficiaries of individual life insurance did not have standing to sue because of the courts' strict interpretation of the privity of contract requirement. See eg *Beswick v Beswick* [1967] UKHL 2. The Contracts (Rights of Third Parties) Act applies also to group insurance in the absence of an express provision to the contrary. See Merkin (ed) *Insurance Law: An Introduction* (2013), 19.

because group policies are accepted as constituting contracts for the benefit of third parties.

In South Africa the nature of a member's and beneficiary's interest in a group life policy has not generated much discussion or litigation. In one of the few cases on point, *Sage Life v Van der Merwe*,[132] the court held that a group life policy was not a *stipulatio alteri* between the fund and the insurer for the benefit of a third party. The result was that only the fund had standing to enforce the policy against the insurer.[133] However, on the facts of the case the insurance policy expressly stated that members and beneficiaries enjoyed no rights under the policy, and that only the fund had standing to sue the insurer.[134]

Even if the fund policy does not meet the legal requirements for a *stipulatio alteri*, its *raison d'être* is to provide benefits to the fund's members. Its sole purpose is to fund, in whole or in part, 'the liability of a fund to provide benefits to its members in terms of its rules'.[135] The benefit to the member is that it provides life insurance over the member's life more cheaply than she would otherwise be able to obtain it.[136] The fund policy is simply a life policy over a group of individuals rather than a life policy in respect of a single individual. Individual life insurance is expensive.[137] The cost places it beyond the reach of many, if not the majority, of

[132] 2001 (2) SA 166 (W). The specific issue before the court was whether the member had standing to sue the insurer directly. The court held not, because there was no contractual privity between the member and the insurer. The court held that an essential requirement for a contract to constitute a *stipulatio alteri* was that the insurer and policy holder must have intended that the third-party member become a party to the contract upon acceptance, such that it be enforceable by the third party (at 169). The court cited no authority for this proposition.

[133] Cf *Refrigerated Trucking (Pty) Ltd v Zive* 1996 (2) SA 361 (T), which suggests that members, beneficiaries or the estate could sue the insurer directly, and do not need to rely on the fund to do so, unless the policy stipulates that only the fund has standing to enforce the policy.

[134] Cf *Havemann v ABSA Group Life Scheme* [2008] JOL 22132 (E), in which a disability policy was silent on the issue of standing, but the court held that there was no privity of contract between the insurer and the employee, and that the contract was not a *stipulatio alteri* for the benefit of the employee. As such, the employee was not entitled to sue the insurer directly.

[135] Long-term Insurance Act 52 of 1988, s1 definition of 'fund policy'. This is precisely the reason courts in the USA recognised that members and beneficiaries have direct standing to sue. See Hanft (n129), 85.

[136] Hanft (n129), 90.

[137] Numerous online life insurance calculators are available. See eg <https://www.oldmutual.co.za/personal/life-insurance/> — the cost of cover for a 48-year old female non-smoker who earns R500 000 p/a is in the region of R800 p/m. Under the University of Cape Town's group life cover, the cost is unrelated to the employee's age and gender. The comparable cost (assuming it is six times the employee's annual salary of R500 000p/a) is approximately half that, at R392

fund members. The origin of, and rationale behind, group life insurance was simply to provide affordable life insurance.[138] The rules of the fund, moreover, often clearly differentiate between the member's savings portion and insured portion, and clearly link the insured portion to the payment of premiums by or on behalf of the member. Members may also retain some control over the value and the cost of the benefit. They may be given the right to increase or decrease the amount of the benefit and the premium paid by, or in respect of the member, will be increased or reduced accordingly. The insured portion only becomes payable on the member's death, and the benefit will ultimately accrue to the member's dependants, nominees or estate. The benefit is not part of the minimum benefits that a fund is statutorily obliged to pay its members; nevertheless, when it does form part of the benefit as per the fund's rules, the fund is under a contractual obligation to pay the insured portion.[139]

In the context of group life, the member's estate is again the contingent beneficiary. The member's right is not dependent on the exercise of the trustees' discretion in her favour; absent dependants or nominees, the benefit will automatically vest in the estate on the member's death.[140] Absent dependants, even with a nominee, the benefit vests in the estate if it is insolvent. The member's estate is therefore the contingent beneficiary until the member dies. Upon the member's death, the nominees or dependants acquire variable rights. Prior to the member's death a nominee enjoys no more than a *spes*, since her nomination is freely revocable. If the member is survived by nominees only, on the member's death they acquire a contingent right to receive whatever proportion of the benefit the member has wished them; the contingency is that the estate is solvent. If the estate is solvent, the nominee's right is a vested right. The nature of a dependant's rights is variable. If there is only one

p/m (the cost of cover is 0.943 the member's annual salary, and it provides six times the employee's annual salary) – see www.uctrf.co.za/uctrf/contributions (as at 1 March 2019).

[138] Hanft (n129).

[139] Cf the Adjudicator's view that '[i]t is debatable whether an entitlement to death benefits under section 37C arises *ex contractu*, or whether it is quasi contractual arising *ex lege',* in *Dobie* (n8), 36.

[140] PFA, s37C(1)(c).

dependant, that dependant enjoys a vested right from the moment the member dies.[141] If there is more than one dependant, then as an undifferentiated group they have a vested right.[142] As individuals within the group they have no more than a *spes*, for they acquire rights only when the trustees exercise their discretion in a particular beneficiary's favour. The same holds true when the group consists of nominees and dependants.

The Administration of Estates Act includes any contingent interest in property within its definition of property,[143] as does the Trust Property Control Act.[144] The Estate Duty Act deems the proceeds of a life insurance policy to be property in the estate of the insured if the proceeds are payable to, or will be utilised for the benefit of, the insured's relatives or financial dependants.[145] Prior to the 2008 amendment to the Estate Duty Act, lump sums payable by retirement funds were similarly deemed property in the estate of the member.[146] Lump sums commuted for cash still incur income tax if they exceed the free withdrawal limit.[147] When the member leaves the fund, the insured portion usually falls away. Should the member die while in service, the savings portion and the insured portion are aggregated into a single lump sum for tax purposes, and in terms of s37C. But for s37C, the insured portion would have devolved according to the laws of succession or contract.

In *Shoprite Checkers*,[148] the CC interpreted the meaning of constitutional property through the lens of the fundamental rights, and values, to freedom, dignity and equality. Property, for the purpose of s25 of the Constitution, is property that the court feels is deserving of protection, having regard to the Constitution's fundamental values. Fundamental values are important in determining the outer boundaries of the right and whether rights *not* hitherto

[141] Since the trustees are obliged to pay the full benefit to that dependant in terms of PFA, s37C(1)(a).
[142] PFA, s37C(1)(a) & (bA).
[143] Act 66 of 1965, s1.
[144] Act 57 of 1988, s1.
[145] Act 45 of 1955, s3(3)(a)(ii).
[146] Ibid, s 3(3)(a)*bis*, which was introduced into the Estate Duty Act by the Revenue Laws Amendment Act 81 of 1965, s2(1)(b) and removed by Revenue Laws Amendment Act 60 of 2008, s2(1)(b).
[147] See Income Tax Act 58 of 1962, Second Schedule 'Computation of Gross Income derived by way of Lump Sum Benefits'. The lifetime tax-free limit is currently R500 000. See also the retirement and death tax tables: <http://www.sars.gov.za/Tax-Rates/Income-Tax/Pages/Retirement-Lump-Sum-Benefits.aspx>.
[148] (n51).

recognised as private property rights should be included within the scope of the constitutional conception of property.

6.3.4 Interim Conclusion

Fund rules that promise to pay an additional sum of money on the death of the member create binding and enforceable obligations. The obligation 'vests' on the death of the member, albeit that the identity of the appropriate beneficiary has not yet been established. The obligation creates enforceable contractual and statutory rights that have value. Its value is that it will make financial provision for the member's beneficiaries. The member is under a common law and statutory obligation to make provision for certain beneficiaries. The member's ability to do so through the means provided by the benefit is intimately connected to the member's dignity and freedom.

There can be little doubt that whether viewed simply as part of the lump sum payable by the fund, or whether treated separately, it too is property in the constitutional sense in the hands of the member.

As Cowen points out, although contingent rights are not actually rights at all, the expression serves a useful purpose.[149] It identifies those interests which, although not yet rights, are nevertheless considered worthy of recognition and protection. The law protects contingent interests in various ways – for example, by protecting the holder should the other party deliberately frustrate the fulfilment of a condition.[150] A spouse's claim to share in a member's pension interest was inserted into the Divorce Act in 1989 because the Law Commission concluded that members had, at least, a contingent right to their benefits.[151]

[149] (n77), 408.
[150] The doctrine of fictional fulfilment applies in such a case. For further examples, see Cowen (n77) fn17.
[151] SALC (Project 41) 1986 *Report* (n84) para 3.3.

6.4 A SPOUSE'S RIGHT TO PROPERTY

In Adjudicator determinations in which the deceased is survived by a spouse, the marital regime is rarely mentioned.[152] It is not considered a relevant consideration.[153] The Adjudicator has consistently stated that marriage in community of property does not entitle a spouse to 50% of the death benefit.[154] This is also the position of the High Court.[155] When funds have appeared to award a surviving spouse 50% of the death benefit *only* on the basis of their marriage in community of property, they have been castigated for doing so.[156] Is the Adjudicator's view correct?[157]

The question is of material importance for most surviving spouses. The default marital regime for monogamous marriages is that they are marriages in community of property,[158] and this is the regime that applies to most marriages. When spouses marry out of community of property, the accrual system similarly applies by default unless expressly excluded by ante-nuptial contract.[159] Would surviving spouses under both regimes not have had an automatic right to share in the death benefit in the absence of s37C? If the answer is yes, then s37C

[152] Cf *Van Vuuren v CRAF* [2000] 6 BPLR 661 (PFA), but here the fund relied on the spouses' marriage out of community of property to justify their award.
[153] See eg *Watney v Metal Industries* [2017] 2 BPLR 408 (PFA), in which the fund made no allocation to the surviving spouse and made no mention of the marital regime. Although it was remitted to the trustees for reinvestigation, the Adjudicator's concern went to a different issue.
[154] *Brummelkamp v Babcock* [2001] 4 BPLR 1811 (PFA); *Ditshabe v Sanlam* [2001] 10 BPLR 2579 (PFA); *Khaba v Wizard* [2007] JOL 20346 (PFA).
[155] *Makume v Cape Joint RF* [2007] JOL 19999 (C).
[156] *Khadi v Univen* (unreported), discussed in OPFA *AR 2013/2014*, 12.
[157] In *Marais v Sasol* [2017] 3 BPLR 615 (PFA), the Adjudicator reasoned that just as a spouse cannot expect to receive 50% of the death benefit merely because they had been married in community of property, so a life partner cannot expect to receive a greater share than the extent of her actual financial dependency.
[158] Hahlo *The South African Law of Husband and Wife* 5ed (1985). Once limited to marriages concluded in terms of the Marriage Act 25 of 1961, the default regime now applies to civil unions concluded in terms of the Civil Union Act 17 of 2006 and customary law marriages concluded in terms of the Recognition of Customary Marriages Act 120 of 1998 came into force. Although s7(1) of the Customary Marriages Act limits in community regimes to monogamous marriages concluded after the Act's commencement, it has been declared unconstitutional. Since *Gumede v President of the Republic of South Africa* 2009 (3) BCLR 243 (CC) monogamous customary marriages concluded before the Act are also in community. Polygynous marriages have different consequences, depending on whether the first marriage was concluded before or after the Act commenced. If after, the first marriage is in community and subsequent marriages are out of community (without accrual). See *Ngwenyama v Mayelane* [2012] 3 All SA 408 (SCA), confirmed by the CC in *Mayelane v Ngwenyama* 2013 (8) BCLR 918 (CC). If before the Act, an interim *sui generis* regime created by the CC applies pending the adoption of legislation, in which no one marriage is in community. See *Ramuhovhi v President of the Republic of South Africa* 2018 (2) SA 1 (CC).
[159] Matrimonial Property Act 88 of 1984, s2.

does not merely limit the member's right to property but that of the spouse also. The question is of greater importance for spouses married in community of property, however. Marriage in community of property does not merely establish entitlements as between the spouses, as is the case with the accrual system. It also makes them jointly liable for all the debts of the estate. The death benefit is insulated from creditors' claims, but the surviving spouse is not. The surviving spouse thus remains liable for the deceased's debts, with no automatic entitlement to any share of the benefit.[160] The fact that a spouse receives less than the 50% to which she would have been entitled does not mean the outcome is necessarily inequitable. Had the marriage terminated in divorce, there are instances in which the deceased might well have succeeded in obtaining an order for forfeiture of the benefits of the marriage.[161] Nevertheless, this does not address the constitutionality of s37C's override of all other laws, including matrimonial property law.

If the savings portion is accepted as constituting property in the hands of the member, should it not, by operation of law, form part of the joint estate of spouses married in community of property?[162] The prevailing view is that it does *not* form part of the joint estate under the common law, and only does so to the extent provided for in the Divorce Act.[163] This is not, however, the universal view, and there are a minority that have doubted its correctness.[164] I share the minority view. At a minimum, the surviving spouse should, by virtue of her marital regime, be entitled to half the savings portion as of right. Why, then, are most commentators and courts of the view that it forms part of the joint estate only on divorce? The reason lies in their interpretation of the relevant provisions of the Divorce Act, coupled

[160] See *Brummelkamp* (n154), 1815; *Makume v Sentinel* (n31) [40].
[161] See eg *Ditshabe* (n154), given the short duration of the marriage.
[162] In the USA, absent legislation to the contrary, vested pension rights are generally considered an asset in the joint estate. See Brinig (n85), 521-522.
[163] *Old Mutual Life Assurance Company (SA) Limited v Swemmer* [2004] 4 BPLR 5581 (SCA); *Ndaba v Ndaba* [2017] 1 BPLR 39 (SCA). See also *Sempapalele v Sempapalele* 2001 (2) SA 306 (O); *Maharaj v Maharaj* 2002 (2) SA 648 (D); *Elesang v PPC Lime Ltd* 2007 (6) SA 328 (NC); *Kirchner v Kirchner* 2009 (4) SA 448. See further Marumoagae 'Can a non-member spouse protect his or her interest in the member spouse's accrued pension benefits before divorce' 2016 *Obiter* 212.
[164] *De Kock v Jacobson* 1999 (4) SA 346 (W) 348; *Chiloane v Chiloane* [2007] JOL 20607 (T), 12. See also Marumoagae 'A non-member spouse's entitlement to the member's pension interest' (2014) 17 *PELJ* 2488. Cf Van Zyl 'Pension interest by spouses on divorce' 1985 *De Rebus* 343; Van Aswegen 'The protection of a spouse's right to share in the joint estate or accrual' 1987 *De Rebus* 59.

with their understanding of the nature of retirement benefits. In the discussion that follows I seek to demonstrate that their understanding is based on an incorrect interpretation of the Divorce Act, and of the authorities upon which they rely in support of their conclusion.

6.4.1 The savings portion

Section 7(7) of the Divorce Act provides that in an action for divorce, the pension interest of spouses shall be 'deemed' to be part of spouses' assets. Pension interest is in turn defined to mean the benefits to which a member would be entitled had she resigned from the fund on the date of her divorce. Section 7(7) was only inserted into the Divorce Act in 1989. In *Old Mutual v Swemmer*,[165] the leading case on the nature and effect of s7(7), the Supreme Court of Appeal stated that 'it appeared' that a member's pension interest had not, prior to 1989, formed part of the member's estate or the joint estate. The court acknowledged that the law prior to 1989 was uncertain in this regard.[166] Whatever the position prior to 1989, the court held that the effect of s7(7) was possibly to create, and certainly to limit, a spouse's entitlement on divorce to sharing in only the member's pension interest, as defined. The court therefore accepted that a member's pension interest is only part of the joint estate by virtue of the 'deeming' provision in s7(7), and that it was not a 'real asset open to division' but a notional asset created by the legislature.[167] If the retirement benefit exceeds the pension interest, the spouse is not entitled to that additional benefit.[168] On the other hand, once the pension interest and any additional benefit has been paid to the member spouse, the

[165] *Old Mutual v Swemmer* (n163) [17].
[166] Ibid.
[167] Para 18, quoting from the SALC (Project 41) *Report on the division of pension benefits on divorce* (1995) ('1995 Report'). This passage was in turn quoted with approval in *Ndaba* (n163) [10].
[168] The particular problem in *Old Mutual v Swemmer* (n163) was that the divorce order entitled the applicant to claim payment of the proceeds of retirement annuity policies which had been taken out by her ex-husband and she was entitled to do so at the earliest date on which the husband would have been entitled to do so, namely on his 55th birthday. Her husband remained the actual holder of the policies. The SCA held that the divorce order was unenforceable in that it entitled her to benefits in excess of her 'pension interest', which was, by definition, fixed as at the date of divorce, and could not include future contributions and investment returns. The SCA further held that only the holder of the retirement annuity was entitled to anticipate the contractually agreed maturity date, which was his retirement date.

benefit as a whole *does* form part of the joint estate.[169] Should the member and spouse divorce after the benefit has accrued to the member, the spouse will be entitled to half of the benefit by virtue of the marriage in community of property — s7(7) of the Divorce Act is then irrelevant.[170]

The proposition that a member's 'pension interest' does not naturally form part of the joint estate has been repeated so often that it seems as though it must self-evidently be true. Some courts have gone so far as to state that the pension interest does not even automatically form part of the joint estate by virtue of the deeming provision in s7(7), but that it only becomes so when the divorce court expressly includes it as an asset in the joint estate for the purpose of dividing the estate.[171] Absent its inclusion in the order, the spouse has been held to be disentitled to a share in the pension interest.[172] The context in which the application, and construction, of s7(7) and s7(8) often arises is when a spouse seeks to have the original divorce order amended, in order to obtain a share of the pension interest. Many such applications have been unsuccessful.[173] The courts failed to appreciate that s7(8) of the Act, which empowered the court to make an order instructing the fund to pay the spouse her half-share on the date the right accrued to the member, was not required to establish the spouse's right (to bring it into existence). It was inserted only to ensure that the spouse could enforce her right as against the fund directly, if the member personally could not afford to satisfy the spouse's monetary claim using other assets.[174] There were courts that held that the pension interest automatically formed part of the joint estate on divorce,[175] but none went so far as to conclude that it formed part of the joint estate outside divorce.[176]

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[169] *De Kock v Jacobson* (n164); *Elesang* (n163); *Eskom v Krugel* [2011] 3 BPLR 309 (SCA).
[170] *Eskom v Krugel* (n169); *GEPF v Naidoo* 2006 (6) SA 304 (SCA); *Harris v Motor Industry* [2014] JOL 31423 (PFA).
[171] *Sempapalele* (n163); *DML v LJL* (ZAFSHC) unreported case no 3981/2010 of 25 April 2013.
[172] *Sempapalele* (n163); *DML v LJL* (n171) and further cases discussed in Marumoagae (n164).
[173] *Sempapalele* (n163); *DML v LJL* (n171).
[174] SALC (Project 112) *Report on the Sharing of Pension Benefits* (1999), para 1.4.
[175] *Maharaj* (n163); *Chiloane* (n164); *Motsetse v Motsetse* [2015] JOL 32959 (FB).
[176] Some have called for such recognition. See Marumoagae (n164). Some courts have come close to doing so, such as *Clark v Clark* 1949 (3) SA 226 (D) and *Chiloane* (n164). In *Chiloane*, Raulinga AJ used the analogy of two athletes competing in the Comrades marathon to highlight the artificiality of the distinction between accrued and unaccrued pension interests: an accrued pension interest is like an athlete who completes the race just seconds ahead of the cut-off time while her unaccrued

In its recent decision *Ndaba v Ndaba,*[177] the Supreme Court of Appeal accepted that a pension interest only forms part of the joint estate by virtue of the Divorce Act but rejected the way in which the Divorce Act has been interpreted by high courts. *Ndaba* held that the effect of s7(7) of the Divorce Act is that a member's pension interest does automatically form part of the joint estate on divorce. The court stated that 'the section creates a fiction that a pension interest of a party becomes an integral part of the joint estate upon divorce which is to be shared between the parties.'[178] The court emphasised that the effect of s7(7) is that the pension automatically forms part of the joint estate on divorce, without the need for a court order specifically awarding a share of the pension interest to the spouse. This means that where the divorce order does not specifically award half the joint estate to the spouse, and/or fails to mention the pension interest separately, the spouse nevertheless has a claim to the pension interest. To the extent that a fund can only act upon an order of court, the necessary order can be granted subsequent to the divorce, and the spouse is not prejudiced because of shortcomings in the original order.[179] In light of *Ndaba,* divorcing spouses married in community of property, who do not wish their spouse to share in the pension interest, will specifically need to apply for an order for forfeiture of benefits.[180]

Is the view that a member's pension interest only forms part of the joint estate in the context of divorce the correct view? If it is correct, it means that a spouse whose marriage is dissolved by divorce enjoys greater rights than a spouse whose marriage is dissolved by

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counterpart reaches the same point just seconds after the cut-off time. Despite having run 'the same distance at almost the same time', the former receives a reward that is denied the latter. The analogy is apt. It makes no sense that a widowed spouse has fewer rights than a divorced spouse.

[177] (n163).

[178] Para 26. The specific issue in *Ndaba* was whether a spouse's entitlement was dependent on the court order specifying that the pension interest be divided. Some decisions, such as *Sempapalele* (n163), had held that absent a specific instruction in the order, the pension interest did not form part of the joint estate. The result was that when a court simply ordered the division of the joint estate, the spouse was held not to be entitled to share in the pension interest. *Ndaba* held that this was an incorrect interpretation of s7(7) of the Act.

[179] For an example of such prejudice, see *Lubbe v CRAF* [2015] JOL 32839 (PFA).

[180] Divorce Act 70 of 1979, s9. See *Human v Human* [1999] JOL 4959 (E) and *JW v SW 2011* (1) SA 545 (GNP). Whether the member will be able to do so subsequent to the divorce is not clear. See *Van Zyl v Van der Merwe* 1986 (2) SA 152 (NC).

death.[181] On the other hand, if the view is incorrect, it means that the treatment of death benefits in terms of s37C limits not only the member's proprietary rights, but also the spouse's right to property.

Why have the courts and commentators so consistently concluded that a member's retirement benefits, or any portion thereof, did not form part of the joint estate prior to 1989, and would still not do so but for the Divorce Act? At a minimum, the amount claimable as a 'pension interest' on divorce should similarly be claimable on death. After all, a pension interest as defined in the Divorce Act is, in essence, the member's savings portion in a defined contribution fund.

For a member's pension interest not to form part of the joint estate, there must be something singular about the pension interest that distinguishes it from the property that otherwise forms part of the joint estate. After all, a joint estate consists of all the assets and liabilities of the spouses, whether acquired before or during the marriage.[182] The Matrimonial Property Act lists specific exclusions, and a member's retirement benefit is not amongst the exclusions.[183] What then is that singularity that leads so many to exclude the savings portion? Few commentators or courts provide an explanation, simply restating, as an article of faith, that prior to 1989 the retirement benefits did not form part of the joint estate.[184]

The original explanation may have been that incorporeal rights were not considered property, in either the member's or the joint estate. In their Law of Persons contribution to the 1984 Annual Survey, Sinclair and Kaganas state that 'pension and retirement benefits are not

[181] It was precisely to remedy this anomaly that the Maintenance of Surviving Spouses Act 27 of 1990 was enacted, see *Hodges v Coubrough* 1991 (3) SA 58 (D). As an example of an unsuccessful maintenance claim see *Glazer v Glazer* 1963 (4) SA 694 (A) 707, described as inequitable by Hahlo 'The Sad Demise of the Family Maintenance Bill 1969' (1971) 88(2) *SALJ* 201, 202.
[182] Hahlo *Husband and Wife* (n158), 157-158, quoted with approval in *De Kock v Jacobson* (n164), *Elesang* (n163), *JW v SW* (n180).
[183] Act 88 of 1984, s15.
[184] *Sempapalele* (n163); *Maharaj* (n163).

yet classified as property'.[185] Later in the same contribution they welcome the decision in *Mathee NO v Koen*,[186] in which the court held that the value of a house which had been bought by the husband, but which had not yet been transferred into his name, did form part of the joint estate. Prior to transfer of ownership the house itself was not yet an asset in the joint estate. The husband, however, enjoyed a contractual right to claim transfer on payment of the final instalment. The house had increased significantly in value between the date of purchase and the date of divorce. The husband's incorporeal right was thus a valuable asset, and Sinclair and Kaganas observed that the court's recognition that the incorporeal right was an asset in the joint estate 'augured' well for the future.[187]

If the view until then had been that pension and retirement benefits did not constitute property in the joint estate *because* they were incorporeal rights, the view is clearly without merit. Incorporeal rights had long prior to the decision in *Mathee* been recognised as constituting assets in an individual's estate, and in the joint estate.[188] In *Peacock v Peacock NO*,[189] the AD held that 'contractual rights are property in the (deceased) joint estate', confirming a long line of previous provincial decisions on point.[190] The only difference between the contractual right in *Mathee* and *Peacock*, and that in relation to retirement benefits, is that the former involved a contractual right to immovable property, while the latter involves a contractual and statutory right to a movable, namely money.

The generally accepted explanation today is that until the member's right to the benefit has *accrued* to the member, it is not an asset in her estate, and therefore cannot be an asset in the joint estate.[191] It is for this reason that the legislature is thought to have inserted the

[185] Sinclair & Kaganas 'Law of Persons' 1984 *Annual Survey* 85, 96. They welcomed the proposed amendment to the Divorce Act allowing spouses to claim a share of the other's pension interest and recommended that in the interim courts use their discretion to make an adjustment in favour of a spouse who does not yet have direct claim to pension interest.
[186] 1984 (2) SA 543 (C).
[187] (n185) 110.
[188] Cowen (n77) 418, clearly considers incorporeal rights to be proprietary rights in the estate. See further the cases cited in *Peacock v Peacock* (n103), some dating back to 1909.
[189] (n103).
[190] Ibid 140 -141.
[191] *De Kock v Jacobson* (n164) 348 H-I; *Old Mutual v Swemmer* (n163) [17].

reference to pension interest in the Divorce Act, which, by virtue of the s 7(7) 'deeming' provision, is a notional asset specially created to permit its division on divorce. Where did the view, that a pension interest is a notional rather than real asset, originate? It is attributed to the Law Commission report that originally recommended that the Divorce Act be amended to make specific reference to pension interest (1986 report).[192]

The Law Commission in its 1986 report did not, however, conclude that a member's pension interest was not an asset in her estate. The Commission merely stated that this was the view of those who considered the member's pension interest to be nothing more than a bare expectation, given the fact that the eventual value of the pension and the date on which it would become payable was uncertain.[193] The Commission disagreed with this view, and instead concluded that both the member and her dependants did have personal rights against the fund, albeit that the right was 'frozen' until such time as the 'de-freezing contingency', in the form of the member's retirement, resignation or death, occurred.[194] The Commission concluded that the member enjoyed a conditional right to her pension interest.[195] It was not certain, however, whether the member's conditional right formed an asset in the member's estate because the question had not been 'answered categorically by the courts.'[196] It found that the *practice* of courts was that a member's right to her pension interest was typically disregarded in the division of the joint estate.[197] The probable reason was that it was not an 'economically realisable' asset,[198] rather than that it was not an

[192] SALC (Project 41) 1986 Report (n84) para 3.3, which was relied on in *De Kock v Jacobson* (n164) 348 H-I and *Old Mutual v Swemmer* (n163) [17].
[193] Ibid, para 3.3.
[194] Ibid, paras 3.4 & 3.6.
[195] Ibid.
[196] Ibid, para 3.11.
[197] Ibid, para 3.16. In its preliminary working paper, the Commission stated the question of whether pension benefits formed an asset in the joint estate had never been answered by the courts because it was 'generally accepted that the wife is entitled to pension benefits only if she has the status of "wife of the member" upon payment of the benefits'. It is clear, however, that what was under discussion was a pension in the strict sense. The investigation was conducted at a time when the benefit promised by most funds was a monthly pension for life rather than a lump sum. See SALC (Project 41) I*nvestigation into the possibility of making provision for a divorced woman to share in the pension benefits of her former husband* (1984) ('1984 Report') para 3.1.3.
[198] The view expressed by the majority of those who submitted comments to the Commission during its investigation. See para 5.5 of the 1984 Report (n197).

asset. In 1980 a government committee had concluded that 'a person's accrued frozen pension interest is often his most valuable possession – worth more than even his house'.[199]

It was only a decade later that the Law Commission reasoned, incorrectly in my view, that a pension interest was not an asset in the member's estate because the member enjoyed 'at best a personal conditional right'.[200] It was in its subsequent 1995 report that the Commission for the first time expressed the view that a 'pension interest is not a real asset open to division'.[201]

Why a personal conditional right cannot be an asset in one's estate, and why a pension interest is not a real asset, was not explained by the Commission. No court has yet interrogated the correctness of this conclusion. Were the question to come before the courts in the context of a surviving spouse's entitlement following the death of the member, I am of the view that the court would conclude that the Commission's conclusion in its 1995 report is wrong, as a matter of law. If by 'accrue' is meant the date on which the benefit becomes payable, the view that it does not accrue before the date of retirement or death is correct. If by accrue is meant that the right does not yet exist, the view is clearly incorrect. Whatever the intended meaning of accrue, the member does not *acquire* her rights when the right accrues. The date on which it 'accrues' is merely the date on which payment becomes due. Prior to that date, the right is already an asset in the member's estate.

As explained above,[202] a member has a vested and enforceable right to be paid her savings portion when she ceases to be an active member of the fund for any reason. Her right exists throughout her membership of the fund. Her right is an asset in her estate.[203] Her right is,

[199] Quoted in the 1984 Report (n197), 1.
[200] SALC (Project 41) *Investigation into the possibility of making provision for a divorced woman to share in the pension benefits of her former husband: Matters relating to the Divorce Amendment Act 7 of 1989* (1993) para 1.1.
[201] SALC (Project 41) 1995 Report (n167) para 4.1.2.
[202] See §6.3 above.
[203] See *Joint Municipal PF v Grobler* (n76), which also confirms members' entitlement to 'established', i.e. accumulated, benefits in the context of a DB fund.

however, only enforceable at the date on which she retires or on which her membership of the fund ceases if prior to retirement. Her membership automatically ceases when she dies. Her marriage is similarly dissolved by her death.[204] At the moment of her death her existing right to the savings portion accrues. At that moment the joint estate is dissolved. The two occur simultaneously. Her right accrues on her death, not after her death. The savings portion was already an existing asset in her estate prior to death. The practical difficulties occasioned by claiming a half share on divorce, while the member is still an active member of the fund, do not arise. The Divorce Act was therefore only ever necessary to deal with those practical difficulties, which do not occur on death. Just as *Burne NO v Commissioner for Inland Revenue*[205]considered it 'irreconcilable in logic' that a member could be liable for income tax on the lump sum while alive, but that the obligation could be extinguished by s37C, so too it is illogical that a spouse's rights are contingent on the member remaining alive, and that they are automatically extinguished on the member's death by virtue of the operation of s37C.[206]

The Law Commission, furthermore, understands s37C to mean that a surviving spouse, irrespective of marital regime, has a right to share in a member's death benefits.[207] It has thus proposed that s 7(7) of the Divorce Act be repealed and a new statutory regime be adopted granting all spouses a right to share the pension interest on divorce. It believes all surviving spouses enjoy an entitlement to share in the member's death benefits, and that s7(7)'s purpose is to equalise the rights of divorcing spouses and surviving spouses.

A further explanation is that it is difficult to calculate the present value of a retirement benefit on divorce.[208] This was the principle reason that the Divorce Act, when adopted in 1979, did not originally entitle a spouse to claim a share of the member's full retirement benefit on

[204] *YG v Executor Estate Late* CGM 2013 (4) SA 387 (WCC).
[205] 1999 (3) SA 876 (D).
[206] Ibid, 882.
[207] SALC (Project 112) Discussion Paper 77 (1998), para 2.2.4 & 4.1.5.
[208] Ibid. See also *Joint Municipal Pension Fund v Martinus* [2007] 1 BPLR 94 (W), which illustrates the valuation difficulties that can arise, albeit in a non-divorce context.

divorce, but limited her entitlement to the 'pension interest', as defined.[209] Valuation, however, is a problem of practice and implementation, and does not relate to the legal question of whether a member's retirement benefit forms part of the joint estate. It is a problem specific to dissolution of marriage by divorce. It is also a problem encountered mainly in defined benefit funds, rather than defined contribution funds.[210] Even in a defined benefit fund, the valuation difficulties do not arise on the member's death, for there is no possibility of future service, contributions and accumulation or the forfeiture of benefits on withdrawal – the aspects in rules that complicate the valuation of a benefit prior to retirement.

The South African Law Commission accepted in its 1999 report on the 'Sharing of Pension Benefits' that, in defined contribution funds, the division of a retirement benefit is a 'relatively simple exercise because the value of the benefits are readily ascertainable at any time.'[211] The introduction of the concept of 'pension interest' in 1989 was, in any event, in order to address the valuation difficulties. The definition did not remove all the practical difficulties, which is why the 1999 SALC report contained detailed methodology for the valuation of a benefit in a defined benefit fund. The 1999 proposals were never adopted. The pension funds industry and legal practitioners found them complicated and confusing.[212] The report was authored in 1999, before the legislature introduced the 'minimum benefit' provisions into the Act.[213] Whatever the merits of the historic explanation for excluding retirement benefits from the joint estate, which were always doubtful with respect to defined contribution funds, they no longer have any force in relation to either type of fund. While valuation may remain a

[209] Keyser 'Law of Persons and Family Law' 1989 *Annual Survey of South African Law* 1, 3.
[210] See also Bonavich 'Allocation of private pension benefits as marital property in Illinois divorce proceedings' (1979) 29 *De Paul LR* 1. He made the point, in the context of DB funds, that whether a pension benefit constitutes property in a member's estate depends on the particular rules of each fund.
[211] SALC (Project 112) *Report on the Sharing of Pension Benefits* (1999) para 4.8.
[212] Ibid para 4.5 & Annexure A of the report.
[213] Sections 14A&14B were inserted in 2001.

practical difficulty in defined benefit funds, the member's entitlement to an 'established', or vested benefit, is incontestable.[214]

Part of the conceptual difficulties regarding whether the member's benefit constitutes an asset in the joint estate may be linguistic and may stem from the use of the words 'deem' and 'accrue' and 'pension interest'. Because the Divorce Act 'deemed' the pension interest to be part of the joint estate on divorce, the SCA has held that this necessarily implies that the interest would otherwise not form part of the joint estate.[215] It is therefore, in the words of the SCA, a notional or fictitious asset rather than a real asset in the joint estate.[216] However, the use of the word 'deem' does not always imply artifice. As the SCA pointed out in *Mostert NO v Old Mutual*,[217] the word 'can be used to convey that something is what it in fact is not; but it can also be used in the sense of "considered" or "regarded"'. If understood in the latter sense, the deeming provision is merely confirmatory, inserted into the Act to remove any doubt about whether retirement benefits form part of the joint estate. The fact that the Act then limits the spouse's entitlement to the 'pension interest' was to simplify the valuation process at a time when defined benefit funds were common and the valuation of the benefit inherently more complex.[218] It is difficult to understand how an asset can be accepted as forming part of the member's estate and yet be held not to fall within the joint estate. The better view must be that the asset should be specifically excluded, by either the parties or the law, for it not to form part of the joint estate.

The word accrue is similarly used in different senses. In analysing the meaning of the word in the context of the Estate Duty Act, the SCA, in *Commissioner, SARS v Frith's Estate*,[219] clarified that on the one hand, it denotes that someone is 'entitled to' something, on the other that someone has 'actually received' something. The sense in which it is most commonly used in

[214] *Joint Municipal PF v Grobler* (n76).
[215] *Old Mutual v Swemmer* (n163) [18-19]; *Ndaba* (n163) [26].
[216] Ibid.
[217] (n47).
[218] SALC Discussion Paper 77, para 1.2 – 1.3. See also *Old Mutual v Swemmer* (n163) [18]; *Chiloane* (n164), 14.
[219] 2001 (2) SA 261 (SCA) [5-7].

law, particularly revenue law, is the former.[220] Amongst the examples given to explain the nuance is 'alimony which is due but not yet paid' and 'interest which has been earned but not yet paid or *payable*'.[221] In this context, accrued rights are synonymous with vested rights, and the terms are often used interchangeably. In *Marshall v Union Government,*[222] the court was required to interpret the meaning of the phrase 'accruing rights' in the South Africa Act 1909, which contained a provision guaranteeing public servants their 'existing and accruing rights' following the transition to a British Colony. The court held that accruing rights meant 'legal rights, rights which, though they had not yet accrued, would in the ordinary course of events be claimable when they had accrued'.[223] In this context accrued rights are vested rights which are not yet payable.[224] This is the sense in which accrued is used in relation to retirement benefits.[225]

The term 'pension interest' was also introduced at a time when pensions, in the strict sense, were commonly the main benefit promised by a fund.[226] In defined benefit funds in particular, the member would probably have become entitled to a monthly pension on retirement. Were the member to die while in service, a reduced pension would become payable to the surviving spouse and/or dependent children. This was at a time when the member was typically the husband, and the spouse a wife. The eventual pension was calculated according to a formula, based on the member's length of service and average salary during his final year of employment. Some pension fund rules also contained forfeiture provisions. Typically, in such cases, if a member were to resign prior to retirement, she would forfeit whatever contributions the employer had made to the fund, although she would

[220] Ibid.
[221] Ibid [6], quoting from Black's Law Dictionary.
[222] 1917 TPD 371.
[223] Ibid, 376.
[224] The retirement fund industry also understands the word 'accrue', as used in s7(8) of the Divorce Act 70 of 1979, to mean 'becomes due and payable'. See SALC (Project 41) 1995 Report (n167), 33. This is also the sense in which the word is used in the PFA. See inter alia ss1 (definition of fund return) and 14B (valuation of defined benefit).
[225] In Income Tax Case No. 1642 60 SATC 541, the court held that a spouse's 50% share of the pension interest, awarded to her in terms of a divorce order, accrued to her as at the date of divorce, even though it was only payable when her husband withdrew from the fund, which he did only a year later. Since her right had accrued, she rather than her husband was liable for tax on her share of the benefit.
[226] A pension is an 'annual payment for life given in recognition for past services', *Faustmann v GA Fichardt* (n109).

remain entitled to her own contributions. It is little wonder, then, that valuation presented real difficulties prior to the 'pension interest' formulation. In the pension context, any lump sum that was payable by the fund would be of relatively little value when compared to the value of the pension. The spouse's entitlement to share in the member's pension would, on the member's death, have been realised through the spouse's separate entitlement to a pension. Spouses enjoyed this entitlement irrespective of their marital regime. The spouse's right to a separate pension was clearly contingent/conditional on her husband dying while they were still married.[227] What, however, of the member's right to his promised pension, which could only be calculated if the member remained in service until retirement?

In these instances, the member's right to *a pension* would only vest on his retirement. Until then, his right to his final pension was contingent on his remaining in service until retirement. Because his prior right to his, and possibly his employer's, accumulated savings was supplanted by his right to a pension, his right to his own savings was not recognised as a vested right but was similarly viewed as a contingent right. However, his right to his own accumulated savings, and his employer's contributions absent a forfeiture clause, had already vested. He was entitled to payment of those vested rights if he was retrenched, resigned or was dismissed. This was a vested right to a capital payment. On his retirement, his right to the capital payment was extinguished, and was replaced with a right to an income for life. The change occurred with his prior agreement. The term 'pension interest' is naturally associated with the promise of a 'final pension payment', which may have contributed to the confusion. In-house pensions were more common in 1979 than they are now, since defined benefit funds have largely been replaced by defined contribution funds.

Much of the confusion, therefore, stems from longstanding terminological imprecision.[228] The use of the term 'pension fund organisation' in the Pensions Fund Act, when it includes organisations that do not provide pensions, and do not compel their members to purchase

[227] *Kroon v Kroon* 1986 (4) SA 616 (E).
[228] For a discussion on the different meanings of the word 'vested', see *Jewish Colonial Trust* (n77).

pensions with their lump sum payment even on retirement, contributes to the linguistic confusion.

I suggest therefore that retirement benefits do form part of the joint estate by operation of law, albeit that a spouse's entitlement when the marriage is dissolved by divorce is limited to claiming her half share of the pension interest. When the marriage is dissolved by death, the full retirement benefit should form part of the joint estate, even if it exceeds the pension interest. It is, however, doubtful that it will exceed the pension interest in defined contribution funds, given that the pension interest is, essentially, the value of the accumulated contributions.

6.4.2 The insured portion

I have argued that the member's interest in the insured portion of the death benefit is constitutionally protected property. The member has a direct interest in the devolution of that property — in who the ultimate beneficiaries will be. It serves the same purpose as term-life insurance, which is usually to protect the member's dependent family in the event of her untimely death. Unlike the member's savings portion, the member does not have a vested right to the proceeds. The member's right is a contingent right. A question that remains unanswered is what rights, if any, a surviving spouse has to those proceeds. Do the proceeds that are payable under individual life policies automatically fall into the member and spouse's joint estate if they were married in community of property and the member had not nominated a beneficiary?[229]

The prevailing view, amongst academic commentators, is that the proceeds do form part of the joint estate of a policy holder who has insured her own life, in the absence of a valid

[229] In community of property states in the USA, they do form part of the community assets on the death of the insured. See McKnight 'Texas community property law: conservative attitudes, reluctant change' (1993) *56 Law and Contemporary Problems* 71. For a discussion of inconsistent judicial decisions on whether the policy proceeds form part of the holder's estate, see Wood-Bodley (n126).

nomination to the contrary.[230] If the nomination is valid, the spouse is considered to be entitled to an adjustment of the joint estate in her favour, if the nomination has been made without the necessary spousal consent.[231]

Case law, however, casts doubt on the correctness of these propositions. The principal cases in point have all arisen in the context of wives who have been convicted of the unlawful killing of their husbands. In *Nell v Nell*,[232] the court held that the spouse was not entitled to the life insurance proceeds, even though it held that she was otherwise entitled to her half share of the joint estate.[233] The court did not explain the basis of its exclusion of the proceeds, or why the joint estate did not include the proceeds as an automatic consequence of the marriage. In *Leeb v Leeb*,[234] the court similarly held that the spouse was not entitled to the policy proceeds, once again without considering whether the proceeds formed part of the joint estate. The court, however, doubted that a murderous spouse was entitled to her half share of the joint estate as of right, and held that it was competent to order that she forfeit the benefits of the marriage, in order to prevent her profiting from her own crime.

The only case to deal directly with the question of whether the proceeds of life insurance policies fall into the joint estate is *Danielz NO v De Wet*.[235] In this case, a murderous spouse

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[230] Wood-Bodley (n126); Henckert 'The life assurance policy, beneficiary clauses and marriage: a few aspects' 1994 *TSAR* 513; Van Niekerk 'Life insurance beneficiaries' (Part 1) (2007) 15 *Journal of Business Law* 110; Van Niekerk 'Life insurance beneficiaries' (Part 2) (2007) 15 *Journal of Business Law* 144. See also Long-Term Insurance Ombud Final Determination *CR274* (October 2009) in which the spouses had affected a 'joint life' policy, payable on the death of the first dying. The Ombudsman held that the spouses were joint owners of the policy, and that the survivor was therefore entitled to half the proceeds, while the estate was entitled to the other half. The same should apply if they are joint owners by their marriage in community of property. See further *Van den Berg v Van den Berg* [2004] JOL 12404 (T) [10-11], in which the court accepted that insurance policies normally form part of the joint estate, unless the proceeds are compensation for non-patrimonial loss.

[231] Matrimonial Property Act 88 of 1984, s15(9)(b). Spousal consent is only required where the policy was taken out, and the nomination made, during the marriage. See Long-Term Insurance Ombud Final Determination *CR298* (March 2011). No such consent is required where the policy was taken out, and the nomination made, prior to the marriage. See *Hees v Southern Life Assoc Ltd* [2000] JOL 5928 (W) – the reason is that the 'alienation' occurred prior to the marriage, and the joint estate is also liable for debts incurred prior to the marriage. Under ordinary contractual principles the nomination should be valid and not require ratification, since the policy is a *stipulatio alteri* concluded before the marriage.

[232] [1976] 4 All SA 11 (T).

[233] On the basis that her entitlement to half the joint estate arose by virtue of the marriage, and that it was not a benefit she was deriving from her crime – the *bloedige hand* principle did thus not apply.

[234] [1999] 2 All SA 588 (N).

[235] 2009 (6) SA 42 (C).

was the nominated beneficiary of the policy. Traverso J held that public policy required that she forfeit her contractual right to the proceeds, [236] which is in keeping with the *bloedige hand* principle in the law of succession.[237] Since her nomination as beneficiary was ineffective, the policy proceeds automatically fell into the deceased's estate, as the contingent beneficiary. As an alternate ground on which to lay claim to a share of the policy proceeds, the spouse argued that the proceeds were an asset in the joint estate, and that she was therefore entitled to half by virtue of her marriage in community of property. Traverso J rejected her claim on this basis also. Rather than holding that public policy requires that a murderous spouse forfeit the benefits of the marriage, Traverso J instead held that the proceeds of life insurance policies do not form part of spouses' joint estate, but only ever form part of the deceased's separate estate. Traverso J's reasoning was that death automatically terminates marriage and brings the joint estate to an end, while the right to the proceeds arises only *after* the death of the insured policy holder. As such, since the asset (the proceeds) only came into existence after the marriage had been terminated, it could not fall into a non-existent joint estate.[238]

Traverso J is quite correct in asserting that prior to the holder's death, the proceeds did not form part of the joint estate. What fell into the joint estate was, at most, the policy itself.[239] However, the joint estate was the default beneficiary. The joint estate had a 'contingent right' to the proceeds (as discussed in the previous section). The moment the policy holder died, absent a valid nomination, that right vests. The right does not arise after the holder's death. It arises at the same time as the holder's death.[240] The estate's position is quite distinct

[236] Paragraph 33.
[237] As a result of which she also forfeited her right to inherit from her husband's estate. See para 37.
[238] Paragraph 43.
[239] See Wood-Bodley (n126), 227 and his discussion of the conflicting case authority on point. The language of ownership creates confusion. The policy is simply a contract setting out the rights and duties of the parties. The rights in the policies may be exercisable by one spouse alone, or they may require consent or joint decision-making (eg nominating a beneficiary or changing the nomination). This is a pure personal right. The rights in the policy may also entitle one spouse, or both via the estate, to receive the proceeds. This also a contractual right, but it is proprietary in nature. The right may also include the right to surrender the policy and obtain its surrender value. This too is a contractual right that is proprietary in nature. This too may be exercisable by only one or both spouses, but either way, since it is a right to payment of money, the money so paid must be part of joint estate.
[240] See also *Madore-Ogilvie v Ogilvie Estate* 232 OAC 152 (Canada) [29].

from that of the nominated beneficiary, who are usually thought to enjoy no more than a *spes* to the proceeds prior to the insured's death.[241] While it may be correct that a nominated beneficiary must 'accept' the benefit, *viz* the right to the proceeds, before becoming entitled to payment, the same is hardly true for the member's estate. In the absence of any nomination, the beneficiary is automatically the estate. The contract is not, in these circumstances, a contract for the benefit of a third party. It is not a *stipulatio alteri* that requires acceptance. It is a contract that is essentially for one's own benefit, i.e. one's estate. That estate is the joint estate. Death triggers both the termination of the marriage with the resultant dissolution of the joint estate, *and* the right to payment of the proceeds. Death and vesting are simultaneous events. They occur concurrently not sequentially, and there is no basis for introducing an artificial sequencing into these events.

In reaching her decision, Traverso J appears to have ignored the views of the majority of commentators and established practice, and possible public policy arguments for depriving the spouse of her share of the joint estate.[242] The decision in *Danielz* has been criticised by academic commentators.[243] It would be highly inequitable if the actions of a murderous spouse could resonate so far beyond the confines of the case, to the clear detriment of innocent spouses who are thereby, for no fault of their own, deprived of the benefits of their marriage.

The proceeds of individual life insurance policies are a protected asset in terms of the Long-Term Insurance Act.[244] As such, the proceeds cannot be used to pay the debts of a policy holder when she is survived by a spouse, child, step-child or parents to whom the proceeds

[241] See Henckert (n230) at fn11, who suggests that provided the insurance policy does not expressly contain a clause stating that the beneficiary acquires no rights, the beneficiary will be entitled to 'accept' the benefit before the insured's death and will then acquire a contingent right to the proceeds. The right is contingent on the holder not revoking the nomination prior to the insured's death. Reinecke & Nienaber (n115) take it even further. They are of the view that the nominated beneficiary acquires a contingent right immediately, which is conditional on non-revocation and acceptance.
[242] Wood-Bodley (n126); *Leeb v Leeb* (n234); Bonthuys 'The rule that a spouse cannot forfeit at divorce what he or she has contributed to the marriage: an argument for change' (2014) 131(2) *SALJ* 439.
[243] Wood-Bodley (n126).
[244] Act 52 of 1998.

devolve on her death.[245] If the conclusion in *Danielz* is correct, it means that a spouse must either be the nominated beneficiary, a testate or an intestate heir in order to enjoy the protection afforded by the Long-Term Insurance Act. If the policy proceeds fall into the separate estate of the deceased, and the deceased has bequeathed her entire estate to third parties, the survivor will have no claim to share in the proceeds, and no part of the proceeds will be protected against creditors. Since a spouse's claim ranks behind those of creditors under the Maintenance of Surviving Spouses Act,[246] she will enjoy no protection whatsoever.

The decision in *Danielz* is, in addition, inconsistent with the requirement that a spouse, married in community of property, requires the consent of the other spouse if she wishes to nominate a third-party as the beneficiary of a life insurance policy taken out during the existence of the marriage.[247] It also makes no sense that the value of a spouse's retirement benefit and the surrender value of life insurance policies can be taken into account in valuing their separate estates when married out of community of property, for the purpose of making a redistribution order, but that they are excluded from community assets.[248]

If the view that the proceeds of individual life insurance policies fall into the joint estate in the absence of a nominated beneficiary is correct, would the same hold true for proceeds payable under group life insurance? The answer is that they would, but for s37C. To the extent, therefore, that the lump sum consists, in whole or in part, of the proceeds of a group life policy, the effect of s37C is again to deprive a spouse married in community of property of that to which she would otherwise have been entitled.[249]

[245] Ibid, ss63(1) and (3).
[246] Act 27 of 1990.
[247] See discussion (n231).
[248] See *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA), where these were included amongst assets listed by each spouse.
[249] See *Jenkins v Denel* [2003] 10 BPLR 5210 (PFA), where the savings portion funded the pension, and the insurance portion funded the lump sum.

6.5 DIGNITY AND EQUALITY RIGHTS: SPOUSES AND CHILDREN

6.5.1 Spouses

The Pensions Fund Act infringes some spouses' right to equality[250] and, in doing so, their right to dignity.[251] Section 9 provides that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'. Section 10 in turn provides that '[e]veryone has inherent dignity and the right to have their dignity respected and protected'.

How does s37C violate these fundamental constitutional guarantees? It does so by treating divorcing and widowed spouses differently, to the potential detriment of the latter.[252] The Divorce Act entitles a spouse, married in community of property or with the accrual system, to share in the member's pension interest on divorce.[253] As the SCA confirmed in *Ndaba*,[254] divorcing spouses have a right to share in the pension interest automatically, by operation of law. However, should the member die while in service, s37C apparently extinguishes widowed spouses' rights. This is how s37C has been interpreted by the Adjudicator.[255] Similarly, had the divorce or death occurred after retirement, the retirement lump sum would already have fallen into the member's estate or the joint estate, and the parties' matrimonial regime would have determined the spouse's right to share in the benefit.

In *Minister of Communications v Ngewu*[256] the CC declared the Post Office retirement fund rules unconstitutional for not permitting a divorced spouse immediate access to her pension interest, in contrast to her rights under the Pension Funds Act and Government Employees

[250] FC, s9.
[251] FC, s10. On the relationship between equality and dignity, see *Dawood* (n10) [35]; Cowen 'Can dignity guide South Africa's equality jurisprudence' (2001) 17 *SAJHR* 34; Ackerman 'Equality and non-discrimination: some analytical thoughts' (2006) 22 *SAJHR* 597.
[252] See eg *Sarrahwitz v Maritz* 2015 (4) SA 491 (CC), in which provisions of the Alienation of Land Act 68 of 1971 were declared an unconstitutional violation of s9(1) because they protected only one class of vulnerable home buyers, viz instalment buyers, and did not protect other equally vulnerable buyers who paid in a lump sum or who made annual payments only.
[253] See §6.3.2 above.
[254] (n163).
[255] *Sakildien v Cape Municipal PF* PFA/WE/6643/05/CN, and cases (n154).
[256] 2014 (3) BCLR 364 (CC).

Pensions Law.[257] The CC held that the differentiation was irrational, and a violation of s9(1)'s promise of equality before the law, and the equal protection and benefit of the law. The CC emphasised that the spouse's inability to access the pension interest was causing her great hardship. The hardship a surviving spouse will suffer is no less than that of a divorcing spouse.

What is the justification then for depriving a spouse to the property to which she is otherwise entitled by the law of marriage? It is presumably that the death benefit will be utilised to support the member's dependants, including the spouse. The death benefit is usually also larger than the savings portion, so the sum she is allocated by the trustees may well still be equal to or greater than the 50% pension interest to which she would have been entitled on divorce. There is, however, no assurance that she will receive the share to which she would otherwise have been entitled as of right. Is this rational or irrational differentiation?

There is no rational connection between the difference in treatment and s37C's purpose of protecting the member's dependants. Consider the following examples. Imagine that a member's accumulated retirement benefit, or savings portion, was R 3 million. The entire sum was accumulated during the marriage. In the first example, the member and spouse divorce, upon which the spouse becomes entitled to half the member's pension interest. The day after the divorce, the member dies. The spouse has received her half share, and only the member's half share is available for distribution to the member's dependants. It may be supposed that the spouse will fall out of the circle of dependants following the divorce, but that is not necessarily the case. The member's dependants may still include the spouse, if a maintenance order was awarded in her favour.[258] In the second example, the member and spouse are still married when the member dies. They may even be in the process of divorcing. If happily married, or if divorce proceedings have been instituted but not yet finalised, the spouse immediately loses her right to share in the member's savings portion. The

[257] The PFA does not automatically apply to public funds. See PFA, s4A.
[258] *Lombard v CRAF* [2003] 3 BPLR 4460 (PFA); *Muller v CRAF* [2014] 2 BPLR 265 (PFA).

entire savings portion, the full R3 million, can potentially be distributed amongst the member's other dependants, to the exclusion of the spouse.

The arbitrariness of the differential treatment between the position of a spouse whose marriage is terminated by divorce versus death is illustrated by *YG v Executor, Estate Late CGM*[259] and *Ex Parte Meyer NO: In re Meyer v Meyer*.[260] In both cases spouses had instituted divorce proceedings. Before the divorce was granted, one died. The courts in both cases held that the marriage had been terminated by death; as such, they could not continue with the divorce proceedings, with the executor of the deceased estate standing in for the deceased. *Litis contestatio* was irrelevant, because a marriage terminates automatically on the death of one spouse. A spouse can claim pension interest as part of a divorce claim, but she loses her claim the moment her spouse dies.[261]

The only possible justification for the difference in treatment is that following a divorce, the member is still alive, and still earning occupational income with which to support her dependants.[262] The supposition may therefore be that her day to day ability to continue providing support for her dependants is unchanged. The same is not true after her death, when the death benefit may be the only source of future income for her dependants.

However, as the cases above show, whether the supposition is true depends on how long the member survives following a divorce. Even in those cases in which it is true, it is an inadequate justification. It effectively transfers part of the member's obligation to support her

[259] 2013 (4) SA 387 (WCC).
[260] 1962 (2) SA 688 (D), discussed and approved by Heaton 'Family Law' 2013 *Annual Survey of South African Law* 425.
[261] As happened in *Sakildien* (n255). Divorce proceedings were underway, and the fund acknowledged that had it been finalised, the spouse would have received 50% of the member's savings portion. As it was, the fund awarded her 10% of the death benefit.
[262] See *Hodges v Coubrough* 1991 (3) SA 58 (D), 305, in explaining why maintenance orders terminate on the death of the payor spouse, absent an express agreement to the contrary: 'Maintenance is payable by and large from the income of the party paying it, and its rate is normally fixed in relation to that. But the income of most people consists mainly of what they earn by working, which stops as soon as they die.' The impact on the member's heirs, should the deceased estate become liable for the maintenance until the recipient's death, is likely to be considerable.

dependants onto her spouse — an act 'tantamount to expropriation'.[263] It sanctions the unequal treatment of a class of spouses, those suffering a bereavement, in order to protect the member's dependants, to whom the spouse may not be related, and with whom the spouse may have no relationship. A spouse whose marriage has been dissolved by death has fewer rights, and less protection, than a spouse whose marriage has been dissolved by divorce.

Section 37C does protect spouses' who have no proprietary claim on the member's death, namely those married out of community of property. However, had the benefit formed part of the estate, all spouses, irrespective of marital regime, would have had a potential maintenance claim against the death benefit under the Maintenance of Surviving Spouses Act (MSSA).[264] The disparity in treatment becomes even more pronounced when one considers that s37C effectively extinguishes many spouses' statutory right to maintenance. It does so because death benefits are many members' only, or most valuable, asset. Section 37C therefore has a doubly negative effect on a sub-set of spouses: their existing property right is extinguished, and there is no further estate from which to claim maintenance. The right to maintenance created by the MSSA is thus the preserve of spouses whose partners had accumulated a meaningful estate.

It may be argued that the MSSA goes too far in protecting surviving spouses at the expense of the member's other dependants and designated heirs. It appears to give the surviving spouse a *right* to maintenance,[265] provided only that she can prove that her own means are insufficient to meet her reasonable maintenance needs.[266] It does not appear to afford

[263] *Madore-Ogilvie v Ogilvie Estate* (n240).
[264] Act 27 of 1990.
[265] *Oshry v Feldman* (n122).
[266] See *Friedrich v Smit* 2017 (4) SA 144 (SCA), in which the spouse's claim failed because she did not provide evidence that she was in need of maintenance. The Master, HC and HCA had all, however, accepted that she was *entitled* to maintenance although they were unable to determine the amount. The SCA rejected their view and held that proof of need is a condition to entitlement. The determinants of need have not been properly canvassed by the courts.

courts a discretion, to order such maintenance as they consider equitable.[267] In preferring a surviving spouse's right in this fashion, it provides a greater entitlement to surviving spouses than it does to divorced spouses, although the legislature's intention had been to equalise the rights of surviving spouses with those of their divorcing counterparts. While the MSSA may well cause injustice in its operation such that it too should be revisited, its existence highlights the disparities in legal recognition and protection accorded one set of surviving spouses over others.

Section 37C thus deprives spouses of any proprietary right to share in the benefit that they would have enjoyed by virtue of the marriage. It deprives all spouses of their right to claim maintenance from the deceased estate, to the extent that there is no longer any, or sufficient, estate from which to claim. The impact that s37C thus has on a large proportion of widowed spouses is not mere differentiation. This is unfair discrimination. To the extent that she receives a smaller share of the death benefit than she otherwise would have, her right has been subordinated in the interests of the member's other dependants.

This subordination of a sub-set of spouses' rights impairs not only their right to equality, but their right to dignity. It is not only their economic rights and interests that are impaired. They are effectively told that neither they as individuals, nor their marriage to the member, are deserving of the same respect accorded to other spouses and other marriages.[268] That goes to the heart of dignity. They are being treated 'differently in a way which impairs their

[267] MSSA, s2(1). See also *Van Niekerk v Van Niekerk* [2011] 2 All SA 635 (KZP), which appears to accept that a young spouse is entitled to such support as will enable her to maintain her marital standard of living, provided only that the estate is large enough to accommodate her full claim. The role played by the duration of the marriage, the spouse's prospective means and ability to earn her own income and the like are not mentioned as relevant considerations.

[268] See *Mayelane v Ngwenyama* (n158) [80-81]. See eg *Pandlev v South African Authorities* [2015] 3 BPLR 440 (PFA), in which the deceased was survived by his widow and their minor daughter aged 14. His death benefit was R 406 000. He was also survived by two girlfriends and four minor children not born of his marriage. His widow and daughter were allocated 30% of the benefit. The widow complained to the Adjudicator, seeking 50% of the benefit as the member's wife (which was dismissed). Amongst her complaints was that she felt the fund had not treated her 'fairly and with dignity as the wife of the deceased'.

fundamental dignity as human beings'.[269] They become, on the member's death, mere means to an end.

6.5.2 Children

Section 37C also impairs children's rights. Children do not have proprietary rights to share in a parent's estate. They do, however, have a right to claim maintenance from the estate if they were dependent on the deceased. The law prioritises children's rights, particularly minor children.[270] The courts have long accepted that needy children, both minor and major, have a common law right to claim maintenance from a deceased estate.[271] The rights of minor children now enjoy statutory recognition and protection.

Section 28 of the Constitution explicitly entitles every minor child to 'family care or parental care',[272] and confirms that 'the child's best interests are of paramount importance in every matter concerning the child.'[273] Trustees and Adjudicators are bound to protect, promote, fulfil and respect children's rights under s28 of the Constitution. They are, moreover, obliged to consider international law when interpreting the BoR.[274]

The Children's Act[275] and the Maintenance Act[276] seek to give effect to children's constitutional rights. The Children's Act places an obligation on each parent to contribute to the child's maintenance;[277] it recognises that children have a right to be treated fairly and equitably in any decision that affects them;[278] and it seeks to give effect to South Africa's

[269] *Harksen v Lane* 1997 (11) BCLR 1489 (CC) [46].
[270] As it does in most jurisdictions. See as one example the statutory protection of children's inheritance rights in Zambia, and the vigilant role courts are expected to play in securing their rights, discussed in Himonga 'Protecting the minor children's inheritance rights' 2001 *International Survey of Family Law* 457.
[271] *Carelse v Estate De Vries* (1906) 23 SC 532.
[272] Constitution of the Republic of South Africa 1996 (FC), s28(1)(b). Section 28 applies to children below the age of 18 only, see s28(3).
[273] Section 28(2).
[274] FC, s39(1)(b).
[275] Act 38 of 2005. The Act defines a child as a person below the age of 18 (s1).
[276] Act 99 of 1998.
[277] Section 18(2)(d).
[278] Section 6(2)(c).

international obligations.[279] The Children's Act recognises that it is parents who have a duty to support their children.[280] Parents are a child's biological or adoptive parents.[281] A non-parent who voluntarily cares for a child is subject to certain parental responsibilities, but those responsibilities do not establish an ongoing legal duty of support.[282]

The Maintenance Act only applies in circumstances in which one person is under a legal duty to support another.[283] Any one of a member's legal dependants would thus be entitled to claim maintenance under the Act while the relative who owes them a duty of support is alive.[284] Were a maintenance order to be granted, a retirement fund would be obliged to give effect to that order if directed to do so by the court.[285] A court is, moreover, obliged to issue a direction to the fund when the member has been convicted of defaulting on an existing maintenance order. When a fund is obliged to give effect to both a maintenance order and an order requiring that the fund pay a divorced spouse's pension interest, priority must be given to the maintenance order if the benefit is insufficient to satisfy both claims.[286]

Any person legally entitled to be maintained may apply to court for a maintenance order, but the Act singles out minor children for special mention. The preamble to the Act recognises that children enjoy special protection under international law. It specifically

[279] Section 2(c). The preamble to the Act identifies the main international instruments as the Universal Declaration of Human Rights, the Geneva Declaration on the Rights of the Child, the UN Declaration and Convention on the Rights of the Child, and in the African Charter on the Rights and Welfare of the Child.
[280] Section 18(2)(d).
[281] Section 1, definition of 'parent', which expressly excludes biological parents who are such only because they donated gametes for the purpose of artificial insemination. The law is incrementally recognising that parent-child relationships can arise in circumstances other than through birth and adoption (both in terms of the Children's Act or customary law). Those instances are rare but should be recognised and protected where they exist. See eg *RAF v Mohohlo* 2018 (2) SA 65 (SCA).
[282] Section 32(1). The parental responsibility to protect the child from maltreatment and neglect may of course require the caregiver to provide for the child while in their care, but it cannot establish an ongoing and indefinite duty of support. See also *MB v NB* 2010 (3) SA 220 (GSJ), in which an obligation to contribute towards school fees was based on the defendant's promise to do so in circumstances in which the defendant had held himself out to be the child's father and the mother and child's reliance on that promise was reasonable.
[283] Section 2.
[284] There are conflicting decisions on whether maintenance courts have jurisdiction to order executors to pay maintenance for minor children from deceased estates. Cf *NB v Maintenance Officer, Butterworth* 2014 (6) SA 116 (ECM) and *Du Toit v Thomas* 2016 (4) SA 571 (WCC).
[285] Sections 16 (2) and 31.
[286] PFA, ss 37D(1)(d) and (3)(b).

acknowledges that the state has given priority to fulfilling the rights of children. It makes special mention of the state's obligations, under the UN Convention on the Rights of the Child, [287] to secure children's right to maintenance that is adequate for their physical, mental, spiritual, moral and social development,[288] while acknowledging that South Africa is 'possibly' falling short in this regard.[289] The Convention obliges states to take 'all appropriate legislative, administrative, and other measures' to secure the implementation of children's rights,[290] and requires that the bests interests of the child be the paramount consideration in all matters affecting the child.[291] Coincidentally, the year the Convention was adopted by the General Assembly, 1989, was the same year the definition of dependant was changed in the Pension Funds Act, to include, amongst others, persons the deceased was legally liable to maintain. Previously, the only dependants entitled to share in the death benefit were the deceased's financial dependants. Prior to 1989, a child whom a parent was legally liable to maintain, but was not maintaining, would not have been entitled to share in the death benefit, unless the fund rules made specific provision for that child.[292]

Despite the legislature's remedying this potential inequity through its amended definition, and despite the international, constitutional and other legislative recognition given to the singular rights of the child, no special mention has been made of their rights in Adjudicator determinations. This is not to say that trustees and the Adjudicator do not in practice prioritise the interests of minor children. They do.[293] The primacy of parental obligations to minor

[287] The Convention was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990. South Africa signed the Convention in 1993 and ratified it on 16 June 1995.
[288] See Art 27.
[289] The preamble also envisages that the Act will be a temporary measure, pending the reform of the entire maintenance system. In *Bannatyne v Bannatyne* 2003 (2) SA 323 (CC) [26-27], the CC observed that the maintenance system was still not functioning efficiently, a state of affairs which undermines the rule of law. See also 'Maintenance courts fail SA's children' *Mail & Guardian* 4 June 2015.
[290] Article 4.
[291] Article 3.
[292] For the original definition and all subsequent iterations, see: Act 101 of 1976, s 21(a); Act 80 of 1978, s 10(b); Act 51 of 1988, s3 (did not come into effect); Act 54 of 1989, s 20; Act 22 of 1996, s1(b). The one difference between the 1989 and current definitions is that children were not included amongst the paragraph (b) statutory dependants. They were only included as such in the 1996 amendment. Interestingly, the 1988 amendment which did not come into operation included children as statutory dependants but not spouses.
[293] See eg *Kipling v Unilever* [2001] 8 BPLR 2368 (PFA); *Phashe v Metro Group* [2003] 9 BPLR 5123 (PFA).

children does not receive special mention, however. Instead, the Adjudicator's stated position is that trustees should not, as a matter of course, prioritise legal dependants over financial dependants.[294] No specific exception is made for minor children. Trustees and the Adjudicator appear to interpret s37C as overriding even the constitutional commitment made to children. The result, in some instances, is that the trustee decisions prioritise beneficiaries towards whom the deceased did not owe a legal duty of support, ahead of the deceased's minor children to whom she owed a paramount duty of support, both legally and morally.[295]

By way of example, the Adjudicator has upheld the decision of trustees to award a larger share of a death benefit to the unborn child of a cohabiting partner rather than to the deceased's minor children.[296] They did so in circumstances in which the deceased may not have been the biological father, and thus under no legal duty to maintain the child.[297] The Adjudicator approved the trustees' reasoning that legal dependants have no greater entitlement than factual dependants, and that what mattered was that the unborn child would have become a financial dependent in the future, even though the Act clearly applies only to existing financial dependants.

Similarly, the Adjudicator dismissed a complaint brought on behalf of a minor child on the basis that the child, about 8 years old, had not been financially dependent on the deceased. The circumstances were that the child was born of a cohabitation relationship, the surviving spouse had alerted the trustees to the child's existence, but they had been unable to trace the mother. The trustees had nevertheless allocated a share to the child. They retained the child's share for about a year before deciding to pay it to the surviving

[294] See §3.2.1 & 4.8 above.
[295] The Children's Act places an obligation on parents to 'contribute to the maintenance of their children' (n277). It does not condition their duty to do so on the existence of a legal duty to support their children, which arises only if the children need support. The Maintenance Act, however, applies only in circumstances in which a legal duty of support is owed. It is of course only in very exceptional circumstances that minor children will not need financial support.
[296] *Koopman v Municipal Gratuity Fund* [2010] 1 BPLR 100 (PFA).
[297] The minor children's mother disputed the paternity of the unborn child, but no mention was made of either the ss 36 (presumption of paternity) or 37 (paternity testing) in the Children's Act.

spouse. It was shortly thereafter that the child's mother came forward to lodge a claim on behalf of the child. Her argument, that the trustees should have retained the child's share instead of paying it to the surviving spouse, was summarily dismissed, only on the basis that the child had not been financially dependent on the deceased. No mention was made of the child's best interests, the deceased's paramount duty of support towards the child, or, conversely, what steps funds should take in such circumstances to protect children's rights.

The Adjudicator has also berated trustees for allocating 90% of a tiny benefit to the deceased's three minor children, without first investigating whether they had been financially dependent on the deceased, while allocating only 10% to the deceased's sister, who had four minor children of her own to support, and 0% to the deceased's mother.[298] The relevance of their actual financial dependence on the deceased is not clear. What matters is whether he should have been supporting them. His obligation to support them before all others was seemingly irrelevant and trustees were not entitled to assume, despite the circumstances, that they were in any need of future support.[299]

The Adjudicator has also accepted the equitability of a trustee decision that awarded 75% of a benefit to a surviving spouse and only 25% to the deceased's three minor children of a first marriage, his nominated beneficiaries, who were living with him, and financially dependent on him.[300] They did so even though the surviving spouse was not obviously in need and the deceased did not have a large separate estate to provide for the children's maintenance needs. It is significant too that 50% of the gross death benefit was used to purchase the spouse a pension for life, with only the remainder, after tax and other deductions, shared

[298] *Khoza v Metal Industries* [2012] 1 BPLR 47 (PFA).
[299] *Baloyi v PPWAWU* PFA/NP/11689/2006/LTN. The benefit was R73 800. Cf *Gowing v LRAF* [2007] 2 BPLR 212 (PFA), where the deceased had nominated his sister as the beneficiary of his small benefit, despite which the trustees allocated the sum to his minor children. The trustees' decision was set aside because the deceased had made ample provision for his children. It is extremely improbable that this was so in *Baloyi*, given the deceased's means and the extent to which his other family members were also dependent upon him.
[300] *Ellis v MEPF* (n31). The spouse was the complainant, so the Adjudicator would not have been able to set aside the trustee decision to benefit the children. The trustees' decision was consequently upheld, but apart from mentioning that the deceased had been under a legal duty to support his children, the primacy of that obligation was not mentioned. The message to trustees was thus that their decision was equitable in the circumstances.

between the spouse and children. It is significant because the spouse was not entitled to the pension as of right in terms of the fund rules. The deceased had not notified the fund in writing that he had a spouse, to whom he had been married for less than five years (the exact duration is not stated). As such, the decision to award the spouse a pension was within the discretion of the trustees, which they exercised in her favour, even though there is some suggestion that she and the deceased may have been estranged.[301] Once again, had the death benefit been part of the estate, the children's right to maintenance would have been prioritised over that of other dependants, with the exception of the surviving spouse. Under the Maintenance of Surviving Spouses Act, a spouse's claim ranks equally with a child's claim. If their claims compete, both must be reduced proportionately, which is not what occurred in this case. In this instance, therefore, s37C worked to the benefit of a spouse and to the clear detriment of the deceased's minor children.[302]

Section 37C appears to give trustees the freedom to prioritise the needs of other dependants over the rights of the member's children. It is not clear to what extent the equitability of trustee decision-making should be informed by, and is subordinate to, children's rights to be treated fairly and equitably in all decisions that affect them. The paramountcy principle, which requires that the best interests of the child be the primary consideration in all matters affecting the child, does not assist trustees when the competing beneficiaries include children who are not the member's biological or adopted children. When trustees and the Adjudicator fail to recognise the primacy of a parent's duty to support a child, they are simultaneously failing to acknowledge the primacy of the *relationship* between a parent and child.[303] This not only affects children's rights to parental

[301] See [4.1.17].
[302] There is again no mention of the spouses' marital regime.
[303] The legal rights and responsibilities that arise from the parent-child relationship transcend the financial. They pertain to the child's emotional and psychological development and well-being. The UN Convention on the Rights of the Child recognises this in various places: the preamble, which recognises that 'the family is the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children'; Art 7, which provides that children have the right to know, and be cared for, by their parents; Art 9, which recognises the right not to be separated from parents, and to maintain contact with parents if they are separated; Art 18, which emphasises that parents are primarily responsible for the upbringing and development of the child.

support – it also impairs their right to dignity, by failing to recognise and acknowledge the importance of the relationship from the perspective of the child.

6.6 THE MEMBER'S RIGHT TO DIGNITY

The right to dignity occupies centre stage in the Constitution. The CC has repeatedly emphasised that the right to dignity (and life) is the 'most important' of all the Constitutional rights, that it is the 'source' of all the specific rights in the Bill of Rights, and that it is not only a fundamental constitutional value but also a 'justiciable and enforceable right that must be respected and protected'.[304]

Section 37C clearly limits a member's freedom of testation. In so doing, it infringes the member's right to property. The infringement is not limited to the right to property, however. It also limits the member's right to dignity. .[305] Numerous cases have recognised that limiting an individual's freedom of testation is a separate violation of both the right to property and the right to dignity.[306]

The right to make bequests, or to dispose of property, in the *abstract* is part of one's proprietary right. The right to make *specific* bequests to individuals of one's choosing as an expression of love, affection, appreciation or even obligation, is central to dignity.[307] It is a particular violation of a member's dignity when her wishes are discounted, and her wishes are not only entirely reasonable and in conformity with the wishes of many, if not most

[304] *S v Makwanyane* 1995 (3) SA 391 (CC) [144]; *Dawood* (n10) [35]; *Mayelane v Ngwenyama* (n158)[68].
[305] *Mayelane v Ngwenyama* (n158) [73]: '[T]he right to dignity includes the right bearer's entitlement to make choices and to take decisions that affect his or her life - the more significant the decision, the greater the entitlement. Autonomy and control over one's personal circumstances is a fundamental aspect of human dignity.'
[306] *BOE Trust Ltd* 2013 (3) SA 236 (SCA); *Harper v Crawford* 2018 (1) SA 589 (WCC); *King v De Jager* 2017 (6) SA 527 (WCC); *Harvey v Crawford* 2019 (2) SA 153 (SCA).
[307] *Harvey v Crawford* (n306).

people, but are also consistent with the legal and moral obligations she owed to family members in life.[308]

In the context of freedom of testation, the right to property and the right to dignity are intertwined. Individuals use their testamentary power to benefit people or causes they hold dear. The association between the right to property, as expressed in the individual's freedom of testation, and the right to dignity, has been most clearly acknowledged in the SCA decision in *BOE Trust Ltd*.[309] The High Court had held only that freedom of testation in South Africa is protected by the constitutional right to property,[310] and that the right to dispose of property after death is a natural extension of the owner's right to dispose of property in life; it is a necessary and inevitable incident of ownership.[311] On appeal, the SCA extended the ambit of constitutional protection, holding that freedom of testation was protected both by the right to property and the right to dignity:

> Indeed, not to give due recognition to freedom of testation will, to my mind, also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away.[312]

In turn, statutory limitations on freedom of testation limit both the right to property and the right to dignity. In its judgment, the SCA quoted Du Toit, who has said that:

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[308] In *Dawood* (n10) [37], the constitutional court held that the right to enter into and sustain a marriage or marriage-like relationship is of 'defining significance' for most people and is protected by the right to dignity. Any legislation which 'significantly impairs' their ability to honour their legal obligations towards each other would similarly violate their right to dignity.
[309] *BOE Trust* (n306).
[310] *Ex Parte BOE Trust Ltd* 2009 (6) SA 470 (WCC) [9].
[311] Para 26. Cf the views expressed by numerous courts in the USA, that the right to make a will and the right to inherit is not a natural or fundamental right but one which derives from statute, and that it is the sovereign who is the natural successor to a decedent's property. The US view has been attributed to the views of Blackstone and Pufendorf, which are contrary to the views of Grotius and Maine. See the discussion by McMurray 'Liberty of testation and some modern limitations thereon' (1919–1920) 14 *Illinois LR* 96, 99 where he (seems) to suggest that the view is out of step with modern social and economic norms and leads to 'seriously confuse[d] legal thinking'.
[312] See paras 26–27.

> Freedom of testation is considered one of the founding principles of the South African law of testate succession: a South African testator enjoys the freedom to dispose of the assets which form part of his or her estate upon death in any manner (s)he deems fit.[313]

Death benefits do not form part of the assets of a member's estate for the simple reason that the legislature removed them from the member's estate, and therefore control, by enacting s37C. The fact that it is not technically an asset in the estate cannot save s37C from judicial scrutiny for the simple reason that, but for s37C, it would be an asset, and quite possibly the most valuable asset, in the member's estate. It is not enough to say that the member's freedom of testation, in respect of other assets, is preserved. The member may have no other assets. It is the content of the right that matters, not the packaging. An egg, with the yolk and albumen removed, is not an egg – it is the empty shell of an egg.

Some argue that freedom of testation lies in the realm of property law, while limitations on freedom of testation lie in the realm of family law.[314] The argument that then follows is that an individual's family obligations are more important than their rights in and to property. This argument is an over-simplification. Most testators use their testamentary power to benefit family members.[315] In most instances, their testamentary choices affirm rather than deny their commitment to family. To the extent that their choices prefer some family over others, their preferences reflect their affection and sense of obligation. From the perspective of the chosen beneficiaries also, discounting the member's wishes denies or diminishes the significance of that relationship. It is as much a limitation of the beneficiaries right to dignity, as it is of the member's right to dignity. A bequest, or a nomination of beneficiary, when it is to a family member or friend, speaks to the relationship between the member and the intended beneficiary. It affirms the relationship. To deny the intended beneficiary the

[313] Du Toit 'The constitutionally bound dead hand? the impact of the constitutional rights and principles on freedom of testation in South African Law' (2001) 12 *Stell LR* 222, 224. See further Du Toit 'The impact of social and economic factors on freedom of testation in Roman and Roman-Dutch Law' (1999) 10 *Stell LR* 232; Du Toit 'The limits imposed upon freedom of testation by the *boni mores*: lessons from common law and civil (continental) legal systems' (2000) 11 *Stell LR* 358.
[314] See McMurray (n311) 537.
[315] Humphrey et al *Inheritance and the family: attitudes to the will-making and intestacy* National Centre for Social Research (2010), 32.

bequest is to deny or diminish the importance or relevance of the relationship as between testator and beneficiary.

The most compelling judicial justification for freedom of testation was that made by the Queen's Bench in *Banks v Goodfellow*.[316]

> The instincts and affections of mankind, in the vast majority of instances, will lead men to make provision for those who are the nearest to them in kindred and who in life have been the objects of their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest relatives the property which he possessed.
> ….
> Among those, who, as a man's nearest relatives, would be entitled to share the fortune he leaves behind him, some may be better provided for than others; some may be more deserving than others; some from age, or sex, or physical infirmity, may stand in greater need of assistance. Friendship and tried attachment, or faithful service, may have claims that ought not to be disregarded.
> …
> The Roman law, and that of the Continental nations which have followed it, have secured to the relations of a deceased person in the ascending and descending line a fixed portion of the inheritance. The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.

Freedom of testation thus emerged to allow for finer adjustments than fixed rules permit.[317] This freedom has not been restricted through s37C by the introduction of fixed rules, which have the benefit of certainty, or to permit that the freedom be curtailed only when it is abused. Instead, the right to make those fine adjustments has simply been transferred to a third party, the trustees of a retirement fund. What has effectively happened is that someone better equipped, and with a better moral claim, to make fine adjustments has been stripped

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[316] (1870) LR 5 QB 549.

[317] Maine *Ancient Law* (1905). See Lehmann 'Testamentary freedom versus testamentary duty: in search of a better balance' 2014 *Acta Juridica* 9, fn68 & accompanying text for an alternative explanation that links the emergence of testamentary freedom with the need to protect agricultural landholdings from uneconomic division between the heirs. Cf Croucher 'How free is free: testamentary freedom and the battle between family and property' (2012) 37 *Australian Journal of Legal Philosophy* 9, who subscribes to the view that the emergence of testamentary freedom in England with regard to both immovable and movable property was as a result of the demise of feudalism and the rise of laissez-faire individualism. Helmholz 'Legitim in English legal history' (1984) 3 *University of Illinois LR* 659 indicates that children's right to a legitimate portion of their parent's movable property had disappeared in most of England before the 17th century under the influence of the Catholic Church and its desire for testamentary bequests.

of that right, and that right has been transferred to someone less equipped to make those fine adjustments.[318]

Section 37C implicates the right to dignity in two further ways. In depriving the individual of freedom of choice the legislature has interfered in the two central relationships that give meaning to individuals' lives: family and work. In *Affordable Medicines Trust v Minister of Health*,[319] the CC stated that the freedom to choose one's occupation is about *more* than the right to earn a living, for work is the 'foundation of one's existence', 'constitutive of one's identity' and the 'relationship that completes one over a lifetime of devoted activity'.

Achieving personal satisfaction and fulfilment is not the principal reason most people work, however. Their main motivation *is* to earn a living. And their main motivation for earning a living is to provide for family. Family is the centre of most people's lives.[320] Family is why people work; work is how people support family.[321] The law not only recognises that individuals have a right to provide for their families; it places a duty on them to do so. Their right to do so is not extinguished by death; neither is their duty, in so far as their spouses and children are concerned. Section 37C impairs the fundamental relationship between family and work. Members cannot rest assured that the very reason they work, to make provision for their families, will be respected after they die. *Dawood* held that legislation that 'significantly impairs the ability of spouses to honour their obligations to one another' infringes the right to dignity.[322] The same must apply with respect to children, and arguably anyone to whom the member owed a moral or legal obligation arising from their family relationship.

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[318] See similarly *McCosker v McCosker* [1957] HCA 82 Kitto J [5].
[319] *Affordable Medicines Trust* (n10) [59].
[320] See *Dawood* (n10) [30], 'Marriage and family are social institutions of vital importance.'
[321] Recent research conducted in Europe confirms that most people consider family to be the most important aspect in their lives, with work being the next most important. It also confirms that earning a living is the main reason people work. Self-fulfilment increases in importance as the need to work decreases – in other words more people in wealthier countries consider it important compared with those in poorer countries. See Méda *The future of work: The meaning and value of work in Europe* ILO Research Paper 18 (2016) International Labour Organisation, para 2.2. On the importance of family for individual well-being, see Thomas, Liu, Umberson 'Family and well-being' (2017) 1(3) *Innovation in Ageing* 1.
[322] *Dawood* (n10) [37].

Section 37C impairs the right to dignity in another way. The freedom to enter into close personal relationships is also central to human dignity, both intimate and platonic. [323] Those relationships are of varying significance. Some relationships mature and strengthen with time; others do not. Some result in marriage; some do not. Some result in separation and divorce, some do not. Friendships fade, affections change. The future is uncertain, and no one can predict whether a relationship, whatever its nature, will endure. Some trends have been observed across jurisdictions: marital relationships are more enduring on average than cohabitation relationships; most cohabitation relationships that do not lead to marriage dissolve within five years;[324] divorce rates are increasing and marriage rates decreasing;[325] cohabitation relationships are increasing;[326] relationship dissatisfaction increases over time;[327] the longer the relationship has already endured, the greater the likelihood that it will continue.[328]

The upshot is simply that all relationships are at risk of dissolution, and the shorter the duration, the higher the likelihood. An individual contemplating marriage or cohabitation with a new partner places her ability to provide for her existing family and friends at risk. If she

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[323] See also Struening 'Feminist challenges to the new familialism: lifestyle experimentation and the freedom of intimate association' (1996) 11(1) *Hypatia* 135.

[324] See Law Commission of England and Wales *Cohabitation: the financial consequences of relationship breakdown* (Consultation Paper No 179, 2006), para 2.39: (3-4, UK); (<3 years, USA). An EU-wide survey showed that cohabitation rates vary considerably in Europe and that it is more common in Western and Northern Europe. Cohabitation rates are increasingly most rapidly amongst the younger generation (25-29), and of these10% dissolve within the first year, and one-third within five years, Kiernan *The State of European Unions* (2000). Cohabitation rates in South Africa are very high, while marriage rates are relatively low. See Posel & Rudwick 'Changing patterns of marriage and cohabitation in South Africa' 2013 *Acta Juridica* 169l; Mhongo & Budlender 'Declining rates of marriage in South Africa: what do the numbers and analysts say' 2013 *Acta Juridica* 181.

[325] StatsSA *Marriages and Divorces 2017*, Tables 19 & 20.

[326] Many commentators have thus, as yet unsuccessfully, called for the legal recognition and protection of domestic partnerships. Amongst the many are Kruuse ''Here's to you, Mrs Robinson': peculiarities and paragraph 29 in determining the treatment of domestic partnerships' (2009) 25 *SAJHR* 380; Sloth-Nielsen & Van Heerden 'The constitutional family: developments in South African child and family law 2003–2013' (2014) 28 (1) *International Journal of Law, Policy and the Family* 100. The SALC has similarly proposed that domestic partners obtain the same rights as married partners. See SALRC (Project 118) *Report on Domestic Partnerships* (2006) and the consequent Domestic Partnership Bill in GN 30663 of 14 January 2008.

[327] Disillusionment is a significant cause of separation and divorce amongst those who unrealistically idealised their partners at the beginning of the relationship. This may explain why divorce rates increase significantly after five years of marriage. Niehuis, Reifman, Lee 'Disillusionment in married and cohabiting couples: a national study' (2015) 36(7) *Journal of Family Issues* 951.

[328] StatsSA (n325) Table 19, shows that the highest proportion of divorces occurs between 5 and 9 years of marriage and decreases incrementally thereafter.

understands the implications of s37C, she will understand that she is faced with a choice: preserving her ability to provide for existing family and friends, or exercising her right to enter a new relationship. She will have to choose between two aspects of life that have both been recognised as fundamental to human dignity. The need to choose between them in itself impairs her right to dignity.[329]

6.7 CONCLUSION

Section 37C does not simply limit a member's freedom of testation; it completely removes the lump sum from the member's testamentary control. For those members who do not have other assets of value, it extinguishes their freedom of testation. Spouses married in community of property or subject to the accrual system lose the share of the member's benefit that they would otherwise have been entitled to. Section 37C transfers the right to control the devolution of the lump sum from the member to the trustees. It is trustees who are given the wide discretion to decide who, amongst the member's dependants and nominees, should share in the death benefit, and in what proportion.

Section 37C is not a carefully designed limitation on testamentary freedom, which limits the individual's right only to the extent required. It simply deprives the individual of the right to decide how her property should be divided amongst those naturally entitled to her bounty and transfers her right to quasi-administrative officials, free of the legal constraints to which testators are themselves subject.

Section 37C transfers the right to control the devolution of the lump sum from the member to the trustees. It is trustees who are given the wide discretion to decide who, amongst the member's dependants and nominees, should share in the death benefit, and in what proportion. Trustees may include, and exclude, beneficiaries as they deem equitable. In this their power is even greater than that enjoyed by the member, for they can effectively

[329] *Dawood* (n10).

'disinherit' a spouse or child, even though they were owed a legal duty of support. They may override a member's wishes, even when those wishes are reasonable, much less indisputably harmful.

The deleterious impacts are borne disproportionately by less affluent members, spouses and children. If testators have no separate estate to speak of, they have no residual freedom of testation. Spouses and children similarly have no estate against which they can enforce their proprietary and maintenance rights. The need to protect dependants may provide a sufficiently compelling justification to limit a member's testamentary freedom, but there is no justification for doing so at the expense of the very persons the law recognises as the member's primary dependants.

Section 37C therefore raises numerous constitutional concerns. It is not the fact of s37C's existence that is problematic so much as its design. Despite the arguments that favour freedom of testation,[330] most countries do restrict freedom of testation. These limitations exist either to protect beneficiaries' inheritance rights, or to correct the deceased's unjust treatment of a beneficiary.

Could s37C be refashioned to increase both the equitability of outcomes and to keep limitations on constitutional rights within bounds that are reasonable and justifiable? This question is the focus of the next chapter, in which I look to the limitations on testamentary freedom that exist in other jurisdictions, to determine whether there are less restrictive means available to protect a member's dependants.

[330] Turnipseed 'Why shouldn't I be allowed to leave my property to whomever I choose at my death?' (2005-2006) 44 *Brandeis LJ* 737; Scalise 'Public policy and antisocial testators' (2010-2011) 32 *Cardozo LR* 1315; Hirsch 'Freedom of testation/freedom of contract' (2011) 95 *Minnesota LR* 2180.

7

CHAPTER SEVEN

A COMPARATIVE SURVEY OF DISCRETIONARY LIMITATIONS ON TESTAMENTARY FREEDOM

7.1 INTRODUCTION

South Africa is not unique in treating retirement savings and death benefits as non-estate assets. Many countries do so.[1] They too restrict members' access to their retirement savings before retirement, and to select their death-benefit beneficiaries.[2] Although South Africa is not unique in treating retirement savings and death benefits as special assets subject to special rules, s37C is, nevertheless, unique. I have found no other country in which *the law* transfers the right to select beneficiaries to the trustees of the fund. The identity of beneficiaries is either determined by fixed rules, as is the case in Canada; or by trustees exercising their contractual power of selection and apportionment, as is the case in Australia or England; or by members exercising their right to make a binding nomination, as is the case in Australia and Malawi. While none of these jurisdictions vest trustees with powers comparable to those of s37C trustees, they do give their judiciaries comparable powers to intervene in a deceased's estate.

[1] They form part of a class of assets regulated by contract rather than the law of succession (such as individual life insurance). Even without s37C, they may thus not automatically have fallen into the estate of the deceased member and would have done so only in the absence of a nomination by the member. There is no fundamental difference between distributing assets via a will and doing so contractually. Legislatures permit contractual assets to bypass the estate and be transferred directly to the designated beneficiary, thereby insulating them from creditors' claims. They could remove their tacit permission. They are already treated as estate assets for estate duty purposes in South Africa and for family provision purposes in Canada and New South Wales. See the Estate Duty Act 45 of 1955, s3(3). See also Succession Act 2006 (NSW), s59 and Part 3.3. See further Langbein 'The nonprobate revolution and the future of the law of succession' (1983-1984) 97 *Harvard LR* 1108 and Braun 'Pension death benefits: opportunities and pitfalls' in Häcker & Mitchell (eds) *Current Issues in Succession Law* (2016).
[2] See §7.2 below.

In this chapter I first compare how the distribution of death benefits is regulated in each of the aforementioned countries. I do so in order to demonstrate that none of the comparative approaches are appropriate for South Africa, and that any future reform of s37C should not be modelled on those approaches.

The nature and scope of trustees' discretionary power in South Africa differs in important respects from that of trustees in Australia, England and Malawi. It more closely approximates the judicial power to override a deceased's testamentary choices, notwithstanding that the trustees' powers are distributive while the courts powers are corrective.

I therefore consider the judiciary's control of testamentary freedom, and how it has evolved over the course of the past century. In doing so, I hope to identify principles and practices that could prove useful when reforming s37C and formulating guidelines to promote the equitable distribution of death benefits, while simultaneously ensuring that trustees intervene to override members' wishes only when those wishes are indisputably harmful.

The purpose of this chapter is partly to demonstrate that there are less restrictive means that are reasonably available to the legislature, if it wishes to protect dependants from members who exercise their testamentary freedom inequitably. It is also to demonstrate that the grant of wide discretionary powers still represents too great an intrusion into testamentary freedom, even when the power is entrusted to judges, and even when they are permitted to override testators' wishes only when necessary to correct inequitable choices.

7.2 A SURVEY OF THE TREATMENT OF DEATH BENEFITS

There is tremendous variation in the scope of members' freedom to select their beneficiaries, and in whether trustees have any discretionary power. I will briefly describe the position in Australia, Canada, England and Malawi. In each of these jurisdictions, death benefits are subject to a *sui generis* regime, while courts have the concurrent power to redistribute the

deceased's assets if, and to the extent, they consider it equitable to do so. Why, then, do I propose examining judicial rather than trustee powers and practice? The answer lies in the approach each jurisdiction has adopted towards the distribution of death benefits.

7.2.1 Australia

Australian law allows for binding and non-binding nomination of beneficiaries. It has done so since 1999. The law is permissive – it neither mandates nor proscribes binding nominations.[3] It is left to each fund to decide whether to allow them. The law does prescribe formalities for binding nominations,[4] and provided they have been complied with trustees *must* give effect to the member's nomination, subject to only one important proviso: that the member has nominated only dependants or her estate as her beneficiary.[5] A binding nomination cannot be challenged on the basis of unfairness or unreasonableness.[6] Despite the potential for unfairness, courts are increasingly encouraging members to make binding nominations when given the choice.[7] If the nomination is not binding, trustees also have the discretion to allocate the death benefit between the dependants. Unlike s37C trustees, trustees in Australia may pay the benefit to the member's estate even when there are dependants.[8] The circle of dependants is, however, smaller: it is limited to spouses (including life partners), children, financial dependants[9] and those in a relationship of interdependency.[10] They,

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[3] Superannuation Industry (Supervision) Act 1993, s59(1A), effective 31 May 1999.
[4] Superannuation Industry (Supervision) Regulations 1994 (Cth), reg 6.17A (4). The nomination must be in writing, addressed to the fund, signed in front of two independent witnesses, and executed not more than three years prior to the death of the member.
[5] Ibid.
[6] *Collins v AMP Superannuation Ltd* [2000] FCA 1110 (nomination of adult sons with no provision for minor daughters). See also SCT determination D16-17/124 (nomination of cohabiting partner of three years, made 18 days before he died, replacing and excluding his minor children).
[7] *McIntosh v McIntosh* [2014] QSC 99; *Burgess v Burgess* [2018] WASC 279. The reason is that a dependant who is also the executor of an estate is not permitted to seek payment of the death benefit to themselves but is required to seek payment of the death benefit to the estate. Seeking payment in their personal capacities is considered a conflict of interest and contrary to their fiduciary duties as executor. In both cases a surviving spouse who had been paid a death benefit was required to account to the estate for that sum since she was also the executor of the estate. However, this only applies to non-binding nominations in which beneficiaries are selected at the trustees' discretion. It does not apply to binding nominations.
[8] Cf *Muir v Mutual & Federal* [2002] 9 BPLR 3864 (PFA), which held that members may not nominate their estate.
[9] To qualify as a financial dependant the recipient does not have to be in 'need'. See *Faull v SCT* [1999] NSWSC 1137. See also Australian Prudential Regulation Authority (APRA) Superannuation Circular No.

moreover, have a guiding principle to help them when there are competing beneficiaries – that the object of retirement savings is to provide an income for the member after retirement.[11] What this means, according to the Superannuation Complaints Tribunal (SCT), is that trustees should prioritise financial dependants, because it is they who have a 'reasonable expectation of receiving ongoing support' from the member.[12] The order of preference is thus almost always spouses and minor children, then financial dependants, inter-dependents and, lastly, adult children.[13] Trustee distributions can be challenged, but the SCT may only scrutinise trustee decisions for substantive unfairness,[14] it may not review their decision for procedural fairness.[15] The SCT routinely substitutes its view of fairness for that of the trustees.[16]

The Adjudicators' prioritisation of financial dependants mirrors that of the SCT,[17] but it should not. The Australian approach is not appropriate for South Africa for three reasons: South African trustees have an obligation to effect an equitable distribution amongst a potentially far larger circle of beneficiaries; the socio-economic circumstances of most beneficiaries are incomparably different – need is immeasurably greater, and future prospects significantly bleaker; and, very importantly, in Australia death benefit dependants are also eligible dependants under each state's family provision laws.[18] The same dependants can, in other words, lodge a claim against the deceased's estate. In South Africa, very few members have

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I.C.2 *Payment Standards for Regulated Superannuation Funds* (September 2006) para 16; SCT *Key Considerations that Apply to Death Benefit Claims* (2006) para 3.4.1 and 3.4.2.

[10] Superannuation Act (n3), ss10 and 10A; Superannuation Regulations (n4), reg 1.04AAAA.

[11] SCT Determinations D06-07\024, 11 (17/8/2006); D16-17\136 [36] (28/02/2017); D16-17\120 [17, 22] (12/01/2017).

[12] Ibid.

[13] D06-07\024 (n11)

[14] Superannuation (Resolution of Complaints) Act 1993, s14(2). See also *Stock v NM Superannuation Proprietary Limited* [2015] FCA 612.

[15] *Wilkinson v Clerical Administrative & Related Employees Superannuation Pty Ltd* [1998] FCA 51. The reasons relate to the constitutional separation of powers.

[16] See (n11) and D12-13\090 (24/4/2013); D13-14\164 (31/3/2014); D14-15\185 (11/3/2015); D16-17\127 (30/1/2017).

[17] See §4.8 above.

[18] Eligibility is not identical across each of the statutes or the Superannuation Act, but they are by and large the same, although eligibility tends to be broader under family provision legislation. See Testator's Family Maintenance Act 1912 (Tas), s3A; Administration and Probate Act 1958 (Vic), s90; Family Provision Act 1969 (ACT), s7; Inheritance (Family Provision) Act 1972 (SA), s6; Family Provision Act 1972 (WA), s7; Family Provision Act 1974 (NT), s7; Succession Act 1981 (Qld), s40-41; Succession Act 2006 (NSW), s57.

a separate estate of any significant value, and the only dependants entitled to claim maintenance from the estate are spouses and children.

7.2.2 Canada

Canada has different rules governing the savings portion and insured portion.[19] The legislative overlay is complex, given the diversity of provincial and federal law, and a comprehensive analysis is beyond the scope of the dissertation. The essentials are, however, as follows. A federal Act, the Pension Benefits Standards Act 1985, governs retirement benefits of federal employees. All other employees' retirement benefits are governed by provincial laws, and each province has its own family provision legislation.

The beneficiaries of the savings portion are fixed by either federal or provincial legislation, but the principles are broadly similar: it must be paid to the member's spouse or common-law partner; failing either, to the nominated beneficiary; failing which, to the member's estate.[20] The insurance portion is governed by insurance laws, which ordinarily entitle members to nominate beneficiaries, and the nomination is binding.[21] There is an important proviso to the binding effect of nominations: a dependant's right to maintenance overrides a nominated beneficiary's contractual right to be paid the insurance portion. When a dependant seeks maintenance from a deceased estate, any life insurance proceeds payable as a result of the member's death are deemed property in the estate.[22] The court thus has the authority to

[19] I use the term savings portion for convenience. It is the vested retirement benefits to which the member was entitled at the time of death. See Government of Canada *Digest of Benefit Entitlement Principles* (2017), 5.3.

[20] See Pension Benefits Standards Act RSC 1985, s23(1) and the definition of 'survivor', s1. The Act applies to federal employees only. If the deceased is survived by both a cohabiting partner (of at least one year) and spouse, the partner is entitled to the benefit. State laws apply to non-federal employees. The order is the same, except that in most cases spouses rank ahead of partners. Some condition a spouse's entitlement on other factors, like not being estranged for a certain period prior to the death; others require a longer period of cohabitation for partners. See eg Employment Pension Plans Act SA 2012, s1(3), which defines a 'pension partner' as a married spouse, provided they have not been living separately from the member for more than three years, or a cohabitating partner of at least three years or one who is in a relationship of 'some permanence' if the couple bore or adopted a child. See also Pension Benefits Standards Act SBC 2012, s1(3); Pension Benefits Act RSO 1990, 1(1) definition of 'spouse'.

[21] Insurance Act RSA 2000, s660; Insurance Act RSBC 2012, s59; Insurance Act RSO 1990, s190.

[22] See eg Succession Law Reform Act RSO 1990, s72(1)(f).

override the nomination and award all or part of the proceeds to the dependant if they consider it just and equitable to do so.[23]

7.2.3 England

In England, trustees commonly also have the power to select the beneficiaries and allocate the death benefit between them. The difference is that their power derives from the rules of the fund; it is entirely contractual in nature. The law governing the administration of retirement funds, the Pension Schemes Act 1993, neither expressly allows nor disallows binding nominations. It is fund rules that do so, and the rules usually do not permit binding nominations. The reason is simply that if fund rules allow binding nominations, the death benefit will be subject to inheritance tax.[24] When the fund rules vest the discretion to choose beneficiaries in the trustees, or provide fixed rules governing the distribution, the death benefit is inheritance-tax exempt. The law, moreover, contains no limitations on who the beneficiaries must be for the inheritance-tax exemption to apply. Eligibility is determined exclusively by fund rules, and many include a wide circle of potential beneficiaries who need not be dependants.[25]

Trustee decisions can be taken on review,[26] but can only be tested on the grounds of common law review.[27] Provided the trustees did not make a mistake of fact or law,[28] ask

[23] See eg *Stevens v Fisher* 2013 ONSC 2282, in which the beneficiary was not a dependant. For a case involving a dependant claim by a surviving spouse against policy proceeds payable to a former spouse, appointed as the irrevocable beneficiary pursuant to a divorce order, see *Dagg v Cameron Estate* 2017 ONCA 366. The purpose of the life insurance was to secure the deceased's obligation to pay spousal and child support. The court held that the former spouse and child were first entitled to so much of the proceeds as were required for their actual maintenance needs, while the survivor would be entitled to the surplus.

[24] Inheritance Tax Act 1984, ss5(1)-(2) and 151(4). See further Her Majesty's *Revenue and Customs (HMRC) Inheritance Tax Manual* paras 17051 & 17052.

[25] See eg *Y v New Airways Pension Scheme* (PO9844, 11 January 2017), in which the beneficiaries include members' descendants, all those related to the member through their parents or grandparents and their respective spouses or civil partners; the member's own surviving or former spouse or civil partner and those similarly related to that person (including their former or subsequent spouse or civil partner); financial dependants and interdependants; the member's estate and nominated beneficiaries, including charities.

[26] Pension Schemes Act 1993, s146(1)(c).

[27] *Edge v Pensions Ombudsman* [1999] 4 All ER 546 (CA).

themselves the incorrect question,[29] or fail to consider the relevant facts,[30] the trustees' decision will be set aside only if the decision is 'perverse', one no reasonable board of trustees could reach.[31] I have not come across a single determination in which the distribution itself was held to be perverse in circumstances in which the beneficiaries were all eligible and all relevant facts had been taken into consideration.[32] Trustees usually give effect to the member's nomination if they are satisfied it still reflects her wishes when she died, even when, by the Australian standard of review, it would clearly be considered unfair and unreasonable towards the complainant.[33]

Pensions Ombudsman determinations are helpful for laying down principles of law, and for giving content to the meaning of concepts like financial dependence, but they do not provide guidance as to the equitability of distributions. Fund rules do not constrain trustees to do what they think is equitable.[34] Just as trustee decisions typically respect member nominations, so too does the Ombudsman respect trustee decisions, recognising that reasonableness exists across a spectrum, and that 'there is unlikely to be only one answer that is 'right', with all others being wrong'.[35]

As is the case in Australia and Canada, eligible dependants can also claim maintenance from a deceased member's estate under the Inheritance (Provision for Family and

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[28] Such as too readily identifying a person as a financial dependant. See *Wild v Smith* [1996] OPLR 129. See also *Hughes v Inchcape Motors Pension Scheme* (L00713, 10 December 2003), in which the Ombudsman held that no reasonable body of trustees would have concluded, on the available evidence, that the deceased was 'helping to maintain' his girlfriend.
[29] See *Catchpole v The Trustees of the Alitalia Airlines Pension Scheme* [2010] EWHC 1809 (Ch).
[30] Usually due to investigatory shortcomings. Examples include *Young v Essential SIPP* (PO 1758, 13 August 2013); *McNee v Local Government Pension Scheme* (PO 2780, 27 April 2011); *Ingram v Paterson Arran Ltd Group Personal Pension Scheme* (PO 80843/1, 27 April 2011).
[31] See *Jones v The Barclays Bank UK Retirement Fund* (N00036, 13 April 2005) [28].
[32] See eg PO 10413, in which the PO stated that any one of the following distributions would not have been perverse: a 100% distribution to a cohabiting partner, a 100% distribution to the surviving spouse from whom the member was separated, or a decision to share the benefit between the cohabiting partner and surviving spouse, since both women were financially dependent on the member.
[33] See *Dudley v Chubb Security* (M00489, 24 March 2004).
[34] Although it is arguably implicit in the nature of discretion. See Grosskopf J in *Media Workers Association of South Arica v Press Corporation of South Africa Ltd ('Perskor')* [1992] 2 All SA 453 (A).
[35] PO *Annual Report 2005-2006*, 17.

Dependants) Act 1975, and the discretion to override the member's wishes has also been entrusted to the judiciary.

7.2.4 Malawi

Nominations in Malawi are binding,[36] provided they are 'current'[37] and the member nominated a spouse, child or close relation as the beneficiary – and a close relation extends as far as the deceased's aunts, uncles and their spouses.[38] Absent a binding nomination, the trustees must apportion the benefit between the member's financial dependants as they see fit.[39] There is no specific mention of an equitable distribution. Only children and spouses may seek maintenance from a testate estate, and the court may award so much as it, on 'reasonable grounds', considers 'just and proper'.[40] Courts have unusual powers in respect of the deceased's intestate estate. They have the power to distribute the estate as they consider equitable between the deceased's spouse(s), children, parents and any other minor child whom the deceased was supporting financially.[41] The Act lays down principles of fair distribution to guide the courts.[42] These principles are particularly relevant for s37C trustees. Courts have also been given the power to affect an equitable distribution. Their powers are not merely corrective, as is the case in other jurisdictions. It thus provides more helpful guidance as to the equitability of death benefit distributions than does the approach of the Australian SCT or the English Pensions Ombudsman. I therefore discuss the principles in greater detail in the last chapter, in which I propose some recommendations for reform.

7.2.5 Summary

[36] Pension Act 6 of 2011, s71(1).
[37] A member may revoke the nomination, while divorce or a later marriage automatically revokes it. See ss71(4) and (5).
[38] Section 1 defines a close relation as a 'spouse, brother, sister, parent, child, child of the spouse, aunt, uncle, grandparent and the spouse of any of these'.
[39] Section 71(3).
[40] Deceased Estates (Wills, Inheritance and Protection) Act 14 of 2011, ss3 and 15.
[41] Section17 and the definition of immediate family and dependants in s3.
[42] Section 17(1)(a)-(e). Additional principles govern polygynous marriages, ss71(2) & (3). *Chinkwende v Chinkwende* (Probate Cause No 757 of 2016) [2017] MWHC 68 (15 March 2017) provides an excellent example of a court exercising its power of distribution.

The only jurisdictions in which trustees have a broad discretion to allocate death benefits is Australia and England. Malawi specifically limits the discretion to financial dependants. In none of the three are trustees expressly required to effect an equitable distribution. In none has the legislature transferred the power to select beneficiaries to the trustees, and in none are the trustees constrained by the constitutional rights of members and beneficiaries. Section 37C is a legislated intrusion into the member's freedom of choice, and as such it must be a reasonable and justifiable interference. I suggest that this means that the interference must be limited to those instances in which the deceased has failed to fulfil her legal and moral obligations. It is the concept of moral obligation that lies at the heart of equitability.[43]

Legislation in Australia, Canada, England and New Zealand grants the courts broad discretionary powers to award maintenance out of a testate or intestate estate when the deceased failed to make proper provision for the applicant. Courts have interpreted the scope of their powers through the lens of moral obligation. Even though the court's role is to correct injustice, while the trustees' role is to distribute the benefit and prevent injustice,[44] trustees perform an adjudicative function that is similar to that performed by the courts in those jurisdictions. In the sections that follow, I discuss how courts have construed and applied their power to effect an equitable redistribution of the deceased's estate. In so doing I hope to identify principles of equitability that should underpin any future guidelines for s37C distributions.

7.3 JUDICIAL CONTROL OF TESTAMENTARY FREEDOM

7.3.1 The origins of judicial control

[43] In *Botha v Botha* 2009 (3) SA 89 (W) [46], Satchwell J explained that the word 'just' requires the court to assess whether and what sum of maintenance it would be morally right and fair, in the sense of appropriate as between the parties, to award.

[44] Sutton & Peart 'Testamentary claims by adult children: the agony of the "wise and just" testator' (2003) 10(3) *Otago LR* 385, believe courts are blurring the bounds of 'corrective justice', the judicial role, and 'distributive justice', the testator's role, because of the degree and extent to which they override the deceased's wishes.

The judicial power to override a deceased's wishes is unusual, and of relatively recent origin.[45] There is, of course, nothing exceptional about restrictions on testamentary freedom.[46] It is unbridled freedom that is exceptional. Restrictions have existed for as long as the concept of testamentary freedom has existed. In their original form they guaranteed a minimum share of the testator's estate to specific relatives, subject to the testator's right to disinherit them for good reason.[47] Civil law countries continue, in modified form, to follow this approach.[48] England and its colonies did not follow the fixed-share model, but protected widows and children through other devices, like the widow's dower rights, which gave her the right to use one-third of her husband's immovable property for the remainder of her lifetime if he predeceased her.[49] It was only after dower rights were extinguished in 1833 that testators in England and elsewhere obtained near unrestricted testamentary power.[50] Their power was, justifiably or unjustifiably, perceived as the power to disinherit those whom they had a moral obligation to maintain.[51] It was thanks to the activism of the women's movement that common law countries gradually began to re-introduce restrictions on testamentary freedom. However, having been briefly persuaded by the virtues of

[45] Other than the countries discussed in the thesis, the only others to have granted courts similar powers of intervention of which I am aware are Singapore and China. I have, however, not done a global survey. See Singapore's Inheritance (Family Provision) Act 1966, which is modelled on the English Inheritance (Family Provision) Act 1938. See also Province 'Killing me softly: a comparative review of Chinese inheritance law to address the problem of elder abuse and neglect in the United States' (2012) 22(1) *Indiana International and Comparative LR* 71.

[46] Turnipseed 'Why shouldn't I be allowed to leave my property to whomever I choose at my death?' (2005-2006) 44 *Brandeis LJ* 737 identifies the state of Georgia as the only state in the USA that permits complete freedom of testation. Every other state provides some form of protection for surviving spouses, but not for other dependants, either through the elective share model that permits a surviving spouse to claim a fixed share of the deceased's estate, or through matrimonial property laws that are similar to South Africa's accrual system. Despite the lack of formal restrictions on testamentary freedom, Leslie 'The myth of testamentary freedom' (1996) 38 *Arizona LR* 235 identifies numerous cases in which the US courts have covertly overridden the testator's intentions, because of a perceived failure of moral duty, by their creative manipulation of, inter alia, the doctrine of undue influence.

[47] See Monro (tr) *The Digest of Justinian* (1904) D5.2 on 'inofficious testaments'. See also BGB (German Civil Code), s2339.

[48] See Van Erp 'New developments in Succession Law': General Report to the XVIIth International Congress of Comparative Law (2007) 11(3) *Electronic Journal of Comparative Law* and the national reports contained in the same issue.

[49] Husbands acquired similar 'curtesy' rights on the death of their wives. The abolition of dower left married women vulnerable if disinherited, particularly since any property they had owned on entering the marriage automatically became that of their husband. The Married Women's Property Acts of 1870 and 1882 ameliorated their position somewhat, for it gave married women full ownership and control over their separate income and property. See further Haskins 'The development of common law dower' (1948-1949) 62 *Harvard LR* 42.

[50] Keeton & Gower 'Freedom of testation in English Law' (1934-1935) 20 *Iowa LR* 326.

[51] Atherton 'New Zealand's Testator's Family Maintenance Act of 1900 – the Stouts, the women's movement and political compromise' (1990) 7(2) *Otago LR* 202.

testamentary freedom, they chose not to adopt the fixed-share model, because it operated as an invariable limitation on testamentary freedom.[52] Instead they opted for a model they considered to be a lesser restriction – that of empowering courts to override a testator's wishes in appropriate cases.

New Zealand was the first country to do so, in 1900,[53] granting courts the power to order such maintenance from an estate as they considered fitting when the testator had failed to make 'adequate provision for the proper maintenance and support' of a spouse or child.[54]

That New Zealand was the forerunner has been attributed to the fact that it was also the first country to grant women the suffrage in 1893.[55] It was in the same year that testamentary freedom became a 'political issue',[56] as women protested their lack of property rights and vulnerability to disinheritance. Australia and Canada soon followed New Zealand's lead.[57] England too, followed suit, but only in 1938, after much parliamentary debate and numerous unsuccessful attempts.[58]

7.3.2 The emergence of the moral obligation norm

[52] For a discussion on the parliamentary debates in New Zealand and England respectively, see Sutton & Peart (n44); Lehmann 'Testamentary freedom versus testamentary duty: in search of a better balance' 2014 *Acta Juridica* 9.
[53] Testator's Family Maintenance Act 1900.
[54] Section 2. Although initially limited to testate succession, family provision laws today apply on intestacy also. Since intestacy may be construed as expressing the tacit intention of the deceased, I will use the term testator to refer to the deceased in a testate and intestate estate, unless the context clearly indicates otherwise. English intestacy laws were historically modelled on the presumed intention of the majority, as derived from an analysis of wills. See Law Commission of England and Wales (LCEW) *Intestacy and family provision claims on death* (Consultation Paper No 191, 2009) para 1.38.
[55] Atherton 'The Stouts' (n51).
[56] Ibid 207.
[57] Victoria was the first Australian state to do so with the adoption of the Widows and Young Children Maintenance Act 1906 (Vic). Alberta was the first Canadian state to do so with the adoption of the Married Women's Relief Act in 1910, see eg *McBratney v McBratney* 1919 CanLII 696 (ABCA). In both Australia and Canada family provision laws are state/provincial laws rather than federal laws. In Australia a reform project to introduce a model law with the aim of increasing consistency across jurisdiction has not been successful. See New South Wales Law Reform Commission (NSWLRC) *Uniform succession laws: family provision* Report 110 (May 2005); South Australia Law Reform Institute (SALRI) *Distinguishing between the Deserving and the Undeserving: Family Provision Laws in South Australia* Report 9 (2017) states that New South Wales is the only state to date to substantially align its laws with the model law (para 2.1.22).
[58] Inheritance (Family Provision) Act 1938. See Lehmann (n52) 31-33.

Since New Zealand was the first country to adopt family provision legislation, its judiciary was also the first to interpret and apply such legislation. The principles first articulated by the New Zealand courts have shaped judicial understanding of the proper role of the courts in all countries that subsequently adopted family provision legislation.[59] The seminal cases are those of *Allardice v Allardice*[60]and *Re Allen (deceased), Allen v Manchester.*[61] They continue to be cited extensively by contemporary courts.[62]

7.3.2.1 The four rules of family provision

Allardice was the first family provision case to come before the Court of Appeal. Stout CJ, an influential champion of family provision legislation,[63] summarised the four 'rules' applicable in family provision cases: (i) that the purpose of family provision is not merely to protect eligible beneficiaries against indigence; (ii) that the court's power is not to re-write the testator's will; (iii) that a court may interfere with the testator's wishes only in order to make *proper provision* for the testator's spouse and children *to the extent* that the testator's will did not make such provision; (iv) that a court would make more generous provision for a widow (if not a widower) than for children who were capable of supporting themselves.[64]

Of these four rules, the third rule has proven the most challenging for courts to apply. Anything in excess of an award of 'proper provision' is, after all, tantamount to re-writing the deceased's will, in violation of the second rule.[65] The third rule also goes together with the fourth rule, which, as will be seen, is *not* a rule that the deceased owes *no* moral duty

[59] See eg *Garrett v Zwicker* 1976 CanLII 1981 (NS CA) 336, acknowledging the influence of the NZ courts on Canadian jurisprudence.
[60] *(No 2)* NZCA (1910) 30 NZLR 222.
[61] [1922] NZLR 218.
[62] *Re Allen* (n61) has been cited in 197 cases on the Austlii database (as at 22/11/2018). Of these, 105 were judgments handed down between 20 April 2000 and 2 November 2018. *Allardice* has been cited in 59 cases, 54 of them between 8 April 2011 and 18 September 2018. These citations reflect only the decisions handed down by Australian and New Zealand Courts. They have also been cited in Canadian decisions, such as *Cummings v Cummings* (2004) 69 OR (3d) 397.
[63] Atherton 'The Stouts' (n51).
[64] At 756.
[65] In *Walsh v Public Trustee* [2016] NZFC 8163, the judge expressly admitted that he was re-writing the testator's will. The estate was so tiny that no provision could be made from it – it was the provision. The moral claims of the deceased's children were so compelling, and the selected beneficiaries' virtual strangers, that the court awarded the entire estate to the children.

towards adult self-supporting children. Delineating the circumstances and extent to which a court may permissibly override a testator's wishes on the application of a self-supporting adult child has become a thorny contemporary question for the judiciary in New Zealand and Australia.[66] English and Canadian courts have also had occasion to grapple with the issue in recent years,[67] with the Nova Scotia Supreme Court declaring unconstitutional provincial legislation that granted courts the power to override a testator's will for the benefit of a non-needy adult child.[68]

New Zealand's Testator's Family Maintenance Act of 1900 granted courts the power to make any order they deemed fit for the provision of the spouse and children where the testator's will did not make 'adequate provision for the[ir] proper maintenance and support'.[69] The use of the word 'proper' and 'support' was the basis on which courts interpreted the legislation as permitting them to make provision in excess of the recipient's strict maintenance needs, i.e. as something more than merely protecting them against indigence.[70] As such, courts could not simply apply a needs-based test to determine whether the testator had failed to make proper provision and what provision it should in turn make. The corollary, however, was that proper provision could, in appropriate cases, also be less than the applicant's actual maintenance needs.[71] The obvious example was if an estate was too small to accommodate every person's maintenance needs. If a court could not determine 'proper' provision by reference only to the applicant's needs, on what basis could it do so? The answer is by devising a novel test – that of the testator's 'moral' duty.

7.3.2.2 The moral duty of the wise and just testator

[66] See §7.3.4 below.
[67] *Ilott v The Blue Cross* [2017] UKSC 17; *Cummings* (n62).
[68] *Lawen Estate v Nova Scotia (Attorney General)* 2019 NSSC 162.
[69] Section 2. The wording remains essentially unchanged, see the current Family Protection Act 1955, s4(1).
[70] *Allardice* (n60).
[71] For eg *Cummings* (n62).

The moral duty test was first formulated by Edwards J in his concurring judgment in *Allardice*:[72]

> It is the duty of the Court so far as is possible to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just but not a loving husband or father owes towards his wife, or towards his children as the case may be.

The test was affirmed, in slightly modified form, by Salmond J in *Re Allen* and by the Privy Council in *Bosch v Perpetual Trustee Company*.[73] It is Salmond J's more neutral exposition, that does not require that there be a 'manifest breach' of a moral duty, which has become the leading formulation:

> The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children, had he been fully aware of all the relevant circumstances.[74]

Edward J's formulation, and that of the Privy Council in *Bosch v Perpetual Trustee Company*[75] approving the decisions of *Allardice* and *Re Allen*, more explicitly distinguish between the choices an impartial wise and just testator would make, and those of a 'loving', 'fond or foolish' testator. The standard against which a testator's choices are to be measured is that which a dispassionate person would consider it their moral duty to make. This standard is not the standard against which the testator's provision for all the beneficiaries is measured; it is the standard of behaviour expected by the testator towards the aggrieved applicant, in assessing whether the provision that was made to that person is sufficient, objectively considered. Testators are free to make choices commensurate with the degree of affection they feel for a beneficiary. They cannot be condemned for acting in accordance with their affections, but only for acting in neglect of their duty. It is not the court's role to condemn testators' positive choices; only to judge their omissions.

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[72] (n60).
[73] *Bosch v Perpetual Trustee Company* [1938] AC 463 (PC).
[74] *Re Allen* (n61), 613.
[75] *Bosch v Perpetual Trustee* (n73).

The moral obligation test appears to underpin the approach to family provision claims in all jurisdictions that confer discretionary powers on courts.[76] An important consideration is that financial need is only one relevant factor. It is not determinative of the existence or scope of the deceased's moral obligation. In *Thomson v Harrison*,[77] the New Zealand High Court considered it 'rather unfortunate' that some previous decisions had focused on financial need. The court emphasised that it was required to consider the factors holistically, for they are all 'inter-related' and cannot be considered '*in vacuo*'.[78] The mere fact that an applicant does not have financial need does not mean that an award for financial provision should not be made. Conversely, the mere fact that an applicant does have financial need does not mean that an award should be made.

7.3.2.3 The problem of small estates

In *Re Allen,* Salmond J distinguished between the court's role in family provision claims involving small and large estates. A small estate is one which cannot satisfy the moral claims of all those towards whom the testator owed a moral duty. A large estate is one which can. Salmond J explained that if the estate is too small to satisfy the moral claims of all eligible beneficiaries, a testator can only do his best to apportion it according to each beneficiaries 'deserts and necessities'.[79] All the court can do in its turn is to ensure that the estate is 'justly' divided between competing beneficiaries in proportion to the 'relative urgency' of their moral claims, recognising that an award to one will necessarily be at the expense of another. In such cases the court is concerned with the equitability of the deceased's distributive

[76] See all Australian, Canadian and New Zealand cases discussed in this chapter. Many similar cases have been handed down in England. The most influential are *Re Coventry* [1979] 3 All ER 815; *Jennings (Deceased), Re* [1993] EWCA Civ 10. See also the important recent decision of *Ilott v The Blue Cross* (n67), which sets out authoritatively what the correct approach is in family provision claims involving an adult child. For a discussion of English case law, see Douglas 'Family provision and family practices – the discretionary regime of the Inheritance Act of England and Wales' (2014) 4(2) *Onati Socio-Legal Series* 222. It also informs claims in China, see Province (n45), 78.
[77] *Re Harrison (Deceased) Thomson v Harrison* [1962] NZLR 6.
[78] At 13. Quoted in *Williams v Aucutt* [2000] NZCA 289 [61]. Peart describes *Re Harrison* as marking a turning point in the jurisprudence of family provision claims in New Zealand, for it was after this decision that courts routinely began to award provision to adult children irrespective of financial need. See Peart 'New Zealand report on new developments in succession law' (2010) 14(2) *ECJL* 1, fn117 and accompanying text.
[79] At 614.

choices. It is implicit that in such cases the deceased will have no residual freedom of testation, for the full estate must be used to fulfil the testator's moral duties. By contrast, if the estate is sufficiently large to satisfy all moral claims, the court's role is quite different: it is required to put a monetary value on proper provision. Of the two, Salmond J considered the latter the more difficult, for it requires a court to determine the 'absolute scope and limit of the moral duty'.[80]

Salmond J recognised that most estates are small estates. Even though he considered these the easier cases to decide, I suggest that the jurisprudence proves otherwise. Division is more difficult than addition. The moral duty on the testator, and thus on the court, to divide the benefit equitably according to each beneficiaries' relative needs and deserts is arguably greater than is deciding on an appropriate absolute sum, however challenging the latter task may be. When *Re Allen* was decided, the only potential applicants were the deceased's spouse and children. The 'rule' that a court should prefer the claims of a spouse over those of adult children may have made the task of assessing the equitability of the testator's division somewhat easier, particularly when the estate is so small that a child's moral claim must yield to the greater claim, in the circumstances, of the surviving spouse.[81]

In the intervening century the substantive essentials of family provision laws have remained the same as those set out in *Allardice* and *Allen*, but the context within which they operate has changed fundamentally. The only significant change that has been made to the law to accommodate the changing context has been to expand the circle of eligible beneficiaries, which different jurisdictions have done to differing degrees.[82]

[80] At 614. An example of which is *Lemon v Mead* [2017] WASCA 215, in which the testator left his youngest daughter, born outside the marriage, a bequest of A$3m out of an estate of A$1bn, and the bulk of the remainder to his two daughters of his marriage. The Master ordered that the daughter's share be increased to A$25m. On appeal, the court reduced it to A$6m.

[81] See eg *Higgins v Wilkinson* [2017] VCC 1534, in which the applicant was a 21-year-old student, and the beneficiary was the deceased's wife of 13 years. The estate was A$40 000.

[82] The expanding circle of beneficiaries has caused considerable consternation in some jurisdictions. See Croucher 'How free is free: testamentary freedom and the battle between family and property' (2012) 37 *Australian Journal of Legal Philosophy* 9, esp 18ff.

7.3.2.4 A contested concept

The notion that a court acts as a surrogate wise and just testator fulfilling the deceased's moral duty continues to dominate judicial conceptions of their role in family provision cases, despite criticism of its use. The key consideration remains whether the deceased owed a moral obligation to a claimant to bestow a (greater) share of the estate on them.

Describing the court's role using the language of moral obligation is not without its critics. In *Singer v Berghouse*[83] the Australian High Court described the concept as an unhelpful 'gloss' on the wording of the statute.[84] The New Zealand Law Commission (NZLC) in 1997 similarly criticised judicial reliance on the 'obscure concept of moral duty'.[85] Amongst the specific concerns raised by the NZLC was that:

> The test also makes a second incorrect assumption: that New Zealand society is culturally and ethnically homogenous…The consequences of the absence of any norm of this kind are that a deceased's perception of his or her moral duty is overruled by a particular judge's assessment of current social norms. This assessment is necessarily based on the judge's personal sense of the fitness of things…

These criticisms did not gain traction within the judiciary. In *Vigolo v Bostin,*[86] the Australian High Court (HCA) criticised its earlier judgment in *Singer* and engaged in a spirited defence of courts' use of the concept. It remains a central part of Australian, Canadian and New Zealand jurisprudence. However difficult to apply, the concept serves as a reminder that whether and how much financial support a wise and just testator would make for an eligible beneficiary must be determined by reference to the prevailing moral convictions of society.

7.3.3 The Canadian perspective: *Tataryn v Tataryn*

[83] [1994] HCA 40.
[84] At [17]. Cf Atherton 'Concept of moral duty in the law of family provision – a gloss or critical understanding' (1999) 5 *Australian Journal of Legal History* 5, which traces the philosophical underpinnings of the concept and demonstrates that it was a deliberate, and essential, part of early family provision laws.
[85] New Zealand Law Commission (NZLC) Report 39 *Succession Law: A Succession (Adjustment Act): modernising the law on sharing property on death* (August 1997).
[86] [2005] HCA 11.

Tataryn[87] contains the most helpful synthesis of the principles courts should apply when assessing claims involving competing beneficiaries.[88] The case involved a claim under British Columbia's Wills Variation Act.[89] The Act, like its New Zealand and Australian counterparts, gave courts a wide discretion to make such provision as it considered 'adequate, just and equitable' in all the circumstances of the case where a testator had failed to make 'adequate provision for the proper maintenance and support' of the applicant.[90]

The Court identified two fundamental interests protected by the Act: that eligible beneficiaries receive proper provision from the estate; and that the deceased's testamentary freedom be respected. The latter must give way to the former, but only to the extent necessary to achieve the former. These two interests led the court to articulate the following series of principles:

- A court should not lightly interfere with a testator's wishes. There are many ways in which testators could choose to divide their estates, each one of which will be a reasonable and equitable division. If their chosen distribution falls within the range of reasonable choices, the court should not interfere with their choices. If it falls below the standard expected of them, the court should interfere only to the extent necessary to correct the testator's failure.[91]

- The meaning of 'proper provision' must be determined with reference to contemporary values and expectations. It is not a purely needs-based analysis.
- Contemporary values require that a court consider both the deceased's legal and moral obligations.

[87] [1994] 2 SCR 807.
[88] *Tataryn* has been cited 412 times as at 13 September 2020 in cases and documents that appear on the CanLii website and has been approved by the courts of other Canadian provinces. See eg *Cummings* (n62); *Ostrander v Kimble* 1996 CanLII 6978 (SKQB); *Petrowski v Petrowski Estate* 2009 ABQB 196.
[89] Wills Variation Act RSBC 1996, since repealed and replaced by the Wills, Estates and Succession Act SBC 2009 (BC).
[90] Section 2(1).
[91] At 21.

- In so far as there are competing claimants, the deceased's legal obligations enjoy priority over her moral obligations. Legal norms reflect 'a clear and unequivocal social expectation'.[92]

- Legal obligations are determined by reference to the testator's *inter vivos* duties of support. The court must consider what, if anything, an applicant would have obtained had she claimed provision while the deceased was still alive. In the case of claims by surviving spouses, the extent of the deceased's legal obligation is what the spouse would have received had the marriage ended in divorce.

- Once proper provision has been made from the estate to meet the deceased's legal obligations, the court must assess whether the deceased owed any applicant a (further) moral obligation. This moral obligation can exist in conjunction with a legal obligation, or entirely independently of a legal obligation.

- The existence and scope of the deceased's moral obligation is determined by asking what provision a 'judicious person', a wise and just testator, would have made in the circumstances. The provision a judicious testator would make is, in turn, determined by reference to contemporary community standards.

- Some moral claims are stronger than others. The court must thus weigh the relative strength of each, and thereby 'assign to each its proper priority'.[93]

Under the *Tataryn* approach, the testator's first obligation is to fulfil his legal obligations. His legal obligation is his minimum obligation. To the extent that there is a surplus in the estate, that surplus should be distributed in accordance with his moral obligations. His primary moral obligation may also be towards the same persons to whom he owed a legal obligation. The Court strongly rejected the contention that it should apply a needs-based analysis in

[92] At 18.
[93] At 20.

determining the scope of the deceased's obligation to the claimant. The contention had been raised in support of the argument that once the applicant's financial needs had been met, the testator's wishes should remain undisturbed. The Court emphasised that a moral obligation could be owed even in the absence of need, and it could still be owed even once the claimant's needs had been met.

In *Tataryn*, the Court did not have to rank the competing moral claims. The Court found that the testator's only legal and moral duty was towards his spouse of 43 years. His moral duty towards his adult, financially independent sons was insignificant, and the Court awarded them C$10 000 each out of an estate of C$315 000.

Tataryn was, however, unusual in that the spouse was the mother of the two sons. The testator had arranged his affairs to favour his one son to the exclusion of his other son. To this end, he had bequeathed the family home to his favoured son subject to a usufruct in favour of his wife. He bequeathed the residue of his estate to a discretionary trust to be administered by the son for the benefit of his wife for her lifetime. On her death the trust was to terminate, and its capital assets devolve on his son. Although the Court overrode his wishes and awarded the bulk of the estate to his widow outright, it gave some recognition of the testator's wishes, even though they were the result of an irrational prejudice he had formed against his disinherited son during the latter's childhood. It ordered that on their mother's death, the residue was to be divided between the sons in a 2/3, 1/3 proportion in favour of the testator's chosen heir.

Tataryn in some ways represents the archetypal situation that the creators of family provision legislation sought to protect against. An unjust husband and father abusing his testamentary power to capriciously disinherit a son and deprive his wife and life partner, in the literal sense, of the right to own, and control, property that had been acquired through their shared contributions and which had been intended for their joint use and enjoyment. In awarding

the bulk of the estate to the widow there was no prejudice to his sons, for they were expected to ultimately inherit via their mother in any event.

Most cases do not fit this mould. In *Tataryn*, the equities clearly favoured the mother, the children were financially independent, the defendant son did not contest his sibling and mother's claim (at least in the two appeals)[94] and the court was able to make an award that merely delayed rather than denied him receipt of the bulk of his intended inheritance. The court did thus not have to make the difficult distributive choices that arise in small estates, or in circumstances in which a re-allocation involves a permanent and substantial loss of the beneficiary's intended share. The principles it lays down are nevertheless useful, even in contested cases, for determining whether and to what extent a deceased's wishes should be overridden.

7.3.4 Contested obligations: spouses and children

Thousands of family provision disputes have come before the courts in the past century.[95] More often than not, the competing beneficiaries are the deceased's surviving spouse/partner, and the children of a previous relationship.[96] They have been the principal

[94] The first appeal was heard by the BC Court of Appeal: *Tataryn v Tataryn Estate* 1992 CanLII 871 (BCCA), the second by the SCC (n87). The trial court's judgment has not been reported.

[95] The increasing number of family provision claims, and the devastating impact that costs, which are normally borne by the estate, have on the value of small estates, is an issue of growing concern, particularly in Australia. White et al 'Estate contestation in Australia: an empirical study of a year of case law' (2015) 38(3) *UNSW LJ* 880 found that there were 195 estate-related disputes in Australia in 2011, of which 99 were family provision claims. Case law suggests that estate litigation is lucrative for the legal fraternity, and judges have questioned the disproportionate costs charged in such cases, sometimes capping the costs. See eg *Abrego v Simpson* [2008] NSWSC 215; *Stern v Sekers* [2010] NSWSC 59. Opinion within the fraternity is divided as to whether costs should follow the cause or be borne by the estate. See the discussion in SALRI Report 9 (n57), paras 7.7.11 - 7.7.22.

[96] The civil law's fixed rules of succession derive from restrictions that were first adopted in Roman Law before the first century AD, for the express purpose of protecting children's moral claim to share in their parent's estate against the competing claims of a second spouse. The first known example is the *Lex Falcidia* (40 BC), entitling children to at least a quarter of their intestate share. In the absence of children, the right to a minimum share passed to parents, and after them siblings. See Monro (n47) D35.2. Gaius, writing between 130-170AD, explained that: 'A parent ought not to be humoured who commits a wrong against his children in his testament; the reason why he does so often being that he has allowed the cajolery and incitements of the stepmother of his children to pervert his mind to the extent that he conceives a prejudice against those of his own blood'. See D 5.2.4. Children enjoyed special protection, spouses did not. Half a century later the Emperor Justinian recognised a poor widow's right to protection when inadequate provision had been made to meet her needs. Additional

'disputants' through the ages, and they remain so today,[97] in South Africa as much as elsewhere,[98] but they are not the exclusive disputants. Parents and siblings are regularly amongst the circle of competing beneficiaries, and their claims equally need to be weighed against those of a spouse or third party.

How are these competing claims resolved by the courts? What are the contemporary community standards that guide them in determining the existence, scope and strength of competing moral claims?

If community standards are discernible from judicial decisions, which I believe they are,[99] they remain, on the face of it, remarkably similar today to what they were 100 years ago, at least in so far as the treatment of spouses and children is concerned. There are, however, discernible differences across jurisdictions in what is best-described as the level of judicial 'sympathy' towards spouses and children, which influences the 'intuitive assessment'[100] that courts make in determining whether, and the extent to which, a testator has failed in his moral duty. Judicial sympathy towards spouses and children is strongest in Australia and New Zealand. Their courts appear to approach the enquiry principally from the perspective of the

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measures to protect the respective rights of children from first and later marriages were introduced. Testators were encouraged but not obliged to treat their children equally. See further Beinart 'The forgotten widow' 1965-66 *Acta Juridica* 285.

[97] Civil law countries predominantly favoured children, while common law favour spouses. Reform projects in civil law countries have sought to reduce or remove the statutory restrictions that favour children, and thereby permit more favourable testamentary dispositions for spouses. The judiciary in New Zealand and Australia have restricted testamentary freedom by recognising the moral claims of almost all children to some share of the estate. See further: Van Erp (n48); Croucher 'A lament for family provision – a good idea gone wrong? Australian Reflections' Colloquium on 40 years of the PRA: reflection and reform 8 December 2016 (2016).

[98] Two of the three reported claims against deceased estates were by spouses seeking to overturn their husband's will that favoured the children: *Oshry v Feldman* 2010 (6) SA 19 (SCA) and *Friedrich v Smit* 2017 (4) SA 144 (SCA). The Malawian case of *Chinkwende v Chinkwende* (n42), concerning a dispute about the appropriate division of an intestate estate, similarly involved a second spouse and children. Many death benefit disputes similarly involve competing spouses/partners and children, see §5.4 & 5.5 above. Increasing numbers of estate-related disputes are coming before the courts in which the validity of a spouse's marriage under customary law is in issue – because it determines whether the spouse or the deceased's family have the right to be appointed administrators of the estate, to decide burial arrangements, and rights to inheritance. See *Marai v Rasello* [2015] JOL 34564B (FB); *None v Tshabalala* [2016] JOL 36713 (GSJ); *Mrapukana v Master of the High Court* [2008] JOL 22875 (C); *Fungisani v Minister of Home Affairs* [2017] JOL 38091 (LT). The applicants are usually either competing spouses or parents.

[99] Cf NZLC Report 39 (n85); Sutton & Peart (n44).

[100] *Grey v Harrison* [1996] VSC 74 [30].

applicant, and their expectation is that the testator use financial provision in order to protect applicants from future harm and compensate for past harm. The principal constraints are the size of the estate and the competing moral claims of the other beneficiaries. In Canada and England, courts are more inclined to approach the enquiry from the perspective of the testator.

7.3.4.1 Spouses

Early New Zealand cases described a widow's claims as 'paramount',[101] and held that 'she has a higher moral claim on his estate than anyone else'.[102] Similarly, in *McKenzie v Topp*,[103] the Victoria Supreme Court stated that:

> Other things being equal, right thinking members of society are likely to accept that the needs of the widow of a second marriage should rank in priority ahead of the claims of the children of a first marriage; although of course it is always a question of fact.[104]

Modern sentiment thus still accords with Stout CJ's 'fourth rule' in *Allardice*.[105] However, the fact that a spouse is considered to have a higher moral claim than other beneficiaries does not mean that a testator is under a moral obligation to make provision for a spouse in every case. In *Re Allen*, in dismissing a widow's claim for additional provision and upholding the testator's will appointing their two minor sons as his primary heirs, Salmond J expressed the view that a testator's moral obligation towards his widow, *in cases in which there were no competing moral claims*, is to provide her with such provision as would enable her, together with her own means, to enjoy a life of comfort, free from financial anxiety and at the same standard of living she had enjoyed prior to the testator's death.[106] This the testator had amply provided the widow, since the estate was large enough to accommodate all moral claims.

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[101] *De Renzi v De Renzi* (1915) 17 GLR 620. It was described as such by all three judges in the case.
[102] *Russell v Dunn* 9 NZ Gaz LR 5og, 5io (Sup Ct 1907), quoted in Laufer 'Flexible restraints on testamentary freedom - a report on decedents' family provision legislation' (1955) 69 *Harvard LR* 277, 305.
[103] [2004] VSC 90. See similarly *Tataryn* (n87), 20. Cf *Bladwell v Davis* [2004] NSWCA170.
[104] Para 58.
[105] (n60). See *Tataryn* (n87); *Cummings* (n62); *Skworoda v Skworoda* 2008 ABQB 240; *Kish v Sobchak* 2016 BCCA 65 (and the cases discussed therein); NZLC Report 39 (n85); Croucher (n97).
[106] At 615.

Salmond J was of the view that in bequeathing the greater portion of the estate to his sons, the testator was fulfilling his moral duty. More recently, in *Marsella v Wareham*,[107] in finding that the testator had breached her moral duty towards her spouse of 30 years, the court affirmed that as 'general rule' a testator is under a duty to provide the survivor with 'appropriate accommodation, a secure income, a fund against contingencies and an entitlement to independence, self-respect and autonomy.'[108] The court nevertheless emphasised that it is a general rather than absolute rule, and that the existence and scope of the duty will always depend on the particular facts of the case – including the 'totality of circumstances' of the relationship between the testator and spouse, as well as that between the testator and others who have a 'legitimate claim' on her bounty.[109] In *Marshall v Carruthers*,[110] the claim of a cohabiting partner of five years was rejected by the court not merely because she had no financial need, and was in fact considerably more affluent than the deceased's son, his chosen beneficiary, but also because the relationship was of relatively short duration, she had suffered no financial disadvantage as a result of the relationship, nor had she contributed to the growth of the deceased's estate. The Chief Judge, in his concurring judgment, pointed out that the 'general rule', which had been formulated in the 1980s, was probably only applicable to the typical 'mid-century widow': one who had sacrificed her own economic opportunities in order to raise children and support her husband while he was amassing his estate.[111]

In Canada and England, the courts' starting point is the amount of provision that the spouse would likely have received had the marriage ended in divorce. In England, it is a factor courts are statutorily required to consider, but it represents neither the lower nor the upper limit that a court can award; it is merely intended as a guide.[112] England has no matrimonial property regime governing the proprietary rights of the parties, so there is nothing which a

[107] [2018] VSC 312.
[108] Ibid [109]. See similarly *Iqbal v Ahmed* [2011] EWCA Civ 900.
[109] Ibid. See also *McKenzie, Re* [2017] VSC 792.
[110] [2002] NSWCA 47.
[111] Ibid [74], [76] (Young, CJ).
[112] Inheritance (Provision for Family and Dependants) Act 1975, s3(2). See eg *Fielden v Cunliffe* [2005] EWCA Civ 1508; *Moore v Holdsworth* [2010] EWHC 683 (Ch).

spouse can claim as of right. The focus of enquiry is thus typically not maintenance, but an equitable redistribution of the spouses' separate estates.[113]

Canadian provinces predominantly follow a hybrid community of property and accrual system, and the parties' proprietary rights are thus fixed by their matrimonial property regime.[114] What spouses are entitled to as of right under matrimonial property law is separate from the question of whether the deceased should have made better testamentary provision for the survivor than she did. The Supreme Court in *Tataryn* approved and applied the divorce benchmark in answering this question.[115] What the spouse may have received on divorce represents the scope of the deceased's *legal obligation* towards her and is the minimum to which she is entitled. A widowed spouse should not be in a worse position than she would have been had her marriage ended in divorce.[116] Moral obligations remain important in determining whether, and how much, additional provision should be made.

Although the discretion whether, and how much, spousal maintenance to award on divorce rests with the court,[117] spousal support guidelines have been drafted to promote certainty and consistency in the quantum of maintenance awards.[118] Although non-binding, they are

[113] There is considerable variation between the awards made by courts in different parts of England, which has become a matter of concern. See LCEW *Report on Matrimonial Property, Needs and Agreements* (Law Com No 343, 2014).

[114] See eg Family Law Act SBC 2011, ss85-86 (BC) - spouses jointly own property acquired during the marriage, while property acquired before the marriage, together with property received by way of inheritance, gift or damages award, remains separate property. However, any increase in value of separate property does form part of family property. Manitoba and Saskatchewan follow the same model, except that in Saskatchewan family property includes the family home and household goods irrespective of when acquired, see Family Property Act CCSM (Ma) and Family Property Act SS 1997, s20-23 (Sk). Alberta is similar, except it gives courts a broader discretion to divide matrimonial property as it considers just and equitable. Once again, the value of property acquired before marriage, plus inheritances, gifts and so forth, is excluded, while growth thereon is included. Property acquired during marriage should ordinarily be divided equally; see Matrimonial Property Act RSA 2000 (AB).

[115] (n87), 17-18, 22.

[116]The provision of maintenance following divorce has decreased significantly in light of women's increased economic opportunities, from lifetime maintenance to rehabilitative maintenance in most instances. In *Messier v Delage* [1983] 2 SCR 401, 416 the Canadian Supreme Court observed that a person does not acquire a lifetime pension through marriage. See also *Botha v Botha* (n43).

[117] See eg Divorce Act RSC 1985, s15.2(1).

[118] Rogerson & Thompson *Spousal Support Advisory Guidelines 2008* Presented to: Family, Children and Youth Section, Department of Justice Canada (July 2008). The Law Commission of England and Wales has also recommended that guidelines be formulated to provide clarity and consistency in the division of property; see LCEW *Report on Matrimonial Property* (n113) [1.31].

widely-used in practice.[119] The guidelines translate an inchoate legal claim into a concrete monetary claim. The federal Divorce Act requires that courts consider a basket of factors,[120] in conjunction with the objectives of spousal support,[121] when exercising their discretion to award maintenance. The factors include the spouses' respective means and needs; the length of time they cohabited; and the functions each performed while cohabiting. The objectives include compensating a spouse for any economic disadvantage suffered because of the marriage or its breakdown;[122] alleviating financial hardship arising from the relationship breakdown; and promoting self-sufficiency. The provisions of the Divorce Act proved difficult to apply in practice, and there was considerable variation in the quantum of maintenance awarded by different courts. Following an analysis of judicial decisions interpreting and applying these provisions, the authors of the guidelines distilled two key considerations that typically inform the quantum of maintenance awarded: the impact that children frequently have on one parent's economic opportunities, and the fact that relationships 'merge over time', even in the absence of children.[123] The guidelines are modelled on these two key insights.

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[119] They are widely used in practice. Over 90% of lawyers reported using the guidelines when maintenance was an issue in a divorce; over 70% had found them helpful in resolving disputes without the need for litigation, and approximately 52% found them useful in predicting what the award was likely to be. Judges, however, made less use of the guidelines – just over 60% reported doing so. See Bertrand *The Practice of Family Law in Canada: Results from a Survey of Participants at the 2016 National Family Law Program* Canadian Research Institute for Law and the Family (2016).

[120] Divorce Act RSC 1985, s15.2(4).

[121] Ibid, s15.2(6).

[122] See eg *Yemchuk v Yemchuk* 2005 BCCA 406, for an award based on compensation for economic opportunities foregone by a husband. A claim based on similar facts was rejected by the Appellate Division in the much-criticised decision of *Kritzinger v Kritzinger* 1989 (1) SA 67 (A). See Clark & Van Heerden 'Asset redistribution on divorce – the exercise of judicial discretion' (1989) 106(2) *SALJ* 243; Sinclair 'Divorce and the judicial discretion – in search of the middle ground' (1989) 106(2) *SALJ* 249. The objective of compensating a spouse for losses attributable to the relationship is particularly relevant to the functional role assumed by the spouses, the conventional example being the wife as homemaker and the husband as breadwinner. The Canadian Supreme Court provided an extensive analysis of compensatory spousal support in the seminal decision of *Moge v Moge* [1992] 3 SCR 813, which has been cited over 3000 times in subsequent cases on the Canadian Legal Information Institute website (CanLii). The compensation-based approach has, however, proven difficult to apply in practice, which is amongst the reasons the Guidelines were formulated. The LCEW *Report on Matrimonial Property* (n113) has similarly concluded that it suffers from 'drawbacks' [3.5], while a leading QC described it as a 'useless concept' in determining spousal support [3.27]. Problems most frequently arise when parties seek to quantify the actual economic loss suffered, which in most cases is difficult to impossible. The Guideline's use of ranges permit courts to take account of the need for compensatory adjustments, without the need to quantify the actual loss.

[123] See Spousal Guidelines (n118) ch7.2.

The premise informing the guidelines is that the purpose of maintenance awards is to make provision for a lower-income earning spouse who is unable to maintain the relationship standard of living on her separate income. The guidelines thus employ two formulae, which distinguish between couples with children and those without, in so far as the child is a child born of the relationship and is still a dependant. Under the with-child formula, a lower-income earning custodial parent is entitled to an award of between 40-46% of the couple's combined 'individual net disposable income'.[124] This is only the spousal award. The sum to which the child is entitled is determined under binding child support guidelines.[125]

The without-child formula is particularly helpful, for the most difficult family provision claims, and s37C contestations, involve surviving partners who do not have the ongoing responsibility of supporting a dependent child of the relationship. It is in these cases that the competing legal and moral claims of spouses and children come to the fore. The significance of the without-child formula is its recognition that relationships merge over time. The duration of the relationship is thus the key consideration in calculating the amount of maintenance that should be awarded.[126] The longer the relationship, the more intertwined the economic and non-economic aspects of a couple's lives become, and the more their emotional and financial dependency and interdependency increases. Contribution to and dependency on a relationship inevitably increase over time. Relationships are analogous to plants that have been planted close together. The longer they remain in close proximity, the more intertwined their roots become. The more intertwined the roots, the slower and more complex the process of unwinding the roots – and there may come a point at which it becomes impossible to separate them completely.[127]

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[124] See ch8.3. For example, if the annual net disposal income of spouse one is $20 000 and spouse two is $100 000 (after deducting all permissible expenses), spouse one's annual income should be between $48 000 and $55 200, entitling her to monthly maintenance of between $2 333 and $2 933.
[125] Federal Child Support Guidelines, SOR/97-175.
[126] The Spousal Guidelines emphasise that they are strictly a guide to calculating the quantum of the award. It is the court that must decide whether the spouse has any entitlement to maintenance, see ch3.2.2.
[127] The duration of a maintenance award in long marriages, those of 20 years or more, would thus be for an indefinite rather than fixed period, subject to review as the parties' life circumstances change (for example retirement), see ch7.1

The without-child formula entitles the lower-income spouse to a percentage of the difference between their respective incomes. The percentage to which she is entitled, and the duration of the award, are both determined by the duration of the relationship.[128] The longer the relationship, the higher the maintenance and the longer the period for which it will be awarded.[129] Conversely, the shorter the relationship, the lower the amount and the shorter the duration of the award.[130] The aim of the formula, in the case of a long relationship, is to enable the poorer spouse to maintain her pre-divorce standard of living as far as possible.[131] If that is not possible, the aim is to equalise the standard of living of both spouses. The aim in a medium-length relationship is to assist the poorer spouse become self-sufficient, or to re-adjust to her pre-relationship standard of living. When the relationship is a short one, which is one of less than five years, the spouse does not have an automatic entitlement to support, notwithstanding disparities in income and the other spouse's ability to afford maintenance. Any sum awarded will thus be small and for a short duration.

The formulae do not remove judicial discretion. They are not purely mathematical formulae in which income and duration are fixed inputs that would yield the identical amount in every case in which these two inputs were identical. The formulae provide input-bands, or ranges of support, which permit judges to adjust the inputs having regard to the particular facts of a case.[132] The Guidelines also recognise that exceptional circumstances may warrant a departure from the formulae. For example, in relationships of short duration, the formula may not provide the dependent spouse with sufficient income to meet even her basic

[128] The Spousal Guidelines use this phrase but explain that it refers to the period during which the parties have cohabited.
[129] If the relationship was 20 years of longer, maintenance will be awarded for an indefinite period, see Spousal Guidelines ch7.1.
[130] There are two parts to the formula: the amount and the duration. The duration of the relationship is relevant to both. The amount is determined by multiplying 1.5–2% x duration of the relationship. Thus, if a relationship lasted 8 years, the poorer spouse would be entitled to between 12–16% of the difference in their respective incomes. The duration is determined by multiplying 0.5–1% x duration of the relationship (4-8 years). Thus, if the difference in income was R100 000, the poorer spouse would be entitled to between R12 000–R16 000 p.a. for between 4–8 years. See eg *McCulloch v Bawtinheimer* 2006 ABQB 232.
[131] Discussed throughout but see especially ch6.7.
[132] Guidelines ch7.3.

maintenance needs if she was wholly dependent on the deceased. In this case a court may depart from the formula, but only to the limited extent of providing for basic maintenance needs, and only for a short 'transition' period to give the recipient the opportunity to become self-sufficient.[133]

South African divorce courts also have the discretion to award such maintenance as they consider 'just' in the circumstances of the case.[134] The Divorce Act requires courts to take into account various factors that speak to the financial circumstances of the parties, the age of the parties, the marital standard of living, the duration of the marriage, and any other relevant factor in deciding what, if any, maintenance to award. Courts have emphasised that no spouse has a right to maintenance.[135] The leading case that discusses the concept of equitability in the context of post-divorce spousal maintenance is *Botha v Botha*,[136] in which Satchwell J explained that the word 'just' requires the court to assess whether and what sum of maintenance it would be morally right and fair, in the sense of appropriate as between the parties, to award. In refusing both permanent and rehabilitative maintenance, she emphasised that to the extent the applicant had financial need (which she had not proven), such need was not attributable to the marriage.[137] Both spouses had established careers and life paths by the time they married, at age 39 and 50 respectively;[138] the husband had prior to and during the marriage earned considerably more than the wife, which had enabled him to acquire the marital home and significant assets; the wife had never owned immovable property and had no expectation that she would ever do so; no children had

[133] Guidelines ch12.7. A further exception is that if the combined age of the spouse and the duration of the marriage is 65 years (or more), then a maintenance award will be for an indefinite period. Both need and the so-called 'rule of 65' might have been applicable on the facts of *Glazer v Glazer* 1963 (4) SA 694 (A) 707. Although the couple had only been married for 18 months, the estate was large, and the husband left his wife no bequest in his will. She was entitled to a small sum under their ante-nuptial contract. Adjusted for inflation using 1 January 1960 as the valuation date, the relevant sums today would be about R337 million vs R746 000. He would doubtless also be considered to owe her a moral obligation.
[134] Divorce Act 70 of 1979, s7(2).
[135] See *Botha v Botha* (n43).
[136] Ibid.
[137] See also *EH v SH 2012* (4) SA 164 (SCA), confirming that need is a prerequisite for a maintenance order.
[138] In the more evocative words of Satchwell J, the wife's 'life choices and experiences had already determined most of life's opportunities, enjoyments and difficulties' [51].

been born of the marriage, and the wife had suffered no financial or economic disadvantage as a result of the marriage; she had instead obtained financial and social advantages from the marriage - her standard of living had increased significantly, her husband bore all household expenses and paid for additional ad hoc expenses for her and for her daughter (such as university fees), even though he had not adopted her daughter and had not undertaken a duty of support towards her; the daughter's biological father was still alive, but the wife had chosen never to seek maintenance towards her daughter's living expenses; they had married out of community of property; the wife had remained an 'economically independent adult' during the course of the marriage.[139]

The court's most important statement of principle was that it was not enough for the wife to satisfy the court that she was unable to maintain her marital standard of living on her own means, and that the husband had the means to maintain her at that standard of living. Justice requires that a court consider factors *other than* the financial circumstances of the parties.[140]

The Maintenance of Surviving Spouses Act (MSSA),[141] by contrast, makes no reference to equitability. It gives the surviving spouse a right to maintenance. The lack of explicit reference to equitability has, I suggest, led to difficulties in interpretation and application. The right appears to entitle the survivor to whatever sum she needs to meet her maintenance needs, and that all that needs to be established is what that sum is.[142] This may explain the course of events in *Friedrich v Smit NO*,[143] in which the executor, Master of the High Court, the HC of first instance and later of appeal, all agreed that the widow had a right to maintenance from the deceased estate, but disagreed on whose responsibility it was to determine the

[139] See also *AV v CV* 2011 (6) SA 189 (KZP) and the cases cited therein, which illustrate the circumstances under which courts have granted or refused maintenance.
[140] Paras 48 & 49.
[141] Act 27 of 1990.
[142] See *Oshry v Feldman* (n98); *Van Niekerk v Van Niekerk* [2011] 2 All SA 635 (KZP).
[143] (n98).

amount.[144] On appeal, the SCA summarily rejected the widow's claim on the basis that she had not discharged the onus of proving that she was in need of maintenance.

Although the MSSA appears to give a spouse an absolute right to maintenance in cases of need, the Act identifies other factors that suggest her right is not as absolute as it has been interpreted. She is entitled only to her *reasonable* maintenance needs, and in deciding on the appropriate sum the executor is required to consider, apart from her financial needs, the duration of the marriage and the interests of other beneficiaries.

The Canadian approach is particularly helpful, for it clearly distinguishes between what a spouse should receive *as of right*, and whether and why an *additional* moral obligation was owed to her. It is an approach that better balances testamentary freedom and testamentary duty, because it requires a court to focus on, and explain, the distinctive elements of the deceased's overarching obligation and how those elements translate into the eventual monetary award.

Further cases illustrate how the tests are applied in practice. In *Skworoda v Skworoda*,[145] the court concluded that despite 26 years of marriage, the husband owed his widow no *legal* obligation of support and that she would not have succeeded in obtaining maintenance had the marriage ended in divorce. The reasons were their estates and incomes were similar, she had made no contribution to the growth of his estate, although he had to hers, nor had she had to sacrifice her economic opportunities as a result of her role within the family. The court concluded further that he nevertheless owed her a *moral* obligation to make sure that her needs were met, but he had fulfilled his obligation prior to his death, by way of a substantial *inter vivos* gift.[146] The court also concluded that the claim was animated by the

[144] The executor had already awarded her a generous sum: R4.5m out of an estate of R7m, for a 3.5-year marriage. He had already paid her R3m before the matter was heard. She was 43 when they married.
[145] 2008 ABQB 240.
[146] Cf the Australian case of *O'Loughlin v O'Loughlin* [2003] NSWCA 99, in which a 67-year-old widow of a marriage of short duration, with assets in the region of A$ 3 million but a relatively small income, was

widow's desire to build her estate for the benefit of her children, at the expense of his children.

Numerous other decisions have also emphasised that the purpose of family provision is not to enable an applicant to build their estate for the benefit of their beneficiaries and to the detriment of the deceased's beneficiaries.[147] Naturally, this principle only constrains the scope of the deceased's moral obligation and not the deceased's legal obligation. It is a consideration that has arisen most commonly in the context of a second or later relationship, in which one or both parties has children of a prior marriage.[148] The nature and circumstances of the claim do therefore create the suspicion that the main motivation is not to obtain provision for a needy spouse, but a legacy for the benefit of the spouse's children.

Canadian jurisprudence indicates that the scope of the legal obligation infuses the moral obligation. The greater the legal obligation, the greater the moral obligation is likely to be. In *Thronberg v Thronberg Estate*[149] the court held that the deceased owed his widow neither a legal nor a moral obligation after 18 years of marriage. Their assets were similar; they had agreed to keep their estates separate to benefit their children; she was age 90 at the time of application, and an award was more likely to build her estate for the benefit of her intended heirs; and her income was just sufficient to meet her needs. In *Seier v Scott*[150] the deceased had made generous provision for his 74-year-old partner of nine years but had left the residue of his estate to his sister. Much of the residue consisted of inherited assets. The partner had sufficient assets and income to maintain the relationship standard of living. She also had three adult children, who the court believed would probably be the ultimate beneficiaries of

awarded an additional A$700 000 out of an estate of roughly A$ 5 million that had been bequeathed to the testator's 10 children. The deceased had bequeathed the widow the marital home and its contents, plus he had made inter vivos gifts in the region of A$ 230 000.

[147] *Thronberg v Thronberg Estate* 2003 SKQB 114; *Seier v Scott* 2015 SKQB 244; *Kish v Sobchak* (n105).

[148] Ibid. The same applies to other applicants. See *Petrowski v Petrowski* (n88), an application by an adult child.

[149] (n147).

[150] 2015 SKQB 244.

her claim. In *Kish v Sobchak,*[151] the court concluded that the deceased probably did owe his widow a legal duty of support since she had some need and his income was higher than hers, even though her estate was somewhat larger than his. He did not, however, owe her an additional moral duty of support. They had expressly agreed to keep their estates separate and had both bequeathed their estates to their respective children. The court emphasised that he also owed his sole heir, his adult daughter, a significant moral obligation. In the circumstances the court held that contemporary community standards required that significant weight be given to testamentary autonomy. The claim had been brought by the widow's adult son, for she suffered from dementia and was in a care home. Her principle asset, her house, could therefore be sold to meet most of her additional needs.

When spouses have married out of community of property, have thereafter kept their financial affairs strictly separate for the duration of the marriage, and the survivor has suffered no disadvantage as a result of the marriage, the smaller the legal and moral obligation owed to that spouse will be, and the more significant the other competing interests become: autonomy, and the legal and moral obligations owed to other beneficiaries – most often children. The cases clearly illustrate that the fact that a spouse enjoyed a higher standard of living due to the contributions of the deceased does not entitle them to retain that standard of living for the duration of their lives, at the expense of the deceased's other beneficiaries.[152]

7.3.4.2 Children

Stout's 'fourth rule', that a court would make better provision for a widow than for independent children, even in the early 20th century, was not an inflexible rule. It was more relevant to the extent of the deceased's moral obligation than to the existence of that moral obligation. It meant only that in appropriate cases, a testator might justifiably prioritise a

[151] 2016 BCCA 65.
[152] Cf death benefit cases: *Whitcombe v Momentum* [2016] 2 BPLR 290 (PFA)*; Kirsten v Allan Gray* [2017] 3 BPLR 566 (PFA).

dependent widow over his self-sufficient children if the full estate was needed to make proper provision for her. The rule did not mean that a testator was not entitled to make provision for his adult children, or that a court would not intervene on behalf of a financially independent, adult applicant. In *Allardice*,[153] Stout CJ himself qualified his own 'rule' by stating that:

> A child, for example, that has been living on a father's bounty could not be expected to begin the battle of life without means. A child, however, who had maintained her or himself and had perhaps accumulated means, might well be expected to be able to fight the battle of life, without any extraneous aid. But, even in such a case if the fight was a great struggle, and some aid might help and the means of the testator were great, the Court might, in my opinion, properly give aid. The whole circumstances have to be considered.[154]

In *Allardice*, five adult children of the testator's first marriage claimed provision from an estate that had been bequeathed to the testator's widow for the benefit of his second family, which included six children, aged 3 to 19. The estate was a large one,[155] and the widow was ordered to utilise a portion of the estate to provide annuities for the testator's three middle-aged, married daughters. The court justified its award on the basis that the daughters' husbands had low incomes and uncertain futures. The sons, although also experiencing some hardship, were young men in their 30s, in employment, and while Stout was doubtful that no provision should be made for them, he ultimately concluded that they could secure better lives for themselves with a bit more industry and drive. The decision to exclude them from consideration altogether is more probably because of the size of the estate and the relative urgency of the competing moral claims of the testator's financially dependent family.[156]

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[153] (n60).
[154] At 757.
[155] £20 000, which is roughly £2.3million today using the Bank of England's inflation calculator.
[156] Cf Renwick '"Responsibility" to provide: family provision claims in Victoria' (2013) 18(1) *Deakin LR* 159, who interprets the decision as evincing a general reluctance on the part of early courts to make family provision for adult, independent sons. My reading is that the court was sympathetic to the claims of the adult sons, but the competing claims were such that the court did not feel able to make an award. Renwick, and Atherton (n51), identify Stout as an early-proponent of family provision legislation, but that he preferred the fixed-share model rather than the discretionary model. This points to a greater innate sympathy for the claims of adult children, for children would then be entitled to a minimum statutory share of the estate as of right.

In *McKenzie v Topp*,[157] the statement that 'right thinking' members of society would agree that a widow's claims should, ordinarily, rank ahead of those of those of adult children of a first marriage, was made by the court in the context of assessing a stepmother's moral obligation towards a stepson. The court simply affirmed that a father's decision to leave his entire estate to his 58-year old widow, after 20 years of marriage, to the exclusion of his son aged 30, was entirely reasonable. The stepmother's subsequent decision to exclude her stepson from her estate, 30 years later, was not. The son was aged 60 when the testatrix died, and he had been living with and caring for her for the last ten years of her life. He was in considerable financial need and would have been reduced to a life of hardship and living in 'doss' houses without some provision from her estate.[158] Her heir was her financially independent and reasonably affluent nephew. The deceased had a moral duty to make proper provision for the son in light of the nature of their relationship, which was that of *de facto* mother and son, the duration of their relationship, the considerable contribution that he had made to her physical and emotional well-being through his caregiving once she had become so frail that she could no longer attend to her own basic feeding and ablution needs, and the fact that his father's estate was of significant value at the time of the father's death, approximating the value of the house in which they lived as a family, and in which the stepmother and stepson had continued to live together for much of their lifetime.[159] Despite the son's considerable contribution, the court emphasised the need to respect the stepmother's testamentary choices. In limiting the provision to be paid from the estate to roughly one-third its value, which was only so much as was necessary to enable the son to purchase a modest home, and maintain a standard of living similar to that which he had enjoyed while living with his stepmother, the court said:

> It is plain, however, that the discretion [to order provision] is not untrammelled or to be exercised according to idiosyncratic notions of what is thought to be fair or in such a way as to transgress unnecessarily upon the testatrix's freedom of testation, but rather carefully and

[157] (n103).
[158] Ibid [64].
[159] She had left the equivalent sum, A$12 500, to her stepson's three children in equal shares. Its present value was of course infinitesimal compared to what it was when she received it.

> conservatively according to current community perceptions of the provision which would be made by a wise and just testatrix.[160]

In both *Allardice*[161] and *McKenzie*[162] the child applicants were in financial need, and the provision made for them was only enough to meet that need.

Existing financial need is not, however, an essential precondition for a successful claim by an adult child. *Financial vulnerability* also creates a moral obligation to make further provision for a child. A just and wise testator should make provision for a child against the vicissitudes of life when able to do so. The point was made in *Re Sinott* in 1948,[163] *apropos* the financial vulnerability of a daughter. The fact that the applicant was a daughter was clearly a relevant factor for the court, but the same vulnerabilities were not unique to women then and are certainly not unique to women today.

> The daughter was in no way dependent on him. … She was well able to earn her own living. … She was in no need, and there was no probability that she would be in need in the calculable future. But she was a woman, she might not marry, she would grow old, she might fall ill, she might in some way or other find herself in a position in which a substantial sum of money would be a great help.[164]

Courts thus recognise that the future is uncertain and may bring hardship. The view of the courts has repeatedly been that a parent's moral duty extends throughout the child's life, albeit that this does not mean that all children can in all circumstances expect parents to provide for them. However, where possible, it does include providing younger adults with a

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[160] Para 63. Cf *State Trustees Ltd v Bedford* [2012] VSCA 274, in which the trial court had assessed a friend's contribution to the deceased's welfare, principally by virtue of being his 'close personal friend and intimate partner' [146], and that of her 9-year-old son, in 'loving' him when he had no children of his own[147], as entitling them to almost a quarter each of the deceased's A$2.1 million estate. They had never cohabited with the deceased. The testamentary beneficiaries were the deceased's siblings, nieces and nephews, whose contribution to the deceased's welfare was held to have been limited, with the exception of one niece, who was similarly awarded almost a quarter of the estate by virtue of their longstanding 'loving relationship over a lengthy period' [148]. The size of the estate and the financial needs of the parties were also relevant in determining the quantum. Less emphasis was placed on the deceased's testamentary autonomy, but the will had been drawn up 30 years prior to his death, when his estate was still a very modest one. The decision was upheld on appeal.

[161] (n60).

[162] *Re McKenzie* [2017] VSC 792.

[163] *Sinnott, Re* [1948] VLR 279. See also *Butler v Tiburzi* [2016] SASC 108 [24]; *Marsella v Wareham* [2018] VSC 312.

[164] *Sinnott* (n163), 282.

start in life,[165] and alleviating the hardships of older children, or even the possibility of hardship, if the estate is large enough.[166]

This holds true even when the child is, in large measure, the maker of their own misfortune and when they have already received considerable support from a parent.[167] Having assumed the responsibilities of parenthood, it appears a parent can almost never be heard to say 'enough is enough' if there is any suggestion of financial vulnerability on the part of the applicant.

The reason is, quite simply, because the parent-child relationship is the foundational relationship in society.[168] As described by the New Zealand Court of Appeal in *Flathaug v Weaver*:[169]

> The relationship of parent and child has primacy in our society. The moral obligation which attaches to it is embedded in our value system and underpinned by the law…[A] parent's obligation to provide for both the emotional and material needs of his or her children is an ongoing one. [170]

In *Flathaug*, the Court held that the deceased owed his 47-year-old financially-needy daughter a moral duty of support, even though she was married, had only learned of his existence when she was 24-years-old, lived in England, and had spent brief periods of time with him and, sometimes, his family, on only six occasions. The moral obligation derived from the 'close and affectionate' relationship they had developed,[171] despite the distance and limited interpersonal contact. The court held that before she learned of his existence, he had owed her no moral obligation to provide support. Once she acquired knowledge of his existence and they established a living parent-child relationship, he did acquire a moral duty. Nevertheless, the moral duty he owed her was proportionate to the nature of their lived

[165] *Allardice* (n60) 756; *Huxtable v Hawkins* [2018] NSWSC 174.
[166] *Flathaug v Weaver* [2003] NZCA 343; *Carusi-Lees v Carusi* [2017] NSWSC 590 [116(f)].
[167] *Carusi-Lees* (n166). See also *McBride v Toth* 2010 BCSC [133].
[168] See also *Glazer v Glazer* (n133), 707: 'However close the relationship between husband and wife, it is terminable, and not the same as the immutable natural relationship between parent and child'.
[169] (n166).
[170] Ibid [32].
[171] Ibid [6].

relationship. It was thus significantly less than that which he owed his children in Australia, with whom he 'had shared a lifetime relationship'.[172] In determining the extent of the moral duty, and consequent proper provision, it is the lived parent-child relationship that matters most, not merely the biological fact of that relationship. The fact that a child is estranged does not, usually, extinguish the parent's moral obligation towards the child, but it does affect its relative strength *vis a vis* the other beneficiaries. The more integral a child has been in a parent's life, the stronger their moral claim to that of siblings who are estranged.[173]

Courts have even accepted that a parent's moral obligation can require them to make financial provision for symbolic reasons. It can exist even in the absence of financial need or vulnerability. One such circumstance is when a failure to make proper provision is seen as a form of rejection, a diminution of the child's role as a valued and contributing member of the family. It can also arise when a parent has neglected or abused a child, and provision is seen as a form of reparation, or as providing restorative justice.

In *Williams v Aucutt*,[174] the court awarded additional provision to an affluent daughter. The deceased had bequeathed 5% to the claimant, and 95% to her poorer sibling. The court held that the deceased had been under a moral duty to affirm her affluent daughter's sense of 'belonging' within the family,[175] since the parental obligation to provide proper support encompasses more than financial support – it extends to the comfort, affirmation and emotional support that parents are expected to provide children. A failure to give due recognition to a child may thus be tantamount to a form of rejection, a breach of the parent-child relationship which courts feel compelled to repair by awarding additional provision to the adult child.[176] Another circumstance in which financial provision plays a

[172] Ibid [41].
[173] See *Stern v Sekers* (n95).
[174] [2000] NZCA 289. The provision can range from an heirloom in the case of a small estate if the child has sufficient means, to a more substantial monetary legacy if the estate is large, even if the child has sufficient means [53].
[175] Para 52.
[176] In *Williams v Aucutt* (n78), the estate was close to A$1 million, of which A$50 000 had been bequeathed to the applicant. The trial court increased her award to A$200 000. The appeal court

symbolic role is as a form of reparation or 'restorative justice' for children who were neglected or abused by their deceased parent.[177] In such circumstances courts seek to acknowledge and make some recompense for the harm caused by an abusive parent. In some circumstances the testator's decision to disinherit children may fall within the classic paradigm of the abusive testator – the very act of excluding them may be a form of abuse.[178]

7.3.5 The deceased's wishes

In assessing the existence and scope of a testator's moral duty towards an applicant, it is easy to forget that the court has been tasked with overriding the testator's wishes *if and only to the extent* the testator failed in her moral duty to the applicant. It is also easy to forget that the court is required to assess not only the moral obligation the deceased owed to the applicant, but also that owed to the intended beneficiaries. Moral obligation plays an important role both in justifying judicial interference with a deceased's wishes, *and in giving effect to* a deceased's testamentary wishes.

In the Canadian case of *Cummings v Cummings*,[179] the Ontario Court of Appeal relied on the deceased's moral duty towards his widow to limit a child's claim for further provision from the estate. The court of first instance had awarded an adult child, who was suffering from a progressive disability that would eventually paralyse him, additional provision from the estate. The son appealed, seeking further provision. If awarded, it would have required that his widow sell the home she and the deceased had bought together. Although the widow's information to the court was that she was not in need and could provide for herself, the Court felt that the deceased's moral obligation towards her, after 11 years of a close, mutually-supportive marriage, required that she at least be able to retain the family home.

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considered this excessive and increased the original award by A$50 000 only. See also *Smart v Webster* [2017] NZFC 7264.

[177] *Roben v Public Trustee* [2016] NZFC 6313 [45]. See also *McBride v Toth* (n167) [132].

[178] In *Roben* (n177) the testator had been an abusive father who had bequeathed his estate to his partner of 11 years and failing her to her children – one of whom he had never even met.

[179] (n62).

In the Australian decision of *Grey v Harrison*,[180] a testator had bequeathed his modest estate to his elderly sister and grandchild in equal shares, to the exclusion of his middle-aged, unemployed son, who was the father of his grandchild. The son was a recovering alcoholic. He had been a practising barrister before his alcoholism destroyed his career, his marriage and rendered him homeless. He had been living with his father for one year prior to the latter's death. The court of first instance awarded the son one-third of the estate. On appeal, the son sought a greater share, specifically from the bequest to the sister rather than that of his daughter. In dismissing his appeal, the Court emphasised two things. One was that the elderly sister's moral claim was also one worthy of protection. A deceased can, after all, owe a moral duty to someone who is not eligible to apply for a family provision order:

> It is all too easy to underestimate the claims of an elderly sibling and to subordinate them to the perceived needs of a man in middle life or a neglected grand-daughter. Additional security and the opportunity to enjoy a few luxuries are all the more important for a person of Mrs. Henderson's age.[181]

The other was that freedom of testation is a fundamental human right. If a court interferes with that right in circumstances in which the testator has not abused that freedom, the court is not correcting an injustice perpetrated against the applicant but is itself perpetrating an injustice on the intended beneficiary.

> … there is no equity, as it were, to interfere with a testator's dispositions unless he or she has abused that right. To do so is to assume a power to take property from the intended object of the testator's bounty and give it to someone else. … A breach of moral duty is the justification for curial intervention and simultaneously limits its legitimate extent. So much may be derived from the concept of "proper" maintenance and support but also, and more fundamentally, from those considerations.[182]

The deceased's wishes, and the reasonableness of those wishes, thus plays an important part in assessing whether the testator was in breach of his moral obligations towards the applicant. The cases serve as an important reminder that testamentary freedom is not an

[180] (n100).
[181] Ibid [14].
[182] Ibid [29].

abstract principle. It exists because the law respects the individual's right to choose who, amongst her kith and kin, are entitled to share in her property. The testator's moral obligation towards an aggrieved beneficiary is informed both by her obligations towards her selected beneficiaries, and also by her moral right to prefer those for whom she feels a greater bond of loyalty, affection or obligation.

7.3.6 Moral convictions: contemporary developments

If ever there was an area of law that proved the truth of the expression 'the more things change, the more they stay the same',[183] it is family law and its intersection with freedom of testation. Contemporary debates regarding the appropriate balance that should be struck between testamentary duty and testamentary freedom are little different to those that were raised a century ago by English parliamentarians debating the introduction of family provision laws. Their concern even then was to adopt a model that achieved the twin objectives of preserving freedom of testation and protection of the family.

Critics of all the proposed models argued that instances of disinheritance were so rare as to make any limitation unnecessary – and that it would make good testators hostage to the few bad testators. Critics of the minimum-share model felt that it constituted an absolute limitation on freedom of testation, protecting those who did not need, or deserve, provision at the expense of those who did. Critics of the discretionary model feared that it would lead to a flood of litigation, the costs of which could consume a small estate, create discord amongst family members, and that it would lead to arbitrary awards.[184]

[183] Attributed to the 19th century French writer Jean-Baptise Alphonse Karr: "Plus ça change, plus c'est la même chose."

[184] For the main debates see Hansard *House of Commons* Debates 27 April 1934, vol 288, cols 2015-2098; 22 January 1937, vol 319, cols 491-544; 5 November 1937, vol 328, cols 1287-1374. The fears raised regarding the discretionary model have been realised. See Crawford 'Family provision applications in small estates: Cope v Public Trustee of Queensland' (2013) 20 *James Cook University LR* 118; SALRI *Looking after one another: family provision laws in South Australia* Background Paper (2017), para 3.55ff.

Clearly, getting the balance right is a perennial concern that is, probably, raised anew by every succeeding generation. Given that most estates are, and always have been, small estates, formulating principles that are equitable to all is all-but impossible. There is one principle that has remained largely constant – all things being equal, and absent disentitling behaviour on their part, an individual's 'natural heirs' are spouses and children. The problem is that they are often the competing beneficiaries.

The past century has witnessed two significant developments in the law of family and property. The first is that wives acquired significantly greater rights to control and share in matrimonial property. The second is that the legal conception of the family has changed quite fundamentally. Much of the legal activism of the 20th century was directed at improving the proprietary rights of wives. Once that had largely been achieved, as family forms began to change, activism was redirected at achieving equal recognition and protection for *de facto* spouses. The result of both trends is, I suggest, that children's legal and moral claims within the family has become subordinate to the claims of married and unmarried partners.[185]

This may explain why it is that most family provision applicants in Australia and New Zealand are by adult children,[186] and why the number of applications is growing.[187] In previous generations, most applicants had been surviving spouses.[188] Today it is adult children.[189]

[185] See Peart 'Protecting children's interests in relationship property proceedings' (2013) 13(1) *Otago LR* 27, commenting on how children's proprietary interests in property are usually side-lined in proceedings for the division of relationship property following divorce or separation. The Property (Relationships) Act 1976 made marriage in community of property the default regime. Although some property is separate property, the family home and family chattels are always considered relationship property. After three years of marriage or *de facto* relationship, the family home and chattels will be divided equally. Although property acquired before marriage or by inheritance is usually separate property, this does not apply to the family home or chattels. See ss8(1)(a)&(b) and 10(4). Unsurprisingly, there are concerns about the inherent unfairness of the equal division principle, and a review of the law is currently underway. See NZLC *Dividing relationship property: time for change*? Issues Paper 41 (2017).
[186] Hannah & McGregor-Lowndes 'From testamentary freedom to testamentary duty: Finding the balance' (2008) Queensland University of Technology Working Paper CPNS 42; White et al (n95).
[187] McGregor-Lowndes & Hannah 'Every player wins a prize? Family provision and bequests to charity' The Australian Centre for Philanthropy and Non-Profit Studies, Queensland University of Technology (2008). *Re Allen* (n61) has been cited in 211 cases on the Austlii database (as at 13/109/2020), of which 160 were handed down between 20 April 2000 and 13/09/2020.
[188] Laufer (n102).

Whereas claims by spouses were, and remain, sympathetically received, claims by adult children receive less sympathy. In 1997, the New Zealand Law Commission described claims by non-needy adult children, based only on the deceased's alleged breach of some 'undefined moral duty', as 'indefensible'.[190] It recommended that children's eligibility be limited to those who are minors, students, incapacitated or genuinely in need.[191] The New South Wales Law Reform Commission in 2005 proposed similar reforms, and expressed the view that the only applicants whose eligibility was not likely to be 'seriously disputed' were spouses, *de facto* partners and minor children.[192] The Commission's reforms were not adopted, and most judges do not appear to share their views, given that successful family provision claims by 'greedy'[193] adult children in Australia have become so common that one commentator has described them as 'right out of hand'[194]

Are these criticisms entirely justified? In some the only reason for the claim may well be to acquire more wealth. However, family relations are too complex to permit such a straightforward conclusion in all cases, as the facts of many cases indicate.[195] '[E]very unhappy family is unhappy in its own way.'[196] The applications that arguably evidence greater avarice are those by surviving spouses who, despite a lack of need, wish to obtain a greater share in the deceased's estate for the benefit of their own children and to the inevitable cost of the deceased's chosen beneficiaries.[197]

Children are most often aggrieved when they are excluded from their parent's 'bounty' in favour of a surviving spouse who is not their parent, or when they are treated less favourably than a sibling. The courts, even if not law commissions and commentators, are clearly

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[189] See the table of cases at Annexure A in Hannah & McGregor-Lowndes (n186).
[190] NZLC Report 39 (n85) para 4.
[191] Ibid para 70, 77.
[192] NSWLRC *Uniform succession laws: family provision* Report 110 (May 2005) para 2.5.
[193] White et al (n95).
[194] Croucher (n97) 34.
[195] *Williams v Aucutt* (n78); *Flathaug* (n166); *Roben* (n177).
[196] Tolstoy *Anna Karenina* (1878) tr by Garnett, Constance (1901).
[197] *Thronberg v Thronberg (*n147); *Seier v Scott* (n147); *Kish v Sobchak* (n105).

sympathetic to their claims. In Australia, about 70% of their claims are successful.[198] In New Zealand their success is such that one commentator has concluded that 'children nowadays have a right to share in their parent's estate, irrespective of age or financial position', and that society is being forced 'to abandon the ideas of individualism inherent in a concept of private property and to place family rights ahead of personal rights.'[199]

In order to curb claims by adult children the leading Australian commentator on family provision has suggested that a distinction be drawn between:

> … the position of partners/spouses from that of children. Marriages, or marriage-like relationships, are based on different logic than *simply being a child* (or analogous relationship) of someone.[200]

The view that there is a 'different logic' to the relationship between spouses versus that of 'simply' parent and child, implies that the logic that favours the former is more compelling than that which includes, or favours, the latter.

The relationship of parent and child versus that of partners is, admittedly, a different type of relationship. But what logic dictates that the moral claims of partners be preferred to those of children? One is not 'simply' a child; there is no relationship 'analogous' to being a child. The relationship of parent and child is distinct from that of parent and foster child, and parent and stepchild.[201] Exceptionally, these relationships may become that of *de facto* parent and

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[198] White et al (n95), 899.

[199] Peart 'Towards a concept of family property in New Zealand' (1996) 10 *International Journal of Politics & Family* 105, 118, 125.

[200] Croucher (n97), 23-24 (emphasis added). Although acknowledging the 'problem' of balancing the competing moral claims of children and spouses is 'aggravated by the problem of "serial monogamy"' (§5.2) she does not return to address the problem in her discussion.

[201] Legislatures are beginning to include non-biological and non-adoptive children within the definition of child, or separately as an eligible applicant, for family provision claims, but not for all purposes (such as the right to inherit on intestacy). See England's Inheritance (Provision for Family and Dependants) Act 1975, s1(1)(d); New Zealand's Property (Relationships) Act 1976, s2; Australia's Succession Act 2006, s57(2)(e) (NSW) and the Administration and Probate Act 1958, s90 (Vic), in which step-children were held to include the children of domestic partners in *Scott-Mackenzie v Bail* [2017] VSCA 108. This does not mean that the relationship between the parent and step-or-other child is generally thought to be equivalent to that between parents and their biological children. In *Williams, Re: Smith v Thwaites* [2017] VSC 365 [63], eg, the court described the deceased's relationship with her biological children as her 'primary relationship and very different' to her relationship with her stepdaughter [63]. The fact that the

child, but that appears to be rare. Parent-child relationships are enduring.[202] Increasingly, the relationships between spouses and partners are not. For most children, they last from the beginning of the child's life to the end of the parent's life. The relationship does not come to an end when the child becomes an adult. And the challenges facing young adults today are greater than those that faced their parent's generation - youth unemployment, increasing insecurity in employment, inadequate education, the higher cost of accommodation, to name but a few.[203]

Is it defensible that a deceased can be thought to owe a moral duty of support to a partner of a few years' duration but not to a child of many years' duration, particularly when the estate was acquired through the contributions of the deceased and predeceased parent rather than the surviving spouse; or when the child relinquished a claim on another's estate in favour of their parent on the understanding that it would, on their death, pass to them; or when the child made significant contributions to the welfare and well-being of the parent; or when the assets in the estate are inherited assets?

Critics of the courts' sympathetic treatment of adult children nevertheless assert that the courts have not struck the right balance between testamentary autonomy and testamentary responsibility.[204] They argue that courts are not being true to the original conception of family provision laws: to interfere with freedom of testation only in order to correct a testator's breach of her moral duty, as judged against the standard of the wise and just testator whose

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testators in *McKenzie v Topp* (n103) and *Carney v Jones* [2012] NSWSC 352 did not include their long-term step-and-foster children, respectively, amongst the beneficiaries in their wills also suggests that the relationship was qualitatively different for the deceased, notwithstanding the close bond of affection that existed between them in both cases. That the majority of parents feel a closer bond of affection for their biological children than stepchildren and foster children has been confirmed in a number of studies. See eg Becker et al 'What narrows the Stepgap? Closeness between parents and adult (step)children in Germany' (2013) 75(5) *Journal of Marriage & Family* 1130, which cites additional studies. The fact that numerous applicants are step-children indicates, perhaps, that either their perception of the relationship differed from that of the deceased step-parent, or that they were aggrieved that their prior relationship with their own parent, which had benefited the step-parent, is not given proper legal recognition and protection.

[202] *Glazer v Glazer* (n133).

[203] United Nations *World Youth Report: Youth and the 2030 Agenda for Sustainable Development* (2018); McKee 'Young people, home ownership and future welfare' (2012) 27(6) *Housing Studies* 853. See also Peart (n185) 'Protecting children's interests', 29.

[204] Peart (n199) 'Towards a concept of family property'; Croucher (n97).

values are informed by contemporary community standards. They suggest that the community does not expect a testator to make provision for financially independent adults; or, arguably, even for financially needy adults.[205]

Their arguments are of course true – up to a point. There is no 'clear and uniform' expectation that every parent make provision for every child in every circumstance.[206] It is, in most cases, simply impossible to do so.[207] Nevertheless, such evidence as exists clearly shows that the majority of parents do wish to make provision for their children, particularly when their surviving spouse is not also the parent of their children; and that most believe that they should treat their children equally – absent exceptional circumstances.[208] This is perhaps why children are so aggrieved when their parents flout the norm – the choices that most parents choose to make when they have the means to do so.

What is the evidence? Apart from academic research,[209] it is apparent from the choices *most* testators make (and always have made);[210] the majority preference is reflected in the laws of intestate succession;[211] the majority preference has been confirmed by research conducted by or for law reform institutions.[212]

[205] NZLC Report 39 (n85); Croucher (n97).
[206] NZLC Report 39 (n85) para 74.
[207] Sappideen 'Families and Intergenerational Transfers: Changing the Old Order?' (2008) 31(3) *UNSW LJ* 738.
[208] *McBride v Toth* (n167) [134]; Sappideen (n207) 756; Humphrey et al *Inheritance and the family: attitudes to the will-making and intestacy* National Centre for Social Research (2010).
[209] Sappideen (n207); Humphrey et al (n208); Drake & Lawrence 'Equality and distributions of inheritance in families' (2000) 13(3) *Social Justice Research* 271.
[210] Drake & Lawrence (n209), 272 citing Finch et al *Wills, Inheritance and Families* (1996).
[211] Reid, De Waal, Zimmermann (eds) *Comparative Succession Law Vol 2: Intestate Succession* (2015).
[212] Humphrey et al (n208). The National Centre for Social Research conducted extensive public surveys in 2009 on behalf of the LCEW as part of its review into intestacy laws. The research revealed that 73% of testators had included children in their will, while only 65% had included spouses or cohabiting partners. Women were more likely to include their children than were men (77% vs 68%), while men were more likely to include their spouse than were women (75% vs 57%). The majority of spouses who had prioritised their spouse in their will assumed that the estate would in due course pass to their children, 32. Those who were single, divorced, separated or widowed prioritised their descendants, 32. See also NSWLRC *I give, devise and bequeath: an empirical study of testators' choice of beneficiaries* Research Report 13 (2006), paras 4.12–4.14.

The fact that most parents choose to make provision for their children does not mean that every parent should be expected to do so. It does not mean that a parent who chooses not to do so has made an unjust choice.[213] What it does mean, however, is that when a parent has made the choice to benefit a child, a court or other decision-making body should be slow to override that parent's choice.

7.4 CONCLUSION

The original *raison d'être* for family provision laws no longer exists: to protect vulnerable widows, where their vulnerability is due to the *legal and social consequences of marriage*, which subordinated their person and property to the power of their husbands.[214] Women are no longer almost inevitably dependent on men, whether as husbands or fathers.[215] Dependency, when it exists, is no longer necessarily attributable to marriage. Intimate relationships are no longer exclusively constituted by marriage. Relationships have become terminable at the will of either party. The incidence of multiple (sequential) relationships over the course of an individual's lifetime, and thus of step and blended families, has increased.[216]

These changes should inform the existence and scope of a deceased's perceived moral duty towards partners, children, and other relatives. They point to a loosening of the bonds

[213] Most of the concern about adult children is directed at those who are not in financial need, see the cases discussed by Croucher (n97) §6. White et al (n95) found that at least one-third of adult children were 'financially comfortable' who simply wanted a greater share of their parent's estate (at 902). However, when a child has need because of their own life choices, why should their claim be any more compelling than that of siblings who are more affluent due to their own effort and prudence? Need alone should also not be a sufficient basis for entitlement. See *Ilott v The Blue Cross* (n67).

[214] *Tataryn* (n87), 12; Atherton 'Expectation without right: testamentary freedom and the position of women in 19th Century New South Wales' (1988) 11 *University New South Wales LJ* 133; Atherton 'The Stouts' (n51), 204. Olive Schreiner in *Woman and Labour* (1911) argued that women should be allowed greater participation in the economy rather than being forced to rely on proprietary claims against men.

[215] This is not to say that women have achieved economic equality, but family provision laws cannot address the wage gap or employment gap. These are issues that are not specific to wives – they affect all women in society.

[216] OECD *Doing Better for Families* (2011). In South Africa marriage rates have also been decreasing while divorce rates have been increasing. See StatsSA *Marriages and Divorces 2017*. The trend is most pronounced amongst Black African women and a variety of explanations have been offered, including that women consider their children, particularly daughters, a more reliable source of future care than husbands. See Mhongo & Budlender 'Declining rates of marriage in South Africa: what do the numbers and analysts say' 2013 *Acta Juridica* 181, 193-4.

created by marriage, and a tightening of the bonds that develop, and mature, over time. These changes should be reflected in any future guidelines that are adopted, to ensure that s37C is constitutional in its design, and consistently equitable in its application.

There are important differences in approach between jurisdictions. The starting premise in all jurisdictions is that the wishes of the deceased should be respected, and that judicial intervention should be limited only to the extent that the deceased's wishes were not those of a 'wise and just' testator. However, judicial intervention in Australia and New Zealand appears today to occur almost as a matter of course. In New Zealand especially, there is a strong sense that parents owe their children a moral obligation to make some provision for them, even if only as an affirmation of the parent-child relationship. This is in contrast to the position in Canada, which displays considerably greater respect for testamentary autonomy.

The approach adopted by the courts in British Columbia, as laid down in *Tataryn v Tataryn*,[217] lay down a particularly helpful set of principles that could inform future legislative guidelines which 'confine, structure and check' trustee intervention:[218] that respect for the testator's wishes is important; that intervention should be permitted only to correct the failure to fulfil legal and moral obligations; that intervention should be limited to the extent necessary to do so; that legal obligations must be fulfilled ahead of moral obligations; and that the existence and scope of the deceased's moral obligations must be informed by contemporary community standards and not by the judge's individual perception of the equities.

[217] (n87).
[218] Davis 'Discretionary Justice' (1970) 23(1) *Journal of Legal Education* 56, 59.

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CHAPTER EIGHT

CONCLUSION AND PROPOSALS FOR REFORM

8.1 INTRODUCTION

Testamentary freedom is an indivisible part of the right to property. The essence of that freedom is the right to select who will benefit from one's property after one has died. Testamentary freedom exists because individuals have moral agency, and the law recognises that those who acquire property, particularly through their own labour, have the moral right to apportion their property as they consider equitable. It is part of the inherent dignity and equality of all individuals that their moral choices are deserving of recognition and respect, unless their choices are indisputably harmful or manifestly unjust. Testamentary choices are deeply personal choices, which speak to the relationship between the testator and beneficiary and the testator's perception of the moral obligations that attach to that relationship. To deny individuals of the right to dispose of their property to the beneficiaries of their choice is to deprive them of a fundamental aspect of their right to property. To transmit their right to third parties strips them of their dignity, for it suggest that they are incapable of making moral choices. To permit third parties to override testamentary choices that are not manifestly unjust is an unreasonable and unjustifiable limitation of their right to property and their right to dignity.

This is s37C's effect. It deprives members of the right to select the beneficiaries of their death benefits, while transmitting that right to the (lay) trustees of retirement funds. The limitation is all the more severe when the death benefit is the member's only or main asset — which is the case for most members in South Africa. The member's death simultaneously deprives spouses and children of their respective proprietary and maintenance rights. The justification that is

offered is that the deprivation is necessary to protect the member's dependants from the hardship that would result were the member permitted to select her own beneficiaries. It presupposes that trustees are readily able to identify members' dependants, and that trustees are better able to allocate the benefit equitably than are members.

This thesis sought to interrogate s37C's constitutionality and equitability. My original objective was threefold: to analyse s37C's inherent challenges, its applied challenges, and its impact on fundamental constitutional rights. All three are relevant to the question of whether s37C is a reasonable and justifiable limitation of those rights. The inherent challenges arise from the definition of dependant, which requires that trustees perform both an investigatory and an adjudicative function. The two are overlapping: trustees must 'identify' who amongst the circle of eligible relatives qualifies as a legal and future dependant, but to do so they need to decide questions of fact and law when the facts are disputed, and the law is uncertain. Even the apparently straightforward category of dependant, spouse, requires trustees to determine the existence and validity of contested customary marriages, or whether the requisites of a life partnership have been satisfied. These are questions that tax the courts, yet trustees are expected to decide these difficult questions as though they are simply part of the routine business of administering a retirement fund.

The applied challenges arise because of the wide discretion that trustees have been given to select who, amongst the member's dependants and nominees, will share in the benefit and in what proportion. Trustees are expected to apportion the benefit equitably, but they have been given no guidance by the legislature as to what 'equitability' means. The socio-economic context within which trustees need to distribute the benefit requires them to make hard choices. Rather than protecting the member's dependants, which is s37C's ostensible purpose, they are instead required to choose *which* dependants to protect, and which to leave exposed to the vagaries of fate and, in South Africa, probability of misfortune, given

the high poverty rate and levels of unemployment.[1] Section 37C often provides only some protection for some dependants, at best – and it is the trustees who must decide who they will be.

Regarding s37C's impact on constitutional rights, there are serious concerns about the extent to which it limits rights to property, equality and dignity. At the very least, given the extent to which it limits fundamental rights, the legislature's failure to provide proper guidance to trustees is itself unconstitutional.

Adjudicators have been critical of trustee decision-making, despite the absence of legislative guidelines. Adjudicators have, however, been unable to provide the necessary guidance. To the extent that they have tried to do so, their determinations have been inconsistent and demonstrate that there is no common conception of equitability. The Adjudicators' understanding of s37C's purpose, which is that it exists to ensure that a member's financial dependants are prioritised over non-financial dependants, has promoted expediency over equitability. Adjudicators most consistent message to trustees has been that s37C's purpose is 'to restrict freedom of testation',[2] and cautioned them against 'following' the members' wishes.[3] In consequence, trustees routinely override members' wishes, with little regard for testamentary freedom, matrimonial property law, or the special legal protections afforded minor children. Trustees do not seek to limit their intervention to only when the member's choices were indisputably harmful. Instead it is their intervention that is sometimes the more harmful, given their disregard for the member's wishes even when those wishes are reasonable and seek to give effect to the member's legal and moral obligations.[4]

[1] See §1.7.1 above.
[2] See eg *Phashe v Metro Group* [2003] 9 BPLR 5123 (PFA) [11].
[3] See §5.5.1 above.
[4] See eg *Tsele v Bidvest* [2016] 1 BPLR 146 (PFA).

The question, then, is what should be done with s37C? National Treasury posed this question in 2004, as part of its investigation into general retirement reform. It proposed that nominations be binding on trustees, unless compelling reasons exist to override a nomination.[5] Treasury received numerous submissions from the retirement fund industry in response to its proposal. A common observation was that s37C was 'difficult' to implement,[6] but there was no single view within the industry regarding whether s37C be retained, discarded, or reformed.

One submission, by the Association of Financial Planners (LUASA),[7] was that s37C be retained in its present form, which is exactly what happened. LUASA was of the view that determining what constitutes 'compelling reasons' would cause much 'debate and legal argument', and that the proposal did not necessarily provide proper protection for 'the most vulnerable' in society, since the nomination might not include the member's 'actual dependants'.[8] One insurer was of the view that determining whether compelling reasons exist would be so onerous that trustees would simply follow nominations, which it thought particularly problematic because members often nominate their parents even though they are survived by minor children.[9] Business Unity South Africa (BUSA) similarly felt that allowing a departure for 'compelling reasons' would require trustees to thoroughly examine the member's 'personal circumstances in every case', which would simply 'reintroduce' and possibly exacerbate s37C's existing difficulties.[10] It thus felt that the legislature had to make a firm decision as to whether to follow a non-paternalistic or paternalistic model. If the former, then nominations should be binding. If the latter, then s37C should be retained, albeit possibly in a 'modified' form.

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[5] National Treasury *Retirement Fund Reform: a discussion paper* (December 2004), para 3.4.1.4.
[6] See eg Submissions by Association of Financial Planners (LUASA) (28 November 2005), para 4.3; Business Unity South Africa (BUSA) (07 March 2005), para 2.22; Old Mutual (29 March 2005) para 11.57, which described s37C as a 'source of great difficulty for trustees.
[7] The Association continues to use its former acronym, LUASA (Life Underwriters Association of South Africa).
[8] LUASA (n7), para 4.3.
[9] Submissions by Glenrand MIB Benefit Services (undated), para 7. This may, of course, be because they expect that their parents will look after their children and nominate them to provide them with the means to do so. Members cannot be expected to know of the existence of Beneficiary Funds as a vehicle through which their minor's benefits can be administered.
[10] BUSA (n6), para 2.22.

While LUASA and BUSA's concern, that what constitutes 'compelling reasons' is itself open to contestation, is valid, this is not a sufficient argument that s37C be retained in its present form. Trustees are already expected to thoroughly investigate a member's personal circumstances in every case. Who qualifies as an eligible dependant is itself open to 'debate and legal argument', and in most cases the successful and unsuccessful beneficiaries are both amongst the member's 'actual dependants', if LUASA is referring to dependants as defined in the Act. If LUASA is referring only to the member's financial dependants, it is in part the prioritisation of financial dependants to the detriment of the member's legal and statutory dependants, who are usually the member's spouse and children, that is the reason s37C, as applied, yields outcomes that are not consistently equitable. I have argued that s37C is unconstitutitional precisely because it permits trustees to override a member's wishes even when the member's own wishes are both reasonable and in keeping with society's prevailing legal and moral convictions.[11] The proposal that s37C be retained in its present form is not a viable recommendation for the future, given the concerns raised in this dissertation.

An alternative proposal was that nominations be completely binding in all cases, and that absent a nomination, the benefit fall into the member's deceased estate. The reasons given were simply that s37C 'creates uncertainty' and imposes considerable administrative costs on retirements funds.[12] A slightly different proposal was that a nomination be binding, in the same way a will is binding, but that the death benefit be treated as an asset in the deceased's estate for the purpose of maintenance claims, and that all those eligible as dependants under the Pension Funds Act be permitted to claim maintenance from the deceased estate.[13] The rationale was that this would preserve the socially-desirable

[11] See eg *Tsele v Bidvest* (n4), in which the trustees included the member's non-nominated major brothers, who had claimed that they were financial dependants, even though the member's former partner advised that they were respectively an admitted attorney and television game show host. The nominated beneficiaries were the member's minor daughter and his mother, who was deceased.
[12] Submissions by Sanlam Personal Portfolios Ltd (28 November 2005), 4.
[13] Submissions by Jonathan Mort, Edward Nathan Corporate Law Advisers (28 November 2005), para 27.

objective of protecting the member's dependants, while simultaneously reducing the costs that funds incur administering s37C.[14]

Others agreed with Treasury's view, which was that a nomination be treated as binding unless compelling reasons exist to override it, but felt that clear guidelines should be provided as to what constitutes 'compelling reasons'.[15] Unfortunately, their submissions did not contain any suggestions as to the types of reasons they considered to be sufficiently compelling.

In what follows, I will consider the merits of the three alternative proposals, before recommending the approach that I think best balances respect for members' wishes with the need to protect dependants.

8.2 POSSIBILITIES FOR REFORM

8.2.1 The first alternative: completely binding nominations

Although trustees and the Adjudicator too readily override members' wishes, there is no doubt that s37C does protect vulnerable dependants. There are undoubtedly cases in which giving effect to the member's wishes would cause hardship to the member's closest family, particularly dependent children and spouses.[16] Although such exclusions are probably more often inadvertent rather than deliberate, the result of nominations completed when a member first joined a fund and forgotten about in the intervening years as the member's life circumstances changed, it would be indefensible to give effect to member nominations that exclude vulnerable spouses and children, the very dependants the law most seeks to protect.

[14] Ibid. These costs are highest for members whose 'affairs are in a muddle', but they are borne by other members of the fund, since they are part and parcel of the general administrative costs that are shared by all members

[15] Submissions by Federation of Unions of South Africa (FEDUSA) (undated), 5 and Old Mutual (n6) para 11.15; 11.60.

[16] See eg *Phashe* (n2), in which the member's nominated beneficiaries were his parents and siblings, to the exclusion of his wholly dependent spouse and minor child.

8.2.2 The second alternative: death benefits as an asset in the member's estate

If s37C was repealed the benefit would devolve according to the law of intestate or testate succession. Alternatively, a nomination could be treated as binding (a 'will substitute'), but the benefit could form part of the deceased's estate when needed to satisfy maintenance claims. A member's testamentary wishes are binding, and the only persons who could potentially upset the member's wishes are spouses and children, since only they are entitled to claim maintenance from a deceased estate.[17] Absent a will, the benefit would devolve on the member's intestate heirs – who would again be her spouse and children.[18] Therefore, if the member bequeathed her estate to her spouses and children, or failed to make a will, the only potential complainants would be spouses and children as against each other. No other eligible dependant could intervene to upset the member's wishes. On the other hand, if the member had included her parents, siblings or partner amongst her testamentary or nominated beneficiaries, only a claim from a spouse or child could override the member's bequest.

Since spouses and children are eligible beneficiaries under the Pensions Fund Act and entitled to claim maintenance from the estate, doing away with s37C should not be to their detriment. It would, in fact, be to their benefit – if the law remained unchanged and only they could seek maintenance from a deceased estate. How would this change affect other eligible beneficiaries? Would it work hardship on those *not* entitled to claim maintenance from deceased estates: unmarried partners; parents and siblings.[19]

[17] See §1.5 above.
[18] Intestate Succession Act 81 of 1987, s1.
[19] Although eligible beneficiaries also include non-familial financial dependants and nominees, they do not loom large in s37C disputes. Most financial dependants are parents and siblings. Most members nominate relatives before they nominate an unrelated third party.

Given the way s37C is currently applied, I do not think it would work undue hardship on parents and siblings. My analysis of trustee decision-making shows that spouses and children are usually prioritised over parents and siblings. Trustees frequently override nominations that include parents and siblings, and they usually do so to make (better) provision for spouses and children. It is less common that a nomination in favour of a spouse or child is overridden for the benefit of a parent or sibling. The outcomes under s37C and under the law of succession are thus *prima facie* not likely to be very different for spouses, children, parents or siblings.

The persons who would be most adversely affected by discarding s37C are unmarried, opposite-sex, partners, who have not been recognised as spouses in terms of the Maintenance of Surviving Spouses Act.[20] Trustees routinely include them in death benefit distributions, even when they have not been nominated by the deceased. They are included *even when* the member is survived by a nominated spouse, children, parents and siblings. They would have no claim to maintenance if the death benefit formed part of the member's estate, while nominations in their favour could be overridden to provide maintenance for spouses and children. Unmarried opposite-sex partners are thus the beneficiaries who derive the greatest protection from s37C. There are clearly cases in which a partner's exclusion would be inequitable.[21]

The existing maintenance laws could be reformed to allow maintenance claims by partners and other dependants.[22] I don't believe this to be the best solution, for two reasons. First, as the law stands at present, maintenance claims are decided by the executor of the estate rather than the court,[23] who is no better equipped to make difficult adjudicative decisions

[20] Same-sex partners will most probably be recognised as such, for the same reasons that apply to their recognition as spouses under the Intestate Succession Act 81 of 1987. See *Laubscher v Duplan* 2017 (4) BCLR 415 (CC).
[21] This is particularly important in South Africa, given the low marriage and high cohabitation rate, and the incidence of polygynous marriages and relationships.
[22] Jonathan Mort's submission (n13).
[23] See *Du Toit v Thomas* 2016 (4) SA 571 (WCC); *Friedrich v Smit* 2017 (4) SA 144 (SCA). In Friedrich, the executor, Master, HC of first instance and HC on appeal all agreed that the surviving spouse was

than are the trustees (or Master).[24] Most executors are family members rather than professionals, and they often have an inherent conflict of interest, since they are amongst the estate heirs who would be adversely affected by admitting the claim.[25] They are therefore likely to lack both the necessary skill and the necessary impartiality.

The second possibility is to amend the law so that all maintenance claims against deceased estates are decided by the courts. While judicial oversight is preferable for deciding contested cases and evaluating evidence than the mixed investigative-adjudicative function expected of trustees, there is one compelling reason it should not be adopted. Litigation is expensive, and it is the intended beneficiaries, the member's nominated beneficiaries or intestate heirs, who will pay the price. Even if they successfully defend a maintenance claim, it is very unlikely that they will be able to recover their legal costs from the applicant. The experiences of other jurisdictions are a cautionary tale that we would be well-advised to heed.

8.2.3 The third alternative: reforming s37C

At present, trustees override member nominations as a matter of course, sometimes causing inequity when none existed to begin with. The challenge is to develop rules and guidelines that promote equitable outcomes, while keeping trustee intervention within reasonable bounds. Two aspects need reform: first, the definition of dependant should be simplified. I believe this to be relatively straightforward; secondly, legislative guidelines should be formulated. Separate guidelines should be drafted for when a member has nominated beneficiaries, and when the member dies without doing so. In the first case, trustees should only intervene when there is good reason to do so. In the second, a set of fixed (or semi-fixed) guidelines should be adopted to clarify, and simplify, the allocative process.

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entitled to maintenance but disagreed as to whose responsibility it was to decide the quantum. The SCA held that the widow had not proven she needed support, so dismissed her claim.

[24] See eg *Friedrich v Smit* (n23).

[25] See eg *Oshry v Feldman* 2010 (6) SA 19 (SCA); *Van Niekerk v Van Niekerk* [2011] 2 All SA 635 (KZP).

To survive constitutional scrutiny, guidelines should ensure that trustees override the member's nomination only when there is a sufficiently compelling reason to do so. The starting premise should be that trustees be expected to respect the member's wishes, except to the extent that the member has failed in her legal or clear moral obligation to provide (better) support for a dependant towards whom she owed a legal or clear moral obligation to provide support. It is the guidelines that should clearly articulate the circumstances under which, and the extent to which, overriding the member's testamentary wishes will be reasonable and justifiable.

8.2.3.1 Simplifying the definition of dependant

The only persons who are eligible to claim under the existing definition are members of the deceased's family and financial dependants. The Adjudicator has already stretched the concept of financial dependant to include virtually all cohabiting partners. The definition could, therefore, simply identify precisely who would be eligible: spouses, cohabiting life partners, children, parents, siblings, grandparents and grandchildren (and further relatives in the vertical line), financial dependants and any other nominated beneficiary.[26] 'Children' already include children adopted under the Children's Act and customary law. Consideration will need to be given to whether there are other relatives to whom a duty of support may be owed under customary law, such as nephews and nieces. Failing any of the above, the benefit should fall into the member's estate.

More thought should, however, be given to the requirements to be met before a person becomes eligible as a cohabiting life partner or financial dependant. Under the current

[26] See the definition in the proposed Family Maintenance Bill of 1969, which was squashed by a parliamentary committee before being put to parliament. The categories were spouses/former spouses entitled to maintenance/minor children and siblings/parents and major children and siblings to the extent they were unable to provide for themselves because of age or disability. The definition would not be equitable today, given that many able majors are dependent due only to the limited employment opportunities. The Bill and its demise are discussed by Hahlo 'The sad demise of the Family Maintenance Bill 1969' (1971) 88(2) *SALJ* 201.

approach, a cohabiting partner of short duration or a partial financial dependant would automatically receive the entire death benefit if the member is survived by no other dependant or nominee. This is potentially inequitable to the member's testate and intestate heirs. Simplifying the definition in the manner proposed would at least permit trustees to consider parents and siblings amongst the potential beneficiaries, even if they were not financially dependent on the deceased or at risk of becoming dependant, rather than being obliged to pay the entire benefit to a 'dependant' whose relationship with the deceased was tenuous and whose financial dependence was limited.[27]

The definition of financial dependant should be restricted to persons who were dependent in the 'literal sense'.[28] Only persons unable to afford their reasonable maintenance needs from their own resources and who were receiving a substantial contribution towards those needs should be eligible.

With respect to cohabiting partners who are not financially dependent in the literal sense, the legislature could adopt one of the following approaches. It could either require that couples have cohabited for a minimum period or it could require that a surviving partner provide sufficient evidence that they had entered into a life partnership in which they had undertaken reciprocal duties of support towards one another.[29] If the former approach is adopted, it means that cohabiting partners will be eligible provided only that they cohabited for a minimum period of time, and irrespective of whether they had undertaken reciprocal duties of support. The period should be sufficiently long to establish that the relationship is a stable one. Most marriages that end in divorce do so in the first five to ten

[27] In *Gerber v Aberdare* [2010] 3 BPLR 275 (PFA), the trustees identified the member's nominated beneficiary, his surviving spouse, and non-nominated foster child as his dependants. This means that had the spouse predeceased him, the foster child would have been entitled to the full benefit, which would clearly have been inequitable on the deceased's testate or intestate heirs. See also *Coetzee v Toyota* (1) [2001] 5 BPLR 2007 (PFA) (divorced spouse whom member expected to retain on own medical aid).
[28] See §4.5.1, 4.8 &5.5.3 above.
[29] See §4.5.3 & 4.8 above.

years of the marriage. [30] Although there are no comparable statistics on the duration of cohabitation relationships, studies elsewhere suggest that they last for a considerably shorter period than marriage.[31] I am of the view that a period of three years, which has been adopted in a number of common law jurisdictions, should be the minimum period required before a cohabitant is eligible as a 'life partner'.[32]

If the alternate approach is adopted, it will require that trustees obtain sufficient proof that the member and partner had intertwined their lives and financial affairs to such an extent that they could be said to have assumed a reciprocal duty of support towards one another. The factors that courts consider are the duration of the relationship, the extent to which the partners have conjoined their financial affairs, whether one or both partners have shown or expressed themselves willing to support a less affluent partner for an extended or indefinite period of time, whether the partners have identified each other as their dependant or primary beneficiary in their medical aid, investment or insurance policies, whether they have nominated each other as the beneficiaries of their respective estates.[33]

From a practical perspective, the first approach is preferable. It will be difficult for the most vulnerable, those who do not own property, hold investments, have bank accounts or wills, to provide the type of evidence that speaks to their having assumed reciprocal duties of support. On the other hand, the more affluent are likely to have such evidence. One cannot, however, apply different eligibility criteria to cohabiting partners based on their relative affluence. The best approach would, I suggest, be a hybrid one. That cohabiting partners are eligible after a minimum period of cohabitation of three years, unless the member and cohabiting partner have entered into a cohabitation agreement in which they expressly

[30] StatsSA *Marriages and Divorces 2018* (P0307), 8.
[31] Cohen, Daniels, Mosher 'First premarital cohabitation in the United States 2006-2010 Survey of Family Growth' (2013) 64 *National Health Statistics Report* 1. See also §6.6 fn324 above.
[32] See §2.3 fn132 above.
[33] See §4.5.3 above.

state that they are not undertaking reciprocal duties of support towards one another.[34] If, notwithstanding their cohabitation agreement, the surviving partner can provide evidence showing that, after the agreement was concluded, circumstances had changed and they had undertaken reciprocal duties of support, they should also be included within the ambit of cohabiting life partner.

8.2.3.2 Formulating equitable guidelines

Ensuring that equitable guidelines are available to trustees is the crux of any future reform. Finding the balance between certainty, flexibility and equitability will be extremely difficult. However, the starting point should be the wishes of the deceased as reflected in her nomination of beneficiaries, provided it represents her intentions when she died. Trustees should, therefore, first determine whether the nomination form is one that reflects the current wishes of the deceased. A nomination that is more recent than three years should be presumed to be an accurate reflection of the contemporary wishes of the deceased, even if she married or entered into a partnership in the intervening period.[35] Some members consciously choose to retain their existing nominated beneficiaries, notwithstanding their remarriage or repartnership, particularly when the member is survived by children from a prior relationship.[36]

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[34] See *Marais v Sasol* [2017] 3 BPLR 615 (PFA), in which the fund rules made provision for a spousal pension to life partners who had undertaken reciprocal duties of support. A lump sum was also payable in terms of s37C. The fund identified the partner as a life partner and a financial dependent. The Adjudicator had no jurisdiction over the fund's characterisation of the partner as a life partner for the purpose of the spousal pension, but doubted that she was a financial dependent because they had entered into a cohabitation agreement in which they agreed to retain separate ownership of their assets, to remain separately liable for their respective debts, and in which they renounced any intention to enter into a universal partnership. These *indiciae* do not speak to financial dependence, however, although they are relevant to whether they had entered into a life partnership as defined by the CC. The agreement is instead akin to an ante-nuptial contract entered into by spouses who choose to marry out of community of property.

[35] Cf Malawi's Pension Act 6 of 2011, s70(5), which provides that nominations are automatically revoked on the member's subsequent marriage or divorce. Its Deceased Estates (Wills, Inheritance and Protection) Act 14 of 2011, s10, contains a similar provision regarding wills. See also Wills Act 1837 (UK), ss18 & 19. Cf South Africa's Wills Act 7 of 1953, s2B, which precludes a former spouse from inheriting should the testator die within three months of the divorce. This is to afford testators an opportunity to revise their wills. Should they not do so, any bequest to a former spouse remains valid. Marriage does not affect the validity of a testator's prior will.

[36] See *Ellis v MEPF* [2014] 1 BPLR 36 (PFA); *Van Schalkwyk v MEPF* [2003] 8 BPLR 5087 (PFA).

National Treasury had proposed that members be required to update their nominations every five years.[37] I suggest that this is too long a period. The purpose behind regular updates is to ensure that the nomination, as far as possible, reflects members' wishes and personal circumstances when they died. The more recent the nomination, the less likely it is that members simply forgot to update the nomination, and more likely that they did not yet feel it appropriate to do so.[38] The suggestion that members be required to update their nominations regularly does not mean that a failure to do so will render the nomination invalid. There is no penalty for non-compliance. The concern is simply that the older the nomination, the less reliance trustees can place on it as reflecting the member's actual wishes when she died, and the greater the possibility that they will find that there has been a change in the member's personal circumstances, justifying their allocating the benefit contrary to the member's wishes.

Formalities for validity could, however, be introduced, as is the case in Australia, so that members realise the importance of updating their nominations regularly.[39] The disadvantage is that a non-compliant nomination will be deemed invalid, even though the nomination reflects the true wishes of the member. This has been a longstanding concern in relation to wills. To address this problem the legislature amended the Wills Act in 1992 by obliging courts to declare non-compliant wills valid provided the court is satisfied that the deceased intended the document to be her will.[40] The deceased's intention must be clear and unequivocal.[41] When the deceased has used language that suggests that the document is a

[37] See (n5) para 3.18.3.1. BUSA (n6) para 22.1.1, supported this proposal.
[38] Glenrand (n9) was of the same view, based on their experience that 'members' family circumstances on average change about every two years'.
[39] A binding nomination in Australia must be in writing addressed to the fund, signed in front of two independent witnesses, and executed not more than three years prior to the death of the member, see Superannuation Industry (Supervision) Regulations 1994, r6.17A(6)&(7). Old Mutual (n6) para 11.63 similarly recommended that members be required to sign their nomination in the presence of two witnesses.
[40] Wills Act 7 of 1953, s2(3), which was inserted into the Act in 1992.
[41] *Smith v Parsons* 2010 (4) SA 378 (SCA) [suicide note accepted as valid will]. See also *Van der Merwe v The Master* 2010 (6) SA 544 (SCA) [email to friend].

draft, or a non-binding expression of wishes, courts have not been satisfied that the deceased displayed the requisite intent.[42]

Beneficiary nominations are less complex than wills. The practice within the retirement funds industry is that members complete the particular fund's nomination form.[43] They are akin to life insurance nominations. Funds typically require the member's signature, but it is not a precondition for validity. The main difference is thus that wills must be executed in the presence of independent witnesses, which funds typically do not require. Unlike wills, nominations are quasi-public documents, in the sense that they are almost invariably completed and submitted to funds prior to the member's death.[44] Statutory formalities would thus not serve the same varied purposes that they do for wills.[45] The purpose most relevant to nominations is that they perform a 'cautionary function', in that they help create awareness of the importance of the decision and the need for careful reflection.[46]

The issue of formalities is becoming moot for members whose funds permit them to complete their nominations online.[47] On balance, I would recommend that formalities not become statutory preconditions for the validity of nominations.

8.2.3.3 Overriding a member's wishes only when there are compelling reasons to do so

[42] See eg *De Reszke v Maras* 2006 (2) SA 277 (SCA); *Taylor v Taylor* 2012 (3) SA 219 (ECP); *Marshall v Baker* 2020 (3) SA 463 (WCC).
[43] PFA, s37C(1)(b) requires that the nomination be in writing addressed to the fund. See also *Van Heerden v Fundsatwork* [2017] 3 BPLR 706 (PFA) [4.5].
[44] I have personal experience of 'nominated beneficiaries' submitting unsigned nomination forms after the member's death, and a signed nomination in which the signature was of doubtful authenticity.
[45] Courts and commentators in some jurisdictions are nevertheless of the view that nominations should comply with the same formalities as wills, since they are 'will-substitutes'. See eg Carr 'Will substitutes in Scotland' in Braun & Röthel *Passing Wealth on Death* (2016), 96.
[46] Fuller 'Consideration and form' (1941) 41 *Columbia LR* 799 identified three purposes to contractual formalities: evidential, cautionary and channelling. Langbein 'Substantial compliance with the Wills Act' (1975) 88 *Harvard LR* 489 identified the same purposes as relevant to wills, but included a fourth, viz 'protective'. Of these purposes, the one I consider most relevant to beneficiary nominations is the 'cautionary'. As explained by Fuller (800), formalities help induce a 'circumspective frame of mind' and act as a check on 'inconsiderate action'.
[47] For eg the University of Cape Town Retirement Fund, of which I am a trustee and member.

The member's right to select the beneficiaries of her choice is the essence of testamentary freedom, which is protected by her constitutional rights to property and dignity. Her wishes should be overridden only when there are 'compelling reasons' to do so — in other words, when they are so unreasonable that enforcing them would be 'unconscionable' or 'manifestly unjust'. Trustees should, in other words, intervene only when necessary to correct the member's choices rather than to make those choices in the member's stead, as is currently the case.

When, however, will the member's choices be so unreasonable as to warrant intervention? It should not be left only to the moral judgment of trustees to answer this question. Although changing the nature of trustees' powers, from distribution to correction, would go some way to limiting their discretion, their decision is likely to be influenced by their subjective preferences and perceptions of right and wrong. The answers must instead reflect the prevailing legal and moral convictions of the community. How are trustees to fathom what those are? Communities are not homogenous, and different members will have very different views on what conduct they consider just and unjust. The divergent attitude of the courts and law commissions in Australia and New Zealand to claims by adult children is one example.[48] Simply reframing trustees' powers will not provide them with the guidance required to remedy s37C's unconstitutionality. It is the legislature that must provide trustees with guidelines, which balance members' right to select beneficiaries with their legal and moral obligations.

I propose the following guidelines as a point of departure. They are informed by the principles that courts in common law jurisdictions, particularly Canada and New Zealand, have adopted when deciding family provision claims,[49] as well as the principles that underpin Canada's spousal support guidelines. The main principles are that members' wishes are deserving of respect; that legal obligations take precedence over moral obligations; that

[48] See §7.3.4 & 7.3.6 above.
[49] Especially *Tataryn v Tataryn Estate* [1994] 2 SCR 807 and *Allardice v Allardice (No 2)* NZCA (1910) 30 NZLR 222.

the scope of a member's moral obligation may be greater or smaller than the extent of the beneficiary's financial need; that the duration of a relationship informs the existence and scope of a member's legal and moral obligation towards a spouse or cohabiting partner; that the focus of enquiry should not only be on the obligation the member owed the aggrieved applicant, but also that owed to the nominated beneficiary.

8.2.3.4 Guidelines

Any nomination of a spouse, partner, child, grandchild, parent, grandparent, sibling, close personal friend or financial dependant is *prima facie* reasonable. Any intervention by trustees to exclude a nominated beneficiary or reduce their share is *prima facie* unreasonable.

Conversely, an intervention by trustees to include a non-nominated spouse, cohabiting *life partner* or child, who *is in financial need*, is *prima facie* reasonable.

It is not merely the fact of trustee intervention that must be reasonable, however, but also the scope of their intervention. Intervention must be justified having regard to: (i) the extent of the non-nominated beneficiary's financial need *and* (ii) the extent of the legal and moral obligation the deceased owed the non-nominated beneficiary. The scope of trustee intervention must be determined having regard to both factors, and not merely the former.

The appropriate scope is, at most, the product of (financial) need and (legal and moral) obligation. The non-nominated beneficiary must provide evidence of their financial need.[50] A scale to determine the degree of legal and moral obligation could be devised. The scope of trustee intervention should not exceed the scale but may be less having regard to the competing claims of the nominated and other non-nominated beneficiaries. The need to reduce a non-nominated beneficiary's entitlement will be inevitable when there are

[50] In keeping with the requirements for a successful maintenance claim against the deceased's estate. See *Mgumane v Setemane* [1998] JOL 1757 (Tk); *Friedrich v Smit* (n23).

numerous beneficiaries in financial need, towards whom the deceased owed an equal legal and moral obligation, and the size of the benefit is insufficient to meet all their legitimate claims.[51]

So, for example, a possible scale could be as follows:

- Minor children and those still studying: 100% up to majority/completion studies and up to 100% of the benefit;

- Major children unable to provide for themselves by reason of disability: 100% of their needs that exceed the state disability grant, up to a maximum of 50% of the benefit;

- Major children post-schooling/studying: 20% of their needs up to a maximum of 10% of the benefit;

- Other relatives: 20% of their needs up to a maximum of 10% of the benefit;

- Spouses and partners (without adult children of their own): 5% per year for the period they were either cohabiting or, in the case of spouses living apart, for each year that the deceased was married to and supporting the spouse up to a maximum of 100% of the benefit;

- Spouses and partners (with adult children of their own): 2.5% per year on the same basis as above up to a maximum of 50% of the benefit. Therefore, in marriages/relationships of long duration: over 20 years: 100% or 50%; 15 years: 75% or 37.5%; 10 years: 50% or 25%; 5 years: 25% or 12.5%; 0-1 year: 5% or 2.5%.

I propose a scale along these lines because guidelines need to be clear and implementable, and they must seek to balance competing considerations: the fact that dependency and

[51] See eg *Sangweni v Private Security* [2013] 2 BPLR 252 (PFA), in which the deceased was survived by his spouse and six children from six mothers, two of whom were still minors. The death benefit was R43 000.

moral obligation both increase with the passage of time; that the deceased's wishes are deserving of respect; and that the nominated beneficiaries are also usually owed an actual or contingent duty of support. The current approach, in which the spouse/partner's financial needs are prioritised and calculated over the remainder of her lifetime, is indefensible, other than in relationships of long duration. Even then, should the spouse have adult children of her own, it is not fair that the burden of support be effectively wholly transferred to the nominated children or relatives of the deceased member.[52] Therefore, I suggest that where a spouse has adult children, their entitlement should not exceed 50% of the benefit.

Allocating a sum that exceeds the scale would be appropriate only if the deceased's choices were perverse. In the South African context this means exposing a non-nominated beneficiary, who falls within the definition of dependant, to considerable financial hardship when the nominated beneficiary is *neither* in any financial need *nor* a dependant, under both the existing and proposed definitions. Therefore, a nomination that favours a nominee, such as a cousin, uncle, or friend who has no existing financial need to the detriment of a dependant facing genuine financial *hardship* is perverse.[53] In these circumstances, departing from the scales above, to meet the full financial needs of the dependant, would be justifiable.

On the other hand, a nomination in favour of a spouse or child is not perverse. A nomination in favour of a parent or sibling similarly so – they are, after all, persons who are owed a contingent duty of support under both common law and customary law; and the frequency with which they are nominated beneficiaries indicates that contemporary community standards, or the moral convictions of the community, confirms the continued existence of a moral duty of support towards them. Even a nomination in favour of a former spouse or

[52] See eg *Oshry v Feldman* (n25).
[53] See eg *Gwebu v Assupol* PFA/WE/1679/02/CN [cousin only nominated beneficiary, despite an aged and needy mother, who claimed to have been financially dependency].

partner can hardly be considered perverse, for it cannot be perverse to nominate a person with whom one was once in a relationship of 'profound significance'.[54]

What, however, of the hard cases that regularly come before the Adjudicator and the courts in other jurisdictions: those involving competing claims between spouses/partners and adult children, when the size of the benefit is a small one? These cases are hard when the nominated beneficiaries are self-sufficient adult children and the other beneficiary, whether also nominated or non-nominated, is a financially-dependent or inter-dependent spouse or partner. In such instances, the spouse/partner should be entitled to the minimum statutory sum to which spouses are entitled on intestacy: R250 000, with the balance allocated to the nominated children. If, on an application of the scales, the sum that will be allocated to a partner exceeds this minimum sum, it should not be increased further, for it will mean either that the size of the benefit was very small to start with, leaving little by way of surplus for distribution to the nominated children, or that the relationship was of short duration. Conversely, if the nominated beneficiary is a spouse or partner and the competing claimant is a non-nominated financially-needy adult child, parent or sibling, the spouse or partner should, at a minimum, receive R250 000 before any provision, up to a maximum as outlined on the above scales, is made for any dependant other than minor children.

8.2.3.5 Default guidelines where there are no nominated beneficiaries

There are already sources that provide a useful starting point for default guidelines. One example is the principles that govern the distribution of intestate estates in Malawi. Another is the rules of retirement funds that governed the distribution of lump sums before the Pension Funds Act was adopted in 1956 or s37C enacted in 1976. The key considerations are clarity, simplicity, and generally accepted principles of fairness.

[54] *Dawood v Minister of Home Affairs* 2000 (8) BCLR 837 (CC) [30].

Malawi

Courts have the power to distribute an intestate estate if family members cannot agree on how the estate should be divided amongst themselves. The court thus becomes the 'testator', performing a role that is much the same as that of s37C trustees. The applicable legislation lays down principles of fairness that the court must observe when dividing the intestate estate.[55] The only persons eligible to share in the intestate estate are the deceased's spouse/s, children, parents and any minor whose education the deceased was paying for.[56] The principles of fair allocation laid down in the Act are:

- A spouse is entitled to all household goods; the remainder shall be used to protect the eligible relatives against hardship; any surplus shall then devolve on the spouse and children. The Act specifically defines hardship.[57]

- The distribution as between spouses and children will be equal, unless special circumstances exist warranting a differential distribution. The factors that must be taken into consideration are: the deceased's wishes (as communicated to reliable witnesses); any assistance the deceased has already provided to a spouse or child, for example by paying for educational costs; any contributions made by the spouse or child that increased the value of the deceased's business or property.

- In so far as the children's shares are concerned, younger children are ordinarily entitled to a larger share than older siblings, but good reason may nevertheless exist to divide the benefit equally.

- Additional principles govern polygynous marriages.[58]

[55] Deceased Estates (Wills, Inheritance and Protection) Act 14 of 2011, s17.
[56] Section 17(1) read together with the definition of 'immediate family' and 'dependant' in s 3(1).
[57] Section 3(1): "hardship" means deprivation of the ordinary necessities of life according to the way of living enjoyed by that person during the lifetime of the intestate, and in the case of a minor includes deprivation of the opportunities for education which he or she could reasonably have expected had the intestate continued to live.
[58] Section 17(2)-(4).

The eligible beneficiaries are clearly defined, the principles according to which a fair distribution should be decided are clear, and there is scope for flexibility when necessary to alleviate hardship or promote equitability. Given the increased circle of eligible beneficiaries under s37C the appropriate guidelines may need to be more complex, but the Malawian example is a clear indication that appropriate guidelines are possible.[59]

Looking to the past

One example of pre-s37C rules governing the distribution of lump sums is the 1929 rules of the Cape Town Municipal Pension Fund.[60] The rules would no longer be entirely suited to contemporary families, but they provide both a helpful definition of dependant and an order of preference amongst the eligible dependants.

The eligible dependants were:

a) spouses, children and step-children;
(b) a financially-dependent parent or sibling; or
(c) any other financial dependant.

The order of preference was:

1) the surviving spouse;
2) the children and step-children in equal shares
3) the father and mother in equal shares;
4) the brothers and sisters in equal shares;
5) the persons wholly dependent in equal shares.

This was the default order of preference. It could be varied by application to the trustees of the fund.[61] The need to do so would not arise any longer, since members are permitted to nominate beneficiaries.[62]

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[59] *Chinkwende v Chinkwende* (Probate Cause No. 757 of 2016) [2017] MWHC 68 (15 March 2017), 15, provides an illustration of how the principles were applied by a court.
[60] Set out in *Ex Parte City of Cape Town In Re Municipal Pension Fund*1941 CPD 117. See also the superannuation fund rules contained in the Railways and Harbours Service Act 28 of 1912, which also identifies eligible beneficiaries and lays down an order of preference.
[61] The member had been permitted to vary the order of preference, to the benefit of his two 'illegitimate' sons to the exclusion of his wife (who had deserted him). She nevertheless came forward to lay claim to the benefit upon his death. The issue before the court was whether the member's nomination of his eldest son was valid. His eligibility depended on whether he fell within the category of a 'child' of the deceased. The younger son was in any event eligible because he was totally dependent on the deceased. The court held that 'child' did include illegitimate children, and as such

In *Ex Parte City of Cape Town In Re Municipal Pension Fund*,[63] the court pointed out that the order of preference prioritised those relatives the deceased 'is ordinarily and usually liable in law to support' (spouses and minor children), than those relatives the deceased is 'sometimes though far less often legally called upon to support' (parents and siblings) and 'lastly those whom he is in fact wholly supporting'.

Every aspect of these rules was preferable to s37C. They were clear, certain and implementable. They clearly identified the potential dependants; they laid down an order of preference; and they were flexible

With some tweaking, the definition of dependant, and the order of preference, could be utilised to simplify the distribution of death benefits. It would have the merit of clarity and certainty and would promote consistent and predictable decision-making. The only change that I would recommend is that spouses are not automatically preferred ahead of the deceased's children and other relatives. However sensible the order of preference favouring spouses in 1929, it is no longer so, if only because marriage is terminable at will and, given the high incidence of divorce, there can be no expectation that it will endure. Linking the scope of a spousal claim to the duration of the relationship would also make it easier to equalise the treatment of married and unmarried partners. It is not equitable that spouses and partners be automatically singled-out for special protection, when all dependants are equally vulnerable because of the high incidence of poverty and unemployment in South African society.

The order of preference should be:

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his nomination was valid and binding. In dismissing the application to have him excluded, the court said: 'That an injustice or inequity is if possible to be avoided in construing a quasi – statutory provision of this kind is too trite to need the citation of authority.'

[62] Members were also permitted to vary the order of preference under the Railways and Harbour superannuation fund rules, and there is no suggestion that this required approval. See Act 28 of 1912, s 50.

[63] (n60).

- Minor children, spouses with children born of the relationship, and spouses without children born of the marriage in relationships ten years or longer, to share equally;
- Major children and spouses in relationships of short to medium duration, to share equally;
- Financially dependent parents and siblings and spouses in relationships of short to medium duration, with the parents/siblings receiving no more than a share proportionate to the level of support the deceased was providing to them when she died.

These are only guidelines, and as such a departure from those guidelines, to prefer one dependant over another, even when they are in the same order of preference, may be warranted. The same factors that courts are required to consider in Malawi and in other jurisdictions could be incorporated into the guidelines to allow for flexibility: namely, the extent of support that one beneficiary may already have received that others have not, and the extent to which the beneficiaries have contributed to the deceased's estate, or physical and emotional well-being.

8.3 CONCLUSION

In one of his earliest determinations, the Adjudicator described s37C as a 'hazarous, technical minefield', which created 'legal anomalies and uncertainties', rendering it difficult to apply and 'potentially prejudicial' to both trustees and beneficiaries. He observed that despite its 'noble and worthy policy intentions', the problem lay in its 'execution', and that the call for 'revision is almost universal'.[64]

Twenty years later s37C is still unreformed, remains difficult to apply, produces inequitable outcomes, and is, I believe, unconstitutional. It is in urgent need of reform, and part of that reform must include the formulation of clear, certain and implementable guidelines for

[64] *Dobie v National Technikon* [1999] 9 BPLR 29 (PFA), 41-42.

trustees. Formulating those guidelines will be challenging. Whatever their eventual content, they must be informed by the legal and moral convictions of the community. In South Africa and other jurisdictions, contemporary community convictions include: that trustees should be slow to override a deceased's wishes; that they should intervene only to correct a legal or moral wrong; that they should only do so to the extent necessary; that the moral claims of spouses and children should generally be paramount; that spouses in relationships of short duration do not have the same legal or moral claim as partners of long duration; that unmarried partners should be treated in the same way as similarly-situated married partners, but only after a minimum period of cohabitation; and, finally, that laws that simply discount the value and meaning a relationship held for a testator are immoral laws.

ANNEXURES
ANNEXURE 1: Pension Funds Act 24 of 1956 (Extracts)

"dependant", in relation to a member, means—
(*a*) a person in respect of whom the member is legally liable for maintenance;
(*b*) a person in respect of whom the member is not legally liable for maintenance, if such person—
(i) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
(ii) is the spouse of the member;
(iii) is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock.
(*c*) a person in respect of whom the member would have become legally liable for maintenance, had the member not died;
[Definition of "dependant" inserted by s. 21 (a) of Act No. 101 of 1976, substituted by s. 10 of Act No. 80 of 1978, amended by s. 38 of Act No. 99 of 1980 and by Act No. 22 of 1996 and substituted by s. 20 of Act No. 54 of 1989 and by s. 1 (i) of Act No. 11 of 2007.]

"spouse" means a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act, 1961 (Act No. 68 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 68 of 1997), or the Civil Union Act, 2006 (Act No. 17 of 2006), or the tenets of a religion;
[Definition of "spouse" inserted by s. 1 (u) of Act No. 11 of 2007.]

37C. Disposition of pension benefits upon death of member.—(1) Notwithstanding anything to the contrary
contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19 (5) (b) (i) and subject to the provisions of sections 37A (3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:

(*a*) If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as may be deemed equitable by the
fund, to one of such dependants or in proportions to some of or all such dependants.
[Para. (a) substituted by s. 5 (a) of Act No. 22 of 1996 and by s. 51 (a) of Act No. 45 of 2013.]

(*b*) 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 as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.
[Para. (b) substituted by s. 21 of Act No. 54 of 1989.]

(*b*A) If a member has a dependant and the member has also designated in writing to the fund a nominee to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the fund shall within twelve months of the death of such member pay the benefit or such portion thereof to such dependant or nominee in such proportions as the board may deem equitable: Provided that this paragraph shall only apply to the designation of a nominee made on or after 30 June 1989: Provided further that, in respect of a designation made on or after the said date, this paragraph shall not prohibit a fund from paying the benefit, either to a dependant or nominee contemplated in this paragraph or, if there is more than one such dependant or nominee, in proportions to any or all of those dependants and nominees.
[Para. (bA) inserted by s. 21 of Act No. 54 of 1989 and substituted by s. 5 (b) of Act No. 22 of 1996.]

(*c*) 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 if the member has not designated a nominee or if the member has designated a nominee to receive a portion of the benefit in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member or, if no inventory in respect of the member has been received by the Master of the Supreme Court in terms of section 9 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), into the Guardian's Fund or unclaimed benefit fund.
[Subs.(1) amended by s. 28 of Act No. 104 of 1993 and by s. 27 (a) of Act No. 11 of 2007. Para. (c) substituted by s. 21 of Act No. 54 of 1989 and by s. 51 (b) of Act No. 45 of 2013.]

ANNEXURE 2: CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 (Extracts)

1. **Republic of South Africa.**—The Republic of South Africa is one, sovereign, democratic state founded on the following values:
(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
(b) Nonracialism and nonsexism.
(c) Supremacy of the constitution and the rule of law.
(d) Universal adult suffrage, a national common voters roll, regular elections and a multiparty system of democratic government, to ensure accountability, responsiveness and openness.

2. **Supremacy of Constitution.**—This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

CHAPTER 2
BILL OF RIGHTS

7. **Rights.**—(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

9. **Equality.**—(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4)* No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

10. **Human dignity.**—Everyone has inherent dignity and the right to have their dignity respected and protected.

25. **Property**.—(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
(2) Property may be expropriated only in terms of law of general application—
(a) for a public purpose or in the public interest; and
(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

28. **Children.**—(1) Every child has the right—
(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that—
(i) are inappropriate for a person of that child's age; or
(ii) place at risk the child's wellbeing,
education, physical or mental health or spiritual, moral or social development;
…
(2) A child's best interests are of paramount importance in every matter concerning the child.
(3) In this section "child" means a person under the age of 18 years.

36. **Limitation of rights**.—(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

ANNEXURE 3: Table demonstrating extent to which members' wishes are overridden

Case Name	**T**	**T**	**A**	**A**	**A**
	F	O	U	R	S
Ackermann v Lifestyle Retirement Annuity Fund [2013] 3 BPLR 295 (PFA)		X	X		
Bakumeni v Old Mutual Staff Retirement Fund [2001] 2 BPLR 1573 (PFA)		X	X		
Baloyi v Denel Retirement Fund PFA/NP/109/00/CN		X	X		
Berge v Alexander Forbes Retirement Fund [2009] JOL 23698 (W)		X	X		
Bester v Central Retirement Annuity Fund [2003] 11 BPLR 5253 (PFA)		X	X		
Bolsiki v Private Sector Security Fund PFA/EC/10538/2006/LN		X	X		
Botha v Cape Gate Negotiated Provident Fund PFA/GA/12495/2007/EMD	X		X		
Brabant v Central Retirement Annuity Fund PFA/WE/4801/2005/LS		X		X	
Brummelkamp v Babcock Africa (1997) Pension Fund [2001] 4 BPLR 1811 (PFA)		X	X		
Chittenden v Estcourt Butchery (Pty) Ltd Provident Fund [2001] 5 BPLR 2001 (PFA)		X	X		
Coetzee v CRAF [2007] JOL 20902 (PFA)		X	X		
De Beer v Nissan PFA/GA/5557/2005/SM		X	X		
De Kock v EMC Provident Fund [2004] 4 BPLR 5618 (PFA)	X		X		
Esterhuizen v Central Retirement Annuity Fund [2013] 3 BPLR 355 (PFA)		X	X		
Gerber v Aberdare Cables (Pty) Ltd Provident Fund [2010] 3 BPLR 275 (PFA)		X	X		
Gorrah v Metal Industries Provident Fund [2014] JOL 31420 (PFA)		X		X	
Govender v Santam Insurance Retirement Fund PFA/GA/6041/05/LCM		X		X	
Gowing v Lifestyle Retirement Annuity Fund [2007] 2 BPLR 212 (PFA)		X			X
Gwebu v Assupol Retirement Fund PFA/WE/1679/02/CN	X			X	
Hattingh v Hattingh [2003] 4 BPLR 4539 (PFA)		X	X		
Jacoby v Metal Industries Pension Fund [2017] JOL 38735 (PFA)	X				C
Jones v National Technikon Retirement Fund [2002] 1 BPLR 2960 (PFA)		X	X		
Jordaan v Protektor Pension Fund [2001] 2 BPLR 1593 (PFA)		X	X		
Karam v Amrel Provident Fund [2003] 9 BPLR 5098 (PFA)	X		X		
Kgapola v Fidelity CMS Retirement Fund [2007] JOL 20987 (PFA)		X	X		
Khulu v Mangxola PFA/GA/8012/2006/SM		X		X	
Kipling v Unilever SA Pension Fund (1) [2001] 8 BPLR 2368 (PFA)		X			X
Kitching v Central Retirement Annuity Fund PFA/KZN/33168/2009/RM		X	X		
Koekemoer v Macsteel Group Retirement Plan [2004] 2 BPLR 5465 (PFA)		X	X		
Koopman v Municipal Gratuity Fund [2010] 1 BPLR 100 (PFA)		X	X		
Kruger v Central Retirement Annuity Fund [2002] 7 BPLR 3643 (PFA)		X	X		
Mahlambi v Chubb Group Pension Fund [2001] 5 BPLR 2034 (PFA)		X	X		
Mahomed v Argus Provident Fund PFA/KN/00013780/2015/UM		X		X	
Maime v Municipal Councillors Pension Fund PFA/GA/5379/05/JM		X	X		
Maji v Cape Joint Pension Fund [2004] 4 BPLR 5624 (PFA)		X	X		
Makola v Eskom Pension and Provident Fund PFA/MP/00012374/2014/TKM		X	X		
Makume v Sentinel Mining Industry Retirement Fund [2014] 2 BPLR 244 (PFA)		X	X		
Malan v Preservation Provident Fund [2017] 2 BPLR 256 (PFA)		X		X	
Malindi v British American Tobacco Retirement Fund PFA/GA/4233/05/VIA		X	X		
Maphothoma v Telkom Retirement Fund [2016] 1 BPLR 117 (PFA)		X			X
Marais v Sasol Pension Fund [2017] 3 BPLR 615 (PFA)		X		X	
Mashazi v African Products Retirement Benefit Provident Fund 2003 (1) SA 629 (W)		X	X		

Masoabi v Central Retirement Annuity Fund PFA/FS/6859/06/CN		X	X		
Masuku v Liberty Provident Fund [2014] 3 BPLR 390 (PFA)		X	X		
Minnaar v Central Retirement Annuity Fund [2015] 2 BPLR 236 (PFA)		X	X		
Moir v Reef Group Pension Plan [2000] 6 BPLR 629 (PFA)	X				X
Mojapelo v Road Crete Construction Provident Fund PFA/GA/11501/2006		X	X		
Monoko v Firestone [2007] JOL 20414 (PFA)		X	X		
Mphahlele v AON Umbrella Pension Fund PFA/LP/00002257/2013/MR		X	X		
Muller v Central Retirement Annuity Fund [2014] 2 BPLR 265(PFA)		X	X		
Musgrave v Unisa Retirement Fund [2000] 4 BPLR 415 (PFA)		X			X
Nduku v VWSA Provident Fund PFA/EC/14187/2007/NVC		X	X		
Nyathi v Leonard Dingler Defined Contribution Provident Fund PFA/GA/3328/05/LCM		X	X		
Owen v Metal & Engineering Industry Bargaining Council Pension Fund [2016] 1 BPLR 136 (PFA)		X		X	
Pandlev v South African Authorities Local Pension Fund PFA/EC/00004962/2013/MD		X	X		
Phahlane v Sasol Negotiated Provident Fund PFA/KZN/2182/2006/NVC		X	X		
Phashe v Metro Group Retirement Fund [2003] 9 BPLR 5123 (PFA)		X	X		
Ramanandh v Alexander Forbes Retirement Fund PFA/KZN/19520/07/CN		X	TB		
Ruiters v Telkom Retirement Fund [2003] 3 BPLR 4501 (PFA)		X	X		
Sakildien v Cape Municipal Pension Fund PFA/WE/6643/05/CN		X	X		
Schleicher v South African Retirement Annuity Fund [2002] 7 BPLR 3677 (PFA)		X	X		
Schoeman v Rentmeester Pensioenfonds [2003] 9 BPLR 5145 (PFA)		X	X		
Segal v Lifestyle Retirement Annuity Fund [2001] 1 BPLR 1519 (PFA)		X	X		
Selomo v Personal Provident Fund PFA/GA/4894/2005/RM		X	X		
Sesinyi v Amplats PFA/GA/6587/2006/LTN		X	X		
Sinclair v Nedcor Defined Contribution Pension Fund PFA/GA/4094/05/VIA		X	X		
Sithole v ICS Provident Fund [2000] 4 BPLR 430 (PFA)	X				X
Smith v MM Retirement Annuity Fund PFA/GA/5229/2005/RM		X	X		
Taljaard v Corporate Selection Umbrella Retirement Fund [2016] 2 BPLR 271 (PFA)		X		X	
Tau v Municipal Gratuity Fund PFA/GA/9044/06/LCM		X		X	
Thene v Bidcorp (2008) PFA/GA/6863/05/LCM		X		X	
Titi v Fundsatwork Umbrella Provident Fund [2011] JOL 28125 (ECM)		X	X		
Tlou v Amplats Mines Retirement Fund [2011] 3 BPLR 439 (PFA)		X	X		
Tsele v Bidvest South Africa Retirement Fund [2016] 1 BPLR 146 (PFA)		X		X	
TWC v Rentokil Pension Fund [2000] 2 BPLR 216 (PFA)	X				X
Van der Merwe v Corporate Selection Retirement Fund [2005] 5 BPLR 463 (PFA)		X		X	
Van der Walt v Fugro PFA/NW/3487/2005/RM		X	X		
Van der Westhuizen v Mine Employees Pension Fund [2015] 2 BPLR 295 (PFA)	X		X		
Van Jaarsveld v OVK Aftreefonds No 2 [2015] 2 BPLR 303 (PFA)		X		X	
Van Schalkwyk v Mine Employees Pension Fund [2003] 8 BPLR 5087 (PFA)		X	X		
Van Vuuren v Central Retirement Annuity Fund [2000] 6 BPLR 661 (PFA)		X			X
Van Zelser v Sanlam Marketers Retirement Fund [2003] 2 BPLR 4420 (PFA)		X	X		
Varachia v South African Breweries Staff Provident Fund [2015] 2 BPLR 310 (PFA)		X	X		
Wellens v Unsgaard Pension Fund [2002] 12 BPLR 4214 (PFA)		X	X		
Williams v FFE Minerals South Africa Pension Fund (1) [2001] 2 BPLR 1678 (PFA)	X				X
Winnan v Mine Employees Pension Fund PFA/KZN/12789/07/MQ		X		X	

Symbols:
T = Trustee: F = Followed member's wishes; O = Overrode member's wishes.
A = Adjudicator: U = Upheld (trustee decision); R = Remitted to Trustees; S = Substituted own decision
TB = Time-barred
C = Corrected legal error

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