THE GUARDIAN'S FUND AS THE APPROPRIATE RECEPTACLE OF LUMP-SUM FUTURE MAINTENANCE FOR CHILDREN

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SUMMARY

The Maintenance Act 99 of 1998 currently only provides for the recovery of arrear maintenance and the enforcement thereof but does not provide for an applicant to claim for future maintenance. The courts have tried to fill some gaps in this regard and have allowed the attachment of certain benefits for the future maintenance of children. However, in addition to this identified gap, the Maintenance Act also does not indicate who will be responsible for administering the benefits that are eligible for attachment.

This dissertation relates to the critical question as to who will be responsible for administering the benefits after a future maintenance order is made – more particularly whether the Guardian's Fund section of the Master of the High Court is the appropriate receptacle to administer lump-sum future maintenance for children.

The research will further be conducted to identify areas of conflict between future maintenance court orders and the Estates Act. Solutions will be suggested to these conflicts to assist in providing a framework for the drafting of amendments to the Maintenance Act to regulate the issue of future maintenance for children.

KEY TERMS

Guardian's Fund; Lump-sum future maintenance; Future maintenance; Maintenance; Maintenance Act; Administration of Estates Act; Maintenance claim; Curator; Receiver; Trustee; Guardian's Fund fees; Master of the High Court; Maintenance Court, Child, Major, Minor, Self-supporting.

LIST OF ABBREVIATIONS

All SA-All South African Law Reports

A- Appellate Division

BPLR-Butterworth's Pension Law Reports

C/CPD-Cape Provincial Division

CC-Constitutional Court

GEPF-Government Employees Pension Fund

GSJ: South Gauteng High Court, Johannesburg

PELJ-Potchefstroom Electronic Law Journal

PFA-Pension Fund Adjudicator

SALRC-South African Law Reform Commission

SA Merc LJ-South African Mercantile Law Journal

SA-South African Law Reports

SCA-Supreme Court of Appeal

Stell LR -Stellenbosch Law Review

T /TPD-Transvaal Provincial Division

THRHR-Tydskrif vir Hedendaagse Romeins – Hollandse Reg

TSAR-Tydskrif vir Suid - Afrikaanse Reg

W/WLD-Witwatersrand Local Division

WCHC-Western Cape High Court

ZAFSHC- South Africa: Free State High Court, Bloemfontein

ZAGPPHC- South Africa: North Gauteng High Court, Pretoria

ZAKZPHC- South Africa: Kwazulu-Natal High Court, Pietermaritzburg

ZAWCHC- South Africa: Western Cape High Court, Cape Town

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CHAPTER ONE

INTRODUCTION

1.1 Background and introduction

In terms of the preamble to the Maintenance Act 99 of 1998 (hereinafter referred to as the Maintenance Act), the South African Law Reform Commission (hereinafter referred to as the SALRC) is investigating, in addition to the recovery of maintenance for children, the reform of the entire South African maintenance system. Two of the areas identified by the SALRC for reform are: firstly, that the Maintenance Act does not stipulate when an application for future maintenance may be made; and secondly, that it does not indicate who will be responsible for administering the benefits that are eligible for attachment or the execution of a benefit under a warrant.[1]

As regards the first area identified for law reform, it is clear that the Maintenance Act currently only provides for the recovery of arrear maintenance and the enforcement thereof but does not provide for an applicant to claim for future maintenance from the person that has an obligation to maintain his/her children.[2] This matter has received a lot of judicial attention, which illustrates the need for future maintenance to be regulated by the Maintenance Act.[3]

In terms of section 28(2) of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), the best interests of the child are of paramount importance in every matter

[1] SALRC *Issue Paper 28 Review of Maintenance Act 99 of 1998*, Project 100 (9 September 2014) para 2.63.
[2] SALRC *Issue Paper 28 Review of Maintenance Act* para 2.64.
[3] SALRC *Issue Paper 28 Review of Maintenance Act* para 2.66.

concerning the child and in terms of s 9 of the Children's Act 38 of 2005 (hereinafter referred to as the Children's Act) the standard that the child's best interests are of paramount importance, must be applied in all matters concerning the care, protection and well-being of a child.

Following the lead of the Constitutional Court case of *Bannatyne v Bannatyne*[4] with reference to s 28 of the Constitution and the best interests of children,[5] the courts[6] have tried to fill some of the gaps relating to the civil enforcement of maintenance claims in the Maintenance Act and have allowed the attachment of the proceeds of immovable property, pension benefits and annuities for purposes of providing for the future maintenance of children.[7] In all the cases the specific institutions[8] were ordered to retain a certain amount on behalf of the maintenance debtors and pay over periodical future maintenance to the caregivers of the children for the benefit of children.

The second area identified by the SALRC relating to the question as to who will be responsible for administering the benefits after a future maintenance order is made has not received as much attention – more particularly whether the Guardian's Fund[9] section of the Master (hereinafter referred to as the Fund) is the appropriate receptacle to

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[4] *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC).

[5] Hoctor SV and Carnelley M "Maintenance arrears and the rights of the child: *S v November* 2006 (1) SACR 213 (C)" 2007 *TSAR* 201.

[6] *Gerber v Gerber* case numbers 12166/07 and 12691/07 (WCHC), unreported judgment delivered on 9 November 2007; *Mngadi v Beacon Sweets and Chocolates Provident Fund & Others* 2004 (5) SA 388 (D); *Soller v Maintenance Magistrate Wynberg & Others* 2006 (2) SA 66 (C); *Magewu v Zozo* 2004 (4) SA 578 (C).

[7] Bonthuys E "Child maintenance and child poverty in South Africa" 2008 *THRHR* 196.

[8] Ie the retention of the maintenance debtors' pension funds, except in the case of *Burger v Burger* 2006 (4) SA 414 (D) and *Gerber* where the court, respectively, interdicted attorney's firms from paying proceeds of immovable property to the maintenance debtor and ordered the sheriff and a receiver to retain the proceeds from a sale of immovable property.

[9] The Guardian's Fund is established by s 86(1) of the Estates Act, which provides that "[t]he guardian's fund established by section *ninety one* of the Administration of Estate Act, 1913 (Act No 24 of 1913), shall continue in existence, and shall consist of all moneys – (*a*) in that fund at the commencement of this Act; or (*b*) received by the Master under this Act or any other law or in pursuance of an order of Court; or (*c*) accepted by the Master in trust for any known or unknown person."

administer the funds for future maintenance. The SALRC advises that one of the strategies is for the Chief Directorate to engage the Office of the Chief Master to put processes in place to enable the Fund to cater for the funds received on behalf of future maintenance beneficiaries.[10] Some years prior to the SALRC's advice, however, the court in *Government Employees Pension Fund v Bezuidenhout* (hereinafter referred to as the *Bezuidenhout* case)[11] already ordered that a lump sum earmarked for the maintenance of children be paid from the Government Employees Pension Fund (hereinafter referred to as the GEPF) to the Fund. The *Bezuidenhout* case is now the precedent allowing the maintenance courts to order a lump sum in respect of future maintenance to be paid to the Fund and also the authority allowing the Fund to accept lump sums in respect of future maintenance.[12] I am in agreement that the court made the correct decision in the *Bezuidenhout* case but, based on the principles of legality[13] and subsidiarity,[14] this could have caused uncertainty with the Master not truly understanding the decision by the court.

1.2 Problem statement

The critical question to be explored relates to the second area identified and this is whether or not the Fund is the appropriate receptacle to administer lump-sum future maintenance for children.[15] If so, what

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[10] SALRC *Issue Paper 28 Review of Maintenance Act* para 2.73.

[11] *Government Employees Pension Fund v Bezuidenhout and Another* Appeal no 2113/04 (TPD) unreported judgment delivered on 6 March 2006.

[12] Chief Master's Directive 1 of 2017 and Chief Master's Directive 1 of 2018. Available at https://www.justice.gov.za/master/directives.html (accessed 10 August 2021).

[13] The rule that an entity can only act within the powers that are lawfully conferred upon it.

[14] The rule that determines that any legislation enacted pursuant to a constitutional command to give effect to constitutional rights, may not be circumvented in favour of direct reliance on the Constitution.

[15] This was the question directly asked in the SALRC *Issue Paper 28 Review of Maintenance Act* para 2(a)(iii) some 10 years after the decision in the *Bezuidenhout* case. It is not clear why the decision was not mentioned at all by the SALRC. The reason may be that the SALRC was unaware of the *Bezuidenhout* case as it was unreported.

reform is required, if any, in promoting and giving effect to the best interests of the child principle?

The research will be conducted to identify and suggest areas for reform to the conflict between the maintenance orders and the empowering provisions of the Fund. Having regard to these conflicts[16] (interest on funds and the age of majority) it will prove problematic to simply amend the Maintenance Act to provide that a lump sum will be paid into the Fund or to amend the Administration of Estates Act 66 of 1965 (hereinafter referred to as the Estates Act) to provide that the Fund is authorised to accept funds from maintenance courts. It is not that simple. The research will assist in providing a framework for the drafting of new legislation or amendments to the Maintenance Act to regulate the issue of future maintenance as suggested by the SALRC.

The problems involved in the proper enforcement of maintenance obligations are manifest.[17] Most women who claim maintenance in the maintenance courts are unemployed and depend on maintenance and social grants to survive.[18] In the majority of cases it is women who reside in rural areas who have to start the process of applying for maintenance. They use public transport or walk long distances and their matters are only finalised after some time, if finalised at all.[19]

Should a lump-sum award be made and ownership therein be transferred to the child, the applicants will no longer have to "run after" dissipating or recalcitrant maintenance debtors every time they wish to secure maintenance for children or be required to go back to court to enforce maintenance obligations.[20] Instead it will be the dissipating or

[16] These conflicts are explained in Chapter 3 below.
[17] Hoctor and Carnelley 2007 *TSAR* 203.
[18] De Jong M and Sephai KKB "New measures to better secure maintenance payments for disempowered women and vulnerable children" 2014 *THRHR* 197.
[19] De Jong and Sephai 2014 *THRHR* 197.
[20] *Magewu v Zozo* 2004 (4) SA 578 (C) para 22.

recalcitrant parent who will have to prove that he/she is unable to support himself or herself and claim from the lump sum held by the Fund in the name of the child. Nothing will prevent the former recalcitrant or dissipating parent to approach the court for maintenance from the child's lump sum in the event that he/she becomes unable to support himself or herself in future.[21]

The courts are also frequently confronted with the problem of finding an appropriate sentence for maintenance defaulters. The transferring of ownership in the funds to the child with the effect of bringing the administration of a lump sum in the Fund in harmony with the provision of the Estates Act will be in line with the Constitutional Court's finding that the failure to comply with maintenance orders undermines not only the best interests of children but also sex and gender equality and the dignity of women.[22] This will go a long way in ameliorating the plight of women and children. As the Constitutional Court stated in *Bannatyne v Bannatyne*:[23]

> "It is a function of the state not only to provide a good legal framework, but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws they implement are important mechanisms to give effect to the rights of children protected by section 28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system."[24]

For purposes of this dissertation the focus will primarily be based on family-, maintenance-, estate law and the workings of the Fund.

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[21] 2010 (6) SA 19 (SCA) para 22 confirming that children also have a liability to support their parents.
[22] 2003 (2) SA 363 (CC) para 30. See also De Jong and Sephai 2014 *THRHR* 213.
[23] 2003 (2) SA 363 (CC).
[24] Para 28.

1.3 Purpose of research

The purpose of the research is in the first instance to point out the administrative problems and anomalies created for the Fund, if a lump sum for the benefit of children will be paid into the Fund.

The research is also conducted to indicate why it is important that a lump sum to be paid must be paid into the Fund having regard to the focus remaining on the best interests of the child being of paramount importance.[25]

To answer the question of who will be responsible for administering the benefits after a future maintenance order is made and to evidence the need for reform in this regard, this research explores whether the Fund is in fact the appropriate receptacle as compared to other types of payment methods (payment directly to the guardian or caregiver of the child,[26] a trust,[27] a receiver[28] and a tutor dative/curator *bonis*)[29] made in respect of lump-sum maintenance awards in favour of children. The advantages and disadvantages of each payment method will be weighed up and ultimately tested against the best interests of the child principle. The research will further identify the challenges the Fund might have or are currently experiencing by administering the funds, having regard to its empowering legislation in terms of the Estates Act. These challenges *inter alia* relate to the earning of interest and the age of majority relating to funds deposited into the Fund. Conflict arises between the situations where interest is being earned in respect of

[25] S 28(2) of the Constitution and s 9 of the Children's Act.
[26] In terms of s 18(3)(a) of the Children's Act.
[27] In terms of s 1 of the Trust Property Control Act 57 of 1988.
[28] In terms of the *Gerber* case para 12.
[29] In terms of s 72(1) of the Estates Act.

minors whose funds are deposited into the Fund as opposed to the situation where no interest is being earned in respect of majors' funds, especially after the lowering of the age of majority by the Children's Act.[30]

Reform suggestions will be made to resolve the above conflicts and to aid in providing a framework for the drafting of new legislation. It will be recommended that ownership of the funds be passed to the minor or the dependent major similar to precedents found in case law and maintenance claims in deceased estates. The transferring of ownership of lump-sum funds to be deposited into the Fund or to be paid directly to the dependant major could provide an alternative to killing the goose that lays the golden eggs for the dependants.[31]

1.4 Structure of the study

Chapter 1 of the study is the introductory chapter. So far, this chapter has set out the background to the research, the problem statement and the purpose of the research. In the remainder of this introductory chapter important terms will be defined and the methodology of the study will be discussed.

Chapter 2 will focus on the gap in the Maintenance Act, as it relates to the ordering of lump-sum future maintenance. It will then be explained how the courts have used the best interests of the child principle, legislation and common law to fill the gap. It will be concluded that the orders are indeed in the best interests of the child.

Chapter 3 will firstly focus on the Fund and lump-sum future maintenance from maintenance courts and a determination as to

[30] In terms of s 17 of the Children's Act.
[31] Hoctor and Carnelley 2007 *TSAR* 203.

whether the Fund is indeed the best receptacle to administer lump-sum future maintenance. To determine this, I will compare the Fund to other types of receptacles used in respect of lump-sum awards to minor children. Such types include payment directly to the natural guardian or caregivers of the children, payment to a trust, payment to a receiver and payment to a tutor dative/curator. The nature, meaning and scope of each receptacle will be explored. Payment to the Fund will be explored and conflicts will be identified. These conflicts *inter alia* relate to the earning of interest and the age of majority on funds deposited into the Fund. Conflict arises between the situation where interest is being earned in respect of minors whose funds are deposited into the Fund as opposed to the situation where no interest is being earned in respect of majors' funds, especially after the lowering of the age of majority by the Children's Act.[32]

In chapter 4, suggestions will made to resolve the above conflicts by recommending that ownership in the funds be transferred to the child.

The final chapter will set out the conclusion and recommendations.

1.5 Definition of terms

1.5.1 Pension funds

For purposes of this dissertation any reference to "pension funds" will include public pension funds (ordinarily referred to as "pension funds") and private pension funds (ordinarily referred to as "retirement annuities" or "provident funds") except where specifically indicated otherwise.[33] It is, however, important to note that private sector pension funds are ordinarily regulated by the Pension Funds Act 24 of 1956, while a number of public pension funds are regulated by their own pieces of

[32] In terms of s 17 of the Children's Act.

[33] For example, throughout this dissertation specific reference will be made to the GEPF as giving rise to the issue of future maintenance payments into the Guardian's Fund.

legislation.[34] Pension funds are generally established to, amongst others, collect contributions from members in order to provide them with pension benefits when they are no longer working, and invest moneys on behalf of the fund for the benefit of the members.[35]

For purposes of the dissertation it is important to take note that a lump-sum benefit from pension funds may be attached for purposes of providing for the future maintenance of children.

1.5.2 Guardian or guardianship

The term "guardian" refers to a parent or any person[36] who administers and safeguards a minor's property and property interest.[37]

Guardianship has a wide and a narrow meaning. In terms of its wide meaning, guardianship is equated with the lawful authority which one person has over the person and/or property of a person incapable of managing their own affairs.[38] In terms of the narrow meaning, it entails the authority to control and administer a child's estate and to assist or represent him or her in the performance of juristic acts.[39]

More specifically for purposes of this dissertation "guardianship" will be restricted to the child's property interests and entail exactly what is denoted in terms of s 1(1) read with s 18(3)(a) of the Children's Act,

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[34] See eg chapter 1B of the Post and Telecommunication-related Matters Act 44 of 1958 read with GN 1107 of 25 November 2005 setting out the rules of the Post Office Retirement Fund; the Transnet Pension Fund Act 62 of 1990 and the Government Employees Pension Law of 1996 (Proc 21 *GG* 17135 of 19 April 1996). See also Marumoagae MC "The need for effective management of pension funds schemes in South Africa in order to protect members' benefits" 2006 *THRHR* 614.

[35] Marumoagae 2006 *THRHR* 614.

[36] For example a person granted guardianship by the high court in terms of s 24 of the Children's Act.

[37] In terms of the definition section of the Children's Act (s 1), a guardian means a parent or other person who has guardianship of a child.

[38] Heaton J (ed) *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (Juta Cape Town 2014) 202.

[39] Schäfer L *Child Law in South Africa, Domestic and International Perspectives* (Lexis Nexis Durban 2011) 224.

which indicates guardianship as the responsibility and right of a parent or other person to administer and safeguard the child's property and property interests amongst other duties.[40]

1.5.3 Child, minor, major and self-supporting

In line with the Children's Act, "child" refers to a person under the age of 18 years[41] and "major" to someone who is 18 years or older.[42] The Children's Act uses the term "child" while the Estates Act uses the term "minor". Both, however, refer to a minor child as a person under the age of 18 years. When reference is made to a child or children in this dissertation, it will, however, include both minors and majors who are not yet self-supporting. In maintenance matters, this inclusion is pertinently necessary since a parent's common law duty of support does not end when a child reaches the age of majority but only when the child becomes self-supporting.[43] Most court orders provide that the child must receive maintenance from periodical payments until the child is no longer in need of maintenance[44] (not until the child reaches the age of majority).

1.5.4 Trust, trustee, trust property and trust instrument

The terms "trust", "trustee" and "trust property" are defined in s 1 of the Trust Property Control Act 57 of 1988 and will bear the same meaning as such for purposes of this dissertation:

The section provides that:-

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[40] See also De Jong M "A better way to deal with the maintenance claims of adult dependent children upon their parents' divorce" 2013 *THRHR* 662.
[41] S 1 of the Children's Act.
[42] See s 17 of the Children's Act: "a child, whether male or female, becomes a major upon reaching the age of 18 years."
[43] De Jong 2013 *THRHR* 657.
[44] For example in the cases of *Mngadi v Beacon Sweets and Chocolates Provident Fund & Others* 2004 (2) SA 388 (D) 20 and *Bezuidenhout* case para 28.2 v.

> "'[T]rust' means the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed –
>
> *(a)* to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or
>
> *(b)* to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the persons or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument,
>
> but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965 (Act No. 66 of 1965)."

The difference between a trust under *(a)* and *(b)* above is that in the former instance the ownership passes to the trustee and in the latter the ownership passes to the beneficiary while the control resides in the trustee.[45] However, both are subject to the terms of the trust instrument. There is further little practical difference between the two from an administration perspective. In both cases, the trustee is in control, charged with the administration of the property and its disposal, as determined by the trust instrument.[46]

The trustee is the person to whom the control and administration of the trust property has been handed. A trustee can only act as trustee by virtue of authorisation in writing by the Master.[47] This requirement of

[45] Meyerowitz (2010) para 23.3.
[46] Meyerowitz (2010) para 23.3.
[47] S 1 of the Trust Property Control Act. See also Meyerowitz (2010) para 23.4.

authorisation by the Master applies even when the trust instrument is a court order.[48]

Trust property refers to any moveable or immoveable property, including contingent interests in property, which are to be administered or disposed of by a trustee in accordance with the provisions of a trust instrument.[49] A contingent interest may include any *spes* in property.[50]

A trust instrument means a written agreement or a testamentary writing or a court order in terms of which a trust was created.[51]

It needs to be emphasised that one of the orders a court may make in respect of lump-sum funds due to children is that a lump sum may be paid to a trustee to administer such.[52]

1.5.5 Receiver or liquidator

In divorce matters where either of the parties has no faith in the *bona fides* of the other party and they were married in community of property and cannot agree upon the division or upon who must make the division of the estate, a court has the power to appoint some impartial person to collect, realise and divide the estate.[53] This person is called a receiver (also referred to as a liquidator or curator). Either of the divorcing parties may approach the court either during or after the granting of a divorce order for the appointment of a receiver.[54]

At this stage it is important to emphasise that one of the orders a court may make in respect of lump-sum funds due to children is the

[48] Meyerowitz (2010) para 23.9.
[49] S 1 of the Trust Property Control Act. See also Meyerowitz (2010) para 23.5.
[50] Meyerowitz (2010) para 23.5.
[51] S 1 of the Trust Property Control Act. See also Meyerowitz (2010) para 23.2.
[52] Meyerowitz (2010) para 21.1. See also *Dube NO v Road Accident Fund* 2014 (1) SA 577 (GSJ).
[53] *Revill v Revill* 1969 (1) SA 325 (C) at 327.
[54] De Jong M "The need for new legislation and/or divorce mediation to counter some commonly experienced problems with the division of assets upon divorce" 2012 *Stell LR* 226.

appointment of a receiver to take possession and control of the funds and to pay monthly maintenance to the maintenance creditor.[55]

1.5.6 Curator and tutor

In terms of the Estates Act, the high court may appoint a tutor dative or curator *bonis* to administer the property of a minor and the Master may grant letters of tutorship or curatorship to such person.[56] This will be done where a minor owns property and does not have a natural guardian. The court may nevertheless also appoint a tutor/curator where the minor has a natural guardian.[57] The court may do so when good reason exists, and ordinarily orders this when a relatively significant amount of money is to be awarded to a child.[58]

At this stage it is important to emphasise that one of the orders a court may make in respect of lump-sum funds due to children is the appointment of a tutor/curator to administer such funds.[59]

1.5.7 Guardian's Fund

The Fund was created to manage funds that are payable to the Master of the high court[60] in terms of the Estates Act.[61] One of the duties of the Master is to administer moneys in the Fund for the benefit of minors.[62] The Master is under direct control of the high court.[63] It has limited authority, as it may only accept funds in terms of the Estates Act,[64] other

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[55] *Gerber* case para 12.
[56] S 72(1)(d) of the Estates Act.
[57] Meyerowitz (2010) para 21.1.
[58] *Dube NO v Road Accident Fund* 2014 (1) SA 577 (GSJ) paras 15 to 19.
[59] Meyerowitz (2010) para 21.1.
[60] Meyerowitz (2010) para 25.1.
[61] S 86(1) of the Estates Act.
[62] *Bezuidenhout* case para 24.
[63] *Bezuidenhout* case para 24.
[64] Examples of funds the Master are allowed to accept in terms of the Estates Act is set out in s 35(12), s 43(6) and s 93 of the Act.

law[65] and an order of court.[66] Despite the fact that the Fund is a creature of statute and is only allowed to act within the confines of its enabling provisions it is now accepted that a maintenance court (not only the high court as statutorily allowed), may order a lump sum for purposes of providing for the future maintenance of a child. In this regard the high court has used its common law powers and the best interests of the child principle to extend the jurisdiction of maintenance courts to include orders in respect of payment of funds to the Fund.[67]

1.5.8 Maintenance

In this dissertation "maintenance" refers to the duty of parents to support their children in terms of their common law duty and extends to such support a child reasonably requires for his/her proper living and upbringing. This includes the provision of food, clothing, accommodation, medical care and education.[68] Parents' duty to support their children applies irrespective of whether a child is born from married or unmarried parents or is born from a first or a subsequent marriage.[69] A parent's common law duty of support does not cease when a dependent child reaches the age of majority but only when the child becomes independent or self-supporting.[70] It has further become trite that the duty of a parent to maintain a child does not end when a parent dies, but becomes a debt in the deceased parent's estate.[71]

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[65] For example, in terms of s 95(2) of the Insolvency Act 24 of 1936 and s 11 of the Expropriation Act 63 of 1975.

[66] In terms of the definition section (s 1) of the Estates Act, "[c]ourt means the High Court having jurisdiction, or any judge thereof".

[67] This is explained in more detail in Chapter 2 below.

[68] S 15(1) and (2) of the Maintenance Act.

[69] S 15(3)(a)(iii) of the Maintenance Act.

[70] *Mngadi v Beacon Sweets and Chocolates Provident Fund & Others* 2004 (5) SA 388 (D) 395 and 396. See further *Mbhele v Mbhele* (2010) ZAKZPHC available at http://www.saflii.org/za/cases/ZAKZPHC/2010/29.html (accessed 8 December 2020) para 14 where the judge referred to the case of *Kanis v Kanis* 1974 (2) 606 (RAD) and stated that it is trite law that a major "child" who is incapable of supporting him or herself, is entitled to support from a parent who is able to do so.

[71] *Du Toit NO v Thomas NO and Others* 2016 (4) SA 571 (WCC) para 17.

The duty of support is not limited to biological parents but may be extended to other persons as stated in *SS v Presiding Office, Children's Court, Krugersdorp*:

> "The law relating to the duty of support can be summarised as follows: Biological parents of children, whether married or unmarried, have a duty of support. Adoptive parents are considered the parents of a child once the adoption is concluded, and have a duty of support. This is also true of children conceived by artificial fertilisation and surrogacy arrangements. Both maternal and paternal grandparents, regardless of whether the mother and father were married, have a duty of support. Siblings have a duty of support. Step-parents generally do not have a duty of support, but have been found to have a limited duty of support in narrowly defined circumstances. Aunts and uncles bear no responsibility to support their nieces and nephews."[72]

The duty of support is also reciprocal and a parent may look to a child with means of support in cases where the parent is indigent and all steps against the parent's spouse have been exhausted.[73]

1.5.9 Interest

"Interest" refers to the interest earned on funds deposited in the Fund on account of minors (amongst other classes of persons).[74] Money in the Fund earns interest calculated on a monthly basis and compounded annually at 31 March.[75]

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[72] Saldulker J in the matter of *SS v Presiding Office, Children's Court, Krugersdorp and Others* 2012 (6) SA 45 (GSJ) para 33.

[73] 2010 (6) SA 19 (SCA) paras 22 and 23.

[74] In terms of s 88(1) of the Estates Act, interest is also earned on funds held by the Master on behalf of mentally ill persons or persons with a severe or profound intellectual disability, an unborn heir or any person having an interest in the funds of a usufructuary, fiduciary or fideicommissary nature.

[75] S 88 of the Estates Act. In terms of s 88(2), the rate is determined by the Minister from time to time. The current rate of interest is 4.25%. Interest rate in respect of the 2021/2022 financial year confirmed in terms of internal memo in my possession and email from Mr Matlou Ramoroka, Deputy Director of the Department of Justice and Constitutional Development, 16 May 2021. See also para 1.3 above.

Money paid into the Fund on account of any other person, does not carry interest.[76] No interest is therefore earned on funds held in the Fund on behalf of major dependent children if the funds are deposited when the child in need of maintenance has already reached the age of majority. Interest will however be earned in respect of a major whose funds were deposited whilst he/she was a minor, for a period of five years after the funds become claimable.[77] In other words a minor will become entitled to payment on majority (unless there are any restrictions for example in terms of a court order) and will be entitled to interest up to the date of payment if he/she claims payment within five years after reaching the age of majority, but he/she will not be entitled to interest after the lapse of five years after reaching such age.[78]

1.5.10 Security

"Security" refers to the instance where a natural guardian gives security to the Master after a sum of money a minor under his/her guardianship is entitled to, has been paid into the Fund. After security has been furnished, the Master may then pay to the guardian, for and on behalf of the minor, the sum of money standing to the credit of the minor in the Fund.[79] The nature and form of the security are not prescribed by the Estates Act and are left to the discretion of the Master. Ordinarily a guardian will furnish a bond of security from an insurance company. A suretyship or a mortgage bond over immovable property may also suffice.[80]

[76] Meyerowitz (2010) para 25.2.
[77] S 88(2) of the Estates Act. See also Meyerowitz (2010) para 25.2.
[78] Meyerowitz (2010) para 25.2.
[79] S 90(2) read with s 43(3), (4) and (5) of the Estates Act.
[80] Meyerowitz (2010) para 20.3.

1.6 Methodology of the study

This study will be reform orientated. The research will be based on a literature study which consists of a research review of various sources.[81] Findings will be based on the consideration of domestic and international laws,[82] case law, common law, customary law and practice as they relate to maintenance law, estates law, family law and child law. With reference to lump-sum maintenance and other aspects regulating child law in South Africa, the Fund has not been researched extensively in the past and may therefore provide a framework for further research in this important area of the law.

[81] Textbooks, journal articles and Master's Directives.

[82] United Nations Convention on the Rights of the Child (1989); African Charter on the Rights and Welfare of the Child (1990); United Nations Convention on the Elimination of all forms of Discrimination against Women (1979).

CHAPTER TWO

THE CURRENT STATUS OF LUMP-SUM FUTURE MAINTENANCE IN SOUTH AFRICAN LAW

2.1 Introduction

The Maintenance Act codifies the common law position regarding the duty of persons to support children who are unable to support themselves[83] and also the enforcement of such duty.[84] As will become apparent below,[85] the Maintenance Act falls short of catering for lump sums to be attached for purposes of securing future maintenance for children and the enforcement thereof. Due to this shortcoming, the courts have had to use their common-law powers together with the application of the best interests of the child principle to order the attachment of lump sums for purposes of providing for the future maintenance of children from various sources. This has been done by way of granting anti-dissipation interdicts against recalcitrant maintenance debtors.[86]

2.2 Current legislation and case law

Chapter 5 of the Maintenance Act deals with the civil execution of maintenance orders. S 26(1)[87] read with s 26(4)[88] of the Maintenance

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[83] S 2(2) of the Maintenance Act provides that "[t]his Act shall not be interpreted so as to derogate from the law relating to the liability of persons to maintain other persons".

[84] S 15(1) provides that "[w]ithout derogating from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue".

[85] Para 2.2 below.

[86] See discussion of cases in para 2.2 below.

[87] S 26(1) provides that "[w]henever any person-

(a) against whom any maintenance order has been made under this Act has failed to make any particular payment in accordance with that maintenance order; or

(b) against whom any order for the payment of a specified sum of money has been made under section 16(1)(a)(ii), 20 or 21(4) has failed to make such a payment,

such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon-

Act, which relates to the enforcement of maintenance orders, only applies to arrear maintenance as it only makes provision for the attachment of property, emoluments and debts of a maintenance defaulter. It therefore does not authorise attachment of a maintenance debtor's assets in respect of future maintenance payments which are not yet due and in respect of which the maintenance debtor is not yet in default.[89] As a result of this gap identified in the Maintenance Act, the high court, by applying the constitutional imperative in section 28(2) of the Constitution, started ordering that attaching funds due to maintenance debtors for the future maintenance of a child was in the best interests of the child.[90] In making such orders, the court exercised its inherent common law powers.[91] This was done by granting anti-dissipation interdicts against various institutions[92] in order to attach lump sums due to the maintenance debtor in respect of future maintenance for his/her children. The issue of whether one may claim future maintenance has therefore been left up to the courts to decide, as s 26 of the Maintenance Act does not cater for it.

In *Mngadi v Beacon Sweets and Chocolates Provident Fund*[93] the court had to decide whether the balance in the father's provident fund may be attached. In this case, the father had resigned from his job to escape paying maintenance to his children. He was not in arrears at the time,

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(i) by execution against property as contemplated in section 27;
(ii) by the attachment of emoluments as contemplated in section 28; or
(iii) by the attachment of any debts as contemplated in section 30".

[88] S 26(4) provides that "[n]otwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under any warrant of execution or any order issued or made under this chapter in order to satisfy a maintenance order."

[89] Heaton J and Kruger H *South African Family Law* (LexisNexis Durban 2015) 54; see also SALRC *Issue Paper 28 Review of Maintenance Act 99 of 1998*, Project 100 (9 September 2014) paras 2.64 and 2.65.

[90] Hoctor and Carnelley 2007 *TSAR* 201. See also Heaton and Kruger S*outh African Family Law* (2015) 54.

[91] Heaton and Kruger S*outh African Family Law* (2015) 54.

[92] Ie the maintenance debtors' pension funds and attorney's firms where the sheriff and receiver was ordered to retain the proceeds from a sale of immovable property.

[93] 2004 (5) SA 388 (D).

but had been in arrears in the past. The court acknowledged that the Maintenance Act does not cater for securing future maintenance but only deals with arrear maintenance and mechanisms for recovering moneys due.[94] To solve the problem, the court turned to the common law allowing it to order an anti-dissipation interdict against recalcitrant maintenance debtors. It referred to the following *dictum* derived from the case of *Knox D'Arcy Ltd v Jamieson:*[95]

> "The law has never shrunk from interdicting a debtor from dissipating funds to thwart the rights of creditors. Such cases are decided because the plaintiff should not have an injustice done to him by reason of leaving his debtor possessed of funds sufficient to satisfy the claim, when circumstances show that such debtor is wasting or getting rid of such funds to defeat creditors, or likely to do so. In general an applicant needs to show a particular state of mind on the part of the respondent, ie that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors, except possibly in exceptional circumstances.
>
> In those cases the effect of the interdict is to prevent the respondent from freely dealing with his own property to which the applicant lays no claim. I interpolate to state that *in casu* the children are creditors, though only admittedly insofar as each month's maintenance is due and payable, but have a *spes* in the lump sum in future. Justice may require this restriction in cases where the respondent is shown to be acting mala fide with the intent of preventing execution in respect of the applicant's claim."[96]

With the application of the above *dictum*, the court found that where the recalcitrant maintenance debtor is shown to act *mala fide* with the intent of preventing execution in respect of the maintenance creditor's claim for maintenance on behalf of the children, then the provisions of the Maintenance Act may be extended to cover the safeguarding of a

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[94] At 392.
[95] 1996 (4) SA 348 (A).
[96] *Mngadi v Beacon Sweets and Chocolates Provident Fund* 2004 (5) SA 388 (D) at 396.

payout in the hands of a provident fund for purposes of securing funds for the future maintenance of the children.[97]

In *Magewu v Zozo*,[98] which also involved a provident fund, the court relaxed the requirements in terms of which an anti-dissipation order may be granted in future maintenance matters. In this case it was not clear whether the father, who had been retrenched, would thwart creditors, and he was also not in arrears at the time the matter was heard. The court decided that the Maintenance Act does not create a closed list of mechanisms available in law to assist children who have maintenance claims and their specific situations are not set out by the Act.[99] The court ordered that the mere conduct of the maintenance debtor indicated that he was not willing to abide by the maintenance order and found that it was sufficient to order the attachment of the maintenance debtor's provident funds for purpose of providing for the child's future maintenance.[100]

In *Soller v Maintenance Magistrate Wynberg*[101] the court had to decide whether a retirement annuity may be attached for purposes of securing future maintenance. The court applied the same common law principles relating to the granting of an anti-dissipation interdict as applied in the *Magewu* and *Mngadi* cases and decided that an annuity is capable of attachment.[102] The court further confirmed that the maintenance court is fully empowered to make orders relating to future maintenance even though this is not regulated by the Maintenance Act.[103] Instead of ordering periodic payments of maintenance from the annuity, the court

[97] At 396.
[98] 2004 (4) SA 578 (C).
[99] Para 15.
[100] Para 24.
[101] 2006 (2) SA 66 (C).
[102] 2006 (2) SA 66 (C) paras 24, 26 and 30.
[103] Para 30.

directed that annual payments be made.[104] This direction was based on its being convenient for both the holder of the annuity and the applicant. The court held that an annual maintenance payment is easier to monitor as opposed to monitoring 12 monthly payments.[105]

In *Burger v Burger*[106] the issue was whether the proceeds from a sale of immovable property belonging to a maintenance debtor who was in arrears, which were held in an attorney's trust account, may be attached for purposes of securing future maintenance. Referring to the cases of *Mngadi* and *Magewu*, the court acknowledged that there is no provision or precedent for a lump sum to be attached in order to secure future monthly maintenance payments.[107] It was argued on behalf of the maintenance debtor that no *mala fides* was shown, that he was not intentionally recalcitrant and that he did not resign from his employment with the intention of frustrating his maintenance obligations.[108] Using its inherent powers,[109] the court held that even though the maintenance debtor had expressed no wish to defeat the children's claims for maintenance, his unsettled and hostile state of mind as to the purpose for which the proceeds of the property was sought to be used, would defeat the maintenance claims of the children.[110] The court held that the result would be similar to an intentional dissipation of funds[111] and ordered that the arm of the Maintenance Act must be extended where its recovery mechanisms falls short.[112]

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[104] Para 8.
[105] Para 42.
[106] 2006 (4) SA 414 (D).
[107] Paras 13 and 15.
[108] Para 20.
[109] Para 13. In paras 13-14 the court agrees with the approaches followed in the *Mngadi* and *Magewu* cases.
[110] Para 17.
[111] Para 21.
[112] Para 23.

Gerber v Gerber[113] also involved the attachment of proceeds from the sale of an immovable property belonging the maintenance debtor for the payment of future maintenance claims. The father was not in arrears up to the date of the court application. However, he was a drug user, unemployed and had spent an amount in excess of R1 000 000 over a period of three months. Despite the father attempting to rehabilitate himself and having plans to start up a business, the court ordered the sheriff to seize an amount of R400 000 of the proceeds from the sale of his immovable property and to keep it in trust in an interest-bearing account.[114] The court further ordered the appointment of a receiver to take possession and control of the funds held by the sheriff in the amount as determined by the maintenance court.[115]

In the unreported case of *Sentinel Retirement Fund v Mtambo and Others*[116] involving a pension fund, an application for future maintenance was dismissed. There was a dispute regarding the *bona* or *mala fides* of the maintenance debtor. The court held that it was clear that s 26 and in particular s 26(4) of the Maintenance Act only applied to arrear maintenance and not to amounts which will become due in future, save for some exceptions. The court referred to the *Mngadi* case and acknowledged that where a member resigned from a pension fund with the specific objective of thwarting payment then the relevant sections of the Maintenance Act and the Pensions Fund Act may be interpreted to include the payment of future maintenance in one lump sum.[117] The case indicates that an application for future maintenance in a lump sum

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[113] Case numbers 12166/07 and 12691/07 (WCHC), unreported judgment delivered on 9 November 2007. The court stated in para 8 that the courts do not hesitate to attach benefits for the purpose of future maintenance whether the recalcitrant parent is in arrears or not.

[114] Paras 12 and 15.

[115] Para 12.

[116] *Sentinel Retirement Fund v Mtambo and Others* (75404/2013) [2015] ZAGPPHC. Unreported judgment delivered on 1 June 2015 available at http://www.saflii.org/za/cases/ZAGPPHC/2015/423.html (Date accessed: 12 November 2015).

[117] Para 41 and 42.

is competent on condition that the member has resigned from the pension fund and the funds are not yet due and payable to such member.

All the above cases were motivated by the application of the best interests of the child being of paramount importance.[118]

2.3 The best interests of the child

The best interests of the child principle runs like a golden thread through South African law.[119] This is so, as the inclusion of the concept is derived from common law and is also provided for in the Constitution,[120] the Children's Act[121] and various international treaties to which South Africa is a signatory.[122] More specifically, the Maintenance Act, with emphasis on the Constitution, acknowledges its commitment to the establishment of a fair and equitable maintenance system.[123]

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[118] See para 2.3 below.

[119] Heaton J "An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context" 2009 *Journal for Juridical Science* 2.

[120] S 28(2) of the Constitution.

[121] S 9 of the Children's Act.

[122] Art 3(1) of the United Nations Convention on the Rights of the Child; art 4(1) of the African Charter on the Rights and Welfare of the Child.

[123] The Preamble to the Maintenance Act states the following:
"-WHEREAS the Constitution of the Republic of South Africa, 1996, as the supreme law of the Republic, was adopted so as to establish a society based on democratic values, social and economic justice, equality and fundamental human rights and to improve the quality of life of all citizens and to free the potential of all persons by every means possible, including, amongst others, by the establishment of a fair and equitable maintenance system;
-AND WHEREAS the Republic of South Africa is committed to give high priority to the rights of children, to their survival and to their protection and development as evidenced by its signing of the World Declaration on the Survival, Protection and Development of Children, agreed to at New York on 30 September 1990, and its accession on 16 June 1995 to the Convention on the Rights of the Child, signed at New York on 20 November 1989;
-AND WHEREAS Article 27 of the said Convention specifically requires States Parties to recognise the right of every child to a standard of living which is adequate for the child's physical, mental, spiritual, moral and social development and to take all appropriate measures in order to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child;
-AND WHEREAS the recovery of maintenance in South Africa possibly falls short of the Republic's international obligations in terms of the said Convention;
-AND WHEREAS the South African Law Commission is investigating, in addition to the recovery

The existence of the best interests of the child concept therefore cannot be denied and needs to be considered in each and every matter relating to children,[124] which includes the maintenance of children. It is argued that a maintenance debtor's maintenance obligation towards his/her children should therefore be seen as a primary obligation.[125]

The Constitutional Court case of *Bannatyne v Bannatyne*,[126] to which all the courts above[127] referred, was central to arriving at the decision that the attachment of a maintenance debtor's assets for future maintenance payments due to children was in their best interests and would prevent the undermining of their future rights.[128] In *Bannatyne* it was held that in enforcing maintenance orders, consideration and due weight should be given to s 28 of the Constitution.[129] In all the cases, the decision was motivated by ensuring that the rights of the child are given paramount importance in maintenance matters.[130]

The court in *Soller v Maintenance Magistrate Wynberg*[131] sums up the best interests of the child principle as it is applicable to the maintenance of children as follows:

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of maintenance for children, the reform of the entire South African maintenance system;
-AND WHEREAS it is considered necessary that, pending the implementation of the said Law Commission's recommendations, certain amendments be effected in the interim to the existing laws relating to maintenance and that, as a first step in the reform of the entire South African maintenance system, certain of those laws be restated with a view to emphasising the importance of a sensitive and fair approach to the determination and recovery of maintenance."

[124] Heaton 2009 *JJS* 2.

[125] De Jong and Sephai 2014 *THRHR* 197.

[126] 2003 (2) SA 363 (CC).

[127] Para 2.2 above.

[128] Hoctor and Carnelley 2007 *TSAR* 201.

[129] 2003 (2) SA 363 (CC) para 17. See also Sigwadi M "Pension-fund benefits and child maintenance: the attachment of a pension-fund benefit for purposes of securing payment of future maintenance for a child" 2005 *SA Merc LJ* 342.

[130] *Mngadi* at 397 and 398; *Soller* para 13; *Magewu* para 18; *Gerber* para 11; *Burger* paras 11 and 23. See also Hoctor and Carnelley 2007 *TSAR* 200.

[131] 2006 (2) SA 66 (C).

> "The Maintenance Act 99 of 1998 …, which came into operation on 26 November 1999, repealed the Maintenance Act 23 of 1963 by virtue of the growing perception that the right of children to be properly maintained required a reconsideration and restatement of the law relating to maintenance. The need for such reconsideration was highlighted by the protection of the rights of children in section 28 of the Constitution, more particularly section 28(2), which emphatically underlined the paramountcy of the child's best interests.
>
> This mirrored the high priority given to children's rights in United Nations conventions to which South Africa was a signatory, namely the *Convention on the Rights of the Child* (1989) and the *World Declaration on the Survival*, *Protection and Development of Children* (1990). In article 3(1) of the former it is stated that, in all actions concerning children, 'the best interests of the child shall be a primary consideration'."[132]

With the courts applying their inherent powers, the application of common law and the best interests of the child principle, it therefore became trite that the maintenance court, too, can order the attachment of a maintenance debtor's assets for purposes of securing future maintenance for children.

Notwithstanding the fact that each case must be decided on its own merits, one may deduce that the Maintenance Act does not create a closed list of mechanisms available in law to assist children who have maintenance claims and whose specific situations are not covered by the Act. Granting an anti-dissipation order would not depend either on whether the maintenance debtor is in arrears or unemployed or on whether or not he/she was acting *mala fide*. However, his/her mere conduct may indicate that he/she is not willing to abide by the maintenance order and justify an anti-dissipation order. A further indication for an anti-dissipation order against a maintenance debtor may be an unsettled and hostile state of mind toward the application

[132] Paras 15-16.

indicating that the children's maintenance claim may be prejudiced in future. In the case of pension funds, it is required that the maintenance debtor resign or intends to resign from his/her pension fund for the remedy of an anti-dissipation interdict to become available and not whilst the member is still an active member of such fund. Innovative court orders may further include annual payments from an attached lump sum, instead of monthly payments.

2.4 Who administers the future maintenance benefit on behalf of the children?

It is evident from the preceding paragraphs in this chapter that even though the Maintenance Act falls short of catering for a maintenance debtors' assets to be attached for purposes of securing future maintenance for children, courts, including maintenance courts, do have the authority to order such attachments. The question that remains is, therefore, not whether an application for future maintenance will be allowed but rather who are responsible for administering the lump sum in the best interests of children.

In all the cases discussed above,[133] the specific institutions[134] were ordered to retain a certain amount on behalf of the maintenance debtor and to pay over periodical future maintenance to the caregivers of the children for the benefit of the children. Until 2004, the institution retaining the funds was never in issue. In that year the focus shifted to the Fund in the *Bezuidenhout* case,[135] where it was for the first time ordered that funds in respect of future maintenance be paid into the Fund.[136] The

[133] Para 2.2 above.

[134] Ie the retention of the maintenance debtors' pension funds, except in the case of *Burger* and *Gerber* where the court interdicted attorney's firms from paying proceeds of immovable property to the maintenance debtor and ordered the sheriff and a receiver to retain the proceeds from a sale of immovable property.

[135] See para 1.1 above.

[136] Other traces of requests by applicants for funds to be paid to the Fund appear in *Coughlan v Kossar* case number 15209/2016 (WCHC), unreported judgment delivered on 25 November 2016

main reason for the court's decision not to order that the GEPF retain the funds and make periodical payments to beneficiaries appears to lie in the submission by the GEPF that it does not have the systems in place to retain an amount or portions thereof and make periodical payments to beneficiaries.[137] A further reason advanced was that the GEPF cannot invest the moneys in an interest bearing account.[138] The court could further not order the maintenance courts to retain the lump-sum amount, as they too are unable to administer their own lump-sum orders in respect of future maintenance since they do not have the necessary infrastructure to do so; nor is there an empowering provision which authorises maintenance courts to pay over any such lump sums to an appropriate administration body.[139] The court then extended the jurisdiction of maintenance courts to order funds to be deposited into the Fund. In this regard, Hartzenberg J refers to the dictum by Van Zyl J in *Soller v Maintenance Magistrate Wynberg*[140] as follows:

> "the maintenance court functions as a unique or *sui generis* court. It exercises its powers in terms of the provisions of the Maintenance Act and it does so subject to the provisions of the Constitution, more specifically section 28(2) thereof. This constitutional provision overrides any real or ostensible limitation relating to the jurisdiction of the magistrates' courts. It would be absurd, and a costly time wasting exercise, if an applicant for relief in the maintenance court should be compelled to approach the high court for such relief because of jurisdictional limitations adhering to the magistrate's court. This could never have been the intention of the legislature in enacting the Maintenance Act with the professed aim of rendering the procedure for determining the recovering of maintenance

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and *Mbhele v Mbhele* (2010) ZAKZPHC available at http://www.saflii.org/za/cases/ZAKZPHC/2010/29.html (accessed 8 December 2020), although it was not ordered that a lump sum be paid to the Fund.

[137] *Bezuidenhout* case para 6.5.

[138] *Bezuidenhout* case para 6.6.

[139] The SALRC advises that one of the strategies is for the Chief Directorate to engage the office of the Chief Master to put processes in place to enable the Guardian's Fund to cater for the funds received on behalf of future maintenance beneficiaries: SALRC *Issue Paper 28 Review of Maintenance Act* para 2.73.

[140] 2006 (2) SA 66 (C) para 30.

'sensitive and fair."[141]

The court in the *Bezuidenhout* case then held that these considerations apply with equal force in respect of the question whether the Master will be bound by orders of the maintenance court.[142] As a direct result of the decision in this case the maintenance courts now use it as precedent on the issue of lump-sum payments earmarked for the future maintenance of children into the Fund.[143]

2.5 The Master's Directives

To ensure uniformity in respect of the way in which the Fund deals with future maintenance moneys, the Chief Master issued a directive in 2017.[144] The directive indicated that the future maintenance moneys paid over to the Fund would be returned to the courts by the end of the financial year 2017/2018.[145] This, however, never materialised and another directive was issued on 28 March 2018 extending the date indefinitely.[146] From this latest directive it is apparent that the Fund was experiencing problems relating to the issue of interest earned. In the 2017 directive it was indicated that future maintenance funds in respect of minors would earn interest.[147] This was changed in the 2018 directive to an instruction that all funds in respect of future maintenance would not bear interest,[148] unless the court expressly ordered that the funds must bear interest.[149] It appears that the Master realised, firstly, that the funds belong to the maintenance debtor (who is usually a major) and not to the

[141] *Bezuidenhout* case para 10.
[142] Para 26.
[143] Chief Master's Directive 1 of 2017 and 1 of 2018.
Available at https://www.justice.gov.za/master/directives.html (accessed 10 August 2021).
[144] Chief Master's Directive 1 of 2017 para 1.
[145] Chief Master's Directive 1 of 2017 paras 2.1 & 3.1 (iv).
[146] Chief Master's Directive 1 of 2018.
[147] Chief Master's Directive 1 of 2017 para 3.1 (ii).
[148] Including previous future maintenance matters accepted under an interest-bearing account, where the court order did not expressly provide otherwise.
[149] Chief Master's Directive 1 of 2018 para 3.1.

minor and, secondly, that maintenance orders in favour of children may be granted beyond their becoming majors causing a direct contravention of the Estates Act only allowing the Master to accept funds in respect of minors.

2.6 Conclusion

As indicated in the preamble of the Maintenance Act, the SALRC is investigating, in addition to the recovery of maintenance for children, the reform of the entire South African maintenance system.[150] Part of this reform relates to the area of future maintenance and more specifically the administration of the funds on behalf of minor children.[151] The question directly asked by the SALRC was whether the Fund is the appropriate receptacle to administer the funds for future maintenance.[152]

I am not aware of any investigation being done on whether the Fund is indeed able to give full effect to the maintenance court orders or whether the Fund is the appropriate receptacle to administer the funds for future maintenance.[153] I believe that this investigation should firstly focus on a comparison between payment to the Fund as opposed to other payment methods allowed in law: such as payment directly to the guardian or caregiver of the child; to a trustee to administer the funds on behalf of the child; to a receiver and to a tutor dative/curator *bonis*. These aspects will therefore be examined in the next chapter.

[150] See para 2.3 above with reference to the preamble of the Maintenance Act.
[151] SALRC *Issue Paper 28 Review of Maintenance Act* para 1.7.
[152] SALRC *Issue Paper 28 Review of Maintenance Act* para 2(a)(iii).
[153] See para 2.4 above.

CHAPTER THREE

IS THE GUARDIAN'S FUND THE BEST AND MOST APPROPRIATE RECEPTACLE FOR THE ADMINISTRATION OF LUMP-SUM FUNDS DUE TO CHILDREN IN RESPECT OF FUTURE MAINTENANCE?

3.1 Introduction

The law does not regard children as capable of managing their own affairs. When they are placed in possession of property, it is necessary that there be someone to administer such property on their behalf.[154] As indicated in the preceding chapter, the court may make various orders relating to lump-sum funds due to children. It may order that a lump sum will be paid to the natural guardian directly or request the appointment of a tutor dative/curator *bonis,* receiver, or a trustee to administer the award.

The ultimate question that needs to be answered is whether the Fund is the best and most appropriate receptacle to administer lump-sum funds in respect of future maintenance as compared to other receptacles, having regard to the best interest of the child principle. To determine this, a comparison is required with four other types of receptacles that may be ordered in matters involving lump-sum awards to children. These other types are, firstly, payments directly to the guardian or caregiver of the child, secondly, to a tutor dative/curator *bonis*, thirdly, to a receiver and, lastly, to a trustee to administer the funds on behalf of the child. Payment to the Fund will then be explored and conflicts identified relating to the interest earned on funds in respect of minors and majors and also conflicts relating to the age of majority.

What is important for purposes of determining what will be in the best interest of the child, is that a comparison be made between the nature

[154] Meyerowitz (2010) para 21.1.

and scope and the protection afforded by the receptacle responsible for administering the funds. Other considerations include the inroads an appointment of an outside body may make into the relationship between the parent and child.

3.2 Payment to the guardian of the child

The common law with regard to who is responsible to administer and safeguard the property of a minor is summarised in the case of *Nelson Tiger Brands Provident Fund and Another*.[155] The court held that:

> "[a] benefit payable to a minor child dependant is normally paid to the guardian of the minor. As a legal guardian of a minor child, at common law, a parent has a duty, *inter alia* to administer the property and assets of his minor child. Thus the payment of the minor children's benefit to his or her legal guardian should be done in the ordinary course of events unless there are cogent reasons for depriving the parent of the duty to take charge of his or her minor children's financial affairs and the right to decide how the funds due to the minor children should be utilised in the best interest of the minor children."[156]

Generally, the management of the minor's property is the preserve of his/her guardian.[157]

The Children's Act, effective from 1 July 2007, refers to guardianship as the responsibility and right of a parent or other person to administer and safeguard the child's property and property interests, amongst other duties.[158] The common law position has therefore been legislatively codified. It is therefore clear that whenever an award is made in favour

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[155] (2008) 3 BPLR 221 (PFA).
[156] Para 25, with reference to *Dhlamini v Smith and Another* (2003) 7 BPLR 4894 (PFA) at 4901C-F.
[157] *Ex Parte Oppel and Another* 2002 (5) SA 125 (C).
[158] S 1(1) read with s 18(3)(a) of the Children's Act. See De Jong M "A better way to deal with the maintenance claims of adult dependent children upon their parents' divorce" 2013 *THRHR* 662. Also see definition of "Guardianship" in Chapter 1 above.

of a child, the administration of such award should as a first instance be awarded to the guardian of the child, to administer on behalf of the child.

Acknowledging that the guardian/s of a child has/have the power and the obligation to manage the child's financial affairs, the high court as the upper guardian of minors cannot order that substantial funds be paid to a guardian without regard first being had to the circumstances under which such funds are likely to be administered and applied.[159] When dealing with large sums of money awarded to minors, it is the court's function to enquire into the circumstances relating to the person/s to whom payment is sought to be released for the purpose of satisfying itself that the order serves the best interest of the minor in relation to the payment and subsequent administration of the funds.[160] The court may therefore deprive a guardian of the right to administer moneys on behalf of his/her child.

The court in *Ramanyelo v Mine Workers Provident Fund*[161] acknowledged that there have been very few reported cased dealing with the circumstances under which a guardian may be deprived of the right to administer funds on behalf of his/her child.[162] With reference to the case of *Van Rij NO v Employers' Liability Assurance Corporation Ltd*[163] the court stated the following with regard to the approach to be followed when depriving a guardian of the right to administer funds:

> "Hence, it appears as if the approach of the Court was that, since the guardian was not competent or qualified to administer the proceeds of the award, the interests of justice are best served by the benefit being placed with a trust company."[164]

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[159] *Dube NO v Road Accident Fund* 2014 (1) SA 577 (GSJ) para 18.
[160] *Dube NO v Road Accident Fund* 2014 (1) SA 577 (GSJ) para 19.
[161] *Ramanyelo v Mine Workers Provident Fund* (2005) 1 BPLR 67 (PFA).
[162] Para 14.
[163] *Van Rij NO v Employers' Liability Assurance Corporation Ltd* 1964 (4) SA 737 (W).
[164] Para 15.

This approach was also approved by the then Appellate Division case of *Woji v Santam Insurance Co Ltd*.[165]

With application of the aforementioned cases of *Van Rij NO* and *Woji* the court in *Ramanyelo* held that it appears that the following list of factors should be considered in determining whether or not a guardian should administer moneys on behalf of his/her minor child:

1. The amount of the benefit;
2. The ability of the guardian to administer the moneys;
3. The qualifications (or lack thereof) of the guardian to administer the moneys; and
4. The benefit should be utilised in such a manner that it can provide for the minor until he/she attains the age of majority.[166]

Further non-exhaustive factors which may militate against a guardian receiving moneys are: the conflict of interest between the guardian's respective duties to maintain the child and administer his/her money; whether there is more than one guardian; a lack of education or acumen in relation to financial matters on the part of the guardian; a poor relationship with the child; a poor relationship between co-guardians; the guardian having insufficient funds to meet his/her own obligations; criminal convictions; mental or physical illness; insolvency; lack of support structure; geographical distance from the child; and lack of independence of the guardian.[167]

In the *Ex parte Oppel* case[168] the court stated that depriving the guardian of the right to administer moneys on behalf of his/her child may create tension with guardianship.[169] The court will not lightly grant such

[165] *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A). Para 15 of the *Ramanyelo* case.
[166] These factors are listed in para 16 of the *Ramanyelo* case.
[167] *Dube NO v Road Accident Fund* 2014 (1) SA 577 (GSJ) para 20.
[168] *Ex Parte Oppel and Another* 2002 (5) SA 125 (C) at 129.
[169] At 129.

an application unless satisfied that the guardian is not capable of looking after the minor's estate.[170] This is a factual enquiry depending on the facts of each case.[171] The mere fear of the guardians that they may make ignorant decisions is insufficient to warrant a deprivation of guardianship.[172]

On the other hand the court in the case of *Molete v MEC for Health, Free State*[173] emphasised that the court in the *Oppel* case did not make any reference to the best interest of the child principle as enshrined in the Constitution and that this must be the overriding consideration above all others.[174] The court in *obiter dicta* goes on to state further circumstances in which the guardian may be deprived of the right to administer the child's money:

> "In a case where it is shown that the minor's guardian is insane, insolvent, alcoholic, prodigal, fugitive, homeless, fraudulent criminal, drug addict, gambling addict, or suffers from one or other addictive ailments or chronic handicap-such a guardian would be threat to a minor's interests-and should thus not be entrusted with the management of a minor's estate."[175]

> "To the aforegoing list of disqualifying factors another scenario has to be added. Where, as in this matter, a legal representative of a minor's perfectly capable and unblemished guardian is shown to be a suspect, not in one but in a number of criminal cases under police investigation– the paramouncy [sic] of a minor's best interests would be seriously undermined if such circumstances were to be disregarded because the guardian is available and capable. **DU TOIT AND ANOTHER v MINISTER OF THE DEPARTMENT OF WELFARE AND POPULATION DEVELOPMENT AND OTHERS (LESBEIAN [sic] AND GAY EQUALITY PROJECT AS AMUCUS CURIAE)** 2003 (2) SA 198 (CC). Unless the

[170] At 129.
[171] At 129.
[172] At 130.
[173] *Molete v MEC for Health, Free State* (2155/09) [2012] ZAFSHC 126 (22 June 2012) available at www.saflii.org.za/cases/ZAFSHC/2012/126.html (accessed: 28 June 2019).
[174] Paras 64 and 65.
[175] Para 67.

> funds are intercepted and the ordinary course of the payment of the award is diverted and recalled substantial injustice may result – section 28 (1) 1996 [sic] of the Constitution of the Republic of South Africa."[176]

Payment directly to the guardian is therefore the preferred method as, in the ordinary course of events, the guardian of a minor is entitled to take charge of, and administer the funds of his/her minor child[177] and only if there are cogent reasons for depriving the natural guardian of the duty to take charge of the property of his/her minor child's financial affairs should the natural guardian be deprived of such right.[178]

Guardians are not entitled to remuneration in respect of their administration and may not claim remuneration for their guardianship. It appears that they may only claim reasonable remuneration if they are also appointed as a tutor/curator to the estate of the minor.[179]

As soon as it is decided in a particular case that the interests of the minor are, on balance, best served by the payment of the moneys other than to the guardian, the court should move to enquire into the best receptacle for the administration of the funds due to a minor.[180]

3.3 The nature and scope of the receptacles

As indicated in the paragraph above it is usually the guardians of the minor child who are responsible to supervise his/her property. It may however sometimes happen that a minor has no natural guardian[181] and

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[176] Para 68.
[177] S 18(3)(a) of the Children's Act.
[178] Mhango M and Dyani N "The duty to effect an appropriate mode of payment to minor pension beneficiaries under scrutiny in deaths claims" 2009 *PELJ* 165.
[179] Spiro E *Law of Parent and Child* (Juta Cape Town 1985) 104.
[180] *Dube NO v Road Accident Fund* 2014 (1) SA 577 (GSJ) para 21.
[181] This will include persons who were granted parental responsibilities and rights in terms of a valid will by the sole parent who is deceased, in terms of s 27 of the Children's Act, or granted guardianship, in terms of s 24 of the Children's Act, by way of a high court order. It is important to note that the courts use the term "trust" and "trustee" but are in fact referring to a curator. The reason for this appears to follow from the order made in the *Van Rij* case at 739 in terms of which the court followed the old Estates Act and used the term "trustee" to avoid confusion. The cases

if he/she is possessed with property the court may appoint a tutor/curator to administer such property.[182]

In terms of the Estates Act, the high court may appoint a tutor/curator[183] to administer the property of a minor and the Master may grant letters of tutorship/curatorship to such person.[184] Where a person is so appointed, the Master must, with the letters of tutorship/curatorship, grant the tutor/curator the powers as set out in the court order.[185]

S 77(1) of the Estates Act makes it peremptory for the tutor/curator to furnish security to the Master to the Master's satisfaction in an amount determined by the Master prior to letters of authority being issued for the proper performance of his/her functions.[186] The Master may only dispense with security if the court directs that the tutor/curator is exempted from furnishing security.[187] The security will naturally be dispensed with if the funds are ordered to be paid into the Fund, as the tutor/curator will not have control over the funds. The costs of finding security are paid from the income derived from the property concerned

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of *Woji* and *Mashini* were decided after the 1965 Estates Act came into operation but the court followed suit as regards the terms used in the *Van Rij* case despite the "new" Estates Act.

[182] Meyerowitz (2010) para 21.1.

[183] See definition section where a tutor/curator is defined as a person who has been authorised by court to administer the property of a minor.

[184] S 72(1)(d) of the Estates Act provides that "[t]he Master shall, subject to the provisions of subsection (3) and to any applicable provision of section 5 of the Matrimonial Affairs Act, 1953 (Act 37 of 1953), or any order of court made under any such provision or any provision of the Divorce Act, 1979, on the written application of any person – (d) who has been appointed by the Court or a judge to administer the property of any minor or other person as tutor or curator and to take care of his person or, as the case may be, to perform any act in respect of such property or to take care thereof or to administer it; and grant letters of tutorship or curatorship, as the case may be, to such person."

[185] S 76(2)(a) of the Estates Act. Also see Meyerowitz (2010) para 21.20.

[186] See *Ex Parte Hullett* 1968 (4) SA 172 (D) 173, confirming that security is required in each and every case.

[187] S 77(2)(c) of the Estates Act. See for example para 44 of *Dewar v Ashton* (25631/2010) [2011] ZAWCHC 101 (5 May 2011), available at http://www.saflii.org/za/cases/ZAWCHC/2011/101.html (accessed 1 December 2020) where the court exempted the curator from furnishing security as long as he practised as an attorney of the court and was in possession of a valid fidelity fund certificate, demonstrating that he enjoyed professional indemnity cover.

or out of the property itself.[188] The purpose of the security is to ensure that the tutor/curator performs his/her functions properly and the Master may enforce the security and recover from the tutor/curator any loss to the minor should the tutor/curator fail to perform his/her functions properly.[189]

The remuneration of the tutor/curator is fixed by tariff and deductible from the income generated from the property under his/her administration.[190] This remuneration is taxed by the Master. Currently the remuneration is set at a tariff of 6% on the income collected during the existence of the curatorship. A further 2% is charged on the value of the capital assets on final distribution or termination of the curatorship.[191] Another mechanism the Master has available to ensure the curator discharges his/her duties properly is by disallowing any such remuneration either wholly or in part.[192] A Master's fee is further payable. Where the gross value of the estate is more than R250 000 but less than R400 000 the fee is R600. Where the gross value of the estate is R400 000 or more then for each completed further R100 000 an amount of R200 is payable. This is subject to a minimum fee of R600 and a maximum fee of R7000.[193]

As a control and oversight mechanism, the tutor/curator must annually submit to the Master a complete account[194] of his/her administration.[195] The account must be supported by vouchers, receipts and

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[188] S 77(4) of the Estates Act.
[189] S 77(5) of the Estates Act. See also Meyerowitz (2010) para 21.9.
[190] S 84(1)(b) of the Estates Act. Also see Spiro *Law of Parent and Child* (1985) 104 where the author states that where a parent happens to be a tutor/curator as well, he/she may claim remuneration in that capacity.
[191] Regulation 8(3) in terms of s103 of the Estates Act.
[192] S 84(2)(a) and (b) of the Estates Act.
[193] Chief Master's Directive 3 of 2017.
Available at https://www.justice.gov.za/master/directives.html (accessed 10 August 2021).
[194] The prescribed form of the account is set out fully in Regulation 7 in terms of s 103 of the Estates Act.
[195] S 83(1)(a) of the Estates Act.

acquittances.[196] In the event that the Master requires the tutor/curator to produce for inspection any securities held by him/her as tutor/curator, the Master may request this by notice in writing.[197]

Another order a court may make in respect of lump-sum funds due to children is the appointment of a receiver. In divorce matters where either of the parties has no faith in the *bona fides* of the other party and they were married in community of property and cannot agree upon the division or upon who must make the division of the estate, a court has the power to appoint some impartial person to collect, realise and divide the estate.[198] This person is called a receiver (also referred to as a liquidator or curator). Either of the divorcing parties may approach the court either during or after the granting of a divorce order for the appointment of a receiver.[199] One of the orders a court may make in respect of lump-sum funds due to children is the appointment of a receiver to take possession and control of the funds and to pay monthly maintenance to the maintenance creditor.[200]

In the unreported case of *Wilken v Willie NO*[201] the court was charged with determining the fees to be charged by a receiver. In this regard the court order appointing the receiver only provided for the receiver's reasonable fees.[202] It appears that there is no authority available which expressly deals with the issue of remuneration of the receiver.[203] The court stated:

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[196] S 83(1)(a) of the Estates Act.
[197] S 83(1)(b) of the Estates Act.
[198] *Revill v Revill* 1969 (1) SA 325 (C) at 327.
[199] De Jong M "The need for new legislation and/or divorce mediation to counter some commonly experienced problems with the division of assets upon divorce" 2012 *Stell LR* 226.
[200] *Gerber v Gerber* case numbers 12166/07 and 12691/07 (WCHC), unreported judgment delivered on 9 November 2007 para 12.
[201] *Wilken v Willie NO* (2019) ZAGPJHC, available at http://www.saflii.org/za/cases/ZAGPJHC/2019/353.html (accessed 6 December 2020).
[202] Para 17.
[203] Para 19.

> "The basis of the appointment of a receiver and liquidator is stated thus by Innes CJ in Gillingham v Gillingham[204]:
>
> 'When two persons are married in community of property universal partnership in all goods is established between them. When a court of competent jurisdiction grants a decree of divorce that partnership ceases. The question then arises, who is to administer what was originally the joint property, in respect of which both spouses continue to have rights? As a general rule, there is no practical difficulty, because the parties agree upon a division of the estate, and generally the husband remains in possession pending such division. But where they do not agree the duty devolves upon the Court to divide the estate, and the Court has power to appoint some person to effect the division on his behalf. Under the general powers which the Court has to appoint curators it may nominate and empower some one [sic] (whether he is called liquidator, receiver or curator-perhaps curator is the better word) to collect, realise and divide the estate. And that that has been the practice in South African Courts is clear.'"

Applying the above the court held that the nature of the receiver is that of a curator as determined by s 72(1)(d) of the Estates Act.[205] He/she is an officer of the court and not a representative of the parties.[206] The court further confirmed that, as is the case in respect of a curator, the Estates Act regulates the receiver's administration. This includes the submission of an account, his/her remuneration and the assessment of such remuneration.[207] Applying the decision by the court, it then follows that what is set out above in respect of curators will apply *mutatis mutandis* in the case of the receiver.

A further order a court may make is to order the creation of a trust to administer lump sum funds due to children.

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[204] *Gillingham v Gillingham* 1904 TS 609 at 613. The court also referred to *Revill v Revill* 1969 (1) SA 325 (C).
[205] Paras 23 and 27.
[206] Para 23.
[207] Paras 28 to 30.

The trustee is the person to whom the control and administration of the trust property has been handed. A trustee can only act as trustee by virtue of authorisation in writing by the Master.[208] This requirement of authorisation by the Master applies even when the trust instrument is a court order.[209] Trust property refers to any moveable or immoveable property, including contingent interests in property, which are to be administered or disposed of by a trustee in accordance with the provisions of a trust instrument.[210] A contingent interest may include any *spes* in property.[211] A trust instrument means a written agreement or a testamentary writing or a court order in terms of which a trust was created.[212] One of the orders a court may make in respect of lump-sum funds due to children is that a lump sum may be paid to a trustee to administer such.[213]

A prescribed fee is payable to the Master upon lodgement of the trust deed by the trustees. This applies to both *inter vivos* trusts and trusts created in terms of a court order.[214] The fee is currently R250.[215]

The Master may authorise a trustee to act without requesting the trustee to provide security if he/she is exempted from furnishing security in terms of the trust deed. The Master may however ask for security if, in his/her opinion, there are sound reasons to do so. The court may order that the trustee is not required to furnish security, in which event the

[208] S 1 of the Trust Property Control Act 57 of 1988. See also Meyerowitz (2010) para 23.4.
[209] Meyerowitz (2010) para 23.9.
[210] S 1 of the Trust Property Control Act. See also Meyerowitz (2010) para 23.5.
[211] Meyerowitz (2010) para 23.5.
[212] S 1 of the Trust Property Control Act. See also Meyerowitz (2010) para 23.2.
[213] Meyerowitz (2010) para 21.1.
[214] Meyerowitz (2010) para 23.7.
[215] In terms of Chief Master's Directive 3 of 2017.
Available at https://www.justice.gov.za/master/directives.html (accessed 10 August 2021).

Master will not be able to request security.[216] Meyerowitz submits that the costs of finding security falls upon the trust fund.[217]

The Master has very limited powers to control the trustee's administration of the trust. The Master may call upon a trustee to account for his/her administration and disposal of the trust property.[218] The trustee is not compelled to lodge accounts except upon the Master's request.[219] The Master may also cause an investigation to be carried out by a fit and proper person into the trustee's administration and disposal of the trust property.[220] Should a trustee not comply with the request by the Master, the Master or any interested person may apply to the high court directing such trustee to comply with the request or perform such duty.[221]

The trustee's fees are not prescribed by any regulation. He/she is entitled to the fee provided for in the trust deed and where there is no such provision then he/she will be entitled to a reasonable remuneration. Should there be a dispute in respect of the fee then the fee shall be fixed by the Master.[222]

Lastly, the court may order that lump-sum funds due to children be paid into the Fund. The Fund was created to manage funds that are payable to the Master of the high court[223] in terms of the Estates Act.[224] One of the duties of the Master is to administer moneys in the Fund for the benefit of minors.[225] The Master is under direct control of the high

[216] S 6(2)(a) and (b) of the Trust Property Control Act. See also Meyerowitz (2010) para 23.10.
[217] Meyerowitz (2010) para 23.10.
[218] S 16(1) of Trust Property Control Act.
[219] Meyerowitz (2010) para 23.20.
[220] S 16(2) of Trust Property Control Act.
[221] S 19 of Trust Property Control Act.
[222] S 22 of Trust Property Control Act.
[223] Meyerowitz (2010) para 25.1.
[224] S 86(1) of the Estates Act.
[225] *Bezuidenhout* case para 24.

court.[226] It has limited authority, as it may only accept funds in terms of the Estates Act,[227] other law[228] and an order of court.[229]

The services of the Fund are free of charge[230] and funds deposited in respect of minors earn interest which is capitalised monthly for the benefit of children.[231]

3.4 Comparison between different receptacles

Having set out the nature and scope of the different receptacles of lump-sum funds due to children, it becomes necessary to determine which of the receptacles are the best and most appropriate having regard to the best interest of the child principle.

In the case of *Dube NO v Road Accident Fund*[232] the trust structure was favoured and labelled as a protective and flexible vehicle for the administration of a minor's funds. The court commented that a trust accommodates a more inclusive approach as opposed to other receptacles such as the Fund and the appointment of a curator. The court stated:

> "The trust structure as contemplated by the Trust Property Control Act 57 of 1988 lends itself to the creation of a protective and flexible vehicle for the administration of such funds. It also accommodates a more inclusive approach to the administration of the funds than curatorship in terms of the Administration of Estates Act 66 of 1965 or a payment to the Guardian's Fund in terms of that Act, in that it allows for the active participation of the

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[226] *Bezuidenhout* case para 24.
[227] Examples of funds the Master is allowed to accept in terms of the Estates Act are set out in ss 35(12), 43(6) and 93 of the Act.
[228] For example, in terms of s 95(2) of the Insolvency Act 24 of 1936 and s 11 of the Expropriation Act 63 of 1975.
[229] In terms of the definition section (s 1) of the Estates Act, "[c]ourt means the High Court having jurisdiction, or any judge thereof".
[230] *Molete* case para 57.
[231] S 88 of the Estates Act. The interest rate is currently 4.25% per annum. See footnote 75 above.
[232] *Dube NO v Road Accident Fund* 2014 (1) SA 577 (GSJ).

> child's guardians and/or other appropriate interested persons in the administration of the trust property. It has the further benefit of also being regulated by statute and being under the control of the master.[233]

The court then goes further and states:

> "Once it has been decided that the funds are to be paid to a trust, the challenge that arises is for the court to be satisfied that the terms of the trust instrument provide for the proper and secure administration of the funds."[234]

> "In my view, it is inadvisable for an order to be made in the absence of the trust instrument itself or a final draft of the proposed instrument. If the final terms of the trust instrument are not circumscribed by the order, there is scope for subsequent amendment of the trust instrument by the parties thereto. This could serve to defeat the object of the order. There should furthermore be a provision in the approved trust deed to the effect that the deed may not be amended or added to, save by way of further order of court."[235]

In terms of the *Dube* case it is therefore a requirement that the trust instrument be submitted with the application prior to the court approving such an arrangement. This appears to indicate the court's fear that, should the court not have sight of the trust deed as a prerequisite, then the trust may be susceptible to abuse and not be secure for the protection of the child.

The court then goes further and sets out the terms a trust should ideally include in cases where the trust is created for administration of a minor's funds. These terms are:

> "1. The child should be the sole income and capital beneficiary.
>
> 2. The number of trustees should be prescribed.

[233] Para 22.
[234] Para 23.
[235] Para 25.

3. There should be a provision which prevents the remaining trustees from acting, otherwise than to achieve the appointment of a replacement trustee, in the event of their number being reduced below that prescribed.

4. The composition and voting rights of the trustees should be such as to avoid deadlock.

5. Unless it is undesirable, a guardian should participate as co-trustee.

6. There should be, at least, one independent professional trustee, who should be properly qualified to administer the trust assets (and who should preferably be an attorney or an accountant).

7. The composition of the board of trustees and the structure of the voting rights of the trustees should be such that the independent trustee/s cannot be overruled or outvoted in relation to the management of the trust assets by any trustee who has a personal interest in the manner in which the trust is managed.

8. The trust should be stated to have the purpose of administering the funds in a manner which best takes account of the interests of the child.

9. Proper provision should be made for the calling and holding of meetings and the taking of resolutions by the trustees.

10. All resolutions must be in writing.

11. Provision should be made for an adequate procedure to resolve disputes between the trustees.

12. Any amendment of the approved trust deed should be subject to the leave of the court.

13. Provision should be made for the recovery and the administration of any undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 (the Act) by the trustees.

14. The trustees should be enjoined to recover their remuneration and the costs incurred by them in administering the trust property and any undertaking in terms of s 17(4)(a) of the Act, in a cost-effective and tax-efficient manner and, if possible and desirable, subject to the prescribed tariff referred to in s 84(1)(b) of the Administration of Estates Act 66 of 1965 in relation to the remuneration of tutors and curators.

15. No charge should be made by any trustee in relation to the receipt of the initial payment to the trust of the proceeds of the litigation.

16. The trust property should be excluded from any community of property or accrual in the event of the marriage of the beneficiary.

17. If apposite, the trust should be stated to terminate at an appropriate date, which should be after the obtaining of his majority and, in the case of disability of the child, should take account of whether such disability is likely to be permanent or temporary and the nature thereof.

18. The powers of the trustees should be determined with reference to the circumstances of each matter and may include the right to purchase, sell and mortgage immovable property, invest and reinvest the trust capital and to pay out so much of the income and/or capital as is reasonably required to maintain the child (with due regard being had to the obligations of any person having a duty to support the child, the requirements of the child and the purpose of the award of damages).

19. The right and obligation of the guardian/s to parent and administer the affairs of the child and the corresponding right of the child to enjoy such parenting and administration of his affairs by his guardian/s should not be unnecessarily impinged upon."[236]

The court then ordered together with the provisions of the trust deed as stated above, that the Road Accident Fund must provide an undertaking covering the reasonable costs of creating the trust, limited to the

[236] Para 26.

prescribed tariffs set out in s 84(1)(b) of the Estate Act. The court further ordered that the remuneration of the trustees be determined by the aforesaid prescribed tariff and also cover the cost of furnishing security by the trustee.[237] For purposes of clarity, these are the costs charged by a tutor/curator in terms of the Estates Act.

However, in the unreported case of *Modiba obo Ruca; In Re: Ruca v Road Accident Fund*[238] the court favoured the appointment of a curator over the creation of a trust. In this regard the court made the following comments comparing the creation of a trust to that of a curator:

> "The creation of a trust with a financial institution avoids the conditions that accompany the appointment of a curator *bonis*, with resultant potential detriment to, and diminishing of the effective protection of vulnerable victims. Other than provided for specifically in the trust deed, trustees of a financial institution's trust are not required to report to the Master annually on the performance of their duties. The Master does not comment upon the suitability of the individuals administering the trusts with financial institutions. The court is denied the benefit of the Master's comment upon the suitability of the person who might be appointed as curator *bonis,* as no such appointment is envisaged by the practice under discussion. When a trust is created, the fees charged by the patient's legal representatives are not subject to the Master's scrutiny, as they are when a curator *bonis* is appointed."[239]

Similarly, the court in *Molete v MEC for Health, Free State*[240] favoured the appointment of a curator over the creation of a trust. The court stated:

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[237] Para 27.

[238] *Modiba obo Ruca; In Re: Ruca v Road Accident Fund* (12610/2013; 73012/2013) [2014] ZAGPPHC 1071 (27 January 2014) available on www.saflii.org.za/cases/ZAGPPHC/2014/1071.html (accessed 29 June 2019).

[239] Para 40.

[240] *Molete v MEC for Health, Free State* (2155/09) [2012] ZAFSHC 126 (22 June 2012) available on www.saflii.org.za/cases/ZAFSHC/2012/126.html (accessed: 28 June 2019).

> "The respondent is naive to think that the proposed creation of a trust by the bank would provide a sound investment haven for the effective protection of the funds of the minor. The applicant ably demonstrated just how burdensome and expensive the running of such trust would be."[241]
>
> "In the instant matter the scenario is different. If the application is successful the minor's estate would be placed under the burdensome curatorship for a fixed period of eleven years at most. The onerous inroads of curatorship would not endure for an endless period of time. There is no prayer that the minor's estate pays the costs of curatorship. The applicant is prepared to foot the curator's bill in full to prevent any depletion of the minor's property. The application was initiated by an organ of state, an independent and disinterested entity."[242]
>
> "The protective remedy of curatorship has many recognised and undesirable downsides. However burdensome inroads thereof may be to parent and child relationship, great caution has to be exercised not to accentuate the disadvantages or to underplay the advantages of the remedy. A damaged relationship can be repaired but a lost fortune can be hard to recover. A family feud about missing wealth can permanently destroy close relationships in the end. Some balancing act of the conflicting triangle of interests is required in order to do some damage control. In doing so, a court has to bear in mind that the overriding consideration above all others is the best interest of the minor. The Constitution enjoins the courts and everyone else to accord those interests supreme protection."[243]

The court then ordered – pending the appointment of a curator – that the funds be paid to the Fund and the Master be authorised to pay to the parents of the minor periodically, in his/her unfettered discretion, amounts which he/she considers necessary for the minor's maintenance, education or any other legitimate cause.[244] Despite the

[241] Para 56.
[242] Para 62.
[243] Para 64.
[244] Para 70.

court favouring the appointment of a curator it made the following favourable remarks in respect of funds to be paid into the Fund:

> "Whatever the rate[245] may be, the point remains that the proposed creation of a trust does not make a sound investment proposition. This is particularly so in the light of the alternative we have in our law that the minor's award can be kept in 'The Guardian's Fund' where his account will not be debited with any charges whatsoever as administration costs but will, instead, earn interest. Currently the applicable rate of interest offered by 'The Guardian's Fund' is 6.5%[246] per annum. The minor's capital will handsomely grow instead of being systematically and drastically depleted as already demonstrated in the aforegoing paragraph."[247]

With the above remarks and by ordering the funds to be paid into the Fund the court in fact acknowledged that the Fund would be the best receptacle of the funds pending the appointment of the curator as it ordered the Fund to administer the funds in the interim. The court further acknowledged by implication that while the funds were being administered by the Fund no burdensome inroads would be created within the realm of the parent-child relationship.

It is also important to take note that in both matters above the applicants were able to foot the costs incidental to the creation of the trust and the appointment of a curator, which appears to be the main consideration taken into account by the court in coming to its ultimate decision. In matters relating to future maintenance this will however not be possible since the maintenance debtor from whom the funds are being claimed is not an independent party but the very person who is responsible for the maintenance of the child. Deducting costs from the maintenance debtor's funds or from the funds destined for the child will in effect

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[245] The rate of the management fee of the trust.
[246] This was the interest rate at the time of the judgment. It is important to note that the interest rate is currently 4.25% per annum. See footnote 75 above.
[247] *Molete* case para 57.

reduce the benefit the child may receive from the maintenance funds. The costs in respect of the administration will therefore have to be footed from the very funds the maintenance creditor seeks relief from. Having regard to the aforesaid, the appointment of a tutor/curator and the creation of a trust will not be the most appropriate receptacle in future maintenance matters.

The salient difference between the different receptacles and the receiver is that a receiver is only appointed in matters of divorce and not in other matters where the parties are not married. There is no authority for the receptacle being available in cases where the parties are not married. Maintenance claims in favour of children may arise from claims of single parents.[248] It is therefore not an all-encompassing remedy. Another disadvantage is that usually the appointment of a receiver is sought under a separate application and this results in piecemeal adjudication of issues originating from the marriage such as the provision of maintenance for spouses and children.[249] This may have undesirable and unfair consequences for both the spouse and the children.[250] Another disadvantage is that the receiver to be appointed must be an impartial person appointed by the court.[251] The appointment of a receiver is therefore not an appropriate receptacle of lump-sum funds due to children in respect of future maintenance.

Depositing maintenance funds into the Fund alleviates the risk that the funds will be used for a purpose other than complying with maintenance obligations towards children.[252] The amounts deposited into the Fund will stay in line with inflation and the increasing maintenance needs of

[248] Sonnekus JC "Onderhoudsbeveiliging vir minderjariges 'n lastige koordloop-kuns as die onderhoudspligtige met sy bates feitelik emigreer" 2017 *TSAR* 1.
[249] De Jong 2012 *Stell LR* 228-229
[250] De Jong 2012 *Stell LR* 228-229.
[251] *Revill v Revill* 1969 (1) SA 325 (C) 327.
[252] Sonnekus 2017 *TSAR* 397.

growing children.[253] With payment into the Fund, the risks and costs are prevented that are normally attached to alternative constructions such as a trust to control the funds due to the child.[254] Any objection by the maintenance debtor that the maintenance creditor will mismanage the lump sum will fall away should the lump sum be paid into the Fund.[255]

The Fund has specialist staff with legal qualifications[256] and is an expert in dealing with a lump sum to be paid in favour of children from deceased estates and other sources. It is further allowed to pay maintenance to children.[257] The maintenance court order may dictate how the maintenance is to be paid or the court may leave such decision in the unfettered discretion of the Master.[258]

Applications to the Fund for maintenance payments are made on an application form directly by the guardian or caregiver.[259] This direct access will reduce the involvement of an independent third party as required in cases such as a trust and curatorship. The inroads into the private realm of the guardian and child will therefore be reduced or circumvented. The decisions of a curator are in any event subject to the approval of the Master. This adds a second step to the process which may be prevented from the outset if the funds are deposited into the Fund. No security costs are payable in respect of funds deposited into the Fund as opposed to the charges that flow naturally from the other receptacles of lump sums.

Having regard to the above it must be accepted that the Fund is the best

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[253] Sonnekus 2017 *TSAR* 402.
[254] Sonnekus 2017 *TSAR* 402.
[255] Sonnekus 2017 *TSAR* 404.
[256] S 2(2) of the Estates Act.
[257] S 90(1) of the Estates Act authorises the Master to pay to the natural guardian or to the tutor or curator so much of the money standing to the credit of the minor or other person in the Fund as may be immediately required for the maintenance, education or other benefit of the minor or other person or any of his dependants.
[258] *Molete* case para 70.
[259] Meyerowitz (2010) para 21.29.

and most appropriate receptacle of lump-sum future maintenance due to children.

The buck however does not stop here as the administration of the funds by the Fund will create certain in-house challenges. These challenges emanate from the Estates Act regulating the fund.

3.5 Challenges that will be experienced by the Fund

Bearing in mind that the Fund is a creature of statute and it is only allowed to act within the confines of its enabling provisions, challenges will be encountered in respect of the earning of interest and future maintenance moneys due to a major dependent child.

3.5.1 Earning of interest

In the *Bezuidenhout* case the judge stated that the high court can order the Master to deposit a pension benefit in the Fund in the name of the father (respondent) for the benefit of his dependants. The court further ordered that the moneys would lie in the Fund and earn interest.[260]

The Estates Act provides that interest shall be allowed on sums of money received by the Master for account of any minor, mentally ill person or person with severe or profound intellectual disability, unborn heir or any person having an interest therein of a usufructuary, fiduciary or fideicommissary nature.[261] It further provides that when the Master receives or accepts any money he must open in the books of the Fund an account in the name of the person to whom the money belongs or the estate of which that money forms part.[262] Amounts paid for the account of any person, not mentioned in the categories, will, however, not carry

[260] *Bezuidenhout* case para 24.
[261] S 88(1) of the Estates Act.
[262] S 86(2) the Estates Act. See also Meyerowitz (2010) para 25.1.

interest.[263] The Estates Act is therefore clear on the categories of persons entitled to interest – which clearly excludes majors.

Although the funds are for future maintenance in favour of a child, the child does not become the owner of the funds save insofar as each month's maintenance is due and payable. The funds in fact belong to the maintenance debtor and, so far, it has been indicated that the child merely has a *spes* in the lump sum to be paid in the future.[264] According to the rules of the Fund, the account must be opened in the name of the maintenance debtor to whom the money belongs, who is ordinarily a major. This results in direct conflict between the court order and the provisions regulating the Fund. The Master is now charged with opening in his/her books an interest-bearing account in the name of a major, which action contravenes the Estate Act. Such action will also go against the best interest of the child (which will also include a major dependent child whose funds were deposited into the Fund whilst the child was still a minor)[265] being served by denying the child interest on the funds.

Compared to the provisions of the Estates Act, there is therefore a direct conflict between interest being earned in respect of minors' funds as opposed to no interest being earned in respect of majors' funds. It appears that the conflict has caused confusion for the Master who, in 2017, instructed that interest must be paid on future maintenance moneys received for minors[266] and, in 2018, changed her directive by instructing that these funds must not bear interest unless the court expressly orders that the funds must bear interest.[267] Even if the court orders that interest must be earned on the funds, the Fund will be acting

[263] Meyerowitz (2010) para 25.2.
[264] *Soller v Maintenance Magistrate Wynberg & Others* 2006 (2) SA 66 (C) para 24.
[265] See discussion of *JG v CG* 2012 (3) SA 103 (GSJ) under para 3.5.2 below.
[266] See Chief Master's Directive 1 of 2017 para 3.1 (ii).
[267] Chief Master's Directive 1 of 2018 para 3.1 (i) (b).

ultra vires, as the Estates Act does not allow interest on funds received in respect of majors.

3.5.2 Future maintenance due to a major

In the *Mbhele*[268] case the court was faced with a situation in terms of which future maintenance was due to a major. The court was referred to *Mngadi v Beacon Sweets and Chocolates Provident Fund & Others*[269] and the *Bezuidenhout* case[270] by the magistrate, but it nonetheless decided that the answer lies in the common law, rendering it unnecessary and inappropriate to decide whether the Fund is the appropriate, or permissible, receptacle for the receipt of moneys to provide for the needs of a major, who is in need of maintenance.[271] In most instances the court orders that the child must receive maintenance from lump sums until the child is no longer in need of maintenance[272] – not until the child reaches the age of majority. The court in *Mbhele* therefore acknowledged that a major is entitled to maintenance,[273] but ordered that the funds be paid directly to the major instead of to the Fund.[274]

The Children's Act lowered the age of majority to 18 years.[275] The common law duty of support, however, does not end when the child reaches majority but when the child becomes self-supporting.[276] Many

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[268] *Mbhele v Mbhele* (2010) ZAKZPHC available at http://www.saflii.org/za/cases/ZAKZPHC/2010/29.html (accessed 8 December 2020).
[269] *Mngadi v Beacon Sweets and Chocolates Provident Fund & Others* 2004 (2) SA 388 (D).
[270] *Mbhele c*ase para 9.
[271] *Mbhele* case para 13.
[272] For example in the cases of *Mngadi v Beacon Sweets and Chocolates Provident Fund & Others* 2004 (2) SA 388 (D) 20 and *Bezuidenhout* case para 28.2 v.
[273] *Mbhele case* para 14.
[274] The order was made on condition that the major is not found incapable of managing his own affairs.
[275] S 17 of the Children's Act.
[276] *Bursey v Bursey* 1999 (3) SA 33 (SCA) at 38. De Jong "A better way to deal with the maintenance claims of adult dependent children upon their parents' divorce" 2013 *THRHR* 657. See further *Mbhele* case para 14 where the judge referred to the case of *Kanis v Kanis* 1974 (2) 606 (RAD) and stated that it is trite law that a major "child" who is incapable of supporting him or

young adults are typically unable to earn enough income to pay for their tuition or to maintain themselves. They may even still be in school.[277] In the case of *JG* v *CG*[278] the judge referred to the Constitutional Court case of *Bannatyne*[279] and stated that:

> "[f]rom a constitutional perspective, it is necessary to recognise that active and effective remedies are necessary to cater for the procuring of maintenance for minor children, and to promote children's rights as contained in s 28 of the Bill [sic]. I see no reason not to apply the same reasoning (albeit only analogously) to protect the interests of dependent children, or to interpret s 6(3) of the Divorce Act restrictively."[280]

From a constitutional perspective, the same principles applying to minor children should therefore also apply to safeguard the interest of major dependent children.[281]

In terms of the Estates Act, whenever a person becomes entitled to receive any money out of the Fund, he/she must apply to the Master for payment.[282] Ordinarily the minor, upon reaching the age of 18 (being the age of majority), is entitled to receive payment of capital and interest.[283] The deed[284] may direct otherwise and the attainment of majority may not be sufficient.[285] The major will, however, in his/her own right become entitled to periodic payments directly of funds for his/her maintenance as he/she is no longer a minor.

The Master in the *Mbhele* case referred to above, however, refused to accept the payment into the Fund on the ground that the child was

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herself, is entitled to support from a parent who is able to do so.

[277] *JG v CG* 2012 (3) SA 103 (GSJ) para 48. See also De Jong 2013 *THRHR* 654.
[278] 2012 (3) SA 103 (GSJ).
[279] *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC).
[280] Para 49.
[281] De Jong 2013 *THRHR* 660.
[282] S 89 of the Estates Act. See also Meyerowitz (2010) para 25.3.
[283] Meyerowitz (2010) para 21.30.
[284] Any will or written instrument disposing of money. This may also include a court order.
[285] Meyerowitz (2010) para 21.30.

already a major at the time of the application.[286] It appears self-evident that the court took cognisance of the provisions regulating the Fund and ordered that the major receive the lump sum directly instead of it being paid into the Fund, except if it was shown that the major was unable to manage his/her own affairs. The court held that the answer lies in common law.[287] It can be deduced that the court refrained from making an order for the funds to be paid over to the Fund in respect of a major dependent child as such an order would be in direct contravention of the common law and the Estates Act.

3.6 Conclusion

The solution to the above-mentioned challenges appears to lie in awarding the child (who may also be a major) ownership of the funds.

There are indications that children's maintenance claims may be paid in a lump sum and ownership therein transferred to the minor child without resorting to the application of the anti-dissipation interdict as has been done in the cases dealt with in chapter 2 above. Besides these indications, children's claims for maintenance against their parent's deceased estate may also be paid in a lump sum.[288] If a lump sum is agreed to, it may be agreed that the ownership in the funds be transferred to the child.[289] As will be discussed under paragraph 4.2 below, it has also been held that a lump-sum award is competent for a surviving spouse in deceased estate matters in terms of the Maintenance Act.[290] Ownership of the lump sum may similarly be transferred to the surviving spouse by agreement between the executor,

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[286] *Mbhele* case para 7.1.
[287] *Mbhele* case para 13.
[288] Meyerowitz (2010) para 21.31.
[289] Bouwer (1978) 330 where the author states: "Die minderjarige word dan reghebbende [ten opsigte van] die geld."
[290] *Oshry NNO V Feldman* 2010 (6) SA 19 (SCA) para 64.

surviving spouse, heirs and legatees.[291]

In the next chapter it will be shown that the same principles as indicated in the above paragraph may be applied to future maintenance matters in the current instance since the non-payment or partial payment of periodical maintenance ultimately leads to arrears and causes the enforcement processes in s 26 of the Maintenance Act to be invoked. This in turn causes the courts to order an attachment of lump-sum funds from dissipating or recalcitrant parents.

The proposed solution will be explored in the next chapter.

[291] Paras 57 and 64.

CHAPTER FOUR

REFORM SUGGESTION TO ADDRESS CURRENT CONFLICT

4.1 Introduction

The basis upon which future maintenance orders have been made to date is by the courts granting anti-dissipation interdicts. In terms of the interdict the maintenance debtor's assets are attached to secure the future maintenance of children and the institutions are ordered to retain amounts from the net amount available for distribution. The order for attachment deals with either the full net amount or a substantial amount of the maintenance debtor's assets. With this remedy the maintenance debtor is prevented from freely dealing with his/her property until such time as his/her maintenance obligations are fulfilled, which will be at some time in the future.[292]

In the previous chapter it was determined that the Fund may very well be the best and most appropriate receptacle of lump-sum future maintenance due to children. Certain conflicts have been identified as a direct consequence of the depositing of a lump sum in respect of future maintenance into the Fund.[293] To resolve these conflicts in the interim (that is, until such time as the necessary amendments have been made to legislation), it is recommended that ownership in the funds be transferred to the child. This construction will allow the effective administration of future maintenance funds in the Fund and in line with the Estates Act.

[292] See Chapter 2 above.
[293] See para 3.5 above.

4.2 Suggested interim solution

As indicated in the opening chapter of this dissertation, the *Bezuidenhout* case read with the Chief Master's directives are now the authority for the maintenance courts ordering that lump sum funds in respect of future maintenance be paid into the Fund. The conflicts caused for the Fund by the *Bezuidenhout* case stem from the order that the high court can instruct the Master to deposit a benefit into the Fund in the name of the father (maintenance debtor) for the benefit of his dependants. The court further ordered that the moneys would lie in the Fund and earn interest.[294] Further conflict also arises between the court ordering that maintenance be paid to a child who is already a major.

It is understandable that the court in the *Bezuidenhout* case made such an order. This stems from the preceding court cases relying on the premise of granting an anti-dissipation interdict and holding that children who are claiming in maintenance matters are creditors only in so far as each month's maintenance is due and that they only have a *spes* in the lump sum in respect of future maintenance amounts.[295] In the case of *Mngadi* the court stated that:

> "[I]n those cases the effect of the interdict is to prevent the respondent from freely dealing with his own property to which the applicant lays no claim. I interpolate to state that *in casu* the children are creditors, though only admittedly insofar as each month's maintenance is due and payable, but have a *spes* in the lump sum in future. Justice may require this restriction in cases where the respondent is shown to be acting *mala fide* with the intent of preventing execution in respect of the applicant's claim."[296]

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[294] See paragraph 3.5.1 above.

[295] See Chapter 2 above for full explanation; *Soller v Maintenance Magistrate Wynberg & Others* 2006 (2) SA 66 (C) para 24; *Mngadi v Beacon Sweets and Chocolates Provident Fund* 2004 (5) SA 388 (D) 396.

[296] *Mngadi v Beacon Sweets and Chocolates Provident Fund* 2004 (5) SA 388 (D) 396.

Based on this authority the court in *Bezuidenhout* could therefore not order that the ownership in the funds be transferred to the child as the child merely has a *spes* in the lump sum in future and the maintenance debtor is merely prevented from freely dealing with their own property.[297]

To enable the transfer of ownership to the child and the effective administration of the lump sum in the Fund, it is necessary to consider an alternative to the approach of granting an anti-dissipation interdict and conferring no more than a *spes* in the lump sum on the child in all instances. The effect of an anti-dissipation order is that the withdrawal benefit (in cases of Pension Funds and annuities) or a substantial amount (in other cases such as the sale of immovable property) is only retained for purposes of catering for the children's future maintenance requirements. This entails that the maintenance debtor may not freely deal with his/her property whilst the funds are retained. There appeared to be no provision or precedent for the proposition that a lump sum may be attached in order to secure future monthly maintenance payments.[298] Such precedent does however exist although it is uncommon for a court to make such an order.[299]

Authority for the approach of ordering a lump sum without resorting to the granting of an anti-dissipation order is found in the case of *Bleazby* v *Bleazby.*[300] In this case the court approved the payment of a lump sum to a building society in the joint names of the maintenance creditor and a nominee of the maintenance debtor for the future maintenance of the child. The court regarded it as the safest way of getting any maintenance at all from the maintenance debtor, who had proved unreliable. The court however specifically indicated that the rights of the

[297] *Bezuidenhout* case para 8 and 9.
[298] *Burger v Burger* 2006 (4) SA 414 (D) para 13 and 15.
[299] Spiro E *Law of Parent and Child* (Juta Cape Town 1985) 381.
[300] *Bleazby v Bleazby* 1947 (2) SA 523 (C).

child to claim further maintenance should not be prejudiced should the amount be exhausted.[301] Having regard to this it was clear that a lump sum was allowed in cases where the maintenance debtor has proved to be unreliable. The court however emphasised that the maintenance debtor would still be under an obligation to maintain his/her child should the lump sum be exhausted.

In the Supreme Court of Appeal case of *Oshry NNO V Feldman*[302] delivered in 2010, subsequent to the cases mentioned in chapter 2 above, the court had to determine whether a lump sum was competent in terms of the Maintenance of Surviving Spouses Act. Although the case applied to maintenance in favour of a major person (surviving spouse) the court made relevant general *dicta* relating to general maintenance matters in terms of the Maintenance Act which are also applicable to children.[303] The court stated that:

> "[E]arlier cases, seemingly to the contrary, were decided either when the definition of maintenance in the Maintenance Act 26 of 1963 (the 1963 Act) prevailed, before that Act was repealed, or they failed to take into account that the definition was no longer in operation. The court below relied on those cases when it held that a lump sum award was not competent.
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> The Maintenance Act 23 of 1963 (the 1963 Act) was repealed and replaced with the Maintenance Act 99 of 1998 (the 1998 Act). Under the 1963 Act the prevailing view was that a lump sum could not constitute a maintenance payment, because that Act defined a maintenance order as 'any order for the periodical payment of sums of money towards the maintenance of any person made by any court'.

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[301] At 523-525.

[302] *Oshry NNO V Feldman* 2010 (6) SA 19 (SCA).

[303] See Heaton and Kruger S*outh African Family Law* (2015) 163 where it is stated that the *dicta* in the case of *Oshry* are framed in such broad terms that they may be equally applicable to lump-sum awards post-divorce and that the current Maintenance Act does not exclude the payment of maintenance in the form of a lump sum. See also Sonnekus 2017 *TSAR* 402 where the author states that the *Oshry* case confirms that a lump-sum payment is competent.

> The 1998 Act came into operation in November 1999 and defines a maintenance order as 'any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic. . . .'
>
> Although there is no particular reference to lump sum payments in the definition of a 'maintenance order' in the 1998 Act, its other provisions do not expressly exclude the payment of maintenance by way of a lump sum."[304]

It is clear that although the case dealt with the claim of a surviving spouse, the court in *Oshry* determined that the Maintenance Act does not exclude the payment of maintenance by way of a lump sum. The salient difference between a surviving spouse's claim for maintenance and that of child is that the child's claim for maintenance will not be in full and final settlement of the maintenance claim since the maintenance debtor will still be under an obligation to maintain his/her child should those funds be exhausted as indicated in *Bleazby* case above.

In analysing the case of *Coughlan v Kossar*,[305] Professor Sonnekus points out the position in Germany relating to future maintenance claims. He states that the position there is that an attachment may be made on identified assets of a debtor as a vested claim. An order for attachment of a debt in maintenance matters is available irrespective of whether the debt is fully recoverable or will become recoverable in future as opposed to the position in South African law where it is only recoverable periodically. In Germany, the recovery of future maintenance is classified

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[304] Para 51-54.

[305] *Coughlan v Kossar* case number 15209/2016 (WCHC), unreported judgment delivered on 25 November 2016. In this case the maintenance creditor instituted proceedings to have an actuarily calculated amount of the maintenance debtor's investment attached and paid over to the Fund for the future maintenance of the minor children. In determining whether an anti-dissipation order may be granted, the court held that it had not been shown that the maintenance debtor was acting *mala fide* with the intention of evading his maintenance obligations. The court further held that it is a matter of judicial knowledge that both South Africa and Mauritius are countries where reciprocal enforcement of maintenance orders is not beyond question. On this basis the anti-dissipation interdict was refused.

as a vested right (and not merely a *spes*) as soon as the maintenance debtor does not pay maintenance. Professor Sonnekus submits that, under these circumstances, a maintenance creditor's entitlement to part of his/her property may be restricted and, in appropriate circumstances, the court clearly has the inherent jurisdiction to limit the ownership of the funds in the best interest of a child.[306] By comparing the use of anti-dissipation interdicts in South Africa to the position in Germany, Sonnekus indicates that in instances where the maintenance debtor has already made attempts to circumvent the payment of maintenance, there is no longer any uncertainty over the children's right to future maintenance. It is at this stage that the children's rights to future maintenance vest and it is possible actuarially to calculate the amount of the maintenance.[307]

I support Professor Sonnekus' view with reference to the position in German law that claims for future maintenance vest as rights as soon as the maintenance debtor indicates that he/she is unwilling to pay for the maintenance of his/her children.[308] This position is also in line with the earlier case of *Bleazby* v *Bleazby*[309] as discussed above.

Transfer of ownership is further competent in deceased estate claims of children against their deceased parent's estates. In terms of the common law, where minors are involved, payment of a lump sum in respect of future maintenance may be made but the funds are paid into the Fund.[310] Where a maintenance claim is brought on behalf of a child against a deceased estate, it is important to consider whether such

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[306] Sonnekus 2017 *TSAR* 397-398. In discussing the case of *Coughlan,* Sonnekus refers to the restriction of the ownership of part of an investment of the maintenance debtor. I submit that the same principles may be applied in the case of transferring the ownership of the funds to the minor child.

[307] Sonnekus 2017 *TSAR* 398.

[308] Sonnekus 2017 *TSAR* 404.

[309] *Bleazby v Bleazby* 1947 (2) SA 523 (C).

[310] Bouwer (1978) 330. These methods are explained by Bouwer in more detail. In the last-mentioned method (payment of funds to the Fund) the funds are applied towards the maintenance of the child by the Master but paid back to the estate. See also Abrie (2015) 113.

payment must be made to the guardian or to the Fund. In this regard the Master has issued an instruction[311] to the effect that claims where a sum of money for the support of the child has been fixed and awarded by court, the sum must be deposited into the Fund.[312] In this regard the moneys due to the minor must be reflected in the liquidation and distribution account as "for and on behalf of the minor", by name.[313] This position is in line with the provisions of the Estates Act.[314] Children's claims for maintenance against their parent's deceased estate may therefore be paid in a lump sum.[315] If a lump sum is agreed to, it may be agreed that the ownership in the funds be transferred to the child.[316] Upon the child coming of age the unused portion is paid out directly to him/her. In the event of his/her death, it will be paid out to his/her estate.[317]

In the case of *Du Toit NO v Thomas NO and Others*[318] the high court had to decide on the issue (amongst other issues) whether the Maintenance Act is applicable to an executor in a deceased estate. On appeal, the executor contended that the maintenance court did not have the necessary jurisdiction to make an order against a deceased estate in terms of s 16(1)*(a)* of the Maintenance Act. The executor asserted that the office of executor cannot be a "person" as defined in s 2(1) of the

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311 Master's Directive No. 29 dated 17 November 1992 (attached as annexure "A").
312 At p2. See *NB v Maintenance Officer, Butterworth and Others* 2014 (6) SA 116 (ECM) para 26.
313 At p2.
314 S 43(6) of the Estates Act.
315 Meyerowitz (2010) para 21.31.
316 Bouwer (1978) 330 where the author states: "Die minderjarige word dan reghebbende [ten opsigte van] die geld."
317 Bouwer (1978) 330. It is important to note that Bouwer uses the word "mondig" and not "meerderjarig". This suggests that the same principle applies to a child who is a major but not yet self-supporting. This is similar to the position in *inter vivos* maintenance matters since a parent's common law duty of support does not end when a child reaches the age of majority but only when the child becomes self-supporting. Most court orders provide that the child must receive maintenance from periodical payments until the child is no longer in need of maintenance (not until the child reaches the age of majority). Bouwer cites the case of *Carelse* in the sentence preceding this. If one considers the judgment delivered in the *Carelse* case at 538 it is clear that the court meant this to apply until the child is self-supporting by using the words: "until they are old enough to earn for themselves."
318 *Du Toit NO v Thomas NO and Others* 2016 (4) SA 571 (WCC).

Maintenance Act and therefore the Maintenance Act does not apply to maintenance claims against a deceased estate. The appeal was dismissed with costs *de bonis propriis* against the executor.[319] Although the case dealt specifically with this question, the court stated that children of both living and deceased parents are entitled to the same cheap and effective maintenance relief for the child whose parent is deceased as a child with living parents would be entitled to. The court further stated that should this not be the case then inequality before the law would exist. The court stated that:

> "The establishment of a fair and equitable maintenance system is sourced by the preamble to the Maintenance Act in the social and economic purposes of the Constitution. Had the Act not provided a remedy for children affected by s.26(1A) of the Estates Act children would have been constitutionally entitled to demand one; inter alia, to resolve situations such as those which have come to exist in the present matter."[320]

> "Six years after the passing of the deceased the child had allegedly not been paid maintenance. As the executor's account had not been finalised, satisfaction of the child's overall maintenance claim could not be satisfied in the ordinary course of winding up of the estate. This situation demands the same cheap and effective maintenance relief for the child whose parent is deceased as a child with living parents would be entitled to. Failing this, inequality before the law would exist."[321]

> "Children of both living and deceased parents are entitled to this benefit."[322]

In the above *dicta*, the court in effect acknowledged that children in *inter vivos* maintenance matters are entitled to the same remedies as those applicable in deceased estate maintenance matters and *vice versa.* Irrespective of whether the child's parents are alive or deceased,

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[319] *Du Toit NO v Thomas NO and Others* (635/15) [2016] ZASCA 94 (1 June 2016) available at http://www.saflii.org.za/za/cases/ZASCA/2016/94.html (accessed: 29 May 2021).
[320] *Du Toit NO v Thomas NO and Others* 2016 (4) SA 571 (WCC) para 33.
[321] Para 34.
[322] Para 35.

inequality before the law would exist should the children not be afforded the same remedies.[323] The entitlement to maintenance of a child does not arise from the principles of inheritance, but out of the relationship between parent and child.[324] It is submitted that the remedy of transfer of ownership as it exists in deceased estate maintenance matters should therefore also apply in *inter vivos* maintenance matters, failing which inequality before the law would exist.

The same principles applied in the cases above and the same constitutional principles used in the cases[325] where the attachment of a lump sum was ordered may be used in support of the transfer of ownership to dependent children. The first principle relates to the application of s 28(2) of the Constitution, which provides that the best interests of the child are of paramount importance in every matter concerning the child. Secondly, in terms of s 9 of the Children's Act the standard that the child's best interests are of paramount importance must be applied in all matters concerning the care, protection and well-being of a child. Thirdly, s 6 of the Children's Act provides that the Children's Act is applicable to all legislation involving children, including the general principles applicable to all legislation involving children and measures by organs of state which includes the child's rights as set out in the Bill of Rights.

It is my submission that the court in *Bezuidenhout* overlooked the provisions of the Estates Act relating to interest. The court appeared to have erred in its view that funds may be accepted in the name of the maintenance debtor (who is a major) and then earn interest. The Master is a creature of statute and, as indicated in the previous chapters, interest is only earned on funds deposited in the Fund on account of

[323] S 9(1) of the Constitution provides that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law".
[324] *Du Toit NO v Thomas NO and Others* 2016 (4) SA 571 (WCC) para 17.
[325] See cases cited in Chapter 2 above.

minors (amongst other classes of persons but excluding majors).[326] The Estates Act is clear that moneys paid into the Fund on account of any other person, do not carry interest.[327] Transferring ownership to the minor child and framing the court order accordingly will ensure that there is harmony between the provisions of the Estates Act and the court order. Payments by the Master will only be made in terms of orders of court and not in terms of the discretion granted to the Master by the Estates Act. The moneys will earn interest, but the Master will only make payments in terms of court orders, which may change from time to time as the circumstances change.[328]

As has been indicated, no interest is earned on funds held in the Fund on behalf of major dependent children if the funds are deposited into the Fund when the child in need of maintenance has already reached the age of majority. Interest will however be earned in respect of a major whose funds were deposited whilst he/she was a minor.[329] In other words a minor will become entitled to payment on majority (unless there are any restrictions in terms of the court order such as a restriction to administer the funds until the child is self-supporting) and will be entitled to interest up to the date of payment.[330] To achieve harmony between the position in respect of these majors and the provisions of the Fund, the same position as set out above with regard to the transfer of ownership should apply in respect of a major dependent child. The salient difference however is that the funds will be paid directly to the major instead of into the Fund.

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[326] In terms of s 88(1) of the Estates Act, interest is also earned on funds held by the Master on behalf of mentally ill persons or persons with a severe or profound intellectual disability, an unborn heir or any person having an interest in the funds of a usufructuary, fiduciary or fideicommissary nature.
[327] Meyerowitz (2010) para 25.2.
[328] *Bezuidenhout* case para 24.
[329] S 88(2) of the Estates Act. See also Meyerowitz (2010) para 25.2.
[330] Meyerowitz (2010) para 25.2.

In the case of *Mbhele*[331] the Master rejected a payment of funds in respect of future maintenance in respect of a major child even though the court was referred to the cases of *Mngadi*[332] and *Bezuidenhout*[333] which dealt with future maintenance in respect of minor children.[334] In the *Mngadi* case the court ordered the provident fund to retain the maintenance debtor's withdrawal benefit and pay an amount per month to the mother of the children until the children are no longer in need of support and maintenance. In the *Bezuidenhout* case the court ordered that the GEPF pay the net amount owing to the maintenance debtor over to the Fund in the name of the maintenance debtor for the benefit of his two minor children and the Fund was ordered to make payments in terms of orders issued by a competent court. Despite these orders, and because the court was dealing with a claim in respect of a major child, the court ordered that the Area Court Manager pay a lump sum in respect of future maintenance directly to a major child who was in need of maintenance as opposed to ordering payment directly to the Fund.[335]

Such a direct payment to the major child means that the major becomes the owner of the lump sum. By implication the court therefore acknowledged that the transfer of ownership in future maintenance matters is competent with regard to major children in need of support. This construction of transferring ownership to the dependent major child in terms of remedies available in common law will achieve harmony between future maintenance orders and the provisions regulating the Fund in respect of major children.

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[331] *Mbhele v Mbhele* (2010) ZAKZPHC available at http://www.saflii.org/za/cases/ZAKZPHC/2010/29.html (accessed 8 December 2020).
[332] *Mngadi v Beacon Sweets and Chocolates Provident Fund* 2004 (5) SA 388 (D).
[333] *Government Employees Pension Fund v Bezuidenhout and Another* Appeal no 2113/04 (TPD) unreported judgment delivered on 6 March 2006.
[334] See discussion of cases in paragraphs 3.5.2, 3.2 and 2.4 respectively.
[335] *Mbhele v Mbhele* (2010) ZAKZPHC available at http://www.saflii.org/za/cases/ZAKZPHC/2010/29.html (accessed 8 December 2020) para 19. The order was on condition that a *curator bonis* is not appointed.

4.3 Actuarially calculated lump sum to be paid

The payment of an actuarially calculated future maintenance payment into the Fund appears to be the most fair and balanced approach.[336]

Firstly, with this construction the risk of high costs attendant on alternative constructions, such as a trust, will be prevented.[337] As the court in the *Oshry* case[338] stated:

> "The court below noted 'policy considerations' militating against a conclusion that maintenance in a lump sum could be awarded in terms of the Act. The concerns expressed by the court below are set out in para 38 above. The difficulties with estimating an appropriate lump sum award by reference to certain assumptions that might later prove to be unfounded do not present insurmountable difficulties. In delictual claims, for example, damages in relation to loss of support are estimated with regard to the life expectancy of a claimant and on the basis of other assumptions. There too, total accuracy can never be assured. Courts do the best they can. This does not mean that a court assessing a claim for maintenance should not take these factors into account in the totality of the presented circumstances in deciding an appropriate award."[339]

> "Additional extended administration burdens, including costs attendant upon the grant of a periodical payment that might also prove to be longer than initially envisaged is another issue for consideration. In our view, for the reasons set out above the concession that a lump sum was competent under the Act was rightly made on behalf of the appellants. Accordingly,

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[336] In the case of *Coughlan v Kossar* case number 15209/2016 (WCHC), unreported judgment delivered on 25 November 2016, the applicant requested an actuarially calculated amount for the future maintenance of the minor children and wanted such payment to made to the Fund to manage the funds and pay an amount monthly for the children's future maintenance. This construction is supported by Sonnekus 2017 *TSAR* as the most fair and balanced approach. In deceased estate matters, the claim is usually calculated by using table B of the Estate Duty Act 45 of 1955 to calculate the present value of the amount required over the foreseen period of the child's dependency which period may extend beyond majority. In this regard see *NB v Maintenance Officer, Butterworth and Others* 2014 (6) SA 116 (ECM) para 15 and Kernick (2006) 22.

[337] Sonnekus 2017 *TSAR* 402.

[338] *Oshry NNO V Feldman* 2010 (6) SA 19 (SCA).

[339] Para 55.

the court below erred in holding to the contrary."[340]

Secondly, an actuarially calculated lump sum ensures that the children will not be without maintenance until becoming self-supporting as it takes into account the inflation rate and any increase in maintenance needs of growing children.[341]

Thirdly, as opposed to a claim by a surviving spouse that is calculated until death or remarriage,[342] a child's claim is more easily determined. This is so since the child's claim will be determined until a more certain date (the date of becoming self-supporting) whereupon the child's claim for maintenance will fall away.[343] There is therefore no reason why such a calculation cannot be applied in future maintenance matters involving children.

4.4 Indigent recalcitrant parent's recourse after paying a lump sum to the Fund

In terms of the remedy of transfer of ownership as suggested it must be noted that in both instances[344] the conduct of the maintenance debtor may indicate that he/she is not willing to abide by the maintenance order and may justify the payment of a lump sum in respect of his/her children's future maintenance needs. In terms of s 31 of the Maintenance Act, a maintenance debtor who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and be liable on conviction to a fine or to imprisonment. These provisions relate to arrear maintenance obligations but will be similarly applicable in instances of future maintenance matters where the basis will be that the maintenance debtor was already recalcitrant. However, in

[340] Para 57.
[341] Sonnekus 2017 *TSAR* 402.
[342] S 2(1) of the Maintenance of Surviving Spouses Act 27 of 1990.
[343] Sonnekus 2017 *TSAR* 402.
[344] In terms of those set out in chapter 2 and in terms of this chapter.

cases where the person liable to pay maintenance has funds available to support the children the court must not adopt a *non possumus* attitude.[345] It must be emphasised that the payment of a lump sum will only be available in cases where the maintenance debtor possesses sufficient assets to allow for a lump sum.[346] This construction will allow the recalcitrant parent to deal freely with his property after the actuarially calculated amount has been paid over to the Fund or directly to the major dependent child.[347]

Should a lump-sum award be made and ownership therein be transferred to the child, the maintenance debtor will no longer have to "run after" dissipating or recalcitrant parents every time he/she wishes to secure maintenance for the child or be required to go back to court to enforce maintenance obligations.[348] Instead it will be the dissipating or recalcitrant parent who will have to prove that he/she is unable to support him or herself and claim from the lump sum held by the Fund in the name of the child or directly from the major child. Nothing will prevent the former recalcitrant or dissipating parent from approaching the court for maintenance from the child's lump sum in the event that he/she becomes unable to support him/herself in future.[349]

Despite the continued existence of an order to pay maintenance against a parent, it will always be open to the parent or party who is liable to pay maintenance to raise the defence on the facts that that he/she is no longer liable to pay maintenance either in whole or in part, for example

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[345] *Mngadi v Beacon Sweets and Chocolates Provident Fund & Others* 2004 (5) SA 388 (D) 396.
[346] Sonnekus 2017 *TSAR* 403.
[347] In *Coughlan v Kossar* case number 15209/2016 (WCHC), unreported judgment delivered on 25 November 2016, the court states at para 12 that an anti-dissipation interdict has the effect of restraining the maintenance debtor from dealing with his/her assets pending the outcome of the action which the maintenance debtor intends to institute against him/her.
[348] *Magewu v Zozo* 2004 (4) SA 578 (C) para 22.
[349] *Oshry NNO V Feldman* 2010 (6) SA 19 (SCA) para 22 confirming that children also have a duty to support their parents.

because the child has become self-supporting.[350] The duty of support is reciprocal and a parent may look to a child with means of support in cases where the parent is indigent and all steps against the parent's spouse (if any) have been exhausted.[351] As per *Anthony v Cape Town Municipality*[352] with reference to *Oosthuizen v Stanley*[353] the court stated that the legal position is clear that in the event that parents are indigent, their children, even minors, are liable to support them according to the children's ability.[354]

It will be impossible for the Master to determine when a dependent child becomes self-supporting. However, since the funds are deposited into the Fund pursuant to a court order, the Master will pay to the parent until such time as the court indicates otherwise in terms of s 16(1)(b) of the Maintenance Act.[355] If an order for maintenance fixes a time for its

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[350] *Bursey v Bursey* 1999 (3) SA 33 (SCA) 39.
[351] *Oshry NNO V Feldman* 2010 (6) SA 19 (SCA) paras 22 and 23.
[352] *Anthony v Cape Town Municipality* 1967 (4) SA 445 (A).
[353] *Oosthuizen v Stanley* 1938 AD 322.
[354] *Anthony v Cape Town Municipality* 1967 (4) SA 445 (A) 447.
[355] S16 provides: "Maintenance and ancillary orders-

(1) After consideration of the evidence adduced at the enquiry, the maintenance court may—
(a) in the case where no maintenance order is in force-
(i) make a maintenance order against any person proved to be legally liable to maintain any other person for the payment during such period and at such times and to such person, officer, organisation or institution, or into such account at such financial institution, and in such manner, which manner may include that an arrangement be made with any financial institution for payment by way of any stop-order or similar facility at that financial institution, as may be specified in the order, of sums of money so specified, towards the maintenance of such other person, which order may include such order as the court may think fit relating to the payment of medical expenses in respect of such other person, including an order requiring such other person, if the said other person qualifies therefor, to be registered as a dependent of such person at a medical scheme of which such person is a member;
(ii) make an order against such person, if such other person is a child, for the payment to the mother of the child, of such sum of money, together with any interest thereon, as that mother is in the opinion of the maintenance court entitled to recover from such person in respect of expenses incurred by the mother in connection with the birth of the child and of expenditure incurred by the mother in connection with the maintenance of the child from the date of the child's birth to the date of the enquiry; or
(b) in the case where a maintenance order is in force—
(i) make a maintenance order contemplated in paragraph(a) (i) in substitution of such maintenance order; or
(ii) discharge such maintenance order; or
(c) make no order".

duration, for example until the child becomes self-supporting, it will cease to operate when that event occurs. An order for maintenance against a parent is an objective fact capable of being established with sufficient certainty.[356] Payment into the Fund will be done by way of court orders and the Fund will only make payments in terms of such court orders, which may change from time to time as circumstances change.[357] Payments will continue while the maintenance order is operational until such time as it is set aside or varied after an application to the maintenance court in terms of the Maintenance Act.[358] The maintenance court will further be the obvious court to monitor payments out of an amount.[359] The maintenance debtor will be at liberty at any time to apply for a variation of the maintenance order should his/her circumstances or the minor children's right or need for maintenance change.[360]

4.5 Capacity of the Fund to deal with lump-sum future maintenance

Another consideration is that the Fund may have challenges with regard to the capacity of dealing with a large number of future maintenance amounts.

In this regard maintenance courts may order that maintenance payments be done annually rather than monthly. In the case of *Soller v Maintenance Magistrate Wynberg & Others*[361] the court directed that payment be made annually rather than monthly. The court stated that this is based on convenience for all parties and it is easier to monitor

[356] *Bursey v Bursey* 1999 (3) SA 33 (SCA) 38.
[357] *Bezuidenhout* case para 24.
[358] *Mngadi v Beacon Sweets and Chocolates Provident Fund & Others* 2004 (5) SA 388 (D) 398.
[359] *Bezuidenhout* case para 25.
[360] *Mngadi v Beacon Sweets and Chocolates Provident Fund & Others* 2004 (5) SA 388 (D) 398.
[361] 2006 (2) SA 66 (C).

one annual payment than twelve monthly payments.[362]

In the case of *Carelse v Estate de Vries*[363] the court ordered the maintenance of the children be paid into the Fund with the direction that the Fund pays certain amounts at the end of each year.

Since the Fund will act in terms of court orders issued, the administrative onus on the Fund will be negligible as the Master will not have to take decisions as to what amounts are to be paid to dependents.[364]

4.6 Principles of *audi alteram partem*, subsidiarity and legality

It is a pity that the court in *Bezuidenhout* did not follow the *audi alteram partem* rule by affording the Master an opportunity to express his/her views on the matter.[365] It may be said that all the cases[366] relating to future maintenance matters were justified as there were no competing statutory limitations on the institutions to administer the funds on behalf of children. However, and besides the conflict caused by court orders and making those orders difficult to implement, the *Bezuidenhout* case placed the Master in an uncomfortable position of disregarding his/her own statutory limitations of only being able to accept orders from a high court and its enabling provisions only allowing deposits in terms of the provision of the Estates Act.

In relation to the GEPF the court stated:

> "I am not aware of a principle in terms of which a court can order an outsider to perform some or other duty for the benefit of someone else, and certainly not without it having had an opportunity to indicate whether it is

[362] Para 42.
[363] *Carelse v Estate de Vries* (1906) 23 SC 540.
[364] *Bezuidenhout* case para 26.
[365] In the only other two cases (*Coughlan* and *Mbhele* cases) dealing with requests for future maintenance funds to be paid to the Fund, it appears that the Master was also not joined as a party to the proceedings nor was the Master given notice of the hearings.
[366] As discussed in chapter 2.

> able and willing to do so. It is absolutely necessary that a fund like the appellant must have an opportunity to indicate to a court whether it is willing and able to administer the fund for the benefit of the dependents. Ideally it must be joined as a party before the court makes an order. If it has not been joined as a party the court cannot grant a final order. The court must issue a rule nisi calling upon the fund to give reasons why an order must not be made. This will afford the fund the opportunity to explain its position before a final order is made".[367]

Against the court's own advice, it proceeded to order the payment of the funds into the Fund. Should the Master have been given the opportunity, he/she would have highlighted the conflicts an order for future maintenance to be deposited into the Fund would cause. The Master would have further indicated to the court that he/she is only allowed to accept funds under the Estate Act, any other law or in pursuance of a high court order.[368] Funds received pursuant to a maintenance order made by a maintenance court are not funds allowed under the Estates Act or in terms of any other law. Although the ordinary jurisdiction of maintenance courts is not limited to that of a magistrates court in civil matters,[369] the court in *Bezuidenhout* appeared to have overlooked the competing statutory restriction of the Master who is only allowed to receive funds pursuant to an order of the high court.[370]

Having regard to the definition of "court" in the Estates Act and the fact that the Master is a creature of statute deriving its power from the Estates Act, the principles of legality and subsidiarity are other issues for consideration.

The rule of subsidiarity entails that any legislation enacted pursuant to a

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[367] *Bezuidenhout* case para 21. The court states in footnote 11 of the case that this paragraph pertains to anti-dissipation interdicts in respect of future maintenance obligations and must not be understood to be applicable in respect of attachments for arrear maintenance.

[368] See para 1.5.7 above.

[369] *Bezuidenhout* para 26.

[370] In terms of the definition section (s 1) of the Estates Act, "[c]ourt means the High Court having jurisdiction, or any judge thereof."

constitutional command to give effect to constitutional rights may not be circumvented in favour of direct reliance on the Constitution. In this regard, the Constitutional Court has held that:

> "[a] litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on s 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in s 33 to be given effect to by means of national legislation."[371]

> "Where, as here, the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question."[372]

In terms of the preamble to the Maintenance Act,[373] the state has committed itself to giving high priority to the constitutional rights of children. The constitutional right in question is found in s 28 of the Constitution which provides that a child's best interests are of paramount importance in every matter concerning the child. Despite the good intentions of the legislature to create a comprehensive legal framework for the recovery of maintenance, there is evidence that the system is not functioning effectively.[374]

The rule of legality entails that an entity can only act within the powers

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[371] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) para 96.
[372] *Comair Ltd v Minister of Public Enterprises and* Others 2016 (1) SA 1 (GP) para 50.
[373] See footnote 123 above where the preamble to the Maintenance Act is set out.
[374] *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) para 24-26.

that are lawfully conferred upon it. With regard to the principle of legality the Constitutional Court stated that:

> "[t]he Court restated the principle of legality and in particular the rule that an entity can only act within the powers that are lawfully conferred upon it. In the context of local government, the Court stated that the powers of local government are conferred upon it either in terms of the Constitution or the laws of a competent authority."[375]

The same principle will apply in cases involving payment to the Fund of a lump sum in respect of future maintenance of children. As indicated above, the Estates Act does not empower the Master to accept funds in future maintenance matters.[376]

Bearing the above in mind it is imperative that the Master be joined in proceedings relating to the future maintenance of children destined for the Fund as the Master's views could have assisted with preventing the anomalies the current situation is causing.

4.7 Conclusion

What has been suggested in this chapter is merely an interim solution. A permanent solution requires an amendment to the Maintenance Act in line with the suggestions made in this chapter. It will prove problematic to simply amend the Maintenance Act to provide that a lump sum will be paid into the Fund.

It is worth repeating the statement by the Constitutional Court in the case of *Bannatyne v Bannatyne*[377] where the court stated that:

> "[i]t is a function of the state not only to provide a good legal framework, but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws they implement are important mechanisms to give effect to the rights of children protected by

[375] *City of Cape Town and another v Robertson and another* 2005 (2) SA 323 (CC) 349.
[376] See para 1.5.7 above.
[377] 2003 (2) SA 363 (CC).

> section 28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system."[378]

Transferring ownership to the child in future maintenance matters destined for the Fund will provide a good legal framework for maintenance orders to operate effectively and insuring that effect is given to the rights of children.

[378] Para 28.

CHAPTER FIVE

SUMMARY AND CONCLUSION

As indicated in chapter 1 of this dissertation, the research was conducted to answer mainly two questions. The first question relates to the same question asked by the SALRC, namely whether the Fund is the appropriate receptacle to administer the funds for future maintenance. In the event that it is found that the Fund is the most appropriate receptacle, the next question was whether the Fund is able to give full effect to maintenance court orders in respect of future maintenance of children.[379]

To determine the questions posed above it was necessary in the first instance to investigate the gap in the Maintenance Act as it relates to the ordering of lump-sum future maintenance. In chapter 2 it was determined that the Maintenance Act does not authorise the attachment of a maintenance debtor's assets in respect of future maintenance payments which are not yet due and in respect of which the maintenance debtor is not yet in default. It was further determined that provision is only made in respect of arrear maintenance for the attachment of property, emoluments and debts of a maintenance defaulter. It was also determined that as a result of the gap identified in the Maintenance Act, the high court, by applying the constitutional imperative in s 28(2) of the Constitution, ordered the attachment of funds due to maintenance debtors for the future maintenance of a child was in the best interests of the child. In making such orders, the court exercised its inherent common law powers. This was done by granting anti-dissipation interdicts against various institutions in order to attach lump sums due to the maintenance debtor in respect of future maintenance

[379] Chapter 1.1 to 1.3 above.

for his/her children. The issue of whether one may claim future maintenance has therefore been left up to the courts to decide.[380]

Chapter 3 focussed on the Fund and lump-sum future maintenance orders made by the maintenance courts. A determination was made as to whether the Fund is indeed the best receptacle to administer lump-sum future maintenance. To determine this, a comparison was made between the Fund and other types of receptacles used in respect of minor children's future maintenance. Such types included payment directly to the natural guardian or caregivers of the children, payment to a trust, payment to a receiver and payment to a tutor dative/curator. The nature, meaning and scope of each method was explored and it was concluded that the Fund is the most appropriate receptacle having regard to the best interest of the child. Although the Fund was determined to be the most appropriate receptacle, conflicts were identified between the maintenance orders and the empowering provisions of the Fund. Having regard to these conflicts (conflicts relating to the interest earned on funds in respect of minors and majors and also conflicts relating to the age of majority), it was necessary to investigate an alternative approach to that followed by the courts in chapter 2 relating to lump sum future maintenance matters. To this end the suggestion was made that ownership in the funds be transferred to the child.

Chapter 4 attempted to resolve the conflicts identified by recommending that ownership in the funds be transferred to the child similar to the awarding of lump-sum maintenance in rare cases and in other maintenance related matters such as maintenance in deceased estates. Authority on an alternative approach was investigated and it was determined that such an approach is possible having regard to the best

[380] See full discussion in chapter 2.

interest of the child and equality before the law. Following the alternative approach it was determined that the payment of an actuarially calculated future maintenance payment into the Fund appears to be the most fair and balanced approach.

In addition to it being a function of the state to provide a good legal framework, it must also put in place systems that will enable these frameworks to operate effectively. This research is a step in the direction of enabling an effective framework relating to the current issues experienced with future maintenance paid into the Fund. Transferring ownership to the child and depositing the funds into the Fund will give effect to the right of children protected by s 28 of the Constitution.

ANNEXURE "A"

MASTER'S DIRECTIVE NO. 29

MINORS MAINTENANCE CLAIMS

[PAYMENT INTO THE GUARDIANS FUND]

This directive replaces master's instruction No. 29 (undated).

Natural persons acquire at birth legal capacity (regsbevoegdheid) to ha or possess legal rights and duties.(1)

A minor has a legal right to claim support from his parents and the paren have a corresponding duty of support. (2)

If in the opinion of the Master a minor is entitled to maintenance and claim for support appears in the liquidation account, he should obtain co firmation from the executor that the guardian of the minor is aware of t minor's rights to claim support and why no claim for support has been ma The Master must naturally satisfy himself that the minor has a guardian.

A claim for maintenance can be determined and fixed in various ways.

A. By agreement between the minor's guardian and the executor.(2)

B. By agreement between the minor's parents in divorce proceedings.(2

C. By an order of court in divorce proceedings between the mino parents.(2)

D. By an order of court in an action for damages from a wrongdoer.(3)

Where the guardian and the executor have agreed on an amount of monet support for the minor the sum agreed upon must be deposited in guardians fund unless some other form of investment is agreed upon. (4)

2/.....

Where a sum of money for the support has been fixed and awarded by agreement or by the Court, the sum must be deposited in the guardians fund.(4)

The parties may not without the Court's consent vary the court order(5) or for that matter vary the terms of the agreement since one of the contracting parties is deceased. The Court may however fix the support inas much as the agreement does not affect the minor's rights to claim, since it could be taken that the agreement applies to his parents inter se and does not bind his rights in any way.(6)

A right to compensation from a wrongdoer for general damages relating to future patrimonial loss such as future medical expenses for bodily injuries co-exists with the parents' duty to support and does not exclude the minor's delictual claim against the wrongdoer.(3)

In regards as to whether or not the compensation must be paid into the guardians fund depends on the terms of the order of Court.

Payments in terms of an agreement or a Court order to the custodian in his own right accrues to the custodian and the amount must not be deposited in the guardians fund.

Eventually the moneys due to the minor must be reflected in the liquidation account as "for and on behalf of the minor", by name.

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1. Broberg : "The Law of Persons and the Family"-1977 at 37 - 41.

2. Bouwer : "Die Beredderingsproses van Bestorwe Boedels" (2de uitgawe) blds 327 - 343.

3. Guardian National Insurance Co Ltd vs Van Gool NO 1992(4) SA 61.

4. Section 43(6) Act No. 66 of 1965. Bouwer : Supra.

5. Hahlo : "SA Law of Husband and Wife" 5th Edition, pages 402 - 415

At page 410 in which it is said :

"No agreement between the parties in a divorce suit relating to maintenance to be paid to a minor child of the marriage can deprive the Court of the right of varying the agreement as to maintenance in so far as such variation is required in the true interests of the minor."

6. Herfst vs Herfst 1964(4) 127

"When in divorce proceedings an order for the maintenance is made by the Court it only operates as between the parties and is not binding on the child whose legal entitlement to proper maintenance is not thereby circumscribed."

Fillis vs Joubert Part Private Hotel (Pty) Ltd SA 1939 TPD 234

"Such order for maintenance merely determines the amount of liability of the spouse inter se."

7. Generally see :

Spiro : "The Law of Parent and child" 3rd Edition pages 385 - 394.

Carelse vs Estate De Vries 23 SC 532.

Hartle NO vs the Master 1921 AD 403.

Zwarenstein vs Zwarenstein 1935 PH B(1).

Liquidators Union Bank vs Watsons Executors 8 SC 300.

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17 November 1992

TGB/MM

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