AANTEKENINGE

A BETTER WAY TO DEAL WITH THE MAINTENANCE CLAIMS OF ADULT DEPENDENT CHILDREN UPON THEIR PARENTS' DIVORCE

1 Introduction

On 1 July 2007 section 17 of the Children's Act 38 of 2005 came into operation. It lowered the age of majority from 21 years to 18 years and brought our law into alignment with the notion in international human rights law that 18 years marks the end of childhood (see Schäfer *Child law in South Africa* (2011) 16; Boezaart "Child law, the child and South African private law" in Boezaart (ed) *Child law in South Africa* (2009) 17). This reduction in the age of majority had several repercussions for young dependent adults between the ages of 18 and 20. This once protected group of people is now exposed to contractual liability, prescription may run against them and they must institute and defend legal proceedings in their own name (see Schäfer *Child law in South Africa* 23). In this note the searchlight falls specifically on the predicament in which many of these young dependent adults may find themselves as far as their maintenance claims upon their parents' divorce are concerned. Two recent cases dealing with the institution of these young adults' maintenance claims pending their parents' divorce are examined and finally some suggestions are made on how their maintenance claims should be dealt with in practice.

2 Practical dilemma

Since the lowering of the age of majority to 18 years, many legal practitioners have been faced with the dilemma that 18 to 20-year-old children of divorcing parents have had to be joined as parties to the divorce action so that the young majors could institute their own maintenance claims or, as happens more often in practice, so that the young majors could institute their own maintenance claims in the maintenance court. The above is necessary because a parent with whom an adult but dependent child lives may not claim maintenance on behalf of the child, since only the adult child has *locus standi* to sue for his or her maintenance. In *Smit v Smit* 1980 3 SA 1010 (O) 1018B–C Flemming J stated that

> "[w]hen the child turns 21 [as the age of majority then was] a claim by one parent against the other for the latter's portion of the common parental duty to support is, usually at least, no longer relevant. It is the child itself who henceforth must claim directly against one or both parents to the extent that he may have a claim for support with effective content".

In South Africa, the social reality is that many children have not concluded their secondary education, let alone their tertiary education or vocational training, when they turn 18. Typically, children between the ages of 18 and 21 are unable to earn sufficient income to pay their tuition fees or to support themselves and

they remain financially dependent on their parents (*Butcher v Butcher* 2009 2 SA 421 (C) 427I; *JG v CG* 2012 3 SA 103 (GSJ) para 48; see also Schäfer *Child law in South* Africa 23). For various reasons it is objectionable to insist that these young and rather vulnerable adults institute their own maintenance claims against one or both of their parents in the high court, the divorce court or the maintenance court.

Firstly, it is generally accepted that it is prejudicial or undesirable for children to become involved in the conflict between their divorcing parents by being joined as parties in divorce proceedings, whether these children are minors or young adults (see Schäfer *Child law in South Africa* 23). As children should preferably maintain a meaningful relationship with both their parents after the divorce, it is undesirable that they should have to to take sides and institute a claim together with one parent against the other. The alternative of instituting a separate claim in the maintenance court is possibly even worse as maintenance court proceedings can be very cumbersome and frustrating. Such a process would *inter alia* require the adult child to be absent from school or from class on several days, first to lodge the complaint with a maintenance clerk and then to appear at the initial informal enquiry before the maintenance officer and later at the final formal enquiry in the maintenance court, which could be postponed several times, as often happens in practice. The institution of a separate claim in the maintenance court would also lead to the piecemeal adjudication of issues that originate from one and the same divorce. Adult dependent children's maintenance claims upon their parents' divorce are intrinsically linked to other issues bound up in the divorce decision, such as housing and the provision of maintenance for spouses and other minor children born from the marriage. There could be very negative repercussions for adult dependent children if their maintenance claims were to be adjudicated in isolation after the date of their parents' divorce. It is possible that no money may be left over for their maintenance needs.

Related to the first objection is the fact that the adversarial system of litigation still forms the basis of the divorce process in the high court and the divorce court today (Schäfer "The role of the attorney in the divorce process" 1984 *De Rebus* 17 and "Alternative divorce procedures in the interests of children: Some comparative aspects" 1988 *THRHR* 297). Although South African courts permit a relaxation of the adversarial approach in matters involving children (see eg *B v S* 1995 3 SA 571 (A) and *T v M* 1997 1 SA 54 (A) in respect of enquiries into the best interests of children without regard to the onus of proof in the conventional evidential sense; see further *Napolitano v De Wet NO* 1964 4 SA 337 (T), *Zorbas v Zorbas* 1987 3 SA 436 (W) and *J v J* 2008 6 SA 30 (C) in respect of the admissibility of hearsay evidence in review proceedings involving children), such an approach would not be followed in relation to 18 to 20-year-old adults since they would no longer be regarded as children. Furthermore, although a more inquisitorial approach is followed in the maintenance court, the ordinary law of evidence applicable to civil proceedings in a magistrate's court nonetheless applies (section 10(5) of the Maintenance Act 99 of 1998; see also Van Zyl *Handbook of the South African law of maintenance* (2010) 68). It is clear that the adversarial system is not conducive to solving intimate and emotional issues between family members who, because of family dynamics, will still be in an ongoing relationship after the issues have been resolved by the courts (see De Jong "An acceptable, applicable and accessible family-law system for South Africa – some

suggestions concerning a family court and family mediation" 2005 *TSAR* 33 and "A pragmatic look at mediation as an alternative to divorce litigation" 2010 *TSAR* 515 516–517 with regard to negative effects of the adversarial system in family matters). In addition, family members, especially young adults who might still be at school, college or university, may well find the formal complexity and adversarial nature of the legal process very daunting, confusing and misleading (see Payne "Family conflict management and family dispute resolution on marriage breakdown and divorce: Diverse options" 1999/2000 *Revue Générale de Droit* 663 676; Walker "Family mediation" in Macfarlane (ed) *Rethinking disputes: The mediation alternative* (1997) 81).

Another consideration is that if the adult child's maintenance claim is granted and paid by one parent, it might be very awkward and undesirable for the other parent with whom the child lives to look to the adult child to pay over some of the maintenance received as a contribution to the child's living costs (as per Gassner AJ in *Butcher v Butcher supra* 428A–B). Furthermore, because adult dependent children find it awkward to engage in litigation against one of their parents, these children often flatly refuse to institute their own maintenance claims, thereby placing an unbearable burden on the parent with whom they reside, usually the mother. What aggravates the position of mothers or women in this regard is that they are often in a very vulnerable position upon divorce because of the way post-divorce spousal maintenance is treated by our courts. Women are most often the ones who need but do not receive adequate maintenance upon divorce owing to the clean-break principle and the movement towards rehabilitative maintenance or no maintenance at all (Heaton *South African family law* (2010) 153; Clark and Goldblatt "Gender and family law" in Bonthuys and Albertyn (eds) *Gender, law and justice* (2007) 220). Women who are not engaged in paid employment at all or who are engaged in limited paid employment are only awarded rehabilitative maintenance for a period of six months to a few years, because they are expected to take up or to increase their participation in such employment after divorce even though this expectation cannot always be realised in practice. Women who are in paid employment are increasingly being denied maintenance upon divorce, because they are assumed to be able to meet their own maintenance needs. However, women in South Africa are generally in lower-paid, casual and informal employment or are often unemployed altogether (Statistics South Africa (Report No 3-19-00) *Social profile of South Africa 2002–2009* (2010) paras 4.1 4.6 4.10; Heaton "Striving for substantive gender equality in family law: Selected issues" 2005 *SAJHR* 547 550; Cooper "Women and the right to work" 2009 *SAJHR* 573 580; Albertyn "Gendered transformation in South African jurisprudence: Poor women and the Constitutional Court" 2011 *Stell LR* 591 592; Fredman "The potential and limits of an equal rights paradigm in addressing poverty" 2011 *Stell LR* 566 575). They further still overwhelmingly assume and are expected to take primary responsibility for the care of children (minor and major) during marriage and upon divorce (Heaton 2005 *SAJHR* 550 552; Fredman "Engendering socio-economic rights" 2009 *SAJHR* 410 424). Achievement of the goal of financial independence upon divorce may therefore well be very difficult or even impossible for most women. The fact that they also have to forego maintenance payments from their children's father for their 18 to 21-year-old children for the reasons set out above may exacerbate women's predicament and contribute to sex and gender inequality between spouses upon divorce.

3 Judicial relief for mothers and adult dependent children pending divorce

In two recent cases, namely *Butcher v Butcher supra* (*Butcher*) and *JG v CG supra* (*JG*), our courts came to the assistance of mothers and adult dependent children who resided with them at the time of divorce – in *Butcher* the relief came in a rather artificial and problematic manner, but in *JG* the relief came in a very innovative and exciting manner. Both cases concerned applications for maintenance (and a contribution towards costs) in terms of rule 43 of the Uniform Rules of Court pending divorce litigation. (Rule 43 applies whenever a spouse seeks relief from the court in respect of specific identified matters pertaining to the pending divorce, namely maintenance *pendente lite* (rule 43(1)(a)), a contribution towards the costs of a pending matrimonial action (rule 43(1)(b)), interim custody of any child (rule 43(1)(c)) and interim access to any child (rule 43(1)(d)).)

3 1 Butcher

In this case the mother applied for interim maintenance for herself and her two daughters aged 18 and 21 years who lived with her in the erstwhile matrimonial home. She requested maintenance in a specified monthly amount for herself as well as certain expenses relating to the household and the daughters' clothing, pocket money, cell phone accounts and maintenance to their motor vehicles (para 7). On her behalf, it was contended that the court is empowered in terms of section 6(1) and (3) of the Divorce Act 70 of 1979 to grant maintenance orders, including interim maintenance orders, in favour of an adult dependent child of parties to a divorce action (para 12). (In terms of section 6(1)(a), a decree of divorce shall not be granted until the court is satisfied that the provisions made or contemplated with regard to the welfare of any minor *or dependent* child of the marriage are satisfactory or the best that can be effected in the circumstances, while section 6(3) empowers the court to make any order which it deems fit regarding the maintenance of *a dependent child of the marriage* or the custody or guardianship of, or access to, a minor child of the marriage.) The father contended, however, that the court was not empowered to make the order as requested by the mother, because the daughters, who were both majors at the time of the rule 43 proceedings, were not joined as parties to the divorce action. (An interesting fact about the case is that section 17 of the Children's Act was not yet in operation when the divorce summons was issued, but by the time the rule 43 application was instituted it had come into operation.) The court then had to decide whether it was competent for it to order the father to pay *pendente lite*

> "(a) maintenance to the applicant in an amount that benefits the parties' major children;
>
> (b) additional amounts directly to the major children or expenses on their behalf, although they have not been joined as parties in the divorce proceedings" (para 9).

Gassner AJ referred to the well-established principle in our law (as established in cases such as *Raichman's Estate v Rubin* 1952 1 SA 127 (C); *Kemp v Kemp* 1958 3 SA 736 (D); *Ex parte Pienaar* 1964 1 SA 600 (T); *Smit v Smit supra*; *Hoffmann v Herdan* 1982 2 SA 274 (T)) that a parent's common law duty of support does not cease when a dependent child reaches majority but only when the child becomes self-supporting (para 10). The judge also referred to *Bursey v Bursey* [1997] 4 All SA 580 (E), where the court rejected the father's argument that the mother lacked *locus standi* to continue to enforce maintenance obligations after the child attained majority, and held that an obligation to maintain a child,

which was incorporated in a settlement agreement when the child was still a minor, was indeed enforceable at the instance of the mother by means of a writ of execution despite the fact that the child had since become a major (para 11). Gassner AJ did, however, distinguish the facts of the *Bursey* case from the present case where there was no enforceable maintenance order in place which was granted when the children were still minors. He further found that although section 6 of the Divorce Act enjoins the high court or the divorce court to make maintenance orders for an adult dependent child, where appropriate, it is silent as to whether a party to divorce proceedings has *locus standi* to claim maintenance on behalf of a dependent adult child (para 13). The court also found no authority in the Children's Act to support the right of a parent with whom an adult dependent child resides to claim maintenance on behalf of such child from the other parent and stated that this Act actually implicitly assumes that children are financially independent at 18 and that parental financial responsibility should end at that date (para 14). The court therefore held that the mother lacked the necessary *locus standi* to claim an order, on behalf of the two adult daughters, that the father should pay certain allowances directly to them or certain expenses on their behalf. Nevertheless, the court was not prepared to deny the mother any relief whatsoever and found a way to assist her to some extent by allowing her to include some shared expenses in respect of the adult dependent children in the monthly maintenance amount payable to her. Gassner AJ stated that in terms of section 7(2) of the Divorce Act a court, when determining spousal maintenance, must take into account, amongst other factors, the parties' respective financial needs and obligations and included in such obligations would be the mother's duty to use her household budget to run the family home and provide groceries for a three-member household (para 17). With regard to specific individual expenses in respect of the major children such as their pocket money, cell phone accounts and clothing expenses, the court was not prepared to allow the mother's claims and found that the claim could only be made by the adult dependent children themselves.

The effect of *Butcher* is therefore that a distinction should be drawn between general or shared expenses and specific expenses in respect of adult dependent children and that only the first-mentioned may be included in a spouse's claim for maintenance in rule 43 applications and upon divorce.

3 2 JG

In a very similar set of facts to those in *Butcher*, the court in *JG* took the relief for the mother and her adult dependent son much further. Here both parties and their 21-year-old son, who was a full-time student, were still living in the matrimonial home at the time of the rule 43 proceedings. In the application the mother sought monthly maintenance for herself and the son from the father in one aggregated amount (para 3). This amount included specified amounts for the boy's clothing, pocket money, full-time technikon studies, cell phone, haircuts and recreational or relaxation costs, as well as the mother's own claim for household expenses, such as groceries, which included provision for the boy's consumption thereof (paras 5 6). The father, however, disputed any entitlement on the part of the mother to claim maintenance for the major child (para 4).

In determining the issue of the mother's entitlement to claim monthly maintenance *pendente lite* in respect of expenditure pertaining to the major son, who had not been joined in the divorce action and had not supported the mother in the

rule 43 application, the court in *JG* (as in *Butcher*) confirmed the principle of our law that a parent has a common law duty to support his or her child (as established by cases such as *Gliksman v Talekinsky* 1955 4 SA 468 (W); *Sikatele v Sikatele* [1996] 1 All SA 445 (Tk)), notwithstanding the fact that the child is no longer a minor (para 7). In the judgment, Symon AJ also referred to *Bursey v Bursey supra* where the court held that a consent order granted between the parents on divorce in respect of a then minor child could still be enforced by one parent against the other post the attainment of majority by the child (para 8). Unlike the court's finding in *Butcher* (para 2 1 above), Symon AJ was not convinced that the facts of *Bursey* were distinguishable from the facts of the present case and opined that the decision in that case was indeed applicable to the present case (paras 13 14). According to the judge, the applicable point of principle is that it appears from that case that, at least as between the parents, the attainment of majority does not *per se* in all circumstances automatically prevent the court from endorsing arrangements already made between the parents *inter se* in respect of the support of their children, albeit concluded when the children were minors (para 52).

The court further discussed the decision in *Butcher* and said:

> "If the decision in *Butcher* is correct, the applicant in casu is entitled to claim maintenance for herself, as adjusted to some extent to make allowance in her favour for the fact that she incurs increased general household expenditure because the major child still resides in the common home, but she can claim no amount for expenses specific to the major child. According to *Butcher* that claim can only be made by the major child" (para 19).

The court rejected the decision in *Butcher*, however, and advocated "a proper and purposive interpretation" of the provisions of rule 43 read with sections 6 and 7(2) of the Divorce Act and the common law (paras 20–21 27 49) so as to allow a parent to request not only shared or general expenses but also specific individual expenses in respect of an adult dependent child without such child being joined in the rule 43 proceedings.

In setting out the reasons for differing so drastically from the decision in *Butcher*, the court firstly looked at the wording and an expansive interpretation of rule 43 and section 6 of the Divorce Act. Although rule 43(1)(c) and (d), which deals with interim custody or care and interim access or contact, specifically refers to interim orders made in respect of *minor* children, rule 43(1)(a), which deals with interim maintenance, contains no such restriction. Similarly section 6(3) of the Divorce Act distinguishes between the court's power upon divorce to make a maintenance order in respect of *a dependent child of the marriage* and the court's power to make a guardianship, custody or care, access or contact order in respect of *a minor child of the marriage*. Furthermore, section 6(1) makes provision for the welfare of *both minor and dependent* children to be considered before a divorce order may be granted, while section 7(2) entitles the court the take into account "any other factor" when making a maintenance order in favour of a spouse upon divorce and rule 43(5) entitles the court to make "such order as it thinks fit to ensure a just and expeditious decision". According to the court, all these discretionary and empowering provisions suggest that a court would be entitled to make an order for maintenance in respect of a dependent child in favour of one of the spouses in rule 43 applications and also upon divorce (paras 26 31 32). The court added that joinder of the adult dependent child to existing proceedings for maintenance would always remain a possibility should the court be concerned about making an order in the absence of such child (para 33).

Secondly, the court stated that the principle of our common law that one spouse has a right of recovery against the other in cases where one parent has contributed more than his or her required share to the maintenance of the child is consistent with the notion that one spouse can be directed to pay a contribution to another in respect of expenses incurred in regard to a dependent child *pendente lite* (para 35). Symon AJ said "it would [therefore] not be alien to accepted common law principles to make one spouse make a payment to another in respect of their shared obligation to meet the expenses of maintaining the child in the matrimonial home, *pendente lite*" (para 36).

As a third reason for its decision, the court referred to the fact that an interim order made in rule 43 proceedings without the participation of the dependent child as a party would only bind the parents and not the dependent child, and that the child would still be free to institute his or her own maintenance proceedings against an errant parent in terms of section 6 of the Maintenance Act 99 of 1998 (paras 37 39 53). The maintenance court would then have the power to make a maintenance order, to substitute or discharge any existing maintenance order, including one issued by the high court, or to make no order (section 16(1)(a)–(c) of the Maintenance Act).

A very important fourth reason for the court's decision in *JG* is that the artificial distinction created by the decision in *Butcher* between general shared or common expenses and specific private or personal expenses in respect of adult dependent children is unnecessary, difficult to apply, and will generate additional controversy in an already problematic area of our law (paras 41 42).

Another reason for the court's decision relates to the policy objectives sought to be achieved by rule 43 as "a rough-and-ready regimen to address the fallout of a failed or failing marriage in a robust and efficient manner" (para 44). In this regard Symon AJ made the following very important statements:

> "[C]hildren (even those who are major, but dependent) should not unnecessarily be drawn into the matrimonial conflict if this can be avoided, and particularly when the process is at its most acute – between the date of institution of the divorce action and the finalisation thereof. It would seem to me to be counterproductive to insist upon the assertion of independent rights to maintenance by dependent children in the matrimonial home against the parents in the already strained pre-divorce environment, and *pendente lite*. This can be inflammatory and unhelpful, drawing the major children into taking sides, and making them potential litigants in their own right about expenditure relating to them, and which is bound to create even further conflict before the divorce action is resolved" (para 45; see also para 1 above);

and

> "[i]n my respectful view, the dependent children (particularly when residing in the matrimonial home) should remain removed from direct conflict for as long as possible, and pending the divorce" (para 46).

For the above reasons, Symons AJ felt that if it is reasoned, from a constitutional perspective, that active and effective remedies are necessary to cater for the procuring of maintenance for minor children and promote children's rights as contained in section 28 of the Constitution of the Republic of South Africa, 1996, the same reasoning, albeit only analogously, should also apply to protect the interests of dependent children (para 49).

The court therefore concluded that it would be counterproductive and unnecessary to insist that the adult dependent son bring separate proceedings to have his maintenance rights against either parent determined, when it is clear that the

expenses attributable to him are required to be borne by both his parents pending the divorce hearing (para 53) (and of course after that until such time as he becomes self-supportive).

4 Discussion of the judicial relief pending divorce and possible expansion thereof upon divorce

Most of the reasons put forward in *JG* as to why a parent in an interim application should be allowed to institute maintenance claims on behalf of his or her adult dependent children could be used to justify the institution of maintenance claims on behalf of such children upon divorce itself.

Firstly, if policy considerations require that divorcing parties' children, whether minor or major, should not unnecessarily be drawn into the matrimonial conflict in the period between the date of institution of the divorce action and the finalisation thereof, why should they be drawn into such conflict upon divorce? Should the aim not be, in the words of Symon AJ in *JG*, that "the dependent children (particularly when residing in the matrimonial home) should remain removed from direct conflict for as long as possible" (para 45; see also para 2 2 above)? There are other policy considerations than those mentioned in *JG* which in my opinion also require that a parent should be allowed to institute maintenance claims on behalf of adult dependent children residing with her (or him) upon divorce. In *GF v SH* 2011 3 SA 25 (NGP) 29F–30J the court explained what would constitute public policy in the context of family law and when it should be invoked. It appears that public policy can be called upon only in cases where the harm to the public is substantially incontestable, and does not depend on the determination of subjective judicial minds. It further appears that the Constitution and its values provide a framework for determining the scope and parameters of such public policy. In the context of family law, policy considerations therefore include the values of equality and non-discrimination and the obligation of parents to maintain their children in accordance with their ability, as well as the needs of the children. Other policy considerations that should accordingly be taken into account are the following: the fact that adult dependent children's general reluctance to get involved in litigation against one of their parents and institute their own separate maintenance claims upon their parents' divorce may perpetuate and exacerbate women's social and economic subordination to men and real inequality of the sexes; the fact that the duty to support their major children should be borne equally by both parents; and possibly the fact that it could have negative repercussions for adult dependent children if their maintenance claims were to be adjudicated in isolation after the date of their parents' divorce (see para 1 above).

Secondly, just as an interim order made in rule 43 proceedings without the joinder of the dependent child would only bind the parents and not the dependent child, in the same way a court order issued upon divorce without the joinder of such child would only bind the parents and the adult dependent child would still be free to institute his or her own maintenance proceedings against an errant parent in terms of section 6 of the Maintenance Act. Similarly, the joinder of the adult dependent child to the divorce proceedings would always remain a possibility should the court be concerned about making an order in the absence of such child.

Thirdly, an expansive interpretation of sections 6 and 7(2) of the Divorce Act and the common law would also lead to the conclusion that a parent should be

allowed to institute maintenance claims on behalf of adult dependent children upon divorce itself. It is, however, my opinion that it is not only these sections of the Divorce Act that should be interpreted properly and purposefully in terms of the new contextual, purposive or text-in-context approach to statutory interpretation (see Botha *Statutory interpretation* (2005) 52–56), but also the relevant provisions of the Children's Act. In terms of such an approach the Children's Act could be interpreted to include both minor and major dependent children born from a marriage within its ambit, like all other legislation dealing with children's maintenance claims and other children's issues upon their parents' divorce. (Reference was made above to the Divorce Act, which stipulates in section 6(3) that a court granting a divorce may make any order it may deem fit in regard to the maintenance *of a dependent child of the marriage*. Furthermore, the Mediation in Certain Divorce Matters Act 24 of 1987 provides in section 4(1) and (2) that the office of the family advocate may, on application by one of the parties, the court or a family advocate, institute an enquiry into *any matter* concerning the welfare of each minor *or dependent child of the marriage concerned*.) The reasoning is as follows:

The Children's Act recasts the term "parental authority" or "parental power" as "parental responsibilities and rights", but it appears that the new term encompasses more than the common law term. At common law parental authority, or parental power, consists of guardianship, custody and access, and the duty of support in respect of a child is not regarded as a component of parental authority (Skelton "Parental responsibilities and rights" in Boezaart (ed) *Child law in South Africa* (2009) 63, 68; Cronjé and Heaton *South African family law* (2004) 277–280). In terms of section 1(1) read with section 18(2) of the Children's Act, parental responsibilities and rights include the responsibility and right to care for the child, to maintain contact with the child, to act as the child's guardian and also to contribute to the child's maintenance. Since 1 July 2007, when sections 1 and 18 came into operation, the duty of support in respect of a child has therefore become part and parcel of parental responsibilities and rights.

The concepts "guardianship", "contact" and "care" are defined in the Children's Act. In terms of section 1(1) read with section 18(3), guardianship is limited to the narrow common law meaning of guardianship and refers to administering and safeguarding a child's property and property interests, assisting or representing the child in administrative, contractual and other legal matters, and giving or refusing any consent that is legally required in respect of the child (see also Heaton *South African family law* 170; Heaton "Parental responsibilities and rights" in Davel and Skelton (eds) *Commentary on the Children's Act* Original Service (2007) 3–5). Contact is the statutory equivalent of the common law right of access (see *WW v EW* 2011 6 SA 53 (KZP) paras 26 28) and in terms of section 1(1) it refers to maintaining a personal relationship with the child and communicating with the child on a regular basis if the child lives with someone else (see also Heaton *South African family law* 175; Heaton in Davel and Skelton *Commentary on the Children's Act* 3–5). In terms of section 1(1) care entails something more than the common law concept of "custody" in that it not only includes a reference to the primary residence of the child, but also contains elements of maintenance (see para (a)(iii) of the definition of "care" in section 1(1)) and contact (see para (h) of the definition of "care" in section 1(1); see also *WW v EW supra* para 21).

The concept "maintenance" is, however, not defined in the Act in the way guardianship, contact and care are defined. It can therefore be argued that it retains its common law meaning (see Heaton *South African family law* 178; Heaton in Davel and Skelton *Commentary on the Children's Act* 3–5). In terms hereof, the parental duty of support not only embraces the necessities of life, such as food, clothing and shelter, but also extends to education and care in sickness, and the child must be provided with all those things that are required for his or her proper upbringing (Clark "Duties of support of living persons' in Heerden, Cockerell and Keightley (eds) *Boberg's Law of persons and the family* (1999) 243–244; Van Schalkwyk "Maintenance for children" in Boezaart (ed) *Child law in South Africa* (2009) 39). It is also apparent that at common law the parental duty of support exists independently of parental authority and lasts until the child becomes self-supporting, regardless of when that happens (in terms of the case law referred to in both *Butcher* and *JG* in paras 2 1 and 2 2 above).

Because the duty of support in respect of a child has now become part and parcel of parental responsibilities and rights, and because this duty may continue after a child's attainment of majority, a contextual, purposive or text-in-context approach to the interpretation of the Children's Act may lead to the conclusion that certain provisions of the Children's Act could indeed apply to adult dependent children of divorcing parents (despite the unambiguous definition of a "child" in section 1(1) of the Act as a person under the age of 18 years). The sentiment of Gassner AJ in *Butcher* that the Children's Act implicitly assumes that children are financially independent at 18 and that parental financial responsibility should end at that date (para 14; see also para 2 1 above) is therefore not shared.

If the Children's Act is interpreted expansively to include adult dependent children in respect of their maintenance claims upon their parents' divorce, such claims could accordingly be dealt with by their parents in parenting plans (in terms of sections 33–35 of the Children's Act) together with minor siblings' maintenance claims and arrangements regarding the minor children's guardianship, care and contact.

Section 33(3) makes it clear that a parenting plan may determine any matter in connection with parental responsibilities and rights, including:

"(a) where and with whom the child is to live;
(b) the maintenance of the child;
(c) contact between the child and –
  (i) any of the parties; and
  (ii) any other person; and
(d) the schooling and religious upbringing of the child".

It is therefore my submission that parents should be allowed to deal with their adult dependent children's maintenance needs and arrangements regarding their schooling in a parenting plan entered into upon divorce. The reason for my eagerness to incorporate the maintenance claims for these children in a parenting plan is so that the schooling, housing arrangements and maintenance claims of adult and minor siblings could be dealt with together. As indicated above (para 2), all these issues are intrinsically linked together. It is therefore imperative that they should be considered holistically. Preferably they should also be dealt with in one plan. Where a parenting plan is concluded upon divorce there should in my opinion be no bar to dealing with the maintenance claims, schooling and housing of all children born from the marriage – minor and major – in such a

plan. However, there is no need to incorporate adult dependent children's maintenance claims in a parenting plan where they have no minor siblings or where their minor siblings' best interests are not addressed in a parenting plan. (It should be borne in mind that section 33(1) and (3) of the Children's Act does not require a parenting plan in all cases where parties with children get divorced.)

Since section 34(1)(a) requires a parenting plan to be in writing and to be signed by the parties to the agreement, making the adult dependent children parties to the agreement could be considered, although I do not think this would even be necessary since section 33 clearly gives the parents the authority to make arrangements on any aspect of parental responsibilities and rights in a parenting plan and, as submitted above, that includes the maintenance claims and also the schooling of adult dependent children if the Children's Act is interpreted in a proper and purposive manner. Even if the dependent adult child's signature is required, it sends out a much better message if an adult dependent child is made a party to a parenting plan upon his or her parents' divorce instead of such adult child being joined in the adversarial divorce proceedings or instituting his or her own maintenance claim in the maintenance court, where most elements of the adversarial system of litigation still apply (see para 1 above).

In this regard it is also significant to note that the Children's Act very specifically mandates mediation, or at least a process which is less confrontational and more conducive to conciliation and problem-solving, where the conclusion of parenting plans is concerned (De Jong "Opportunities for mediation in the new Children's Act 38 of 2005" 2008 *THRHR* 630 631–633). Section 33(2) read with section 33(5) provides that the co-holders of parental responsibilities and rights in respect of a child who are experiencing difficulties in exercising their responsibilities and rights should first seek to agree on a parenting plan by attending mediation through a social worker or other suitably qualified person, or by obtaining the assistance of a family advocate, social worker or psychologist. In the informal, private and unthreatening atmosphere of the mediation process (for the features and suitability of the mediation process see De Jong "A pragmatic look at mediation as an alternative to divorce litigation" 2010 *TSAR* 515 518–522 and "Giving children a voice in family separation issues: A case for mediation" 2008 *TSAR* 785 787–789) adult dependent children should negotiate their maintenance claims in the presence of both their parents and even other minor siblings who also have a right to participate in the process in terms of section 10 of the Children's Act.

There may even be a need for the formal amendment of the Children's Act so as to specifically include the maintenance of adult dependent children within its ambit despite the unambiguous definition of a "child" (section 1(1)). Such an amendment would not be unacceptable or impermissible as the present position is that in limited cases the Children's Act is explicitly made applicable to children over the age of 18. For example, section 176(2) permits a child in alternative care to remain in that care until his or her twenty-first birthday in order to complete his or her education or training. However, until such time as the Act is amended, a proper and purposive interpretation of the Act as advocated above should be followed so as to allow divorcing parties to deal with all their children's maintenance needs, including those of their adult dependent children, in a parenting plan.

5 Conclusion

It is therefore my opinion that in general adult dependent children should not be joined as parties in divorce proceedings to institute their own separate maintenance claims. Along with minor siblings, they should merely participate in the mediation process in which the terms of a parenting plan are negotiated. If divorcing parties no longer have any minor children or where they do not conclude a parenting plan which regulates their parental responsibilities and rights in respect of their minor children, adult dependent children's maintenance claims could also be dealt with in the settlement agreement between the parties. In circumstances where their parents cannot agree on a parenting plan or a settlement agreement, the parent with whom an adult dependent child resides should be able to institute a maintenance claim on behalf of such child in the divorce summons. This was advocated in *JG* where Symon AJ said that "[i]n my opinion, the discretionary and empowering provisions of these sections of the Divorce Act [sections 6 and 7] are sufficiently wide to enable a court, *on divorce* [my emphasis], to make an order directing the one spouse to pay amounts to the other spouse in respect of expenses incurred to maintain the major, but dependent, child" (para 31). Such an approach would ensure that mothers are not further prejudiced upon divorce and that both parents fulfil their common law duty of support in respect of their children. It would also save school-going children or students from the negative repercussions of having to institute their own maintenance claims upon or after their parents' divorce.

M DE JONG
University of South Africa

FORMALITEITSVOORSKRIFTE (OF GEBREK DAARAAN) INGEVOLGE DIE NASIONALE KREDIETWET 34 VAN 2005

1 Inleiding

Verbruikerskredietwetgewing (synde wetgewing wat verbruikers wat goedere koop of huur, dienste bekom of geld leen ingevolge 'n kredietooreenkoms teen die kontraktuele en finansiële implikasies van sodanige ooreenkomste beskerm) in Suid-Afrika (selfs voor Republiekwording) het oor die jare heen formaliteitsvoorskrifte (ook "vormvereistes" of "formaliteite") neergelê waaraan 'n kredietooreenkoms moes voldoen. Dieselfde geld die Wet op Vervreemding van Grond 68 van 1981 ("Wet op Vervreemding van Grond") en die voorgangers daarvan wat insgelyks as verbruikerskredietwetgewing kwalifiseer (Diemont en Aronstam *The law of credit agreements and hire-purchase in South Africa* (1982) 365ff; Grové en Otto *Basic principles of consumer credit law* (2002) 5–6 103ff en Otto en Otto *The National Credit Act explained* (2013) 3). Die verbruikerskredietwetgewing wat tans in Suid-Afrika aanwending vind, is die "National Credit Act" 34 van 2005 (die Nasionale Kredietwet) en die Wet op Vervreemding van Grond (Otto in Scholtz (red) "Commentary" *Guide to the National Credit Act* (2008) (laaste opdatering 2012) par 1.3.4; Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005* (LLD-proefskrif UP 2012) 16 327).