

**AN ANALYSIS OF THE EFFECTS OF MARRIAGE, DIVORCE  
AND DEATH ON THE CHILD MAINTENANCE OBLIGATION  
IN SOUTH AFRICAN LAW WITH SOME COMPARATIVE  
PERSPECTIVES**

A thesis submitted in fulfilment of the  
requirements for the degree of

**DOCTOR OF PHILOSOPHY**

of

**RHODES UNIVERSITY**

by

**BRIGITTE CLARK**

November 1999

---

## ABBREVIATIONS

CILSA	Comparative and International Law Journal of Southern Africa
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg or Journal of Contemporary Roman Dutch Law
TSAR	Tydskrif vir die Suid Afrikaanse Reg/ Journal of South African Law
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
CSA	Child Support Agency (England)
CRC	United Nations Convention on the Rights of the Child
CSG	Child Support Grant

## **ABSTRACT**

This thesis analyses the law of child maintenance in South Africa with particular reference to the effects of marriage, death and divorce on such an obligation. In the introductory section, the types of South African family are demographically and statistically sketched, from a socio-legal perspective with some reliance on interdisciplinary research to assess the prevalence of the AID/HIV epidemic in South Africa, and the effects of poverty and ageing on the incidence of marriage and death.

In the second part of the thesis, the parental child maintenance obligation is analysed in the common law context. The effects of serial marriage and artificial conception are also analysed with regard to their effect on the concept of biological parent. The nature and definition of parenthood is examined and the diverse and fluid nature of parenthood in South African society is stressed, particularly in relation to children's welfare. One of the aims of the thesis is to indicate how parenthood refers to a fluid set of social practices which are both biologically and culturally situated and thus have a complex effect on the maintenance obligation. The procedural problems of enforcement are also analysed in the light of recent amendments to the law in terms of the Maintenance Act 99 of 1998 (not yet in force) and some further proposals for reform in this area are proposed.

The third part of the thesis examines the state obligation to maintain children, especially in the light of the state's commitments to children in terms of the Constitution of the Republic of South Africa Act (108 of 1996) and its international commitments in terms of the United Nations Convention on the Rights of the Child which was ratified by the South African government on 16 June 1995.

In the fourth part of the thesis, there is some comparative analysis, firstly, of the procedural law reforms proposed in Namibia as a result of detailed research done there. Secondly, alternative methods of assessing and enforcing child maintenance obligations in Australia and England are examined and briefly assessed in relation to their possible implementation and efficacy in a South African context.

Finally, the thesis concludes with an overall synopsis of the position in this country and some proposals for reform in the light of the international and constitutional commitments of the state.

\*\*\*\*\*

## TABLE OF CONTENTS

Preface	<i>i</i>
---------	----------

### **Part 1** **Introduction**

Introduction: Scope and Objectives of the Thesis .....	1
--	---

Chapter 1	Types of South African Family: a Demographic and Statistical Analysis	
1.1	Statistical Analysis .....	7
1.2	Poverty and Ageing in South Africa .....	13
1.3	The Impact of the AIDS/HIV Epidemic on South African Children.....	14
1.4	Patriarchy in South Africa .....	17
1.5	A Complex and Diverse Society.....	18

### **Part 2** **Child Maintenance Obligations in Private Law**

Chapter 2	The Duty of Child Support During Marriage and After Divorce	
2.1	An Overview .....	20
2.2	Spousal Maintenance .....	22
2.3	Child Maintenance Obligations	
2.3.1	Introduction .....	30
2.3.2	Scale and Extent of Support .....	33
2.3.3	Child Maintenance on Divorce .....	38
2.3.4	The Duty of Support of the Child Conceived by means of Artificial Insemination or Surrogate Motherhood .....	41
2.4	Conclusion .....	47
Chapter 3	Duties of Child Support After Death of Parents or Loss Due to Deprivation of Support by Third party	



3.1	Duty of Support of Deceased Estates .....	50
a)	The Nature and Extent of the Claim .....	50
b)	Child's Claim .....	52
3.2	Loss of Support due to Third Party Negligence .....	54
a)	Nature of the Claim .....	54
b)	Women married in terms of Customary Law .....	59
c)	Women married according to Muslim or Hindu rites .....	61
Chapter 4	The Duty of Support in terms of Customary Law and Marriages by Islamic or Hindu Rites	
4.1	Customary Law .....	67
4.2	Hindu or Muslim Law .....	74
4.3	Conclusion .....	75
Chapter 5	Enforcement of the Duty of Support	
5.1	Introduction .....	79
5.2	Criminal Prosecution .....	80
5.3	Imprisonment .....	82
5.4	Garnishee Orders and Other Remedies .....	84
5.5	Maintenance Orders: The Present Operation of the System in South Africa	85
5.5.1	Lack of Specialised Personnel .....	87
5.5.2	Procedure .....	89
5.5.3	Definition of a Maintenance Order .....	90
5.5.4	Types of Orders .....	91
5.5.5	Tracing Liable Persons .....	95
5.5.6	Enforcing Payment .....	96
5.6	Foreign Maintenance Orders .....	102
5.7	Further Proposals for Reform .....	104
5.7.1	Court Administration .....	104
a)	Shortage and Training of Personnel .....	104
b)	Recovery of Arrears and Delays .....	104
c)	Standardisation and Simplification of Summons Procedure .....	105
d)	Conditions at Courts .....	106

e)	Allegations of Corruption .....	106
f)	Mechanisms for Enforcement .....	107
g)	Emergency Maintenance Fund .....	108
5.7.2	Family Courts .....	108

### **Part 3**

#### **The Duty of the State to Provide for Children**

Chapter 6	State Maintenance for Children in South Africa	
6.1	Introduction .....	118
6.2	The South African Social Security System - its History and Development	118
6.3	The Lund Committee on Child and Family Support .....	123
6.4	Child Support Grants .....	124
6.5	The Overall System of Child Grants .....	129
6.6	Future Changes in the Demand for Grants and Services .....	133
6.7	Proposals for Reform .....	136

### **Part 4**

#### **Comparative Perspectives**

Chapter 7	The Australian Child Support Scheme	
7.1	Introduction .....	148
7.2	Main Features of the Child Support Scheme.....	150
7.3	Assessment by means of a Formula .....	154
7.4	The Court's Jurisdiction .....	160
7.5	Evaluations of the Scheme .....	161
7.6	Conclusion .....	167
a)	The Agency as a mechanism for providing financial support .....	167
b)	The Position of Custodian and Non-custodian Parents .....	169
c)	The Social Security Context .....	172
Chapter 8	Child Support Legislation in the United Kingdom	
8.1	Introduction .....	175
8.2	The Background: The Finer Committee of 1974 .....	176

8.3	The English Child Support Act of 1991 .....	181
8.4	The Child Support Scheme of 1991 compared with the proposals of the Finer Committee .....	189
8.5	Child Support Act 1995 .....	191
8.6	Compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms by the Child Support Agency .....	198
8.7	Conclusion .....	202
	a) The Child Support Agency - a monumental failure? .....	202
	b) Green Paper - reform? .....	205
Chapter 9	Namibian Maintenance Law and its Enforcement	
9.1	Introduction .....	210
9.2	A Summary of Maintenance Procedure in Namibia .....	213
9.3	Reciprocal Enforcement of Maintenance Orders .....	214
9.4	State Maintenance Grants .....	217
9.5	Some Research Findings .....	219
	a) Shortage of personnel .....	219
	b) Number of children for whom maintenance is sought .....	220
	c) Ages of children for whom maintenance is sought .....	221
	d) Relationship between complainant and respondent .....	221
	e) The termination of the support .....	222
	f) Amounts of maintenance sought .....	223
	g) Use and effectiveness of subpoenas or summons .....	223
	h) The high incidence of consent agreements .....	225
	i) Comparison between consent agreements and orders resulting from enquiries .....	225
	j) Private consent agreements .....	226
	k) Legal representation .....	227
	l) Postponements .....	227
	m) Warrants and arrests .....	228
	n) Time lapse between arrears and issue of first warrant .....	231
	o) Time lapse between issue of warrant and successful arrest .....	231
	p) Low incidence of Criminal Proceedings .....	232
	q) Sentencing .....	233

r)	Garnishee orders .....	235
9.6	Suggestions for Law Reform .....	235
9.7	Conclusion .....	246

## Part 5 Synopsis

Chapter 10	Conclusions	
10.1	Judicial Maintenance .....	247
a)	Complexity of the Issues .....	247
b)	Feminisation of Poverty .....	248
c)	Costs of Child-rearing .....	250
d)	Spousal Support .....	252
e)	Equality.....	255
f)	Guidelines .....	260
g)	Changing Concepts of Parenthood .....	266
h)	Conditioning of Child Support on Access and Termination of Parental Responsibilities .....	269
10.2	State Maintenance .....	272

## Bibliography

1	Articles and Chapters .....	<i>i</i>
2	Books .....	<i>xiii</i>
3	Statutes, Bills, Commission Reports and Government White and Green Papers .....	<i>xvi</i>
4	Case Law .....	<i>xxii</i>

## PREFACE

The issue of child maintenance is one of the most critical issues in this country, affecting the daily lives of many, particularly women and children. In the past ten years, since I commenced my research in this field, the demand for the reform of the law in this regard has become ever more insistent in the light of the probable effects of AIDS on the children of this country and the constitutional and international commitments of the South African government since 1994. Which model could South Africa adopt, in the light of severe financial constraints? The diversity and fluidity of family life and experience in this country complicate the issue still further and there is no ideal solution to which the country may steer in order to improve the lot of the majority of its children. Furthermore, how does one assess the constitutional entrenchment of a set of justiciable human rights within the South African domestic legal system? The Bill of Rights of the 1996 South African Constitution integrates a comprehensive range of economic and social rights with civil and political rights and all these rights are subject to judicial enforcement (see section 38 of Act 108 of 1996). This represents a far-reaching commitment at the domestic level to the interdependence and indivisibility of all human rights. The South African Constitution entrenches children's socio-economic rights: the obligation of the State in relation to these rights is not qualified by reference to 'progressive realisation and resource constraints'. The courts have indicated that the positive duties in these basic rights will be enforced<sup>1</sup> This has enormous implications for the duty of support in respect of destitute children and, especially in the light of the AIDS/HIV crisis, will have major repercussions on the state's obligation to support children. It was an examination of the implications of these obligations which provided the spur for this thesis.

I wish to express my deep gratitude to Mrs Sandy Scrivener, without whose unfailing assistance in every way, this thesis would not have been possible. I also owe a debt of gratitude to my dear friend, Dodie Springer, who listened and supported me through the months leading up to the submission of this thesis. I also wish to thank my supervisor, Professor Ivan Schäfer for 'burning the midnight oil' on my behalf and for his help and encouragement. Finally, I wish to thank my children for tolerating an often abstracted mother,

*Page i*

---

<sup>1</sup> See Sandy Liebenberg National Implementation of Economic and Social Rights (1999) (Community Law Centre) (unpublished paper).

and my husband for always listening and encouraging.

Research for this thesis was undertaken in the law libraries at the University of Cape Town, the Grahamstown High Court, Rhodes University, the University of Western Australia, the Library of the Family Court in Melbourne (per kind favour of Margaret Harrison). A particular debt is due to Mrs Ria Greaves, the law librarian at Rhodes University, who was always ready and willing to track down a book or journal for me with unerring success.

The law is stated as at 15 October, 1999.

Brigitte Clark  
Grahamstown  
October, 1999.

## PART ONE INTRODUCTION

### 1 *Scope and Objectives of the Thesis*

This thesis aims to examine private and state maintenance law in the context of South African society. In particular, the effects of divorce and death on the child maintenance obligation are examined, firstly, in relation to changing concepts of parenthood due to advances in medical technology<sup>1</sup> and the increased prevalence of serial marriage and restructured families<sup>2</sup>; secondly, in relation to the probable effects of the HIV/AIDS pandemic and, thirdly, in relation to South Africa's commitment to the rights enshrined in the Constitution,<sup>3</sup> and international conventions and covenants which have been ratified by the South African government. Child maintenance legislation or laws, in some cases, provide the only significant legal responsibilities of parents,<sup>4</sup> and, in many first world states, such laws have been viewed as 'welfare cost-saving schemes', rather than any expressions of commitment to the surviving post-divorce responsibilities of parenthood.<sup>5</sup> It has been argued that the terminology utilized by the law is merely a rhetorical and convenient justification for the imposition of such an obligation.<sup>6</sup> In the case of the natural father of an extra marital child, such an argument is convincing, since in South African common law such person has no inherent rights to his child as only the mother (or her guardian if she is a minor)<sup>7</sup> is clothed with parental authority.<sup>8</sup>

---

<sup>1</sup> Advances in medical technology and the use of artificial insemination techniques combined with surrogacy have led to complex procreation with up to six persons being able to claim parenthood either biologically, gestationally or socially.

<sup>2</sup> In Canada, for example, the concept of parenthood has been extended beyond its traditional legal meaning to include any person standing *in loco parentis* to a child. Section 2 (2) of the Divorce Act, SC 1967-8c24. This broader definition governs child support obligations.

<sup>3</sup> Section 28 of Constitution of the Republic of South Africa Act 108 of 1996.

<sup>4</sup> See John Eekelaar and Mavis Maclean *The Parental Obligation* (1997).

<sup>5</sup> See Lynn D Wardle 'Evolving Rights and Duties of Step-parents: Making New Rules for New Families' in *Parenthood in Modern Society* (1993) edited John Eekelaar and Petar Sarcevic 375 at 391.

<sup>6</sup> See Wardle *ibid*.

<sup>7</sup> See Section 3 of Children's Status Act 82 of 1987.

<sup>8</sup> See *Bethel v Bland & Others* 1996 (2) SA 194 (W).

In terms of its international conventions and covenants, the South African Government has assumed certain international obligations relating to child support. The International Covenant on Economic, Social and Cultural Rights<sup>9</sup> recognises the right of every person to social security, including social insurance. South Africa's signature of this treaty requires it to review all policy and law to ensure compliance when ratification eventually takes place.<sup>10</sup> States that have ratified the Covenant are required to report to the United Nations on the measures which they have adopted and the progress they have achieved in the observance of the rights guaranteed under the Convention.<sup>11</sup> Furthermore, the right to social security is contained in the United Nations Convention on the Rights of the Child (CRC), which recognises the right of every child to benefit from social security.<sup>12</sup> South Africa ratified the convention in 1995 and is accordingly bound to comply with the obligations contained therein.<sup>13</sup> The CRC further stipulates the right of every child to an adequate standard of

---

<sup>9</sup> The covenant was adopted by the United Nations on 3 January 1966 and brought into effect in 1976. It was signed by the South African government on 3 October 1994.

<sup>10</sup> It was due to be ratified on 10 December 1998 and cabinet has approved ratification, but to date this has not yet been effected due to technical problems.

<sup>11</sup> Article 11 of the Covenant requires the continuous improvement of living conditions. See too General Comment No 3 on the nature of State Parties' obligations, adopted by the Committee on Economic, Social and Cultural Rights during its fifth session (1990) UN doc E/199/23, 10; Catarina Krause 'Lowering of Social Security Standards under International Human Rights Law' (unpublished paper); Sandra Liebenberg 'The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa' (1995) 11 *South African Journal on Human Rights* 359.

<sup>12</sup> Article 26.

<sup>13</sup> This Convention was ratified by the South African government on 16 June 1995. See Julia Sloth Nielsen 'Ratification of the United Nations Convention on the Rights of the Child: some Implications for South African Law' (1995) 11 *South African Journal on Human Rights* 401. See too Julia Sloth-Nielsen 'Chicken soup or chain saws: some implications of the constitutionalisation of children's rights in South Africa' in *Children's Rights* (ed R Keightley) (1996). The implementation by states of socio-economic rights can be problematic. Article 4 of the Convention provides that: 'With regard to economic, social and cultural rights, State Parties shall undertake such measures to the maximum extent of the available resources and, where needed, within the framework of international cooperation'. This clause allows for a measure of flexibility in the implementation of the rights contained in the Convention which is particularly useful for poorer states with limited human, economic and organisational resources. However, in a General Comment on article 4, the United Nations Committee on Social, Economic and Cultural Rights determined that in order for a State Party to be able to attribute its failure to meet its minimum core obligations to a lack of available resources, it must show that every effort has been made to use all resources that are at its disposal. It has also been suggested that to avoid article 4 being used as an escape clause for poorer countries, State Parties should be made accountable by requiring them to set time-bound objectives, with corresponding strategies, programmes, budgets and measurement mechanisms for assuring a



living.<sup>14</sup> Although the primary responsibility is placed on parents for the upbringing and development of the child,<sup>15</sup> State Parties are enjoined 'within their means' to take appropriate measures to assist parents and others responsible for the child to implement this right and, in cases of need, are required to provide material assistance and support programmes.<sup>16</sup> Furthermore, State Parties are obliged to take all appropriate measures to secure the recovery of maintenance for the child both from within the country and abroad.<sup>17</sup>

In 1993, the South African government signed four international human rights conventions relating to women.<sup>18</sup> Of these, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is the most comprehensive.<sup>19</sup> CEDAW guarantees the right to women to benefit from social security programmes<sup>20</sup> and expresses concern that women and particularly rural women, in situations of poverty have the least access to food, health and training and employment.<sup>21</sup> CEDAW requires States Parties to encourage the provision of social services to enable parents to combine family obligations with work responsibilities, in particular through promoting child-care facilities and to accede to women

---

minimum set of children's rights. See Robert J Ledogar 'Realising Rights Through National Programmes of Action for Children' in Himes *Implementing the Convention of the Rights of the Child* 55. The implementation mechanism for the Convention is a National programme of Action (NPA) by each ratifying state. In 1995 the government established a committee to oversee the development of a NPA for South Africa.

<sup>14</sup> Article 27.

<sup>15</sup> Articles 5; 18 and 27 (1) and (2) of the Convention on the Rights of the Child, especially in relation to the child's physical, spiritual, moral and social development.

<sup>16</sup> Article 27 (3) of the Convention on the Rights of the Child.

<sup>17</sup> Article 27 (4) of the CRC.

<sup>18</sup> The Convention on Political Rights of Women of 1953, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 1962, Convention on the Nationality of Married Women of 1957 and the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) (1979).

<sup>19</sup> The Convention was adopted by the United Nations General Assembly in 1979 and entered into on 3 September 1981. South Africa became a signatory on 29 January 1993 (GN 158 of 1993). Parliament agreed to ratification on 13 September 1995 and this followed in January 1996.

<sup>20</sup> Article 14 (2) (c).

<sup>21</sup> See Article 14 (2).

equality with men before the law.<sup>22</sup> Poverty is most frequently found in single-parent households headed by women.<sup>23</sup>

From a domestic perspective, the Constitution of South Africa bestows upon children the right to basic nutrition, shelter, basic health care and social services.<sup>24</sup> The phenomenon of child poverty is widespread in South Africa.<sup>25</sup> Internationally, challenges have been directed against basic assumptions regarding maintenance obligations.<sup>26</sup> These challenges ultimately lead to state assumption of some degree of financial responsibility for all dependent spouses and children, for restructuring of the social support system and an increase in the degree of state involvement in the procedure of maintenance enforcement. In South Africa, the widespread prevalence of inadequate, irregular or unfulfilled maintenance obligations is often attributable to an increasing inability to meet support obligations due to poverty or other family commitments.<sup>27</sup> Welfare programmes in South Africa have tended to be fragmented and of a varied standard, with levels of financing traditionally having been dependent on race: the result has been a proliferation of diversely grouped and equipped organizations, operating under divergent principles and cultures.<sup>28</sup> Rural families have suffered particularly from a lack of access to resources and services.<sup>29</sup> Responsibility for social legislation has been placed in the

---

<sup>22</sup> Articles 11 (2) (c) and 15 (1).

<sup>23</sup> It is estimated that 56 percent of South African women 15 years and older are without income of any sort. See Annual Report of the Commission on Gender Equality (1998-9) 38. World Bank/SALDRU (October 1995) *Key Indicators of Poverty in South Africa* 3-4; 6-7.

<sup>24</sup> Section 28 (1) (c) of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>25</sup> See Francis Wilson and Mamphela Ramphele *Uprooting Poverty* (1989) (David Philip) (Cape Town).

<sup>26</sup> John Eekelaar & Mavis Maclean *Maintenance after Divorce* (1986) 107-112; Martha Minow 'Rights for the next Generation: a Feminist Approach to Children's Rights' (1986) 1 *Harvard Women's LJ*; Harry Krause 'Child Support reassessed: Limits of Private Responsibility and the Public Interest' (1989) 2 *Univ of Illinois LR* 367 at 392.

<sup>27</sup> See Brigitte Clark 'Children's Right to Support: A Public Responsibility?' in *Children's Rights* (ed. R Keightley) (1996) 82 at 86.

<sup>28</sup> The National Department of Welfare and Population Development maintains overall responsibility for control of statutory social services.

<sup>29</sup> See Sandra Burman and Shirley Burger 'When Family Support Fails: the Problems of Maintenance Payments in Apartheid South Africa Part II' (1988) 4 *SAJHR* 334 at 346.

hands of voluntary welfare organisations,<sup>30</sup> and the South African Government has regularly subsidised community groups to undertake approved social services. In the past, the subsidy structure was used to promote the racial separation of social services, and the division of such services according to religion and culture was also actively promoted. A divided social-service system emerged, with the availability of services becoming dependent upon community initiative from and for particular groups, and on the availability of state or private sector support, rather than on any holistic plan to ensure that everyone had access to the necessary services.

Furthermore, the major problem for the custodial parent is not simply to obtain a fairly-assessed maintenance order against the liable parent, but to ensure that the order is able to be enforced.<sup>31</sup> Inefficacy is a universal problem of traditional maintenance enforcement. The reasons for failure are not only financial inability, but also, at times, negative feelings towards the custodial parent. Factors such as the earnings potential of the obliged parent, his or her ability to borrow, the existence of other dependents of the obliged parent, special hardships of the obligor might affect his or her ability to pay. From a practical perspective, there are two basic approaches to determining child support: a discretionary case by case method; and a formula method based on calculations involving the non-custodial parent's income. Both these approaches will be examined in the context of a comparative survey of Australian, English and Namibian maintenance law and reform.

If South African maintenance law is to serve the child's best interests and to meet its international and constitutional commitments, it needs firstly, to acknowledge the growing

---

<sup>30</sup> See South African Law Commission 'Review of the Child Care Act 74 of 1983' *First Issue Paper* [18 April 1998] 33.

<sup>31</sup> South African Law Commission Project 100 Issue Paper 5 (1997). The issues discussed in the paper range from the shortage of human resources to the orders made by maintenance courts and their enforcement. The Law Commission explains various options for reform including the introduction of administrative procedures to enforce maintenance payments, the separation of the offices of public prosecutor and improving execution procedures. cf Department of Justice Discussion Paper 'Maintenance Law Reform: The Way Ahead' (1997) and the Maintenance Act 99 of 1998.

diversity and multiplicity of family forms which exist;<sup>32</sup> secondly, to recognise the advances made by medical technology in the area of procreation<sup>33</sup> and, lastly, to improve the enforcement of its laws, the accessibility of its courts and the expertise of its judicial officers.

---

<sup>32</sup> See Sinclair (assisted by Heaton) *Law of Marriage* volume 1 (1996) 305; See too South African Law Commission 'First Issue Paper 13 on the Child Care Act 74 of 1983' (Project 110) (1998) para. 2.1.

<sup>33</sup> Denise Meyerson 'Surrogacy Agreements' in *Gender and the New South African Law Order* (1994) (edited Christina Murray) 121 at 122-3; Section 1 of the Human Tissue Act 65 of 1983.

## CHAPTER 1

### TYPES OF SOUTH AFRICAN FAMILY: A DEMOGRAPHIC AND STATISTICAL ANALYSIS

#### 1.1 *Statistical Analysis*

Until recently the South African family has not enjoyed a high political or public profile. This is reflected in the relatively underdeveloped state of family sociology in this country. Despite efforts by the Human Sciences Research Council (HSRC),<sup>1</sup> there is no well-documented study of family life in South African society as a whole. This situation is complicated by the fact that due to a problematic definition of the family and the exclusion of certain key areas, census data have been inadequate for the identification of household composition patterns. However, in 1994, a process of reassessment of almost every sphere of South African society began. The practical manifestation of this has been the publication of a large number of green papers, white papers and legislation which may have an effect on families in South Africa.<sup>2</sup>

South Africa has a population of about 40 million just over half of whom<sup>3</sup> live in urban areas. The South African economy is categorized as a medium income country and as having a human development index that is also in the middle range.<sup>4</sup> It is somewhat ironic that the government has decided to retain the racial classification system which was the basis of the previous regime. It would appear that this has been done for various reasons,<sup>5</sup> firstly, there is a correlation between population group membership and various indicators of socio-economic status; secondly, to monitor changes in this regard;<sup>5</sup> and thirdly, as a means of implementing

---

<sup>1</sup> In the 1980's the HSRC initiated a programme on marriage and family life which was published in the form of monographs.

<sup>2</sup> See Recognition of Customary Marriages Act 120 of 1998, Maintenance Act 99 of 1998; Ministry for Welfare and Population Development Draft White Paper 'A Population Policy' (August 1997).

<sup>3</sup> 55%.

<sup>4</sup> 0.716 in 1994. As such, it ranks with countries like Indonesia, Brazil and Turkey.

<sup>5</sup> Ministry for Welfare and Population Development Draft White Paper 'A Population Policy' (August 1997.)

recently-passed affirmative action legislation.<sup>6</sup> The table below sets out the relative distribution of the various population groups and some indicators of socio-economic status:

Table 1

POPULATION GROUPS: HUMAN DEVELOPMENT INDEX AND CHANGES IN PROPORTION OF TOTAL INCOME				
	PROPORTION OF POPULATION(1)	HUMAN DEVELOPMENT INDEX(2)	PROPORTION OF TOTAL INCOME	
			1985	1994
ASIAN	3%	0.836	3.6%	4.0%
BLACK	76%	0.500*	44.5%	38.5%
COLOURED	9%	0.663	8.1%	8.9%
WHITE	13%	0.901**	56.2%	48.6%
(1) October Household Survey, 1995 (Central Statistical Survey (2) E Sidiropoulos <i>et al</i> , SA Survey 1997/8 SA Institute of Race Relations				
* Similar to that for the Maldives, Zimbabwe and Namibia ** Similar to that for New Zealand, Australia, the United States and Japan				

The majority of South Africans follow a domestic life cycle involving both nuclear and extended family living. These account for just under eighty percent of households: it is quite rare for South Africans generally to live either alone, with a spouse only or in a single parent family arrangement. There are, of course, significant differences by population group, the table below most closely resembles the experiences of Black South Africans among whom rates of extended family living are even higher than the average for the society<sup>3</sup> as a whole.

---

<sup>6</sup> See Employment Equity Act 55 of 1998.

Table 2<sup>7</sup>

HOUSEHOLD STRUCTURES IN URBAN SOUTH AFRICA					
	ASIAN	BLACK	COLOURED	WHITE	TOTAL
SINGLE PERSON	1.1	0.7	2.1	14.9	2.7
COUPLE	5.4	2.9	5.7	23.9	6.0
NUCLEAR	55.1	36.9	40.1*3	46.3	38.9
SINGLE PARENT	6.3	10.6	11.3	5.1	9.8
EXTENDED	30.5	44.6	37.6	6.9	38.8
OTHER	1.6	4.4	3.2	2.9	3.9
TOTAL*	100	100	100	100	100
*May not add up to 100 due to rounding					

The survey on which this data is based only included urban areas: one covering the entire country would probably yield much higher rates of extended family arrangements, particularly among Black South Africans. At the other extreme are White South Africans, amongst whom extended family arrangements are very unusual, while living alone or with a spouse only is quite common. It is evident that the family patterns of Asian and 'Coloured' communities fall somewhere in between these extremes.

The extended family may be used loosely to cover all household arrangements which include individuals other than those who make up the nuclear family, which may be defined as a family unit consisting solely of a married man and woman and their offspring.<sup>8</sup>

<sup>7</sup> Both Tables 2 and 3 are as cited by SC Ziehl 'Social Class and Household Structure' (1994) 24 *South African Journal of Sociology*.

<sup>8</sup> See Kate Standley *Cases & Materials on Family Law* (1997) 5.

Amongst Black South Africans, the most common would be grandparent or grandparents living with a nuclear family,<sup>9</sup> but there are also instances of a married couple living with a sibling of one of the spouses.<sup>10</sup> There appears to be a direct relationship between rates of extended family living and socio-economic status. However, these communities are also differentiated by cultural pre-dispositions and it is more likely that in the case of Black South Africans, poor material conditions combine with cultural emphasis on strong extended family ties to produce relatively high levels of extended family arrangements while the opposite is true of White South Africans.<sup>11</sup> In a nation-wide study based on a representative sample of South African youth,<sup>12</sup> it was found that 80% of Black and Coloured respondents agreed or strongly agreed with the statement that young people 'have a duty to look after their relatives' compared with only 56% of White youth. The respective figure for the total sample was 77%.<sup>13</sup>

The nuclear family represents a relatively large proportion of households, but only in the urban

<sup>9</sup> 64% of all extended families and 29% of all households.

<sup>10</sup> Table 3 (See SC Ziehl 'Social Class and Household Structure' (1994) 24(5) *South African Journal of Sociology* 101.)

TYPES OF EXTENDED FAMILY ARRANGEMENTS (As a proportion of all Extended families)				
	ASIAN	BLACK	COLOURED	WHITE
THREE GENERATIONAL	39	64	53	18
NUCLEAR FAMILY & RELATIVE (Two generational)	48	21	31	49
COUPLE AND RELATIVE	7	5	7	18
SINGLE PARENT & RELATIVE	7	5	7	18
TOTAL*	100	100	100	100
* May not add up to 100 due to rounding				

<sup>11</sup> SC Ziehl 'Social Class and Household Structure' (1994) 24(5) *South African Journal of Sociology* 101.

<sup>12</sup> 16 to 30 years of age.

<sup>13</sup> D Everatt and M Orkin 'Families should stay together: inter-generational attitudes among South African youth' (1994) 3(2) *South African Journal of Gerontology* 43-48.



communities. South Africans of different cultural and socio-economic backgrounds follow different domestic life cycles, but the nuclear family is common to all of them. Many adult South Africans are or have been married. A surprisingly high level of support is expressed for 'the family'.<sup>14</sup> However, the propensity to marry is lower among South Africans than is the case in more developed societies.<sup>15</sup> This is particularly relevant in the case of Black South Africans, not only because of a relatively low *per capita* income, but also because of the practice of lobola (bride wealth), which customary practice involves the transfer of wealth, traditionally measured in head of cattle, from the family of the groom to the family of the bride and symbolic of the value attached to children and their labour; a compensation to the family of the bride for the loss of control over their daughter and her offspring. It is also the means by which children are incorporated into the kin group of the father. Lobola is frequently cited as the reason for pre-marital cohabitation and pregnancy.<sup>16</sup>

South African and African surveys have illustrated that responsibility for a child<sup>17</sup> is not always synonymous with biological parenthood.<sup>18</sup> The significance in other jurisdictions of the need to strike a balance between the welfare principle of the duty of the state to protect children and the philosophy of non-intervention whereby children are generally best cared for within the family with (biological) parents retaining responsibility for well-being<sup>19</sup> is of little relevance in many South African households. For some South African children, there is no one to

---

<sup>14</sup> 92% of all respondents, and a higher proportion of Black youth, agreeing or strongly agreeing with the statement "it is important that families stay together" and 82% endorsing the statement "it is important to be married before having children" (D Everatt and M Orkin 'Families should stay together' (1994) 3(2) *South African Journal of Gerontology* 43-48.)

<sup>15</sup> C Simkins 'Household Composition and Structure in South Africa' in S Burman and S Reynolds *Growing Up in a Divided Society* (1986) 16-42.

<sup>16</sup> AJ Kerr 'Claim by Widow of Customary Union for Loss of Support' (1984) 101 *SALJ* 445 at 454-456.

<sup>17</sup> In the sense of physical caring or nurturing of a child: daily custody and supervision.

<sup>18</sup> See for example Alice Armstrong 'School and Sadza: Custody and the Best Interests of the Child in Zimbabwe' (1994) 8 *Int Journal of Law and the Fam* 151 at 170; Vivienne Bozalek 'Contextualising Caring in Black South African Families' (1997) 5, *Social Politics International Studies in Gender, State and Society*; See too *Lund Committee Report* 1996 Chapter 2.

<sup>19</sup> See Janet Walker 'From Rights to Responsibilities for Parents: The Emancipation of Children' (1990) 20 *Family Law* 380; see too Andrew Bainham 'The Children Act 1989: The State and the Family' (1989) 19 *Family Law* 231.

assume the title of 'parent', whether biological or social: there may not even be any one in relation to these children, who has any intention or desire to have the title of parent.<sup>20</sup> According to the October household survey of 1996, the household location of children under seven years of revealed that seventeen per cent of children live with neither parent.

Table 1<sup>21</sup>

Household location of children under 7 years of age					
	African	Coloured	Indian	White	Total
with neither parent	18%	11%	5%	7%	17%
with mother only	43%	37%	16%	10%	40%
with father only	1%	1%	1%	0%	1%
with both parents	38%	51%	78%	83%	42%
Total	100%	100%	100%	100%	100%

With regard to children under the age of 18 years, the figures indicated not only that a slightly higher proportion of this age group is not with their parents, but also that a slightly higher proportion is with both parents.

Table 2

Household location of children under 18 years of age					
	African	Coloured	Indian	White	Total
with neither parent	22%	14%	5%	16%	20%
with mother only	38%	30%	18%	11%	35%
with father only	2%	1%	1%	1%	2%
with both parents	38%	55%	76%	83%	44%
Total	100	100%	100%	100%	100%

<sup>20</sup> See Andrew Bainham 'Changing Families and Changing Concepts: Reforming the Language of Family Law' in *The Changing Family, Family Forms and Family Law* (ed. John Eekelaar and Thandabantu Nhlapo) (1998) 153 at 171.

<sup>21</sup> The following tables were prepared by Debbie Budlender of Statistics SA. Her analysis used the October household survey of 1996. The survey covered 16 000 households across the country and the weights adjust the results to reflect the full population. (See Belinda van Heerden 'The Parent-Child Relationship' unpublished Discussion Paper (1999) for the South African Law Commission.)

## 1.2 Poverty and Ageing in South Africa

Approximately one-third of all South African households,<sup>22</sup> are living below the poverty line.<sup>23</sup> Some of the poorest households are those in rural areas headed by women.<sup>24</sup> In October 1995 nearly 23% of all Black women aged 25 and older had not received any formal education,<sup>25</sup> compared to 16% of Black men and the unemployment rate amongst African women is 50.2%, compared to 33.6% amongst African men. This disparity in the unemployment rates between men and women is reiterated amongst all race groups.<sup>26</sup> Although the South African population has historically been a 'young' one, there are indications that this is changing. Given the decline in fertility as well as the impact of AIDS, the indications are that as a proportion of the total population, the relative size of 'older' age category will increase significantly in the future.<sup>27</sup> Although life expectancy is set to decline substantially due to the impact of AIDS, this will be because of deaths in the under 30 age category where HIV infections are most prevalent.<sup>28</sup>

While the budget of the Ministry of Welfare and Population Development is small relative to

---

<sup>22</sup> About 18 million people.

<sup>23</sup> *Ministry of Welfare and Population Development White Paper for Social Welfare* (1997) 1/3).

<sup>24</sup> The mean monthly income per head in female-headed households was R243, compared to R468 for all households in 1993.

<sup>25</sup> Over a half of all households in non-urban areas are forced to fetch water from outside the household. Women are predominantly responsible for this task. The median time spent by women collecting water is 60 minutes a day. See Karrisha Pillay 'The Commission for Gender Equality: What is its Role?' in (1998) (3) *Economic and Social Rights in Africa Review* 13.

<sup>26</sup> The first South African CEDAW Country Report (1998), Part 1, 'The Economy'; see too D Budlender, 'Women and Men in South Africa' *Central Statistical Service* (1998).

<sup>27</sup> It is estimated that between the year 2000 and 2025, the growth of the 60 plus age category in Africa will be 145,7% and that it will double in only 17 years (K Kinsella and M Ferreira *Ageing Trends: South Africa* (1997); DJ Adam Chak 'Population Ageing: gender, family support and the economic condition of the older Africans' (1996) 5(2) *South African Journal of Gerontology* 3-8).

<sup>28</sup> In the case of South Africa it is projected that the percentage of the population over 60 years of age will increase from 8% in 1997 to 10.8% in 2025 (Sunday Times 10 January 1999).

some other Ministries,<sup>29</sup> it has increased significantly since the beginning of the 1990's<sup>30</sup> and it seems that pensions have become a major source of assistance to poor families.<sup>31</sup> Pensioners have thus become comparatively wealthy members of poor communities making the presence of a pensioner a critical factor in many households' well-being. In rural communities, pension income circulates widely and is crucial in combatting poverty and reducing material insecurity. It is probably the most effective social programme in targeting and reaching economically-vulnerable groups: higher Black pension levels to achieve parity among racial groups have reduced rural poverty substantially.<sup>32</sup> This is a significant factor in assessing provision of social security benefits and state maintenance for children.<sup>33</sup> Studies on poverty indicate that children in the 0-5 and 6-15 age group are the most vulnerable and experience the highest poor<sup>34</sup> and ultra poor<sup>35</sup> poverty rates in South Africa. Given the age structure, the racial composition mainly Black and the fact that approximately 70% of the poorest people live in rural areas (mainly women and children), there is adequate justification for targeting children as an entry point for the overall development and well-being of people in South Africa.

### *1.3 The Impact of the HIV/AIDS epidemic on South African Children*

Many South African children, and not only those in direct contact with an HIV infected family

---

<sup>29</sup> 9.8% of the national and provincial budget and 3% of GDP in 1997/8 compared with 21.3% and 6.5% respectively in the case of education.

<sup>30</sup> The present ministry inherited a system that was heavily biased in favour of caring for the aged. Indeed, the latter accounted for 61% of the total welfare budget which includes social pensions and residential care, in the period 1995/6.

<sup>31</sup> The Ministry of Welfare and Population Development Report (1993) indicates that 7.7 million South Africans lived in households which receive a state pension and that each pensioner supports five other individuals.

<sup>32</sup> Given the ageing of the population as well as budget constraints, the Ministry of Welfare and Population Development has embarked on a restructuring process. (Ministry of Welfare and Population Development White Paper on Social Welfare (1997) 8-15.) It furthermore regards the emphasis on government's responsibility for the care of the aged as "inappropriate" claiming that "the family is the core support system for the elderly."

<sup>33</sup> See Vivienne Taylor 'A Price on Children's Protection?' (April 1997) *Poverty Profile* 4. In 1995, only 12% was spent on children as a percentage of the total allocation of social security.

<sup>34</sup> 60%-60.9%.

<sup>35</sup> 33.3%-35.1%.

member, will be affected by this epidemic. Children may be affected directly through day to day contact with peers who have experienced personal tragedy, by sharing their homes with orphaned children or by participating in community programmes to address the needs of infected and affected community members. More pervasive will be the indirect contact with the socio-economic sequelae of the epidemic. Unless addressed now these sequelae could include deteriorating levels of education, health care, social services and economic growth. A committee of the United Nations Convention on the Rights of the Child<sup>36</sup> has recommended that States should be encouraged to adopt a children's rights centred approach to HIV/AIDS.<sup>37</sup> One of the main demographic effects will be that dependency ratios may worsen and that population age distributions and household structures will alter, leaving children increasingly in the care of the elderly and economically unproductive, since age distributions show a peak in the 20-35 year age groups.<sup>38</sup> The South African epidemic is estimated to be growing at a rate of 1500 new infections daily and the 1997 annual antenatal HIV seroprevalence survey<sup>39</sup> estimated that 17.04% of South African women were HIV positive. There have been no cases brought on behalf of HIV positive children to determine what steps the state must take to promote their right to basic health care services. In the Southern African context, almost all HIV infections in children below 13 years of age are the result of the transmission of the virus from an HIV infected mother to her baby before, during or soon after birth. The absence of effective measures to prevent maternal to child transmission of the virus means 30-35% of babies born to HIV infected women will be infected.<sup>40</sup> Moreover, up to 40% of HIV infected

---

<sup>36</sup> Ratified by South Africa on June 16 1995.

<sup>37</sup> See C Barrett, N McKerrow and A Strobe 'Consultative Paper on Children living with HIV/AIDS' (January 1999) prepared for the South African Law Commission project on the review of the Child Care Act 74 of 1983.

<sup>38</sup> N McKerrow 'The Current Status, Anticipated Sequelae and Implications of the South African HIV/AIDS Epidemic' input paper to the *Report on Poverty and Inequality in South Africa* commissioned by the Office of the Deputy President, (1998).

<sup>39</sup> At present, considerable variation exists between provinces with levels ranging from 6.3% in the Western Cape to 26.9% in KwaZulu-Natal. With time this provincial discrepancy will decrease resulting in a more uniform picture throughout the country. Department of Health *Eighth Annual National HIV Sero-prevalence Survey of Women Attending Antenatal Clinics in South Africa*, Pretoria, 1997.

<sup>40</sup> An estimated 250 000 infected newborn babies were born in South Africa between 1 January 1991 and 31 December 1997, 65 000 during 1997 alone and an estimated 120 000 children are presently HIV positive. A Nicoll, I Timaues, RM Kigadye, G Walraven, J Killewo; 'The impact

new born babies could survive beyond the age of 5, necessitating some policy of support towards such children. Probably the greatest impact of HIV/AIDS is on children who may not be HIV positive, but will be orphaned as a result of their parent's infection.

Historically, the incidence of orphaned children on a large scale has been a sporadic, short-term problem associated with war, natural disasters or disease. HIV/AIDS is transforming this into a long-term chronic problem.<sup>41</sup> Prior to the death of their parents, many children in households with HIV infected adults may start to take on adult responsibilities.<sup>42</sup> This may push the concept of parental responsibility and primary caretaker further away from that of a biological parent or even a responsible adult. In order to supplement household incomes, as in other countries in Africa, older children from rural areas will increasingly be forced to migrate to urban centres in search of greater work opportunities and frequently lose all contact with their families as they join other 'street' children.<sup>43</sup> The younger children may not only assume responsibility for more complex household chores, but also be deprived of the nurturing previously received from their parent(s) or adults. The concept of care becomes increasingly divorced from the ideological constructs of responsible biological parenthood.

New persons and structures beyond those employed by the state will need to be authorised to identify a child in need of care and protection and to include community structures and community leaders such as priests, teachers, community health workers and others.<sup>44</sup> Furthermore, new regulations will be required to provide for child care committees, and to determine their structure, composition and function. Further debate into the structure,

---

of HIV infection on mortality in children under 5 years of age in sub-Saharan Africa: a demographic and epidemiologic analysis' (1994) *AIDS* 8995-1005.

<sup>41</sup> It is estimated that by 2005 South Africa will have one million orphans whose parents have died as a result of AIDS (see Sunday Independent 19 September 1999).

<sup>42</sup> The older children may leave school to reduce household expenditure or work to supplement the household income or remain at home to care for their sick parent(s) or younger siblings.

<sup>43</sup> See S Daley 'In Zambia, the Abandoned Generation' in *New York Times*, Friday September 18 1998.

<sup>44</sup> This will require a redefinition of 'authorised officer' in Section 1 of the Child Care Act 74 of 1983, as amended.

composition and functioning of community-based models of identifying children in need of care and protection, and the links between community based structures and other structures will have to be encouraged.<sup>45</sup> In Zimbabwe, for example, the Zimbabwe Commercial Farmers Union<sup>46</sup> has developed a programme for the fostering of orphans on commercial farms. Children living on the farms or surrounding areas who become orphaned are placed with a surrogate family living on the farm. This family is responsible for providing care and meeting the day-to-day needs of these orphans whilst the farmer subsidises the stay of the children and facilitates the creation of day care facilities on his farm. In return for the expenses incurred by the farmer, some remuneration is expected from the government in the form of access to labour or tax relief.

Any proposals made to reform the South African law of child maintenance will have to deal with the issues raised by the effects of HIV/AIDS and substantial funding will need to be made available to ensure that the constitutional rights of such children are not compromised.<sup>47</sup>

#### 1.4 Patriarchy in South Africa

In South Africa, men are strongly represented in positions of power in the economy, politics and in families.<sup>48</sup> Women remain generally concentrated in those sectors and occupations that

---

<sup>45</sup> See Department of Welfare *Draft Discussion Document on Foster Care Guidelines*, August 1997, paragraph 7.1.1(a) and paragraph 7.4 recommends the formation of a Foster Care Body with the legal mandate and responsibility to protect children and to guide the process of foster care. The function of this body could possibly be expanded to assist children with other forms of placement.

<sup>46</sup> SafAIDS and the Commercial Farmers Union *Orphans on Farms: Who Cares? An Exploratory Study into Foster Care for Orphaned Children on Commercial Farms in Zimbabwe*, 1996.

<sup>47</sup> See section 28 of the Constitution of the Republic of South Africa Act 108 of 1996; see too Article 26 and 27 of the United Nations Convention on the Rights of the Child, ratified by South Africa June 1995.

<sup>48</sup> However, one of the consequences of the modernization and commercialization of lobola has been the high value placed on female education since, a more educated daughter may command a higher lobola price. In 1996 women accounted for less than 18% of administrators and managers while only 23.7% of parliamentarians were female, Ministry for Welfare and Population Development, a Draft White Paper on Population Development (1997) (14). On the other hand, educational enrolment rates proportion in each age category attending an educational institution, are high and roughly similar for boys and girls. Whereas women accounted for only 47% of university students in 1990, this had risen to 53% in 1996. (D Budlender (1998) *Women*

are poorly paid.<sup>49</sup> As far as families are concerned, the fact that many households in South Africa are female-headed has not substantially eroded the authoritarian position of men in society.<sup>50</sup> It seems that, although there is a growing discrepancy between the traditional ideology of men as bread-winners and women as confined to the roles of nurturer and homemaker, this has not led to a re-definition of gender roles in practice. On the one hand, many women do not perceive themselves as oppressed in gender terms and therefore do not acknowledge the need for a redefinition of gender roles and, on the other hand, many men do not perceive the contradiction between their public quest for democracy in the workplace and their private authoritarian roles in the family.<sup>51</sup>

### 1.5 *A Complex and Diverse Society*

The fluidity, mobility and dispersion of caring relationships in South Africa complicates the definition of family or household.<sup>52</sup> Many Black households have survived through multiple earners and carers. The incidence of the multi-generational family among Black, Coloured and Asian, families and the incidence of the single-parent family among the Blacks and Coloureds is high. Such family structures are regarded as legitimate among these population

---

*and Men in South Africa 30.)*

<sup>49</sup> This is reflected in the fact that in 1995, Black women employees earned 26% and White women 60% of White male employees' salaries. (D Budlender *Women and Men in South Africa* (1998) 24). Furthermore, whereas more than 70% of men with university degrees were earning over R4000.00 per month in 1995, this applied to less than half of women graduates.

<sup>50</sup> In a study of family life in a Durban township, it was found that even in female-headed households, a great deal of energy is invested in trying to approximate the old fashioned blueprint of male head and bread-winner, subordinate mother and so on. The example is given of an abandoned woman who had single-handedly raised her children and was still making an economic contribution to the household but handed over the role of 'household head' to her son the moment he started making an economic contribution as well. See discussion by S Ziehl *Family Diversity - A South African Perspective focussing on Whites in Grahamstown* (unpublished PhD thesis) (Rhodes University) (Grahamstown).

<sup>51</sup> C Campbell 'The Township Family Women's Struggles' (1990) 4 *Agenda* 1-22. In a study of Whites in Grahamstown, a similarly high level of acceptance of traditional gender roles was found. See too, S Ziehl *Family Diversity - A South African Perspective focussing on Whites in Grahamstown* (unpublished PhD thesis) (Rhodes University) (Grahamstown).

<sup>52</sup> Pamela Reynolds 'The ground of all making. State violence, the family and political activists'. (1995) Pretoria: Human Sciences Research Council, Co-operative Research Programme on Marriage and Family Life HG/MF-24.



groups and must be taken into account in the development of a family policy.<sup>53</sup> Furthermore, many Black families maintain relationships across long distances.<sup>54</sup> Children from such families temporarily, but sometimes over a long term, become part of new households. The care arrangements for such children often interfere with parent-child relationships: the mother may have to accept another care-giver with the result that the definitions of 'family' 'dependency' and 'responsibility' become extremely varied.<sup>55</sup> The western notion of seeking physical, financial or psychological independence is inappropriate in a Black South African context, where reciprocity and a sense of long-term obligation to care for in return for having been cared for has frequently been the norm.<sup>56</sup> Thus the term 'household' has been questioned by South African writers, as being a term which was developed in the west to collect survey or census data, but which is unsuited to the diversity and fluidity of kinship relations in South African families.<sup>57</sup>

---

<sup>53</sup> Anna Steyn *Family structures in the RSA* (1994) (Pretoria: Human Sciences Research Council) (Afrikaans version 1993). See too Ina Snyman 'The Family and the Legal System' (1996) 9 *Acta Criminologica* 64 at 65.

<sup>54</sup> Female employees such as domestic workers either live on the employer's premises may work long hours and travel long distances, within a framework of job uncertainty, and therefore may choose to have children schooled and cared for elsewhere.

<sup>55</sup> See Tessa le Roux "We have families too" *Live-in domestics talk about their lives*' (1995) Co-operative Research Programme on Marriage and Family Life (Pretoria) (Human Sciences Research Council) (Report HG/MF-29); see too Margo Russell *Parenthood among Black migrant workers to the Western Cape: Migrant Labour and the Nature of Domestic Groups* (1995) (Pretoria:) (Co-operative Research Programme on Marriage and Family Life) (Human Sciences Research Council Report HG/MF-22).

<sup>56</sup> See RT Nhlapo 'International Protection of Human Rights and the Family: African Variations on a Common Theme' (1989) 3 *International Journal of Law and the Family* 1 at 4 who stresses that in traditional African society the emphasis was on duties rather than rights and mutual obligations rather than individual promotion; see too Tessa le Roux 'We have families too'. *Live-in domestics talk about their lives*' (1995) (Co-operative Research Programme on Marriage and Family Life) (Pretoria:) (Human Sciences Research Council. Report HG/MF-29.)

<sup>57</sup> Research indicates that many domestic arrangements are in a continual state of flux, with some members migrating to urban areas to sustain the household, children being cared for by relatives or grandparents in rural areas or following their mothers to urban areas. Margo Russell *Parenthood Among Black Migrant Workers to the Western Cape: Migrant Labour and the Nature of Domestic Groups* (1995) (Pretoria:) (Co-operative Research Programme on Marriage and Family Life) (Human Sciences Research Council Report HG/MF-22); Andrew Spiegel, Vanessa Watson and Peter Wilkinson 'Domestic Diversity and Fluidity among some African Households in Greater Cape Town' (1996) 22 *Social Dynamics*; Fiona Ross 'Diffusing Domesticity: Domestic Fluidity in Die Bos' (1996) 22 *Social Dynamics*, 55-71. In 1996 it was reported by the National Programme of Action for Children in South Africa that 70% of Black children under the age of five live in rural areas. Of these 76% live in households with incomes below the minimum living level.

## PART 2 CHILD MAINTENANCE OBLIGATIONS IN PRIVATE LAW

### CHAPTER 2

#### DUTY OF CHILD SUPPORT DURING MARRIAGE AND AFTER DIVORCE

##### 2.1 *An Overview*

Legal mechanisms, such as marriage, impose an obligation on one person to support another. In South African law, these mechanisms create a legal duty which is imposed where there is need on the part of the obligee, ability on the part of the obligor and a legally recognised relationship between the parties, based generally on consanguinity and marriage. In other words, the South African common law imposes a duty<sup>1</sup> upon one party to support another when the person claiming support lacks the ability to support himself or herself; the person from whom support is claimed is able to support the claimant;<sup>2</sup> and the relationship between the parties creates a legal duty of support between them.

This requires an examination of the circumstances and facts surrounding each case, and application of the relevant law by the court concerned.<sup>3</sup> Both statute and the common law impose an

---

<sup>1</sup> Voet 25.3.

<sup>2</sup> *Oberholzer v Oberholzer* 1947 (3) SA 294 (O) at 297; see too *Jodaiken v Jodaiken* 1978 (1) SA 784 (W); *Reyneke v Reyneke* 1990 (3) SA 927 (E); *Zimelka v Zimelka* 1990 (4) SA 303 (W); *Sikatele v Sikatele* [1996] 1 All SA 455 (Tk).

<sup>3</sup> In the case of a parent, the mere existence of a relationship creates a rebuttable presumption of a duty of support: there is no necessity to allege and prove the need for support and the ability to supply it where a child claims maintenance (*Gildenhuys v Transvaal Hindu Education Council* 1938 WLD 260 at 262). However, in the case of a parent claiming support, an allegation that the support is necessary because the claimant is unable to support himself or herself constitutes an essential ingredient of the cause of action: *Waterson v Mayberry* 1934 TPD 210, *Stander v Royal Exchange Assurance Company* 1962 (1) SA 454 (SWA). Where a child claiming maintenance has reached the age of majority, he or she bears the onus of proving that the parent is obliged to support him or her: *Sikatele v Sikatele* (2) [1996] 2 All SA 95 (Tk).

obligation of support on parents.<sup>4</sup> In this regard, it has been argued that the concept of marriage, as one of the legal mechanisms for support,<sup>5</sup> is too narrow and fails to recognise the multiplicity of family forms which exist such as extended family arrangements, same sex partnerships and customary and religious unions.<sup>6</sup> New definitions of family are emerging in legislation and government white papers. In 1996, the Department of Welfare's White Paper<sup>7</sup> defined family as

'... individuals who either by contract or agreement choose to live together intimately and function as a unit in a social and economic system'.

The Employment Equity Act<sup>8</sup> defines 'family responsibility' as

'the responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care and support'.<sup>9</sup>

A maintenance order in respect of a child is directed at the enforcement of the common law duty of support, but this is left to the discretion of the court to determine. No guidelines are laid down to aid the court in its assessment of the amount of maintenance to be paid or the extent of the common law duty.

---

<sup>4</sup> The new Maintenance Act encapsulates this duty for the first time in South African legislation. See Section 15 (2) of Maintenance Act 99 of 1998, not yet in force.

<sup>5</sup> See Mavis Maclean and John Eekelaar *The Parental Obligation* (1997) 27.

<sup>6</sup> See 'Audit of Legislation that discriminates on the basis of Sex/Gender' (1998) Commission on Gender Equality 10.

<sup>7</sup> Department of Welfare, White Paper, Government Gazette 16943, 2 Feb 1996.

<sup>8</sup> Section I of Act 55 of 1998.

<sup>9</sup> The First Issue Paper of the SALC'S Project 110 on the Review of the Child Care Act 74 of 1983 calls for the explicit recognition of different family forms in parenting and care-giving of children.

## 2. 2 Spousal Maintenance

The common law defines marriage as 'the legally recognised voluntary union for life of one man and one woman to the exclusion of all others, while it lasts'.<sup>10</sup> A reciprocal duty of support<sup>11</sup> exists between spouses<sup>12</sup> which exists during the marriage and which, in some cases, may continue after the marriage is dissolved by death<sup>13</sup> or divorce.<sup>14</sup> In *Santam v Meredith*<sup>15</sup> it was held that parties to a bigamous union do not owe each other a duty of support: it is confined to monogamous unions.<sup>16</sup> Further, in *Amod v Multilateral Motor Vehicle Accident Fund*<sup>17</sup> the court *a quo*, per

---

<sup>10</sup> See Inst. 1.9. I; *Hyde v Hyde and Woodmansee* (1866) LR IP & D 130 at 133.

<sup>11</sup> This duty has always been reciprocal as it derives from Roman and Roman-Dutch law. See Inst. 1.9.1.

<sup>12</sup> Voet 25.3.8; *Union Government v Warneke* 1911 AD 657 at 663, 666, 672; *Miller v Miller* 1940 CPD 466 at 469; *Amaneeammah v Naidoo* 1948 (3) SA 712 (D); *Ex parte Jacobs* 1950 (2) PH M26 (O); *Edelstein v Edelstein* NO 1952 (3) SA I (A) at 15; *Woodhead v Woodhead* 1955 (3) SA 138 (SR) at 139-40; *Karim v Karim* 1962 (1) PH 84 (D); *Jodaiken v Jodaiken* 1978 (1) SA 784 (W) at 788; *Park v De Necker* 1978 (1) SA 1060 (N) at 1061; *Marine & Trade Insurance Company Limited v Mariannah* 1978 (3) SA 480 (A) at 486-8; *McKelvey v Cowan* 1980 (4) SA 525 (2); *Erdmann v Santam Insurance Company Ltd* 1985 (2) SA 402 (C) at 408; *Burns v National Employers General Insurance Company Ltd* 1988 (3) SA 355 (C) at 363; *Witham v Minister of Home Affairs* 1989 (1) SA 116 (ZHC) at 131; *Chawanda v Zimnat Insurance Co Ltd* 1990 (1) SA 1019 (ZH).

<sup>13</sup> At common law the surviving spouse had no claim for maintenance against the deceased spouse's estate (*Glazer v Glazer* 1963 (4) 694 (A)). The South African Law Commission Project 22: *Review of the Law of Succession* recommended that a claim be given to the surviving spouse against the estate of the deceased spouse by operation of law. Section 2(1) of the Maintenance of Surviving Spouses Act 27 of 1990 gives effect to this by giving the surviving spouse who is unable to support him or herself a claim for maintenance against the deceased spouse's estate in an amount sufficient to provide the survivor with reasonable means (see Wille's *Principles* II 2n171; see too JC Sonnekus 'Verlengde Onderhoudsaanspraak van die Langslewende Gade; 'n Aanvaarbare Ondergraving van Beskikkingsbevoegheid?' (1990) TSAR 491).

<sup>14</sup> Where an order is made by a court for spousal maintenance (section 7 of the Divorce Act 70 of 1979).

<sup>15</sup> 1990 (4) SA 265 (Tk) at 269.

<sup>16</sup> See too *Mudizingwa v Mudizingwa* 1991 (4) SA 17 (ZSC).

<sup>17</sup> 1997 (12) BCLR 1716 (D). Cf *Amod v Multilateral Motor Accident Fund* Case No 444/98 (SCA) as yet unreported.

Meskin J, held that the Constitution,<sup>18</sup> did not give the courts the general power of developing the common law in this regard to the extent that they could alter it.<sup>19</sup> The court in this case held that it could not come to the assistance of the plaintiff, a woman married by Islamic rites whose marriage had not been registered as a civil marriage and was accordingly not one presently recognized by our law. However, this decision has recently been overruled by the Supreme Court of Appeal.<sup>20</sup>

Although the duty of support has in the past been regarded as being imposed on the husband in favour of the wife, this is only because in practice it has been the husband who has had the greater means and ability to fulfil this duty.<sup>21</sup> Divorce puts an end to the reciprocal duty of support between spouses, but the court granting the decree of divorce has a discretion to include in its order a written agreement of the spouses for payment of maintenance or, in the absence of such an agreement, to order the payment of maintenance by one spouse to another.<sup>22</sup> Where the one spouse is the major or sole breadwinner, the other spouse may fulfil her role indirectly by managing the home and looking after the children.<sup>23</sup> However, in the increasingly prevalent two-breadwinner family, both spouses are obliged to share the financial burden associated with

---

<sup>18</sup> Sections 39 (2) and ss 8 (2)-(3) of Act 108 of 1996. See chapter 3.

<sup>19</sup> At 1725C.

<sup>20</sup> See SCA appeal Case No 444/98 as yet unreported judgment on 13 September 1999. The Supreme Court of Appeal reversed the decision of the court *a quo* and allowed the claim of the widow to succeed in these circumstances. (See below chapter 3).

<sup>21</sup> This is still generally the case in this country and even in England, men still earn 34 % more than women (*Times Magazine* 1 July 1999).

<sup>22</sup> Section 7(2) of the Divorce Act 70 of 1979.

<sup>23</sup> *Union Government v Warneke* 19II AD 657 at 608-9; *Excell v Douglas* 1924 CPD 472 at 476; *Gildenhuys v Transvaal Hindu Educational Council* (supra) at 263-4; *Van Vuuren v Van Vuuren* 1940 NPD 170 at 181-2; *Plotkin v Western Assurance Co Ltd* (supra) at 389; *Milns v Protea Assurance Co Ltd* 1978 (3) SA 1006 (C) at 1011-12; *Erdmann v Santam Insurance Co Ltd* 1985 (2) SA 402 (C) at 408.

the maintenance of the matrimonial home; income and capital, if necessary, must be used.<sup>24</sup> Support encompasses accommodation, food, clothing, medical and dental care, and other necessities of life<sup>25</sup> and may include the costs of legal proceedings instituted by or against the wife.<sup>26</sup> The scope of the duty is determined by the couple's standard of living and position in the community in which they live, but the spouses may obviously decide for themselves how support is to be provided.<sup>27</sup>

In some situations, the chief breadwinner may contribute most of his or her salary to a household allowance. If the parties are married in community of property, any articles acquired or investments made from this money fall into the joint estate.<sup>28</sup> Where the marriage is out of community, such moneys and property belong to that spouse.<sup>29</sup> At common law, and prior to the

---

<sup>24</sup> June Sinclair (assisted by Heaton) *Law of Marriage* vol 1 443 91; *Oberholzer v Oberholzer* 1947 (3) SA 294 (O) at 298; *Hartmann v Krogscheepers* 1950 (4) SA 421 (W) at 424; *Jodaiken v Jodaiken* 1978 (1) SA 784 (W) at 789C.

<sup>25</sup> June Sinclair (assisted by Heaton) *Law of Marriage* vol 1 443 91; *Oberholzer v Oberholzer* 1947 (3) SA 294 (O) at 298; *Hartmann v Krogscheepers* 1950 (4) SA 421 (W) at 424; *Jodaiken v Jodaiken* 1978 (1) SA 784 (W) at 789C.

<sup>26</sup> *Lyons v Lyons* 1923 TPD 345. Sinclair (assisted by Heaton) *Marriage Vol* 1 443 93 questions the refusal by Mason JP in *Lyons's* case to extend the principle to actions other than matrimonial ones and suggests that it could apply to the costs of any action, reasonably brought or defended; cf *Chamani v Chamani* 1979 (4) SA 804 (W). In an application by a wife for legal aid her husband's means may be taken into consideration (*Lewis v Petsch Properties (Pty) Ltd* 1961 (1) SA 290 (O)). See *Karrim v Karrim* 1962 (1) PH 84 (D). The fact that a wife is already in receipt of legal aid is not necessarily a bar to her claiming a contribution towards costs from her husband: *Opperman v Opperman* 1975 (3) SA 337 (O); see too *Cary v Cary* 1999 (3) SA 615 (C).

<sup>27</sup> *Gammon v McClure* 1925 CPD 137 at 139; *Shanahan v Shanahan* 28 NLR 15; *Oberholzer v Oberholzer* 1947 (3) SA 294 (O) at 297; *Schuurman-Stekhoven v Schuurman-Stekhoven* 1951 (1) PH B1 (C); *Salem v Chief Immigration Officer, Zimbabwe* 1995 (4) SA 280 (ZSC) at 283E.

<sup>28</sup> See June Sinclair (assisted by Heaton) *Law of Marriage Vol* 1 443.

<sup>29</sup> Voet 4. 1.11, *Linde v Cohen* 1914 TPD 369; *Grant v Grant* 1945 WPD 15; cf section 1 of the English Married Women's Property Act 1964 in which a presumption is created by legislation that savings made by a wife from a household allowance and property acquired by such savings belong to the husband and wife in equal shares. See further Sinclair (assisted by Heaton) *Marriage Vol* 1443.

commencement of the Matrimonial Property Act,<sup>30</sup> donations between spouses during the marriage were prohibited, subject to certain exceptions.<sup>31</sup> With the enactment of the Matrimonial Property Act, this rule was abolished.<sup>32</sup> Both spouses in a marriage out of community of property are jointly and severally liable to third parties for all debts incurred by either of them in respect of household necessities.<sup>33</sup> Where the marriage is in community of property, the spouses may be sued jointly and severally for such a debt.<sup>34</sup> This is an invariable consequence of the marriage and may not be excluded by antenuptial contract.<sup>35</sup> When it comes to a right of recourse in respect of contributions to household necessities, only spouses married before the commencement of the Act have a right of recourse against each other for contributions to household necessities which exceed their pro rata share.<sup>36</sup>

A spouse's right to support from the other spouse is restricted to current maintenance. A claim for arrears of maintenance during a period when a spouse succeeded in supporting himself or herself is barred and this is justified by the argument that, if he or she managed on his or her own resources, support was not required.<sup>37</sup> The position changes where a spouse entitled to support

---

<sup>30</sup> Act 88 of 1984.

<sup>31</sup> Wille's *Principles of South African Law* 8ed. (Ed Dale Hutchison, Belinda van Heerden, DP Visser and CG van der Merwe) (Cape Town) (1991) (Juta) 115.

<sup>32</sup> Section 22 of Act 88 of 1984: no transaction between spouses is void or voidable on these grounds, whether effected before or after the commencement of the Act and irrespective of the matrimonial property regime applicable to the marriage. However, like any promise of donation, a spouse's promise of donation must be signed by the donor or by a person acting on written authority in order to be enforceable.

<sup>33</sup> Section 23(5) of the Matrimonial Property Act 88 of 1984.

<sup>34</sup> Section 17(5) of the Matrimonial Property Act 88 of 1984.

<sup>35</sup> Sinclair (assisted by Heaton) *Law of Marriage* Vol 1 446.

<sup>36</sup> Section 23(3)-(4) of the Matrimonial Property Act 88 of 1984.

<sup>37</sup> The principle that a person does not have to be maintained in arrear: *Farrell v Hankey* 1921 TPD 590 at 595; *Oberholzer v Oberholzer* 1947 (3) SA 294 (O) at 298. Voet 2.15.14; See further D J Joubert 'In praeteritum non vivitur' (1985) 18; *De Jure* 368; *Kuchling v Kuchling* 1981 (1) PH 88 (SWA); *Africa v Africa* 1985 (1) SA 792 (SWA).

has incurred debts to maintain himself or herself,<sup>38</sup> or where the claim is for arrears due in terms of an order of court or a maintenance agreement.<sup>39</sup> However, the rule about arrear maintenance does not apply to the spouse's claim for arrear maintenance on behalf of a child, because the obligation to support the child rests upon both spouses, and one spouse is entitled to be reimbursed in respect of that portion of the expenditure which it was the other spouse's obligation to provide.<sup>40</sup> Furthermore, a liable spouse cannot evade this obligation by showing that the claimant is in fact receiving maintenance from another member of her family<sup>41</sup> and a relative who maintains a spouse when it is the other spouse's duty to do so is entitled to be reimbursed by the liable spouse,<sup>42</sup> because this duty takes precedence over the duty of other relatives to support that spouse. If the family is in difficult financial circumstances, one spouse may be obliged to assist gratuitously in the operation of the other spouse's enterprise, or to seek employment to improve the family's financial position. These are not legally enforceable duties, but are significant, because each spouse has the right to claim damages for loss of these services from a third party who has wrongfully killed or injured the other spouse.<sup>43</sup> However, the lost services must be rendered as

---

<sup>38</sup> The rationale is that debts were incurred because support was needed but this reasoning is illogical - (see *Woodhead v Woodhead* 1955 (3) SA 138 (SR) at 141G-H). A financially careful spouse who does not incur debts, perhaps by living more simply, has no claim, while a less careful spouse can make the liable spouse pay the debits. It seems anomalous to allow such a spouse to be supported in these circumstances.

<sup>39</sup> *Woodhead v Woodhead* 1955 (3) SA 138 (SR) at 140 G-H. It seems clear that the spouse's claim is no different from that of any person who, having maintained another while not legally liable to do so, now seeks reimbursement from the party upon whom the duty of support lay. See too *S v Frieslaar* 1990 (4) SA 437 (C).

<sup>40</sup> *Young v Coleman* 1956 (4) SA 213 (D).

<sup>41</sup> *Miller v Miller* 1940 CPD 466, *Ex parte Jacobs* 1950 (2) PH M26 (O), *Karrim v Karrim* 1962 (1) PH 84 (D), *Manuel v African Guarantee & Indemnity Co Ltd* 1967 (2) SA 417 (R); *Salem v Chief Immigration Officer, Zimbabwe* 1995 (4) SA 280 (ZSC).

<sup>42</sup> *Gammon v McClure* 1925 CPD 137 at 139; *Behr v Minister of Health* 1961 (1) SA 629 (SR) at 630; *Karrim v Karrim* 1962 (1) PH 84 (D). It must be clear, however, that the person who paid maintenance without legal duty to do so did not intend to make a donation: *Stark NO v Fisher NO* 1935 SWA 53 at 59-60, applied in *Vermaak v Vermaak* 1945 CPD 89. The claim for reimbursement is based on either unjust enrichment or *negotiorum gestio*.

<sup>43</sup> *Union Government v Warneke* 1911 AD 657; *Abbott v Bergman* 1922 AD 53; *Plotkin v Western Assurance Co Ltd* 1955 (2) SA 3 85 (W); *Yorkshire Insurance Co Ltd v Porobic* 1957 (2) PH J16 (A). See chapter 4.



part of a legal duty of support otherwise the spouse has no legal remedy if the other spouse's assistance or earnings were not necessary for the support of the family, but merely improved its standard of living.<sup>44</sup>

Research at the University of Cape Town has revealed that the divorce rate in South Africa for all groups is very high.<sup>45</sup> Before a divorce can be granted, the court must be satisfied that the arrangements for the children are satisfactory or are the best in the circumstances.<sup>46</sup> Where practicable, a consent paper incorporating provisions agreed to between the parties is handed up to the court. The court, of course, is not obliged to give effect to these provisions and will usually refuse to do so where they are vague or undesirable on any ground.<sup>47</sup> Potentially disruptive access agreements have also been rejected.<sup>48</sup> An agreement between parents to fix immutably the amount of maintenance, or the order of custody or access is not allowed as this is deemed to be contrary to public policy and not in the best interests of the children.<sup>49</sup>

---

<sup>44</sup> *Williams v British America Insurance Company* 1962 (2) PH J18 (SR); Sinclair (assisted by Heaton) Marriage Vol (1996) 445; *De Harde v Protea Co Ltd* 1974 (2) SA 109 (E); *McKelvey v Cowan NO* 1980 (4) SA 525 (Z); *Erdmann v Santam Insurance Co Ltd* 1985 (3) SA 402 (C); *Witham v Minister of Home Affairs* 1989 (1) SA 116 (ZH); *Hendricks v President Insurance Co Ltd* 1993 (3) SA 158 (C) at 159-160.

<sup>45</sup> Approximately fifty per cent for urban whites and well over that figure for urban Africans - though official statistics are most unreliable for all groups except those historically classified as White. See Sandra Burman & Fiona McLennan 'Providing for Children? The Family Advocate and the Legal Profession' (1996) *Acta Juridica* 69. The arrangements for the children of divorces is very important, especially in the poorer sectors of our community.

<sup>46</sup> Section 6(1)(a) of the Divorce Act 70 of 1979.

<sup>47</sup> 1948 (4) SA 109(C). In this case, the court rejected an agreement that required the consent of the non-custodian parent should the custodian wish to remove the child from the province, prevented the custodian from placing the child in the care of any other person for more than fourteen days and which gave the non-custodian parent the right to stipulate at what age the child was to start school and which school and university he was to attend.

<sup>48</sup> See *Ben Yishai v Ben-Yishai* 1976 (2) SA 307(W).

<sup>49</sup> *Girdwood v Girdwood* 1995 4 SA 698 (C).

In 1990, in terms of the Mediation in Certain Divorce Matters Act,<sup>50</sup> the Family Advocate was introduced into the South African legal system with the primary purpose of identifying and establishing what is in the best interests of the child concerned.<sup>51</sup> The function and duty of the Family Advocate is to enquire into, report on, and make recommendations regarding the welfare of such children. The Family Advocate is assisted in such functions by family counsellors appointed in terms of the Act, who are usually qualified social workers, and also by clinical psychologists, psychiatrists, educational authorities, ministers of religion and any number of other persons who may be aware of the physical and spiritual needs or problems of the children and their parents or guardians, and who may be able to render assistance to the Family Advocate in weighing up and evaluating all relevant facts and circumstances relating to the welfare and interests of the children concerned.<sup>52</sup> The institution of the Family Advocate is currently established to operate only in the High Court.

Although divorce obviously ends the reciprocal duty of support between spouses, the High Court has a discretion to include in its order a written agreement between the divorcing spouses concerning the payment of spousal maintenance, or where there is no agreement between the spouses with regard to maintenance, to order the payment of maintenance by one spouse to the

---

<sup>50</sup> Act 24 of 1987 as amended.

<sup>51</sup> See *Terblanche v Terblanche* 1992 (1) SA 501 (W).

<sup>52</sup> In *Van Vuuren v Van Vuuren* (1993) (1) SA 163 (T)), the court stated that, even though the Family Advocate in the case under discussion neglected to investigate the matter when an investigation was necessary, the Family Advocate generally had a positive role to play; the court commended the manner in which most Family Advocates fulfil their role. However, in *Whitehead v Whitehead* (1993) (3) SA 72 (SEC)), the court was critical of the Family Advocate who appeared in the particular case. The judge said that he was disappointed with the attitude of the Family Advocate and her adviser because they had made an unbalanced recommendation and created the impression that they had taken a decision and that they wanted to prescribe to the court. The court emphasized that the function of the Family Advocate is only to assist the court by placing facts and considerations before it, not to prescribe to the court. See too ID Schäfer 'The Family Advocate in South Africa' in *Frontiers of Family Law* A Bainham and D Pearl (eds) 32 at 37-8 (1993) Chancery Law Publishing; see further Sandra Burman and Fiona McLennan 'Providing for Children? The Family Advocate and the Legal Profession' *Children's Rights* (ed R Keightley) (1996) 22.

other.<sup>53</sup> The High Court may, however, refuse to make a maintenance agreement an order of court if it regards as unacceptable certain terms in the agreement.<sup>54</sup> The parties may come to any agreement they choose, but up until now, an agreement on spousal maintenance could not amount to an agreement for the payment of a lump sum: it had to be an agreement regarding periodic payments.<sup>55</sup> However, the definition of 'maintenance order' in the new Maintenance Act<sup>56</sup> contemplates the payment of maintenance by any order, including periodic payments.

The High Court cannot grant a maintenance order after the dissolution of the marriage<sup>57</sup> and the court's discretion in making a spousal maintenance order is governed by the need to consider certain factors listed in the Divorce Act.<sup>58</sup> There has been a tentative movement in our case law towards recognition of the 'clean break' principle: whereby encouragement is given to each party (especially the woman) to become financially independent and to sever the tie between the spouses. Where the marriage has been brief and the parties are young and without children, the 'clean break' may be applied and maintenance is unlikely to be awarded. 'Permanent' maintenance for spouses is considered to be only available to older women who are unable to acquire the skills to earn a living.<sup>59</sup> For younger women, the idea is that she should only be awarded 'rehabilitative' maintenance for a limited period to provide for her while she trains or retrain for a job or profession.<sup>60</sup> However, the phenomenon of the wife living as an 'alimony drain' enjoying a 'meal ticket for life' is certainly not a phenomenon in this country, nor in many First World countries and the 'clean break' principle should not be rigidly applied, especially where there are children

---

<sup>53</sup> Section 7 (2) of the Divorce Act.

<sup>54</sup> *De Crespigny v De Crespigny* 1959 (1) SA 149 (N).

<sup>55</sup> See *Zwiegelaar v Zwiegelaar* [1998] All SA 151(C).

<sup>56</sup> 99 of 1998, not yet in force.

<sup>57</sup> *Schulte v Schulte* 1986 (1) SA 872 (A).

<sup>58</sup> Section 7 (2) of Act 70 of 1979.

<sup>59</sup> *Beaumont v Beaumont* 1985 (4) A 171 (W) at 194: cf *Ronsalis v Ronsalis* 1980 (3) SA 446 (C).

<sup>60</sup> *Singh v Singh* 1983 (1) SA 781 (C) at 788; *Kroon v Kroon* 1986 (4) SA 616 (E) at 632-3.

involved.<sup>61</sup>

Our courts have recognised that the 'clean break' principle is often not an equitable realistic principle to utilize in determining maintenance amounts.<sup>62</sup> The courts should bear in mind the realities of the economy and the frequent financial difficulties experienced by single custodian parents, especially women. The ages of the parties, the duration of the marriage and the standard of living of the parties prior to the divorce are also important factors to consider. Unless the parties are very wealthy, both parties will have obviously suffer some reduction in living standards.<sup>63</sup> The conduct of each spouse insofar as it is relevant to the breakdown of the marriage is also a factor to be considered,<sup>64</sup> but only insofar as it is legally relevant to the breakdown of the marriage; the court is not required to examine in great detail the degree of each party's fault. The court in awarding spousal maintenance also bears in mind any order made for the transfer of any assets of the marriage from one party to another. The court may further consider any other factor which it regards as relevant.<sup>65</sup> Where there are children involved in a marriage, to draw a sharp distinction between spousal and child maintenance is artificial since any award of spousal maintenance to a custodian parent will ultimately affect the children unless the spouses are extremely wealthy or the award is so low as to be negligible.

---

<sup>61</sup> LJ Weitzman *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985); John Eekelaar & Mavis Maclean *Maintenance after Divorce* (1986).

<sup>62</sup> *Kroon v Kroon* 1986 (4) SA 616 (E) at 632H; *Beaumont v Beaumont* 1985 (4) SA 171 (W) at 178 D-F.

<sup>63</sup> *Grasso v Grasso* 1987 (1) SA 48 (C) at 52C-D and 56C-E, cf *Kroon v Kroon* 1986 (4) SA 616 (E) at 637D.

<sup>64</sup> *Swart v Swart* 1980 (4) SA 364 (O) at 368-9.

<sup>65</sup> Section 7 (3) of Divorce Act.

## 2.3 Child Maintenance Obligations

### 2.3.1 Introduction

The duty of parents to support their children, whether legitimate or born out of wedlock is firmly entrenched in South African common law and legislation.<sup>66</sup> The duty of support arises *ex lege*<sup>67</sup> and creates an obligation *sui generis*.<sup>68</sup> This duty of support arises even if the child is born as the result of an unwanted pregnancy.<sup>69</sup> The duty to support a child is common to both parents, and must be shared between them according to their means,<sup>70</sup> and in *Lamb v Sack*,<sup>71</sup> the equality of

---

<sup>66</sup> D 25.3.5; Voet 25.3.5; *Van Rooyen v Werner* (1892) 9 SC 425 at 429; *In re Knoop* (1893) 10 SC 198 at 199; *Ford v Allen* 1925 TPD 5 at 7; *In re Estate Visser* 1948 (3) SA 1129 (C) at 1133; *Lloyd v Menzies* NO 1956 (2) SA 97 (D) at 102; *S v MacDonald* 1963 (2) SA 431 (C) at 433; *S v Pitsi* 1964 (4) SA 583 (T) at 587; *Lamb v Sack* 1974 (2) SA 670 (T); *Tate v Jurado* 1976 (4) SA 238 (W) at 241 H. See too section 15 (1) of the Maintenance Act 97 of 1998. (Not yet in force.)

<sup>67</sup> *In re Knoop* (1893) 10 SC 198 at 200; *Spiro Parent and Child* 385. See also Brigitte Clark 'Child Support -Public or Private?' (1992) 55 *THRHR* 277-86; Brigitte Clark 'Comparative Legal Developments in Child Maintenance' 1993 *CILSA* 606. The distinction between duties of support arising *ex contractu* and those arising *ex lege* is important in relation to a dependant's action against a third party who has negligently killed the person who was maintaining him or her. Such an action cannot be based on a contractual duty of support; the duty must arise *ex lege* by virtue of the relationship of the parties: *Nkabinde v SA Motor & General Insurance Co Ltd* 1961 (1) SA 302 (D); *Amod v Multilateral Motor Vehicle Accidents Fund* 1997 (12) BCLR 1716 (D). The distinction is also relevant to the means by which the duty of support may be enforced.

<sup>68</sup> The *sui generis* character of an obligation to pay maintenance is particularly evident where the debtor is a deceased estate, as it was in *In re Estate Visser* 1948 (3) SA 1129 (C). See chapter 3.

<sup>69</sup> *Administrator Natal v Edouard* 1990 (3) SA 581 (A) where the Administrator was ordered to compensate the parents for the cost of the maintenance and support of a child who was born after the hospital doctors had failed to perform a sterilization operation in terms of a contractual undertaking to do so. The court held that this payment merely enabled the parents to fulfil their duty of support. It did not transfer the duty to the Administrator.

<sup>70</sup> Voet 25.3.6; *Union Government v Warneke* 1911 AD 657 at 663, 668-9; *Farrell v Hankey* 1921 TPD 590 at 596; *A v M* 1930 WLD 292 at 293; *Amaneeammah v Naidoo* 1948 (3) SA 712 (D) at 718-19; *Hartman v Krogscheepers* 1950 (4) SA 421 (W) at 243; *Woodhead v Woodhead* 1955 (3) SA 138 (SR) at 140-1; *Christie NO v Estate Christie* 1956 (3) SA 659 (N) at 661-2; *Kemp v Kemp* 1958 (3) SA 736 (D) at 737-8; *R v Kingsburgh* 1958 (2) PH H337 (C); *Herfst v Herfst* 1964 (4) SA (W) at 130; *Buch v Buch* 1967 (3) SA 83 (T) at 88; *Lamb v Sack* 1974 (2) SA 670 (T) at 671-2; *Couper v Flynn* 1975 (1) SA 778 (R) at 780 F-G; *Tate v Jurado* 1976 (4) SA 238 (W) at 242; *Harwood v Harwood* 1976 (4) SA 586 (C); *Ncubu v National Employers General Insurance Company* 1988 (2) SA 190 (N); *Van der Horst v Viljoen* 1977 (1) SA 795 (C); *Jodaiken v Jodaiken* 1978 (1) SA 784 (W); *Dionisio v Dionisio* 1981 (3) SA 149 (Z); *Sager v Bezuidenhout* 1980 (3)

parental obligations was stressed.<sup>72</sup> In *Santam Insurance Co. Ltd v Fourie*,<sup>73</sup> the court stressed that the question of whether parents support their children is a question of fact; where a family was in fact better off after the death of the mother, it was held that there could no claim for patrimonial loss as a result of her death: the theoretical loss of support had to be balanced against the practical reality of the situation.

Whether a child is legitimate or born out of wedlock makes no difference to the extent of the father's obligation to support it; the paternal duty of support seems to be founded on the blood relationship (paternity rather than legitimacy). Although the natural father of an extra-marital child, has been regarded as legally unrelated to the child, he is liable to maintain it.<sup>74</sup> It is trite law that the duty to support is of a reciprocal nature. However, in the instance of the extra-marital child an anomaly occurs since there is no duty on the extra-marital child to maintain his or her natural father, irrespective of the fact that his or her natural father is legally obliged to maintain him or her.<sup>75</sup> This anomaly extends to the extra-marital child's blood relations on the father's side, as it is accepted that the reciprocal duty of support exists only between such child and his or her blood relations on the mother's side.<sup>76</sup> Each parent of the extra-marital child is legally obliged to contribute to the support of the extra-marital child according to his or her means. At common law, in the case of illegitimate children, the mother, or if she is a minor, her guardian has guardianship rights over the child.<sup>77</sup> The father of an illegitimate child has no automatic rights of guardianship,

---

SA 1005 (O); *Zimelka v Zimelka* 1990 (4) SA 303 (W) ; *Osman v Osman* 1992 (1) SA 751 (W).

<sup>71</sup> 1974 (2) SA 670 (T),

<sup>72</sup> However, in *Zimelka v Zimelka*, 1990 (4) SA 303 (W) it was held that the custodian father, (who earned RI 2 000 a month), was not entitled to a contribution from the mother, (who earned RI 400 a month), and who had the children in her custody for two-and-a-half to three months each year.

<sup>73</sup> 1997 (1) SA 611 (A).

<sup>74</sup> *Tate v Jurado* 1976 (4) SA 238 (W); *F v L* 1987 (4) SA 525 (W) at 526-7.

<sup>75</sup> PQR Boberg *The Law of Persons* (1977) 341.

<sup>76</sup> *Motan v Joosub* 1930 AD 61.

<sup>77</sup> Section 3 of Children's Status Act; *B v S* 1995 (3) SA 571 (A).

custody or access and can only acquire such rights if the High Court is convinced that this is in the best interests of the child.<sup>78</sup> There are many arguments in favour of<sup>79</sup> and against<sup>80</sup> granting unmarried fathers inherent access rights. In recent years, a new dimension has been added to this debate. Since the enactment of the Bill of Rights in the interim and final Constitutions,<sup>81</sup> many authors have maintained that the existing legal position regarding access between the unmarried father and his child amounts to unfair discrimination against both the father and his child.<sup>82</sup>

### 2. 3. 2 *Scale and Extent of Support*

Parents must supply their children with food, clothing, accommodation, medical and dental attention and suitable education or training.<sup>83</sup> The necessary costs of litigation by or against a child may also be included.<sup>84</sup> The scale upon which these expenses have to be provided is determined by the standard of living of the parents, measured against the background of the family generally, and their social and economic position within society: a matter of discretion and common sense according to the particular circumstances of each case. In appropriate

---

<sup>78</sup> See *B v S* 1995 (3) SA 571 (A) at 575 GH; Section 2 of the Natural Fathers of Children Born Out of Wedlock.

<sup>79</sup> Eckard 'Toegangsregte tot buite-egtelike kinders - behoort die wetgewer in te gryp?' 1992 *TSAR* 122; Kruger, Blackbeard and De Jong 'Die vader van die buite-egtelike kind se toegangsreg - S v S' 1993 *THRHR* 696; Ohannessian and Steyn 'To see or not to see? - that is the question' 1991 *THRHR* 254.

<sup>80</sup> Brigitte Clark 'Should the unmarried father have an inherent right of access to his child?' 1992 *SAJHR* 565; Sonnekus and Van Westing 'Faktore vir die erkenning van 'n buite-egtelike kind' 1992 *TSAR* 232.

<sup>81</sup> The Constitution of the Republic of South Africa Act 200 of 1993, and the Constitution of the Republic of South Africa Act 108 of 1996, respectively.

<sup>82</sup> Kruger 'Die toegangsbevoegdheid van die ongetroude vader - is die finale woord gespreek?' - *B v S* (1996) 113 *SALJ* 8; Sinclair (assisted by Heaton) *Marriage* (1996) 121-126.

<sup>83</sup> See Section 15 (2) of the Maintenance Act 99 of 1998 (not yet in force.)

<sup>84</sup> *Meyer v Mohammed* 1930 CPD 301; and see *Caldwell v Erasmus* NO 1962 (4) SA 43 (1) at 45. But cf De Villiers J in *Grobler v Potgieter* 1954 (2) SA 188 (O) at 191-2.

circumstances, a child may be entitled to a university or other tertiary education.<sup>85</sup> In *Smit's* case<sup>86</sup> Fleming J stated that the duty of support is not limited to a low level of education since the concepts of 'necessaries' and indigence are inherently wide. Further, in *Mentz v Simpson*,<sup>87</sup> the court held that where the parents are divorced, the decision of the custodian parent as to the manner of the child's education is not decisive, especially if it can be shown that the child has the ability to benefit from an university education, although in *Theiss' case*,<sup>88</sup> the Appellate Division (now the Supreme Court of Appeal) had held that a custodian parent is entitled to decide whether a child on leaving school should receive further education. However, in *Theiss' case*, it seems that the attempt by the mother to compel the father to provide maintenance for further education failed because insufficient information had been furnished to the court *a quo* about the child's intellectual ability, the standard of living and income of the parents.

Sometimes the duty of support extends beyond the attainment of majority.<sup>89</sup> The need for support, and not majority status, is the determining factor for liability to support a child.<sup>90</sup> The duty to support a crippled or otherwise handicapped child persists throughout the child's life.<sup>91</sup> This legal issue has major implications in view of the increasing numbers of children who are born HIV

---

<sup>85</sup> Voet 25.3.4. See too *Richter v Richter* 1947 (3) SA 86 (W) at 92; *In Estate Visser* 1948 (3) SA 1129 (C); at 1138, 1132; *Ex parte Insel* 1952 (1) SA 71 (T) at 75 G-H; *Christie NO v Estate Christie* 1956 (3) SA 659 (N) at 662, *Couper v Flynn* 1975 (1) SA 778 (R) at 781B.

<sup>86</sup> 1980 (3) SA 1010 (C).

<sup>87</sup> 1990 (4) SA 455 (A).

<sup>88</sup> 1977 (1) PH B 4 (A).

<sup>89</sup> See *Richter v Richter* 1947 (3) SA 86 (W) at 92.

<sup>90</sup> See *Ex parte Jacobs* 1982 (3) SA 276 (O) at 278; *Bursey v Bursey* [1999] 2 All SA 289 (A).

<sup>91</sup> *In re Knoop* (1983) 10 SC 198 at 199; *Gliksman v Talekinsky* 1955 (4) SA 468 (W) at 469 where a father was held liable to contribute towards support of his widowed daughter and her six minor children.



positive and therefore handicapped for their limited lives.<sup>92</sup> Where the child is a major, there is no presumption that support is needed and that the parent is able to supply it; a major child must discharge the onus of proving that both these requirements of the duty of support are satisfied. It has been also been held that a major child is not entitled to support on as generous a scale as a minor child of the same parents.<sup>93</sup>

Whether a court order for the maintenance of a child lapses automatically when the child becomes self-supporting is controversial. In *Richter's* case,<sup>94</sup> the court held that it does, but no age up to which payments had to continue had been specified in the order in that case.<sup>95</sup> In *Kemp's* case,<sup>96</sup> Jansen J came to the conclusion that it was inconsistent with the nature of an order of court that a maintenance order providing for payments until the child reaches a specified age should *ipso jure* cease to operate before that time if the child becomes self-supporting, though the court may vary

---

<sup>92</sup> See C Barrett, N McKerron & A Strode 'Consultative Paper on Children Living with HIV/AIDS' unpublished (January 1999). Children under the age of 6 years are entitled to free medical care, but beyond this age there is no provision for free medical aid; See GN No 882 in Government Gazette of 19010 of 26 June 1998. It is estimated that 10.7 per cent of adults and at least 2.7 million South Africans, including 1.5 million women were infected by the end of 1997 with AIDS/HIV. In addition an estimated 65000 HIV infected babies were born during that year. The situation is probably much worse as the latest census data show the South African population to be larger than previously supposed and recent research shows HIV levels of non-pregnant women to be higher than those of pregnant women. This means that South African society is going to confront an immense problem in respect of orphaned or ill children.

<sup>93</sup> It has been held that such duty is confined to necessities (*B v B* 1997 1 All SA 598 (E) ). See *Van Vuuren v Sam* 1972 (2) SA 633 (A); *Hoffmann v Herdan* NO 1982 (2) SA 274 (T); *Ex parte Jacobs* 1982 (2) SA 276 (O); *Bursey v Bursey* [1997] 4 All SA 580 (E); *Sikatele v Sikatele* [1996] 1 All SA 445 (Tk); See *Bursey v Bursey* 1999 2 All SA 239 (A ); 1999 (3) SA 33 (SCA). *Gliksmann v Talekinsky* 1955 (4) SA 468 (W) at 470; *Kemp v Kemp* 1958 (3) SA 736 (D) ; *Ex parte Pienaar* 1964 (1) SA 600 (T); *Smit v Smit* 1980 (3) SA 1010 (O); *Mujee v Mujee* 1981 (3) SA 800 (Z).

<sup>94</sup> 1947 (3) SA 86 (W) at 90-1.

<sup>95</sup> This decision was applied to an order where an age had been specified in *Rheeder v Rheeder* (1950) (4) SA 30 (C), the argument being that the age (18 years) had been fixed on the assumption that support would be required until then.

<sup>96</sup> 1958 (3) SA 736 (D).

the order to bring it into harmony with the common-law duty to maintain.<sup>97</sup> In *S v Danhauser*<sup>98</sup> Cillie J confirmed the rule that a maintenance order lapses ipso jure when a child become self-supporting, but no mention was made of the order stating a specific age until which maintenance should be paid. It is therefore not clear whether the judge intended the rule to apply even if an age is specified and it is unfortunate that the issue was not canvassed.<sup>99</sup> The decision in *Kanis*' case<sup>100</sup> that a maintenance order specifying no age did not lapse automatically when the child concerned reached the age of eighteen was based on a finding that the child was not yet self-supporting at that age.

If necessary to support their children, parents must look for and perform work appropriate to their talents and training.<sup>101</sup> In *Mgumane v Setemane*,<sup>102</sup> the court stated that a parent could not fail to realise the full potential of his or her earning capacity to the detriment of his or her children who require maintenance.<sup>103</sup> Such duty to work to support a child applies to the mother as well as the father. In many cases in South Africa, due to inadequate provision of child-care facilities and the failure by the father to share the child care duties, mothers resort to part-time employment, which is poorly paid with little provision for career advancement.<sup>104</sup>

Obviously parents cannot evade their responsibility by giving up their employment and embarking

---

<sup>97</sup> This view was endorsed obiter by Cillie J in *Van Dyk v Du Toit* 1993 (2) SA 781 (O).

<sup>98</sup> 1993 (2) SA 398 (O).

<sup>99</sup> See Victoria Bronstein & Vivienne Goldberg (1993) *Annual Survey* 114.

<sup>100</sup> 1974 (2) SA 606 (RAD) at 611

<sup>101</sup> *Martins v Martins* 1959 (2) PH B19 (O).

<sup>102</sup> (1998) (2) SA 247 (Tk).

<sup>103</sup> See too Spiro *Parent and Child* at 368.

<sup>104</sup> See June Sinclair, 'Family Rights' in *Rights & Constitutionalism* (ed Van Wyk et al) (1995) 514n36, 516-7, 520, 555.

on further education.<sup>105</sup> However, in accordance with the general principles applicable to all duties of support, no obligation rests upon a parent who, whether due to ill-health or other reasons, is unable to discharge it.<sup>106</sup> For the same reasons, children who have the means to support themselves cannot require their parents to do so;<sup>107</sup> parents are entitled to apply the children's income to their maintenance before using their own resources for the purpose.<sup>108</sup> However, a child's capital may be used only where the parents are unable to maintain him or her and then only with the leave of the court.<sup>109</sup> Where maintenance for a child is claimed from a deceased parent's estate, the courts have held that benefits which the child acquires from that estate, of a capital as well as of an income nature, must be taken into account.<sup>110</sup> Although the duty to maintain children ends when they become self-supporting,<sup>111</sup> the fact that a child has an income from employment does not

---

<sup>105</sup> *Martins v Martins* 1959 (2) PH B19 (O).

<sup>106</sup> Voet 25.3.18; *In re Knoop* (1893) 10 SC 198 at 199; *Grobler v Union Government* 1923 TPD 429; *Ford v Allen* 1925 TPD 5 at 7; *Davis' Tutor v Estate Davis* 1925 WLD 168 at 172. In *Ncubu v National Employers General Insurance Co. Ltd* 1988 (2) SA 190 at 195 the court stressed (per Galgut J) that the obligation to support falls away if the parent is unable to support a child. See further Wilna Faul 'Onderhoud van Kind: Verband Tussen Omvang van Plig en Ouer se Vermoe' (1988) TSAR 583. A parent's ability to maintain his or her minor children will be presumed until the contrary is proved: *Gildenhuys v Transvaal Hindu Educational Council* 1938 WLD 260 at 262; *Stander v Royal Exchange Assurance Company* 1962 (1) SA 454 (SWA) at 455. In any event, it seems that in proceedings before a maintenance court in terms of the Maintenance Act 23 of 1963, it is not correct to speak of an onus resting on a party: *Buch v Buch* 1967 (3) SA 83 (T), cf *S v Malgas* 1987 (1) SA 194 (NC).

<sup>107</sup> Van Leeuwen R-HR 1.13.7; Voet 25.3.14, 15; *Grobler v Union Government* 1923 TPD 429; *Ford v Allen* 1925 TPD 5 at 7; *Davis' Tutor v Estate Davis* 1925 WLD 168 at 173; *Richter v Richter* 1947 (3) SA 86 (W) at 90, 91; *In re Estate Visser* 1948 (3) SA 1129 at 1137; *Ex parte Jacobs* 1950 (2) PH M26 (O). See also *Ex parte Jacobs* 1982 (2) SA 276 (O) where the case was reported some 32 years after it was handed down. *Hoffmann v Herdan* NO 1982 (2) SA 274 (T); *Gliksman v Talekinsky* 1955 (4) SA 468 (W) at 469; *Kemp v Kemp* 1958 (3) SA 736 (D); *Lotz v Boedel Van der Merwe* 1958 (2) PH M16 (O).

<sup>108</sup> Voet 25.3.15; *Van Rooyen v Werner* (1982) 9 SC 425 at 429; *Stark NO v Fisher NO* 1935 SWA 53 at 57; *Vermaak v Vermaak* 1945 CPD 89 at 96; *Smit v Smit* 1980 (3) SA 1010 (C) at 1017.

<sup>109</sup> Voet 25.3.16; *Goldman NO v Executor Estate Goldman* 1937 WLD 64 at 69.

<sup>110</sup> *In re Estate Visser* 1948 (3) SA 1129 (C) at 1137; *Ex parte Jacobs* 1950 (2) PH M26 (O).

<sup>111</sup> Voet 25.3.16; *Goldman NO v Executor Estate Goldman* 1927 WLD 64 at 69; *Vermaak v Vermaak* (supra) at 96; *Bursey v Bursey* [1997] 4 All SA 580 (E) confirmed on appeal see *Bursey v Bursey* [1999] 2 All SA 289 (A); 1999.

make him or her 'self-supporting' in the legal sense, for the income may be insufficient to maintain the child at the standard of living of that family.<sup>112</sup>

### 2. 3. 3 *Child Maintenance on Divorce*

Where the parents share a common household with their children, the apportionment of the duty of support of the children is an issue which, hopefully, is not likely to arise. On divorce, however, the court often has to assess the relative means and earning capacity of the parties in order to determine how much the non-custodian should pay to the custodian parent for the maintenance of the child.<sup>113</sup> The need for assessment may also arise where a mother claims maintenance for her child born out of wedlock.<sup>114</sup>

Remarriage after divorce, whether in or out of community of property, does not relieve parents of their responsibility to maintain a child of a previous marriage.<sup>115</sup> However, in *Chizengenu's*

---

<sup>112</sup> *Ex parte Jacobs* 1950 (2) PH M26 (O).

<sup>113</sup> *Farrell v Hankey* 1921 TPD 590 at 596; *Hartman v Krogscheepers* 1950 (4) SA 421 (W) at 423-4. In *Woodhead v Woodhead* 1955 (3) SA 138 (SR), where it appeared that the father earned £90 per month and the mother £50, the court apportioned the duty to support two minor children equally between them. See too *Kemp v Kemp* 1958 (3) SA 736 (D) at 738A; *Herfst v Herfst* 1964 (4) SA 127 (W) at 130; *Buch v Buch* 1967 (3) SA 83 (T) at 88 C-D; *Senior v National General Insurance Company* 1989 (2) SA 136 (W). Section 6 (3) of the Divorce Act 70 of 1979 provides that a court granting a divorce may make any order which it deems fit in regard to the maintenance of a dependent child of the marriage, but its order is ancillary to the common law duty of support (*Kemp v Kemp* 1958 (3) SA 736 (D)). Where maintenance for a child is claimed from a parent's deceased estate, it may be necessary to apportion the duty of support between the estate and the surviving parent: *Davis' Tutor v Estate Davis* 1925 WLD 168 at 173, *In re Estate Visser* 1948 (3) SA 1129 (C) at 1135 (where the question was left open), *Christie NO v Estate Christie* 1956 (3) SA 659 (N) at 662, *Bank v Sussman* 1968 (2) SA 15 (O) at 17 H, *Couper v Flynn* 1975 (1) SA 778 (R) at 780-1, *Van der Vyver & Joubert Persone-en Familiereg* 628.

<sup>114</sup> *Lamb v Sack* 1974 (2) SA 670 (T). See too *Tate v Jurado* 1976 (4) SA 238 (W) at 242, *Sager v Bezuidenhout* 1980 (3) SA 1005; Johan David Van der Vyver and David Joubert *Persone-en Familiereg* 628, *Zimelka v Zimelka* 1900 (4) SA 303 (W); South African Law Commission (1984) 'Investigation into the Legal Position of Illegitimate Children' *Working Paper 7 Project* 38 88.

<sup>115</sup> Voet 23.2.81; *Scott v Scott* 1946 WLD 399; *Hartman v Krogscheepers* 1950 (4) SA 421 (W); *Van der Walt v Van der Walt* 1961 (4) SA 854 (O); *Du Preez v Du Preez* 1961 (1) PH 84 (O); *Heinrich v Heinrich* 1968 (2) SA PH 89 (SWA); *Hancock v Hancock* 1957 (2) SA 500 (C).

case,<sup>116</sup> a more flexible attitude was adopted by the Zimbabwean High Court, which pointed out that, although one's obligations to a first wife and children are properly regarded as a prior charge, the subsequent establishment of a family will clearly affect the husband's ability to maintain his first wife and family: those requiring support will have to adjust their standard of living, with the second family playing a subordinate role to the first.<sup>117</sup> This approach seems a commendable one, if one considers the high divorce rate in this country.<sup>118</sup> Furthermore, in the new Maintenance Act,<sup>119</sup> it is stated that, as from the commencement of this Act, a provision of any law to the effect that any obligation of support incurred by a parent in respect of a child from a first marriage shall have priority over any obligation incurred by that parent in respect of any other child, shall have no force and effect.<sup>120</sup> This is somewhat at variance with the case law since, in applications for a reduction of maintenance on the grounds of a deteriorating financial position in the life of a liable parent, the courts have customarily attempted to establish whether the financial decline is due to circumstances beyond that parent's control. If that parent has been the cause of it, for example by entering into a second marriage, the court is generally less sympathetic. However, a person who marries a second time in community of property is bound to utilize his or her share of the joint estate of his or her second marriage for this purpose.<sup>121</sup> The joint estate therefore becomes liable to maintain stepchildren and an application for an increase in the maintenance payable by a liable parent may require disclosure of particulars of the assets in and value of the joint estate of the second marriage. However, the duty to support children is

---

<sup>116</sup> 1989 (1) SA 454 (ZHC).

<sup>117</sup> At 456J-457A.

<sup>118</sup> Sinclair (assisted by Heaton) *Marriage* Vol 1 307; Hahlo 1983 *Acta Juridica* 1-4; Sinclair *An Introduction to the Matrimonial Property Act* (1984) 1-2; 1983 *Acta Juridica* 75 at 77-8.

<sup>119</sup> 99 of 1998.

<sup>120</sup> Section 15 (4).

<sup>121</sup> See ID Schäfer *Family Law Service* C8; *Hancock v Hancock* 1957 (2) SA 500 (C); *Dawe v Dawe* 1980 (1) SA 141 (Z); *Mentz v Simpson* 1990 (4) SA 455 (A); cf *Chizengeni v Chizengeni* 1989 (1) SA 454 (ZHC).

unaffected by remarriage out of community of property.<sup>122</sup>

Changing concepts of parenthood can affect the law of maintenance. Given the prevalence of divorce and remarriage in our society, concepts of 'social parent' may well be influential in South Africa. The central issue is whether legal parenthood should correspond with social or biological parenthood.<sup>123</sup> A problem, however, arises if the new marriage or partnership dissolves. What basic arguments can be used for a duty to support a 'former' step-child?<sup>124</sup>

---

<sup>122</sup> In Canadian legislation the definition of 'parent' has been extended to include a 'person who has demonstrated a settled intention to treat a child as a child of his or her family'. As a result of this changing definition of family and parent, Canadian courts are facing a number of contentious issues. One such issue is whether the person who has come within the extended definition of 'parent' towards a child can unilaterally terminate the child support obligation following separation by ceasing to provide economic support and discontinuing any involvement in the child's life and thereby ceasing to stand in the place of the parent. One view adopted by the Manitoba Court of Appeal in *Carignan v Carignan* (1989) 22 RFL (ed) (376) (Man CA) is that a step-parent who ceases to live with a child has an unfettered right to terminate the relationship and thereby end any legal obligation to the child. The Court found support for this approach in jurisprudence dealing with the concept of in loco parentis in the context of inheritance issues. This approach has, however, been rejected by other courts. See *Carson v Carson* (1986) 49 RFL (2d) 459 (Ont Prov Ct) in which the court held that such a relationship, once established cannot be unilaterally set aside at 463; see too N Bala 'The Evolving Canadian Definition of the Family: Towards a Pluralistic and Functional Approach' (1994) 8 *International Journal of Law and the Family* 293 at 299.

<sup>123</sup> See Belinda van Heerden 'Parental Responsibility' (unpublished paper for the South African Law Commission Review of the Child Care Act) (1999). See too LD Wardle 'Evolving Rights and Duties of Step-Parents' in *Parenthood in Modern Society* (edited John Eekelaar and Petar Sarcevic (1993) 375. In terms of the laws of most countries in Europe, the step-parent does not assume any maintenance obligations. Only Dutch law stipulates that the step-parent is obliged, within marriage, to maintain the minor children of his or her spouse who form part of the new household (Art. 395 of the Dutch Civil Code). The Swiss Civil Law Code stipulates that the step-parent must assist his ex spouse in the execution of maintenance obligations, but is not under any obligation. (Article 278 para. 2). The Swiss approach is perhaps the preferable one; it applies in South African society in marriages in community of property.

<sup>124</sup> See J Sosson 'The Legal Status of Step-Families' in *Parenthood in Modern Society* (ed John Eekelaar and Petar Sarcevic (1993) 395 at 397 (Martinus Nijhoff Publishers, The Netherlands.)

#### 2.3.4 *Duty of Support of the Child Conceived by means of Artificial Insemination or Surrogate Motherhood.*

It is not only the prevalence of 'social'<sup>125</sup> parents or an extended family structure that needs to be considered in implementing reform of the maintenance law, but also the changing nature of the family as a result of the use of new techniques of reproduction. Two legal presumptions govern our law in relation to fatherhood: the presumption of legitimacy and that of paternity. In terms of the presumption of legitimacy, a child born to or conceived by a married woman is presumed to be the legitimate child of such woman and her husband<sup>126</sup> unless this presumption is rebutted by evidence which indicates on a balance of probabilities that the woman's husband is not the father of the child.<sup>127</sup> A husband who shows that his wife had intercourse with other men does not rebut the presumption.<sup>128</sup> A presumption of paternity arises in any disputed paternity proceedings where it is proved that the man had sexual intercourse with the mother at any time when that child could have been conceived.<sup>129</sup> Since 1965, our courts had accepted that for the presumption of paternity to arise, an unmarried woman who was trying to establish the paternity of her child had only to prove that she had intercourse with the alleged father.<sup>130</sup> Such intercourse did not have to be proved to have taken place at such a time as to serve as an indication of his paternity: she simply had to prove the fact of intercourse at any time. The alleged father was then faced with proving the impossibility of paternity, even though it might not have been proved (by the mere fact of intercourse) that he might be the father. The Children's Status Act has improved the law in this regard by specifying that it must be proved that intercourse took place at a time when the child in

---

<sup>125</sup> See A Agell 'Step-Parenthood and Biological Parenthood in Parenthood in Modern Society' (ed John Eekelaar and Petar Sarcevic) (1993) 407 at 417.

<sup>126</sup> *Pater est quem nuptiae demonstrant.*

<sup>127</sup> *Van Lutterveld v Engels* 1959 (2) SA 669 (A).

<sup>128</sup> *S v Sambo* 1962 (4) SA 93 (E) at 98C.

<sup>129</sup> Section I of the Children's Status Act 82 of 1987.

<sup>130</sup> *S v Swart* 1965 (3) SA 454 (A).

question could have been conceived.<sup>131</sup>

Being a genetic parent does not always imply being a legal parent. The husband of a woman who has a child by means of assisted reproduction is considered to be the father of the child, provided that he consented to the receipt of the donated sperm. A doctor may perform artificial insemination on any woman.<sup>132</sup> Until 1997, an artificial insemination procedure (as defined in the Human Tissue Act)<sup>133</sup> could only be performed by a medical practitioner on a married woman, and then only with the written consent of her husband. This provision was challenged by three unmarried women, all of whom were desirous of being recipients of donor sperm. Approaches by these women to the Minister of Health and to the Human Rights Commission resulted in the amendment by the Minister of Health of the offending regulations on 17 October 1997.<sup>134</sup> Unmarried women now qualify for artificial insemination procedures, including the receipt of donor sperm, on exactly the same basis as their married counterparts. If the woman is married, however, the presumption arises that the husband gave his consent to the artificial insemination and the onus would be on him to show that he did not consent.<sup>135</sup> All ties are severed between the donor and child.<sup>136</sup>

As far as mothers are concerned, until recently it was beyond question that the woman who gave

---

<sup>131</sup> Section 5 of Act 82 of 1987.

<sup>132</sup> Regulation 8 (1) of the Regulations regarding the Artificial Insemination of Persons, and Related Matters, issued by the Minister of Health under s 37 of the Human Tissue Act (65 of 1983) on 20 June 1986 as amended by GG 18362 of 17 October 1997.

<sup>133</sup> 65 of 1983.

<sup>134</sup> See Government Notice 1354 in Government Gazette 18362.

<sup>135</sup> Section 5 (1) (a) of Act 82 of 1987.

<sup>136</sup> Section 5 (2) of the Children's Status Act. In England, legislation goes much further and where donated sperm is used for a woman in the course of licensed 'treatment services' provided for her and a man together, that man is treated as the father of the child. This means that an unmarried partner may acquire the status of a father, even though he is not the genetic father and he is not required to be cohabiting with the mother. However, in the case of 'licensed treatment,' it is provided that those offering the treatment must examine the prospective parents' suitability to parent, taking into account the child's need for a father. (See Human Fertilisation and Embryology Act 1990 and Regulations issued thereunder (1994)).



birth to a child was in law the mother. With the advance in reproductive methods and techniques, a woman is now able to give birth to a child to which she is not genetically related, for example where an embryo or eggs and semen have been placed in her uterus.<sup>137</sup> This raises the question whether the woman giving birth or the genetic mother is the legal mother.<sup>138</sup> Artificial insemination is defined sufficiently widely by the Children's Status Act<sup>139</sup> to include in vitro fertilization and embryo transfer: it seems that at present the woman giving birth to the child - and not the genetic mother - would be deemed to be the mother of the child. Therefore, with regard to contracts of surrogate motherhood where one woman agrees to bear a child for another, the legality and enforceability of such arrangements requires clarity.<sup>140</sup>

A distinction is usually drawn between partial surrogacy and full surrogacy. Where the pregnancy

---

<sup>137</sup> As in the case of full or gestational surrogacy. See ML Lupton 'Medico-Legal Aspects' in *Family Law Service* (ed Schäfer) (1987) J106-J117; see too ML Lupton 'Surrogate Parenting: The Advantages and Disadvantages' (1986) 11 *TRW* 148.

<sup>138</sup> See Belinda van Heerden 'Putting Humpty Dumpty Back Together Again: Towards Restructuring Families and Children's Lives in South Africa' (1998) 115 *SALJ* 156 at 161.

<sup>139</sup> Section 5 (1) (a) of Act 82 of 1987.

<sup>140</sup> In England the Surrogacy Arrangements Act combines a 'criminalising' and a 'laissez-faire' approach in that it does not ban any form of surrogacy agreement directly or any agreement that a fee should be paid to the surrogate (ss 2 (2) (b) and s 3). The woman who gives birth to a child is presumed to be the mother and where the surrogate is married, then her husband is presumed to be the father (s 27 (1) cf s 28 of the Human Fertilisation and Embryology Act 1990). This is in accordance with the policy of the Surrogacy Arrangements Act: a policy aimed at discouraging surrogacy as far as possible. There has, however, been some relaxation in this policy: it is now possible for the commissioning couple to apply to court to be registered as the parent of the child (s 30 of the Human Fertilisation and Embryology Act 1990). The commissioning couple are provided with a legal mechanism, which enables them to avoid resorting to adoption procedures in order to obtain legal rights to the child. The English Parental Orders (Human Fertilisation and Embryology) Regulations 1994, made under section 30(9) of the Human Fertilisation and Embryology Act, introduced new procedural arrangements necessary to transfer legal parenthood to the commissioning couple; and apply certain sections of the Adoption Act 1976 (and similar provisions in Northern Ireland) to give effect to the arrangements whereby a parental order may be made. Advice on the new regulations was issued to Local Authorities and Health Authorities in November 1994 (LAC (94) 25). Among other things, this guidance requires local authorities to make enquiries when they are aware that a child has been, or is about to be, born as the result of a surrogacy arrangement in order to satisfy themselves that the child is not at risk as the result of the arrangement. The provisions of the Children Act 1989 permit the local authority to intervene if they consider the child is suffering, or is likely to suffer, significant harm by seeking a care order.

of the surrogate mother is achieved through the implantation into her uterus of an embryo which has been 'created'<sup>141</sup> using the gametes of the commissioning person or couple or of donors (or of a combination of these persons), the process is referred to as 'full' surrogacy or 'gestational' surrogacy. In such cases, the surrogate mother carries and gives birth to a child to whom she is not genetically related. If, on the other hand, the surrogate mother's own ovum is fertilised (either naturally or through 'artificial' fertilization) using the semen of the commissioning man or of a donor, or where the surrogate mother's ovum is extracted, fertilised in vitro using the semen of the commissioning man or of a donor and the resultant embryo replaced in her womb, the process is known as 'partial' surrogacy. In such cases, the surrogate mother is both the genetic and the gestational mother of the child. Depending on the technique utilized, a child born as a result of a surrogacy agreement could have as many as six different 'potential' parents: the genetic 'parents' (the donors of the semen and ovum), the commissioning 'parents', the surrogate mother who carries the baby to term and, if she is married, the surrogate's husband.

There is as yet no legislation in South Africa dealing specifically with surrogacy arrangements. The 1986 Regulations Regarding the Artificial Insemination of Persons, and Related Matters, issued in terms of the Human Tissue Act,<sup>142</sup> were apparently not intended to include surrogacy within their ambit, but do not forbid it. Although the Children's Status Act<sup>143</sup> was on the face of it not intended to deal with the surrogacy, this Act has far-reaching implications for many cases of surrogate motherhood.<sup>144</sup> The definition of 'artificial insemination' in this Act is broad enough to cover many of the procedures used to implement surrogacy agreements. In those situations of surrogacy to which the Act applies, the effect is that the child will be deemed for all purposes to

---

<sup>141</sup> Either naturally through sexual intercourse, or in vitro, by combining semen and ova in a glass container under laboratory conditions.

<sup>142</sup> 65 of 1983 which were recently amended so as to make it legally possible for unmarried women to undergo 'artificial' fertilization procedures and hence to access donor semen : see Government Notice RI 354 in Government Gazette 18362 of 17 October 1997. Prior to these amendments, 'artificial' insemination could legally only be carried out on a married woman and then only with the written consent of her husband.

<sup>143</sup> Section 24 of Act 82 of 1987.

<sup>144</sup> Section 5 (1) (a) of Act 82 of 1987.

be the legitimate child of the surrogate mother and her husband, provided that both spouses consented to the 'artificial' insemination process.<sup>145</sup> The persons whose semen and/or ova were used in the conception process have no rights, obligations or duties of support towards the child. This would be so even in a case of 'full' surrogacy where the gametes of both the commissioning 'parents' have been used so that they are the genetic parents of the child. If, on the other hand, the legal requirements are not complied with, the common law will prevail and the child will be considered to be the extra-marital child of the surrogate mother, and she will be obliged to support the child.

Under the current South African law, the only way in which the commissioning person or couple can become the legal parents of the child is by adopting this child. In terms of the Child Care Act,<sup>146</sup> the surrogate mother (and, if she is married, her husband) must consent to the adoption of the child unless the children's court is prepared to dispense with such consent.<sup>147</sup> Adoption could give rise to problems in a situation of commercial surrogacy, since the Child Care Act<sup>148</sup> criminalises the payment or receipt of remuneration in respect of the adoption of a child, although the surrogate's actual expenses incurred might be paid. The commissioning person or couple could theoretically also apply to the High Court for an order awarding the guardianship of the child to them, which order can be made by the High Court in its capacity as upper guardian of all minors if it is in the best interests of the child and the duty of support will follow.

This highly inconclusive state of affairs gave rise to an investigation by the South African Law Commission into the legal and other implications of surrogate motherhood.<sup>149</sup> Following the circulation of a Questionnaire on Surrogate Motherhood in November 1989, the Law Commission

---

<sup>145</sup> From Regulation 21 (1) (b) (iii) of the Regulations issued under the Child Care Act (as inserted by the 1998 Amendments).

<sup>146</sup> 74 of 1983.

<sup>147</sup> Section 17 of Act 74 of 1983.

<sup>148</sup> Section 24 of Act 74 of 1983.

<sup>149</sup> Working Paper 38 Project 65 *Surrogate Motherhood* (April 1991).

published (in 1991) a Working Paper on the topic, incorporating a draft bill.<sup>150</sup> In 1995, the Law Commission Report was referred by Parliament to an Ad Hoc Select Committee for investigation and report.<sup>151</sup> The Law Commission had taken the view that surrogacy should not be banned or criminalized in South Africa, but should rather be recognized and regulated by legislation, which view was shared by the Ad Hoc Committee. However, on many other aspects, the approaches of the Law Commission and the Committee differ quite widely.

The 1998 Committee Report and Draft Bill recommended that, in the case of full surrogacy, any child or children born from a surrogate motherhood arrangement should be regarded as the legitimate child or children of the commissioning parent or parents immediately after birth and the birth of the child or children must be registered accordingly. This is referred to as direct parentage.<sup>152</sup> The surrogate mother is then obliged to hand over the child to the commissioning parent or parents immediately after the birth and neither the surrogate mother nor any of her relatives will have any rights of guardianship, custody of or access to the child or children. However, the parties to the agreement may enter into an agreement regarding visitation rights and access to the child or children.<sup>153</sup> The child born through full surrogacy shall not, on account of the surrogacy, have any claim of maintenance or of succession against the surrogate mother, or any of her relatives. Nor will there be any duty of support.<sup>154</sup>

---

<sup>150</sup> The Draft Bill contained in Schedule A to the Law Commission Report was published on 14 June 1995, members of the public being requested to make written representations on the Bill to the Committee by 30 July 1995. The Committee also conducted public hearings, called for written submissions through advertisements, conducted study tours in the North-West, Northern Province, Eastern Cape and KwaZulu-Natal and visited the United States of America and the United Kingdom to investigate how surrogate motherhood is dealt with in other jurisdictions.

<sup>151</sup> See Proposed Bills on Surrogate Motherhood, South African Law Commission (1993) Report Project 65; cf Final Report of the Ad Hoc Committee on Report of South African Law Commission on Surrogate Motherhood dated October 1998.

<sup>152</sup> At para 6.9.1 p42.

<sup>153</sup> At para 6.9.13.

<sup>154</sup> At para 6.9.14.

In the case of partial surrogacy, after six weeks but within six months of the birth of the baby, the commissioning parent or parents may apply for a change of parentage or so-called fast track adoption.<sup>155</sup> The parties to the agreement may enter into an agreement regarding visitation rights and access to the child or children.<sup>156</sup> If the transfer of parentage take place in favour of the commissioning parents, the child born through partial surrogacy shall not have any claim for maintenance or of succession against the surrogate mother, or any of her relatives.<sup>157</sup>

## 2.4 Conclusion

The use of judicial discretion to determine maintenance obligations has almost universally been viewed negatively as inconsistent, unfair, and unpredictable.<sup>158</sup> An international trend away from discretion and towards the use of formulae to set levels of child support has developed. Such reforms have already taken place in Australia, in some states in the United States and in England. It may be that this is the result of a recognition that only standard levels set by a formula could remove the inconsistent and arbitrary nature of awards. It can also be seen as part of a more general swing towards making the process of divorce more administrative and bureaucratic since obtaining a divorce is already to some extent a routine procedure in many countries, such as Australia and Sweden. However, the complexity of the issues to be resolved cannot be underestimated. It is difficult to envisage a formula which could cater for all varieties of circumstance. The trend towards administrative-based rules may be too extensive, abandoning the

---

<sup>155</sup> This would entail that the baby will be given a new birth certificate in which the commissioning parent or parents are named as a parent or parents of the child or children. The six week-rule flows from the requirement that the surrogate mother should only make a final decision to give up her rights towards the baby after six weeks. The consent of the surrogate mother should be unconditional. Should the surrogate mother not give her unconditional consent to a transfer of parentage, the status quo will remain. (At para 6.9.2.5.)

<sup>156</sup> At para 6.9.2.6.

<sup>157</sup> At para 6.9.2.7.

<sup>158</sup> See Emily Jackson, Fran Washoff with Mavis Maclean and Rebecca Emerson Dobash 'Financial Support on Divorce: the Right Mixture of Rules and Discretion' (1993) 7 *International Journal of Law and the Family* 230 at 232.

flexibility which is required in such situations. It is debatable whether a rule-based system can cater for all the adjustments which are required for the overall financial package on divorce. Even though discretion may not facilitate the resolution of disputes without the need for legal representation and may lead to inconsistencies, it might nevertheless be fairer for the decision-maker to examine each case individually before determining the amount of maintenance to be paid.

Greater certainty, however, is required in this area of the law. Custodial parents need to know the amount of the contribution from liable parents in order to budget the family expenditure. Such contribution must be expressed authoritatively by the law so that it can be enforced in the courts. Conversely, liable parents should be informed of the extent of their obligations to their first family to enable appropriate budget planning to be done. The aggregate income will generally be inadequate to meet all the desires and expectations of the former family members. A compromise is required and the role of law should be to provide a framework of rules and objectives to guide the nature of the settlement and strengthen legitimate claims. Future circumstances are a crucial factor in determining priorities for expenditure, and these are contingent upon a variety of circumstances, such as new commitments and resources as a result of a second partnership and the needs of children. The ex-spouses' incomes may furthermore be subject to fluctuations in the labour market. The debate surrounding the relative merits of rules and discretion becomes extremely complex. Rules, on the one hand, may clearly demarcate entitlement, but this may be at the expense of the need for flexibility. Discretion, on the other hand, may seem to provide individualized decision-making, but at the price of uncertainty and high legal costs.<sup>159</sup> The law needs to be predictable to enable individuals to foresee the legal consequences of their actions and organise their lives accordingly, but has a duty to secure justice and to examine the individual facts of each case. It may be that some retention of the judicial discretion is required but with the provision of guidelines to ensure greater certainty in the extent of the support obligation and also

---

<sup>159</sup>

In England, it appears that there has been a lack of anticipation of the difficulties which may arise from a strongly rule-based administrative system to redistribute resources on divorce. See Emily Jackson, Fran Washoff with Mavis Maclean and Rebecca Emerson Dobash 'Financial Support on Divorce: the Right Mixture of Rules and Discretion' (1993) 7 *International Journal of Law and the Family* 230 at 231.

to clarify the position of others who may provide for the child such as step-parents.

In this context, moreover, there is a need to redefine the concept of 'family' to reflect the heterogeneous reality of South African society.<sup>160</sup> Children's issues in South Africa are characterised by diversity and plurality - diversity in the wide range of legal arrangements affecting children and in their differing cultural and linguistic backgrounds, plurality in the number of statutes affecting children and the differing judicial approaches adopted with regard to the criteria for the development of the child's best interests. South Africa has no Children's Code, no Ministry dedicated to children's affairs and no children's ombudsperson.<sup>161</sup> To ensure that the concept of the child's best interests becomes more than an ideological/political constraint, it is suggested that a comprehensive code should be drawn up encompassing all aspects relating to child welfare and setting out clear guidelines on the factors to be scrutinised by a court in attempting to reach a decision in the child's best interests. Furthermore, a properly constituted Family Court, with trained specialised personnel, effective operation and adequate funding is required to ensure that the promotion of children's best interests is more than a merely academic issue.<sup>162</sup>

---

<sup>160</sup> See *Gold v Commissioner of Child Welfare, Durban* 1978 (2) SA 300 (N). In this case, a couple who had no legal status at all in respect of the child, but had cared for the child for more than four years, succeeded in having their de facto custody of the child recognised and protected in the children's court. Here too, the court held that the custodian mother had delegated her responsibilities for the care of the child to Mr and Mrs Gold - although the mother was not looking after the child personally, he had been properly 'cared for' and was not 'in need of care', the Golds had a substantial interest in the proceedings of the children's court which should in law have been conducted not in the court of the area where the mother resided but in the court of the area where the child resided with the physical carers - where the child habitually ate, drank and slept.

<sup>161</sup> Although the office of the Deputy President does have staff dedicated to children's rights. See too the Constitution of the Western Cape Act I of 1988 which makes provision for a Commissioner for Children.

<sup>162</sup> See further discussion in chap 5.

## CHAPTER 3

### DUTIES OF CHILD SUPPORT AFTER DEATH OF PARENTS OR LOSS DUE TO DEPRIVATION BY THIRD PARTY

#### 3.1 *Duty of Support of Deceased Estates*

##### a) *The Nature and Extent of the Claim*

It has been accepted in South African law,<sup>1</sup> that parents' deceased estates are liable for the support of their children, both legitimate and extramarital.<sup>2</sup> In *Hoffman v Herdan*<sup>3</sup> the court found that it did not exclude major children.<sup>4</sup> So far as spousal support is concerned, however, in *Glazer v Glazer* NO<sup>5</sup> the Appellate Division (now the Supreme Court of Appeal) refused to extend this principle<sup>6</sup> to cases of spouses requiring support to enable them to claim maintenance out of their deceased spouse's estates. There was thus a need for legislative intervention to

---

<sup>1</sup> *Carelse v Estate de Vries* (1906) 23 SC 532.

<sup>2</sup> In arriving at his conclusion, De Villiers CJ followed a text of Groenewegen *De Legibus Abrogatis*, ad Dig 34.1.15 in preference of the opinion of Voet, who states that the obligation ceases on the death of the parent. See Voet 23.2.82, 25.3.18. B Beinart 'Liability of a Deceased Estate for Maintenance' 1958 *Acta Juridica* 92 at 96, 106. It seems that Roman law did not recognise the transmissibility to a deceased estate of the duty of support except in the case of extreme need of the person to be maintained. The Roman law position appeared to have received little extension in the Netherlands. The Appellate Division then held that it was too late to reverse this decision. (*Glazer v Glazer* NO 1963 (4) SA 694 (A) at 707A.); see PQR Boberg *Law of Persons* (1977) 279.

<sup>3</sup> 1982 (2) SA 274 (T).

<sup>4</sup> The court held (at 275) that where a major claimed support from a deceased estate, the onus would be on the claimant to show that support was necessary and to prove the quantum. See too *Ex parte Jacobs* 1982 (2) SA 276 (O).

<sup>5</sup> 1963 (4) SA 694 (A). In the court, the trial judge (Ludorf J) in *Glazer* NO v *Glazer* 1962 (2) SA 548 (W) rejected the widow's claim (see HR Hahlo in (1962) 79 *SALJ* 361), and the Appellate Division refused condonation of the late noting of an appeal against this judgment on the ground that she had virtually no prospect of success on the merits. Thus it effectively decided the question. See Hahlo op cit (1964) 81 *SALJ* 1 at 2; see too Beinart op cit 1965-6 *Acta Juridica* 285 at 310-11.

<sup>6</sup> See *Carelse v Estate de Vries* (1906) 23 SC 532, which held that a parent's estate was liable to support his children and may have been an erroneous interpretation of Roman-Dutch law.



remedy the common-law situation<sup>7</sup> and this initially led to the abortive Family Maintenance Bill of 1969.<sup>8</sup> At long last, in 1990, the Maintenance of Surviving Spouses Act<sup>9</sup> was passed.<sup>10</sup> In terms of the Act, a surviving spouse will, in so far as he or she is not able to provide for his or her reasonable maintenance needs from his or her 'own means' and income, have a claim against the deceased spouse's estate for the provision of his or her reasonable maintenance needs until his or her death or remarriage.<sup>11</sup> The 'own means' of a surviving spouse includes any money, property or other financial benefit which accrues to the surviving spouse in terms of matrimonial property law or the law of succession at the deceased's death.<sup>12</sup> A divorced

---

<sup>7</sup> Beverley Keyser 1990 *Annual Survey* 3.

<sup>8</sup> The Family Maintenance Bill empowered the executor of a deceased estate to award maintenance out of the estate to a dependant (defined as a surviving spouse; divorced spouse entitled to maintenance under an order of court; minor child, brother or sister; and a major child, brother, sister or parent disabled from maintaining himself) of the deceased. The executor's decision granting or refusing maintenance was to be subject to appeal, first to the master and thereafter to the court. Application for maintenance out of an estate would generally have had to be brought within two months after the appointment of an executor. Provision was made for the calculation and manner of payment of maintenance. This Bill was later scrapped following the recommendation of a Select Committee. The committee's report (SC 9-'69), is reproduced in Annexure II to H Hahlo 'The Sad Demise of the Family Maintenance Bill 1969' (1971) 88 *SALJ* 201.

<sup>9</sup> Act 27 of 1990. The Act came into operation on 1 July 1990: Proc R110 GG 12594 of 29 June 1990 *Reg Gaz* 4515.

<sup>10</sup> The Act emanated from the recommendations of the South African Law Commission's *Report on the Introduction of a Legitimate Portion or the Granting of a Right to Maintenance to the Surviving Spouse* (Project 22), submitted in 1987. The Commission was of the view that the institution of a legitimate portion would not be the appropriate solution to the problem, and recommended that a claim for maintenance be given to the surviving spouse by operation of law (see Beverley Keyser 1990 *Annual Survey* 4).

<sup>11</sup> Section 2(1). The claim is dealt with in accordance with the Administration of Estates Act 66 of 1965: the executor of the deceased spouse's estate has the power to enter into an agreement with the surviving spouse, the heirs and legatees to settle the claim of the survivor. A trust may even be created (s2(3)(d)). Assets may be transferred in terms of this agreement or obligations imposed on heirs or legatees. See JC Sonnekus 'Verlengde Onderhoudsaanspraak van die Langslewende Gade - 'n Aanvaarbare Ondergraving van Beskikkingsbevoegheid? 1990 *TSAR* 491, in which Sonnekus concludes that, in many cases, the most pressing need will not be for maintenance in the ordinary sense, but for sufficient accommodation for the surviving spouse if the matrimonial home has been left to a third party. In this case the registration of a personal servitude of *habitatio* against the assets would meet that need.

<sup>12</sup> When calculating the 'reasonable maintenance needs' of the surviving spouse, the following factors must be considered: (i) the amount in the estate of the deceased spouse which is available for distribution to heirs and legatees; (ii) the existing and expected means, earning capacity, financial needs and obligations of the surviving spouse and the subsistence of the marriage; and (iii) the standard of living of the surviving spouse during the subsistence of the marriage and the age of the surviving spouse at the deceased spouse's date of death. Section 3 of the Maintenance

spouse who was entitled to receive maintenance from the deceased whilst he or she was alive is not entitled to maintenance after the deceased's death since the reciprocal duty of support ceases on the death of either of them.<sup>13</sup>

Furthermore, no maintenance claim can be made by a divorced spouse against the estate of the deceased ex-spouse as the Maintenance of Surviving Spouses Act applies only to marriages dissolved by death.<sup>14</sup> The Act does not cater for survivors of customary unions or Muslim marriages.<sup>15</sup> The maintenance claim of the surviving spouse ranks the same as that of a dependent child, that is after creditors and before heirs<sup>16</sup> and no time limit is laid down in the Maintenance of Surviving Spouses Act within which the surviving spouse must lodge a claim.<sup>17</sup> However, a surviving spouse has no right of recourse against anyone who, as a result of a valid distribution in terms of the Administration of Estates Act,<sup>18</sup> has received any benefit from the estate of the deceased spouse.<sup>19</sup>

(b) *Child's Claim*

With the increasing number of deaths due to HIV or AIDS related diseases, such claims against

---

of Surviving Spouses Act 27 of 1990. Provision is further made for 'any other factor which should be taken into account'.

<sup>13</sup> *Wille's Principles of South African Law* (1991) 114 (ed. Dale Hutchison, Belinda van Heerden, DP Visser and CG van der Merwe).

<sup>14</sup> Beverley Keyser 1990 *Annual Survey* 5.

<sup>15</sup> Debates of Parliament (Hansard) 8 March 1990 col 2481; but cf Sinclair (assisted by Heaton) *Marriage* vol 1 179, s 5(6) of the Maintenance Act 23 of 1963; Frik van Heerden 'Onderhoudsverpligtinge Voorspruitend uit 'n Gebruiklike Huwelik' (1993) 56 *THRHR* 670 at 673.

<sup>16</sup> Section 2(3)(b) of the Maintenance of Surviving Spouses Act 27 of 1990. If the claims compete with one another, they are reduced proportionately. Where the interests of the surviving spouse as a claimant for maintenance compete with the interests of his or her minor or dependent children, the Master of the High Court may refuse to entertain a claim for maintenance by the survivor until such conflict has been resolved by the High Court (s 2(3)(c)). This is to protect the interests of minor children.

<sup>17</sup> See Beverley Keyser 1990 *Annual Survey* 6.

<sup>18</sup> Act 66 of 1965.

<sup>19</sup> Section 2(2) of the Maintenance of Surviving Spouses Act 27 of 1990.

deceased estates are likely to increase dramatically. Such claims rank before the rights of heirs and legatees. As with all duties of support, the child's claim to be supported out of his or her parent's estate is dependent upon the child's need,<sup>20</sup> which means that benefits accruing to the child from that estate, whether of an income or of a capital nature, are taken into account in determining whether he or she is entitled to support and, if so, the amount. As the duty to support a child rests upon both parents according to their relative means, the capacity of the surviving spouse to contribute to the maintenance of the child is a significant and relevant consideration<sup>21</sup> and a surviving spouse who had already contributed more than his or her share might claim arrear maintenance from the estate.<sup>22</sup>

The support due by a parent's estate is not confined to the bare essentials of human existence.<sup>23</sup> the court exercises its discretion in striking a balance between the child's needs and the resources of the estate.<sup>24</sup> Besides granting regular maintenance, the court may order the creation of a 'contingency fund' to provide for expenses of an extraordinary nature connected with a child's health and the age up to which maintenance is awarded varies with the circumstances of the case.<sup>25</sup> This might be relevant in the case of a child born infected with HIV/AIDS. The court may order the executor to set aside from the residue of the estate a capital sum sufficient, when invested, to produce the requisite maintenance by way of

---

<sup>20</sup> See *Lotz v Boedel Van der Merwe* 1958 (2) PH M16 (O), where an application for maintenance out of an estate failed for want of evidence of such need. See too the cases in the next footnote.

<sup>21</sup> *Bank v Sussman* 1968 (2) SA 15 (O) at 17H; *Couper v Flynn* 1975 (1) SA 778 (R) at 780-1. Cf in *Estate Visser* 1948 (3) SA 1129 (C) at 1135, because the surviving spouse lacked the means to contribute. See too *Christie NO v Estate Christie* 1956 (3) SA 659 (N) at 662; *Estate De Klerk v Rowan* 1922 EDL 334 at 338; *Davis' Tutor v Estate Davis* 1925 WLD 168 at 173; and *Goldman NO v Executor Estate Goldman* 1937 WLD 64 at 69.

<sup>22</sup> *Christie NO v Estate Christie* 1956 (3) SA 659 (N) at 663A, following *Estate Visser* 1948 (3) SA 1129 (C) at 1141-2.

<sup>23</sup> *Estate Visser* 1948 (3) SA 1129 (C) at 1135.

<sup>24</sup> *Estate Visser* 1948 (3) SA 1129 (C) at 1136.

<sup>25</sup> *Estate De Klerk v Rowan* 1922 EDL 334 at 338; *Davis' Tutor v Estate Davis* 1925 WLD 168 at 174; *Estate Visser* 1948 (3) SA 1129 (C) at 1138; *Ex parte Jacobs* 1950 (2) PH M26 (O); *Bank v Sussman* 1968 (2) SA 15 (O) at 17.

interest.<sup>26</sup> The heir to the bulk of the estate may be required to make the payments out of the income of estate assets, subject to the provision of appropriate security.<sup>27</sup> Where the estate has already been liquidated and distributed by the time a claim for maintenance arises, the claim may still be brought against the heirs personally.<sup>28</sup>

### 3.2 *Loss of Maintenance Due to Third Party Negligence*

#### a) *Nature of the Claim*

A child or spouse might have a claim for maintenance where another person had wrongfully caused the death or injury of the person providing such support, either intentionally or negligently. The wrongdoer may be delictually liable to pay damages for the deprivation of support by the bodily injury or death of a bread winner.<sup>29</sup> It makes no difference whether the injured party's remedy is diminished by his or her own contributory negligence: a dependant has a claim for a loss suffered by him or her alone and not shared with the injured party. However, in some cases, it has been held that the dependants have no claim in their own right if their loss flows from the injured party's loss of income, for his or her remedy includes theirs.<sup>30</sup> In *Erdmann v Santam Insurance Co. Ltd.*,<sup>31</sup> the court was not unwilling to grant the

---

<sup>26</sup> *Davis' Tutor v Estate Davis* 1925 WLD 168 at 174. *Ex parte Zietsman NO*; *Estate Bastard* 1952 (2) SA 16 (C) at 21 A-B.

<sup>27</sup> *Estate Visser* 1948 (3) SA 1129 (C) at 1139-40.

<sup>28</sup> *Lotz v Boedel Van der Merwe* 1958 (2) PH M16 (O); *Bank v Sussman* 1968 (2) SA 15 (O) at 17; *Couper v Flynn* 1975 (1) SA 778 (R) at 779G; *Barnard NO v Miller* 1963 (4) SA 426 (C) at 428C-D.

<sup>29</sup> *De Waal v Messing* 1938 TPD 34 (criticized by Van der Merwe & Olivier *Die Onregmatige Daad* 314-15). See too *De Harde v Protea Assurance Co. Ltd* 1974 (2) SA 109 (E) at 114D, 115. See too *De Harde v Protea Assurance Co. Ltd* 1974 (2) SA 109 (E) at 114D, 115; cf Neethling, Potgieter & Visser *Law of Delict* (1993) 276 who submit that, in principle, no distinction can be drawn between the two cases.

<sup>30</sup> In *Abbott v Bergman* 1922 AD 53, therefore, a husband whose wife was injured by the defendant's negligence was held entitled to damages for the loss of her services in running a boarding-house. See too *Plotkin v Western Assurance Co Ltd* 1955 (2) SA 385 (W) at 394, where Ramsbottom J explained that 'the plaintiff's wife has suffered no patrimonial loss for which she herself could sue. She was not working for a salary, and the value of her work accrued to her husband .. The person who has suffered loss is the husband ..'

<sup>31</sup> 1985 (3) SA 402 (C) at 409.

husband an action for loss of support as a result of injuries to his wife, but concluded that the primary claim was that of the wife. The Apportionment of Damages Amendment Act<sup>32</sup> acknowledges the distinct claim of the dependant by giving the dependant an action where the injured breadwinner and the third party acted negligently: both are treated as joint wrongdoers *vis-a-vis* the dependant.<sup>33</sup> This remedy is based on the Aquilian action and applies whether the defendant acted intentionally or negligently.<sup>34</sup> The remedy is enforced by bringing a dependant's action against the wrongdoer or if the death was caused by the negligent driving of a motor vehicle the statutory third party insurer.<sup>35</sup> Only actual pecuniary loss may be recovered in a dependant's action: no compensation is awarded for injured feelings or grief.<sup>36</sup> Unlike maintenance, which is subject to variation as circumstances change, damages for loss of support are awarded in a lump sum to compensate the plaintiff, once and for all, for past and future deprivation of support resulting from such breadwinner's death or injury.

A detailed consideration of the assessment of damages for death is beyond the scope of this thesis. The court starts by estimating how much the plaintiff has lost annually and multiplying this by the number of years during which support would probably have been provided but for the accident.<sup>37</sup> Allowance is made for probable improvements in the deceased's income with promotion, and a diminution upon eventual retirement. The resulting capital sum is discounted

---

<sup>32</sup> 58 of 1971.

<sup>33</sup> See too *Evins v Shield Insurance Co. Ltd* 1980 (2) SA 814 (A) at 837-8; Jonathan Burchell *Principles of Delict* (1993) 234.

<sup>34</sup> See *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A).

<sup>35</sup> In terms of sections 17 and 18 of the Road Accidents Fund Act 56 of 1996, an action for damage falling within the scope of the Act cannot generally be brought against the owner or driver of the vehicle personally, but must be brought against the 'authorized insurer'. The latter is however, liable only if the owner or driver would have been liable at common law, and the measure of damages is the same. The insurer therefore in effect 'steps into the shoes' of the owner or driver. See Daniels MMF, *The Practitioner's Guide* (1994); see too *Mlisane v South African Eagle Insurance Co.* 1996 (3) SA 36 (C), in which the court found that, under the provisions of Article 40 of the Multilateral Motor Vehicle Accident Fund Act 93 of 1989, read with Articles 48(a) and 52, a pre-existing delictual liability of the wrongdoer is a prerequisite for a claim against the Fund or its appointed agent.

<sup>36</sup> Voet 9.2.12; *Jameson's Minors v CSAR* 1908 TS 575 at 602, *Union Government v Warneke* 1911 AD 657 at 662, 665, 667.

<sup>37</sup> With a widow's claim, usually the joint life expectation of the spouses; with a child's claim, the period until he or she becomes self-supporting.

by a certain percentage to allow for its being acquired all at once, instead of by degrees, as the support would have been, had the deceased survived (its investment potential), after which it is usually further reduced to allow for 'contingencies' - the uncertainties of life. Our courts have held that the 'actual pecuniary loss', which is the only proper subject to an award of damages for death, is a net loss that can be ascertained only by deducting from the plaintiff's gross loss all pecuniary benefits accruing to him or her by reason of the breadwinner's death. These include insurance moneys, pensions and inheritances. The courts take account of the plaintiff's inheritance from the deceased's estate and, in the case of a widow, her prospects of remarriage. The assessment of damages for loss of support resulting from a breadwinner's death is an involved process in which the court may be assisted, but is not bound, by statistical and actuarial evidence. Ultimately, the court arrives at a capital sum which it considers fair in all the circumstances, and awards this sum to the plaintiff. In assessing damages, the court is required to predict the future. Its predictions may be wrong and the process can be a fairly subjective one, rather than an objective calculation.<sup>38</sup> The plaintiff may live longer than expected; prospective remarriage may never materialise. These obvious disadvantages of the system of awarding capital compensation for income loss militate in favour of the introduction of a procedure by which the plaintiff receives 'maintenance' on a reviewable, annuity basis. However, administrative problems have so far prevented law reformers from introducing such a scheme.<sup>39</sup>

In theory, the money, together with its income from suitable investment on an annuity basis, will replace the lost support. Nothing compels the plaintiff to use the money for support: the plaintiff may squander the money and it is not the defendant's business as to how the plaintiff spends the money. Damages awarded to children may, however, be protected from maladministration by an incompetent guardian.<sup>40</sup> Damages may generally not be recovered

---

<sup>38</sup> See Jonathan Burchell *Principles of Delict* (1993) 238; *Shield Insurance Co. Ltd v Booysen* 1979 (3) SA 953 (A).

<sup>39</sup> Cf *Kleinhans v African Guarantee & Indemnity Co. Ltd* 1959 (2) SA 619 (E) where an award of this type was made.

<sup>40</sup> *Van Rij NO v Employers' Liability Assurance Corporation Ltd* 1964 (4) SA 737 (W), followed in *Moshesh NO v Marine & Trade Insurance Co. Ltd* 1971 (4) SA 288 (D).

where the support has been obtained from an illegal or *contra bonos mores* activity.<sup>41</sup>

Besides establishing the defendant's legal responsibility for the breadwinner's death on ordinary delictual principles, the dependant's action is *sui generis* in that, although it is based on negligence towards the deceased, it is conferred upon the dependants in their own right and not by transmission from the deceased's estate.<sup>42</sup> Defences which would have been available against the deceased, such as contributory negligence,<sup>43</sup> cannot be raised against dependants. The deceased's contributory negligence does not preclude recovery in full by the dependants in the first instance, though it entitles the defendant to claim, in the same or a subsequent action, a pro rata contribution from the deceased's estate.<sup>44</sup>

A widow's ability to claim may affect the position of her custodial children, although they will obviously have a claim in their own right for loss of support. The general principle is that a widow should be placed in as good a position with regard maintenance as she would have been had the deceased not been killed.<sup>45</sup> The measure of the damages is the difference between her position as a result of the loss of support she has suffered and the position she could reasonably have been expected to be in if the deceased had not died.<sup>46</sup> However, from such difference

---

<sup>41</sup> *Dhlamini v Ferguson* 1985 (4) SA 843 (A), but cf *Lebona v President Versekeringsmaatskappy* 1991 (3) SA 395 (W) at 405; *Xatula v Minister of Police, Transkei* 1993 (4) SA 344 (Tk), where a claim for loss of support as a result of the wrongful killing of the plaintiff's son by the Transkeian police was allowed, despite the fact that the deceased was earning a salary from an illegal organization. See too *Minister of Police, Transkei v Xatula* 1994 (2) 680 (TkA); *Mankebe v AA Mutual Insurance Association Ltd* 1986 (2) SA 196 (D); *Dhlamini v Multilaterale Motorvoertuigongelukkefonds* 1992 (1) SA 802 (T); see too Brigitte Clark & Johan Roos 'The Law of Delict and the Illegal Breadwinner' (1986) 49 *THRHR* 91; Jonathan Burchell *Principles of Delict* (1993) 129-32; *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A).

<sup>42</sup> Innes CJ in *Jameson's Minors v CSAR* 1908 TS 575 at 584-5.

<sup>43</sup> *Union Government v Lee* 1927 AD 202.

<sup>44</sup> See the Apportionment of Damages Amendment Act 58 of 1971, discussed by PQR Boberg in 1971 *Annual Survey* 142, and in details in his monograph *Apportionment of Damages*, also published in (1971) 88 *SALJ* 423, see PQR Boberg *Delict* vol 1 662-3, who stresses the independent, non-derivative nature of this remedy; see too Neethling, Potgieter & Visser *Delict* (1993) 153; 237-8; Jonathan Burchell *Principles of Delict* (1993) 233n3.

<sup>45</sup> *Legal Insurance Co. v Botes* 1963 (1) SA 608 (A); *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A).

<sup>46</sup> See *Victor v Constantia Insurance Co. Ltd* 1985 (1) SA 118 (C) at 120.

must be deducted any financial benefit accruing to the dependant as a consequence of the breadwinners' death.<sup>47</sup> Where a widow has remarried, it has been held that she has no further claim for damages. Evidence to prove that her new husband has less of a present or prospective capacity to support her than the deceased had is not relevant or admissible.<sup>48</sup> Factors which are taken into account here are, *inter alia*, the joint life expectancies of the couple and the widow's chances of remarriage. However, the inclusion of a widow's chances of remarriage as a factor to be considered was criticized by Rabie CJ in *Constantia v Versekeringsmaatskappy v Victor*.<sup>49</sup> This criticism is all the more applicable when compared to the situation of a minor child, whose parents have been killed in a motor accident and who has thereafter been adopted by adoptive parents, who are capable of supporting the child at the same standard as his natural parents. Such a child is still entitled to damages for loss of the support which he would have received from his natural parents during the period after his adoption.<sup>50</sup> The Appellate Division, now the Supreme Court of Appeal, has held that such a claim was not extinguished<sup>51</sup> and that the award would not doubly compensate the child:<sup>52</sup> the existence of an adopted child's new right to claim support from his adoptive parents was held to be *res inter alios acta* in such an action.<sup>53</sup>

One wonders whether there is any justifiable logic in the practice of reducing a widow's

---

<sup>47</sup> See *Santam Insurance Ltd v Meredith* 1990 (4) SA 265 (TkA).

<sup>48</sup> *Glass v Santam Insurance Ltd* 1992 (1) SA 901 (W) at 904D; see too Jonathan Burchell *Principles of Delict* (1993) 238, who states that it is unfortunately a rule of South African law that a court is entitled to take into account a widow's remarriage in determining her damages for loss of support at 239. See too *Union Government v Warneke* 1911 AD 657; *Yorkshire Insurance Co. Ltd v Porobic* 1957 (2) PHJ16 (A); *Williams v British American Assurance Co.* 1962 (2) PHJ 18 (SR); see too *Milns v Protea Assurance Co. Ltd* 1978 (3) SA 1006 (C), in which the court reduced the compensation to be paid to a widow for loss of support on the death of her husband because the plaintiff wife had herself been earning and contributing towards the joint income; see too *Marine & Trade Insurance Co. v Manamah* 1978 (3) SA 480 (A).

<sup>49</sup> 1986 (1) SA 601 (A); see too Jonathan Burchell *Principles of Delict* (1993) 238 49.

<sup>50</sup> *Constantia Versekering Bpk v Victor* 1986 (1) SA 601 (A).

<sup>51</sup> At 612 B-C.

<sup>52</sup> At 612-13.

<sup>53</sup> At 614 E-G.



damages for loss of her late husband's support, where there is a chance of remarriage.<sup>54</sup> Such a practice is unfairly discriminatory and might well be held to be unconstitutional.<sup>55</sup> It is clear that it is now mandatory for every court, if necessary, to develop the common law so as to render such rules consistent with fundamental constitutional principles.<sup>56</sup> Public policy also needs to be re-examined where it has a role in shaping the evolution of common law.<sup>57</sup> Hence, when the common law rules are at variance with constitutional principles, consideration should be given to changing them, especially where they are based on public policy which is inconsistent with the principles of the Constitution.<sup>58</sup>

*b) Women married in terms of customary law*

A plaintiff in a dependant's action must prove that, but for his or her death, the deceased would have contributed to plaintiff's support in terms of a legal duty to do so.<sup>59</sup> The fact that support was actually provided before the death will not establish a dependant's action without a legal duty of support.<sup>60</sup> This rule has been criticized,<sup>61</sup> but followed by the courts. In *Nkabinde v SA Motor & General Insurance Co. Ltd*,<sup>62</sup> the surviving 'widow' of a customary union failed in a claim on this basis. The Appellate Division (now the Supreme Court of Appeal) had held,

---

<sup>54</sup> See Rabie CJ's comments in *Constantia Versekeringsmaatskappy Bpk v Victor* 1986 (1) SA 601 (A) at 614-15.

<sup>55</sup> See section 9 (3)-(4) of Act 108 of 1996.

<sup>56</sup> See section 39 (2) of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>57</sup> MM Corbett: 'Aspects of the Role of Policy in the Evolution of our Common Law' 1987 (104) *SALJ* 52 at 67.

<sup>58</sup> Cf Warren Freedman 'Islamic Marriages, the Duty of Support and the Application of the Bill of Rights' 1998 (61) *THRHR* 537 at 538.

<sup>59</sup> *Van Vuuren v Sam* 1972 (2) SA 633 (A); *Union Government v Warneke* 1911 AD 657 at 668, 672; *Waterson v Maybery* 1934 TPD 210 at 214; *Oosthuizen v Stanley* 1938 AD 322 at 327-8; *Vaughan NO v SA National Trust & Indemnity Co. Ltd* 1967 (2) SA 417 (R) at 419-20; *Singh v Santam Insurance Co.* 1974 (4) SA 196 (D) at 198 G.

<sup>60</sup> *Vaughan NO v SA National Trust & Assurance Co. Ltd* 1954 (3) SA 667 (C).

<sup>61</sup> See Trynie Davel *Skadevergoeding aan Afhanklikes* (1987) 66-7 for a critical review of this rule.

<sup>62</sup> 1961 (1) SA 302 (D).

in *SANTAM v Fondo*,<sup>63</sup> that a customary union, though it gives rise to certain rights and duties (including support) enforceable between the parties thereto, cannot found a dependant's action for loss of support because, not being a civil marriage, it creates no real duty of support. This situation, which left the majority of women married under customary law without legal remedy if their customary 'husbands' were unlawfully killed, was rectified by legislation granting a dependant's action to the surviving partner of a customary union.<sup>64</sup> The plaintiff in *Pasela v Rondalia Versekeringskorporasie van SA Bpk*,<sup>65</sup> based her claim on this legislation.

The action is not available if either partner to the customary union was also a party to a civil marriage, and the existence of a certificate containing certain prescribed particulars is a condition precedent to instituting it,<sup>66</sup> although the children of a customary union are, of course, entitled to bring a dependant's action for the death of their father under the common law, for his duty of support is based on his paternity and has nothing to do with the status of his union with their mother.<sup>67</sup> It was held in *Makgae v SentraBoer (Koooperatief) Bpk*,<sup>68</sup> that such a certificate must be obtained before the issue of summons, being a condition precedent to the enforceability of such a claim. In that case, it appears that the court overlooked the fact that part of the plaintiff's claim was in her capacity as mother and natural guardian of five minor children born of the union.<sup>69</sup>

However, a new development by the Zimbabwe Supreme Court in *Zimnat Insurance Co. Ltd*

---

<sup>63</sup> 1960 (2) SA 467 (A).

<sup>64</sup> Section 31 of the Black Laws Amendment Act 76 of 1963 (see Ellison Kahn (1964) 81 *SALJ* 102; PQR Boberg 1963 *Annual Survey* 210-11.

<sup>65</sup> 1967 (1) SA 339 (W).

<sup>66</sup> *Mayeki v Shield Insurance Co. Ltd* 1975 (4) SA 370 (C).

<sup>67</sup> See *Zondi v Southern Insurance Association Ltd* 1964 (3) SA 446 (N).

<sup>68</sup> 1981 (4) SA 239 (T).

<sup>69</sup> See (1981) *Annual Survey* 60; *Mayeti v Shield Insurance Co. Ltd* (supra) footnote 65; *Makgae v SentraBoer (Koooperatief) Bpk* (supra); *Slikilili v Federated Insurance Co. Ltd* 1983 (2) SA 275 (C); *Monamodi v SentraBoer (Cooperative) Ltd* 1984 (4) SA 845 (W); *Hela v Commercial Union Assurance Co.* 1990 (2) SA 503 (N).

*v Chawanda*<sup>70</sup> adapted the Aquilian action to modern conditions to give a widow of an unregistered customary union a claim for damages for loss of support as a result of the death of her partner. This decision was reached in the absence of legislation<sup>71</sup> with the Zimbabwe Supreme Court taking the view that it would be inequitable to deny a claim to such a widow because parliament had been slow to react to the needs of society. Despite the weight of judicial precedent against it, the court held that the interests of justice demanded that the claim be allowed.<sup>72</sup>

c) *Women married according to Muslim or Hindu Rites*

In respect of women married according to Muslim or Hindu rites, however, in *Amod v Multilateral Motor Vehicle Accidents Fund*,<sup>73</sup> the court *a quo*, per Meskin J, held<sup>74</sup> that the equivalent of section 39 (2)<sup>75</sup> in the interim Constitution,<sup>76</sup> read with sections 8(2) and (3) thereof,<sup>77</sup> did not give the courts the general power of developing the common law to the extent

---

<sup>70</sup> 1991 (2) SA 825 (ZS).

<sup>71</sup> Such as section 31 of Black Laws Amendment Act 76 of 1963.

<sup>72</sup> On the basis of this case, it has been argued that the South African courts could allow a divorced wife, whose former husband has been ordered to pay maintenance in terms of Section 7 (2) of the Divorce Act 70 of (1979) to claim damages for loss of support from the person who wrongfully caused his death (MJD Francis & MP Freemantle '*Santam v Fondo Revisited*' (1992) 109 *SALJ* 197-203; see too Jonathan Burchell *Principles of Delict* (1993) 236.)

<sup>73</sup> 1997 (12) *BCLR* 1716 (D).

<sup>74</sup> Cf *Gardener v Whitaker* 1993 (2) SA 672 (E); *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 603 (G).

<sup>75</sup> Section 39 (2) of the Constitution of the Republic of South Africa, 1996, provides as follows: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

<sup>76</sup> Constitution of the Republic of South Africa Act 200 of 1993.

<sup>77</sup> Section 8 of the 1996 Constitution (Act 108 of 1996) provides as follows:  
'(1) ...  
(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.  
(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the

that they could alter it.<sup>78</sup> In this case, the plaintiff was a woman married by Islamic rites, which marriage had not been registered as a civil marriage. Her husband was killed in a motor collision and she lodged a claim against the defendant for loss of support. It was common cause that the cause of the accident was the negligence of the other driver. The plaintiff's counsel in the court *a quo* argued that there was a duty of support deriving from the Muslim marriage which entitled her to a dependant's action based on the *lex Aquilia*. However, the plaintiff was faced with the legal obstacle presented by *Ismail v Ismail*,<sup>79</sup> in which the Appellate Division (now the Supreme Court of Appeal) had concluded that a marriage according to Muslim rites, as a potentially polygamous union, was not a lawful marriage, since it was contrary to public policy and, furthermore, that a contract or custom flowing from such a relationship was also vitiated, including the husband's obligation to support his wife. The plaintiff failed to convince the court that public policy had changed since *Ismail's* case.

The parlous position of the plaintiff was further affected by Meskin J's reading of section 39 (2) of the Constitution to the effect that the legislature intended the courts to develop the common law exclusively as envisaged by subsection 8 (2) and (3)<sup>80</sup> and that, furthermore, there was no provision in the Constitution which indicated that the court was to have legislative powers; the intention behind section 39 (2) of the Constitution was that only if the common law is silent with regard to the enforcement of a right in the Bill of Rights, and if legislation does not give effect to such a right, must the court amplify the common law to eliminate such silence.<sup>81</sup> It was not intended that the court could eliminate or alter an existing principle of the common law which affected the operation of such right, irrespective of the manner in which this occurred: such alternation or elimination was to remain the function of the legislature.<sup>82</sup> The court held further that a legal duty of support on which liability in cases such as the

---

limitation is in accordance with section 36 (1).'

<sup>78</sup> At 1723 H-J.

<sup>79</sup> 1983 (1) SA 1006 (A).

<sup>80</sup> At 1722 H-J.

<sup>81</sup> At 1723.

<sup>82</sup> At 1723.

present is grounded depends on the existence of a lawful marriage between the woman (plaintiff) and her now deceased husband. In the light of the court's interpretation of section 39 (2) of the Constitution, the established law could not be altered by importing into it a principle that a duty of support not founded on a lawful marriage was sufficient to ground the liability which the plaintiff sought to enforce.<sup>83</sup> In the premises, the court was obliged to find that the defendant was not legally liable to compensate the plaintiff for the loss of support of her deceased husband.<sup>84</sup> The case went on appeal to the Supreme Court of Appeal.<sup>85</sup> The Supreme Court of Appeal examined the historical origins and evolution of the dependant's action in the common law and agreed that such dependants should in equity be able to recover such loss from a party who has unlawfully caused the death of the breadwinner by any act of negligence or other wrongful conduct and that this was the rationale for the dependant's action (per Mahomed CJ).

The court conceded that the precise scope of the dependant's action is not clear from the texts of the Roman Dutch law, but found that the action was competent at the instance of any dependant within his broad family whom he in fact supported whether he was obliged to do so or not.<sup>86</sup> The tests to be applied were whether:

- (i) the deceased had a duty to support the claimant who was his former wife;
- (ii) that duty was legally enforceable;
- (iii) the right of the former wife to such support was a right which was worthy of protection

---

<sup>83</sup> At 1725. The plaintiff's substantial reliance on the case of *Ryland v Edros* 1996 (4) All SA 557 (C) was held to be of no assistance. The court pointed out that Farlam J in *Ryland's* case clearly did not hold that the marriage according to Muslim rites was a lawful marriage or that it generated a legal duty to support the wife (at 1726E). The issue in that case was whether the contract relied on by the defendant was enforceable *inter partes*, which was not the issue in the present case (at 1726F). This was held to be the distinguishing factor between these cases.

<sup>84</sup> For a critical constitutional assessment of this case see Warren Freedman 'Islamic Marriages and the Application of the Bill of Rights' (1998) 61 *THRHR* 532. Cf *Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T). See too Brigitte Clark and AJ Kerr 'Dependant's Action for Loss of Support: Are Women married under Islamic rites Victims of Unfair Discrimination?' (1999) 116 *SALJ* 20-27.

<sup>85</sup> *Amod v Multilateral Motor Vehicle Accident Fund* as yet unreported Case number 444/98, judgment given 13 September 1999.

<sup>86</sup> See the judgment of Nienaber JA in *SANTAM Bpk v Henery* 1999 (3) SA 421 (SCA) at 425H-426A. See too Grotius *Inleidinge* 3.33.2 and 3.33.3.

by the law, for the purposes of the dependant's action and  
(iv) the last assessment was justified by the criterion of the *boni mores*.

The court held that the crucial question which therefore needs to be applied is whether or not the legal right which the appellant had to support from the deceased during the subsistence of the marriage, is a right which in the circumstances disclosed by the present case, deserves recognition and protection by the law for the purposes of the dependant's action.

In the court's view, it was a right deserving recognition if it was common cause that the Islamic marriage between the appellant and the deceased was a *de facto* monogamous marriage; that it was contracted according to the tenets of a major religion; and that it involved a very public ceremony, special formalities and onerous obligations for both parties in terms of the relevant rules of Islamic law applicable.<sup>87</sup> The court held that the insistence that the duty of support, which such a serious *de facto* monogamous marriage imposes on the husband, is not worthy of protection can only be justified on the basis that the only duty of support which the law will protect in such circumstances is a duty flowing from a marriage solemnized and recognised by one faith or philosophy to the exclusion of others. This was an untenable basis for the determination of the legal convictions of society. It was inconsistent with the ethos of pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993.

The court held that this new ethos is now substantially different from the ethos which informed the determination of the legal convictions of the community when the cases which decided that 'potentially polygamous' marriages did not deserve the protection of the law for the purposes of the dependant's action. The *boni mores* of the community at the time when the cause of action arose in the present proceedings would not, in the court's view, support a conclusion which denies recognition of the common law duty of support, arising from a *de facto* monogamous marriage solemnly entered into in accordance with the Muslim faith. Recognition of duty of support is afforded to a similarly solemnized marriage in accordance with the Christian faith and even to a polygamous marriage solemnized in accordance with

---

<sup>87</sup> Description of Islamic marriage and its consequences in *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC) at para 21.

customary law.<sup>88</sup> The inequality, inherent in such a conclusion would be inconsistent with the new ethos which prevailed on 25 July 1993 when the cause of action commenced. The legal convictions of the community would at that time support the approach which gave to the duty of support flowing from a *de facto* monogamous marriage in terms of the Islamic faith the same protection of the common law for the purposes of the dependant's action, as would be accorded to a monogamous marriage solemnized in terms of the Christian faith.

The court emphasised in this judgment the *de facto* monogamous character of the Muslim marriage between the appellant and the deceased in the present matter, but stressed that it did not

‘wish to be understood as saying that if the deceased had been party to a plurality of continuing unions, his dependants would necessarily fail in a dependant's action based on any duty which the deceased might have towards such dependants’.

The court left that issue open, since arguments arising from the relationship between the values of equality and religious freedom now articulated in the Constitution, but consolidated in the immediate period preceding the interim Constitution, might influence the proper resolution of that issue.

The court concluded that in order to have a claim;

- (a) the deceased had a legally enforceable duty to support the dependant and
- (b) that it was a duty arising from a solemn marriage in accordance with the tenets of recognised and accepted faith and
- (c) it was a duty which deserved recognition and protection for the purposes of the dependant's action.

The dependant would not succeed by establishing (a) alone. The requirement in (a) was held to be a necessary condition but it was not a sufficient condition.<sup>89</sup> It was also suggested that, if a legal duty of support arising from a contractual incident of a Muslim marriage was to be afforded recognition for the purposes of the dependant's action, it would also lead to a

---

<sup>88</sup> by virtue of the provisions of section 31 of the Black Laws Amendment Act 76 of 1963).

<sup>89</sup> See *Union Government v Warneke* 1911 AD 657.

recognition of possibly other incidents of such a marriage which have neither been articulated or properly analysed in the present appeal. The court held that that suggestion is unsound. It is possible to recognise one incident of such a marriage for a special purpose, without necessarily recognising any other incident of such marriage for that purpose or any other purpose. This is made clear in several cases in South Africa and abroad.<sup>90</sup>

Finally, the court stressed that the legal legitimacy of the claim can be assessed purely on the proper application of common law principles to the dependant's action without any reference to any religious doctrine or policy, and thus found for the appellant without any need to rely on either section 35 (3) of the interim Constitution or section 39 (2) of the 1996 Constitution. The judgment is thus somewhat limited in its ratio and leaves the position of such marriages which are polygamous unclear in this respect.

---

<sup>90</sup> *Ryland v Edros* 1996 (4) All SA 557 at 710D; *Fondo's* case note 13 at 710D; *Baindail v Baindail* [1946] 1 All ER 342 (CA) at 346, [1946] P 122 at 128; *Sinha Peerage* case [1946] 1 All ER 348n (Committee of Privileges); *Chaudhry v Chaudhry* [1975] 3 All ER 687 (Fam) at 690, [1976] Fam. 148 at 153; *Imam Din v National Assistance Board* [1967] 1 All ER 750 (QB) at 753, [1967] 2 QB 213 at 219; *Re Sehota (deceased) Surjit Kaur v Gian Kaur and another* [1978] 3 All ER 385 (Ch).



## CHAPTER 4

### THE DUTY OF SUPPORT IN TERMS OF CUSTOMARY LAW AND MARRIAGES BY ISLAMIC OR HINDU RITES

#### 4.1 Customary Law

African customary marriages have not in the past been recognized as legal marriages in South African common law. The reason for this is not the custom of lobola, which is sometimes stigmatized as the sale of women, but the fact that they are potentially polygamous.<sup>1</sup> Civil marriages have been governed by civil law and customary marriages by customary law. Marriage under customary law has been something of an anomaly in South African law. The constantly changing nature of customary law has often not been reflected in the case law or the jurisprudence on the topic.<sup>2</sup> Customary unions may be polygamous, but since 1988 the existence of such a union has acted as a barrier to a subsequent civil-law marriage by the husband to another woman.<sup>3</sup> The Births and Deaths Registration Amendment Act of 1996<sup>4</sup> provided for the first time for children born of African customary unions or marriages by religious rites not to be registered at birth as 'extra-marital' children. This was followed by the Child Care Amendment Act of 1996,<sup>5</sup> which includes African customary unions and marriages concluded in accordance with a system of religious law subject to specified procedures as legally recognised marriages for the purposes of the Child Care Act.<sup>6</sup>

In customary law, divorce ends the connection between the families of the couple. The concept

---

<sup>1</sup> *Ismail v Ismail* 1983 (1) SA 1006 (A); cf AJ Kerr 'Back to the Problems of a Hundred or more years Ago: Public Policy Concerning Contracts Relating to Marriages that are Potentially or Actually Polygamous' (1984) 101 *SALJ* 445; see too Brigitte Clark and AJ Kerr 'Dependant's Action for Loss of Support: Are Women married by Islamic Rites Victims of Unfair Discrimination?' (1999) 116 *SALJ* 20-27.

<sup>2</sup> See Sinclair (assisted by Heaton) *Marriage* Vol 1 239 fn 94 and authorities cited therein.

<sup>3</sup> Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

<sup>4</sup> Act 40 of 1996.

<sup>5</sup> Act 96 of 1996.

<sup>6</sup> Section 1(d).

of making maintenance payments is therefore generally a foreign one.<sup>7</sup> The rule is that all children belonging to a family group are guaranteed support within the group and by all members acting jointly:<sup>8</sup> customary law is focused on group rather than individual rights.<sup>9</sup> As far as the children born outside a customary union or a civil-law marriage are concerned, customary law does not concern itself with the problem of maintenance. Such obligations are imposed on a natural father only if he has acquired guardianship over the child. This has led to increased reliance on statutory enforcement as both the Child Care Act,<sup>10</sup> and the present Maintenance Act<sup>11</sup> are applicable to all.

However, the Recognition of Customary Marriages Act<sup>12</sup> sought to overcome these difficulties by providing for the recognition and registration of all customary marriages whether polygamous or not.<sup>13</sup> It further stipulates that the proprietary consequences of customary marriages will continue to be governed by customary law.<sup>14</sup> The decision not to outlaw polygamous marriages was based on the idea that such a ban would be impossible to enforce and that the practice is waning. However, should a man in an existing (*de facto*) monogamous (or polygamous) customary marriage wish to take on an additional wife, the provisions of the Act will come into effect. These demand that the man applies to the court for the dissolution of the property system previously applicable to the marriage and the division of assets between the various spouses (existing or future). It further provides for the conversion of an existing

---

<sup>7</sup> See TW Bennett *A Source book of Customary Law* 277.

<sup>8</sup> See South African Law Commission Issue Paper 13 Project 110 '*The Review of the Child Care Act*' *First Issue Paper* (April 1998) 8.7).

<sup>9</sup> Thandabanthu Nhlapo *Marriage and Divorce in Swazi Law and Custom* (1992) (Websters) (Mbabane).

<sup>10</sup> Sections 5(2)-(3) and section 9(1)(a) of Act 74 of 1983.

<sup>11</sup> Section 5(5) of Act 23 of 1963.

<sup>12</sup> 120 of 1998 at date of writing not yet in force, assented to 20 November 1998, date of commencement to be proclaimed.

<sup>13</sup> Section 2; see too AJ Kerr 'Customary Law' in *Family Law Service* (1987) ed Brigitte Clark G27.

<sup>14</sup> Section 7 of Act 120 of 1998.

monogamous customary marriage into a civil marriage but not *vice versa*.<sup>15</sup> The upshot of this new legislation is that it seems to attempt to move towards a uniform system of rules for the governance of all marriages, but there are a number of difficulties in interpreting the Act. To some extent, the legislation replaces African customary law with Western civil law, the only exception being that both African and Western ways of *concluding and celebrating* marriage are recognized and that in the case of the former, lobola agreements will be registered and taken into account when decisions are made concerning the maintenance of children after divorce.

In terms of the Recognition of Customary Marriages Act,<sup>16</sup> a wife in a customary marriage has full status and capacity to acquire assets and to dispose of them and to enter into contacts and litigate but the proprietary consequences of a customary marriage entered into before the commencement of this Act continue to be governed by customary law.<sup>17</sup> A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage is a marriage in community of property, unless this is specifically excluded by the parties in an antenuptial contract.<sup>18</sup> A husband in a customary marriage who wishes to enter into a further customary marriage with another woman after this Act must apply to the court for its approval of a written contract which will regulate the future matrimonial property regime of his marriages.<sup>19</sup> The court considering the application has to ensure an equitable distribution of the property and dissolve any accrual or community of property regimes.<sup>20</sup>

There is an institution in African customary law which resembles maintenance in common law

---

<sup>15</sup> Section 7(4) of Act 120 of 1998.

<sup>16</sup> Section 6.

<sup>17</sup> Section 7(1).

<sup>18</sup> Section 7(2).

<sup>19</sup> Section 7(6).

<sup>20</sup> Section 7(7).

and appears to be confused in our law with maintenance.<sup>21</sup> This is the institution of *isoldlo*, which enables any person who has raised a child, whether born in or out of wedlock, to claim payment from a parent if the parent demands custody of the child.<sup>22</sup> *Isondlo* constitutes a token of the transfer of the parental rights to the parent tendering the *isondlo*; payment is limited to one beast. Despite some apparent resemblance between *isondlo* and maintenance, the two institutions cannot be equated: there is no duty resting on a parent to pay *isondlo*, nor does it appear to signify any form of reimbursement for past maintenance. In fact, *isondlo* may be viewed from a western perspective as closely resembling purchase and sale of a child,<sup>23</sup> which is not only illegal in terms of the Child Care Act<sup>24</sup> but also contrary to public policy and the principle of the paramountcy of the best interests of the child which is now enshrined in the Constitution.<sup>25</sup>

With regard to the effect of death on customary marriages, the Maintenance of Surviving Spouses Act<sup>26</sup> makes no provision for the surviving spouses of customary unions.<sup>27</sup> Under customary law the effect on marriage of the death of one of the spouses depends on which one dies first.<sup>28</sup> Death of the wife dissolves the marriage, but does not end the house created by it and the children continue to belong to that house. Death of a husband does not terminate the marriage and the support obligation in respect of the surviving spouse rests on her

---

<sup>21</sup> See South African Law Commission Paper 13 Project 110 *The Review of the Child Care Act 74 of 1983* First Issue Paper (1998) 8.4.3.

<sup>22</sup> TW Bennett *A Source book of African Customary Law* (1991) 277.

<sup>23</sup> It is acknowledged that this is merely an opinion and is not the view of those who are subject to customary law and who have actively experienced this custom.

<sup>24</sup> Section 24 of Act 74 of 1983.

<sup>25</sup> Section 28 of Act 108 of 1996.

<sup>26</sup> 27 of 1990.

<sup>27</sup> See criticism voiced in Debate of Parliament 8 March 1990 col 2481; cf Frik van Heerden 'Onderhoudsverpligtinge Voortspruitend uit 'n Gebruiklike Huwelik' (1993) 56 *THRHR* 670 at 673.

<sup>28</sup> See Sinclair (assisted by Heaton) *Law of Marriage Vol 1* (1996) 259.

husband's heir.<sup>29</sup> In *Mthembu v Letsela*,<sup>30</sup> the court was asked to strike down the formal customary law of inheritance (which allows only men to inherit) on the basis that it was against public policy. The court found that the law was not against public policy, stating that inheritance by male heirs was acceptable, since customary law required such heirs to maintain widows. The court failed to acknowledge that, in practice, heirs often do not discharge the duty of maintaining widows in accordance with the rule.<sup>31</sup> If this practice had been acknowledged by the court, it may have reached a completely different finding. No attempt was made by the court to implement an innovative approach to the development of customary law.

Despite the High Court having concurrent jurisdiction for all divorce cases, Blacks continue to utilise the former Black Divorce Courts,<sup>32</sup> whilst others attend the High Court. Practically, this has meant that a magistrate rather than a judge presides over the divorce and that matters relating to child welfare and maintenance cannot be dealt with at the time of the divorce proceedings. This in turn leads to an unnecessarily protracted divorce procedure as women are left having to approach the Maintenance Court to settle outstanding matters.

There is no marital-property regime in the official version of customary law. As the South African Law Commission commented:

'Before colonization, there would have been little need for an elaborate code of property law, because people had a relative abundance of food and land and the economy was geared mainly to subsistence. An individual's responsibility to support dependants was given far greater emphasis than property rights. It is understandable then that only a few rules about property

---

<sup>29</sup> *Sekeleni* (1904) 21 SC 118.

<sup>30</sup> 1997 (2) SA 936 (T).

<sup>31</sup> See Likhapha Mbatha 'The Role of the Courts in the development of Customary Law' (1999) 4 *Gender Research Project Bulletin* 7. See too Jeanne de Koker 'Male Primogeniture in African Customary Law' (1998) 23 *Tydskrif vir Regswetenskap* 100.

<sup>32</sup> The Black Divorce Courts are now open to all races see section 1 (a) of the Divorce Courts Amendment Act 65 of 1997 which came into effect on 1 April 1998.

entered the official version of customary law.<sup>33</sup>

Customary law was based on the understanding that an individual's primary source of support was the extended family and thus the maintenance of wives and children is of little consequence.<sup>34</sup> Both in law and society, women were supposed to be reliant on men, who therefore bore the responsibility for supporting them. Reality, however, seldom corresponds with the law or popular belief.<sup>35</sup> Most women today are responsible for their own livelihood and on divorce women can seldom rely on the support of extended family.<sup>36</sup> The precolonial context in which indigenous law was formed no longer exists, and so it must now be interpreted and developed to address current law. There have been attempts within African nations to reform customary African family law through legislation.<sup>37</sup>

Without relying on arguments of constitutional invalidity, there is ample justification for the development of the customary law rules. If the statutory rules are not developed and judicial interpretation is not modernised, the customary law rules will surely be *ultra vires* the Constitution. On their face and in their effect, the customary law rules deny both formal and substantive equality to a wife in a customary union simply by virtue of her sex, and result in

---

<sup>33</sup> South African Law Commission Discussion Paper 74 Project 90 'The Harmonisation of the Common Law and the Indigenous Law' (1997) 86.

<sup>34</sup> Bride wealth was seen as provision of security for the wife if she had to return to her own family.

<sup>35</sup> See Alice Armstrong *Struggling over Scarce Resources; Women and Maintenance in Southern Africa* (1992). See too AK Armstrong and RT Nhlapo *Law and the other Sex; the legal position of women in Swaziland* (1985) University of Swaziland Kwaluseni; see further RT Nhlapo *Marriage and Divorce in Swazi Law and Custom* (1992) Websters Mbabane.

<sup>36</sup> South African Law Commission Project 90 'The Harmonisation of the Common Law and the Indigenous Law' (1997) 86.

<sup>37</sup> For example, Welshman Ncube succinctly described reforms in Zimbabwe: 'It is clear that this customary law worked untold hardships on countless wives who had to leave their marriages without any meaningful property ... Consequently, through section 7 of the Matrimonial Causes Act the post-independence government altered this law in respect of its consequences at divorce...' '.... The powers of the courts under this provision are extensive. They include the power to order transfer of property from one spouse to another and [make] any other order the court deems fit in respect of the division, re-allocation, apportionment and distribution of the property of the spouses.' Welshman Ncube 'Reallocation of Matrimonial Property at the Dissolution of Marriage in Zimbabwe' (1990) 34 *Journal of African Law* at 2-3.

her 'subordination and disadvantage in and through the law'.<sup>38</sup> This is no longer permissible under the Bill of Rights.<sup>39</sup> Without reform, the obstacles confronting the attainment by a wife in a customary union of any form of self-determination seem insurmountable. Even if she is the sole wage earner and *de facto* head of a family, she is denied, on the grounds of her sex, control of and potentially even access to the wealth she generates. Furthermore, given the apparent reticence of the courts to develop and rationalize customary law rules,<sup>40</sup> the inferior status of a wife is endorsed and even worsened after dissolution of a customary union. The customary law rules have promoted and reinforced a pattern of disadvantage experienced by women involved in a customary union.

Furthermore, the provisions of the Divorce Act<sup>41</sup> which give the court extensive discretion to order a division and transfer of assets on dissolution of a civil marriage, despite its being (by virtue of an antenuptial contract) out of community of property and, in the absence of any agreement between the parties as to the division of assets<sup>42</sup> do not apply to customary marriages. Whether through earning wages or raising children, many women in customary unions contribute to both the maintenance and increase of a family estate. Yet, they have had no access to any equitable remedy on dissolution of a customary union. The disparate treatment of one form of marriage to the systemic disadvantage of African women is no longer constitutionally permissible. In *Du Plessis & others v De Klerk & another*,<sup>43</sup> Mokgoro J referred to the need for and the ability of the courts to develop customary law:

---

<sup>38</sup> Catherine Albertyn & Janet Kentridge 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 *SAJHR* 149 at 160.

<sup>39</sup> See *President of the Republic of South Africa & another v Hugo* (1997) (4) SA 1 (CC), 1997 (6) *BCLR* 708 (CC), at para 93.

<sup>40</sup> See *Mtembu v Letsila* 1997 (2) SA 936 (T); *Amod v Multilateral Motor Vehicle Accident Fund* 1997 (12) *BCLR* 1716 (D).

<sup>41</sup> Section 7 of Act 70 of 1979.

<sup>42</sup> Section 7 (4) identifies factors to be considered by the court in considering such an order: '...it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner.'

<sup>43</sup> 1996 (3) SA 850 (CC), 1996 (5) *BCLR* 658 (CC), at para 172.

'Under the pre-constitutional order, customary law was lamentably marginalised and allowed to degenerate into a petrified set of norms alienated from its root in the community. There is hence significant scope for the dynamic application and development of customary law by the courts'.

At present, customary law rules deny women in customary unions the right to equal benefit and protection of the law on the grounds of sex and race. They affect such wives adversely, making their attainment of substantive equality or the realization of their inherent human dignity very difficult.<sup>44</sup> Ultimately, such rules are also antithetical to the interests of children and to the development of a sound basis for child maintenance legislation. Such rules are antithetical to the interests of children, because women are predominantly the primary care-givers for children and their legal status will affect the position and welfare of the children for whom they care.<sup>45</sup>

#### 4.2 *Hindu or Muslim Law*

Marriages in terms of Muslim or Hindu rites also occupy an anomalous position in our law, largely in view of their potentially polygynous status.<sup>46</sup> In terms of Islamic law, a wife is entitled to reasonable maintenance from her husband during the marriage as well as during the *iddah* period after divorce.<sup>47</sup> In terms of Islamic law, a mother is under no obligation to contribute to the maintenance of her family.<sup>48</sup> Where, however, the father is unable to maintain the family, the mother is obligated to do so.<sup>49</sup> The failure to recognise Muslim and Hindu marriages results in substantial discrimination against Muslim women, especially in

---

<sup>44</sup> See Wayne van der Meide 'Gender Equality v Right to Culture' (1999) 116 *SALJ* 100.

<sup>45</sup> See Belinda van Heerden 'The Implications of the concept of the Primary Care-giver for Concepts of Custody and Guardianship in Common Law and Legislation' (unpublished paper) presented at a Seminar on the Concept of the Primary Care-giver (August 1997) University of the Western Cape.

<sup>46</sup> See *Ismail v Ismail* 1983 (1) SA 1006 (A).

<sup>47</sup> See *Family Law Service* (ed B Clark) 013. See Sura Talaq ch 65 verse 6; Nasir *The Islamic Law of Personal Status* 103.

<sup>48</sup> Qur'an 4:34.

<sup>49</sup> Abd al Ati *The Family Structure in Islam* (1977) 165.



terms of the lack of enforcement of maintenance upon divorce and the lack of a dependant's action against third parties for the negligent killing of a breadwinner.<sup>50</sup> The impact of the Constitution on this area of the law and the need to review public policy in the light of the new values enshrined in it<sup>51</sup> was clearly demonstrated in *Ryland v Edros*,<sup>52</sup> in which the court held that, since the enactment of the interim Constitution,<sup>53</sup> a contract concluded by parties which arose from a marriage relationship entered into by them in accordance with Muslim rites could not be said to be contrary to the principles of our society since it was quite inimical to all the values of the new South Africa for one party to impose its views on another. The courts should only brand a contract as offensive to public policy if it was offensive to those values which were shared by the community at large, by all right-thinking people in the community and not only by one section of it.<sup>54</sup> In *Ismail v Ismail*<sup>55</sup> the view had been expressed that the customs and contracts there in issue had been contrary to public policy and also *contra bonos mores*, but the court held in *Ryland's* case that the values under the interim Constitution meant that such grounds for invalidation could no longer be supported, particularly in the case of a marriage which was in fact monogamous although potentially polygamous.<sup>56</sup>

---

<sup>50</sup> See *Amod v Multilateral Motor Vehicle Accident Fund* 1997 (12) BCLR 1716 (D); *Amod v Multilateral Motor Vehicle Accident Fund* 1998 (4) SA 753 (CC); see too *Amod Multilateral Motor Vehicle Accident Fund* Case No 444/98 as yet unreported SCA judgement delivered 13 September 1999.

<sup>51</sup> See section 36 of the Constitution of the Republic of South Africa Act 108 of 1996, Ashraf Mahomed 'Case Notes' (March 1997) *De Rebus* 189; Warren Freedman 'Islamic Marriages, the Duty of Support and the Application of the Bill of Rights' (1998) 61 *THRHR* 532 at 537.

<sup>52</sup> 1997 1 BCLR 77 (T); 1997 (2) SA 690 (C).

<sup>53</sup> Act 200 of 1993.

<sup>54</sup> At 709.

<sup>55</sup> 1983 (1) SA 1006 (A).

<sup>56</sup> At 709-710; see too *Kalla v The Master* 1995 (1) SA 261 (T); *Amod v The Multilateral Motor Vehicle Accidents Fund* 1997 (12) BCLR 1716 (D); Case No 444/98 judgement of SCA delivered 13 September 1999, as yet unreported; AJ Kerr and Brigitte Clark 'The Dependant's Action for Loss of Support: Are Women Married by Islamic Rites Victims of Unfair Discrimination?' (1999) 116 *SALJ* 20. See further Ashraf Mahomed *Case Notes* (March 1997) *De Rebus* 189-190.

### 4.3 Conclusion

In South Africa, there has been a particularly marked decline in family ties and support due to a number of factors including the erosion of social support networks following the break-up of the traditional extended-family unit.<sup>57</sup> The economic, social and administrative conditions prevailing in South Africa are those of a developing rather than an advanced society in which family life tends to be very fluid.<sup>58</sup> The policies of the support system in South Africa therefore need to cater for fluid and extended families as well as nuclear single-parent families.<sup>59</sup> Many men have legal support obligations to more than one family, either due to divorce or because they have more than one wife under customary or Hindu or Muslim law.<sup>60</sup> The South African Law Commission, in conjunction with the Department of Justice, is currently undertaking a project<sup>61</sup> that will result in a Discussion Paper addressing the obvious inequities suffered by women in non-civil unions. Civil unions and marriages in general under the Marriage Act<sup>62</sup> are also under review by the South African Law Commission.<sup>63</sup> It is hoped that major recommendations for change will result, especially in view of the fact that South Africa is now bound by, *inter alia*, the Convention on the Nationality of Married Women and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration for

---

<sup>57</sup> See S Burman 'Maintaining the One-Parent Support in South Africa' in *Family, State and Individual Economic Security* vol 1 *The Family* (1988) (ed M Meulders-Klein and J Eekelaar) 507 at 518.

<sup>58</sup> See *Report of the Lund Committee on Child and Family Support* (1996) 16-17. See too unpublished *Summary of Proceedings of Seminar on the Concept of the 'Primary Care-giver' in New South African Legislation*, Community Law Centre, University of the Western Cape, August 1997.

<sup>59</sup> See TW Bennett *Human Rights and African Customary Law* (1995) 97.

<sup>60</sup> See *Report of the Lund Committee on Child and Family Support* (1996) 16-17; Belinda van Heerden and Julia Sloth-Nielsen 'Putting Humpty Dumpty Together Again: Restructuring Families and Children's Rights' (1998) 113 *SALJ* at 166-8; Alice Armstrong 'School and Sadza: Custody and the Best Interests of the Child in Zimbabwe' (1994) 8 *Int J of L and the Fam* 151 at 170. S Jones 'Children on the move: parenting, mobility and birth-status among migrants' in *Questionable Issue* (1991) ed by S Burman & E Preston-Whyte 282.

<sup>61</sup> Project 59 entitled Islamic Marriages and Related Matters (1999).

<sup>62</sup> 25 of 1961.

<sup>63</sup> *Review of the Marriage Act*, Project 109 (1999).

Marriages.<sup>64</sup>

South Africa is a kaleidoscope of cultural, linguistic and religious heterogeneity.<sup>65</sup> The problem of accommodating and protecting ethnic, religious and linguistic minorities in a democratic state operating in accordance with the philosophy and practice of constitutionalism and a justiciable bill of rights eclipsed most other issues in the drafting of the 1993 and the 1996 Constitutions.<sup>66</sup> As a whole, the fundamental rights embodied in Chapter 2 of the 1996 Constitution accord protection to minorities in general,<sup>67</sup> but contain conflicting interpretations that will inevitably give rise to a conflict of rights. Conflicts can arise particularly between the recognition of customary law and equality.<sup>68</sup> There is no explicit hierarchy of rights, and except where the text itself indicates how conflicts are to be resolved (as is the position with section 15 (3), which insulates family laws with an essentially religious content from being challenged in terms of the equality guarantee encapsulated in section 9; both conflicting rights enjoy equal status; as a result the courts must effect a balancing of these in the context of the Constitution as a whole. Although, symbolically and implicitly, equality as the first enumerated right appears to enjoy a hierarchical advantage in relation to other rights, this excludes a process of balancing of either an *ad hoc* nature under the limitation clause or a definitional nature in determining the scope of the given rights.<sup>69</sup> It will be left to the courts to perform a sociological role in balancing cultural liberty with equality.

---

<sup>64</sup> See Chris Jones-Pauly 'The Law and Morality of Support in the Wider Family' in *The Changing Family* (1998) (ed. John Eekelaar and Thandabantu Nhlapo) 265 at 285-6.

<sup>65</sup> See George Devenish 'Minority Rights and Cultural Pluralism: The Protection of Language and Cultural Identity in the 1996 Constitution' (1999) 62 *THRHR* 201 at 202.

<sup>66</sup> Constitution of the Republic of South Africa Acts 200 of 1993 and 108 of 1996.

<sup>67</sup> The equality provision encapsulated in section 9 guarantees equality of treatment to groups of people who were in the past marginalised by virtue of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

<sup>68</sup> See Cachalia 'Citizenship, Muslim family law and a future South African Constitution: A preliminary enquiry' 1993 *THRHR* 392.

<sup>69</sup> Canadian and American cases provide a great deal of assistance in this regard. See *Jehovah's Witnesses v King County Hospital* 390 US 598 (1968); *Wisconsin v Yoder* 406 US 205 (1972); *Estate of Thornton v Caldor* 472 US 703 (1985); *Goldman v Weinberger* 106 SC 1310 (1986); *R v Keegstra* 1990 3 SCR 697.

In comparisons of family support in an European and African context, indications are that the notion of the nuclear family form as the epitome of westernisation and the extended family form as the epitome of an archaic tradition polarise the position too dramatically. Different family forms have always existed contemporaneously, though the spread of any one form and the reasons for its existence may differ.<sup>70</sup> The different family forms may be interdependent. What alters is the law's perception of family and the expectations its members have on one another for support. The law is still struggling to find ways to draw the boundaries of interdependence between the nuclear and the extended family forms. It is suggested that 'need' should be the key legal issue to be hierarchised in terms of expectations, rather than hierarchising persons obliged to and persons entitled to support. Westernisation and urbanisation may not necessarily destroy the extended family obligations, nor lead to the polarisation of extended and nuclear families.<sup>71</sup>

---

<sup>70</sup> See Chris Jones-Pauly 'The Law and Morality of Support in the Wider Family' in *The Changing Family* (1998) (ed. John Eekelaar and Thandabanthu Nhlapo) 265 at 285-6.

<sup>71</sup> See Chris Jones-Pauly *ibid* at 286.

## CHAPTER 5

### ENFORCEMENT OF THE DUTY OF SUPPORT

#### 5.1 Introduction

In August 1996, a parliamentary committee, the Lund Committee, was appointed; one of the terms of its reference was 'to investigate the possibility of increasing parental financial support through the private maintenance system'. Chapter 5 of the Lund Committee Report, dealt with the judicial maintenance system and noted that the maintenance system was 'in disarray'.<sup>1</sup> Further to this, the South African Law Commission conducted a review of the maintenance system<sup>2</sup> to investigate the operation of the Maintenance Act<sup>3</sup> and to recommend steps to try to ensure a more effective maintenance system. Subsequently, a Project Committee was appointed to continue with the Law Commission's investigation into maintenance. Meanwhile, at the same time the Department of Justice published a Discussion Paper entitled *Maintenance Law Reform: The Way Ahead*. As a result of the findings of this Discussion Paper, a new Act<sup>4</sup> was published in July 1998 which incorporates some of the recommendations of the Law Commission and will, when implemented, entirely repeal and replace the Maintenance Act.<sup>5</sup> The South African Law Commission, through its Project Committee on Maintenance, reviewed the Discussion Paper and the new Act proposed by the Department of Justice and pointed out certain shortcomings in the proposed Maintenance Act and suggested that the cause of reform would be better served by way of amendments to the

---

<sup>1</sup> See *Lund Committee Report* (1996) 49.

<sup>2</sup> *Issue Paper 5 Project 100*, 'Review of the Maintenance System' (1997).

<sup>3</sup> 23 of 1963.

<sup>4</sup> 99 of 1998.

<sup>5</sup> 23 of 1963.

existing Maintenance Act<sup>6</sup> rather than the implementation of an entirely new Act.<sup>7</sup> The Maintenance Act<sup>8</sup> has, however, been passed, although to date it is not yet in force.

The new Maintenance Act<sup>9</sup> in its preamble refers to the Constitution of South Africa<sup>10</sup> and the establishment of a society based on democratic values, social and economic justice, equality and fundamental human rights. The Preamble refers to the need to improve the quality of life of all South African citizens and to free the potential of all persons by every means possible, including the establishment of a fair and equitable maintenance system. It is acknowledged that the recovery of maintenance in South Africa possibly falls short of the country's international obligations in terms of the United Nations Convention on the Rights of the Child. It further refers to the fact that the South African Law Commission is investigating, in addition to the recovery of maintenance for children, the reform of the entire South African maintenance system. Pending the implementation of the Law Commission's recommendations, certain amendments are required in the meantime to the existing laws relating to maintenance and, as a first step in the reform of the entire South African maintenance system, certain of those laws need to be restated with a view to emphasising the importance of a sensitive and fair approach to the calculation and recovery of maintenance.

## 5.2 *Criminal Prosecution*

Enforcement is one of the most important steps to effective implementation of judicial maintenance. Provision is made in South African law for a person's duty to support a child to be

---

<sup>6</sup> 23 of 1963.

<sup>7</sup> See Project 100 Interim Report (1998) proposed Maintenance Amendment Bill Annexure A.

<sup>8</sup> 99 of 1998.

<sup>9</sup> 99 of 1998.

<sup>10</sup> Act 108 of 1996.

directly enforceable, even without an initial application to court for a maintenance order.<sup>11</sup> The procedure is by way of a prosecution in terms of the Child Care Act,<sup>12</sup> which states that any person legally liable and able<sup>13</sup> to maintain a child who, while able to do so, fails to provide that child with adequate food, clothing, lodging and medical aid,<sup>14</sup> is guilty of an offence.<sup>15</sup> Accused persons charged under this section are presumed to have been able to provide support, unless they prove that their failure to do so was due to a lack of means and not attributable to their own negligence or default.<sup>16</sup> An accused who relies on this defence must supply the court with full particulars of his income, assets and financial responsibilities: an unsubstantiated statement of inability is insufficient.<sup>17</sup>

To obtain a conviction under this section, the State must prove that the accused's failure to provide for the child was due to his or her fault,<sup>18</sup> and therefore a father's liability depends on knowledge of the child's birth.<sup>19</sup> Where the accused is the child's father, it is not, however, necessary to

---

<sup>11</sup> On the other hand, it would seem that the existence of such an order is no bar to the institution of a prosecution under the Child Care Act 74 of 1983. See *R v De Jager* 1953 (2) SA 197 (T) at 199C, which was decided under the repealed Children's Act 33 of 1960, but the *ratio* is still applicable to the present Act.

<sup>12</sup> Section 50 (2) of Act 74 of 1983.

<sup>13</sup> A charge which fails to allege that the accused was able to maintain the child is fatally defective: *R v Mpaco* 1947 (4) SA 142 (N); *R v Madichane* 1949 (4) SA 224 (O).

<sup>14</sup> But see the definition of 'medical practitioner' in section 1(xxii) of the Child Care Act 74 of 1983 as a 'person registered as such under the Medical, Dental and Supplementary Health Services Professions Act 56 of 1974'. See too *Spiro Parent and Child* 433116.

<sup>15</sup> Maximum penalties are of a fine of R20 000, imprisonment for a period not exceeding five years, or both. See the Child Care Act 74 of 1983, as amended by s 18(b) of Act 86 of 1991. See too *S v Maree* 1990 (3) SA 365 (C).

<sup>16</sup> Section 50(2); *R v Glover* 1950 (2) SA 601 (N); *S v Nel* 1964 (2) PH H196 (GW); *S v Clark* 1971 (2) SA 352 (RA).

<sup>17</sup> *S v Nel* 1964 (2) PH H 196 (GW); *S v Clark* 1971 (2) SA 352 (RA).

<sup>18</sup> A *mala fide* denial of paternity, made for the purpose of evading responsibility for supporting a child, was held to amount to 'blameworthiness' in *R v Ahli* 1959 (2) PH H225 (T). See *Spiro Parent and Child* 440 173.

<sup>19</sup> *R v Jack* 1953 (2) SA 624 (A); *R v Coenraad* 1959 (3) SA 938 (C).

establish a need on the part of the child. Legal liability to maintain the child is determined according to common-law principles and although a step-parent married to the child's parent in community of property is obliged to support the child from the joint estate, he or she is not a 'person legally liable to maintain' his or her stepchild for the purpose of this section if he or she fails to do so.<sup>20</sup> As far as the issue of paternity is concerned, this issue may be *res judicata* as a result of an earlier decision, so that it does not have to be proved *de novo* every time the accused is charged with failure to maintain his child,<sup>21</sup> but a previous acquittal, does not necessarily mean that the issue of paternity was resolved in favour of the accused.<sup>22</sup> A man may escape liability by showing that a child was born by artificial insemination with donor semen to his wife without his consent.<sup>23</sup> However, the presumption arises that his consent *has* been obtained and he would have to rebut this presumption.<sup>24</sup>

### 5.3 Imprisonment

Imprisonment is obviously the most drastic of the sanctions available for contravention of this section. However, this prevents the defaulter from being able to earn an income and sustain a job and there has been extensive opposition to the imprisonment sanction.<sup>25</sup> Normally, therefore, a

---

<sup>20</sup> *S v MacDonald* 1963 (2) SA 431 (C). In Washington, it has been held that a step-parent may not be substituted for a natural parent in determining the basic child support obligation because a step-parent no longer has a duty to support under Washington law once the step-children move out of his or her home (*Harmon v Dept of Social & Health Services*, 951 p 22 770 (Wash. 1998)). But see chapter 10 for a commentary on the legal position in the Netherlands and New Zealand and chapter 2 for the comparative position in Canada.

<sup>21</sup> *R v Kriel* 1939 CPD 221.

<sup>22</sup> *R v Hlengwa* 1958 (4) SA 160 (N); *S v Qongqo* 1962 (3) SA 252 (E).

<sup>23</sup> *L v J* 1985 (4) SA 371 at 377G.

<sup>24</sup> See section 5 (1) (a) of the Children's Status Act 82 of 1987.

<sup>25</sup> See the *English Finer Committee Report* (1974) Cmnd 5629 para. 4.170.



suspended sentence is imposed *in terrorem*.<sup>26</sup> Although it has been suggested that imprisonment does operate as an effective deterrent if it is linked to a well-organized and efficient method of calculating maintenance,<sup>27</sup> the argument has been raised that it may be an unconstitutional and hence inappropriate punishment. In *Coetzee v The Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison*,<sup>28</sup> the Constitutional Court considered the constitutionality of civil imprisonment in terms of the Magistrates' Court Act<sup>29</sup>. Three separate judgments were delivered. Kriegler J held that the sanction of imprisonment for failure to pay a debt was unreasonable because it struck at those who were unable to pay and failed to prove this at a hearing. Kriegler J based his decision on a specific scrutiny of section 65 and not on the overall concept of imprisonment for failure to pay a judgment debt. Didcott J suggested (*obiter*) that imprisonment was not necessarily unconstitutional in all circumstances, provided that the committal was preceded by a full inquiry into the reasons why the debtor had failed to pay. Civil imprisonment would need to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom in terms of the Constitution Act.<sup>30</sup> Sachs J emphasized that nothing in the judgment of the Constitutional Court should be seen as impinging on the sections of the Maintenance Act<sup>31</sup> which provided for imprisonment in cases of failure to comply with maintenance payments. Imprisonment may, therefore, still be a competent sentence in a case where a party, who is financially able to pay, deliberately withholds support from his family, without any extenuating circumstances and in a spirit of contempt for the law.

---

<sup>26</sup> *S v Siyeni* 1963 (3) SA 545 (C); *S v Knoetze* 1976 (1) PH H43 (C). On the similar question of sentence under s 11 of the Maintenance Act 23 of 1963, see South African Law Commission *Issue Paper 5 Project 100* (1997) 'Review of the Maintenance System' 4.43.

<sup>27</sup> D Chambers 'Men Who Know They are Watched: Same Benefits and Costs of Jailing for Non-Payment of Support' (1977) 75 *Michigan Law Review* 900.

<sup>28</sup> 1995 (4) SA 631 (CC).

<sup>29</sup> Section 65 of Act 32 of 1944.

<sup>30</sup> 108 of 1996.

<sup>31</sup> 23 of 1963.

Imprisonment does seem, however to have an effective coercive effect, substantially increasing the amount of maintenance collected,<sup>32</sup> but threat needs to be linked to a well-recognized system of collecting maintenance. However, even if a system of enforcement is devised utilizing imprisonment as a deterrent, it is still necessary to consider the overall propriety of imprisoning defaulters.<sup>33</sup> A legalistic solution to a social problem may be difficult to justify: imprisonment as a punishment should be reserved for cases where there is very clear evidence of ability to pay and a deliberate violation of a court order for maintenance.

#### 5.4 *Garnishee Orders and Other Remedies*

Another major enforcement mechanism is attachment of earnings. The success of this system depends on the effect of a coercive sanction on the employer and obliged parent in implementing the system and the degree of co-operation received from both employer and liable parent.<sup>34</sup> Generally, as far as improving enforcement procedures there are a number of initiatives which the

---

<sup>32</sup> David Chambers 'Men Who Know They are Watched: Some Benefits and Costs of Jailing for Non-Payment of Support' 75 *Michigan Law Review* 900 (1977). In Michigan, a central feature in the system of enforcement is an agency known as the Friend of the Court, which is in charge of the receipt of maintenance payments and which is able to detect failures to pay maintenance very quickly. Chambers at 910.

<sup>33</sup> Cf in the English Finer Committee on One-Parent Families (Cmnd 5629 (1974) vol 1 para 4.162-4.172.) recommended that Parliament eliminate jail as a permissible sanction for non-support, arguing that the actual implementation of the threat does not alleviate the position of the destitute custodial parent and the children in any way.

<sup>34</sup> In Manitoba, a programme of automatic enforcement exists which appears to be operating fairly expeditiously and effectively. A computerised system exists for monitoring maintenance payments. All accounts enrolled in the programme are automatically monitored by a central computer. If maintenance is not paid, enforcement proceedings are immediately commenced - there is no need for the maintenance creditor to initiate proceedings. The maintenance debtor can be compelled to complete a financial statement and to provide financial particulars of his employment income and financial circumstance. In 1984, approximately 85% of the orders registered in the computer system were collected. Defaults are detected within ten days and enforcement proceedings are commenced within one month of the first default. The success of this system appears to be largely dependent on the fact that the maintenance creditor does not have to initiate proceedings, so problems of access to justice, compounded by ignorance or lack of financial resources to seek legal advice, do not arise. See Steel 'Maintenance Enforcement in Canada' (1985) 17 *Ottawa Law Review* 491 at 514-7.

state can take.<sup>35</sup> The creation of a central agency with the ability to monitor automatically all payments seems to promise a greater degree of success. There needs to be provision for prompt detection of defaults. Tax allowances might also be offset against unpaid maintenance. However, all these suggestions for more effective enforcement depend in part on the ability of maintenance debtors to maintain themselves and their families at an adequate standard of living. If they lack this ability, the State has to come to their assistance. The financial cost of family breakdown causes great disparities in the standard of living between broken or single-parent families and two-parent families. The State may well have to assume a major role in this regard.<sup>36</sup>

### 5.5 *Maintenance Orders: The Present Operation of the System in South Africa*

In South Africa, the High Court's common-law jurisdiction to make a maintenance order has been largely superseded by the machinery of the Maintenance Act.<sup>37</sup> This Act constitutes every

---

<sup>35</sup> The United States 1984 Child Support Enforcement Amendments (CSEA) stipulate that all support orders issued or modified in a state must include an order for withholdings. A recipient is entitled to withholding on the date that the amount of arrears equals the support payable for one month. There are provisions for notice to the debtor and opportunity to contest the withholding. The amount which can be withheld is limited to 50% of the disposable earnings of the obliged parent who has a second family and 60% for one who has no second family. Employers are liable for all amounts which they fail to withhold, and are also fined if they discharge or retaliate against a person subject to income withholding. See Horowitz 'The Child Support Enforcement Amendments of 1984' (1985) 36 *Juvenile and Family Court Journal* 1.

<sup>36</sup> See chapter 6 on State Support.

<sup>37</sup> A maintenance order of the High Court may be varied or even discharged by a maintenance court: section 6 read with section 1 of the present Maintenance Act 23 of 1963. It may also be enforced under section 11 of the Maintenance Act. See *Sher v Sher* 1978 (4) SA 728 (W) at 729H; *Osman v Osman* 1992 (1) SA 751 (W). However, see *Steyn v Steyn* 1990 (2) SA 272 (W), where it was held that the Supreme Court, now the High Court, may not (except by way of appeal or review) vary a maintenance order made by the maintenance court (see too *Rabie v Rabie* 1992 (2) SA 306 (W); *Purnell v Purnell* 1993 (2) SA 662 (A)). In regard to children, however, a maintenance order granted in terms of section 8(1) of the Divorce Act 70 of 1979 may be rescinded, varied or suspended by the High Court at any time if there is sufficient reason (see I D Schäfer *Family Law Service* F36.). The enforcement provisions of the Act apply not only to orders of maintenance courts but also to maintenance orders of the High Court. Accordingly, it has been held that these provisions should be invoked wherever possible, and that the High Court will enforce a maintenance order only in very exceptional circumstances: *Troskie v Troskie* 1968 (3) SA 369 (W) at 371. However, in *Cullen v Haupt* 1988 (4) SA 39 (C) at 42 it was held that where maintenance

magistrate's court as a maintenance court within its area of jurisdiction,<sup>38</sup> and provides for the appointment of maintenance officers to institute and assist with the conduct of inquiries in such courts.<sup>39</sup> Upon receipt of a complaint on oath that either any person legally liable to maintain another fails to maintain that person; or sufficient cause exists for the substitution or discharge of a maintenance order, the maintenance officer *may*, after investigation, institute an inquiry in the maintenance court.<sup>40</sup> The new Maintenance Act<sup>41</sup> continues to leave the institution of the inquiry in the discretion of the maintenance officer, although the Discussion Paper,<sup>42</sup> had suggested that legislation might usefully set out some guidelines to inform the court's exercise of discretion and examined the comparative law of Australia and the United Kingdom in this regard.<sup>43</sup>

Although public prosecutors are deemed to be maintenance officers,<sup>44</sup> and although such officers perform functions analogous to those of prosecutors in presenting evidence to the court, a

---

at the rate of R2 000 per month for four children was claimed, this was not a trifling amount and to proceed in the High Court rather than the maintenance court was not necessarily irresponsible. Committal for contempt of court remains, however, an available remedy: *Hayward v Hayward* 1974 (1) PH F3 (C); *Kok v Kok* 1974 (2) SA 657 (T) at 660. The basis of the remedy is that an order to pay maintenance is both *ad pecuniam solvendam* and *ad factum praestandum* (*Hofmeyer v Fourie* 1975 (2) SA 590 (C) at 594ff).

<sup>38</sup> Section 2 of Act 23 of 1963; Section 3 of Act 99 of 1998.

<sup>39</sup> Section 4 of Act 23 of 1963; Section 4 of Act 99 of 1998.

<sup>40</sup> Section 4 (1). *Spiro Parent and Child* 421 interprets (contrary to the statement in *Buch v Buch* 1967 (3) SA 83 (T) at 87A) 'may' to mean 'must'. This is a further section of the Maintenance Act requiring reform and greater specificity (see South African Law Commission Issue Paper 5 Project 100 *Review of the Maintenance System* (1997); see too Department of Justice's Discussion Paper *Maintenance Law Reform: The Way Ahead* (1997) 13--21; South African Law Commission Project 100 *Maintenance* Interim Report (1998) 1.1; see too the *Lund Committee Report* (1996) 55, and new Maintenance Act 99 of 1998 which retains the discretion.

<sup>41</sup> Section 10 of Act 99 of 1998.

<sup>42</sup> *Maintenance Law Reform: The Way Ahead* published by the Department of Justice (1997).

<sup>43</sup> At 13 ff.

<sup>44</sup> Section 3 (2) of Act 23 of 1963; s 4 (1) of Act 99 of 1998.

maintenance inquiry is essentially civil in nature.<sup>45</sup> The proceedings have been described as *sui generis* and one of the special characteristics of this court is that a minor parent against whom a maintenance order is claimed need not be assisted by a parent, guardian or *curator ad litem*.<sup>46</sup> In *Govender v Manikum*<sup>47</sup> the court held, *inter alia*, that appeals against maintenance orders are not criminal in nature and must, in terms of the regulations made under the Maintenance Act, be noted and prosecuted as if they were appeals in ordinary civil cases and it is not correct to describe a maintenance officer as a person 'who prosecutes in the name and on behalf of the State'.<sup>48</sup>

#### 5.5.1 *Lack of specialised personnel*

One of the areas requiring urgent reform in the maintenance courts is the lack of trained personnel. The public prosecutor usually performs the additional role of the maintenance officer. It has been suggested that these roles should be separated<sup>49</sup> and that the maintenance officer who institutes the inquiry should not be confused with the judicial officer who presides over it.<sup>50</sup> It appears that maintenance officers do not follow a standardized procedure of investigation and that practices vary considerably from one maintenance court to another. The new Maintenance Act<sup>51</sup> proposes the appointment of maintenance investigators for each maintenance court to assist in dealing with

---

<sup>45</sup> *Moodley v Gramani* 1967 (1) SA 118 (N) at 120B--C; *Govender v Amurtham* 1979 (3) SA 358 (N); *Nodala v The Magistrate: Umtata* 1992 (2) SA 696 (Tk).

<sup>46</sup> See *Kruger v Ferreira* 1979 (1) SA 915 (NC); see too *Govender v Amurtham* 1979 (3) SA 358 (N).

<sup>47</sup> 1981 (1) SA 1178 (N).

<sup>48</sup> *S v Bedi* 1971 (4) SA 501 (N) at 503-4.

<sup>49</sup> See South African Law Commission Issue Paper 5 Project 100 *Review of the Maintenance System* (1997) 4.19, 4.23; see too the *Lund Committee Report* (1996) 50.

<sup>50</sup> See South African Law Commission Issue Paper 5 Project 100 *Review of the Maintenance System* (1997) 3.3, 3.4; see too *Lund Committee Report* (1996) 50-1.

<sup>51</sup> Section 5 of 99 of 1998.

this problem section. The South African Law Commission<sup>52</sup> has also proposed the appointment of such maintenance investigators<sup>53</sup> and set out their functions in some detail and with greater specificity than the new Maintenance Act. Only a relatively small part of the training of maintenance officers has up until now addressed maintenance issues; many of the course notes for the maintenance training have been out of date.<sup>54</sup> No training in accountancy or gender-sensitivity has been received to enable such persons to understand the income and assets issues involved.<sup>55</sup> This issue is addressed by the new Maintenance Act, which requires that policy directions be issued by the National Director of Public Prosecutions to establish uniform norms and standards to be observed by public prosecutors operating as maintenance officers and to attempt to build up a pool of trained and specialised maintenance officers.<sup>56</sup> With the provision made for the appointment of maintenance investigators to trace persons who are legally liable to maintain other persons,<sup>57</sup> it is hoped that the standard of adjudication will improve in these courts and lead to greater certainty and confidence in this court.

Since unlike a civil trial, a maintenance inquiry is not simply a form of adversary procedure, the responsibility of placing evidence before the court should not rest only on the parties, but should be shared by the maintenance officer and the presiding judicial officer.<sup>58</sup> At present, although an applicant for parental maintenance is required to provide details of expenditure, it is left to the discretion of the officers to decide what is reasonable. Generally, the awards have been low and inadequate. Research done in Cape Town indicated that in the Mitchell's Plain magistrate's court,

---

<sup>52</sup> 100 *Maintenance* Interim Report (1998).

<sup>53</sup> Proposed Maintenance Amendment Bill (Annexure A cl 3A.)

<sup>54</sup> See *Lund Committee Report* 57.

<sup>55</sup> See *Lund Committee Report* 54.

<sup>56</sup> Section 4 (1) (b) of Act 99 of 1998.

<sup>57</sup> See too South African Law Commission Project 100 *Maintenance* Interim Report (1998) Annexure A: Proposed Maintenance Amendment Bill.

<sup>58</sup> *Buch v Buch* 1967 (3) SA 83 (T); *S v Ward* 1992 (1) SA 265 (B).

the awards were far lower than in the Wynberg magistrate's court.<sup>59</sup> Theoretically, the gross incomes of both parents are added together and the proportional division between the parties is determined pro rata according to their relative income. These proportions are applied to a calculation of the child's reasonable needs, which would include a portion for housing and other joint costs. Once these amounts have been calculated, there is an inquiry into the ability of the non-custodial parent to pay, but in practice there is a great deal of variation and lack of certainty.<sup>60</sup>

### 5.5.2 Procedure

The person allegedly liable and any witnesses may be summoned to appear,<sup>61</sup> and may be required to produce books and documents<sup>62</sup> and the procedure and rules of evidence followed at an inquiry are generally those that apply in a civil action in a magistrate's court.<sup>63</sup> witnesses are examined on oath or affirmation, and their evidence is recorded.<sup>64</sup> The person allegedly liable is entitled to legal representation.<sup>65</sup> In *Govender v Manikum*,<sup>66</sup> the court held that where an appeal has been

---

<sup>59</sup> *Lund Committee Report* 55. This is only partially explained by the fact that the levels of income in that area would be lower.

<sup>60</sup> See South African Law Commission Issue Paper 5 Project 100 *Review of the Maintenance System* (1997) 3.6; see too the Lund Committee Report (1996) 55.

<sup>61</sup> As far as travelling expenses are concerned, in *Foster v De Klerk NO* (1993(1) SA 596(O)) the court set aside a warrant of arrest issued against the applicant, who had failed to appear at a maintenance inquiry, believing, contrary to the views of the maintenance officer, that he was entitled to advance payment of his travelling and subsistence fees. The matter is now beyond doubt with the enactment of the General Law Sixth Amendment Act 204 of 1993, which enables the travelling and other expenses of a legally liable person to be negotiated (see s9 (2) (c) and 11 (2) of Act 99 of 1998).

<sup>62</sup> Section 4(1), (2) of Act 23 of 1963; section 8 of Act 99 of 1998.

<sup>63</sup> Section 10 (5) of Act 99 of 1998.

<sup>64</sup> Section 5(1) of Act 23 of 1963. The record is available for inspection by interested parties: s 5(10). The rights and privileges of witnesses (including the person allegedly liable, who is not obliged to 'incriminate' himself) are dealt with in s 8, and offences (including perjury) by witnesses in s 9 of Act 23 of 1963 and section 11 of Act 99 of 1999.

<sup>65</sup> Section 10 (3) of Act 99 of 1998. The new subsection speaks of '[a]ny party to proceedings.' The subsection 5 (2) of Act 23 of 1963 referred to "[a]ny person against whom an order may be made". The duties of the maintenance officer and the presiding judicial officer where the

noted against the granting by a maintenance court of a maintenance order and the complainant or respondent does not engage their own legal representative or wishes to appear in person, the services of the Attorney-General should, on grounds of public policy, be made available as *amicus curiae*. The court held further that, as a matter of practice, the clerk of the court should furnish the Attorney-General with a copy of the court record when an appeal against a maintenance order is noted to enable the Attorney-General to make the necessary arrangements. This case concerned the position of a respondent on appeal and the court expressly left open the question whether the above ruling might apply to a complainant *qua* appellant on appeal.

### 5.5.3 *Definition of a Maintenance Order*

In *Zwiegelaar v Zwiegelaar*<sup>67</sup> the court held that a maintenance order in respect of a lump sum payment to buy household necessities could not be made in terms of the Divorce Act,<sup>68</sup> since it was not a periodical payment for the purposes of the Maintenance Act<sup>69</sup> and therefore only permissible in terms of a redistribution of assets.<sup>70</sup> The definition of 'maintenance order' in the current Act relates only to the *periodical* payments of amounts of money. This interpretation seems to exclude all payments which are not made at regular intervals.<sup>71</sup> This position has been

---

parties are unrepresented were discussed by Claassen J in *Pieterse v Pieterse* 1965 (4) SA 344 (T). See further *Buch v Buch* 1967 (3) SA 83 (T); *Perumal v Naidoo* 1975 (3) SA 901 (N) at 903E-H; *Mgumane v Setemane* 1998 (2) SA 247 (T).

<sup>66</sup> 1981 (1) SA 1178 (N).

<sup>67</sup> [1998] 4 All SA 151 (C) at 154C.

<sup>68</sup> Section 7 (2) of Act 70 of 1979.

<sup>69</sup> 23 of 1963.

<sup>70</sup> Section 7 (3) of Act 70 of 1979.

<sup>71</sup> See Sinclair (assisted by Heaton) *Marriage Vol I* 468 194, who indicates that, as a consequence, an order for the payment of medical expenses could not be enforced in terms of ss 11 and 12 of the Maintenance Act 23 of 1963.



ameliorated in some cases by a wide judicial interpretation of 'maintenance'.<sup>72</sup> The Law Commission recommended that a definition for 'maintenance order' be devised which includes expenses that are of a non-recurring nature, such as expenses related to education and training and medical expenses.<sup>73</sup> The new Maintenance Act improves the position by widening the definition of maintenance order to include *any* order for the payment of sums of money towards the maintenance of any person.<sup>74</sup>

#### 5.5.4 *Types of Orders*

A maintenance court conducting an inquiry may make an order as to the payment of money, expenses in connection with the birth of the child and future medical expenses but, under the present Act, the court cannot make any ancillary order to ensure compliance with this order. Furthermore, only upon conviction of the offender, can warrants of execution against property and garnishee orders be made. Provision exists for the making of an order against persons in their absence, but only if it is made in accordance with their written consent:<sup>75</sup> a maintenance order cannot generally be made unless the liable party is present or has consented in writing to the order being made in his or her absence. The new Maintenance Act makes provision for maintenance orders to be made against a person in his or her absence on the application of the maintenance officer for an order by default,<sup>76</sup> provided the court is satisfied that such person had knowledge of the subpoena.<sup>77</sup> Bearing in mind that this order may always be substituted or discharged upon application by the respondent, it is submitted that this will not unduly prejudice the respondent or

---

<sup>72</sup> See *Schmidt v Schmidt* 1996 (2) SA 211 (W).

<sup>73</sup> See cl 1(a) and cl4(a)-(d) of the proposed Maintenance Amendment Bill (1998).

<sup>74</sup> Section 1 of Act 99 of 1998.

<sup>75</sup> Section 5(7) of Act 23 of 1963.

<sup>76</sup> Section 18, not yet in force.

<sup>77</sup> Section 18 (1).

contravene his or her right to due process and a fair trial. The South African Law Commission<sup>78</sup> also proposed that the current Maintenance Act<sup>79</sup> be amended to provide that an order may be made against any person not present at the inquiry, provided that it is made either with that person's written consent or the court is satisfied that the person against whom the order is made has been duly summoned.<sup>80</sup> A maintenance court may also make an order against a liable person relating to the payment of the medical expenses of the maintenance creditor, and order the registration of the maintenance creditor as a dependant in terms of a 'medical scheme' of which the liable person is a member.<sup>81</sup>

Provision has been made for written statements of other persons to be tendered in evidence, hereby obviating the need for oral evidence.<sup>82</sup> Such statements should be admitted in defended and undefended inquiries.<sup>83</sup> Under the present Act, a maintenance court hearing an application for an increase in the amount payable under an existing order is competent to decrease the amount on application by the debtor, without it being necessary for separate proceedings to be instituted for that purpose.<sup>84</sup> Maintenance payable in respect of a child may be increased to keep pace with inflationary rises in the cost of living,<sup>85</sup> and may be awarded retroactively in a proper case.<sup>86</sup>

---

<sup>78</sup> Project 100 *Maintenance* Interim Report (1998).

<sup>79</sup> Section 5(7) of Act 23 of 1963.

<sup>80</sup> In terms of section 4 (2) of the Maintenance Act (Annexure A: Proposed Maintenance Amendment Bill).

<sup>81</sup> Section 5(4)(a)(iii) of Act 23 of 1963; see *Schmidt v Schmidt* 1996 (2) SA 211 (W). See also Sinclair (assisted by Heaton) *Marriage Vol I* 468. See s 16(1)(a)(i) of Act 99 of 1998.

<sup>82</sup> Section 5(7A) of Act 23 of 1963 as inserted by Act 2 of 1991; Section 12 of Act 99 of 1998.

<sup>83</sup> See Memorandum on the Aims of the Maintenance Amendment Bill (1990).

<sup>84</sup> *Van Zyl v Steyn* 1976 (2) SA 108 (O).

<sup>85</sup> *Green v Green* 1976 (3) SA 316 (RA).

<sup>86</sup> *Harwood v Harwood* 1976 (4) SA 586 (C). See criticism of South African Law Commission Issue Paper 5 Project 100 *Review of the Maintenance System* (1997) 4.28-4.30; *Maintenance* Interim Report (1998) Annexure A: Proposed Maintenance Amendment Bill. See too the new Maintenance Act, which makes provision for the imposition of a garnishee order at the inquiry stage where the

Since a maintenance order may be made only against a person 'proved to be legally liable to maintain any other person',<sup>87</sup> a maintenance court is competent to adjudicate upon the issue of liability, including the question of paternity of a child where this is denied.<sup>88</sup> Since the proceedings are civil in character, it is sufficient for paternity to be established on a preponderance of probabilities; there is no need for proof beyond a reasonable doubt, despite the fact that failure to comply with a maintenance order is a criminal offence.<sup>89</sup>

Any person aggrieved at the decision of a maintenance court granting, refusing, varying or discharging a maintenance order may appeal to the High Court.<sup>90</sup> The maintenance courts have the additional power to vary an order made by the High Court,<sup>91</sup> and it has been argued that the

---

court is satisfied that the liable person is in the service of an employer and that it is not impracticable or inappropriate in the circumstances of the case. Whenever the liable person leaves the service of the employer, that employer has to give notice in writing to the maintenance officer (section 29 (2)).

<sup>87</sup> For the purpose of granting a maintenance order, a man is 'legally liable' to maintain his customary-law wife: section 5(6) of Act 23 of 1963 as amended by section 2(c) of Act 2 of 1991.

<sup>88</sup> *Moodley v Gramani* 1967 (1) SA 118 (N). See too *Perumal v Naidoo* 1975 (3) SA 901 (N). In *S v Sephiri* 1981 (2) SA 837 (B) it was held that when a conversion in terms of s13 takes place, it is competent for the maintenance court to adjudicate on the issue of paternity.

<sup>89</sup> *Moodley v Gramani* 1967 (1) SA 118 (N), followed in *Mountford v Mukukumidzi* 1969 (2) SA 56 (RA); *S v Bedi* 1971 (4) SA 501 (N) at 502-3; and *Perumal v Naidoo* 1975 (3) SA 901 (N) at 902D.

<sup>90</sup> Section 25 (1) of Act 99 of 1998. If an appeal is lodged against a maintenance order, this does not suspend the obligation to pay maintenance unless the appeal is noted against a decision that the appellant is legally liable to support the person in whose favour the order has been made.

<sup>91</sup> Section 5(4)(b) of the Maintenance Act 23 of 1963 and s 1 sv 'maintenance order'. See Sinclair (assisted by Heaton) *Marriage Vol I* 464-5182 and 'The Divorce Act and the Duty of Support' (1981) 98 *SALJ* 89 at 98-102 and 1983 *Annual Survey* 100. Cf *Jerrard v Jerrard* 1992 (1) SA 426 (T), in which it was held that a maintenance court does not have the power to vary maintenance orders made by the High Court in terms of section 7 (1) or (2) of the Divorce Act 70 of 1979 since the jurisdiction of the maintenance court is limited to orders to be made in respect of persons 'legally liable to maintain' (see M L Lupton 'Variation of a Spouse's Maintenance' (1992) 109 *SALJ* 591; J A Robinson '*Jerrard v Jerrard, Rubenstein v Rubenstein*: Wie is 'regtens verplig' om Onderhoud te Betaal?' 1992 *Obiter* 138). *Jerrard's* case was overturned by *Rubenstein v Rubenstein* 1992 (2) SA 709 (T), a full bench decision. Finally, in *Purnell v Purnell* 1993 (2) SA 662 (A) the Appellate Division (as it then was) held that a maintenance order issued by the maintenance court in variation of an order made by the High Court in terms of the Divorce Act replaces the High Court's order, with the result that the maintenance order made by the High Court ceases to be of any force and

High Court should be relieved from having to deal with frequent applications to vary maintenance orders.<sup>92</sup> However, the High Court retains its inherent power to vary or suspend any maintenance order, although this is generally a power which is exercised only in exceptional circumstances.<sup>93</sup> If an application for variation of a maintenance order which ought to have been brought in the magistrate's court is brought in the High Court, an order for costs will be refused to an otherwise successful applicant, unless he or she demonstrates to the High Court's satisfaction that there were circumstances and reasons justifying the failure to utilize the magistrate's court.<sup>94</sup> It has been pointed out, however, that in practice, due to the low level of maintenance awards made by the maintenance courts, most of the legal profession recommend that those who can afford it apply to the High Court rather than the maintenance court for an order for the increase of their awards.<sup>95</sup> At the conclusion of its inquiry a maintenance court may make a maintenance order, replace an existing order with a new one (ie vary the order),<sup>96</sup> discharge an existing order, or make no

---

effect; see too *Davis v Davis* 1993 (1) SA 621 (C).

<sup>92</sup> See *Troskie v Troskie* 1968 (3) SA 369 (W) at 371B-C; see too *Schmidt v Schmidt* 1996 (2) SA 211 (A) at 220I. The maintenance court also has the power to substitute or discharge an interim order for maintenance made by the High Court in terms of rule 43 of the Uniform Rules of Court (*De Witt v De Witt* 1995 (3) SA 700 (T)).

<sup>93</sup> See *Sher v Sher* 1978 (4) SA 728 (W) at 729; cf *Steyn v Steyn* 1990 (2) SA 272 (W); *Rabie v Rabie* 1992 (2) SA 306 (W).

<sup>94</sup> See *Sher v Sher* 1978 (4) SA 728 (W); *Osman v Osman* 1992 (1) SA 751 (W) at 756D-E; cf *Nguza v Nguza* 1995 (2) SA 954 (Tk) at 956A. See too Sandra Burman & Shirley Berger 'When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa' (1988) 4 *SAJHR* 194.

<sup>95</sup> See S B Burman & J Barry *Divorce and Deprivation in South Africa* conference paper presented for the Second Carnegie Inquiry into Poverty and Development in South Africa, 1984) 15 as cited by Sinclair (assisted by Heaton) *Marriage Vol I* 462; see too Sandra Burman 'Maintaining the One-Parent Support in South Africa: Law and Reality' in Meulders-Klein & Eekelaar *Family, State and Individual Economic Security Vol 1* (1988) 507 at 514.

<sup>96</sup> Variation may be ordered where there is sufficient cause, even in the absence of changed circumstances (*Havenga v Havenga* 1988 (2) SA 438 (T); *Beukes v Beukes* 1995 (4) SA 429 (O); *Young v Young* 1985 (1) SA 782 (C), where the magistrate was held to be bound by the parties' agreement to a reduction of the maintenance payable). See too Sinclair assisted by Heaton *Marriage Vol I* 463ff.

order.<sup>97</sup>

#### 5.5.5 *Tracing liable persons*

A maintenance officer may request that two photographs be taken of a person against whom a maintenance order is made.<sup>98</sup> The Lund Committee Report on Maintenance<sup>99</sup> suggested that specialized tracers should be employed by the larger courts. These tracers should be competent in the different languages required; know the geographical area well; be provided with the necessary means to protect their own physical security; and be assisted by other departments such as Police, Telecommunications and Home Affairs. The report also suggested the possibility of using community police forums to trace liable persons.

#### 5.5.6 *Enforcing Payment*

A maintenance court may order maintenance to be paid, not only to a government institution, but

---

<sup>97</sup> Section 5(4) of Act 23 of 1963. The definition of 'maintenance order' in s 1 makes it clear that an existing High Court order may also be varied or discharged. *Pieterse v Pieterse* 1965 (4) SA 344 (T) and *Buch v Buch* 1967 (3) SA 83 (T) dealt with applications to vary existing High Court orders. A maintenance order could be varied only under this section; it was not competent for a magistrate to vary an order when trying a charge of failure to pay maintenance in contravention of s 11: *S v Jacobs* 1973 (4) SA 302 (O); *S v Sebola* 1974 (1) PH H(S)92 (NC); *S v Olivier* 1976 (3) SA 186 (O) at 190A, 191H. Under the present Act the magistrate could, however, convert the trial into an inquiry under s 5 if this appeared desirable: s 13. In *S v Vermeulen* 1981 (2) SA 486 (E) it was held that when a criminal trial was converted in terms of s 13, the criminal trial ceased to exist. Any conviction of the accused during the criminal stage fell away, as a conviction could follow only upon a criminal trial and has no place in an inquiry. Existing maintenance orders are not, however, affected by such a conversion. A consequence of this decision is that a maintenance debtor may be charged again for the same contravention of s 11 and a plea of *autrefois convict* cannot validly be raised (at 489G-H). See too *S v Sephin* 1981 (2) SA 837 (B); *S v Nkabinde* 1981 (1) PH H71 (O), in which the court held that the magistrate should have investigated the possibility of a s 13 conversion.

<sup>98</sup> Section 5(5) of the Maintenance Act as amended by s 2(b) of the Maintenance Amendment Act.

<sup>99</sup> (1996) par.1.28.

also into a bank or to the maintenance creditor personally.<sup>100</sup> If it is alleged that a person has failed to make a payment in terms of a maintenance order, the onus lies on such person to prove that he or she has paid.<sup>101</sup> A maintenance officer may furnish to a credit bureau the personal particulars of any person convicted for failure to comply with a maintenance order.<sup>102</sup> Prior to the enactment of the Maintenance Amendment Act,<sup>103</sup> considerable delays and administrative problems were caused by the failure to allow for the transfer of a maintenance order when a maintenance creditor moved from one magisterial district to another. Since the amendment of 1991, such orders may be transferred together with the prescribed records<sup>104</sup> and a person against whom a maintenance order has been made is obliged to notify the maintenance creditor of changes of address on pain of criminal sanctions.<sup>105</sup>

Although maintenance orders are also enforceable by ordinary execution, the procedure under the Maintenance Act has generally followed.<sup>106</sup> The principal means of enforcing a maintenance

---

<sup>100</sup> Section 2(a) of Act 2 of 1991. If payment is to be made into an account with a bank, the maintenance debtor must notify the maintenance officer of the court which made the order of any change in his residential or work address. If payment is to be made to the maintenance creditor personally, it is she or he who must be notified of a change of address. Failure to do so renders the maintenance debtor liable to a maximum fine of R2 000 or six months' imprisonment.

<sup>101</sup> Section 14A of Maintenance Act 23 of 1963 as amended by Act 2 of 1991. If the maintenance debtor wishes to rebut this presumption, he or she should obtain a receipt if he pays the money to the maintenance creditor personally.

<sup>102</sup> Section 11(6) of the Maintenance Act as inserted by s 8 of the Maintenance Amendment Act 2 of 1991.

<sup>103</sup> Act 2 of 1991.

<sup>104</sup> Section 6 of the Maintenance Act 23 of 1963 as amended by section 3 of Act 2 of 1991; see too rule 4B of the rules issued under the Maintenance Act.

<sup>105</sup> Section 14 as substituted by section 10 of the Maintenance Amendment Act 2 of 1991. A maintenance debtor who fails to do so is liable to a fine not exceeding R2000 or imprisonment not exceeding six months.

<sup>106</sup> See ID Schäfer *Family Law Service* para F36-40; B van Heerden (revised by T Schweltnus) 'Marriage' *LAWSA* Vol 16 (first reissue, 1998) para 65; PJ Visser & JM Potgieter *Introduction to Family Law* 64-7; L Neil & Van Schalkwyk *Huweliksreg-Bronnebundel* 122-31. But on the problems experienced in the maintenance courts, see SB Burman & J Barry *Divorce and Deprivation in South Africa* (conference paper presented for the Second Carnegie Inquiry into Poverty and Development in Southern Africa, 1984) 15; Sandra Burman 'Maintaining the One Parent Support in South Africa:

order, whether made under the Maintenance Act or under some other law,<sup>107</sup> is by a criminal prosecution for a contravention of s 11(1) of the Act. Under this section, 'any person who fails to make any particular payment in terms of a maintenance order' is guilty of an offence carrying a maximum penalty of a fine of R4000 or one year's imprisonment.<sup>108</sup> In addition, the court may make an order, having the effect of a civil judgment,<sup>109</sup> for recovery of the unpaid maintenance.<sup>110</sup>

---

Law and Reality' in MT Meulders-Klein & John Eekelaar *Family State and Individual Economic Security* (1988) Vol 1 507 at 514; *Nguza v Nguza* 1995 (2) SA 954 (Tk); cf *Osman v Osman* 1992 (1) SA 751 (W) at 756D-E; *Sher v Sher* 1978 (4) SA 728 (W). See too Sandra Burman & Shirley Berger 'When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa Parts I and II' (1988) 4 *SAJHR* 194 and 334; Sandra Burman & Denise Rudolph 'Repression by Mediation: Mediation and Divorce in South Africa' (1990) 107 *SALJ* 251 at 258-9; Lund Committee Report 49-55. On delays experienced in the maintenance courts, see South African Law Commission Issue Paper 5 Project 100 *Review of the Maintenance System* (1997) chs 2-3.

<sup>107</sup> On the High Court's reluctance to enforce its own maintenance orders, see *Troskie v Troskie* 1968 (3) SA 369 (W). On the enforcement under s 11 of a maintenance order made by a foreign court and registered in South Africa under s 3 of the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963, see *S v Dolman* 1970 (4) SA 467 (T); *S v Walraven* 1975 (4) SA 348 (T).

<sup>108</sup> Section 11(1) as amended by s 8 of Act 2 of 1991. The maximum fine for wilfully interrupting an inquiry or hindering or obstructing the court is R2 000 (s 10). The penalty for publication of information which reveals the identity of someone under the age of 18 years who is or was involved in an inquiry has been increased to R8000 (s5(11)(b)). Payment directly to the maintenance creditor is lawful (s 5(4) of the Maintenance Act as amended by s 2(a) of the Maintenance Amendment Act); cf *S v Mngxaso*, *S v Polo* 1991 (2) SACR 647 (Ck).

<sup>109</sup> See too s 14C of the Maintenance Act as inserted by s 11 of Act 2 of 1991. The effect of this section is that, although an order for medical expenses to be paid or a garnishee order may not meet the requirements of being an enforceable maintenance order, a court may still utilize s 14C to impose whatever sanction it wishes for failure to comply with a civil judgment. The civil maintenance order may be enforced also by contempt proceedings at common law; see *Weinberg v Weinberg* 1958 (2) SA 618 (C); *Hayward v Hayward* 1974 (1) PH F3 (C); *Kok v Kok* 1974 (2) SA 657 (T); *BJBS Contractors (Pty) Ltd v Lategan* 1975 (2) SA 590 (C) at 597E; *Spiro Parent and Child* 441 and op cit (1969) 86 *SALJ* 65 at 73-4. Execution may be effected by way of a writ: *Du Plessis v Du Plessis* 1974 (2) SA 216 (O); *Hofmeyr v Fourie* 1975 (2) SA 590 (C) at 596-8; *Du Preez v Du Preez* 1977 (2) SA 400 (C); *BJBS Contractors (Pty) Ltd v Lategan* (supra) at 594ff; *Duncan v Duncan* 1984 (2) SA 310 (C); see June D Sinclair & Felicity Kaganas 1984 *Annual Survey* 115; see too Sinclair assisted by Heaton *Marriage Vol I* 469n199. Cf *Strime v Strime* 1983 (4) SA 850 (C), criticized by June Sinclair 1983 *Annual Survey* 99-101.

<sup>110</sup> Section 11(2)(a). A magistrate is not empowered to 'write the arrears off' (*S v Dickenson* 1971 (3) SA 922 (E)), though he may suspend the accused's sentence on condition that all arrears due are paid (*S v Sigalo* 1973 (4) SA 469 (NC)). The obligation to pay arrear maintenance is a continuing one which the accused must meet as soon as he has money: *S v Clark* 1971 (2) SA 352 (RA).

One of the reforms suggested by the South African Law Commission<sup>111</sup> was that a procedure be introduced for the execution of maintenance orders which will function independently of a prosecution for the failure to comply with a maintenance order. The South African Law Commission<sup>112</sup> recommended that the procedures for the execution of a maintenance order and the enforcement of that order (through criminal sanction) be separated. The execution of a maintenance order should be seen as a final order of a court for the payment of a specific amount to another person and should be executable as such without requiring the person in whose favour the order was made to initiate further court proceedings. In 1997, the Law Commission recommended a procedure for the execution of a maintenance order which is akin to the procedure for the execution of a civil judgment for the payment of money. Such maintenance orders will now<sup>113</sup> be executable against the movable and immovable property of the person who has failed to comply with the order in terms of a warrant of execution issued by the court. The person who has failed to comply with a maintenance order will be entitled to approach the court with an application for a stay in execution, at which time the court may set aside the warrant or suspend its execution upon certain conditions. The conditions for the suspension of the warrant of execution will be the payment of the arrears in instalments coupled with an attachment of income due to the person who has failed to comply with the order or an attachment of debts due to him or her.<sup>114</sup>

At present, to facilitate the recovery of arrear maintenance, the court is empowered to order the

---

<sup>111</sup> Issue Paper 5 Project 100 *Review of the Maintenance System* (1997) and *Maintenance Interim Report* (1998).

<sup>112</sup> *Maintenance Interim Report* (1998).

<sup>113</sup> As soon as the new Maintenance Act 99 of 1998 comes into force.

<sup>114</sup> See Sections 26 and 27 of the Maintenance Act 99 of 1998; cls 9 and 10 of the proposed Maintenance Amendment Bill. The South African Law Commission further recommended a procedure which would allow the recovery of maintenance payments from a maintenance debtor's income as the automatic consequence of the making of a maintenance order which should apply not only to a person's wages or salary but also to other forms of income, such as income from a profit-sharing agreement and income from a trust (where this was practical). See cls 6 and 1(a); 8 of the proposed Maintenance Amendment Bill.



attachment of any pension, annuity or compassionate allowance or other similar benefit,<sup>115</sup> but a summary inquiry has to be held into the existing and prospective means of the convicted person, the financial needs and obligations of the person maintained by the convicted person, the conduct of the convicted person so far as it is relevant to the failure to pay maintenance and any other circumstances which must be taken into account by the court before a warrant of execution is issued.<sup>116</sup> The onus of proving that the accused has failed to make payments in terms of a maintenance order rests on the State.<sup>117</sup> Similarly, where an order for the recovery of arrears is sought, the State must prove the amount due.<sup>118</sup> The only defence available to the accused is that such failure to pay was due to a lack of means not attributable to unwillingness to work or misconduct.<sup>119</sup> A lack of means attributable to duties of support arising from a second marriage is no defence.<sup>120</sup> In *S v Moeti*,<sup>121</sup> the accused had undertaken his own defence when prosecuted in the magistrate's court for failing to comply with a maintenance order. A response by the accused to a query posed in terms of the Criminal Procedure Act<sup>122</sup> indicated the possible availability of this defence to the accused. At no time, however, had the existence of such defence been explained to the accused. On review, the court found that the magistrate had been under an obligation to explain the availability of this defence to the accused and that the conviction and sentence should be set aside.

---

<sup>115</sup> Section 11(2)(d) as amended by section 8 of Act 2 of 1991.

<sup>116</sup> Section 11(2)(c) as substituted by section 8 of Act 2 of 1991.

<sup>117</sup> *S v Cronje* 1968 (1) SA 186 (O). Section 11(5) assists the State by making a certified copy of a maintenance order admissible as *prima facie* evidence of its contents. Section 14A creates a presumption of a failure to comply with a maintenance order casting upon the accused the onus of proving that he has complied with the order.

<sup>118</sup> *S v Cronje* 1968 (1) SA 186 (O).

<sup>119</sup> See *S v Barnes* 1967 (4) SA 706 (N).

<sup>120</sup> *S v Walraven* 1975 (4) SA 348 (T) at 352-3.

<sup>121</sup> 1989 (4) SA 1053 (O).

<sup>122</sup> 51 of 1977.

The principle that a maintenance order remains effective until discharged or varied by subsequent order of a competent court was stressed in *Kanis v Kanis*,<sup>123</sup> where the court held that a father could not set off his voluntary payments in respect of his children's schooling against his liability to make fixed periodical payments under a maintenance order in their favour, even though such voluntary expenditure greatly exceeded the amount owed in terms of the order. An accused person who wishes to argue that the amount which the order requires him to pay is unreasonable, or that circumstances have changed since it was fixed, may seek to persuade the magistrate to convert the proceedings into an inquiry<sup>124</sup> with a view to obtaining a variation of the order.<sup>125</sup> If the accused is unrepresented, he or she should be informed of this onus<sup>126</sup> and that he bears such onus.<sup>127</sup> 'Lack of means' has been held to refer not only to a total lack of means, but also to a lack of sufficient money to pay the maintenance payments in full.<sup>128</sup> Imprisonment may follow if the accused willfully failed to pay when able to do so.

A court convicting a liable person under the present Act<sup>129</sup> might order the employer to make the payments directly out of the accused's wages before he or she receives them in terms of a garnishee order.<sup>130</sup> The new Maintenance Act provides for the attachment of wages as an

---

<sup>123</sup> 1974 (2) SA 606 (RA).

<sup>124</sup> Section 5 of Act 23 of 1963.

<sup>125</sup> See *S v Miller* 1976 (1) SA 12 (C) at 14A-B, H; *S v Olivier* 1976 (3) SA 186 (O) at 189H, 190D, 191C, G, H.

<sup>126</sup> *S v Guaya* 1990 (4) SA 282 (CK).

<sup>127</sup> *S v Barnes* 1967 (4) SA 706 (N) at 710A. It is an onus which need, however, be discharged only upon a preponderance of probabilities: supra at 710H. See *S v Clark* 1971 (2) SA 352 (RA); *S v Cross* 1971 (2) SA 356 (RA); *S v Malgas* 1987 (1) SA 194 (NC).

<sup>128</sup> *S v Moeti* 1989 (4) SA 1053 (O) at 1055B.

<sup>129</sup> Section 11 (1) of Act 23 of 1963.

<sup>130</sup> Section 12. Such an order takes precedence over any other garnishee order (12(2)). At present, such orders can be issued only after a conviction in terms of Section 11 of the Maintenance Act. The maintenance debtor can *mero motu* at any time request his or her employer to subtract such payments for his or her salary or wages, but employers have often been unwilling to do so because of the administration involved (see Sandra Burman & Shirley Berger 'When Family Support Fails: The

administrative measure, without requiring a prior criminal conviction and where there has been a prior criminal conviction, that the court should be *required* to issue such an order.<sup>131</sup> A garnishee order has to be made at present in respect of a *named* employer and a change of employment by maintenance debtors may enable them to avoid such a deduction from their salaries.<sup>132</sup> Under the present Act an employer who fails to comply with a garnishee order is guilty of an offence punishable by a fine of up to R2 000 or imprisonment of up to six months.<sup>133</sup> Under the new Act such employer is not only liable, but is also required to give priority to these payments.<sup>134</sup> If the employer fails, in terms of the new Act, to give effect to the order, such order may be enforced, with the necessary charges against the employer.<sup>135</sup>

### 5.6 Foreign Maintenance Orders

The Reciprocal Enforcement of Maintenance Orders Act<sup>136</sup> makes it possible for a maintenance order of a foreign country to be enforced in the Republic as though it had been made by a South African maintenance court under the provisions of the Maintenance Act.<sup>137</sup> Broadly, the requirements for such enforcement are: (a) the country from which the order emanates must have

---

Problems of Maintenance Payments in Apartheid South Africa Parts I and II' (1988) 4 *SAJHR* 194 and 334 at 343).

<sup>131</sup> Sections 28 and 29 of Act 99 of 1998.

<sup>132</sup> See South African Law Commission Issue Paper 5 Project 100 *Review of the Maintenance System* (1997) 4.28-30; *Marriage* Interim Report (1998); See too Sinclair (assisted by Heaton) *Marriage* Vol I 470 202.

<sup>133</sup> Section 12(3) as amended by section 9 of the Maintenance Amendment Act 2 of 1991.

<sup>134</sup> Section 29 (3) of Act 99 of 1998.

<sup>135</sup> Section 29 (4) of Act 99 of 1998.

<sup>136</sup> 80 of 1963. The Act is examined in detail in Spiro *Parent and Child* 544-8; what follows is merely an outline. See too ID Schäfer *Family Law Service* F40; Sinclair (assisted by Heaton) *Marriage* Vol I 474. See chapter 9 for the position in Namibia.

<sup>137</sup> 23 of 1963.

been proclaimed for the purpose by the State President,<sup>138</sup> and (b) the order must have been registered in a South African maintenance court<sup>139</sup> or, if provisional only, confirmed by such a court after due inquiry on lines similar to those set out in the Maintenance Act.<sup>140</sup> The Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act<sup>141</sup> came into operation on 1

<sup>138</sup> Section 2. The following countries and territories have been proclaimed: under Proc R122 GG 6419 of 14 April 1960: State of Tasmania; under Proc R345 GG 6540 of 30 September 1960: England and Northern Ireland (but under Proc R9 GG 4951 of 9 January 1976 the whole of the United Kingdom was proclaimed: see below), Guernsey, Isle of Man, Rhodesia (now Zimbabwe), Lesotho, Botswana, Malawi, Swaziland, Zambia, Kenya, Nigeria, Australian Capital Territory, New South Wales, Northern Territory of Australia, Queensland, South Australia, Victoria, Western Australia, Norfolk Islands, Cocos Islands, Cocos (Keeling) Islands, New Zealand, the Canadian Province of Ontario, Cyprus, Fiji, Mauritius, Sarawak, Singapore, St Helena; under Proc R131 GG 6690 of 19 May 1961: the Island of Jersey; under Proc R175 GGE 304 of 3 August 1962: British Columbia; under Proc R274 GGE 619 of 4 October 1963: the Crown Colony of Hong Kong (now Hong Kong); under Proc R160 GG 2735 of 19 June 1970 (*Reg Ga* 1293): the Northwest Territories of Canada; under Proc R1 GG 2969 of 8 January 1971 (*Reg Gaz* 1387): the State of California USA; under Proc R175 GG 3227 of 13 August 1971 (*Reg Gaz* 1479): the Province of Alberta, Canada; under Proc R9 GG 4951 of 9 January 1976: the United Kingdom, under Proc R48 GG 5467 of 25 March 1977 (*Reg Ga* 2443): the Transkei, under Proc R105 GG 6003 of 5 May 1978 (*Reg Gaz* 2629): the Republic of Bophuthatswana; under Proc R310 GG 6794 of 28 December 1979 (*Reg Gaz* 2931): the Republic of Venda; under Proc R174 GG 8954 of 4 November 1983: the Republic of Ciskei (the former TBVC states are now part of the national territory of South Africa); under Proc R19 GG 9615 of 8 March 1985 (*Reg Ga* 3806): the Province of Manitoba, Canada; under Proc R68 GG 11104 of 13 January 1988 (*Reg Gaz* 4170): the Federal Republic of Germany; under GN R1837 GG 15145 of 11 October 1993: Namibia; under GN R1372 GG 15907 of 12 August 1994 (*Reg Gaz* 5373): the State of New Jersey, USA; under GN R1802 GG 16030 of 21 October 1994 (*Reg Gaz* 5409): the State of Florida, USA (21 October 1994). Since South Africa's re-admittance to the international arena, a number of countries have shown an interest in concluding such agreements with South Africa.

<sup>139</sup> Section 3. Once registered, the order remains enforceable in South Africa, until set aside there, whatever its status in its country of origin may be: see *S v Dolman* 1970 (4) SA 467 (T); but cf *S v Simpson* 1964 (1) SA 61 (N), in which it was held, under the Maintenance Orders Act 15 of 1923 (the predecessor of Act 80 of 1963), that such an order ceases automatically if it is in favour of a married woman who becomes divorced. The order can be enforced by a prosecution under s 11 of the Maintenance Act 23 of 1963, and the defence of lack of means provided for by s 11(3) of this Act is also available: *S v Walraven* 1975 (4) SA 348 (T) at 350-2; see too *Severin v Severin* 1951 (1) SA 225 (T); *Mavendaz v Mavendaz* 1953 (4) SA 218 (C).

<sup>140</sup> Section 4. Thus witnesses may be summoned and examined, and ss 8, 9 and 10 of the Maintenance Act are made applicable. An appeal against the decision of the maintenance court lies to the High Court. As Sinclair (assisted by Heaton) *Marriage Vol I* 476 points out, proceedings under the Reciprocal Enforcement of Maintenance Orders Act and the Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act are the only means of enforcing foreign maintenance orders in South Africa. Since such orders are neither 'final' nor 'complete', they cannot be made judgments of our courts at common law (see *Abrahams v Abrahams* 1981 (3) SA 593 (B)).

<sup>141</sup> Act 6 of 1989.

September 1990.<sup>142</sup> The principle of reciprocity finds expression in the provision which exists for a South African maintenance order to be transmitted to a proclaimed country for enforcement against a debtor resident there.<sup>143</sup> A South African maintenance court is empowered, after due inquiry,<sup>144</sup> to make a provisional maintenance order against a person resident in a proclaimed country in his or her absence.<sup>145</sup> The order is then forwarded to that country for confirmation and enforcement there.<sup>146</sup>

## 5.7 FURTHER PROPOSALS FOR REFORM

### 5.7.1 Court Administration

#### a) Shortage and Training of Personnel

Increased personnel are required to deal with the vast number of maintenance cases and the lengthy delays.<sup>147</sup> There is a serious and urgent need for in-service training for all such persons, especially

---

<sup>142</sup> Proc R154 GG 12714 of 31 August 1990 (*Reg Gaz* 4546). See Beverley Keyser 1989 *Annual Survey* 7-8; Sinclair assisted by Heaton *Marriage Vol I* 475-6, who points out that the Act now seems somewhat superfluous in view of the fact that African countries are proclaimed routinely in terms of the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963 and the only countries in respect of which this Act was utilized were the former TBVC states, which have now been incorporated into South Africa.

<sup>143</sup> Section 7. See *Bekker v Bekker* 1975 (2) PH F85 (D).

<sup>144</sup> Held under Section 5 of the Maintenance Act 23 of 1963.

<sup>145</sup> Section 8.

<sup>146</sup> *Ibid.* The depositions of the witnesses at the inquiry, a statement of the grounds on which the order might have been opposed, and information to identify and locate the debtor are also sent. The foreign court before which the provisional order comes for confirmation may remit the case to the South African court for further evidence. Upon confirmation, the order has been deemed to have been made under s 5 of the Maintenance Act 23 of 1963.

<sup>147</sup> Various case studies were presented to the Portfolio Committee on Welfare in 1996 by the Black Sash, a Human Rights organisation. In one study a woman had applied for maintenance in 1993 but was told in 1994 that she was not on the computer but that this would be rectified. In May 1994 she was told that there was no longer any record of the application and that she would have to apply again. She did so but by 1995 still had no money.

with regard to administrative procedures, gender issues and the rights of children. Procedures need to be explained to those not familiar with the maintenance courts, so as to alleviate public misunderstanding and encourage members of the public to approach the maintenance courts for help. Maintenance officers should be required to use their powers of investigation more assertively to help locate respondents or to obtain accurate information about respondents' income and means.

*b) Recovery of Arrears and Delays*

It is submitted that all maintenance officials be required to keep a full record of all awards, together with other basic details such as income of each parent, number and ages of children, so as to allow monitoring of the application of these guidelines and should be compelled to note all deviations from the norms, and provide reasons why this occurred. The terms of agreements should be recorded in standardised form, subject to periodic scrutiny and monitoring by senior officials. Information required would include income levels of both parties, number of children, and the level of awards. It is further submitted that the maintenance court be authorized to order automatic increases or decreases in maintenance orders on the basis of rises and falls in the consumer price index, and required to do so unless the specific circumstances of the case prescribe otherwise. This would ease the burden on the court, as there would be less need for regular review of cases. A centralized and net-worked computer system is required of all maintenance payments.

Where payments are made into the maintenance court, it is suggested that the Act require that the court take direct action on arrears without waiting for charges to be filed by the complainant and make it mandatory, unless good reason is given, for arrears to be recovered with interest. Both parties should also be required by law to notify the maintenance office of any change in their financial circumstances. A telephone inquiry system is suggested to allow non-custodial parents to check whether their money has been paid in without wasting time and money unnecessarily. A master copy of all maintenance files must be made and kept securely in a locked storeroom to

safeguard against loss, theft and corruption. Custodial parents should be permitted to institute a complaint immediately upon default rather than waiting for three months.<sup>148</sup> It is submitted that officials institute action as soon as possible upon receipt of the complaint. More aggressive measures against consistent defaulters, including the public display of names and photographs and blacklisting with credit bureaux, should be adopted. The Department of Justice should provide for publication, at state expense, and perhaps through police or state-appointed photographers, of photographs of maintenance defaulters.

*c) Standardization and simplification of summons procedure*

Summonses and subpoenas which are used to order respondents to come to court should be standardised. A simply-worded directive translated into all eleven official South African languages must be included which explains the consequences of failing to attend court; the importance of bringing a recent pay slip and/or other relevant evidence of income to court, as well as documentary evidence of expenditure and liabilities; and the possibility of returning a signed consent form instead of coming to court in person. If a subpoena is not able to be served, it is submitted that the evidence be immediately forwarded to the Department of Social Services as proof of untraceability of the respondent.

*d) Conditions at Courts*

I submit that maintenance officers ought to investigate the possibility of improving the conditions and facilities at court for those waiting for their cases to be heard<sup>149</sup> and the possibility of extended court hours to enable complaints to be reported after working hours, as well as to make it more

---

<sup>148</sup> This seems to be the current practice. (See Case Studies presented to Lund Committee Report by Black Sash (1996)).

<sup>149</sup> Officers should investigate food, drink and child-care services, possibly to be provided by charitable organizations or by members of the community for a small fee. Those waiting to be attended to should be provided on arrival with a number indicating their place in the queue. Cases should be attended to strictly in case number, and the progress of the queue should be publicly displayed or announced.

convenient for recipients of maintenance payments to collect their money from the court. Where magistrates' offices cover a large geographical region with many maintenance clients, circuit courts should be investigated to ease the burden on custodial parents. All courts must be computerised as soon as possible and this computer system should cover the full process, from application to payment. Systems will be required to be networked, at least within a given province, to allow those paying maintenance to pay at any office, and those receiving to receive at any office.<sup>150</sup> The larger courts should employ specialised tracers, who are competent in the different languages required, know the geographical area well, provided with the necessary means to protect their own physical security and given the necessary inter-departmental assistance from departments such as Police, Telecommunications, and Home Affairs.<sup>151</sup>

*e) Allegations of corruption*

It is proposed that a full-scale investigation of corruption be instigated with public calls for people to report suspected incidents. Those found guilty of corruption ought to be severely punished.<sup>152</sup> Liaison between the police and maintenance court personnel is in need of improvement.<sup>153</sup> Records must be kept of the individual police officers who assume responsibility for serving court documents, and sanctions imposed on those individuals who do not carry out this task properly. There is furthermore a general need to provide public education on the operation of the maintenance court and the responsibility of parents to provide for their children, where they are

---

<sup>150</sup> See *Lund Committee Report*, chapter 5.

<sup>151</sup> See new Maintenance Act 99 of 1998; see too *Lund Committee Report* (1966) chapter 5.

<sup>152</sup> See *Lund Committee Report* chapter 5.

<sup>153</sup> A senior officer in the Head Office of the South African Police Service should be given responsibility for supervising the service of summonses, subpoenas and warrants of arrest in maintenance cases. This person should also be responsible for following up complaints from maintenance court personnel and members of the public.



capable of such support.<sup>154</sup> Parents require education on the usefulness of formalizing private agreements as court orders in order to provide access to enforcement mechanisms. Both women and men need to be informed of the possibility of requesting an increase or a decrease in an existing maintenance order in the light of changed circumstances, and the procedure to be followed at each stage of the process, and particularly when the respondent falls into arrears. Public education must emphasize maintenance as an issue affecting the welfare of children rather than as a dispute between men and women.<sup>155</sup>

f) *Mechanisms for enforcement*

The new Maintenance Act<sup>156</sup> requires expansion to provide for Deed's Office searches, and checking of tax records; additional staff will be required to conduct this investigative work. This would expand the courts' powers to make maintenance orders against a respondent who is unemployed, but has substantial assets. Where a defendant cannot be traced easily or quickly and appears to be avoiding service of papers, the Maintenance Act must allow for the attachment of the defendant's assets by means of an *ex parte* application brought by the maintenance officer to the court.<sup>157</sup>

---

<sup>154</sup> The public needs to be informed that the maintenance courts are available to parents who are single, married, divorced or separated as well as to extended family members such as grandmothers who are caring for the children of their sons and daughters.

<sup>155</sup> For example, public attitudes might be influenced by statements by prominent persons such as politicians, sports stars, ministers of religion and musicians on this point.

<sup>156</sup> 99 of 1998.

<sup>157</sup> Section 11 (2)(a) of the present Act provides that the court *may* make an order for the recovery of arrear maintenance, with the effect of a civil judgment. This section should be amended to make it compulsory for the presiding officer to consider such an order, and section 11 (2)(b) should be amended to make warrants of execution the *norm* rather than the rare exception. Section 11 should only allow for conversion of prosecution into an enquiry to take place after conviction, in place of a sentence being imposed. This will ensure that the decision to convert is only taken after the presiding officer is in possession of all the facts. It will also avoid magistrates' resorting to conversion (a) out of ignorance or (b) simply to get cases off the role. The new Act now allows for the attachment of wages (a garnishee order) as an administrative measure, without requiring a criminal conviction for arrears first.

g) *Emergency Maintenance Fund*

It is suggested that all fines collected under the Act should be paid into a Maintenance Fund.<sup>158</sup> A Maintenance Fund could be used to make emergency payments to beneficiaries of maintenance orders in cases where the payments have fallen into arrears. These amounts could then be repaid if the arrears were recovered from the respondent.

5.7.2 *Family Courts*

Finally, the importance both to the system of judicial maintenance and to the community of a specialized efficient family court system with comprehensive jurisdiction in all matters pertaining to the family cannot be over-estimated.<sup>159</sup> With society in transition, with changing social conditions, attitudes and customs, increasing pressure is being brought to bear, not only for reform in substantive family law, but also for reform in its administration. As long ago as 1979, this need for reform in the structure and functioning of the courts led to the establishment of a Commission

---

<sup>158</sup> See Green Paper 1985. In the United Kingdom, a Social Fund exists to provide for exceptional needs at the discretion of a specialist officer. Social Fund officers have a discretion as to whether to pay out but are required to have regard to all the circumstances of the case. (S 168(1) to (4) of the Social Security Administration Act 1992.) Budgetary loans are available to those in receipt of income support; crisis loans to those not ordinarily dependent on public funds (Direction 14) and community care grants to help those in need of State assistance to remain in their community. (See National Health Service and Community Care Act 1990; see also *Caring for People* Cm 849.) The English courts have ruled that a common sense approach to such discretionary grants must be taken by the Social Fund officers who grant them. *R v Social Fund Inspector and Secretary of State for Social Services, ex parte Healey, Stitt and Ellison* [1992] COD 335, CA.) A further non-discretionary Social Fund exists from which maternity expenses and cold weather payments may be claimed. (See Social Fund Maternity and Funeral Expenses (General) Regulations 1987 and Social Fund Cold Weather Payments (General) Regulations (1988).)

<sup>159</sup> See ID Schäfer 'The Concept of Family Courts in South Africa' (1981) (unpublished PhD thesis, University of Natal) 325; see too ID Schäfer 'Family Courts - Reconsideration Invited' (1983) *Acta Juridica* 191.

of Inquiry,<sup>160</sup> under the chairmanship of Hoexter JA.<sup>161</sup> In the fifth report,<sup>162</sup> the Hoexter Commission criticised the adversarial divorce procedure which, in its view, hampered the process of adjudication in divorce. In undefended divorce actions, the Commission was of the view that a superficial and unsatisfactory approach was taken, which failed to investigate fully *inter alia* whether adequate attention had been paid to the maintenance of minor children of the divorce. The Commission recommended the establishment of a specialised family court at regional court level whose judicial officers were independent of the Public Service.<sup>163</sup>

In 1993, the Magistrates' Courts Amendment Act<sup>164</sup> purported to establish a forum for the adjudication of divorce actions within the structure of the civil lower courts.<sup>165</sup> Family courts were to be established to adjudicate divorce actions as defined in the Divorce Act.<sup>166</sup> The proposal for the establishment of these family courts emanated largely from comments received on the Divorce Amendment Bill, 1992, which proposed, firstly, the abolition of Black Divorce Courts, as established under section 10 of the Black Administration Act<sup>167</sup> and, secondly, the abolition of the jurisdiction of the High Court in all other divorce actions. The 1993 Act proposed the amendment of the Black Administration Act<sup>168</sup> by the deletion of the words 'magistrate's court' wherever it occurs and the insertion of the words 'family court'. Any divorce court established under section

---

<sup>160</sup> Commission of Inquiry into the Structure and Functioning of the courts in South Africa Government Gazette 6761 of 1979, GN 286 of 1979.

<sup>161</sup> Hereafter the Hoexter Commission. See too ID Schäfer 'The Concept of Family Courts in South Africa' (1981) (unpublished doctoral thesis) (University of Natal).

<sup>162</sup> Report No RP 78 of 1983.

<sup>163</sup> S9.2; Part VII; chapter 9.

<sup>164</sup> Act 120 of 1993. This Act is still not in force.

<sup>165</sup> Section 2.

<sup>166</sup> Section 1 of Act 70 of 1979.

<sup>167</sup> 38 of 1927.

<sup>168</sup> Section 12 of Act 38 of 1927.

10 of the Black Administration Act<sup>169</sup> was to be deemed to be a family court. The Memorandum to the Act stated that 'the principle that divorce actions should be adjudicated in the lower courts enjoys the support of a wide spectrum of interested parties'.

The reasons given in the Memorandum were firstly, that the work load of the High Court would be significantly relieved and accessibility to the courts will be increased as a result. Secondly, the Memorandum envisaged that 'experienced and competent' civil magistrates, who, aspired to appointment as regional magistrates would be retained for the civil administration of justice: a more proficient civil adjudication is envisaged, ranking with the regional courts' criminal jurisdiction. Provision was therefore made for the creation and appointment of 'family magistrates', who were required to be in possession of a *baccalaureus legum*.<sup>170</sup> An Advisory Board was proposed to advise the Minister of Justice from time to time of the suitability of persons for appointment as family magistrates.<sup>171</sup> In terms of this Act, legal practitioners would qualify for appointment, but only in an acting capacity.<sup>172</sup> This was in marked contrast to the proposals made by the Hoexter Commission, which stressed that family court judicial officers should be independent of the Civil Service.<sup>173</sup>

When assessing this Act and the comments of the Hoexter Commission, it is necessary to refer to the changes brought about by the implementation of the Mediation in Certain Divorce Matters Act.<sup>174</sup> This Act regulates the appointment of persons as Family Advocates. Such persons must

---

<sup>169</sup> 38 of 1927.

<sup>170</sup> Section 9.

<sup>171</sup> Section 8.

<sup>172</sup> Section 8.

<sup>173</sup> Report No RP 78 of 1983, Part VII, s 9.2.

<sup>174</sup> 24 of 1987.

be suitable for appointment by reason of their involvement in family matters.<sup>175</sup> Persons who are not members of the public service may also be appointed for the duration of a specific proceeding or more than one proceeding.<sup>176</sup> The main function of the Family Advocate is to safeguard the interests of the minor or dependent children of divorce and to assist the court in discharging its duty in terms of the Divorce Act.<sup>177</sup> Accordingly, the Family Advocate may institute enquiries where minor children are involved or applications for variations in custody or guardianship orders are heard. The court may order an enquiry or either of the parties may request one.<sup>178</sup> The Family Advocate also has the power to apply to court at any stage of the proceedings where she/he deems it to be in the interests of any minor child for permission to hold an enquiry.<sup>179</sup> The specialised nature of their work ensures that full-time Family Advocates are able to develop experience and expertise in this field over a relatively short space of time. They are furthermore assisted by family counsellors who have an important inter-disciplinary role to play. Family Advocates are thus enabled not only to intervene where the court cannot, but also to gain access to information which judges often do not have at their disposal.

The Mediation in Certain Divorces Act<sup>180</sup> was amended by the insertion of a clause<sup>181</sup> which stated

---

<sup>175</sup> Section 2 (2). The Minister of Justice may appoint officers in the public service as Family Advocates in each division of the High Court on a full-time basis.

<sup>176</sup> Mediation in Certain Divorce Matters Amendment Act 121 of 1991.

<sup>177</sup> See section 6 of Divorce Act 70 of 1979. See too ID Schäfer 'The Family Advocate in South Africa' in *Frontiers of Family Law* A Bainham and D Pearl (eds) (1993) 32.

<sup>178</sup> *Mediation in Certain Divorce Matters Act* 24 of 1987; Section 4 (1).

<sup>179</sup> Reg 2 (2) of Act 24 of 1987. Every copy of a deed of settlement involving children has to be given to the Family Advocate to ensure that the agreement is in the best interests of the child. The regulations to the Act require that a prescribed form be completed in every case where children are involved by either or both of the parties. The prescribed form must indicate where the children are presently living, who is looking after them, and what arrangements have been made or proposed in respect of the custody or access to and guardianship of the children. (See Annexure A or B of the Regulations to Act 24 of 1987.)

<sup>180</sup> 24 of 1987.

<sup>181</sup> Section 1 A.

that its provisions were not applicable to divorce actions adjudicated in a family court established in terms of the Magistrates' Courts Amendment Act,<sup>182</sup> although the Minister has the power to declare the provisions applicable in certain cases by notice in the Government Gazette. The Family Advocate is able to apply for suspension of proceedings in the family court and the referral of an action to the provincial or local division having jurisdiction, but generally the role of the Family Advocate in the family court would appear to be curtailed, which is not in accordance with the suggestions of the Hoexter Commission<sup>183</sup> which recommended the appointment of a 'Children's Friend' or Family Advocate to protect the interests of minor and dependent children in the family court.<sup>184</sup> The Commission recommended further that, where the interests of minor children were at stake and the Family Advocate was of the opinion that the protection of the children's interests required it, the Family Advocate was to be given the power to arrange for legal representation of the children concerned at public expense. It would be extremely unfortunate if, as a result of the Act,<sup>185</sup> the work of the Family Advocate was to be confined to those matrimonial matters which were still heard in the High Court. Persons who were unable to afford to litigate in the High Court would then be denied the very valuable assistance and protection afforded by the Family Advocate in such matters.

In 1974, in England the Finer Committee set out certain criteria which a family court should, in its opinion, satisfy.<sup>186</sup> One of these criteria was that the family court should organise its procedure, sittings and administrative services with a view to gaining the confidence and maximizing the convenience of the citizens who appear before it. The proposals of the Finer Committee were not adopted at the time they were made, largely for financial reasons. However, although England did not accept the recommendations of the Finer Committee in 1974, it is

---

<sup>182</sup> 120 of 1993.

<sup>183</sup> Part VII, Chapter 9, S.9.8.2-3 S99.

<sup>184</sup> S9.8.3.

<sup>185</sup> 120 of 1993.

<sup>186</sup> Cmnd 5629, 1974; Section 13.

interesting to note that the operation of the New Zealand family court system, which closely follows the recommendations of the Finer Committee, has now been adopted in England as a result of the implementation of the Children Act.<sup>187</sup> In fact, though not in name, a vertically-integrated Family Court has been created in England.<sup>188</sup> At the same time as the Children Act was introduced in 1991, significant changes were made in the selection of the judges to hear cases involving children. For the first time, a degree of specialisation was introduced at the County Court level.<sup>189</sup> The creation of this specialist cadre of judges has significantly improved the calibre, around the country, of the decision-making process for children,<sup>190</sup> although, of course,

---

<sup>187</sup> 1989. Most public law applications start in the Family Proceedings Court. If, however, factors such as difficulty, length or complexity are identified, then the case may, at the instance of the court or upon the application of the parties, be transferred to the County Court, and thence if need be on to the High Court for ultimate hearing and for control via direction hearings. The more straightforward and simple cases tend to be dealt with by magistrates (with an avenue of appeal to a High Court Judge sitting alone); the middle-ranking cases by full-time and professional judges (invariably prior to their appointment counsel or solicitors) from whom appeal lies to the Court of Appeal; and the most complex by one of the seventeen Judges of the Family Division (who sit mainly in London) but also service the needs of provincial centres throughout England and Wales. From these courts, appeal is to the Court of Appeal. Scotland and Northern Ireland have their own separate systems.

<sup>188</sup> See The Hon. Mr Justice Peter Singer 'Has The Children Act 1989 advanced the English Child's Best Interests?' Unpublished paper for Seminar on 'Best Interests of the Child - a Changing Concept' Cape Town 28-29 January 1999. Private law applications can be commenced in either the Family Proceedings Court (as the domestic wing of the largely lay and non-legally-qualified Magistrates' Court was re-labelled), or in the County Court, or in the Family Division of the High Court. Commenced at one level, they are susceptible to transfer vertically up or down in accordance with guideline principles (of which difficulty, length and complexity are the most pertinent); and laterally, geographically, from one Family Proceedings or County Court to another. A different approach is applied for local authority applications for a care or supervision order, where a single point of entry is used.

<sup>189</sup> Separate certification systems exist for private law and for public law "nominations", with an element of specific training at two or three day residential courses as a pre-requisite for inclusion on the relevant list. Both Circuit Judges and their deputies, formerly called Registrars but now known as District Judges, need to be on the list before they can embark upon Children Act work of whichever category. As a rule, they should expect to spend at least 30% of their sitting time hearing such cases, or expect to be removed. See Peter Singer *supra* fn 188.

<sup>190</sup> Singer (*supra* footnote 188) 4. No-one is obliged to hear family cases. The most delicate and sensitive work, which involves the public law cases involving local authorities, is concentrated at a limited number of "Care Centres". There are 52 such centres throughout England and Wales. Each Care Centre has its own "Designated Judge", usually a relatively senior judge experienced in children work, who heads up that court's team of family judges. He or she has responsibility for supervising Children Act functions at that court, both judicially in terms of

many matters relating to maintenance will be handled by the Child Support Agency.

In Australia, family courts have also been established. In marked contrast to the system proposed for South Africa, such family courts are superior courts.<sup>191</sup> In some respects, they have inherent jurisdiction and as such fulfil the important functions of a family court. They consist of a Chief Judge, a Deputy Chief Judge and Judge Administrators. It is a precondition of a family court judge's appointment that she/he has been judge of another court created by the Parliament or of a court of a State or has been enrolled as a legal practitioner of the High Court or of the Supreme Court for not less than five years and by reason of his or her training, experience and personality is a suitable person to deal with matters of family law. Very detailed provision is made in the Family Law Act for the jurisdiction and procedure of this court and the appointment of Registrars who are independent, administrative officials, similar to the Registrars of our High Court. In Australia, likewise, the family court makes provision for mediation. Conciliation procedures were introduced into the Australian court because the adversarial system was regarded as inadequate, expensive and inefficient.<sup>192</sup> The Family Law Act tries to encourage parties whose marriages or family lives are in difficulty to come and take advantage of the court counselling facilities, regardless of whether proceedings have been contemplated or not. Of course, maintenance matters are now handled largely by the Child Support Agency, not the courts.

Three essential functions of a family court are: firstly, to resolve disputes whether arising from family breakdown or from the state's intervention in family life on behalf of the children;

---

ensuring so far as possible uniformity of approach, and administratively by overseeing lists and reducing delay in the court process. The country has historically been divided into six "circuits". For each of these Circuits one of the Family Division Judges has administrative responsibility as the "Liaison Judge", and liaises regularly with the designated Judges, and sits regularly on that Circuit.

<sup>191</sup> Section 22 (2) of the Family Law Act, 1975. See ID Schäfer 'The Concept of Family Courts for South Africa' (unpublished doctoral thesis) (1991) (University of Natal) 55ff for a useful discussion of the Australian system.

<sup>192</sup> Wolfgang Voegli 'Alternative Dispute Resolution in Divorce Conflicts' (July 1992) *Civil Justice Quarterly* 283 at 287.



secondly, to assert a state interest in agreements between parties where, if the parties had not reached agreement, a court decision would have been necessary, thirdly, to provide a vehicle for the enforcement of court orders, even those made by consent.<sup>193</sup> To perform these functions, a dual role for a family court would be ideal, as in Australia, with both a judicial and therapeutic component. Each may complement each other in the special context of a family court. To fully implement these functions, the family court should not be limited in its jurisdiction and should be held in high regard by the public and profession. It is essential that the judicial officers appointed to this court be highly respected and recognised experts in family law. The demand for greater informality in family matters must be tempered by the need for an expert and independent forum to administer the law in this regard. Such a court would be well-equipped to handle maintenance matters sensitively and consistently.

However, there is more to be considered than merely whether South Africa should proceed with the introduction of courts to be styled, 'family courts'. The concept of family courts obviously gives rise to numerous further questions such as what should be the jurisdiction of these courts, and what should be their status with pre-existing courts? Another basic question is whether any kind of formal, slow-moving court structure will ever be adequate to deal with the increase in children in need of alternative care. Professor Zaal argues that perhaps the time has come to scrutinise a less formal, alternative forums designed to ease the burden on courts when it comes to making legally-binding child-care decisions.<sup>194</sup> Professor Zaal notes that in many other countries, there is some degree of reliance on child-solution forums which are not courts. The word 'forum' should therefore be broadly understood as including a formal sitting of a person or group of people whom the law assigns to provide a child-solution which has at least some degree

---

<sup>193</sup> British Agencies for Adoption and Fostering and Association of Directors of Social Services, 'Family Justice - a Structure for the Family Court' *The Report of the BAAF/ADSS Family courts* (Denis Allen ed) (1986) paras. 29-31.

<sup>194</sup> See FN Zaal 'Children and the Courts: How can we improve the availability of Legal Forums?' unpublished paper (1999) for the South African Law Commission Project on Child Care Act 74 of 1983.

of a formally binding status at law.<sup>195</sup> Increasing numbers of street children in many parts of South Africa provide evidence that our formal, societal structures for dealing with children in need of alternative care are failing to provide adequate services. As the AIDS epidemic rapidly increases the numbers of orphaned and seriously ill children, the failure to provide such services becomes more urgent. The purpose of a lay forum such as family group conference (FGC) as utilised in New Zealand is to decide whether the child is in need of care or protection and to formulate a plan for the care of the child.<sup>196</sup> Family group conferences may be appropriate for South Africa in that the emphasis on the extended family means that this is a mechanism in harmony with the concept of indigenous African family norms.<sup>197</sup>

---

<sup>195</sup> A recent example of the use of an alternative to courts may be found in the structure set up under the Uganda Children's Statute of 1996. After parents, responsibility for safeguarding the welfare of children rests with local government councils from village to district level. These are required to mediate in situations where the rights of the child are infringed. They must provide assistance and accommodation to children within their area where the child has been lost, abandoned or is seeking refuge. They must also make all efforts to trace parents or relatives of lost or abandoned children and keep a register of abandoned children and assist wherever possible. Section 23 of the Uganda Children's Statute of 1996 requires that a matter shall have been dealt without success at a lower level before it may be taken to the Uganda Family and Children Court. The lay forms thus serve to reduce the workload of the courts. See further *The Review of the Child Care Act First Issue Paper* [16 April 1998] at pp. 126-27. For further discussion of the Uganda Statute see Julia Sloth-Nielsen and Belinda van Heerden: 'New Child Care and Protection Legislation for South Africa? Lessons from Africa' (1997) 3 *Stellenbosch Law Review* 261, at 266 and 270.

<sup>196</sup> Jeremy Robertson 'Research on Family Group Conferences in Child Welfare in New Zealand' in Hudson, Morris, Maxwell and Galloway *Family Group Conferences: Perspectives on Policy and Practice* (1996) 49 at 55. The care and protection coordinator who convenes the conference is required by law to "make a written record of the details of the decisions and recommendations made, and the plans formulated" by the conference. This record can subsequently be made available to a court. The introduction of the family group conference approach in New Zealand has led to a dramatic reduction in the number of children and young persons taken out of family care and placed in institutions such as orphanages. Although half of the of family group conferences lead to a new care-giver being appointed to the child, this person is usually a family member related to the child.

<sup>197</sup> The functions of the FGC in New Zealand are to consider matters relating to the care or protection of the child or young person, and where the conference considers that the child or young person is in need of care and protection, to make decisions or recommendations and to formulate plans in relation to the child or young person. The decisions, recommendations and plans are made by agreement. Where no agreement is possible, the law provides that the care and protection coordinator will make a report on the matter to the person or forum who initially referred the matter. See principles set out in Sections 5, 6 and 13 of the New Zealand Act.

Given both the South African Law Commission project to draft a Children's Code and the family court pilot projects which are already operational, it seems opportune to reconsider the ways in which maintenance matters involving children are adjudicated. Our present court-based system is failing.<sup>198</sup> Problems of expense and inaccessibility impede the administration system: in many cases long delays are experienced by the child and the court process may be unintelligible or intimidating to the parties. It may be that these forums need to be developed in conjunction with a more specialised family court system, which operates with guidelines to establish greater consistency, expertise and efficiency.

---

<sup>198</sup> See Frederick Noel Zaal 'Children and the Courts: How can we improve the Availability and Dispositions of Legal Forums?' unpublished paper (1999) for the South African Law Commission Project on Child Care Act 74 of 1983.

## PART THREE THE DUTY OF THE STATE TO PROVIDE FOR CHILDREN

### CHAPTER 6

#### STATE MAINTENANCE FOR CHILDREN IN SOUTH AFRICA

##### 6.1 *Introduction*

The maintenance system in South Africa rests on two legs.<sup>1</sup> On the one hand, there is the judicial maintenance system which is based on the legal duty to support one's dependants. On the other hand, there is the State maintenance system, which is meant to act as a safeguard by providing support where the procedures of the judicial maintenance system fail to do so. To separate these two systems is impossible when considering the maintenance provision in South African law: the two need to be viewed holistically if the complete picture is to be canvassed and adequate attention given to the implementation of the Constitution<sup>2</sup> and international covenants concerning children and women's rights.<sup>3</sup> Support of families with children involves large scale equalisation of the financial position of families in such a way as to attempt to achieve the best investment in children and to alleviate poverty, but any suggestions made in this regard are severely constrained by lack of resources.<sup>4</sup>

##### 6.2 *The South African Social Security System: its History and Development*

The link between social security and the provision of child maintenance by the state is

---

<sup>1</sup> South African Law Commission Issue paper 5 Project 100 *Review of the Maintenance System* (1997).

<sup>2</sup> Section 28 of Act 108 of 1996.

<sup>3</sup> See International Covenant on Social and Economic Rights; United Nations Convention on the Rights of the Child (1989) Convention on the Elimination of All Forms of Discrimination against Women; African Charter on Human and People's Rights (1981).

<sup>4</sup> John Kruger 'Supporting Single Parent Households: Situation and Options with regard to State Maintenance Grants in South Africa' *Development Bank of Southern Africa Centre for Policy and Information Development Paper* no 115 (1996) 1.

significant and entails some examination of this system in South African law. However, the social security system in this country is very rudimentary.<sup>5</sup> No substantial universal cash benefits are provided for the poor or the long-term unemployed. Similarly, provision for families with children is very limited, although foster parent grants are payable in respect of all formally adopted children. Benefits in kind are also limited.<sup>6</sup> Although educational and medical services are available, to some extent, to the poor, at present they are often ineffective owing to inaccessibility or the poor quality of the services.<sup>7</sup> Thus, the primary responsibility for the welfare of children rests on the family and little responsibility is borne by the state. However, family support has in many cases broken down and the interaction between public support and private maintenance has become increasingly of vital importance.<sup>8</sup>

The first system of state cash grants for child maintenance was implemented in 1921.<sup>9</sup> Prior to that, welfare was provided on a limited scale by the church<sup>10</sup> and on a very limited scale by the state. Between 1905 and 1910, the publication of high infant mortality rates by the Cape Town Medical Officer of Health led to the introduction of child protection legislation in the various colonies, the founding of a voluntary child welfare society and the provision of preventative health care units. In 1913, the Government introduced the Children's Protection

---

<sup>5</sup> John Kruger 'Supporting Single Parent Households: Situation and option with regard to State Maintenance Grants in South Africa' *Development Bank of Southern Africa Centre for Policy and Information Development Paper No 115* (1996) 14. Recent World Bank findings indicate that at least 23.7% of the South African population live on US\$1 a day (currently just over R6).

<sup>6</sup> See *Lund Committee on Child and Family Support* (1996) chapter 4. The *Lund Committee* recommended that alternative programmes involving benefits in kind which could have an influence on children in poverty should be seen as extremely valuable complements to the social security system, but should be viewed, not as alternatives, but only as part of a multi-pronged strategy for intervention (as 47.) See too John Kruger 'An Overview of the South African Social Security System' in G J Coetzer, J Kinghorn and S van der Berg (eds) *Working Documents on the Post-Apartheid Economy No 5 - Social Safety Nets* (Stellenbosch) (1992) (University of Stellenbosch).

<sup>7</sup> A school-feeding scheme was implemented in 1994, but there have been numerous allegations of corruption and inefficiency in its implementation.

<sup>8</sup> See Mamphela Ramphele and Francis Wilson, *Uprooting Poverty: The South African Challenge* (1989) (David Philip) (Cape Town) 169, 342.

<sup>9</sup> See Child Protection Amendment Act of 1921 as cited in Kruger *supra* 16.

<sup>10</sup> See system of grants to people with custody of orphans in late 1600s instituted by the Dutch Reformed Church, Zonnebloem College (Anglican Church) 1856 and St George's Orphanage (1862).

Act<sup>11</sup> to formulate and consolidate the social measures to be applied for the protection and care of children. In terms of this Act, Children's Courts were established, Commissioners of Child Welfare were appointed and certain crimes against children were stipulated and penalties imposed. The Act provided powers to refer children to institutions or appropriate care, but there was no provision for the financial implications of such referral. In cases where the neglect was the result of poverty alone, children might remain with their parents, and relief for such poverty was only available from private institutions.

At the beginning of this period, maintenance grants were payable to mothers, stepmothers or grandmothers or grandmothers for the care of a child where an order had been made committing them to their care if the care-giving woman was a widow or the father was unable to care for the child for reasons other than unemployment or low wages.<sup>12</sup> Very few women historically classified as Black (hereafter Black women) benefitted from these grants. Children's allowances were paid in respect of such children only in exceptional circumstances. No grants were made to rural Blacks.<sup>13</sup> All other avenues had to be exhausted before an application for a maintenance grant in respect of an urban Black child could be lodged.<sup>14</sup> It was thought that differential treatment of Blacks could be justified by the argument that under customary law it was the duty of the kraal-head to support any minor in his kraal.<sup>15</sup> However, increasingly an awareness of the inequity of these policies began to develop and from the mid 1930s to the 1940s social policy became a little more progressive in terms of the provision of benefits for all population groups. In 1937, when the Children's Act<sup>16</sup> made maintenance grants payable under more extensive conditions and left more room for administrative discretion

---

<sup>11</sup> 25 of 1913.

<sup>12</sup> See *Report of the Department of Social Welfare 1937-9* (UG 15-1940) 59.

<sup>13</sup> *Report of the Department of Social Welfare for the Financial Years 1937-1939* (1940) (UG 15-1940).

<sup>14</sup> *Report of the Social Security Committee and Report No 2 of the Social and Economic Planning Council* entitled: Social Security, Social Services and the National Income (1944) (UG 14-1944).

<sup>15</sup> *Report of the Social Security Committee and Report No 2 of the Social and Economic Planning Council: 'Social Security, Social Services and the National Income'* (UG 14-1944) 20. It was also felt that cash allowances to Black women would lead to a flood of rural women to the towns.

<sup>16</sup> 30 of 1937.

and regulation, family allowances became payable to historically classified, White Coloured and Indian families with low incomes and large numbers of children. Grants could now be paid for the maintenance of any child by any person in whose custody the child had been placed under the Act. In the same year the Department of Social Welfare was established. By the end of 1942, 13 276 Whites, 5 816 Coloureds, 3 034 Indians and 190 Blacks were receiving maintenance grants.<sup>17</sup> Although Blacks were technically included in the welfare system, means tests and benefits were lower for other races than for Whites and rural persons also received lower grants.<sup>18</sup> However, it was during this period that many progressive reforms were suggested which were never implemented.<sup>19</sup>

From 1948 to 1961, all such proposals were swept aside and indeed schemes established in the earlier period were jettisoned such as the school feeding scheme and cost of living allowances. The maintenance system survived, but subject to severe racial discrimination.<sup>20</sup> However, in the 1980s there was a rapid increase in the extension of benefits and a move towards equalising the value of benefits.<sup>21</sup>

<sup>17</sup> J Iliffe *The African Poor - a History* (1987) 141 (Cambridge University Press).

<sup>18</sup> See *Report of the Social Security Committee* (1944) 61.

<sup>19</sup> John Kruger *supra* 19.

<sup>20</sup> The extent of the racialisation of the old maintenance grant system is indicated by this table.

Table 1

Maintenance Grants and Foster Parents' Grants paid by the State 1987

	<u>No of beneficiaries</u>	<u>Amount</u>	<u>Average Grant (R) paid</u>
Whites	22 126	62 173	2 810
Asians	16 586	37 015	2 232
Coloureds	64 718	121 296	1 874
Africans	13 389	6 297	470

(SA Statistics 1990 6.4)

Charles Simkins and T Dhlamini 'The Problem of Supporting Poor Children In South Africa' in S Burman and E Preston-White (ed) *Questionable Issue: Illegitimacy in South Africa* (1991) 70.

<sup>21</sup> See South African Statistics 1992 as cited in Kruger *supra* (1996) 20.

The average level of benefits to Whites decreased.<sup>22</sup> Grants for supporting children and their parents were paid in terms of the Child Care Act<sup>23</sup> and other regulations. Different sets of regulations applied to different population groups.<sup>24</sup> These regulations were administered by separate departments.<sup>25</sup> It would appear that the basis for making such state grants was not founded on any clear directives and varied depending on the race of the claimant. There were two types of grant: a parental allowance and a child's allowance. To qualify for an allowance as a parent, the applicant had to be a South African citizen resident in South Africa for five years prior to the application, unmarried or divorced or widowed. If married, her husband must have deserted her for more than three months and be entitled to a State pension, he must have been declared unfit for work for more than six months or sentenced to jail for more than three months.<sup>26</sup> A woman could not claim an allowance if she was living with a man who was not her husband or if she was capable of working and did not. As far as children were concerned, it would appear that an unmarried Black mother could only claim for one child but no parental allowance.<sup>27</sup> Black children were not only discriminated against in the allocation

<sup>22</sup> See South African Statistics 1992.

Average annual maintenance foster parent grant paid and consumer price index

Classification	Current Rand		Average Annual Change 1972-1987 (%)
	1972	1989	
African	133.80	2197.10	17.89
Coloured	265.16	2779.91	14.82
Asian	287.38	3065.46	14.94
White	767.47	3456.88	9.26
Consumer Price Index (Base Year 1990)	10.4	87.4	13.34

<sup>23</sup> 74 of 1983.

<sup>24</sup> Regulation 1086, Government Gazette 6494 of 22 July 1960 (Africans); Regulation 236 GG 726 of 21 February 1964 (Coloureds); Regulation 2433, GG 535 of 10 December 1976 (Whites) and Regulation 85 GG 5385 of 28 January 1977 (Indians).

<sup>25</sup> The House of Assembly was responsible for grants to Whites, the House of Representatives for grants to Indians and the provincial authorities and administration of the homelands for grants to Africans.

<sup>26</sup> Regulation 1086, Government Gazette 6494 of 22 July 1960 (Africans); Regulation 236 GG 726 of 21 February 1964 (Coloureds); Regulation 2433, GG 535 of 10 December 1976 (Whites) and Regulation 85 GG 5385 of 28 January 1977 (Indians).

<sup>27</sup> Sue Sparks *Black Sash* 'Maintenance Research' (1991).



of benefits, but also in the practical difficulties facing mothers attempting to claim state grants for their children: problem of long-distance travelling, language difficulties, and inefficient bureaucracy in the maintenance offices.<sup>28</sup> Customary marriages were generally interpreted in most cases as legal marriages provided that proof of such marriage could be submitted. However, the difficulty of proof in some cases could result in exclusion of eligibility.<sup>29</sup> In 1992, the Social Assistance Act<sup>30</sup> consolidated legislation pertaining to social assistance to persons, welfare organizations and national councils. The various administrations were unified with effect from 1 April 1994 and administered by the Department of Welfare.

### 6.3 *The Lund Committee on Child and Family Support*

By 1996, in terms of the Social Assistance Act,<sup>31</sup> poverty-stricken parents and their children were supported by State Maintenance Grants hereafter (SMGs). The SMG consisted of a maximum parent allowance of R430 and a child allowance of R135 per child under eighteen years for up to two children, paid monthly. Approximately 350 000 persons were recipients of SMGs. Under this system regulated by the Social Assistance Act, and the regulations thereto,<sup>32</sup> persons were entitled to a grant if they supported a child, were South African citizens and complied with the prescribed conditions which included the fact that a maximum of two children per family received the grant and the parent was single and indigent or married, or indigent and the spouse was not contributing income to the family. In mid-1995, the Committee of the Ministers of Welfare and Provincial Members of the Executive Council for the Welfare hereafter (MINMEC) was poised to do away with the SMG, due to a concern that

---

<sup>28</sup> S Burman and S Berger 'When Family Support Fails: The Problems of Maintenance Payments in Apartheid South Africa: Part 1' (1988) 4 (2) *South African Journal on Human Rights* 345-350.

<sup>29</sup> S Burman and A Barratt 'Welfare Law and Bureaucracy in a Changing South Africa: A Case Study of Maintenance Grants for the Illegitimate' *Working Paper No 19* Centre for Applied Legal Studies (1993) cf M Brow *Social Security - Basic Needs* (1994) who submits that such children were treated as illegitimate for the purpose of the receipt of grants.

<sup>30</sup> 59 of 1992.

<sup>31</sup> 59 of 1992.

<sup>32</sup> Promulgated 1 March 1996.

this grant was in the long term not affordable.<sup>33</sup> A final decision as to the fate of the SMG was deferred, pending the report of an enquiry. As a result, in 1996, the Lund Committee for Child and Family Support was set up by the Welfare MINMEC. The Committee had five terms of reference: firstly, to undertake a critical appraisal of the existing system of state support in all government departments; secondly, to investigate the possibility of increasing parental financial support through the private maintenance system; thirdly, to explore alternative policy options in relation to social security for children and families; fourthly, to develop approaches for effective targeting of programmes for children and families; and finally to present a report giving findings and recommendations.<sup>34</sup> This report was submitted in August 1996.

#### 6.4 *Child Support Grants*

Major recommendations of the Lund Committee were accepted: the SMG was to be phased out over a three-year period, and a new Child Support Grant (CSG) was introduced on 1 April 1998.<sup>35</sup> The SMG had been largely directed to mothers caring for children on their own. It was fairly accessible to White, Coloured and Indian women who met certain criteria, but due to discriminatory means tests and the erection of other administrative barriers, it was virtually impossible for Black women to gain access to it. The Lund Committee sought to design a benefit which would end racial discrepancies, be accessible and flexible, and reach as many

---

<sup>33</sup> See JH Vorster and HM Rossouw 'Poverty Alleviation and the State Maintenance Grant: some comments on the Lund Committee on Child and Family Support' (1996) 32(4) *Social Work* 296. See too John Kruger 'Supporting single-parent households: Situation and option with regard to State Maintenance grants in South Africa' (1996) paper published by *Development Bank of Southern Africa Centre for Policy and Information* No. 115 37.

<sup>34</sup> *Report of the Lund Committee on Child and Family Support* (1996) Executive 2 Summary.

<sup>35</sup> See Welfare Laws Amendment Act 106 of 1997; the provisions of this act relating to the phasing out of the SMG came into operation on 19 December 1997, while those relating to the administration of the CSG came into operation on 1 April 1998. See also the Regulations regarding the phasing out of SMGs in terms of the Social Assistance Act, 1992 (Government Notice R417 in Government Gazette 18771 of 31 March 1998) and the Regulations regarding grants and financial awards to welfare organizations and to persons in need of social relief of distress in terms of the Social Assistance Act, 1992 (Government Notice R418 in Government Gazette 18771 of 31 March 1998).

children as possible.<sup>36</sup> It was argued that the new measure should not be introduced to the detriment of other forms of support for children, specifically the foster care grant, and the care-dependency grant for children with severe disabilities. Ultimately, Cabinet decided that the CSG would be payable for children under the age of seven years in an amount of R75 per month. After much lobbying from non-governmental organizations, this amount was increased to R100.<sup>37</sup> The CSG is means-tested (the test being based on the household income of the household of which the primary care-giver is a member), payable to the primary care-giver, and aims to target children in rural areas and in informal settlements particularly.<sup>38</sup>

A CSG is payable to a primary care-giver of a child who is under seven years or any higher age as the Minister of Welfare may determine. A primary care-giver is defined in the Welfare Laws Amendment Act<sup>39</sup> as a person (whether related to the child or not), who take primary responsibility for meeting the daily care needs of the child, but excludes a person who is paid (or an institution which received an award) to care for the child and also excludes a person who does not have the (express or implied) consent of the parent, guardian or custodian of the child.<sup>40</sup> A CSG is payable only if the child and the primary care-giver are resident in South Africa at the time the grant is applied for and are also South African citizens.<sup>41</sup> Although, SMGs were officially abolished on 19 December 1997, SMGs payable immediately before this

---

<sup>36</sup> See *Report of the Lund Committee on Child and Family Support* (1996) 88 and Executive 4 Summary.

<sup>37</sup> See *Media Statement Ministry for Welfare and Population Development* (21 August 1997) at 2.

<sup>38</sup> See the financial criteria for the CSG in Regulation 16 of the Regulations published by Government Notice R418 in Government Gazette 18771 of 31 March 1998, as also the provisions regarding eligibility for the CSG in, respectively, Regulations 3 and 20 of these Regulations.

<sup>39</sup> 106 of 1997.

<sup>40</sup> Section 3 of the Welfare Laws Amendment Act. The original Welfare Laws Amendment Bill 90 of 1997 did not follow the wide factual definition of 'primary care-giver' favoured by the Lund Committee on Child and Family Support in terms of a biologically linked test (see clause 3(h) read with 1 (a) and (b)), restricting such a care-giver generally to persons biologically related to the child. This would have restricted the availability of the grant and failed to reflect the reality of child-care arrangements in this country and in the face of pressure from non-governmental organizations, amendments were made and the factual objective criteria were followed as set out in the Namibian legislation. (See 1996 Namibian Draft Child Care and Protection Act).

<sup>41</sup> Section 3 of the Welfare Laws Amendment Act 106 of 1997.

date are to be phased out by continuing to pay beneficiaries for a period of no longer than three years at an annually reduced rate.<sup>42</sup>

The CSG is widely recognized as having significant positive qualities, in that it is designed to eliminate racial discrepancies and target the poor of the country's children in their vulnerable early years. In terms of the Regulations, a primary care-giver will qualify for the grant if the household income of the household of which he or she is a member is below R9 9600 per annum or, if the child and the primary care-giver either live in a rural area or in an informal dwelling, R13 200 per annum.<sup>43</sup> However, many fears have been expressed about the shortcomings of attempting to give effect to human rights principles in this way.<sup>44</sup> Undoubtedly, although the central goal of the new grant is to target three million children over a five-year period, as compared to approximately 203 000 children at present benefitting from such grants, the public provision of maintenance will only cater for a limited sector of the population and the pressure on the private maintenance system will continue or even increase.

Several valid criticisms of the scheme have been voiced. Firstly, whereas there is legal provision for state aid for the support of a child in a children's home or in foster care, there is no provision to assist parents to care for children of seven years and older (other than children who qualify for the care-dependency grant, or who are for the time being beneficiaries of the SMG), unless new forms of assistance are developed.<sup>45</sup> Secondly, children at risk, who are not provided for by the scheme, are those under the age of seven years whose care-givers do not qualify for the CSG in terms of the household means test, although such children may well be in dire need of state assistance. Thirdly, as a result of the new system, many governmental and constitutional policy commitments toward the prevention of a family

---

<sup>42</sup> Section 4 of the Welfare Laws Amendment Act, (providing for a new section 21 of the Social Assistance Act).

<sup>43</sup> Regulation 16 of R418 (GG 18771) (dated 31 March 1998.)

<sup>44</sup> Sandy Liebenberg 'Social Security and Human Rights' (1998) 1 (2) *Economic and Social Rights in South Africa* 10.

<sup>45</sup> See South African Law Commission 'Review of the Child Care Act 74 of 1983', *First Issue Paper* (1998) 40-41.

breakdown, the prevention of institutionalisation of children<sup>46</sup> and child labour,<sup>47</sup> including commercial sexual exploitation, may well prove to be futile commitments in the face of growing child poverty. Fourthly, there has been widespread opposition to the legislation on the basis of lack of consultation,<sup>48</sup> the inadequacy of the proposal,<sup>49</sup> the overemphasis placed on repaying the country's debt as opposed to attending to the poverty of children,<sup>50</sup> the assumption that the system could be immediately expanded to include support payments to every eligible child,<sup>51</sup> and possible lack of constitutionality.<sup>52</sup>

A central aim of the new child support grant is to ensure that it is more equitably distributed among a much larger number of children than were reached by the state maintenance grant.<sup>53</sup> If this goal is to be reached, it is essential that the grant is adequately budgeted for at national and provincial levels. Furthermore, it must be administered fairly, efficiently and transparently. Finally, it must be accessible to poor women who, in most instances, will be the primary care-givers of children.<sup>54</sup> Social grants are administered by the provinces and

---

<sup>46</sup> Section 28 of Act 108 of 1996.

<sup>47</sup> Section 28 of Act 108 of 1996.

<sup>48</sup> The Lund Committee failed to hold public hearings and it was only after protest that parliament agreed to convene hearings in the Eastern Cape and Northern Province (See *Poverty Profile* April 1997) 1).

<sup>49</sup> In 1997 there were some 14,3 million children under the age of 15 living with care-givers who earned less than R800 per month (*Poverty Profile* April 1997 1). This legislation will only target about 3 million children.

<sup>50</sup> Servicing government debt cost R36 billion in 1997. The child support benefit, if implemented successfully, will cost just R2,7 billion in eight years' time and will in fact cut state expenditure on child welfare by some R2,9 billion over the next five years (*Poverty Profile* April 1997).

<sup>51</sup> The Congress of South African Trade Unions (COSATU) has pointed out in reality it will be a lengthy process before the system can expand to its fullest capacity as the government has to extend its administrative system to parts of South Africa, such as the rural areas, where it has never been in operation before (*Poverty Profile* April 1997 - report by John Stokes).

<sup>52</sup> The new proposals fail to meet the constitutional rights of children to basic nutrition, shelter and social services (s28(1)(c) of Act 108 of 1996).

<sup>53</sup> The target of the child support grant is 3 million children over a five-year period as compared to the approximately 203 000 children who received state maintenance grants.

<sup>54</sup> See Belinda van Heerden 'The Concept of the Primary Care-giver in South African Law' unpublished paper presented at a seminar on the concept of the primary care-giver (University of Western Cape) August 1998.

therefore sufficient funds must be transferred to the provinces to pay all primary care-givers who qualify for the grant in terms of the regulations. However, it appears that the increase from the 1998/1999 overall welfare budget of R19 billion to the 2000/2001 budget of R21 billion in the medium-term expenditure framework only keeps pace with predicted inflation rates.<sup>55</sup> This budget will struggle to accommodate the additional expenditure on the child support grant if the three million children are to be reached. It is feared that, as happened with pensions in the Eastern Cape in December 1997, certain provinces may run out of money for this grant. Without proper budgeting for the grant at national level, the goal of achieving equitable access to the grant throughout South African will be frustrated.

Another cause for concern is the two-tier means test for determining who is eligible for the grant under the regulations. In terms of this test, a primary care-giver will qualify for the grant if the household income of the household of which he or she is a member is below R9600 per annum or, if the child and the primary care-giver live either in a rural area or in an informal dwelling, R13200 per annum.<sup>56</sup> Household income is defined to mean "any contribution in the form of money, food, or other household necessities to the household and any contribution to the cost of the accommodation of the household."<sup>57</sup>

A simple means test based on the income of the primary care-giver (as opposed to household income) would be more transparent and administratively more simple. Furthermore, the administration of the child support grant requires a doubling of the capacity of the welfare system to process grants; the present system is already overburdened and the proposed means-test is unnecessarily complex, with the result that it may disadvantage those primary care-givers who live in large and poverty-stricken households. In addition, the regulations impose a number of conditions on primary care-givers seeking to qualify for the grant,<sup>58</sup> which include the requirement of proof of attempts to secure maintenance for the child from the parent/s of

---

<sup>55</sup> *Poverty Profile* April (1997) John Stokes.

<sup>56</sup> See Regulation 16 (2) of GG R18771 31 March 1998.

<sup>57</sup> See Section 1 of Regulation 418 (31 March 1998), published in terms of Social Assistance Act 59 of 1972 (No. 18771).

<sup>58</sup> See Regulation 3.8.8 of R418 (31 March 1998).

the child and of the immunization of the child where these services are available.<sup>59</sup> The primary care-giver can only qualify for the grant if he or she does not 'without good reason' refuse to accept employment or participate in any development programme. This condition vests a wide discretion in administrative officials as to the interpretation of reasonableness in respect of a refusal to take up employment or to participate in a development programme.<sup>60</sup> What if the primary care-giver refuses for the reason that she is the only person who can take care of her young child during the day? Such a condition might actually deter primary care-givers from seeking assistance on behalf of the children in their care. Finally, it is unfairly discriminatory in that similar conditions are not imposed on old age pensioners<sup>61</sup> and might be held to be unconstitutional in this regard.<sup>62</sup>

### 6.5 *The Overall System of Child Grants*

There are three main types of child grant, child maintenance grants, foster care grants and care-dependency grants. A person is eligible for a 'foster care grant' if he or she is a foster parent and qualifies in terms of the Act.<sup>63</sup> A foster parent is a person in whose custody a foster child has been placed in terms of the Child Care Act<sup>64</sup> or the Criminal Procedure Act<sup>65</sup> or a tutor in terms of the Administration of Estates Act.<sup>66</sup> A care-dependency grant is available to a parent of a child (under eighteen) who receives permanent home care due to severe disability.

---

<sup>59</sup> See Regulation 9 (3) of R418 (31 March 1998).

<sup>60</sup> See Regulation 3 (2) (f) of R418 (31 March 1998).

<sup>61</sup> Sandy Liebenberg 'Social Security and Human Rights: Current Issues' (1998) 1 (2) *Economic and Social Rights in South Africa Review* 10 at 11.

<sup>62</sup> See section 9 of the Constitution of the Republic of South Africa Act 108 of 1996).

<sup>63</sup> See Regulations 4(1)(2) of Regulations regarding Grants and Financial Awards to Welfare Organizations etc in terms of the Social Assistance Act (1992) Gov. Gazette No. 18771 (31 March 1998) R418.

<sup>64</sup> Chapters III and VI of Act 74 of 1983, as amended.

<sup>65</sup> Section 290 of Act 51 of 1977.

<sup>66</sup> Sections 1 and 2 (g) of Act 66 of 1965.

### Differences between Grants

Type	Who is Eligible?	Means Test	Amount	Duration
Child Support Grant	Primary care-giver of a child under 7 years; resident; SA citizen. Some further conditions in the regulations	Household income below (i) R9 600 per annum; or (ii) R13 200 per annum if in rural area or informal dwelling.	R100 per month per child	Until child's 7th birthday; death of child or care-giver; until child no longer in custody of care-giver.
Type	Who is Eligible?	Means Test	Amount	Duration
Foster Care Grant	Foster parents of children under 18 years; foster parent and child resident in South Africa.	Income of child less than twice the annual amount of the grant	R360 per month per child.	Until child turns 18, or 21 if at school. Until foster parent or child dies, or child no longer in custody of parent.
Type	Who is Eligible?	Means Test	Amount	Duration
Care-dependency Grant	Parent or Foster-parent of a child between 1 and 18 years who receives permanent home care due to severe disability; parent and child resident; SA citizens, medical report.	Combined annual income of family below R48 000.	R490 per month per child	Lapses when child turns 18, parent or child dies; child admitted to state institution.

Previous recipients of the state maintenance grant are at this stage still eligible, but the grants will be paid at a reduced rate as they are phased out.

The foster care grant was intended to provide some monetary assistance to persons other than the biological parents who cared for a child while state and private welfare organizations searched for a more permanent placement, either with the biological family after regulation of the problems leading to statutory intervention, or in an adoptive environment.<sup>67</sup> In reality, given the limited number of adoption and institutional opportunities, many foster parents are permanent rather than temporary. The emphasis in some quarters on non-relative foster care

---

<sup>67</sup> See *Lund Committee Report* (1966).



was heightened in the mid-1980s when the state attempted to enforce a policy that care-givers who were related to the child should receive the lower amount of the maintenance grant rather than the foster care grant. This measure failed after strong opposition from welfare organizations. In some parts of South Africa, related foster families have consistently had access to the foster care grant. The tension has become more acute with the replacement of the maintenance grant by the even lower child support grant. Although the shift to 'primary care-giver' in the Social Assistance Act<sup>68</sup> rather than biological parent was widely welcomed and was perceived as an acknowledgment of the diversity of family and household units and a movement away from any bias in favour of a supposedly western norm,<sup>69</sup> nevertheless, this shift, occurring in isolation, has increased the contradictions between the different types of grants.<sup>70</sup>

The foster care grant has thus become the preferable child support grant for a number of reasons, including the increased amount and because the foster care grant is paid until the child is eighteen years old, while the child support grant ends with the seventh birthday. The foster care grant also has a very minimal means test, which examines only the child's personal income, while the means test of the child support grant considers the full household income. It further appears that these grants, at least in the interim, will not be as quickly and easily accessible as was hoped<sup>71</sup> that officials are applying extra criteria not required by the regulations.<sup>72</sup> There had in the past been repeated complaints about administrative barriers to accessing the child maintenance grant. These were particularly severe when, as was common

---

<sup>68</sup> 59 of 1992.

<sup>69</sup> See Belinda van Heerden 'The Concept of the Primary Care-giver in South African Law' unpublished paper presented at a seminar on the concept of the primary care-giver (University of the Western Cape) August 1998.

<sup>70</sup> As one welfare worker stated: "the government seems to be saying that a child in a reconstructed family is worth R360 per month while one who remains in a family is only worth R100 per month".

<sup>71</sup> See Allison Tilley (1998) 'The New Child Support Grant: Theory & Practice' (unpublished) (Black Sash) incorporating questionnaire research in the Department of Welfare's Cape offices, which revealed that while applications were accepted from April 1998, by mid-June 1998, no grants had been processed anywhere in the country because the system was not yet able to deal with them.

<sup>72</sup> See Tilley (1998) *ibid.*

for Black women, the father was geographically distant. Some of these problems may persist with the new system.

From 1996, child welfare agencies have reported an increase in the number of foster care applications. It was suggested that this reflected an increase in the number of orphaned children, particularly as a result of AIDS.<sup>73</sup> Western Cape welfare agencies attribute the increase to the replacement of the maintenance grant with the lower and more restricted child support grant. They suspect that some parents 'disappear' and leave their children with others who will be eligible for the higher foster grant rather than the child support grant. The gap between the two grants is significant.<sup>74</sup> Although the amount of the child maintenance grant has been equalized across race groups, access has remained extremely uneven. In the former Black 'homelands' the grant was often not available at all.<sup>75</sup> In other areas, there was a child maintenance grant, but no parental maintenance grant.

The value of the state maintenance grant for Whites fell from R8 000 per annum in 1976 to R3 600 in 1996. Coloured and Indian grants stayed the same over that period, but declined after 1976.<sup>76</sup> The costs of administration and delivery of the grants vary by type of grant. Foster care grants are particularly expensive because they involve a large amount of a social worker's time. Even after the grant is approved, social workers are required to pay regular visits to the family and to write reports on these visits and thus costs are incurred in terms of the time which staff spend in policing the care.<sup>77</sup> An emphasis on community care might shift the

---

<sup>73</sup> *Report of the Lund Committee on Child and Family Support*, Department of Welfare (1996) 19.

<sup>74</sup> However, it is significant also that the maximum old age pension was R370, but has increased to R500, an increase of 35%: the percentage increase in the foster care grant over the same period is only 25%.

<sup>75</sup> See Sandra Burman and Shirley Berger 'When Family Support Fails: the Problems of Maintenance Payments in Apartheid South Africa Part II' (1988) 4 *South African Journal on Human Rights* 334 at 346 (footnote 15). Burman and Berger point out that, prior to 1 July 1986, women were required to hold 'section 10 rights' under the Black (Urban Areas) Consolidation Act (45 of 1945) before they qualified for a maintenance grant. The position in the 'homelands' was unclear: it seemed that maintenance was only available in limited circumstances, and in some cases, applicants were forced to seek help from social workers in their home areas.

<sup>76</sup> *Ibid Lund Committee Report* 12.

<sup>77</sup> See Allison Tilley 'The New Child Support Grant: Theory & Practice' (1998) unpublished paper.

emphasis onto non-monetary as opposed to monetary costs. For those concerned about limited finances, this may be an attractive option. Women, however, usually bear a disproportionate burden as the 'natural' carers in the family and community, and particularly in the case of children.<sup>78</sup> The non-allocation of monetary value also could mean that the issue acquires insufficient status in relation to other budgetary concerns.

## 6.6 *Future Changes in the Demand for Grants and Services*

The greatest change in the future demands for grants and services is almost certain to emanate from the crisis caused by the HIV/AIDS epidemic. While there is growing awareness of the problem, there are still very few suggestions or recommendations for action. An organisation called 'Children in Distress' (CINDI) in Pietermaritzburg is one of the few groups who has been working for some time, particularly on the issue of AIDS orphans. Their activities include a number of pilot projects.<sup>79</sup> There has been a move in this connection toward developmental social welfare. This move towards developmental social welfare can be interpreted as a repugnance for grants: a perception that these are 'handouts' which are neither beneficial for the state nor the recipients. Concern has been expressed about the incentives which different types of grants and eligibility criteria might introduce.<sup>80</sup> The issues are not entirely confined to money.<sup>81</sup> Separate specific programmes for children affected by the disease may stigmatize such children. What is required is a social welfare system that will encompass the needs of such children within its daily instruments. The problems faced by such children may begin before the death of their parents when household income declines or when

---

<sup>78</sup> M Harber 'Developing a Community-based AIDS orphans' Project: A South African project' (unpublished paper) (1998) 8. Local evidence of this gender imbalance in the meaning of community participation was recorded by the 'negligible' involvement of men in a Pietermaritzburg AIDS orphan project. She argues that this places an unfair burden on women.

<sup>79</sup> At an international conference ('Raising the Orphan Generation',) in Pietermaritzburg, June 1998, the problems experienced by these pilot projects were revealed. Nevertheless, community-based initiatives are still offered as the only hope for addressing the issue.

<sup>80</sup> *Lund Committee Report* (1996) chapter 1.

<sup>81</sup> G Machel Opening Speech in *Raising the Orphan Generation*, Conference organized by Children in Distress (CINDI) in Pietermaritzburg 10-12 June, 1998. Children who have lost their parents, especially those who have been orphaned through HIV/AIDS, can be reluctant to place themselves in the care of the community or society they feel has abandoned them, especially if they have some other means of survival by living on the streets.

children take over the care of sick relatives.

The Lund Committee Report supported monetary grants as having important economic and developmental benefits which include economic cost-efficacy,<sup>82</sup> and indicating commitment towards the cost of raising children. Monetary grants may assist in redistributing income; influence the birth rate; provide a degree of equity in taxation; enable parents to care for children independently of the labour market; boost low earnings; reduce demands for a minimum wage; increase incentives to work; relieve unemployment or low income traps.<sup>83</sup> In South African society, the central economic problem of child support concerns the question of redistribution.<sup>84</sup>

Much research is required into which policy should be adopted. South Africa is not a rich country.<sup>85</sup> The economic, social and administrative conditions prevailing here are those of a developing rather than an advanced society, although vast differences in wealth exist. Problems are exacerbated by the fact that in our society, unlike developed countries, a nuclear family is fairly rare among the poorer sector of the population. Illegitimacy among this sector of the population is prevalent along with high levels of desertion and divorce. Nuclear families are only predominant among Whites, Coloured, Asians and a minority of relatively affluent urban Black people.

The extended family would appear still to be the norm for most Black households<sup>86</sup> and it seems that the involvement of parents in the contract labour system has a more significant impact on their lives than their marital status.<sup>87</sup> The policies of the state support system in a

---

<sup>82</sup> Lund Committee on Child and Family Support (1996) 9.

<sup>83</sup> Lund Committee 9.

<sup>84</sup> C Simkins and T Dhlamini 'The Problem of Supporting Poor Children' in *Questionable Issue, Illegitimacy in South Africa* (1991) (ed. S Burman & E Preston-Whyte) 75.

<sup>85</sup> C Simkins and T Dhlamini *ibid* 64.

<sup>86</sup> See C Simkins & T Dhlamini (*supra*) at 77.

<sup>87</sup> S Jones 'Children on the move: parenting, mobility and birth-status among migrants' in *Questionable Issue* (ed S Burman and E Preston-Whyte) (1991) 282.

new South Africa will need to cater for extended families as well as nuclear single parent families in order to adequately target the poor. Social work and improved use of the health and education systems will be required; more resources will need to be devoted to primary health care, to contraception, to subsidized child-minding, to low-cost housing and promotion of community-based youth organizations.

There are various types of benefits which are in existence in various developed nations such as Britain, France and the United States for child support. These include:

- (i) universal cash payments;<sup>88</sup>
- (ii) tax expenditures;<sup>89</sup>
- (iii) automatic additions for dependent children in the case of general means-tested cash transfers;
- (iv) income-tested cash transfers to families with children;<sup>90</sup>
- (v) means-tested benefits in kind. There are problems with the provision of benefits in kind: they are expensive to provide and often do not take into account related aspects of importance, for example, the provision of free education in a third-world country

---

<sup>88</sup> These are benefits in respect of which all citizens are treated equally. Some of the arguments in favour of universal cash allowances of this kind are that wage rates do not reflect the number of dependents of a wage earner and there is a need to distribute income among different groups in society. Another argument in favour of this form of child support is to view expenditure as an investment in the future of an economy. It acknowledges the particularly weak position of single parent families and the fact that such families usually require greater assistance.

<sup>89</sup> These take the form of exemptions from tax on income on the grounds of the number of dependent children to ensure the vertical equity of a tax system. This is on the basis that allowance must be made for those incurring high child-raising expenses by reducing their tax burden. Furthermore, tax reductions in child care expenses for single parents and two-earner families prevent adverse work incentives for single parents and second earners in a family. However, there are a number of problems with such a system. Both credits and exemptions benefit only those who are liable to pay tax and do not benefit those with low incomes.

<sup>90</sup> In the United States, there is an income-tested cash benefit known as Aid To Families with Dependent Children (AFDC). State income tested programmes for families exist in most states restricted to single parent families. This is dependent on the gap between the family's resources and the State's need standard for the family. This is run in conjunction with efforts to enforce private maintenance payments and 'workfare' schemes combined with various active labour market policies - child care, training and assistance with finding employment. In Britain, housing benefits are also paid on the basis of a means test which involves assistance with rent and rate payments. Free school, meals and milk are also provided where the parents of children are on Income Support or Family Credit. Assistance is provided by the state for health care and education. In the United States, there is provision for lower income housing assistance and assistance is provided for housing and free or reduced school lunches (Kruger *ibid* 4-5; See too *Lund Committee Report on Child and Family Welfare* (1996), chapter 7.)

many hold little value if conditions at home or even in the school render it impossible to study.<sup>91</sup> In addition, many societies bear the cost of education and health care of children. Benefits of this nature in developing countries are found almost exclusively in French-speaking African countries and some of the large South American countries. They are mostly absent in other African and Asian developing countries.<sup>92</sup>

## 6.7 *Proposals for Reform*

Logically, it would seem that the child support and foster care grant should be consolidated, or at least be at the same level. The support grant took an important step forward in relaxing the conditions relating to household structure. Through 'following the child', the eligibility criteria attempt to ensure that allocation is based on need rather than circumstances beyond the control of the child, and or circumstances which reflect cultural, religious or other choices of the people involved. However, the difficulties of shifting the perceptions and practices of bureaucrats, service providers and communities will need to be addressed. The demand for child grants of one form or another is likely to increase dramatically, due to the poor economic situation in the country and the ravages which HIV/AIDS will wreak on families. If poor households are not provided with significant financial assistance, they will be unable to contribute their own time and energy in providing for children. Ultimately, the costs to society and government will be higher.

The criteria for qualification for foster care and child support grants need to be synchronized, especially now that the child support grant has changed to the approach of follow the child. If this is not done, the assistance given to beneficiaries will vary according to factors which are inequitable. The issues are whether the foster care grant should be decreased to the level of the child support grant in order to remove the incentive for parents to give up their children, or whether the foster care grants be increased to encourage unrelated people to care for the growing number of children without care, even if this increased the economic gap between the

---

<sup>91</sup> See *Lund Committee Report on Child and Family Support* 45-7.

<sup>92</sup> International Labour Office (1998) 'The Cost of Social Security - Twelfth International Inquiry' 1981-1983.

child support and foster care grant. It is suggested that a disparity in amount should remain, but that efforts should be made to ensure that the real level of the grants is not eroded by inflation. The Department of Welfare and its officials must ensure that all those who are eligible are aware of what is available; and that officials receive further training and are well-monitored to ensure that they are applying the grants fairly and consistently and in accordance with the legal criteria.

It appears that to date the majority of children orphaned by HIV/AIDS have been absorbed into the extended family structure or the community without going through a formal court process.<sup>93</sup> This means that their care-takers are not court-appointed foster parents, despite the fact that they may be providing care to a child on a long-term basis. These care-takers are therefore not eligible for the far more substantial foster care grant. They may only access the child support grant and this grant is only available for children under the age of seven years. For those caring for children over the age of seven years, there is no relief. The care-dependency grant is available to the parent or foster parent of a child between the ages of one and eighteen years whose intellectual and physical impairment necessitates full-time home care.<sup>94</sup> The grant is based upon a means test and amounts to R490 per month per child.<sup>95</sup> The care-dependency grant is poorly accessed<sup>96</sup> and may not be available to children on the basis of HIV/AIDS.<sup>97</sup> Children infected with HIV and orphaned by AIDS are not able to access free medical services in the public health sector over the age of six years since free medical services are only available to children up to the age of six.

Furthermore, with regard to school fees, a person other than a foster parent who cares for children orphaned by AIDS will be unable to qualify for exemption from school fees on this

---

<sup>93</sup> CASE 'Social Security for People with Disabilities' researched for the Department of Welfare (1998).

<sup>94</sup> Sections 1 and 2(f) of Social Assistance Act 59 of 1992.

<sup>95</sup> See GN No. 882 in Government Gazette of 19010 of 26 June 1998. Children under the age of 6 years are entitled to free medical care.

<sup>96</sup> CASE *Social Security For People with Disabilities*. Researched for the Department of Welfare June 1998.

<sup>97</sup> CASE (*ibid*) *Social Security for People with Disabilities*.

basis. Although care-takers are in many respects taking on the function of foster parents without formal appointment of custody or guardianship, they are unable to access this form of assistance in terms of the present regulations. Additionally, in many cases children do not attend school because their care-takers cannot afford other basics such as school uniforms.<sup>98</sup>

Comparisons with other African countries indicate, the need, firstly, for increased measures to assist children in especially difficult circumstances and, secondly, to improve the capacity of families and communities to respond to the needs of children infected and affected by HIV/AIDS. In a number of African countries, primary health care is free or available at low cost to certain sectors of the population. For instance, in Zambia, health care is provided either free or at low cost to children.<sup>99</sup>

Zimbabwe offers free primary health care in rural health centres, free health care for children below 5 years of age and free health care based on a means test.<sup>100</sup> Likewise, assistance is provided with education in various African countries. In Zimbabwe, primary education is compulsory and tuition is free in rural areas. However, costs such as uniforms, books, stationery, building funds and levies have to be met by parents, and are often too expensive for parents or guardians to meet, particularly in the case of those caring for orphaned children.<sup>101</sup> In Zimbabwe, creative mechanisms initiated by communities and community based organizations include income generation projects and loan and credit programmes. Communities have also begun to pool labour to develop communal agricultural programmes and day-care schemes to support vulnerable families, and it has been recommended that assistance in the form of technical assistance and entrepreneurial skills should be directed

---

<sup>98</sup> Linda Aadnesgaard, Director, Thandanani AIDS Orphan Project, 20 November 1998.

<sup>99</sup> UNICEF *Orphans and HIV/AIDS in Zambia* Draft Report of an Assessment of UNICEF Programming in Zambia for Children and Children Affected by HIV/AIDS, July 1998.

<sup>100</sup> *Community Based Orphan Assistance in Zimbabwe*.

<sup>101</sup> *Ibid.*



towards these efforts.<sup>102</sup> The same recommendations have been made in Malawi.<sup>103</sup>

Other initiatives include skills training for older orphaned children, such as the Kwasha Mukwenu Project in Zambia which developed tailoring and carpentry workshops for older orphaned children to assist them in generating income.<sup>104</sup> Feeding posts and day care centres occur in five regions of Tanzania where they provide a daily meal to all children below six years of age who attend the centres.<sup>105</sup> The value of these centres lies in the nutritional support given to vulnerable children. Costs of staff and food are borne by the local communities, whilst commencement funding, staff training and transport costs are borne by external donor agencies. Day-care centres are supervised by the Department of Social Welfare and run by formally trained and paid staff who work half a day. They provide a meal, education, developmental and play activities for children aged 2-6 years. One of their main functions is to relieve parents and older siblings of their child care duties so that they may engage in economic activities or attend school. Since most of the recommendations involve extensive budgetary implications. It is likely that further research will be necessary accompanied by a policy decision by the Department of Welfare.<sup>106</sup>

It is recommended in South Africa that consideration be given to extending the eligibility for the foster care grant<sup>107</sup> in order to ensure that care-takers of children orphaned by HIV/AIDS are able to access such grants in certain circumstances. It is further recommended that

---

<sup>102</sup> *Community Based Orphan Assistance in Zimbabwe* 50.

<sup>103</sup> *The Development of an Orphans' Policy and Programme in Malawi* recommends that capacity building be directed towards mobilizing community resources and supporting local community initiatives such as through organizational assistance and seed funding to invest in productive activities.

<sup>104</sup> *Kwasha Mukwenu* in Lusaka, Zambia.

<sup>105</sup> Ainsworth M Rwegarulia. 'Coping with the AIDS Epidemic in Tanzania: Survivor Assistance.' Technical Working Paper No. 6.

<sup>106</sup> In South Africa, by contrast, to date, there are only 3897 crèches with a capacity of nearly 20 000 children. But see *Sunday Times* August 22 1999. The *Sunday Times* is building a home for HIV-positive babies. This newspaper has donated R136 400 to build a baby sanctuary for parents with AIDS to spend time with the HIV-positive children.

<sup>107</sup> In terms of section 2(e) and section 4A of the Welfare Laws Amendment Act.

legislative amendment<sup>108</sup> include provision for subsidized adoptions.<sup>109</sup> The care-dependency grant should also be thoroughly investigated and consideration be given to extending the eligibility for the grant, with the possibility of partial grants in some situations based on the needs of the child and that the Department of Education<sup>110</sup> exempt a caretaker of an orphaned child from payment of school fees. Research into the possibility of further grants to assist with purchasing of school uniforms and books is recommended. In view of a child's right to basic health care services,<sup>111</sup> the Department of Health should be encouraged to examine the possibility of extending free basic health care services to orphaned children between the ages of six to eighteen years. The Department of Welfare should pilot and evaluate other forms of assistance to children infected and affected by HIV/AIDS and communities such as income-generating activities, credit schemes and technical assistance, including skills-building.

The constitutional rights relating to access to child health care have not yet been tested in our courts.<sup>112</sup> It is therefore difficult to determine to what extent they may protect and promote the rights of children infected and affected by HIV/AIDS. The Department of Health needs to develop and adopt clinical guidelines on the appropriate treatment and care which children with HIV/AIDS can expect to receive through the public health system.

Ultimately, the newly enacted proposals for a child support grant are inadequate. At present, there are over 14 million children in South Africa living with care-givers who earn less than R800 a month.<sup>113</sup> The Government proposes to increase the budget for child grants to R2,7 billion by 2005. This is inadequate and in fact the new system of child support grants will cut

---

<sup>108</sup> Section 2 of the Welfare Laws Amendment Act.

<sup>109</sup> As recommended by the Department of Welfare's *Draft Paper on the Transformation of Adoption Practice*.

<sup>110</sup> By amending the Exemption of Parents from the Payment of School Fees Regulations 1998 Regulation 3(2).

<sup>111</sup> In terms of section 28(1)(c) of the Constitution.

<sup>112</sup> See Section 27(1); Section 28(1)(c).

<sup>113</sup> See John Stokes *Poverty Profile* April, 1997 Special Edition.

government spending on child welfare by R2,9 billion.<sup>114</sup> Furthermore, applicants are required to indicate that they have attempted to recover money via the private maintenance system which is unrealistic given the state of the legal system and the levels of unemployment. The amount of the grant should be increased to at least R135 per month and paid every month to the child's care-giver. The rate of R75 a day was initially suggested by the Department of Welfare.<sup>115</sup> The rate of R75 per child per month was calculated using household subsistence level (HSL) data from the Institute for Development Planning and Research at the University of Port Elizabeth. These levels do not include the cost of transport and shelter in their estimates. The benefit received should be adequate to support human well-being. There is a significant proportion of the South African society without an income of any sort.<sup>116</sup> It has been calculated that for a low cost area, such as Cape Town, an amount of R99.70 is the subsistence level for a child of between four and six years - for food, clothing and fuel, and this figure does not include rent and transport.<sup>117</sup> Research is required to establish an appropriate level of support, taking into account the realities of the cost of living and inflation.

Furthermore, although children up to the age of seven years are eligible for the grant, the Constitution defines a child as anyone under the age of eighteen years. It is thus probable that the new child support grants are unconstitutional. The system has not been fully assessed in

---

<sup>114</sup> John Stokes *Poverty Profile* (April 1997) 2.

<sup>115</sup> See *Lund Committee Report on Child and Family Support* (1996) 86.

<sup>116</sup> See Vivienne Taylor 'A Price on Children's Protection?' in *Poverty Profile* (April 1997) (Special Edition) 5.

<sup>117</sup> The Household Subsistence Level (HSL) survey produced by researchers at the University of Port Elizabeth (on which the Department relies) for a child of one to three years within the low income group in the Cape Town area is R73.71. The Institute for Development, Planning and Research (UPE) has just finalized their household subsistence level calculations as at March 1997. The primary HSL figure as at March 1997 for a child of four to six years from a low income community in Cape Town is R99.70 (excluding rent and transport) and varies to R123.65 in Peddie, a small town in the Eastern Province of South Africa. Thus the amount proposed by the Lund Committee represents one of the most minimal and unfavourable parameters derived from the HSL. See Commission for Gender Equality Information and Evaluation Workshops: (May 1997) 239.

terms of the constitutional obligations of the state.<sup>118</sup> The Constitution<sup>119</sup> confers upon children the rights to basic nutrition, shelter, basic health care services and social services. All persons have the right to life and dignity.<sup>120</sup> It might be argued that this confers the right to essential amenities to sustain life.<sup>121</sup> The question arises of, in whom does the right vest? And when does it protect? It is arguable that these rights impose a positive obligation upon the state. The Bill of Rights applies to “all law”: that is all statute or common law. It is submitted that the new child support grant does not give full effect to the positive constitutional obligations imposed upon the state in terms of the Constitution.<sup>122</sup> The proposals should be re-examined by the Department of Welfare and weighed up against the constitutional mandate.

Poverty in South Africa is closely related to factors such as race,<sup>123</sup> gender, region and age.<sup>124</sup> In terms of South Africa’s international obligations, the Convention for the Elimination of All Forms of Discrimination against Women further supports the right to social security. The Government White Paper for Social Welfare<sup>125</sup> indicates that social security should cover a wide range of public and private measures that provide cash or in-kind benefits:

“... in the event of an individual’s earning power permanently ceasing, being interrupted, never developing...only at unacceptable social cost and such person being unable to avoid poverty... [also] in order to maintain children”.<sup>126</sup>

---

<sup>118</sup> John Stokes ‘New Child Grants may fall foul of the Constitution - SAHRC’ *Poverty Profile* April 1997 5.

<sup>119</sup> Section 28(1) of Act 108 of 1996.

<sup>120</sup> Sections 10 and 11 of Act 108 of 1996.

<sup>121</sup> W Trengove ‘The Application of Section 8(1) of the Constitution’ unpublished paper delivered 28 July 1999. (Rhodes University, Grahamstown).

<sup>122</sup> Act 108 of 1996.

<sup>123</sup> Nearly 95% of South Africa’s poor are African.

<sup>124</sup> World Bank/SALDRU (October 1995) *Key Indicators of Poverty in South Africa*. Pp 3-4, 6-7.

<sup>125</sup> Department of Welfare, White Paper, Government Gazette 16943 2 Feb. 1996.

<sup>126</sup> *The White Paper for Social Welfare*, chapter 7 para 1.

Although, the Government's Growth, Employment and Redistribution programme (GEAR) has emphasised the role of the market in social security provision, and the role of the state as providing only a 'social security net', few women are adequately protected by the market.<sup>127</sup> Research indicates that the pension system is well targeted for rural areas (where the majority of poor are women and often bear child-care duties), performs well in gender terms and acts as a source of 'pooled' income to support other family members (ie children).<sup>128</sup> However, by contrast, the Child Support Grant (CSG) has a number of negative implications such as the means test. Many women will find it difficult to provide the requisite proof of household income and proof that they have 'made efforts' to secure maintenance from the parent(s) concerned.<sup>129</sup> The current grant system excludes those poor households who do not have elderly members or children qualifying for the CSG and also completely exclude non-citizens, including those with permanent residence status. Those currently entitled to receive Child Support Grants (CSG), will receive about one third less than their previous payments initially as the three year process of phasing out these grants with the replacement of the CSG begins.<sup>130</sup>

The allocation of more state resources to the above grants would address the poverty of families in general and children in particular.<sup>131</sup> The Ministry for Welfare and Population Development's White paper for Social Welfare sets out a national development social welfare strategy that will require the restructuring of social insurance, including unemployment insurance and health insurance for universal access, meeting a minimum income to meet basic subsistence needs.<sup>132</sup> The Social Welfare Action Plan supports this and sets a period of five

---

<sup>127</sup> S Van der Berg 'South African Social Security Under Apartheid and Beyond' (1997) *Development Bank Southern Africa* vol. 14 No. 4:485.

<sup>128</sup> See E Ardington, F Lund, *How the Social Security System can Compliment Programmes of Reconstruction and Development*. Development Bank of South Africa 1995. *Report of the Lund Committee on Child and Family Support* (August 1996). Financial and Fiscal Commission, Public Expenditure on Basic Social Services in South Africa. A FFC Report for UNICEF and UNDP.

<sup>129</sup> There may also be violent implications for those trying to seek maintenance from their partners.

<sup>130</sup> See Sandy Liebenberg 'Audit of Discriminatory Legislation' (1998) conducted by Gender Research Project for Commission for Gender Equality 44).

<sup>131</sup> See Audit of Legislation for Commission for Gender Equality (1998) 45.

<sup>132</sup> The Ministry for Welfare and Population Development's White Paper for Social Welfare (February 1997) para 27.

years to implement the White Paper policies. In the meantime, those who do not have access to work-related benefits must rely on the flawed social assistance scheme outlined above. Access to contributory social insurance is usually connected to a stable, uninterrupted job in the formal sector. Many women who care for children are indirectly excluded because of their higher unemployment rates, their prevalence in less secure, informal sector jobs (ie home work, seasonal work), and because of the fact that their employment record is much more likely to be interrupted due to child-care and other domestic responsibilities.<sup>133</sup>

Inadequate research and motivation<sup>134</sup> has been provided as to what constitutes an appropriate and realistic figure for child support in South Africa. However, the government should commit itself to progressively increasing the age group as financial circumstances permit.<sup>135</sup> The Department is targeting thirty per cent of South African children in the 0-6 age group for the receipt of the benefit. However, it is estimated that sixty-eight per cent of children live with a care-giver who earns less than R250 per month.<sup>136</sup> This implies that a means test will have to be devised to exclude seventy per cent of children, the vast majority of whom will be living with care-givers earning less than R250 per month. Much of this income will be insecure, variable and derived from informal sector activities. Government should adopt a target rate of 83 per cent for the child support income of approximately R800 per care-giver. This would represent a far more rational and equitable basis for the targeting of the grant in the South African context.

---

<sup>133</sup> The 1995 October Household Survey estimates that seventy-five per cent of Black workers in the informal sector are women. See D Budlender (1997) *Introduction*. In D Budlender (ed) *The Second Women's Budget*, Cape Town: IDASA 26.

<sup>134</sup> Until a more broadly accepted figure can be determined, the benefit should remain at the current level of R135 per month so that the phasing-out of the old system does not result in a net financial saving for the state without the basic needs of disadvantaged children and their care-givers being met.

<sup>135</sup> The Lund Committee's preferred option was that the benefit be payable to children in the nought to nine age group, but this was reduced to nought to six. The state could arguable justify limiting the benefit to children in this age group of 0-6 year or 0-9 years on the basis of the urgent requirement to achieve equity in the distribution of child support benefits within a sustainable system of social assistance and to coincide with the primary health care provision and free health care for children under 6 years of age, hence reaching children in the cortically important years before they go to school.

<sup>136</sup> See Information and Evaluation Workshops: (May 1997) 240.

It is further recommended that no moratorium should be placed on the state maintenance grants until the new system of child support grants is in place and all changes to the Social Assistance Act<sup>137</sup> should be effected by way of legislative amendment, and not through subordinate legislation (ie proclamation or regulation). This course of action is required in the light of the constitutional status of the right to social assistance. The drastic reduction in the level of the child support benefit does not meet the state's core obligation to ensure essential levels of the rights to social assistance and the children's socio-economic rights under the Constitution and international human rights law.

The South African Constitution<sup>138</sup> is widely regarded as one of the most progressive constitutions in the world. The main reason for it being accorded this status is the inclusion of socio-economic rights in the Bill of rights. This emphasis has raised people's expectations and placed great pressure both on politicians and on government departments to show progress in the delivery of a wide range of goods and services. Of primary importance are the rights of children,<sup>139</sup> as well as the right to a basic education.<sup>140</sup> These latter rights are accorded special status relative to the other rights mentioned above. Whereas the other rights are limited in certain significant respects, the rights of children and the right to a basic education are not qualified in the same way or to the same extent.<sup>141</sup> The Constitutional Court has acknowledged the fact that the Bill of Rights engenders different kinds of obligations for both civil and political rights on the one hand and social and economic rights on the other.<sup>142</sup>

---

<sup>137</sup> 59 of 1992.

<sup>138</sup> Act 108 of 1996.

<sup>139</sup> In section 28.

<sup>140</sup> In section 29(1)(a).

<sup>141</sup> Pierre de Vos 'Paid Wishes or Directly Enforceable Human Rights' (1997) *SAJHR* 67. See Technical Committee 4 Memorandum 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights' 8 March 1996, para 2, p11. Article 2 of the International Covenant on Civil and Political Rights (1996) requires states 'to respect and ensure' the rights in the Covenant to all individuals within their territory. The European Convention on Human Rights (1950) requires states 'to secure' to everyone the rights in the Convention while the American Convention on Human Rights (1969) refers to the obligation 'to respect and...to ensure'.

<sup>142</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996, (4) SA 744 (CC) at 77, where the court states: 'It is true that the inclusion of socio-economic rights may result in courts making orders which have direct

It has also made it clear that it accepts the idea that social and economic rights are enforceable, despite the fact that it may give rise to budgetary implications.<sup>143</sup>

Once it is accepted that all rights are fundamental and that they are enforceable by courts, it becomes clear that they all require the state and other relevant institutions, on a primary level, to refrain from infringing the stated rights directly. The interpretation of the scope of these rights will require very close scrutiny of the way in which each right is framed. The right to housing and the right to health care, food, water and social services are framed as rights of 'access to' the social and economic entitlements. This formulation explicitly limits the obligation of the state and will never include an obligation, for example, to provide individuals with free housing. On the other hand, children's rights and the right to education are not qualified by the 'access to' provision. This broad formulation leaves open the possibility of a constitutional duty on the state directly to provide the basic resources necessary to fulfil the targeted individual's basic needs. A starving child would have a possible constitutional claim against the appropriate state department to provide him or her with food.<sup>144</sup>

The Constitution enunciates the rights of children as clear, core entitlements that are necessary to provide the basic subsistence needs of children, the most vulnerable group in any state.<sup>145</sup> These rights have been worded in a precise and restrictive way, first, by referring to 'basic' nutrition and health-care services, and, secondly, by restricting the right holders to children.<sup>146</sup>

---

implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications.'

<sup>143</sup> *Ibid.* The court has stated that: '[W]e are of the view that these rights are, at least to some extent justiciable...[M]any of the civil and political rights entrenched in the new constitution will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us a bar to their justiciability.'

<sup>144</sup> Section 28(1)(c) states that every child has the right to basic nutrition, shelter, basic health-care services and social services. A child is defined as a person under the age of eighteen.

<sup>145</sup> See Geraldine van Bueren 'Alleviating Poverty through the Constitutional Court' (1999) 15 *SAJHR* 52.

<sup>146</sup> See Azhar Cachalia *et al Fundamental Rights in the new Constitution* (1994) at 102; and Dion Basson *South Africa's Interim Constitution: Comments and Notes* (1994) at 46, who make similar comments on children's rights in the interim Constitution. Only children are awarded this



It seems that these rights are provided as a safety net in cases of deprivation, neglect, starvation and abuse, and place an onus on the state to deliver such services only where they are non-existent or inadequate. Whenever a challenge is brought, the court will have to determine whether the level of the services delivered meets the basic needs. If they do not, the court will have to order the state to comply with its constitutional obligations.<sup>147</sup>

---

important socio-economic right clearly because they are most vulnerable and accordingly the courts will have to accept this priority in state expenditure when the judiciary is called upon to allocate economic resources in order to realise this right.'

<sup>147</sup> See Pierre de Vos 'Paid Wishes or Directly Enforceable Human Rights?' (1997) 13 *SAJHR* 67 at 88.

## PART FOUR COMPARATIVE PERSPECTIVES

### CHAPTER 7

#### THE AUSTRALIAN CHILD SUPPORT SCHEME

##### 7.1 Introduction

Australia is a country which has experienced a rapid expansion in the number of female-headed single-parent families, often living in difficult financial situations.<sup>1</sup> It inherited from England a common-law family law system based on broad judicial discretion, a separate property approach to allocation issues and a generally laissez-faire approach to the distribution of (undefined) matrimonial assets. Its Federal constitution has provided it with a complex distribution of power between the States and the Commonwealth legislatures. Issues such as child welfare are still distinguished from federally administered 'family law' (marriage, divorce and ancillary matters.)<sup>2</sup> Australia's Family Law Act, which introduced no-fault divorce and

---

<sup>1</sup> See Margaret Harrison 'The Australian Child Support Scheme: Practicalities' in J Eekelaar and P Sarcevic (eds), *Parenthood in Modern Society*, (1993) 533-545.

<sup>2</sup> The Australian Commonwealth Legislature can only legislate for the States and Territories in respect of certain matters Section 51 of the Constitution of 1991, as amended which provides: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with regard to marriage; and divorce and matrimonial causes, and in relation thereto, parental rights and the custody and guardianship of infants". In short, the Commonwealth parliament does not legislate for the family in general, but only "so far as concerns ... marriage and matrimonial causes" (per Berwick CJ at 402 in *Vitzdamm-Jones v Vitzdamm-Jones; St Clair v Nicholson* (1981) 148 CLR 383.) There was much debate in the 1970's and 1980's about the inter-relationship between the Commonwealth and state legislatures. Problems became more pronounced with the enactment of the Family Act, 1975 (Cth), and were finally resolved when the Victoria, South Australia, New South Wales and Tasmanian parliaments expressly reserved certain powers to the Commonwealth in 1986-7. This was done by means of the Commonwealth Powers (Family Law) Acts in each state. One of the matters expressly reserved was "the maintenance of children". Queensland followed suit in 1990. Thus, Commonwealth legislation governs all questions of maintenance of children in all states except Western Australia, which has not made any such reservation of powers. In the states governed by Commonwealth legislation, matters are regulated by two statutes. The Family Law Act 1975 (Cth) part vii, applies in respect of all claims arising prior to 1 October 1989; the Child Support (Assessment) Act 1989 (Cth) applies to all matters arising after 1 October 1989. In Western Australia, the position was different. Prior to 1989, in Western Australia, the Family Law Act 1975 (Cth) applied only to maintenance claims by children "out of marriage". All other claims were dealt with in terms of the Family Courts Act 1975 (WA). After the Child Support (Assessment) Act 1989 (Cth) was passed, it applied also

established a separate Family Court, came into operation in the mid 1970's at a time of economic optimism. However, the onset of a severe economic recession in the 1980's was accompanied by a high foreign debt and high levels of unemployment.<sup>3</sup> The increasing divorce rate<sup>4</sup> and suggestions of a higher incidence of family violence are partly attributed to this economic downturn.

The financial responsibilities of parents, whether in intact or separated families, were clearly demarcated in the Family Law Act 1975, which originally required married parents to support their children 'according to their respective resources'.<sup>5</sup> While the original provision implied that the differential incomes of fathers and mothers would be reflected in orders or agreements, social security entitlements were taken into account when child support amounts were being calculated. This resulted in many custodians being granted a full single-parent pension<sup>6</sup> and the child's other parent at most 'topping up' that amount, regardless of his or her financial capacity. The cumulative effects of these provisions included a burgeoning social security budget, resentment at taxpayers paying for 'other people's children' and increasing proportions

---

in Western Australia but only in respect of children born of a marriage. The position has now altered. The Child Support (Adoption of Laws) Act 1990 (WA) was passed in 1990 and has subsequently been amended since by the Child Support (Adoption of Laws) Amendment Act 1994. The effect of these statutes is that federal legislation has now been adopted in the form in which it existed immediately after 1 July 1993. Therefore, the main provisions of the Child Support (Assessment) Act, 1989 (Cth) now apply to all children in Western Australia. However, the most recent amendments to this Act apply only in Western Australia to children born out of a marriage (to date, these amendments are the Child Support Legislation Amendment Act 1995 (Cth) and the Family Law Reform (Consequential Amendments) Act 1995.) In short, in every state in Australia, apart from Western Australia, federal legislation (the 1975 Act or 1989 Act, depending on when the claim arose) applies completely. In Western Australia, the 1989 Act applies in most - but not all - matters; where a matter falls beyond its scope, then it is governed either by the Family Law Act 1975 (Cth) or, failing that, the Family Courts Act 1975 (Western Australia). See ID Schäfer 'The Concept of a Family Courts for South Africa' (1991) (unpublished doctoral thesis) (University of Natal) 55 for a summary of the position in Australia.

<sup>3</sup> See Stephen Parker 'Child Support in Australia: Children's Rights or Public Interest?' (1991) 5 *International Journal of Law and the Family* 24 at 26-8.

<sup>4</sup> The crude divorce rate in 1991 was 2.6 per 1000 population.

<sup>5</sup> Following the introduction of the Child Support Scheme, the provisions were expanded to place the duty to maintain a child before other financial commitments and of no lower priority than the duty to maintain any other child or person.

<sup>6</sup> Of the approximately 400 000 single parent households in Australia, approximately 260 000 are in receipt of a sole parent pension.

of mothers and their children living on or below the poverty line.<sup>7</sup> An additional factor was that, given the lack of enforcement, relatively few separated parents had orders or enforceable agreements for the payment of child support, and all the evidence pointed to very low compliance by legally obligated parents.<sup>8</sup> It seems that the low coverage of orders was attributable as much to their voluntary nature as it was to the difficulties of enforcement and the low amounts actually involved.<sup>9</sup> The limitations of the amounts were exacerbated by the need (in the absence of a parental agreement to vary or an indexation provision) to institute legal proceedings when incomes changed or inflation eroded the value of agreed amounts or those originally ordered.

The severe problems of poor coverage, inadequate amounts and ineffective enforcement rates, combined with increased receipt of pensions by single-parents, led to the changes to child support assessment and collection which were first proposed in Australia in the early 1980s, and ultimately became operational in 1988-89.<sup>10</sup> The challenges, and to some extent the mechanisms for their solution, are well documented in similar European and North American jurisdictions.<sup>11</sup> However, the Australian legislation is somewhat different and a considerable amount of empirical work has already been conducted on the various effects of the reform.

## 7.2 *Main Features of the Child Support Scheme*

The Australian Child Support Scheme was implemented quickly, despite criticism from some

---

<sup>7</sup> See Stephen Parker 'Child Support in Australia' (1991) 5 *International Journal of Law and the Family* 24 at 26.

<sup>8</sup> Estimates made in a 1984 Attorney-General's Department inquiry suggested that 40per cent of orders were never complied with, and at best 40per cent were being paid in full (Australia, Attorney-General's Department.)

<sup>9</sup> Research confirmed the presence of a 'going rate' of \$20 per week per child which operated almost regardless of the financial capacity of each parent or the ages of the children (Margaret Harrison 'The Australian Child Support Scheme: Practicalities' in *Parenthood in Modern Society* ed. John Eekelaar and Petar Sarcevic (1993) 535).

<sup>10</sup> See Cabinet Sub-Committee on Maintenance, *Child Support: A Discussion Paper on Child Maintenance* (AGPS, Canberra, 1986).

<sup>11</sup> See eg HD Krause 'Child Support Reassessed: Limits of Private Responsibility and the Public Interest' in HH Kay and SD Sugarman (eds) *Divorce Reform at the Crossroads* (1990) 175-6; 178-181.

groups, counterbalanced by support from the government, which welcomed the predicted lower expenditure on social security. There are several features of the Australian Scheme which distinguish it from such schemes in other jurisdictions. Whether these ameliorate or hinder its performance is in many cases a matter of opinion.<sup>12</sup> These features include: the gradual introduction of the Scheme; the key role played by the Australian Taxation Office; the interplay between family law, social security and taxation provisions; the unique assessment characteristics of the administrative formula, and its effect on the jurisdiction of the courts.

The phased introduction of the Scheme in two distinct stages led to considerable confusion.<sup>13</sup> Stage One of the scheme came into operation in mid 1988 and is governed by the Child Support (Registration and Collection) Act, which focuses on enforcement issues by establishing a Child Support Agency within the Australian Taxation Office. The Child Support Agency collects payments made following court orders and court-approved agreements and transfers them to the Department of Social Security, which in turn pays custodial parents. Where the custodian parents receive single-parent pensions, the amount payable may be reduced if the amount of child support exceeds the amount permitted by the maintenance income test. The Agency is able to deduct amounts owing at source from the salary of the payer/employee. These become debts owing to the Commonwealth rather than the individual parent. The money is handed over by the employer in the same way as union dues, and tax instalments.

The Child Support Scheme requires the integration of the Departments of Social Security, the Child Support Agency and the Attorney-General's Department. The Department of Social Security develops policy and evaluates its social effect as well as playing a major role in the distribution of the single parent pension and child support payments. The Child Support Agency, which is part of the Australian Taxation Office, has the role of processing applications and collecting child support together with client service and enforcement. The Attorney-

---

<sup>12</sup> See Regina Graycar 'Family Law and Social Security in Australia: the Child Support Connection' (1989) 1 *Australian Journal of Family Law* 70 at 82-3, 86-8; Stephen Parker 'Child Support: Rights and Consequences' in P Alston, S Parker and J Seymour (eds), *Children, Rights and the Law* (Oxford, Clarendon) (1992); Stephen Parker 'Rights and Utility in Anglo-American Family Law' (1992) 55 *Modern Law Review* 311.

<sup>13</sup> See *Beck and Sliwka* (1992) FLC 92-296 at 79, 254-64 (Full Ct). In this case a summary is given of the history of child support legislation in Australia. See too *Gyselman v Gyselman* (1992) FLC 92-279.

General's Department has a policy role and the task of performing on behalf of the Child Support Agency as the Australian Government Solicitor in enforcement action. This Department also provides funding through the Office of Legal Aid and Family Services to selected legal aid agencies to assist them in providing legal support and advice to parents under the Child Support Scheme. The Family Court of Australia, together with other courts with jurisdiction under the Family Law Act 1975, is also an integral part of the Scheme. These courts set orders for maintenance under Stage 1, provide a right of appeal beyond the Child Support Review Office, enforce child support liabilities and provide the interpretative framework which enables the Child Support Review Office to determine applications for review of the formula assessments.

The Stage One reform package involved amendments to the Family Law Act 1975 and social security legislation. The former amendments removed the provision that had allowed social security entitlements to be taken into account in determining amounts of maintenance, gave priority to child support over other financial commitments, and required courts to consider the ability to make periodic payments of support before payments in the form of lump sums of property settlements are made. Amendments to the Social Security Act required applicants for pensions as single parents to take 'reasonable steps to obtain maintenance' and established an additional pension income test for money received as child support. Stage Two came into operation as a result of the implementation of the Child Support (Assessment) Act.<sup>14</sup> It focused on the problems associated with low amounts awarded in court orders and agreements and therefore concentrated primarily on assessment, using the collection and enforcement mechanisms established by the Child Support Act in relation to Stage One. The Stage Two procedures are available only to those who separated after 1 October 1989 or whose children were born after that date. Concern was expressed regarding the retrospective operation which might operate inequitably where property and other financial arrangements had been made on the basis of very divergent principles.<sup>15</sup>

---

<sup>14</sup> See *Beck v Sliwka* (1992) F.L.C. 92-296 at 79, 254-64 (Full ct).

<sup>15</sup> An evaluation of Stage One took place after the implementation of the administrative assessment procedures. All respondents to this evaluation were, by definition, excluded from these procedures, but the publicity surrounding the reforms had obviously been effective in at least alerting custodians to the possible consequences of their separation after the implementation date. Many comments about the operation of the Scheme made by custodial parents referred

The establishment of the Child Support Agency within the Australian Taxation Office theoretically bestows considerable benefits on the operation of the Child Support Scheme by enabling missing liable parents to be traced and located, involving employers in the payment process and allowing the diversion of tax rebates to satisfy child support obligations.<sup>16</sup> The lack of success in the collection of child support is surprising considering the overall efficiency of the Taxation Office and its revenue collecting operations.<sup>17</sup> One of the predicted advantages of the reforms was the power to withhold amounts due from the salaries of liable parents without the need for garnishee proceedings to be instituted. However, automatic withholding does not have extensive application, as its scope is limited to pay-as-you-earn taxpayers. Parents, such as those who are self-employed, are required to make monthly remittances directly to the Child Support Agency. Originally calculations indicated that most employee parents would qualify for automatic withholding,<sup>18</sup> but in 1992 less than half were estimated to be eligible to have amounts automatically withheld.<sup>19</sup> Another role of the Taxation office is in the tracing of liable parents whose whereabouts are not ascertainable from the information contained in the registration form; this involves reference by the Child Support Agency to information held by the Australian Taxation Office.<sup>20</sup>

Furthermore, in Australian society, there is a close relationship between the family law, social security and taxation systems within the Child Support Scheme. The obligation to support

---

to their inability to benefit from what they correctly visualised as procedures which would have resulted in higher amounts of child amount being payable. By contrast, non-custodial parents made no such comments. A proposal was made to extend Stage Two procedures to the children of all separated parents in 1991, but was rejected by the government.

<sup>16</sup> The treatment of child support obligations as debts owing to the Commonwealth was perceived as being advantageous, with centralised government-backed collection being more efficient than individualised methods.

<sup>17</sup> The collection rate at 30 June 1992 averaged 69 percent of eligible cases, with 51 per cent of custodians receiving payment within 30 days of the due date and 70 per cent receiving amounts within 60 days (Family Law Council, 1992.)

<sup>18</sup> By 1993 only about one-quarter of all Child Support Agency cases actually involved collection by this method (See M Harrison *ibid* at 537.)

<sup>19</sup> Where that procedure applies the collection rate increases from 65 per cent to 96 per cent.

<sup>20</sup> At any given time approximately 10 per cent of payers were being traced and an additional 0.6 per cent were considered untraceable after all available information sources had been exhausted.

legitimate and extra-marital children is contained in the Family Law Act 1975; those parents who are pension recipients have obligations to participate in the Scheme, or at least make financial arrangements according to the formula; their entitlements may be subject to the application of the maintenance income test. The administration of the Scheme is very integrated with the operations of the Australian Taxation Office; and final payment to all custodian parents, even if they are in receipt of a single parent pension, is handed over by the Department of Social Security.

### 7.3 *Assessment by means of a Formula*

The Australian Scheme, unlike that in some other jurisdictions, concerns income-sharing, rather than cost-sharing. Child support is assessed under the Child Support Assessment Act according to a formula, which in turn is based on the taxable income of the non-custodial parent (and in some circumstances that of the custodial parent) and the number of children for whom there is a support obligation.<sup>21</sup> The non-custodian is permitted to have an amount of formula-free income which is deducted first from his or her taxable income. This amount is equivalent to the basic single maximum pension rate where the payer has no other dependent children and increases, according to their number, where there are such children, in an attempt to balance the obligations across first and subsequent families. Step-children are not included in the exemption,<sup>22</sup> and neither are the expenses incurred by financially dependent subsequent partners: biological criteria form the basis of financial responsibility.<sup>23</sup> The remaining sum is multiplied by the relevant child support percentage according to the number of children involved. These percentages range from 18 per cent for one child up to 36 per cent for five

---

<sup>21</sup> Pt 5 Div 1 of the Assessment Act; section 39 of the Child Support (Assessment) Act of 1989 (Cth).

<sup>22</sup> The Family Law Act 1975 continues to be used in respect of these claims.

<sup>23</sup> See criticisms by Regina Graycar 'Family Law and Social Security in Australia: The Child Support Connection' (1989) 1 *Australian Journal of Family Law* 70 at 82-3 cf F. Carberry 'The Child Support Scheme: An Evaluation of its Personal Impact' (1992) (Autumn) *Social Security Journal* 43 for the favourable results of survey of 497 sole parent pensioners. See too Kathleen Funder 'Exploring the Access-Maintenance Nexus' in Kathleen Funder, Margaret Harrison and Ruth Weston (eds) *Settling Down, Pathways of Parents After Divorce* (1993) (Australian Institute of Family Studies, Monograph No. 13.) Legislation in recent years has emphasised the importance of biological parenthood, both in terms of duties and liabilities.



or more children.<sup>24</sup> An indexation factor is used to update the income relied on to current terms since tax information is unavailable for the year in which separation occurred. A distinction is made between custodians who are dependent on public funds, with single-parent pensioners being allowed to make private child support arrangements only where they are able to indicate that the amount agreed to is within 10 per cent of the amount that would have resulted from the application of the formula. Non-pensioner parents are allowed to negotiate outside the Scheme. The Child Support Assessment Act sets out the methods by which the liability is assessed in a number of situations, including arrangements where custody is shared so as to split the obligation between the parents,<sup>25</sup> where the custodian is a high income earner<sup>26</sup> and where the children live with a third person.<sup>27</sup>

The issue of the custodian's financial contribution has been much debated.<sup>28</sup> The Scheme allows her<sup>29</sup> to earn the equivalent of average earnings<sup>30</sup> plus a pre-determined amount for child care costs, before the father's obligation is reduced.<sup>31</sup> In reality, this reduction seldom operates as only a very small proportion of custodians, particularly where they are single parents, earn anything like average amounts. The basis for this stipulation of the law is that, since

---

<sup>24</sup> See Child Support (Assessment) Act 1989 (Cth) Pt. 5, Div 1. After these calculations, a percentage of the remaining income is paid as child support, depending on the number of children:

1 child .....	18 per cent
2 children .....	27 per cent
3 children .....	32 per cent
4 children .....	34 per cent
5 children .....	36 per cent

<sup>25</sup> See Section 8 (1) of the Child Support (Assessment) Act 1989 (Cth).

<sup>26</sup> The policy is that a custodial parent's income should only rarely affect the child support payable by the liable parent.

<sup>27</sup> The income of a non-parent custodian does not affect the child support payable by the liable parent.

<sup>28</sup> See *Gyselman v Gyselman* (1992) F.L.C. 92-279 at 79, O61-81 (Full ct). See Stephen Parker, Patrick Parkinson, Juliet Behrens *Australian Family Law in Context* (1994) 475.

<sup>29</sup> It is usually the mother who has the custody of the children, although the Act is not gender-specific.

<sup>30</sup> Approximately AS27 000 per year.

<sup>31</sup> Section 46 of the Child Support (Assessment) Act of 1989 (Cth).

custodians incur much of the daily expenditure of child-rearing by the simple fact of joint residence, and contribute time in the form of child care, they should not receive less support unless their actual earnings are 'substantial'. This aspect of the Scheme, and its provision for identical percentages for children irrespective of their age, was liable to the criticism that it might be unfair. However, criticism is, on the whole, targeted at the administration of the Scheme rather than at its main features.<sup>32</sup>

A positive feature of the Stage Two procedures is the provision for an annual review of amounts owing,<sup>33</sup> which previously were not given adequate attention and were reduced by inflation. Orders very seldom included an indexation clause; increases were dependent on the ability of parents to negotiate privately. It seemed that amounts, where they were paid at all, usually remained static and unaltered until the child was no longer entitled to support.<sup>34</sup> Under Stage Two, liabilities are assessed annually after consideration of the taxable income for the financial year before last. At the end of the year, once the taxation assessment and parent's tax return have been lodged, the child support liability is recalculated on the basis of the most recent financial information. This allows for the child support percentage to be applied to a different base where a change has occurred. Both increases and decreases in the financial fortunes of either parent may result in changed liabilities.

The effort to develop formulae is supposed to be guided by several underlying principles: namely, first, that both parents share legal responsibility, and that economic responsibility should be divided in proportion to available income, and, secondly, that application of a formula should avoid creating economic disincentives for remarriage or labour force

---

<sup>32</sup> M Harrison 'Child Support Reforms and Post-Separation Parenting: Experiences and Expectations' (1992) 6 *Australian Journal of Family Law* 22 at 23-7; see too Child Support Evaluation Advisory Group *Child Support in Australia* (A.G.P.S., Canberra, 1992) 3-9, 16-23.

<sup>33</sup> An application is made to the Child Support Review Office under Pt. 6A of the Child Support (Assessment) Act that the assessment be recalculated on the basis of the non-custodial parent's income.

<sup>34</sup> See Child Support Evaluation Advisory Group (1992) (*supra*) at 3. A 1988 survey revealed that only 34 per cent of all custodial parents were being paid any maintenance; a 1991 survey indicates that 45 per cent of all custodians were receiving payments and 56 per cent of those involved in Stage Two.

participation. There are four variations to the formula.<sup>35</sup> The basic formula applies when the custodial parent has sole daily care of all the children and earns less than average weekly earnings and when a non-parent custodian is claiming child support from a parent. Formula 2 applies when the custodial parent's taxable income is above average weekly earnings. Formula 3 applies when there is shared custody, where the children spend time with both parents on at least a 60/40 basis; or divided custody, where each parent has the sole care of some of the children; or substantial access, where the non-custodial parent has the children for more than 30 per cent of nights (109 nights) during the year but less than 40 per cent (146 nights). Formula 4 applies when a non-custodial parent has children from more than one previous relationship and is used to assess how much should be paid to each custodian.<sup>36</sup> Parties seeking departure orders from administrative assessments under the Child Support (Assessment) Act must satisfy the Family Court or the Child Support Registrar that there are special circumstances of the case; or that at least one of the three grounds in section 117 (2) can be made out,<sup>37</sup> and that it would be just and equitable as regards the child and otherwise proper to make a departure of order.<sup>38</sup>

In making a determination as to the amount of any altered child support assessment the court must have regard to:

‘the commitments of each parent ... that are necessary to enable the parent to support ... any other child or another person that the [parent] has a duty to

---

<sup>35</sup> J Bowen *Child Support: a Practitioner's Guide* (1994) 21; 93-110.

<sup>36</sup> Sections 35-54 of the Child Support (Assessment) Act 1989 (Cth). See J Bowen *Child Support, A Practitioner's Guide* (1994) chapter 2.

<sup>37</sup> Section 117 (2) states that the capacity of either parent to provide financial support for the child is significantly reduced if the parent is obliged to maintain any other child or another person; or because of the special needs of any other child or another person that the parent has a duty to maintain; or commitments of the parent necessary to enable the parent to support himself or herself; or any other child or another person that the parent has a duty to maintain so that the costs of maintaining the child are significantly affected because of the high costs involved in enabling a parent to gain access to the child or the special needs of the child; or because the child is being cared for, educated or trained in the manner that was expected by his or her parents; that application of the provisions of this Act would result in an unjust and inequitable determination of the level of financial support provided because of the income, earning capacity, property and financial resources of either parent or the child; or any payments or property made by the liable parent to any person for the benefit of the child.

<sup>38</sup> Section 117 (1) of the Child Support (Assessment) Act 1989 (Cth).

maintain'.<sup>39</sup>

There have been two interpretations by the Family Court of the term "duty", as it is used in the Child Support (Assessment) Act 1989. The wide view, adopted by Kay J in the case of *In the Marriage of Gerges*,<sup>40</sup> is that the term includes "moral" duties, such as maintaining one's parents or siblings. The narrow view, that the term only applies to "legal" duties, was adopted in *Dwyer v McGuire*.<sup>41</sup> There is no definition for the term "duty" in the Child Support (Assessment) Act. The Act provides that the parents of a child have the "primary duty" to maintain the child.<sup>42</sup> There are, however, a number of limitations or clarifications of this duty.<sup>43</sup> The first clarification is that the duty to maintain the child "is not of lower priority than the parents' duty to maintain any other child or another person". The second provides that the duty: "has priority over all commitments of the parent other than commitments necessary to enable the parent to support .. himself or herself .. and .. any other child or .. person that the parent has a duty to maintain." The duty is not affected by the duty of any other person to maintain the child.

Every biological parent has the primary duty to maintain their offspring and there is nothing in the Family Law Act<sup>44</sup> to indicate that the definition of children is limited to children under 18 years of age. However, prior to the 1987 amendments, the duty to maintain children over the age of 18 only arose on a court making an order for maintenance.<sup>45</sup> At common law, the recognised duty of parents to maintain their children continued after the child attained the age of majority.<sup>46</sup> Under the Family Law Act there is a duty to maintain a stepchild if a court, by

---

<sup>39</sup> Section 117 (4) (e) of Child Support (Assessment) Act 1989 (Cth).

<sup>40</sup> (1990) 14 Fam LR 35.

<sup>41</sup> (1993) 17 Fam LR42.

<sup>42</sup> Section 3(1) of the Family Law Act.

<sup>43</sup> See Grant T Riethmuller 'Conflicting Duties and Australia's Maintenance Quagmire' (1997) 71 *Australian Law Journal* 190 at 192.

<sup>44</sup> Section 66.

<sup>45</sup> See Section 73.

<sup>46</sup> *Waterhouse v Waterhouse* (1905) 22 TLR 195.

an order,<sup>47</sup> determines that it is proper for the step-parent to have that duty.<sup>48</sup> A step-parent is a person who is married to a biological parent of the child.<sup>49</sup> A de facto relationship is not sufficient to create a step-parent relationship under the Family Law Act 1975. In determining whether to make an order that it is proper for the step-parent to have this duty, the court must have regard to a number of prescribed factors.<sup>50</sup>

In the situation where there is no custody order, or guardianship, the duty of a step-parent to maintain the stepchild does not arise until a court having jurisdiction under the relevant part of the Family Law Act determines that it is proper for the step-parent to have that duty. The Family Law Act ranks the duty of the step-parent as secondary to that of the biological parents in respect to the maintenance of the stepchild.<sup>51</sup> The biological parents will be called upon first to fulfil the duty to maintain a child. The effect of the Family Law Act and the Child Support (Assessment) Act is that the parents' duty to maintain their child has priority over all commitments other than maintenance of themselves or another person that they have a duty to maintain.<sup>52</sup> It appears, however, that it is not possible to formulate any specific priorities as to the competing claims of biological children and stepchildren.<sup>53</sup> The manner in which competing claims are balanced depends upon the circumstances of each individual case,<sup>54</sup> although, the ability of the biological parents of the stepchild to maintain that stepchild will be relevant.<sup>55</sup>

In some States, a practice is developing of step-parents obtaining Magistrates' Court orders by

---

<sup>47</sup> See section 66M.

<sup>48</sup> Section 66D(i).

<sup>49</sup> Section 60D.

<sup>50</sup> Section 66 G(2) of Family Law Act 1975.

<sup>51</sup> Section 66G(3).

<sup>52</sup> See Section 66B(2)(b)(ii) of Family Law Act 1975; Section 3(2)(b)(ii) of Child Support (Assessment) Act.

<sup>53</sup> *Axtell and Axtell* (1981) 7 Fam LR 931 at 938.

<sup>54</sup> *In the Marriage of Soblusky* (1976) 2 Fam LR 11,528 at 11,553.

<sup>55</sup> Section 66 M(3) *Family Law Act* 1975 and see *Axtell and Axtell* (1981) 7 Fam LR 931 at 938.

consent,<sup>56</sup> when the child and the biological parent are still living with the step-parent. In these cases, the extent of the duty remains to be determined on a child support departure application. Clearly this is not the purpose for which this section was designed, and highlights the need to revise the wording of the section.<sup>57</sup>

A child adopted pursuant to State welfare laws, or the Family Law Act, is treated in the same way as a biological child of the adopting parents.<sup>58</sup> Children born as the result of artificial conception procedures are also treated as biological children of the marriage<sup>59</sup> or de facto relationship.<sup>60</sup>

In this decade, serial families have become widespread in Australia, and many parents, who are liable to pay child support, have further responsibilities to other adults and children with whom they are associated. The Department of Social Security assumes that de facto spouses will support or maintain those that they are living with, and alters pensions and benefits accordingly.<sup>61</sup> The Child Support (Assessment) Act<sup>62</sup> acknowledges this, allowing for departures from the formula assessment in special circumstances: for example, where a person has a duty to maintain another child or person.

#### 7.4 *The Court's Jurisdiction*

The application of Stage Two of the Child Support Scheme removes the courts from the assessment procedure. Even those parents who choose to arrange their affairs independently of the Child Support Scheme are not permitted to rely on the legal system to assess or sanction

---

<sup>56</sup> See Section 66M(2) of Family Law Act 1975.

<sup>57</sup> See Grant T Riethmuller (1997) 71 *Australian Law Journal* 194. See Section 66G.

<sup>58</sup> Section 60 D *Family Law Act* 1975 and Sections 5 and 29 (2) *Child Support (Assessment) Act* 1989.

<sup>59</sup> Section 60 H *Family Law Act* 1975.

<sup>60</sup> Section 60 H (4) *Family Law Act* 1975.

<sup>61</sup> P633.2-7 of Social Security Act 1991.

<sup>62</sup> Section 117.

amounts, and any agreements requiring registration are finalised by the Child Support Agency. Only where an assessment is refused, or a parent seeks an order departing from the administrative assessment or an appeal against an allegedly incorrect assessment is made, will recourse to the Family Court be available. Applications to depart from the formula are seldom brought, either due to ignorance, or expense or acceptance of the formula.

### 7.5 *Evaluations of the Scheme*

The objectives of the Child Support Scheme have provided yardsticks from which its performance may be evaluated. The Explanatory Memorandum to the Child Support Registration and Collection Act identified its objectives as being multifaceted, and to some extent irreconcilable. For example, it was to ensure that non-custodial parents share the costs of supporting their children according to their capacity to pay;<sup>63</sup> adequate support is available for the children of separated parents; Commonwealth expenditure is limited to what is necessary to ensure that those needs are met; neither parent is discouraged from participating in the work force; and the overall arrangements are simple, flexible and respect personal privacy.<sup>64</sup> These objectives are not prioritised and there seems to be a contradiction between raising the standard of living of children in single-parent families and relieving taxpayers of the burden of supporting such families.

Parents who were able to agree informally were apparently more likely to have less hostility

---

<sup>63</sup> Analysis of pre-Scheme data revealed that nearly one-quarter of the relevant custodial parents surveyed explicitly reported that they had never attempted to seek financial support for their children from the other parent and 23 per cent had failed to obtain a court order, court-approved agreement or even a private agreement, leaving just over half of the total population surveyed with some money due.

<sup>64</sup> The information provides a striking illustration of the minor role played by private contributions by non-custodians before the reforms. Just over one-third of the custodians in the sample were receiving any payments for their children in mid 1988, and this fortunate minority were still only entitled to receive approximately \$24 per week per child. Previous calculations using Census data, Department of Social Security and Australian Bureau of Statistics records showing that 24 per cent of eligible parents were receiving regular payments were therefore close to the mark. Although there are long-established requirements that parents support their legitimate and extra marital children regardless of the status of their own relationship it was obvious that there were distinct trends associated with payments for the pre-Scheme group which were quite independent of the legislation.

towards each other than those who formalised their arrangements.<sup>65</sup> Although there were very few custodial fathers in the survey, custodial mothers were significantly more likely than fathers to be paid by the other parent. This may be associated with women's generally lower incomes, or may suggest that the mother custody stereotype is so powerful that 'aberrant' fathers are reluctant to pursue financial claims. Custodians who had been married to their former partners were more than twice as likely to be receiving payments as those who had not. There appeared to be a correlation between the nature of the relationship and the chances of payment being made.<sup>66</sup> For the cohabitation group, the likelihood of money being sought, or paid increased with the length of cohabitation and decreased the longer the parents had been separated. It was clear that more regular contact for the non-custodial parent increased the likelihood of maintenance being requested, and paid. The sample of parents' experiences supplied information to those involved in the administration of the Scheme. As to be expected, the data showed major differences between the attitudes of custodial and non-custodial parents (almost invariably mothers and fathers respectively) and general dissatisfaction with certain aspects of the Scheme's operation, such as frustration at the delays in the transfer of money to the payee, lack of contact with officials handling such cases, lack of clarity about the operation of the income test and the correspondence from the Agency, and a perception that the Scheme was too rigid.

The second phase of the evaluation was carried out in late 1989/ early 1990, several months after the introduction of the Stage Two administrative assessment procedures in order to assess the impact of the Stage One provisions on the custodial parents from the pre-Scheme sample.<sup>67</sup> These parents were re-contacted and requested to participate. This evaluation revealed that most of the circumstances of the respondents' had not altered between 1988 and 1990 insofar

---

<sup>65</sup> Where the support obligation arose because of a court order or court-approved agreement, the compliance rate was 55 per cent; where it arose from a private agreement the rate was 90 per cent.

<sup>66</sup> The definition of eligibility to receive support included parents who had never cohabited, and less than half (43 per cent) of the never-cohabited group had made any attempt to seek maintenance, contrasted with 85 per cent of the divorced group.

<sup>67</sup> See M Harrison 'The Australian Child Support Scheme: the Practicalities' in *Parenthood in Modern Society* (1993) (ed John Eekelaar and Petar Sarcevic) 535 at 542.



as their child support obligations were concerned.<sup>68</sup> As the participation of these parents in the first phase of the survey guaranteed that they were aware of the existence of the reforms, increase amongst the rest of the custodians parents would be expected to be even lower. Obviously, registration with the Agency did not guarantee prompt payment. Just more than half<sup>69</sup> of the registered custodians reported receiving support payments following their entry into the Scheme, a figure which was reflected in the Agency's own statistics.<sup>70</sup> Non-custodial parents were pessimistic and critical of the operation of the Scheme, indicating a limited understanding of the collection procedures. Their main fear was that they had inadequate income to meet their obligations to the Agency.<sup>71</sup>

In 1991, at the request of the Department of Social Security, a private market research company was contracted to conduct survey work to assess the impact of Stage Two of the Scheme. The research set out to evaluate whether the Scheme met the main objectives of Stage Two; its effect on custodial and non-custodial parents; attitudes to the Scheme and its acceptance.<sup>72</sup> It was established that it was more probable that those parents who separated after the introduction of Stage Two were in receipt of payments following agreements.<sup>73</sup>

---

<sup>68</sup> There was a net increase of only 0.3 per cent in the population receiving support and an average increase (across all custodians, whether receiving any support or not) of only \$1.30 per week per child.

<sup>69</sup> 55 per cent.

<sup>70</sup> Clearly neither custodial nor non-custodial parents wanted to have their orders changed by way of court proceedings, custodians in particular were concerned about the cost and trauma of court proceedings.

<sup>71</sup> Thirty per cent of non-custodial parents surveyed were unemployed and 85 per cent of the unemployed were not paying child support despite their registration with the Agency. These parents could obtain remedies, but being involved in Stage One meant they were bound by the amount cited in the order, with the Agency having no discretion to vary it.

<sup>72</sup> The survey focused on three groups of parents; those registered with the Child Support Agency, those unregistered but with a private agreement for the payment of child support; and those neither registered nor party to a private agreement. The final sample comprised 1546 single custodial parents, 23 per cent of whom were Stage Two registrants, and 617 non-custodial parents, 40 per cent of whom were also registrants.

<sup>73</sup> Total amounts received by those parents averaged \$24.85 per week more than the amounts received by parents whose separations had preceded the implementation of administrative assessment. The sub-group of parents identified as Stage Two clients were receiving an average of \$9.39 per week more than those who separated after 1 October 1989 but who had made arrangements independently of the Child Support Scheme. (M Harrison *ibid* at 543).

Three-quarters of the non-custodial parents separated before October 1989 were of the view that their child support arrangements were equitable, only just over one-third of the custodians in the same position agreed with them. After October 1989, non-custodial parents had very different opinions, most of them considering the situation to be unfair, probably because they perceived themselves as being required to contribute higher amounts. In these cases half of the custodial parents' believed their position to be fair. Although generally their financial position was better than that of parents who separated earlier, Stage Two parents (as a group) were among the least likely to be satisfied with their lives and living standards, and were also among the least likely to consider that their incomes from all sources was adequate. The analysis does not volunteer reasons for these views, but the recent separation combined with the possibility that the payment cycle had not yet begun are probably important factors. Knowledge of the Child Support Scheme was found to be extremely high, with most parents being aware of its existence, but this knowledge was accompanied by a high level of dissatisfaction with the quality of information provided, particularly amongst the non-custodians.

Certainly, it seems that the worst predictions of critics of the reforms have not materialised.<sup>74</sup> Litigation over children has not increased nor have second families failed to function because of high child support liabilities. However, in 1992 there was fairly widespread criticism of the administration of the Scheme: many custodians were disappointed at their exclusion from administrative assessment and non-custodians often believed that they were paying extortionate amounts of child support. The scheme was more expensive than was expected in its operation and has yielded lower financial benefits than were originally predicted, but it was generally fairly efficient in terms of the costs involved.<sup>75</sup>

In May 1993, a further inquiry into the operation and effectiveness of the Child Support Scheme was announced, with the establishment of a Joint Select Committee on Certain Family

---

<sup>74</sup> See Margaret Harrison 'The Australian Support Scheme: Practicalities' in *Parenthood in Modern Society* (1993) (ed John Eekelaar and Petar Sarcevic) 533 at 544.

<sup>75</sup> See Margaret Harrison 'The Australian Child Support Scheme: Practicalities' in *Parenthood in Modern Society* (ed John Eekelaar and Petar Sarcevic) (1993) 533 at 544.

Law issues.<sup>76</sup> This inquiry into the Child Support Scheme arose out of the number of complaints to the Ombudsman, to the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act and to Members of Parliament and Senators. In August 1994,<sup>77</sup> an efficiency audit conducted by the Australian National Audit Office, which examined the Australian Taxation Office's management of the Child Support Agency, was referred to the Joint Committee as part of its inquiry. This report also constituted the Joint Committee's report on this additional term of reference. The Joint Committee's terms of reference also included a further reference into the administration and funding of the Family Court of Australia.

The Joint Committee recommended that the Child Support (Assessment) Act 1989 and the Child Support (Registration and Collection) Act 1988 be redrafted in a more simplified and understandable form; and combined into one piece of legislation and that the Government adopt certain priorities in respect of the objectives of the Child Support Scheme. The first priority was that adequate support to be available to all children not living with both parents. The second priority was that non-custodial parents should share in the cost of child support according to their capacity to pay; and the last priority was that commonwealth expenditure

---

<sup>76</sup> See Child Support Scheme: An Examination of the Operation and Effectiveness of the Scheme (Australian Government Publishing Service) (1994) (Parliament of the Commonwealth of Australia). The inquiry into the operation of the Child Support Scheme was advertised on 5 June 1993 in all major daily newspapers and regional daily newspapers. Submissions continued to be received until May 1994. The Joint Committee received a total of 6197 submissions, including 332 confidential submissions. This represents the largest number of submissions ever received by any Australian parliamentary committee. The Joint Committee set up a child support inquiry database to record, sort and analyse the information contained in each submission to the inquiry. Each submission was read and categorised according to the issues it raised. The child support inquiry database records the origin of each submission, the number of times each issue was raised and the percentage this represents of the total number of submission received by the joint Committee for over eighty different issues. It provides a succinct summary of how the Child Support Scheme and the Child Support Agency have impacted upon those who are clients of the Scheme or who have otherwise come into contact with the Scheme. Submissions were received from a large number of individuals - custodial and non-custodial parents who had been directly involved in the Child Support Scheme, as well as people indirectly affected by the Scheme, and from lawyers, academics, government departments and authorities, and community groups. A submission was also received from the Family Court of Australia. What was undertaken was an investigation into the operation and effectiveness of the Child Support Scheme, not a system of redress for grievances. To the extent that personal experience was indicative of the operation of the Scheme, the Joint Committee considered those cases and referred to them throughout its report.

<sup>77</sup> Audit Report No. 39, 1993-4.

should be limited to the minimum necessary to ensure the adequacy of child support to all children not living with both parents

The Joint Committee suggested that the objective of the Child Support Scheme that non-custodial parents share in the cost of supporting their children according to their capacity to pay be redrafted to state that all parents should share in the cost of supporting their children according to their respective capacities to pay and recommended that the Child Support Agency, as a matter of urgency, develop national guidelines for the identification and administration of cases where there was a history or risk of domestic violence and or child abuse, and that the Child Support (Registration and Collection) Act 1988 be amended to provide the Child Support Registrar with the discretion to suspend enforcement action where the continuance of this action would result in the likely abuse of a child or parent. The Child Support Registrar was to be given the discretion to substitute private collection for Child Support Agency collection where a liable parent had established a reliable voluntary payment record of six months and this discretion to substitute private collection for Child Support Agency collection was to be ordinarily exercised in favour of private collection, except where the special circumstances of the case required otherwise. National guidelines on acceptable private child support collection arrangements were recommended.

Furthermore, the Joint Committee proposed that the Minister for Social Security appoint persons to conduct an independent study into the costs of children to enable a critical evaluation of the current child support formula percentages and that the child support legislation be amended to substitute the term, 'excluded income' for 'self-support component'<sup>78</sup> wherever it appears; that the custodial parent's disregarded income level should be reduced to the applicable pension cut-off point;<sup>79</sup> and that the current withdrawal rate of child support from custodial parents who earn more than the applicable pension cut off point be reduced to

---

<sup>78</sup> The Joint Committee further recommended that the non-custodial parent's basic formula for self-support component be increased by twenty per cent, that is from \$8 221.00 to \$9 865.20 per annum and that a financial penalty be introduced for persons who knowingly, recklessly or inadvertently fail to notify the Child Support Agency of an increase in their monthly taxable income of 15 per cent or more when required to do so.

<sup>79</sup> The current Department of Social Security cut off point is \$19 723.60 which increases by \$624 per annum for each additional child.

50 cents in the dollar: finally it recommended that the child care component of the custodial parent's disregarded income level be abolished. Further, it was proposed that the child support legislation be amended to introduce a minimum child support payment<sup>80</sup> where the formula resulted in an assessment less than this amount; which could be waived by the Child Support Registrar in special circumstances.

It was suggested that child support legislation be amended, firstly, to allow a liable parent who has a *de facto* spouse the same right of departure from the formula assessment as presently exists for married spouses, and, secondly, to require the Child Support Registrar to adopt the social security legislation concept of 'marriage-like relationships' when determining the standing of a *de facto* parent in a departure application. The Child Support Agency should be required to undertake research to identify the number of parents under the Child Support Scheme who receive business or investment income and the extent to which these parents minimise their child support liabilities; fringe benefits were to be added to the existing child support income base for both parents. Both parents should be required, within a set period, to provide the Child Support Agency with full details of all fringe benefits received from an employer.<sup>81</sup>

## 7.6 Conclusion

### a) *The Agency as a mechanism for providing financial support*

Only twenty per cent of custodial parents surveyed in the 1993 enquiry endorsed the Child

---

<sup>80</sup> \$260 per annum.

<sup>81</sup> The scope of the Joint Committee's inquiry was extensive. Substantial research and preparation was carried out by the committee members, both on their own behalf and as a result of the numerous submissions received. Attempts were made not only to gain an extensive overview of what had taken place in the initial enactment of the legislation, but also the reform implemented since then. The Joint Committee also heard in great detail from the Child Support Agency, as well as the Department of Social Security, which has the responsibility in the most part for the policy programme under which the Child Support Agency operates. Both custodial and non-custodial parents expressed strong dissatisfaction with the administration of the Scheme. There was concern at the lack of sensitivity with which the Child Support Agency (and, indirectly, the Department of Social Security) dealt with the delicate issues involved. This view was most strongly expressed by non-custodial parents, who were often unnecessarily cast as defaulting debtors or criminals.

Support Agency as an effective mechanism for providing child support from non-custodial parents. However, on the strength of the contents of these submissions and the Joint Committee's own investigations, it appears that there has been a marked improvement in the provision of financial support by non-custodial parents for their children.<sup>82</sup> This indicates that the first priority of the Scheme, that is 'adequate support is available to all children not living with both parents' is, or has been, more effectively carried out by the Scheme than it was prior to the Scheme and continues to be improved upon. The Child Support Scheme was enacted to assist those children whose parents separated after 1 October 1989, those born on or after that date, or those with siblings born on or after that date. All children who did not fall into these categories were forced to rely solely upon the collection of maintenance monies from court orders made pursuant to the Family Law Act. The collection of maintenance for Stage 1 custodial parents has never been simple or efficient.<sup>83</sup> Only about one third of children are covered by the Child Support Scheme.<sup>84</sup> The Scheme, despite other problems with its operations, must be credited with providing a better avenue for child support payments than the entirely judicial structure that existed previously.

The Child Support Advisory Council (also known as the Fogarty Committee) strongly recommended that the Child Support Scheme should be extended to all children and not merely those that fell within the above parameters. This recommendation was not taken up by the Government, although the opportunity remains for changing circumstances to lead to a different conclusion. Evidence suggests that the level of maintenance being awarded pursuant to court orders under the Family Law Act 1975 is also being determined by reference to the

---

<sup>82</sup> This is best illustrated by examining the percentage of non-custodial parents who met their child support obligations prior to the commencement of the Scheme (30 per cent) and the percentage of child support collected by the Agency five years later (73 per cent). The average dollar value of this maintenance has also increased significantly over the period of the Scheme's operation, reaching an average of \$46.34 per week payable under the Scheme, and an average \$40.00 per week payable as a result of court orders for maintenance.

<sup>83</sup> A study by the Australian Institute of Family Studies, which is discussed in Chapter 1 of the Joint Committee's report, indicated that prior to the Child Support legislation approximately 60 per cent of all children received no support whatever.

<sup>84</sup> Of these 73 per cent receive child support. This shows that a child covered by the Scheme is almost twice as likely to receive child support than a child of separated parents who is not covered by the Scheme.

formula set out in the Child Support (Assessment) Act 1989.<sup>85</sup> This would indicate an indirect benefit of the operation of the Child Support Scheme, for those children who are not eligible to receive direct benefits from it.<sup>86</sup> Those custodial parents still relying on court orders to obtain a reasonable level of child maintenance for their children discover that the difficulty, emotional stress and cost of legal proceedings to increase their level of maintenance is not out of proportion to the benefit and there is also a greater cost of legal proceedings which is transferred to the community through grants of legal aid. In the light of this situation, it seems that the Child Support (Assessment) Act 1989 should be extended to all children of separated parents.

*b) The position of custodian and the non-custodian parents*

The financial position of families headed by single parents is generally that of the poorest section of the Australian community,<sup>87</sup> although the financial position of the non-custodial parent still compares favourably with the financial position of the custodial parent. The non-custodial parent does not have the additional expenses of the child within the household which extends beyond the recurring expenses for groceries, clothes, transport, school fees and medical expenses, and includes the provision of time for parenting, and other obligations, which often reduce the earning capacity of custodial parents.<sup>88</sup> Thus, single custodial parents

---

<sup>85</sup> It can also be seen that the average level of maintenance payable pursuant to the Family Law Act 1975 has increased markedly since the inception of the Child Support Scheme, from \$26.00 per week in 1988 to \$42.00 per week in 1992/93, bringing it almost on par with the average weekly payments under the Scheme. The Child Support Agency, in its submission to the Joint Committee, stated that, had the Scheme not been initiated, the average value of maintenance from court orders issued under the Family Law Act 1975 would have remained closer to \$31.00 per week.

<sup>86</sup> The decision of the Family Court in *Beck and Sliwka* (1992 - FLC 92-296) indicated that the Court did not think it improper to take the Child Support (Assessment) Act formula into account when determining the details of court orders where the issue was the capacity of a non-custodial parent to make an equitable contribution to the cost of child maintenance.

<sup>87</sup> Ninety-one percent of those custodial parents registered with the Child Support Agency for collection have an income of less than \$19 000 per annum. Seventy six per cent have an income of less than \$10 000 per annum. See too Social Welfare Policy Secretariat, *Report on Poverty Measurement*, Canberra A.B.P.S. (1981) 204.

<sup>88</sup> Approximately 68 per cent of non-custodial parents registered at the Child Support Agency for collection have an income of less than \$20 000 and 31 per cent have an income of less than \$10000. See too Justice Claire L'Heureux Dubé 'Economic Consequences of Divorce: A View

are among the most disadvantaged and vulnerable groups in Australian society,<sup>89</sup> although generally the financial position of the non-custodial parent within the Scheme is not affluent.

The 'excluded income' component provided to the non-custodial parent is in essence a living allowance, which is deducted from their taxable income before the percentage payable for child support is calculated. By contrast, the 'disregarded income' amount applied to the custodial parent is an amount which recognises the contribution of the custodial parent to the financial support of their children. This 'disregarded income' amount takes into account the cost of the parenting for the custodial parent, including child-care costs, and at the lost opportunities in employment which the custodial parents often suffer. Because of this misunderstanding relating to the equivalence of these amounts, there would appear to be a general tendency within the Australian community and, in particular among those affected by the Scheme, to consider that it would be fairer if these two figures were closer in value.<sup>90</sup> However, this does not appreciate the different issues embraced in the custodial parent's disregarded income, which relates to the costs associated with having the care of the children, compared with the excluded income component which preserves a portion of the non-custodial parent's income for their own use before the application of a percentage.

The unemployment rate for single parents is one of the highest in the community. The effect of decreasing the 'disregarded income' level to the cut-off point of the single parent's pension

---

from Canada' (1994) 31 *Houston Law Review* 451, in which the author stresses that there are numerous financial consequences accruing to a custodial parent, which are not reflected in the direct costs of support of that child (at 496).

<sup>89</sup> The obvious difficulties created by low levels of income are exacerbated in families that are supporting one or more children. The unemployed parent then has difficulty providing the example and skills for their children to pursue employment in the future. The lack of role models and the relegation to at least semi-permanent poverty must in time create an entire generation of single parent children with limited employment futures and no particular job skills. This generation will be required to face the prospect of having potentially less skills with which to obtain work, and will be required to deal with the attendant personal and emotional difficulties of being unable to take a full part in society. It is essential that consideration is given to methods of assistance to avoid this outcome. One possibility would be the wider application of the child support formula to give greater financial assistance to those families in need, and also to consider the possibility of providing a wider range of non financial assistance to increase the likelihood of employment for sole parents and their offspring such as subsidised good child care.

<sup>90</sup> The majority of the Joint Committee recommended a reduction of the custodial parent's disregarded income level.



can only exacerbate this tendency. Single parents when re-entering the work force must overcome the usual financial and practical difficulties of establishing transport and proper presentation and skills for new jobs, as well as providing alternate care for their children often at great costs. These financial difficulties coupled with emotional challenges presented by going back to work after some time out of the work force are daunting. The Joint Committee's recommendation regarding the lowering of the 'disregarded income' level could only make things worse, by having a negative effect on the financial position of the custodial parent and thus preventing her from escaping from social security dependence. This leads to a continued reliance on the community through Social Security payments and the non-custodial parent through child support. In addition, a family in which there is no role model provided for employment may perpetuate a non-employment cycle.

With the passage of time, the number of children covered by the assessment scheme will progressively increase and the court-based system will be phased out. Once collected, the task of disbursing payments to custodial parents is carried out by the Department of Social Security. Despite the key role played by the Department of Social Security in distributing child support, the Child Support Agency is not part of the Government's social security system and the Agency does not guarantee payment. If a non-custodial parent cannot be found or fails to pay for whatever reason, the Agency will do its best to pursue the matter, but does not have funds of its own to pay to a custodial parent.

In Australia, prior to the legislation of 1988, there was undoubtedly a problem surrounding the payment of maintenance, a problem which needed urgent attention. The legal system was in disrepute, women and children living in poverty.<sup>91</sup> It was indicated that the majority of non-custodial parents were better off than they were during their former marriage. Application of a formula system indicated that most male non-custodial parents had the capacity to pay more maintenance than they were paying. In practice, there have been problems in implementing the

---

<sup>91</sup> See Margaret Harrison, Peter McDonald and R Weston 'Child Maintenance in Australia' (1987) vol 1(1) *International Journal of Law and the Family* 92 at 130. See too Carol Bartlett and Henry Finlay 'Child Support in Australia' in *Family State and Individual Economic Security Volume One The Family* (ed MT Meulders-Klein and John Eekelaar (1988) 251 at 259; see further Stephanie Charlesworth 'The Economic and Social Position of One-Parent Families in Australia and France: a Comparative View' in *Family, State and Individual Economic Security Volume II The State* (1988) (ed MT Meulders-Klein and John Eekelaar) 631 at 651.

formulae because of the sudden change that is involved in the expenditure patterns of non-custodial parents, and the difficulty in dealing with large irregular payments and lump-sum maintenance in the form of additional property. The provision of lump-sum maintenance might be a preferable option to lower the demand for public housing and provide a capital base to enable a sole-parent to re-enter the labour force. Furthermore, employment incentives pose a problem since some men with a dependent spouse and new baby would be at least as well off on unemployment benefits if the formula is applied. Wealthy men might also consider whether it was worth earning the additional dollar when they receive only 25 cents of it. The additional payments which women receive may also be a work disincentive, but responses may vary: for some women, the additional income might be employed in child-care expenses to enable them to obtain gainful employment. Thus, the Australian scheme is by no means without flaws.<sup>92</sup> The scheme, although ostensibly committed to ending child poverty, is only directed at those families where there is a liable parent with a capacity to pay.

c) *The Social Security Context*

In Australia, according to figures in 1990, about two thirds of sole parent families in Australia receive social security payments. Most sole parent families are headed by women and in about two thirds of these social security constitutes the main source of income.<sup>93</sup> Many reforms to Australian family law since 1987 have been promoted by a wish to contain or reduce social security expenditure after marriage breakdown. The Child Support Scheme exemplifies this and there have been significant changes to the Family Law Act 1975 which came about for similar reasons. The former policies of encouraging a clean break collapse in cases where there is, or might be, resort to income-tested social security. Where the payment of a lump sum or the transfer of property is ordered by way of maintenance, rather than property alteration, the order must be clearly specified as such. The purpose of these labelling provisions is to make it easier for the Department of Social Security to apply income and assets tests.

---

<sup>92</sup> R Graycar & T Morgan *The Hidden Agenda of Law* (1990) 142.

<sup>93</sup> See Stephen Parker, Patrick Parkinson and Juliet Behrens *Australian Family Law* (1994) ch. 12.

Before 1 January 1993, the most significant form of social security for family law purposes was the Sole Parent Pension. This was basically made up of a standard amount for the sole parent and additions for dependent children. To be qualified, the claimant must, inter alia, have taken such action to obtain maintenance as the Department of Social Security considered reasonable.<sup>94</sup> Sole Parent Pension was subject to the full range of means tests. Thus, pension could be reduced, or extinguished altogether, on account of maintenance income, ordinary income or assets. On 1 January 1993 an allowance called Family Payment was introduced. This took the place of Family Allowance and Family Allowance Supplement; the first of which was a near universal payment in respect of dependent children and the second of which was a supplement for families with low earnings. The additional components in Sole Parent Pension, that is those related to the number of children in the family, were moved over to Family Payment and the maintenance income test applied. Many sole parents now rely heavily on a Family Payment and Sole Parent Pension which is subject to an ordinary income test.<sup>95</sup> To qualify for Family Payment, a maintenance requirement applies. To be qualified for the additional components related to the number of children, a recipient must have taken reasonable action to obtain maintenance.<sup>96</sup> The amounts yielded by these additional components are subject to a maintenance income test.

It has been argued that, although Australia inherited a rights model of family law from England, the system seemed designed to promote social security maximisation.<sup>97</sup> Although the language of rights is employed, the private realm is only sacrosanct where there are no social security consequences. Overt public policy considerations dominate the realm of private ordering. In South Africa, interfamilial rights talk is misplaced and the public utilitarian model

---

<sup>94</sup> Section 252 of the Social Security Act 1991.

<sup>95</sup> Pension is reduced by 50 cents for each dollar of earnings over the "free area" allowed from time to time. It does not reduce as a result of any maintenance income received. The claimant must have taken reasonable action to obtain maintenance, despite the fact that receipt of the maintenance can no longer lead to any reduction in the pension. The power of the Department of Social Security to insist on maintenance being claimed remains a significant inroad into the ability of parties to settle their financial affairs privately.

<sup>96</sup> Section 1069-D11.

<sup>97</sup> See Stephen Parker 'Rights and Utility in Anglo-Australian Family Law' (1992) 55 *The Modern Law Review* 311 at 328.

would need to dominate to a far greater extent than in Australia. The Australian system is worthy of careful consideration, if funds could be found to implement such a system based on a Family Court. This would require a social security system and the retention of a measure of discretion for the courts, controlled by the use of guidelines. The guidelines could be based on the Australian model, but with greater emphasis on social families and step-parents. The use of an enforcement and collection mechanism such as the Child Support Agency would operate successfully only in the case of liable parents who were able but unwilling to pay.

## CHAPTER 8

### CHILD SUPPORT LEGISLATION IN THE UNITED KINGDOM

#### 8.1 Introduction

There seems to be an international trend toward the use of rules within family law, and this manifested itself in the United Kingdom in the Child Support Act 1991. Recent dramatic changes in the Australian and English system of assessment and collection of maintenance for children have set in motion a trend which may in time influence South African legislation and thus require critical evaluation. Changes to the child maintenance system in Australia seem to have had a significant influence on those responsible for change in the United Kingdom.<sup>1</sup> Following the changes in the Australian system of maintenance assessment and enforcement, increasing concern began to be expressed in the United Kingdom about the shortcomings of the English maintenance system. Three main areas of concern were: firstly, the high number of children born to young single mothers unsupported by the fathers;<sup>2</sup> secondly, the poverty caused by the high divorce rate and the lack of adequate maintenance paid by non-custodial parents and, thirdly, there was concern over the heavy obligation being placed on the state to assist single parent families.<sup>3</sup>

Between 1971 and 1986, the number of single parent families increased by 400,000 and by 1992 had reached over a million.<sup>4</sup> The economic difficulties experienced by children in one-parent

---

<sup>1</sup> Roger Bird *Child Maintenance: The Child Support Act* (1993). (Second edition).

<sup>2</sup> Throughout the 1980's the proportion of lone parent families receiving payments from absent parents dropped from approximately 50 per cent of all lone parents to 23 per cent. (See National Audit Office, Department of Social Security: Support for Lone Parent Families (1989-1990).

<sup>3</sup> Roger Bird *Child Maintenance - the New Law* (1991) 18.

<sup>4</sup> Susan Edwards and Ann Halpern 'Parental Responsibility - an Instrument of Social Policy' (1992) 22(3) *Family Law* 113 at 115. In 1989, one-fifth of children in the United Kingdom were not living with both biological parents. See M Clarke *Children's Changing Circumstances: Recent Trends and Future Prospects* (London) (Centre for Population Studies) (1989).

families became a focal point of discussion and concern, more than the plight group of lone parents, perhaps because the majority of children in this position were there as a result of divorce or separation rather than born to a mother who had never formed a separate household with the father.<sup>5</sup>

By the end of the 1980's, the burden of social security expenditure was causing concern to politicians,<sup>6</sup> particularly the amount of benefit paid to single parents. In 1978/79 some £2.4 billion was paid to single parents; by 1992, the figure had risen to around £6.6 billion and approximately 895,000 single parents were on Income Support with an additional 132 000 on Family Credit.<sup>7</sup>

## 8.2 *The Background: The Finer Committee of 1974*

Divorce statistics rose with the introduction of 'no fault' divorce<sup>8</sup> and this led, as early as 1974 to the appointment of an official committee into one-parent families: the Finer Committee,<sup>9</sup> whose terms of reference reveal the uncritical attitude of the 1960s towards poverty-stricken single-parent families.<sup>10</sup> In the Report which followed, recognition was given to the view that

---

<sup>5</sup> The financial position of lone mothers has been made even more difficult by their low, and declining, workforce participation rate. The fall in full-time paid work is the most remarkable. Between 1979 and 1989 the number of single mothers working full-time fell from 23 per cent to 17 per cent, and those in part-time employment from 25 per cent to 22 per cent at a time when there was a significant growth in the part-time labour force. See J Millar and P Whiteford 'Child Support in Lone-Parent Families: Policies in Australia and the UK' (1993) 21 *Policy and Politics* 59-72.

<sup>6</sup> See Carol Harlow 'Accountability, New Public Management and the Problems of the Child Support Agency' (1999) 26 (2) *Journal of Law and Society* 150 at 155.

<sup>7</sup> DSS *The Growth of Social Security* (1993).

<sup>8</sup> The Divorce Reform Act of 1969.

<sup>9</sup> Report of the Committee on One-parent Families (1974); Cm 5629, chair Morris Finer.

<sup>10</sup> The Committee was required to 'consider ... the problems of one-parent families in our society'; 'to examine the nature of any special difficulties which the parents of the various kinds of one-parent families may encounter ...'; and 'to consider in what respects and to what extent it would be appropriate to give one-parent families further assistance' (Finer Report (1974) Cmnd. 5629 vol. 1 para 1.1.)

social security constitutes in effect another system of family law,<sup>11</sup> and that private maintenance is often an insufficient means of support.<sup>12</sup> The Report was published in 1974 as the *Finer Report*.<sup>13</sup> Had this Report been accepted, it would have made significant changes in the level of social commitment to such children<sup>14</sup> but, unfortunately, this Report was rejected by the government on financial grounds.<sup>15</sup> The *Finer Committee*, recognising that the real problem of maintenance is not the unwillingness but the inability of men to pay and that there were simply insufficient resources available,<sup>16</sup> proposed the payment of a guaranteed maintenance allowance to all one-parent families, irrespective of the reason for the absence of one parent.<sup>17</sup> The aim of the proposed allowance was to place most one-parent families in a better economic position than they would have been on the social welfare system of supplementary benefit.<sup>18</sup> The Report aimed to give a single parent the opportunity to choose between a domestic role or career outside the home.<sup>19</sup> A parent who was gainfully employed was entitled to benefit on a diminishing scale until the earnings reached the level of average full-time male earnings. An attempt was thus made to create a new standard of living, above the official poverty level but below the average family wage.<sup>20</sup>

---

<sup>11</sup> See too Stephen Cretney 'Divorce and the Low Income Family' (1990) *Family Law* 378-9.

<sup>12</sup> *Finer Report* (1974) para 4.89.

<sup>13</sup> DHSS Cmnd. 5629 *Committee on One Parent Families* (*Finer Report*).

<sup>14</sup> See John Eekelaar 'Public Law and Private Rights: The *Finer* Proposals' (1976) *Public Law* 64.

<sup>15</sup> See John Eekelaar *Family Law and Social Policy* (1984) (London, Weidenfeld & Nicholson) 123-5; See too Mavis Maclean & John Eekelaar 'Child Support: The British Solution' (1993) 7 *International Journal of Law & The Family* 205 at 210-211.

<sup>16</sup> *Finer Report* vol 1 para 4.90.

<sup>17</sup> *Committee on One-Parent Families Finer Report Volume 1* Cmnd. 5629 para 5.104. See discussion in A Ogus, E Barendt & NJ Wikeley (1995) *The Law of Social Security* (4th ed.) (London Butterworths); see too John Eekelaar and Mavis Maclean *Maintenance after Divorce* (1986) 109-110.

<sup>18</sup> *Finer Report* (1974) Vol 1 Paras 5.107 and 5.112.

<sup>19</sup> *Ibid.* Para 5.106.

<sup>20</sup> John Eekelaar & Mavis Maclean *Maintenance After Divorce* (1986) 110; See too *Finer Report* Vol 1 Recommendations 64-92.

The main features of the Finer Committee's proposal were firstly, that the allowance is a substitute for maintenance payments, which are assessed and collected by the authority administering the allowance and are offset against the allowance paid: the need for single parents to go to court to sue for maintenance awards is largely eliminated. Secondly, the level is fixed in relation to supplementary benefit payments and reviewed regularly, so that it would be sufficient to bring one-parent families off supplementary benefit even if they had no earnings.<sup>21</sup> Thirdly, the benefit would be available for all one-parent families and would consist of a child-care allowance for the adult and a separate allowance for each child; the benefit would be non-contributory and would not be adjusted to the particular needs of individual families. Fourthly, the benefit would decline slowly for parents in receipt of a salary or income but would fall by considerably less than the income increased: the adult benefit would be extinguished by the time the income reached the level of average male earnings, but the child benefit would continue to be payable to all parents, whatever their income.<sup>22</sup> Benefits, once awarded, would be fixed at that level for three months at a time.

In the United Kingdom at that time, the majority of children in such households had lost a parent through separation or divorce,<sup>23</sup> and generally were not, as in the United States, children born to young mothers who had never lived with the father.<sup>24</sup> The fathers were likely to have remarried and have second families, and the characteristically pragmatic approach of the Report was to allow the man to devote his income to supporting the family he currently lived with, while the first family was supported by the State through the social security system. The authorities had a right of recourse against the father, but they would allow him to keep enough to support any new

---

<sup>21</sup> See criticisms of the practice of supplementary benefits in Finer Report (1974) Cmnd 5629, vol. 1 paras 4.199-202; para 5.106.

<sup>22</sup> *Ibid.* Para 5.106.

<sup>23</sup> See Committee on One Parent Families (Finer Report) (1974) ch8.

<sup>24</sup> See Harry Krause *Illegitimacy, Law and Social Policy* (1971) ch 8 as cited in Mavis Maclean & John Eekelaar 'Child Support: The British Solution' (1993) 7 *Int. Journal of Law and the Family* 205 at 227 fn 23.



partner of his and any step-children living with him, and an amount on top of that.<sup>25</sup> At the time, it seems that no more than sixteen per cent of payments to single parent families was being recovered: maintenance ordered by courts seldom exceeded what mothers were entitled to through Supplementary Benefit and compliance was low.<sup>26</sup> The Committee's major recommendation was thus that a guaranteed maintenance allowance be paid to all single parent families at a level higher than Supplementary Benefit, and attempts be made to recover some of it from father's or liable parents on its own initiative.<sup>27</sup>

Although this scheme was not adopted in the United Kingdom, it was however, adopted in New Zealand.<sup>28</sup> New Zealand introduced a system of child support in which the child no longer depended primarily on its parents to determine its standard of living. Like the Finer Report, it

---

<sup>25</sup> Finer Report (1974) Cmnd 5629 vol 1 para 4.879.

<sup>26</sup> O R McGregor, L Blom-Cooper and Colin Gibson (1970) *Separated Spouses*.

<sup>27</sup> Mavis Maclean and John Eekelaar 'Child Support: The British Solution?' (1993) 7 *International Journal of Law and the Family* 205 at 207.

<sup>28</sup> In 1973, New Zealand introduced Domestic Purposes Benefits payable to all single parents who care for one or more children. The Domestic Purposes Benefits were payable irrespective of ability to work, leaving the option of employment to the custodian parent. Earnings were, however, taken into account. When the domestic purposes benefit was first started, the private law system of maintenance enforcement remained as it was. Maintenance payments were then used to offset the outlay on the benefit. Before a domestic purposes benefit could be claimed, some maintenance had to be claimed. In 1981 a radical change was made in this system: a new scheme known as the Liable Parent Contribution Scheme (LPCS) was introduced. This scheme was run by the Department of Social Welfare, when a parent was receiving a domestic purposes benefit. Maintenance was replaced by a contribution assessed not by the courts, but by the Social Security Commission and the Department of Social Welfare. Liability was based on an administrative calculation made by governmental officials using a standard formula laid down in statute. This formula provided four different methods of calculation, including one which was worked out by deducting specified amounts from the liable parent's income, depending upon the liable parent's own circumstances. The calculation which provided the lowest figure was the one which the liable parent had to pay. This was subject to the exceptional 'minimum payment rule', under which a minimum contribution was exacted even if the lowest calculation produces a figure of less than the minimum. It was only necessary that the absent liable parent was identified. Payments were then made to the custodial parent and the social security authorities had the task of claiming this from the liable parent in accordance with a series of statutory formulae (Social Security Amendment Act 1980). While the state made these payments, any maintenance order was suspended. However, a custodian parent might obtain an order against the liable relative if he or she wanted to find employment and lose the state benefit.

placed considerable emphasis upon the retention of the economy of *de facto* families.<sup>29</sup> The New Zealand statute provided uniform criteria for the assessment of the living standards of children from divided families. Claims were made against the absent parent, primarily to raise revenue for the state and to continue the notion of parental responsibility for child support. The problem was the level at which the standard of living of such families should be set: that which the child enjoyed before the break up of the family or that of the average, two-parent family. It seems that in New Zealand the standard was set at a level somewhere between subsistence and the average two-parent family, which is what the Finer Committee recommended.<sup>30</sup> The inevitable conclusion from the New Zealand experience is that reliance on private law remedies is not feasible.<sup>31</sup> The theory that the effects of marriage breakdown should be borne by the parties themselves is impractical, although it may be theoretically sound, since it leaves many women and children without an adequate income or standard of living. The consequences of marriage breakdown are forced to become not only an individual, but also a community responsibility. The New Zealand scheme was part of that country's wider social policies.<sup>32</sup> The welfare state is deeply engrained in that country's mentality and this scheme recognised the community's responsibility for the enforcement of potential financial duties towards children. It would therefore appear to be logically justifiable in this ideology.<sup>33</sup>

However, New Zealand has since embarked on a different scheme for the determination of

---

<sup>29</sup> See Mavis Maclean and John Eekelaar 'Child Support: The British Solution' (1993) 7 *International Journal of Law and the Family* 205. See too John Eekelaar 'Public Law and Private Rights: The Finer Proposals' (1976) *Public Law* 64.

<sup>30</sup> See Finer Report Cmnd 5629 para 5.106.

<sup>31</sup> W R Atkin 'The New Zealand Liable Parent Scheme' in *Family, State and Individual Economic Security* vol 1 (1988) (ed M Meulders-Klein and John Eekelaar) 436.

<sup>32</sup> W R Atkin 'The New Zealand Liable Parent Scheme' in *Family, State and Individual Economic Security* vol 1 (1988) (ed M Meulders-Klein and John Eekelaar) 436; see too Bill Atkin 'Financial Support: The Bureaucratisation of Personal Responsibility' in *Family Law Policy in New Zealand* (ed by Mark Henaghan & Bill Atkin) (1992) 210.

<sup>33</sup> W R Atkin 'The New Zealand Liable Parent Scheme' in *Family, State and Individual Economic Security* Vol 1 (ed M Meulders-Klein and J Eekelaar) 436 at 445.

financial obligations on the breakdown of a family. The Child Support Act of 1991 places control of support obligations in the hands of the Department of Inland Revenue and reduces the courts' role. It forces non-custodial parents, especially fathers, to fulfil 'responsibilities' towards their children but appears to suffer from a high degree of bureaucracy and rigidity.<sup>34</sup> The New Zealand Child Support Act has been in force for about seven years and has provided a significant amount of litigation from liable parents and custodians, many of whom receive less under the Act than before. No account was apparently taken of the notions of family ingrained in Maori culture and other communities and little recognition given to restructured or second families, who are often placed in dire financial straits. It has been criticised for failing to deal adequately with the problems of 'legal' and 'social' parenthood and the position of step-parents.<sup>35</sup>

### 8.3 *The English Child Support Act of 1991*

By 1989, in England, 770,000 single parent families depended on income support.<sup>36</sup> In July 1990 the Prime Minister, Mrs Thatcher declared the government's intention to set up a Child Support Agency and, following this announcement, a discussion paper entitled *Child Maintenance Review* was published and circulated to interested bodies which stated clearly that the interests of the children took precedence over those of the parents.<sup>37</sup> A White Paper followed in October 1990 entitled '*Children Come First*',<sup>38</sup> which proposed the establishment of a Child Support Agency.<sup>39</sup>

---

<sup>34</sup> See WR Atkin 'Child Support in New Zealand runs into Strife' (1994) 31 *Houston Law Review* 631.

<sup>35</sup> See Bill Atkin 'New Zealand: 1992 Controversy Surrounds Policies on Children (1993-4) 32 *Journal of Family Law* 377 at 379-384. Atkin states that even six months after its implementation on 1 July 1992 the operation of the scheme had been marked by high levels of litigation, a poor press and a sense of injustice by many affected. Furthermore, the actual collection rate for the first six months was only a very slight improvement on collection under the liable parent scheme (Evening Post, Wellington, December 17, 1992). The courts only managed to deal with 13.5% of the applications for departure orders.

<sup>36</sup> See Stephen Cretney 'Divorce and the Low Income Family' (1990) *Family Law* 378.

<sup>37</sup> Roger Bird *Child Maintenance: The New Law* (1991) 21.

<sup>38</sup> Cmnd 1264 dated 29 October 1990, 2 vols, London HMSO. The White Paper found that maintenance awards represented only about eleven per cent of the total net income of absent parents on above average incomes: *Children Come First*, Cm. 1264, 2 vols, London, HMSO, 1990. See also John Eekelaar, 'A child support scheme for the United Kingdom: an analysis of the White Paper' (1991) 21 *Family Law*, 15-21. The White

The proposed Agency was to be given powers to prescribe the method by which maintenance payments were made and to order the attachment of earnings without having to await evidence of arrears or default. The White Paper set out proposals for a new system for the payment of maintenance to support children and for further help for parents who wanted to go to work.<sup>40</sup> The key aims were to ensure that: parents honour their responsibilities to their children whenever they can afford to do so; a fair and reasonable balance exists between children in different families for whom a parent is responsible; the results of the scheme are fair and consistent; regular reviews take place to take account of changes in the circumstances; incentives to work are maintained; an efficient and effective service is provided; and that dependence on Income Support is reduced.<sup>41</sup>

A Bill, substantially embodying the proposals in 'Children Come First', became the Child Support Act and finally received Royal Assent in July 1991. The entire process of passing the Bill took one year and was fully in force in England in early 1993. A mathematical formula is applied in all cases, calculated by reference to the cost of maintaining children as determined by the levels set out for income support.<sup>42</sup> The cost of subsistence at the level of income support, including reasonable housing costs, is deducted from available income and referred to as 'exempt income'.<sup>43</sup> Half of the remainder is then deducted. The process of assessment, review and enforcement of maintenance payments is done by the Child Support Agency. The custodial parent is encouraged

---

Paper revealed that only 30 per cent of lone mothers [this includes never-married as well as divorced mothers] and three per cent of lone fathers receive support in any form from the other parent, compared to the seventy per cent who receive state support.. The average amount of maintenance awarded was £16 per child, dropping to £12 per week in families with three or more children. Two in five lone parents experienced one or more periods where the absent parent did not pay anything and eighty per cent of the arrears in Department Social Security (DSS) cases were never recovered. The amount which the DSS did recover amounted to no more than 5 per cent of the total value of the arrears.

<sup>39</sup> *Ibid* 22.

<sup>40</sup> Vol I/i.

<sup>41</sup> See Susan Edwards 'Making Fathers Pay' (1990) *New Law Journal* 1687 at 1688.

<sup>42</sup> Section 11 of Child Support Act 1991; Schedule 1 of the Child Support Act 1991.

<sup>43</sup> See Rebecca Boden and Mary Childs 'Paying for Procreation: Child Support Arrangements in the UK' (1996) 4 *Feminist Legal Studies* 129.

to work by two incentives: firstly, all maintenance was treated as income which reduced the entitlement to income support and, secondly, those who worked for at least sixteen hours a week were able to claim Family Credit,<sup>44</sup> which meant that they were entitled to disregard £15 a week of income from maintenance. Where an absent parent could afford to pay the whole of the maintenance bill with some income to spare, she/he was then expected to pay another percentage of surplus income for child support to enable the children to share the standard of living enjoyed by the absent parent and provide for a standard of living above the basic level of subsistence envisaged by Income Support. There was a minimum payment and a maximum above which the formula did not apply.

All liable parents, if fit and single or part of a childless couple, had to pay something: five per cent of income support was suggested. Annual review of parental financial circumstances was to take place, but application for earlier review would take place if the circumstances changed. The Government stated categorically that no connection should be made between the payment of maintenance and the amount of contact with the absent parent. Allowances were to be made to cover the non-custodial parent's liability for himself and any of his own children living with him. However, no account was to be taken of step-children who were living with such parent unless their own father was dead or untraceable. The Act directed the Secretary of State or any child support officer to have regard to the welfare of children but did not make the welfare of children the paramount consideration.<sup>45</sup>

Parents who want to make formal arrangements for the payment of maintenance have the choice of either a voluntary agreement which is legally binding and can be sued upon like any other debt or an application to the Secretary of State for a maintenance assessment.<sup>46</sup> If a maintenance

---

<sup>44</sup> Para 3.21 and 3.22 of White Paper 'Children Come First'.

<sup>45</sup> Section 2 of the Child Support Act, 1991. The child support officer, in exercising any discretionary powers under the Act, must 'have regard to the welfare of any child likely to be affected by his decision'. Thus, the application of a welfare principle is limited and does not apply where the amount of maintenance is assessed for is intended to be no room for exercise of discretion.

<sup>46</sup> See Section 4 of the Child Support Act.

assessment is made, the parents are obliged to accept whatever decision was made. The courts might also make an order for additional amounts to be paid where a maintenance assessment is in force. The Child Support Scheme of 1991 was dominated by the Department of Social Security: it was modelled on the social security system and the amounts of maintenance assessments were based on social security rates of payment.<sup>47</sup> A parent<sup>48</sup> (usually a mother) who received income support or family credit or any other welfare benefit had to apply for a maintenance assessment.<sup>49</sup> Such a parent was under a duty to give information regarding the name of the father and all necessary information to have him traced, unless there was a severe threat of physical violence to the mother.<sup>50</sup> If the mother refused to name the father of the child, the Department of Social Security might reduce payment of income support or family credit for a given length of time.<sup>51</sup> Research established that one-fifth of single parents were unable or unwilling to reveal the whereabouts of an absent parent.<sup>52</sup> Many commentators were worried about this clause of the Act which was in fact rejected in the House of Lords Committee Stage.<sup>53</sup> What exactly constitutes

---

<sup>47</sup> Roger Bird *Child Maintenance; The New Law* (First edition) chapter 5. The aim of the Act was this: to provide for assessment, collection and enforcement of periodical payments for children whose parents live apart. Although the court's jurisdiction to make orders for maintenance for 'qualifying children' is excluded (section 8(3)), the existing law for application for periodical payments remains and continues to be relevant (eg for disabled children, for capital payments, for step children (who are not qualifying children), for school fees.

<sup>48</sup> 'Parent' is defined as any person who is in law the mother or father of the child' (section 54); ie natural mother or father (subject to Human Fertilisation and Embryology Act 1990) and adoptive parents, but not, for example, step-parents.

<sup>49</sup> Section 6 (1) of Child Support Act, 1991.

<sup>50</sup> Section 6 (2) of Child Support Act 1991. This is the so-called 'good cause' clause. Up to November 1993 some 6600 parents with care (out of the 327 000 returned application forms had invoked this section and in 4 900 of those cases the claim was accepted. A number were still being dealt with but in twenty two cases were reduced benefit orders made where the parent's claim was rejected. See *The Operation of the Child Support Act, First Report and Proceedings*, HC 69, session 1993-4 (London HMSO, 1993).

<sup>51</sup> Section 46 of Child Support Act 1991; See too Mavis Maclean and John Eekelaar 'Child Support: The British Solution' (1993) 7 *International Journal of Law and the Family* 205 at 223.

<sup>52</sup> Bradshaw and Miller *Family Policy Studies Bulletin Special Issue* as cited in Susan Edwards and Ann Halpern 'Parental Responsibility - an Instrument of Social Policy' (1992) 22 (3) *Family Law* 113 at 115.

<sup>53</sup> Bradshaw and Miller, *Family Policy Studies Bulletin* (ibid.) However, the evidence of the chief executive was that it was necessary in only 22 cases to impose a penalty on a caring mother for unreasonably refusing to name the absent father. See too Ruth Deech 'Property and Money Matters' in *Divorce: Where Next?* (ed.

harm or undue distress to the parent or child from disclosure of the whereabouts has not been clarified. The risk of domestic violence would constitute potential harm but the extent of the evidence required to prove the existence of the harm is not clear. The Agency claimed that the harm was minimised because the agency acted as go-between avoiding direct contact between the absent parent and the child carer.

Although the English Child Support Act was modelled on the Australian Child Support (Assessment) Act 1989, the English legislation took no account of clean break agreements already reached by the divorcing couple: the disregard for clean break settlements would appear to have been one of the most contentious aspects of the Child Support Act.<sup>54</sup> Even where there is no payment of benefit to the parent with care, there is nothing to stop her applying to the Child Support Agency hereafter (CSA); and once made the assessment is likely to supersede any previous order.<sup>55</sup> Nor may a parent agree to restrict the right of a person to seek an assessment: any such agreement is void.<sup>56</sup> The drafting of section 9, which applies to agreements about

---

M Freeman) (1996) 89 at 92. There seems to be no serious evidence to support the widespread fears held before the scheme started that mothers would be harassed into naming fathers of whom they were fearful.

<sup>54</sup> See *Crozier v Crozier* [1994] Fam 114; David Burrows 'The Child Support Act 1991 Why we need to know about it now' (1992) 22 *Family Law* 342 at 343. In the *Crozier's* case the husband had transferred to the wife his half share in the matrimonial home; child maintenance had been deliberately excluded in the Registrar's order. A few years later the CSA ordered the husband to pay £29 per week for the child. The husband applied for leave to appeal against the clean-break consent order out of time. His argument was that he was being made to pay twice over because, in his view, the transfer of his half share in the home was to meet the obligations of child maintenance. The wife contended that she could come off state support if she could invest and keep the entire proceeds of the sale price of the home. Booth J noted that a consent order could only be set aside where there were new events that invalidated the basis on which the order was made. She held that the clean break governed the spouses but that, in relation to child maintenance, there was an ongoing parental responsibility to which the clean-break doctrine never applied. Although the parties to the clean-break order did not anticipate state intervention in the form of the CSA, the fact that Parliament had chosen a new administrative method by which the state could intervene to compel a parent to contribute to the maintenance of a child did not fundamentally alter the position as it stood at the date of the clean-break order, and the state was never bound by the agreement between parents. No new event had thus arisen, the only difference being that the parental continuing liability would be enforced by the Agency. This did not undermine the clean-break order, and the husband was refused leave to appeal. This judgement removes any motivation on the part of the divorcing husband to reach a settlement of this sort because regardless of the value of the matrimonial home transfer, he will always remain liable to the CSA assessment.

<sup>55</sup> Section 10 (1).

<sup>56</sup> Section 9 (4).

maintenance, makes it clear that the section applies retrospectively; so that agreements noted on the court file, and probably undertakings given, not to pursue periodical payments claims for children which formed the basis of a settlement of financial issues, would not be effective if a parent subsequently decided to seek an assessment under the Act and to enforce it.<sup>57</sup> This appears to be counterride the court's duty, where possible, to terminate the parties' financial obligations to one another.<sup>58</sup> Whilst a clean break is never possible for children's periodical payments, orders were often made which recognised that a parent with care would not pursue a claim, although calculation of the maintenance requirement included allowances in respect of the caring parent.<sup>59</sup> Thus, even though her claims for periodical payments may have been dismissed under the Matrimonial Causes Act,<sup>60</sup> the Child Support Act of 1991 gave a wife an element of financial support where an assessment was made under it; and, this seems to lie counter to the intention of the Matrimonial Causes Act.<sup>61</sup>

The powers of the state were radically extended into a hitherto private domain. The child support officer had jurisdiction over all those habitually resident in the United Kingdom<sup>62</sup> and wide powers were conferred on inspectors to examine and enter premises<sup>63</sup> to obtain information which was required. Trenchant criticism was voiced about the extent to which these powers infringed civil liberties,<sup>64</sup> but the Lord Chancellor responded to such criticism by arguing that, if the principle of the Act was to be supported, then the necessary powers had to be given to those responsible. The assessments once made could, however, be changed as circumstances altered. Where a liable

---

<sup>57</sup> See David Burrows *ibid* 343.

<sup>58</sup> See Section 25 A of the Matrimonial Causes Act 1973.

<sup>59</sup> Sch 1, para. 1 (3) (b).

<sup>60</sup> 1973.

<sup>61</sup> Section 25 A (1).

<sup>62</sup> Section 44 (1) of Child Support Act 1991.

<sup>63</sup> Section 15 (4) of Child Support Act 1991.

<sup>64</sup> House of Lords, Official Report, 19 March 1992, col 588.



person has remarried and has further obligations towards another family, there was a re-calculation of protected income to provide a safety net to ensure that enough money is left to enable the person to remain above subsistence level.

The policy of the Act was to exclude the courts' jurisdiction both in making maintenance assessments and in dealing with appeals. A system of tribunals and commissioners was set up under the Act to deal with appeals. The reason for this was that it was believed that social security tribunals had developed a degree of expertise in assessing the living costs of children and were a fairly quick and informal forum to which the parties themselves could appear. However, the Government did not rule out the possibility of involving the courts.<sup>65</sup> Judicial review may still be used if it is alleged that a body has acted ultra vires or breached the rules of natural justice and if there are no other remedies available. The reasons for the removal of court jurisdiction were the unpredictability of court decisions and the resultant lack of certainty and clarity in the law in this regard. The maintenance orders were also generally too low and their enforcement ineffective and unsatisfactory. Many orders were allowed to fall into arrears. Much foreboding and criticism was expressed:<sup>66</sup> it has been pointed out that the primary objective of the Child Support Scheme was to relieve the taxpayer, not to ensure that the custodian parent received more cash.<sup>67</sup> The Act was heavily criticised for being, not a document drawn up after careful discussion about principles and policy, but rather an administrative manoeuvre on the part of the government to cut public expenditure on such issues.<sup>68</sup> Further criticism of the Act was that the formula was

---

<sup>65</sup> Roger Bird *Child Maintenance - The Child Support Act 1991* (Second edition) 99.

<sup>66</sup> See Ruth Deech 'Property and Money Matters' in *Divorce: Where Next?* (1996) (ed Michael Freeman) 89 at 93; who compares the Child Support Act to the poll tax in its unpopularity.

<sup>67</sup> See Ruth Deech 'Property and Money Matters' *Divorce: Where Next?* (ed. M Freeman (1996) 89 at 92. Allegations were made especially in *The Guardian*, that, rather than tracing missing defaulters, the Agency pursued absent parents who were already paying maintenance to existing benefit claimants in order to achieve the savings of public money it had been set (£530 million in the first year of operation).

<sup>68</sup> Mary Hayes 'Making & Enforcing Child Maintenance Obligations: will the proposed scheme cause more harm than good?' (1991) 21 *Family Law* 105 at 109; see too Carol Harlow 'Accountability, New Public Management and the Problems of the Child Support Agency' (1999) 26 (2) *Journal of Law and Society* 150 at 157.

incomprehensible to a lay person and bureaucratically administered.<sup>69</sup> Further criticism has been levelled at the section<sup>70</sup> of the Act which provided for a partial disallowance of benefit for a custodial parent who refuses to co-operate with the CSA, for example to a mother who refuses to name the father of her illegitimate child.<sup>71</sup> Generally, the passage of this Act met with considerable argument and aroused great controversy, particularly in the House of Lords.<sup>72</sup>

The main concern was that the aim of the Act was to cut benefits to one-parent families. Although the key aims of the Act were to ensure that parents honour their responsibilities to their children whenever they could afford to do so and dependence on Income Support was reduced, the State would undoubtedly save if the CSA was able to collect even a small proportion of these maintenance assessments, but the position of the single parent family would only improve financially if the custodian parent was gainfully employed.<sup>73</sup> Furthermore, where sums were deducted by the Agency for the maintenance of children, it was likely that a substantial reduction in the maintenance amounts awarded for custodian parents would follow. It was unlikely that the total financial situation of the custodian parent and child would improve markedly. Single parent poverty is caused by the interaction of the social security and wages system and a lack of decent affordable child care. During the period 1980 to the present, the United Kingdom government has not done a great deal to increase the supply of publicly-funded child-care.<sup>74</sup> The amount paid by working mothers for child care rose by forty-two per cent between 1991 and 1994.<sup>75</sup> Single

---

<sup>69</sup> 4,700 people were employed to administer the formula, of whom 2,200 were new recruits and added to the existing bureaucracy.

<sup>70</sup> Section 46.

<sup>71</sup> Section 46 was amended by the House of Lords to remove its punitive aspect, but was reintroduced and passed in the House of Commons. But see Ruth Deech 'Property and Money Matters in *Divorce: Where Next?* (1996) (ed. M Freeman) 89 at 92.

<sup>72</sup> House of Lords, Official Report, 25 February 1991, col 812.

<sup>73</sup> House of Lords, Official Report, 25 February 1991, col 812.

<sup>74</sup> See Sandra Fredman *Women and the Law* (1997) (Clarendon Press, Oxford) 210.

<sup>75</sup> Fredman (*supra*) at 215.

parents have special needs which need to be addressed within a general expansion of child-care.<sup>76</sup>

#### 8.4 *The Child Support Scheme of 1991 compared with the Proposals of the Finer Committee*

A comparison between the scheme introduced in Britain and the Finer Committee's proposals indicates the effect of socio-political change on social policy agenda. Superficially, there are some similarities between the two schemes.<sup>77</sup> The Finer Committee proposed that the absent parent's obligation to reimburse the state for the payment of maintenance should be assessed according to a formula and imposed by an administrative order. This administrative order could require payments exceeding the payment of maintenance by the state and appeals could be within a system of tribunals.<sup>78</sup> However, the proposals of the Finer Committee had a far greater degree of flexibility than those of the present scheme. The Committee was sensitive to the demands of the absent parent's new family.<sup>79</sup> As far as disclosure of the father's name was concerned, the Committee was satisfied to rely on the voluntary co-operation of the mother.<sup>80</sup>

The Child Support Scheme, by contrast, shifted the emphasis from the provision of maintenance and security to the improvement and enhanced efficiency of enforcing maintenance payment by the responsible parent. There was also an emphasis in the Scheme on the importance of the biological link rather than the social (*de facto*) family and the need to promote a sense of individual responsibility.<sup>81</sup> This emphasis was somewhat anachronistic, bearing in mind the

---

<sup>76</sup> See Gingerbread Child-care Commission Report (1995); see too B Cohen and K Clarke (eds) (1986) *Child-Care and Equal Opportunities* HMSO.

<sup>77</sup> Mavis Maclean and John Eekelaar 'Child Support: The British Solution' (1993) 7 *Int. Journal of Law & the Family* 205 at 225.

<sup>78</sup> Mavis Maclean and John Eekelaar 'Child Support: The British Solution' (1993) 7 *International Journal of Law and the Family* 205 at 225.

<sup>79</sup> Finer Report vol. 1 para. 5.226.

<sup>80</sup> See *ibid* at 225.

<sup>81</sup> See Section 43 of the Child Support Act 1991; Section 1 (1) of the Child Support Act.

prevalence of reconstituted families and the logistical difficulties of shifting finances from one family to another.<sup>82</sup> The government, its advisers and interested pressure groups believed that the underlying policy of the Child Support Act had popular support, but in fact this belief was probably illusory.<sup>83</sup> The Agency's intervention into people's lives made a negative impact.<sup>84</sup> However, the government presented the courts as to blame for previous failures to collect maintenance effectively and quelled opposition from lawyers.<sup>85</sup> The argument for an effective Family Court with the CSA as enforcement agency to implement judgements was simply ignored.<sup>86</sup> There were failures too in communicating the impact of the policies to those most affected; in particular, the shift from second to first families had never been properly discussed.<sup>87</sup>

Furthermore, in England, although legal practitioners seldom expressed directly any views on child support formulae, their orientation to maintenance as an adjustment factor to be considered as a means to resolve the main housing question suggested that the introduction of a formula approach, which determines maintenance first without allowing the parties to reach their own agreements, hampered their ability and flexibility in reaching satisfactory housing settlements.<sup>88</sup> Finally, the Child Support Act put an end to the desirability of the clean break, especially where a transfer of the matrimonial home was to take place. Such a transfer initially had no effect

---

<sup>82</sup> See Mavis Maclean and John Eekelaar *The Parental Obligation* (1997) ch. 4.

<sup>83</sup> See pamphlet for the Child Poverty Action Group (CPAG), A Garnham and E Knights, *Putting the Treasury First, The truth about child support* (1994) 51.

<sup>84</sup> Letter of Miss Chant, 14 January 1995, quoted by the PCA in HC (1994/5) 135, 1.

<sup>85</sup> R Young, G Davis and N Wikeley, 'A bureaucrat's dream and a citizen's nightmare?' (1998) 148 *New Law Journal* 692.

<sup>86</sup> In the House of Lords, Lord McGregor argued strongly for a Family Court: 526 *HL Debs.*, col. 790 (25 February 1991). See, also, Social Security Select Committee, First Report, *The Operation of the Child Support Act* HC (1993-4) 69. This might well have constituted an excellent way of improving enforcement but retaining the discretionary power of the court.

<sup>87</sup> See Carol Harlow 'Accountability, New Public Management and the Problems of the Child Support Agency' (1999) 26 *Journal of Law and Society* 150 at 158.

<sup>88</sup> Emily Jackson, Fran Wasoff, with Mavis Maclean and Rebecca Emerson Dobash 'Financial Support on Divorce: The Right Mixture of Rules and Discretion' (1993) 7 *International Journal of Law and the Family* 230 at 253.

on the man's liability under the Child Support Act.<sup>89</sup> Lawyers acting for the absent parent will thus advise parents to press for the sale of the former matrimonial home, since there is no longer any point in negotiating immovable property transfer against maintenance orders. The Child Support Act thus contravenes the general non-interventionist principle enshrined in the Children Act.<sup>90</sup>

### 8.5 *The Child Support Act 1995*

On 6 December 1993, the Social Security Committee (SSC) published its report on its investigation into the working of the CSA.<sup>91</sup> From its establishment in April 1993, the Agency was subjected to criticism<sup>92</sup> for its failure to recognise capital settlements that had been made in the past, approved by the courts, and which had been intended to meet wholly, or partly obligations of child maintenance. As a result, the Social Security Select Committee of the House of Commons had begun an inquiry into the workings of the Act. This Committee praised the scheme, but it identified the main concerns as relating to the treatment of clean break settlements; the costs of travel to work; expenses connected with access to children; debts resulting from the marriage or separation; and the inescapable cost of caring for stepchildren. Moreover, amendments to the existing phasing arrangements were suggested. From this report can be traced

---

<sup>89</sup> See *Crozier v Crozier* [1994] Fam 114; see too Ruth Deech 'Property and money matters' in *Divorce: Where Next?* (ed. Michael Freeman) (1996) 89 at 95.

<sup>90</sup> 1989 See too *Richardson v Richardson* [1994] 1 WLR 186.

<sup>91</sup> *First Report of the Social Security Committee: The Operation of the Child Support Act*, Session 1993-94, HC 69, 1 December 1993). In their first scrutinizing report, the SSC found failures at both policy and operational levels. Accepting the goal of savings to taxpayers, they thought the targets unrealistic as well as inflexible. They also criticized the prioritization of cases and the CSA's apparent concentration on middle-class fathers already paying maintenance. They wanted reconsideration of the formula, to include greater space for discounts, capital assessments, and hardship. At the operational level, the SSC was disquieted by the delays and degree of error. The performance indicators for assessment (six to twelve weeks) were criticized as too long and even then were regularly exceeded (para 41). The impression was created that fathers were being made to pay for the agency's inefficiency. Appeals from incorrect decisions also took too long.

<sup>92</sup> 'Absent fathers' and their new families complained of demands, sometimes in disregard of settlements they believed to have been final. Custodian mothers have objected to intrusion by the agency. During the period immediately preceding the publication of the report there were public demonstrations against the agency and the suicide of an absent father, apparently occasioned by demands from the Agency, received much publicity.

the progressive complexification of the child support scheme.<sup>93</sup> The Government acted swiftly on receiving the Committee's report. On 22 December 1993, the Minister overseeing the operation of the scheme, Alistair Burt MP, announced changes which would take effect as from February 1994.<sup>94</sup>

Another Report of the House of Commons (SSC) 'The Operation of the Child Support Act: Proposals for Change' was published at the beginning of November 1994 and reported abuse and harassment of CSA staff.<sup>95</sup> The Committee recommended that full periodic reviews be conducted every two years from assessment and that relevant CSA staff receive necessary adjudication powers and all other necessary authority to ensure effective communication and practice between the benefits agency and the CSA and that employers cooperate with all enquiries made by the CSA. Where income support was reduced, it was suggested that procedures be agreed between the CSA and the benefits agency so that full benefit is restored as quickly as possible when maintenance was not paid and that the Government consider the possibilities of introducing a mechanism whereby family credit can be adjusted to take into account non-payment of maintenance in the first six months of a claim. Self-employed non-custodial parents should have their maintenance assessment based on the accounts and profits agreed with the Inland Revenue in the tax year preceding assessment with regard to the accounts and profits of the person concerned. Standard housing allowances and the recognition by the CSA of informal maintenance agreements were recommended. The informal maintenance agreements were for the following purposes:

- (a) to offset against arrears bills arising prior to assessment (the situation at present is unclear

---

<sup>93</sup> See Nicholas Mostyn 'The Green Paper on Child Support - Children First: a new approach to child support' (1999) 29 *Family Law*, 95.

<sup>94</sup> Para 18.

<sup>95</sup> HC (1993-4) 470. The second report was a compromise. The chair had argued for radical changes, including a switch to a simpler maintenance formula, but was voted down by the government majority; instead the SSC accepted a Conservative compromise which substituted detailed recommendations for improvement. To the press, the chair warned that unless the recommendations were implemented, 'the bi-partisanship that exists for this long-overdue reform [was] in danger of collapsing'.

and should be clarified;

- (b) to be recognised as a means to qualify for phasing-in and transitional provisions; and
- (c) to qualify for tax relief in the same way as formal agreements.

It was advised that voluntary maintenance arrangements should be accepted as existing where both parties agree on the amount paid, its frequency and that it has actually been received, and evidence of this can be provided. As part of any review of the retrospective nature of the Act, it was suggested that the Government take into account past property and capital settlements and investigate the practicalities of introducing a lower rate of assessable income to meet the maintenance requirement in retrospective cases by taking illustrative changes to the formula to calculate how different first, second and subsequent families would be affected, and the numbers involved, and that the findings were reported urgently to the House of Commons. It also recommended that travel to work costs be included in the calculation of exempt income; an automatic standard addition be made to the non-custodial parent's exempt income if that non-custodial parent was a step-parent; and that no distinction should be drawn between step-children and natural children in the allocation of housing costs.

Two months later, in January 1995, the Government published a White Paper, promising new legislation.<sup>96</sup> The opening paragraphs of the White Paper *Improving Child Support* refer to 'a child maintenance system which was failing large numbers of children and the parents with whom they lived'; 'the result was uncertainty and inconsistency as to the amounts to be paid and, in many cases a failure of the system to ensure that payments were made; 'only one-third of parents with care received maintenance regularly'. This describes, not the effects of the CSA, but the old 'discretion-based system'. The Child Support system is described as still commanding 'widespread support', although necessary changes in the light of experience are required. The White Paper *Improving Child Support*<sup>97</sup> proposed, the introduction of a departures system (now implemented), a child maintenance bonus scheme as a halfway house towards a maintenance disregard; and the

---

<sup>96</sup> Cmnd. 2745 HMSO, 1995.

<sup>97</sup> Cmnd 2745.

inclusion of travelling costs and an allowance in respect of capital settlements in the formula. Amending regulations were passed in April 1995 and the Child Support Act 1995 made rapid unopposed passage through Parliament receiving Royal Assent on 19 July 1995. The changes which were proposed, fell into three broad categories, namely, those introduced in April 1995, those introduced in 1996, and administrative changes.<sup>98</sup>

The changes effected by the Child Support Act 1995 were to some extent more far-reaching than the Committee had envisaged.<sup>99</sup> A number of changes to the method of calculation of exempt income were introduced in April 1995. The first of these was what the White Paper describes as a 'broad brush provision for property or capital settlements', and sought to deal with one of the long-standing grievances about the formula, namely that it took insufficient account of the plight of parents, usually fathers, who have transferred capital, normally the former matrimonial home, to the spouse. The purpose of the broad brush approach was to meet the concerns of such parents without the need for lengthy and detailed investigation, and it was proposed that the transferor parent should be entitled to a further allowance calculated according to the value of the property which he has transferred.<sup>100</sup> The second change was another broad-based allowance to take account of high costs of travel to work.<sup>101</sup> The third major change introduced in April 1995 related to housing costs. Prior to this, housing costs were part of a person's exempt income, but they were limited to the costs of that person and his natural children only; where a parent has a partner living with him, a deduction was made from the actual housing costs to reflect the fact that part of those costs relate to the partner. This was clearly highly artificial and bore little relation

---

<sup>98</sup> See Roger Bird 'Newline .. Child Support; Reform or Tinkering?' (1995) 25 *Family Law* 112.

<sup>99</sup> See Harlow (1999) 26 *Journal of Law and Society* 150 at 167. Section 4(10) Child Support Act 1991.

<sup>100</sup> No account is taken of any transfer the value of which is less than £5000. Transfers greater than this be divided into three bands, namely, £5000 to £9999, £10,000 to £25,000, and over £25,000. Each band has a specific allowance attached to it.

<sup>101</sup> This came into operation when the 'straight line' distance between the employee's home and place of work was more than 150 miles per week. In such cases an allowance of 10 pence per mile was made for the distance above 150 miles. For example, a person who travels 300 miles to and from work every week will receive an allowance of £15 (150 miles at 10 pence) to be added to his exempt income. This will be the same, regardless of the method of transport used.



to reality, and that fact was now recognised. Reasonable housing costs were now allowed in full. Finally, changes were introduced to ensure that an absent parent is left with at least 70% of his net income; thus, no one is assessed to pay maintenance of more than 30% of his net income.

An interim assessment may be imposed where an absent parent fails to provide sufficient information for an assessment to be made. Apparently, some wealthy parents found it cheaper to pay a permanent interim assessment than to pay what would be a proper assessment based on their income. From April 1995 where a child support officer believed that this was the case, he was able to estimate the level of income, using his powers of inspection, and make an assessment using a revised exempt income calculation. This does not make allowance for housing costs nor any other allowances except the personal allowances. Once an assessment has been made, either parent is able to apply for a departure from the assessment. The cases where application for a departure may be made fall into the following broad classes.<sup>102</sup>

(a) *Applications by the absent parent where there was no court order or written maintenance agreement before April 1993*

Two conditions had to be met; first, the absent parent had to show that because of the special circumstances of the case, he faces specific additional expenses not taken into account in the formula. These additional expenses were tightly defined by the legislation, but it appears that they will include exceptionally high costs of travel to work beyond those allowed in the formula, high costs of travel to maintain contact with the child, particular expenses arising out of sickness or disability, in exceptional circumstances the costs of caring for step-children, and certain debts of the former relationship between the parents. Secondly, a departure was only to be allowed when this would be fair to both parents, taking account of their circumstances and the welfare of the child. It was also said that there will be explicit provisions to ensure that the interests of taxpayers are taken into account; one awaits these with interest.

---

<sup>102</sup> See Roger Bird 'Newslines ... Child Support: Reform or Tinkering' (1995) 25 *Family Law* 112 at 113.

(b) *Applications by the parent with care*

The grounds on which a custodial parent with care might apply appear to be, essentially, cases where it is being alleged that the absent parent has 'played the system' or otherwise presented a false or misleading picture. Examples given include a parent whose assets and/or lifestyle are inconsistent with his alleged low level of income, a parent who has deliberately created excessive housing costs, a parent whose housing costs should be or are being met by his partner, and a parent whose travel to work costs have been deliberately created. In addition, where a parent with care has assessable income, the grounds available to the absent parent, as set out above, will also be available to her.

(c) *Cases where maintenance agreements were made before April 1993*

Where a maintenance agreement was made before April 1993, a departure may be allowed to take account of new financial or family commitments from which it would be unreasonable to expect the absent parent to withdraw.

A system of maintenance credits from April 1997 was proposed. Under this scheme, parents with care who are on income support might take up work for more than 16 hours per week and receive a maintenance bonus from the government of an amount up to £1000.

The office of the Independent Case Examiner (ICE) was instituted. The first ICE, began investigating cases in April 1997. It was intended that the ICE be an impartial referee between the CSA and the client.<sup>103</sup> The ICE will look at complaints about how the CSA has handled the case. Complaints might also be made to the Parliamentary Commissioner for Administration (the

---

<sup>103</sup> The CSA complaints procedures must first be utilised, which requires the unhappy client to complain first to the CSA customer services manager, and then to the chief executive. The complaint about the decision of the child support officer can also be challenged, and review procedures are set up for those decisions to be reviewed. See discussion by Emma Knights, 'Child Support Update' (1997) 27 *Fam. Law* 345.

Ombudsman).<sup>104</sup> It was hoped that the new complaint procedures would be quicker and reduce the number of dissatisfied clients. Courts are given limited powers to make or vary orders for maintenance of children.<sup>105</sup> Those situations where courts might make or vary orders continued as they had existed since 1991, namely:

- (i) the CSA has no jurisdiction because one of the three parties (child, person with care, absent parent) is not habitually resident in the UK;<sup>106</sup>
- (ii) the child is not an adopted or natural child of both parents;<sup>107</sup>
- (iii) the child is between 17 and 19 years old, and not in full-time education;
- (iv) the child is 19 years old or over;
- (v) in all the circumstances of the case, the assessment formulas achieve a figure that is too low, and there should be considered a 'top up' assessment, a court might consider the application, provided the assessments have been done and are presented to the court;<sup>108</sup>
- (vi) where the child is, or will be receiving instruction at an education establishment, or receiving training for a trade, and the application is made solely for the purpose of requiring the person making the order to meet those education or training expenses, a court might hear the application;<sup>109</sup>

---

<sup>104</sup> Cases before the Ombudsman take on average one year before a decision is reached.

<sup>105</sup> Section 8(3) provides that 'in any case where subsection (1) applies, no court shall exercise any power which it would otherwise have to make, vary or revive any maintenance order in relation to the child and absent parent concerned'.

<sup>106</sup> Child Support Act 1991, s 44.

<sup>107</sup> A qualifying child under the Act does not include the 'child of the family' provisions of s52 of the Matrimonial Causes Act 1973. Where a child of the family is a child of one party, but not the other, an application must be made to the court to determine the appropriate level of maintenance.

<sup>108</sup> Child Support Act 1991, s 8(6).

<sup>109</sup> Section 8 (7). District Judge Roger Bird notes that the section might also include orders for accommodation charges, travelling expenses, or the provision of special clothing, books or computer equipment. The expense must be directly attributable to the provision of the education or training. See Bird, *Child Maintenance*, 3rd edn (Family Law), (1996), 142.

- (vii) where the child is disabled or blind, the court might hear an application for maintenance,<sup>110</sup>
- (viii) where the application concerns making an order against a person with care of the child, only a court might hear the application.<sup>111</sup>

#### 8.6 *Compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms by the Child Support Agency*

The British government's plan to make the European Convention on Human Rights part of its domestic law, marks a radical change of approach to traditional thinking on how best to protect the rights and freedoms of British citizens. The view was formerly that freedoms were properly protected by a democratically elected parliament and that they existed unless and until they were expressly abrogated by common law or legislation. Furthermore, it was considered that to adopt a written constitution, as in France and the USA, would endanger underlying liberties since only those listed would gain recognition.<sup>112</sup> The government decided that it is not enough merely to assert the theoretical existence of citizens' fundamental liberties, but their constitutional rights require formal guarantees and direct modes of protection.<sup>113</sup> In terms of the Human Rights Act 1998, arrangements will be made enabling individuals to invoke their Convention rights in the domestic courts in England, rather than having to apply to Strasbourg. It is unlawful for a 'public authority' to act in a way which is incompatible with Convention rights. This means that all arms

---

<sup>110</sup> The Child Support Act 1991 provides that in the case of disabled or blind children mechanisms outside those set out in the Act may be used, and allows the court to exercise its jurisdiction with regard to setting appropriate levels of maintenance even if a disability living allowance is in respect of the child. Section 8 (8). A disabled child is one who is blind, deaf or dumb, or substantially and permanently handicapped by illness, injury, mental disorder or congenital deformity or such other disability. Section 8 (9).

<sup>111</sup> Section 8 (10). It is difficult to conceive a case where the person caring for the child has to pay maintenance to the absent parent, but the provision is available if applications are made.

<sup>112</sup> The United Kingdom's approach to protecting rights and the arguments for and against introduction of a Bill of Rights are discussed by D Feldman. *Civil Liberties and Human Rights in England and Wales* (Oxford: Clarendon Press 1993) 60-88. See also C Gearty 'The United Kingdom' in C Gearty (ed) *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (Dordrecht: Martinus Nijhoff, 1997, 1997). Gearty, at 65-83, provides a comprehensive discussion of the legal and political background to the campaign to incorporate the Convention. See also 84-103 for a discussion of the decisions reached by the European Court of Human Rights involving the United Kingdom.

<sup>113</sup> *The Human Rights Act 1998*, not yet in force. See Jane Fortin 'Rights Brought Home for Children' (1999) 62 *The Modern Law Review* 350.

of government will be forced to consider the human rights of all those affected by their operations. The new system will enable an individual to apply to the domestic courts, arguing that the government or any public authority is infringing his or her rights under the Convention and that he or she is a victim of that unlawful act.<sup>114</sup> If the court considers the claim to be legitimate, it may grant 'such relief or remedy, or make such order, within its powers as it considers just and appropriate'.<sup>115</sup> In some cases, the infringement will be attributable to the terms of primary legislation, which itself takes no account of the Convention right or rights claimed. In such a case, the courts<sup>116</sup> will be empowered to declare that legislative provision incompatible with the terms of the Convention.<sup>117</sup> It will then be for the government and parliament to put matters right if they choose, through a 'fast-track' procedure established to amend the law as swiftly as possible, to bring it into conformity with the Convention.<sup>118</sup> The common law will also be open to challenge, since like any other public authority, the courts must also refrain from acting 'in a way which is incompatible with a convention right'.<sup>119</sup> Consequently, if litigants can satisfy the courts that the existing principles of the common law infringe their Convention rights, the courts must adjust those principles through their decisions, in a way that ensures compatibility.

It seems that some of the decisions made by the CSA could well be open to objection in the European Court of Human Rights, on the basis that there has been a breach of Article 8 of the

---

<sup>114</sup> Section 7 (1) of Human Rights Act (HRA) 1998.

<sup>115</sup> Sections 8 (1), 8(2) and (3) makes clear that the remedy might include the award of damages.

<sup>116</sup> The power to make such declarations is limited to the House of Lords, Court of Appeal and High Court: *ibid* section 4 (5) of HRA.

<sup>117</sup> That is by making a 'declaration of incompatibility': *ibid* section 4 (2).

<sup>118</sup> 'Remedial action' will then be taken (see section 10 and Sched 2) by the government minister taking responsibility for that particular piece of legislation, designed to ensure that it is amended speedily to remove the incompatibility in question. Amending legislation should be put in place within 120 days - see Sched 2 para 4 (4).

<sup>119</sup> See sections 6(1) and (3).

Convention.<sup>120</sup> The text of Article 8 is as follows:

- (i) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (ii) There shall be no interference by a public body with this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of crime, for the protection of health or morals, or the protection of the rights or freedom of others.

Such a claim might be made in those cases where, prior to the decision by the CSA to require higher payments from the absent father, there had been a clean break settlement at the end of the marriage. Such settlements had been intended to enable former spouses 'to put the past behind them and to begin a new life which is not overshadowed by the relationship which has just broken down'.<sup>121</sup> Although such views have lost much of their force since the Children Act 1989 and the emphasis on continued responsibility of both parents for children of a former marriage, courts have continued to be reluctant to interfere with clean break settlements. The CSA, however, appeared to have the authority to overrule these arrangements when making an assessment against an absent parent. Another argument for a breach of Article 8 would be that a decision by the CSA requiring a man to make substantially increased maintenance payments to the children of his former family could represent an obstacle to his ability to provide for the material well-being of his new family. As such, the decision by the CSA would constitute an interference with his 'right to respect for ... family life'.

However, if Article 8 could be relied upon, it is questionable whether it would be appropriate to provide relief in the particular context of claims against decisions of the CSA. The wide powers

---

<sup>120</sup> See Garry Bastin 'Europe and the CSA' (1996) 26 *Family Law* 678. In terms of the new Human Rights Act 1998, any existing legislation considered by the courts to be incompatible with children's rights under the European Convention will be capable of swift amendment. New legislation will also be drafted with Convention rights firmly in mind.

<sup>121</sup> See *Minton v Minton* [1979] AC 593, per Lord Scarman.

of the CSA are bestowed upon it by the Child Support Act 1991. Provided the CSA does not act *ultra vires*, it is 'in accordance with the law' and, perhaps, for a purpose which is 'necessary in a democratic society ... for the protection of the rights or freedom of others'. This may mean that a claim might be defeated on the ground that any interferences by the CSA are justified under the exceptions in the second paragraph of Article 8.<sup>122</sup>

It seems likely that a claim against an unreasonable assessment by the CSA might be successful by demonstrating that a breach of Article 8 occurred. Even where the CSA can be shown to have acted in accordance with UK law, it might be judged to have stepped outside the acceptable limits of the rule of law in interfering with a citizen's right to provide for the needs of a family. The European Convention relates only to civil and political rights.<sup>123</sup> The Articles and Convention case law reinforce the common view advocated by most legal systems throughout the world that the value of family life lies in its privacy from state interference; furthermore, that family privacy involves parental autonomy. Incorporation of the Convention may encourage the *laissez-faire* approach adopted by English law regarding the regulation of family life as evidenced by the Children Act 1989 which promoted the assumption that responsible parents would automatically promote their children's interests without legislative encouragement, but was also intent on reinforcing the privatisation of family life, by withdrawing the law from areas where it had previously had some influence.<sup>124</sup>

---

<sup>122</sup> In the case of *Malone v UK* (1984) Series A, no 82, the ECHR stated that the words 'in accordance with the law' had a wider meaning than simply the domestic law. The phrase 'also relates to the quality of the law, requiring it to be compatible with the rule of law'. That meant that 'the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to ... interference with the right to respect for private life and correspondence.

<sup>123</sup> By contrast, the UN Convention on the Rights of the Child not only provides children with fundamental freedoms, such as freedom of expression, but requires resources available to fulfil their social and economic rights. It sets out in detail the extent to which governments are expected to take positive steps towards promoting these rights, for example by guaranteeing their right to the highest attainable standard of physical and mental health, thereby enabling them to take full advantage of their civil and political rights.

<sup>124</sup> See Andrew Bainham 'Changing Families and Changing Concepts: Reforming the Language of Family Law' in *The Changing Family* ed. John Eekelaar and Thandabanthu Nhlapo (1998) 153 at 155.

## 8.7 Conclusion

### a) *The Child Support Agency - a monumental failure?*

The main features of the child support scheme which were difficult to administer were, firstly, that the formula was based on income support levels which failed to take into account the liable parent's actual needs, including those of any new family. A second problem was that maintenance was deducted from benefit, subject to a small disregard, giving the impression of 'putting the Treasury first'. All custodian parents claiming benefits had to use and co-operate with the CSA and a custodian parent who refused to co-operate could lose a substantial proportion of benefit unless she or he could demonstrate that 'harm or undue distress' was likely to ensue. All these points had been raised during consultation or lobbied on during the parliamentary process.<sup>125</sup> But despite efforts of the CSA, it seems that dissatisfaction was regularly revealed: one survey of single mothers reported regular breaches of confidentiality, a multiplicity of complex forms sent, letters unacknowledged, difficulty in finding out how cases were progressing, delay in issuing maintenance enquiry forms, and in carrying out assessments of fathers' maintenance liabilities.<sup>126</sup> There was a serious lack of liaison between regions and centres and a high degree of misinformation as to the effects of non-co-operation on mothers, which remained uncorrected by letters and even interviews. The study concluded from the experience of these families that the Agency was unlikely to be more successful than the previous court-based maintenance system.

From its implementation, the Child Support Act faced widespread condemnation by members of most political parties, various protest groups, professional bodies, and family members.<sup>127</sup>

---

<sup>125</sup> Garnham and Knights (*supra*). The CSA attempts to be user friendly by advertising *CSA, For parents who live apart* (published annually) and producing a free guide and a Charter, holding itself out as able to answer telephone inquiries within ten seconds, to reply to letters within ten working days, to cut interview waiting time to twenty minutes, and maintain full confidentiality at all times. Client satisfaction surveys are carried out. See *Child Support Agency National Client Satisfaction Survey 1993* (1994).

<sup>126</sup> K Clark, G Craig, C Glendinning with M Thompson, *Losing Support: Children and the Child Support Act* (1994). See too generally, John Eekelaar and Mavis Maclean, *The Parental Obligation* (1997).

<sup>127</sup> See Lucie Carrington 'Forgotten Family' (1995) Issue No 1055 *Community Care* pp 14-15.



Contrary to its aims, and despite several policy amendments, including the Child Support Act 1995, it continues to be accused of inflexibility, inequity, and inefficiency.<sup>128</sup> Its detractors claim that these deficiencies mean that it benefits neither caring parents, absent parents nor the children whom it was, in theory, primarily intended to assist.<sup>129</sup> The inflexibility and application of the CSA's formula also illustrates its attempt to typify family and social situations which are clearly complex and based on wholly individual circumstances.<sup>130</sup>

A sample of CSA 'customers' taken by the Agency itself between April 1994 and February 1995 indicated that seventy-seven per cent of custodian parents were receiving no child maintenance, compared with the estimate in the Government's original White Paper *Children Come First* of seventy per cent. If this sample is representative, then the CSA is less effective in its assistance to caring parents than the previous system operated by the CSA. The findings of a recent study conclude that the CSA's intervention has caused family relationships in the sample, in most circumstances, to deteriorate.<sup>131</sup> There are fundamental charges, from custodian and liable parents, of injustice by the Agency. Treasury aims are still perceived to be more important than

---

<sup>128</sup> Although the English Child Support Act was modelled on the Australian Child Support (Assessment) Act 1989, the English legislation takes no account of clean break agreements already reached by the divorcing couple. See Ruth Deech 'Property and Money Matters' in *Divorce: Where Next?* (1996) ed M Freeman (Dartmouth Publishing Company) (Aldershot) 89 and 92). Seldom has there been such a hated piece of legislation.

<sup>129</sup> See Ruth Deech *supra* at 93. The disregard for clean break settlements would appear to have been one of the most contentious aspects of the Child Support Act. See *Crozier v Crozier* [1994] Fam 114.

<sup>130</sup> See Gill Gillespie 'Child Support - The Hand that Rocks the Cradle' (March 1996) *Family Law* 162.

<sup>131</sup> The head of the CSA has blamed the huge rise in uncollected maintenance on absent fathers' and mothers' refusal to co-operate, admitting that even custodian parents were not co-operating. Some of the reasons behind parents' non-co-operation have been investigated. The Government claimed that the Child Support Act 1995 addressed the needs of all groups affected by the CSA. One of the aims of the Act was to increase the incentives for lone parents on benefit to find work, via credit, of £5 per week, to be paid if and when they take work of 16 hours per week or more. The White Paper stated that 'this will provide a substantial incentive to take up work and will ease any financial problems during the transition', contributions to these 'funds' have a ceiling of £1000, a figure which represents the average cost of child care (16 hours per week) for one year. Further 'benefits', such as taking 'clean break orders' into account to a limited extent, only apply to orders made prior to April 1993. See Emma Knights 'Child Support Update' (1998) October *Family Law* 606. See too Rebecca Boden and Mary Childs 'Paying for Procreation: Child Support Arrangements in the UK?' (1996) 4 *Feminist Legal Studies* 129 at 157.

providing real benefits to children, which was one of the few issues serving to unite parents in their opposition to the 1991 Act. In addition, questions concerning the validity and longevity of the court system with regard to divorce settlements and, perhaps more significantly, contact and residence issues, have been raised by all parents. Several custodian parents still fear violence due to further contact with absent parents, but the fear of violence was not usually considered to be an adequate reason for not supplying information. Furthermore, many liable parents have considered giving up their jobs to be financially advantageous, despite the fact that this would probably mean less contact with their children due to the unavailability of finances. This has resulted in a minimal maintenance assessment, leaving the custodian parent in no better financial position and the liable parent much better off. Concern was further expressed over the 1991 Act's long term grip over families. Children stated that they were distressed at the deterioration in 'old' and 'new' parental relationships with regard to finances and access.<sup>132</sup>

It has been argued that if any child support officer does not have regard to the welfare of any child likely to be affected by his decision,<sup>133</sup> a decision will be made which is ultra vires, unlawful, void and of no effect,<sup>134</sup> for example, if the custodian parent and the child were no better off after assessment because of the deduction from income support, but the second family were worse off and the liable parent was prevented from visiting the child because of reduced finances. Furthermore, criticism has been levelled at the fact that arrangements such as the national provision of long-term child care and maternity/paternity benefit,<sup>135</sup> which are provided in

---

<sup>132</sup> Several of the subjects were approached to take part in the CSA'S first Client Satisfaction Survey (published in 1994). One of the main concerns to be noted by the parents who took part in this survey was that the quality of contact with their children had deteriorated due to the perception that their children had become political pawns, either of the State and/or their ex-partners. One subject who did not have a correct assessment calculated by the CSA until 2 years after the original incorrect assessment, had a lengthy meeting with local CSA staff. After agreeing to pay arrears at a mutually agreed amount per month until 2115, he was then told that in the event of his death the Secretary of State was entitled to and would make a claim on his estate to collect the remaining arrears. This statement was accompanied by advice to the effect that the subject should transfer capital to his new partner or parents to avoid this.

<sup>133</sup> Section 2 of Child Support Act 1991.

<sup>134</sup> See too Paul Bloom 'Child Support - A Personal View' (1994) *Family Law*.

<sup>135</sup> See Sandra Fredman *Women and the Law* (1997) 209-217.

Sweden,<sup>136</sup> and which might enable and encourage joint financial and caring parenting, continue to take second place to the government's short-term financial considerations.

b) *Green Paper - reform?*

In July 1998 a Green Paper was published,<sup>137</sup> which promised a new formula based on the flat-rate principle to try to make assessment simpler and quicker. The government proposes to alter the formula for child support cases making the amount of support payable a percentage of the absent parent's net income, rising in proportion to the number of children. The present formula has been deemed to be too lengthy and complicated. Although the Child Support Agency has been hailed as 'the greatest failure of public administration in the present century'<sup>138</sup> the Green Paper does not propose to do away with it. The 1998 Green Paper<sup>139</sup> acknowledges that 1.8 million children currently receive no money at all from 'absent' parents. Seventy per cent of single mothers are acknowledged to avoid invoking the procedure (which now takes over six months to process some one-third of all applications.) The Green Paper concedes that child support officers spend ninety per cent of their time assessing maintenance, and only ten per cent collecting it, but a return to the courts is rejected.<sup>140</sup> The 1998 Paper states that it will replace the complications of the current formula with a simpler system aimed at providing an excellent service for all parents who use it.<sup>141</sup> The present formula is described as 'inflexible, rigid ... complex, unclear and very difficult to

---

<sup>136</sup> See David Bradley 'Financial Support for Children - The Swedish Example' (1990) *Family Law* 349.

<sup>137</sup> Cmnd 3992, *Children First: a new Approach to Child Support*.

<sup>138</sup> Dr Stephen Cretney as cited by Roger Bird 'Benchmarks - a guide through the changing maze of the Government's Child Support System' (1998) 95 *Law Society's Gazette* 33.

<sup>139</sup> Cmnd 3992.

<sup>140</sup> At page 10.

<sup>141</sup> At page 3 and again at page 23.

understand'.<sup>142</sup> The formula is also perceived as unfair.<sup>143</sup>

The decision not to return to a court-based discretionary system means that any changes must be limited to the formula and its exceptions. The proposed formula is to be comparatively simple. For non-resident parents whose net earnings are over £200 per week, child support will be fifteen per cent for one child, twenty per cent for two, and twenty-five per cent for three or more. Those earning between £100-£200 will lose lesser proportions of their incomes, and those whose incomes are under £100 will pay a fixed amount. As regards the non-resident parent's second family, it is undecided as to whether: (a) to deduct the same percentage per child in calculating his net earnings; or (b) to split maintenance liability equally amongst all the children of his first and second families. On the meaning of income, the paper is undecided as to the position of pension contributions and overtime and, for the self-employed, whether assessment should be on the basis of the most recent year's taxable profit. The 1998 paper suggests that its approach will lend itself to the production of read-off tables available at such as libraries and Citizens Advice Bureaux.<sup>144</sup> As for exceptions to the formula, the policy of *Children First: a new approach to child support* seems to be that, as the new formula is more likely to do justice than before, fewer exceptions will be needed.<sup>145</sup>

The Government believes that the scope for appeal should be correspondingly more limited than

---

<sup>142</sup> Over 100 pieces of information can be required to make a full assessment... any one change of circumstances can lead to a change in the assessment - and the process never catches up with itself.

<sup>143</sup> The carer allowance 'intended to provide for the children's need for adult care [is seen] as being paid specifically for the parent with care rather than the children'. This, together with the requirement to know the income of new partners, 'give people further excuses not to comply'. Finally, the post-1993 attempts at rectification (such as the 'departures' scheme), 'were very much bolted onto a system that was already too complex...and compounded its...obscurity'. (At pages 23-4).

<sup>144</sup> at p 24.

<sup>145</sup> It appends examples whereby a non resident parent with a net income of less than £101.99 per week with one child from his first family and three or more in his second (if any) would pay £5. At the other extreme, someone with a net income of £400, three children by his previous partner and none with his second, would face a maintenance obligation of £100.

before.<sup>146</sup> Payment not made direct to the parent with care will be made to the CSA either by direct debit/standing order or, non-consensually if need be, direct from salary.<sup>147</sup> It has been argued in support of the existing scheme that certain features of the present Child Support Act are working<sup>148</sup> and should not be hastily abandoned. Those parents who are not within the benefit system are able to contract out of the system by the mechanism of entering a consent order in the court.<sup>149</sup> Secondly, it is argued that the current formula is responsive to many individual circumstances of the particular case. These include a minimum target figure for the support of the number of children in question ('the maintenance requirement'); the income of both parents; the minimum cost of support of the parents in question; their housing costs; the effect of any earlier capital settlement; their disability; their responsibilities for other children; shared care arrangements; their travel to work costs.<sup>150</sup> The new scheme by contrast takes account only of the income of the non-residential parent, the number of children in question, responsibilities for other children, and the question of shared care. Although a tribunal may set a different level of maintenance in certain exceptional circumstances, and parents may apply for a different level of maintenance where they already provide some support for their children, the new scheme fails to bring into account the income of the parent with care and there is no maximum income on which child support can be assessed.

---

<sup>146</sup> Where there are 'special expenses' (At page 27) a tribunal will be allowed to set a different level of maintenance eg disabled children in the second family, the cost of maintaining contact with the children of the first family, and meeting the latter's housing costs.

<sup>147</sup> A start has already been made by Benefits Agency staff in helping clients with child support applications when dealing with income support claims, and software is being produced to enable child support, income support and housing benefits to be dealt with together. These links with the Department of Social Security have persuaded (At page 32) the Government not to transfer responsibility for child support to the Inland Revenue.

<sup>148</sup> See Nicholas Mostyn 'The Green Paper on Child Support - Children First: a new approach to Child Support' (1999) 29 *Family Law* 95 at 97.

<sup>149</sup> Sections 8 (3A), 8 (5) and 4 (10) of the 1991 Act (as amended).

<sup>150</sup> (a) travel to work costs; (b) contact costs; (c) illness or disability costs; (d) pre-separation debts; (e) pre-April 1993 commitments; (f) costs of supporting other children; (g) capital settlements; (h) non-income producing assets; (i) diverted income; (j) lifestyle inconsistent with income; (k) unreasonably high housing costs; (l) unreasonably high travel costs; (m) failure of a partner to contribute to housing costs; (n) unreasonably high travel costs.

Thus, although the Green Paper repeatedly states that the new scheme will be more beneficial to parents with care than under the old, it is silent when it comes to comparing the figures paid under the existing scheme with the new scheme. Furthermore, it does not acknowledge that there will be very substantial reductions in payment in almost all cases. In non-benefit cases, this will be to the detriment of the parent with care and the children. In benefit cases, the taxpayer will bear the loss, since not only will there be less child support collected, but the introduction of the £10 maintenance disregard will remove that benefit from those citizens paying tax who are already supporting their own children. In almost every case, there will be a substantial reduction in child support receipt in the hands of the parent with care, or the taxpayer, as the case may be. Only in those cases where the parent with care earns very significant sums will the new scheme in fact provide the same or increased payments than before.

Under the existing scheme there is a maximum assessment dependent upon the age and number of children in question.<sup>151</sup> In Australia, there is a ceiling of assessable income of two and a half times average national earnings. The Green Paper does not propose any maximum income on which child support may be assessed, which could lead to difficulty. A child has a right to be maintained by each of the parents and an expectation to share in each of his parents' income. Failure to impose a maximum might lead to blatant wealth distribution without regard to need, or to the precept of each parent discharging a legal obligation to maintain in fair proportions, amounting to disguised spousal maintenance without any judicial determination, and might be a breach of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Green Paper has much to commend it by its suggestion of improvements in the administration of the CSA and attempting to make the system more transparent in its workings. However, a wide departures system will be required to enable the special circumstances of the individual case to be addressed and this will inevitably lead to the same difficulties as those experienced with the existing Scheme. Perhaps the time has come for the system to be jettisoned in favour of a Family

---

<sup>151</sup> Thus for the case where there is one child aged under 11 the maximum assessment is £109 per week. This maximum assessment would be reached where the income of the paying party was approximately £47 000. This maximum can be topped up by the court.

Court determination of maintenance with the use of discretionary guidelines<sup>152</sup> and use of the CSA merely as an enforcement mechanism.<sup>153</sup>

---

<sup>152</sup> See Chapter 10.

<sup>153</sup> As suggested by Lord McGregor 526 HL Debs. col 790 (25 February 1991). See too Social Security Select Committee, First Report The Operation of the Child Support Act HC (1993-4) 69.

## CHAPTER 9

### NAMIBIAN MAINTENANCE LAW AND ITS ENFORCEMENT

#### 9.1 Introduction

Namibia is an African country facing similar problems to South Africa. Namibia inherited its legal system from the previous colonial administration. In 1990, the independence Constitution was declared the supreme law: the fundamental rights and freedoms, as enshrined in chapter three of the Constitution, are thus the indisputable yardsticks of all governmental acts. However, the Constitution provided generally for the law in force at the date of independence to remain in force, until changed in accordance with the procedures set out by the Constitution.<sup>1</sup> Not all statutory changes enacted in South Africa in the years before independence were extended to 'South West Africa' by the South African government or the South West African administrative bodies.<sup>2</sup> Neither the South African Divorce Act,<sup>3</sup> nor the Matrimonial Property Act,<sup>4</sup> were made applicable to Namibia. Thus, the abolition of the common law concept of marital power of the husband over his wife and the unification of the matrimonial property law of white and black marriages did not affect Namibia.<sup>5</sup> Indigenous family law had been only recognised in a limited way.<sup>6</sup> Legal terminology did not refer to

---

<sup>1</sup> Art. 140. The Constitution stipulates that common and customary law should only remain valid to the extent to which that law "does not conflict with this Constitution and any other statutory law" (Art. 66 (1)).

<sup>2</sup> See S Bekker and MO Hinz *Marriage and Customary Law in Namibia* (1995) (Windhoek)(CASS). Namibia was formerly known as 'South West Africa', prior to 1990.

<sup>3</sup> 70 of 1979.

<sup>4</sup> 24 of 1984.

<sup>5</sup> The concept of marital power was only recently abolished in Namibia. Civil marriages, ie marriages in accordance with the Marriage Act 25 of 1961, between 'natives' and conducted north of the so-called 'police zone' are automatically out of community of property, unless the parties to the marriage declare their wish to be married in community of property. Civil marriage conducted within the 'police zone' are automatically in community of property unless the parties decide otherwise by antenuptial contract.

<sup>6</sup> See MO Hinz 'Family Law in Namibia: The Challenge of Customary and Constitutional Law' in *The Changing Family* ed. John Eekelaar and Thandabanthu Nhlapo (1998) 139.



customary law marriages, but to customary unions<sup>7</sup> which never enjoyed the status of recognised marriages.<sup>8</sup> The Constitution changed this<sup>9</sup> and customary law was recognised as part of the law of the land and at the same level as common law.<sup>10</sup> Neither the view of Roman-Dutch common law being the predominant law, nor the corresponding one of customary law being only subsidiarily applicable will stand up to constitutional scrutiny: common law and customary law represent distinct legal systems with the same degree of validity and recognition.

The South African Maintenance Act<sup>11</sup> (the Act) was made applicable to Namibia in 1970. The administration of the Act was transferred to 'South West Africa' (Namibia) in 1977,<sup>12</sup> which had the effect of 'freezing' the Act as it stood at that date. As in the case of all such South African statutes, South African amendments after the date of transfer applied to 'South West Africa' only if this was explicitly stated. The maintenance procedure is thus similar to the South African procedure before the amendments to the South African Maintenance Act.

It became apparent through community dissatisfaction expressed *inter alia* to the Namibian Law Commission through its Women and Law Committee, Women's Groups, the Department of Women's Affairs and the offices of the Legal Assistance Centre that the maintenance rules and procedures were largely inadequate and ineffective. Consequently, the Commission initiated an investigation with the aim of addressing the shortcomings through law reform. During 1993, the Women and Law Committee of the Commission identified the procedure in

---

<sup>7</sup> Cf. Section 17 (1) of the Native Administration Proclamation 15 of 1928.

<sup>8</sup> S Bekker and MO Hinz *Marriage and Customary Law in Namibia* (1995) 13ff.

<sup>9</sup> Art. 4 (3) (b) and Art. 12 (1) (f). Cf *Ndsiro v Mbandera Community Authority*, 1986 2 SA 532 (SWA); *Pack v Mundjuna* 1989 3 (SA) 556 (SWA); *Kakujaha v Tribal Court of Okahitua*, Supreme Court of South West Africa of 20 March 1989 (unreported).

<sup>10</sup> Cf Art. 66 of the Constitution.

<sup>11</sup> 23 of 1963.

<sup>12</sup> In 1977, the Act was administered in part by the Minister of Justice and in part by the Minister of Bantu Administration and Development. Therefore, the administration of the Act was transferred to SWA by both the Executive Powers Transfer Proclamation (AG. 3/1977, as amended), dated 28 September 1977, and the Executive Powers (Justice) Transfer Proclamation (AG. 33/1979, as amended), dated 12 November 1979.

obtaining and executing maintenance orders as a priority for law reform. At about the same time, the Ministry of Justice forwarded some proposals on this issue to the Commission for its comments. The Legal Assistance Centre in Windhoek was willing to conduct research in this field and to recommend the necessary reforms. Discussions were held by the Legal Assistance Centre, the Women and Law Committee, maintenance officers and magistrates, persons in the Ministry of Justice who are involved in the administration of the maintenance courts, the Office of the Prosecutor General and lower courts in the Ministry of Justice. The Legal Assistance Centre embarked on field research encompassing in various regions of the country. The research involved an examination of maintenance court files; interviews with individuals and maintenance court personnel; group discussions, public meetings and consultations with community members.

During 1995, the Legal Assistance Centre published a report entitled 'Maintenance, a Study of the Operation of Namibia's Maintenance Courts'. The report covered the legal background, field research, recommendations and a draft bill. The Minister of Justice handed this report to the Commission and its Women and Law Committee for review during late 1995. In many cases, the amendments introduced to the South African maintenance law were followed, where they were considered useful. In the light of the reciprocal enforcement of maintenance orders between Namibia and South African, uniformity was encouraged. Additional amendments provided for unique Namibian situations. The various consultations and the research results indicated that the reforms were required, not so much in the substantive legal rules, but more in the procedural rules and the manner in which these substantive rules are enforced. For this reason, not much comparative legal research was done. Practical solutions had to be found for the local problems experienced by maintenance officers, magistrates, complainants and respondents.

It became apparent that a lack of practical experience and direction contributed to the general inefficacy of the maintenance system. A comprehensive set of regulations providing guidelines for each step in the maintenance process was considered essential and required from the Ministry of Justice without delay. However, it was acknowledged that many of the problems could not be addressed through amendments to the Act nor by the drafting of rules. Many problems are caused by both the social perceptions of the role and the purpose of maintenance

courts and the lack of dedication of maintenance officers and officers serving and executing maintenance processes.

## 9.2 *A summary of maintenance procedure in Namibia*

The maintenance procedure in Namibia follows the same procedure as South Africa, since Namibia is still bound by the South African Maintenance Act.<sup>13</sup> All the relevant sections of that Act bind the Namibian Courts.

As in South Africa, the Maintenance Act<sup>14</sup> provides that the court may in addition to or in lieu of any penalty, grant an order for the recovery from the convicted person of any amount he or she failed to pay in terms of a maintenance order. Such an order shall have the effect of a civil judgement of that court and shall be executed in the prescribed manner, which means by attachment of property or through debt recovery procedures. Where a court acquits the accused and finds that he or she failed to comply with the order because he or she was financially unable to make such payment, the court will convert the criminal hearing into a new maintenance enquiry where all circumstances will again be considered before an order is made. As in South Africa, every magistrate's court in Namibia may function as a maintenance court.<sup>15</sup> However, in Windhoek, because of the volume of maintenance cases, there is a maintenance officer who deals exclusively with maintenance cases and a magistrate is designated especially to hear maintenance cases. In other parts of the country, prosecutors perform a dual role as maintenance officers and magistrates, who handle other cases, also preside over maintenance enquiries.<sup>16</sup>

---

<sup>13</sup> 23 of 1963.

<sup>14</sup> Section 11 (1).

<sup>15</sup> See section 1 of Maintenance Act 23 of 1963.

<sup>16</sup> See section 2 of Maintenance Act 23 of 1963.

### 9.3 *Reciprocal enforcement of maintenance orders*

The South African Reciprocal Enforcement of Maintenance Orders Act,<sup>17</sup> allows for the enforcement of maintenance orders between Namibia and countries with which Namibia has concluded an agreement on this issue. Prior to independence, the reciprocal enforcement of maintenance orders between Namibia and a number of other countries was possible by virtue of agreements entered into between these countries and the Republic of South Africa. According to the Ministry of Justice, these agreements no longer apply to Namibia since independence.<sup>18</sup> However, maintenance orders have been enforceable between Namibia and South Africa since 10 September 1993.<sup>19</sup> The South African Act has been replaced by a Namibian Reciprocal Enforcement of Maintenance Orders Act,<sup>20</sup> which is similar to the previous statute, but which incorporates simplified and streamlined procedures for transmitting maintenance orders from one country to another. In terms of this Act, whenever it appears to any court in Namibia that a person against whom a maintenance order has been made is resident in a country which has been designated for the purposes of the Act, the court must transmit a certified copy of the maintenance order to the Permanent Secretary of the Ministry of Justice for transmission to the administrative head of the Department of Justice of the country in question for enforcement.<sup>21</sup> A similar procedure applies to an order for the attachment of wages made against a person who is resident in Namibia but receives remuneration in a designated country.<sup>22</sup>

Maintenance courts in Namibia have the additional power to hold an enquiry in terms of the

---

<sup>17</sup> Reciprocal Enforcement of Maintenance Orders Act 80 of 1963. See chapter 2 for the procedure in South African law.

<sup>18</sup> Interview with Mr Truter, Ministry of Justice, March 1994.

<sup>19</sup> Government Notice 124/1993 (Government Gazette 727).

<sup>20</sup> Reciprocal Enforcement of Maintenance Orders Act 3 of 1993.

<sup>21</sup> See section 3 of the Reciprocal Enforcement of Maintenance Orders Act 3 of 1993. The previous Act required that the maintenance order be transmitted through diplomatic channels.

<sup>22</sup> See section 8 of the Reciprocal Enforcement of Maintenance Orders Act 3 of 1993.

Maintenance Act in the absence of a respondent who is resident in a designated country.<sup>23</sup> After recording the evidence of all witnesses at the enquiry, the court may make a provisional maintenance order against the absent respondent. If the respondent supplies written consent, a final order can be made in his or her absence. Otherwise, the provisional maintenance order, together with the depositions of the witnesses at the enquiry and any information which may help to identify or locate the respondent, is sent to the Department of Justice in the designated country for confirmation by an appropriate court. Where a maintenance order has been made in a designated country against a person resident in Namibia and a certified copy of this order is transmitted to the Permanent Secretary of the Ministry of Justice, the order is registered in the maintenance court with jurisdiction over the person in question for enforcement.<sup>24</sup> Orders for the attachment of wages made in a designated country may be similarly transmitted to Namibia and registered for enforcement by the appropriate maintenance court.<sup>25</sup> Where a final maintenance order made in a designated country has been transmitted to Namibia for enforcement, the Namibian maintenance court does not have the power to discharge the order or to decide that it has lapsed. The Namibian court's powers in this case are limited to enforcement. The respondent in such a case should seek to have the order varied or discharged in the country where it was made.<sup>26</sup>

If the transmitted order is a provisional maintenance order rather than a final one, it must first be confirmed at an enquiry held in a Namibian maintenance court, following procedures similar to those applicable to enquiries held in terms of the Maintenance Act. However, if the respondent has received reasonable notice of the enquiry but fails to attend, the enquiry is

---

<sup>23</sup> See section 5 of the Reciprocal Enforcement of Maintenance Orders Act 3 of 1993.

<sup>24</sup> See section 4 of the Reciprocal Enforcement of Maintenance Orders Act 3 of 1993. There is no right of appeal against the fact of registration, as this is purely an administrative act, although a respondent could make application to have the registration set aside on the grounds that it was not properly carried out.

<sup>25</sup> Section 9 of the Reciprocal Enforcement of Maintenance Orders Act 3 of 1993.

<sup>26</sup> See *S v Dolman* 1970 (4) SA 467 (T). *S v Simpson* (1964 (1) SA 61 (N)) held that a local court could discharge a foreign order registered with that court, but the holding was based on a provision of the Reciprocal Enforcement of Maintenance Orders Act 15 of 1923 which specified that an order registered in RSA would be of the same force and effect as an order obtained in RSA. There is no analogous provision in either the current South African Act or the Namibian Act.

limited to a determination of the amount of maintenance which should be paid. At the conclusion of the enquiry, the Namibian maintenance court may confirm the provisional maintenance order, with or without a variation; remit the case to the court which made the provisional maintenance order for further evidence; or refuse to make an order.<sup>27</sup> A provisional maintenance order which has been confirmed by a Namibian maintenance court may be varied or discharged by the Namibian court in question at any time.<sup>28</sup> Appeals from such confirmation proceedings operate in the same way as appeals made in terms of the Maintenance Act.<sup>29</sup> Payments which are made in terms of a maintenance order which has been registered or confirmed in Namibia, or in terms of an order for the attachment of wages which has been registered in Namibia, must be made to the clerk of the maintenance court which registered or confirmed the order.<sup>30</sup>

A maintenance order from a designated country which has been registered or confirmed in a Namibian maintenance court can be enforced in the same way as an order made in Namibia in terms of the Maintenance Act, with one difference. Where a final maintenance order from a designated country has been registered in a Namibian maintenance court, the Namibian court does not have the power to convert a criminal proceeding in respect of non-payment into an enquiry which may result in a variation or discharge of the order.<sup>31</sup> This restriction arises because the recipient of the maintenance payments will not be available in Namibia to give evidence on this point. Thus, it appears that lack of means is perhaps the only defence to a charge of non-payment of a foreign order registered in Namibia,<sup>32</sup> although absence of the necessary *mens rea* might also qualify as a defence.<sup>33</sup> A local court has no power to order the

---

<sup>27</sup> Sections 6 and 11 of the Reciprocal Enforcement of Maintenance Orders Act 3 of 1993.

<sup>28</sup> Section 6(4)(d) of the Reciprocal Enforcement of Maintenance Orders Act 3 of 1993.

<sup>29</sup> Section 6(5) of the Reciprocal Enforcement of Maintenance Orders Act 3 of 1993.

<sup>30</sup> Section 10 of the Reciprocal Enforcement of Maintenance Orders Act 3 of 1993.

<sup>31</sup> Section 7 of the Reciprocal Enforcement of Maintenance Orders Act 3 of 1993.

<sup>32</sup> *S v Walraven* 1975 (4) SA 348 (T).

<sup>33</sup> See *S v Mngxaso / S v Polo* 1991 (2) SA 647 (Ck).

recovery of arrears which accrued in terms of a foreign order prior to the date of registration.<sup>34</sup>

#### 9.4 *State Maintenance Grants*

A limited amount of financial assistance is available to assist families with maintenance in terms of the Children's Act.<sup>35</sup> The criteria for obtaining financial assistance and the grant amounts are still governed by racially-based regulations inherited from South Africa. For all race groups other than Whites, state maintenance grants are targeted at single mothers, including unmarried mothers, widows, and women whose husbands are imprisoned or disabled. In the case of Whites, this system was replaced in 1988 by a 'family allowance' available to a husband and wife who are caring for a child born to one or both of them; a father is caring for his child but has no wife or whose wife is not living with him; or a woman who is single, divorced, widowed, or for some other reason functioning as a single parent.

The usual practice of the Ministry is to require documentary proof of eligibility for maintenance grants. For example, a single parent will be asked to provide proof that he or she has approached the maintenance court to seek support from the absent parent. A person who is unemployed will sometimes be asked to produce letters showing that he or she is actively seeking work. Proof that the children in question are attending school is also usually required. Grants are available in respect of differing numbers of children with respect to different race groups. For example, Blacks, Basters, Namas and Whites can obtain grants for a maximum of 4 children; Hereros for a maximum of 6 children; and Coloureds for a maximum of 10 children. All state maintenance grants are paid on a sliding scale, with the grant amounts varying according to the family's income.<sup>36</sup> Families who earn more than the maximum

---

<sup>34</sup> *Marendaz v Marendaz* 1955 (2) SA 117 (C) at 129; see also *S v Jones* 1987 (3) SA 823 (N) at 824.

<sup>35</sup> 33 of 1960. This act is still in force in Namibia, although in South Africa it has been largely repealed by the Child Care Act 74 of 1983.

<sup>36</sup> Like the grant amounts, the cut-off incomes vary for the different "race groups", ranging from NS650/year for a Nama family to NS11136/year for a Baster family or a White family with 4 children.

income are not eligible for financial assistance.<sup>37</sup>

Data on grant recipients during 1992-1994 is shown in the following table:<sup>38</sup>

RACE GROUP	MARCH 1992	MARCH 1993	AUGUST 1994
Coloureds	582	573	440
Basters	503	561	606
Namas	212	199	532
Blacks	915	1244	927
Whites	20	79	9
Race unknown	0	0	74
Total	2232	2656	2588

The table below illustrates the degree of disparity in the grant amounts currently prescribed for the different 'race groups'.<sup>39</sup>

STATE MAINTENANCE GRANTS Comparison of maximum grant amounts: Single mother with three children September 1994	
Namas	NS58,20/month
Blacks, excluding Hereros	NS58,91/month
Hereros	NS63,41/month
Basters	NS182,50/month
Coloureds	NS288,00/month
Whites	NS582,00/month

In July 1994, a Children's Act Workshop convened by the Ministry of Health and Social Services in Windhoek recommended that all racial disparities in the grant system should be eliminated as a matter of urgency.<sup>24</sup> Workshop participants also recommended that grants should be aimed at households with the lowest income, regardless of family composition, and that the criteria for grants should be re-defined to remove sex distinctions which might unfairly discriminate against fathers raising children on their own. At the request of the Ministry of

<sup>37</sup> Information provided by the Ministry of Health and Social Services, 1994.

<sup>38</sup> Source: Namibian Ministry of Health and Social Services.

<sup>39</sup> Source: Calculated by the Legal Assistance Centre from information provided by the Namibian Ministry of Health and Social Services.

<sup>24</sup> This Workshop was funded by UNICEF and I attended and presented a paper on the comparative position in South Africa as at July 1994.



Health and Social Services, a draft bill and regulations were prepared by the Legal Assistance Centre and Human Rights and Documentation Centre of the Law Faculty at the University of Namibia to give effect to the workshop recommendations. This proposal includes the possibility of temporary emergency assistance to a parent who is awaiting the outcome of a maintenance enquiry under the Maintenance Act, or in a situation where a maintenance order is in force but the respondent has fallen into arrears. To date this has not been implemented. A more effective system of state maintenance grants is urgently required as a support system. Improvements in the judicial system alone can never be sufficient to address situations where total family resources are inadequate to provide for the needs of the children in question.

### 9.5 *Some Research Findings*<sup>30</sup>

#### a) *Shortage of Personnel*

There seems to be a shortage of court personnel to deal with maintenance complaints in some areas, particularly outside of Windhoek. The prosecutors and magistrates who deal with maintenance outside of Windhoek are charged with other duties. Thus, in many instances, complainants are turned away because the appropriate official is elsewhere engaged and has insufficient time to take complaints or to respond to queries. In many areas, questions and investigations seem to be handled primarily by court clerks and interpreters rather than by

---

<sup>30</sup>

See Dianne Hubbard 'Maintenance, a Study of the Operation of Namibia's Maintenance Courts' (1995). During 1995, the Namibian Legal Assistance Centre embarked on field research encompassing various regions of the country by an examination of maintenance court files and interviews with individuals and maintenance court personnel, group discussions, public meetings and consultations with community members. A report was published entitled 'Maintenance, a Study of the Operation of Namibia's Maintenance Courts' under the auspices of the Legal Assistance Centre. The report covered the legal background, field research, recommendations and a draft bill. It was handed to the Women and Law Committee of the commission for review during late 1995. In many instances the amendments in the South African Maintenance laws were followed where they were useful and in the light of the reciprocal enforcement of maintenance orders between Namibia and South Africa, uniformity was stressed. Additional amendments provide for unique Namibian situations. The various consultations and the research results stated that the reforms were urgently required in the procedural law, rather than in the substantive rules. The proposed amendments do not concentrate on the rules indicating which people are liable to maintain others, but rather on the manner in which these rules are to be enforced. Practical solutions needed to be found for the problems experienced by maintenance officers, magistrates, complainants and respondents. The drafted amendments have now been incorporated into the current Act in the form of an Amendment Bill which to date has not yet been passed by the Namibian parliament.

prosecutors. The overlapping duties of prosecutors who also serve as maintenance officers also leads to scheduling problems which sometimes produce confusion and frustration on the part of the complainants. Some courts try to reserve particular days of the week for maintenance complaints, this procedure requires sufficient publication to be fully effective. All these problems arise also in the administration of the South African system.

*b) Number of children for whom maintenance is sought*

In Namibia, it seems that women generally seek maintenance for only one child.<sup>31</sup> However, it must be kept in mind that the complainants may have had more children in total than the maintenance files indicate. The files record data only for those children for whom maintenance is being sought. For example, a woman might have one child who was fathered by the respondent, as well as additional children of a subsequent relationship; in such a case, the maintenance file would include *only* data about the child fathered by the respondent. Women may seek maintenance from more than one father and men may have responsibility for maintaining the children of a number of different mothers.

---

<sup>31</sup> Maintenance was sought for one child in almost 68 per cent of all cases, and for two children in 18 per cent of all cases. Very few cases involved more than two children: 8 per cent involved three children; 3 per cent involved four children and about 2 per cent involved 5 or more children. There was a single case in which maintenance was sought for 11 children.

Number of Children for Whom Maintenance is Sought	per cent	CUMULATIVE per cent
1 Child	6.8	68.0
2 Children	18	86.3
3 Children	8	94.5
4 Children	3	97.4
5 Children	1	98.8
6 Children	1	99.5
7 Children	0	99.8
11 Children	0	99.8
Total	100	100.0

c) *Ages of children for whom maintenance is sought*

The average age of the single or oldest child in the family at the date of the maintenance complaint was 6 years old.<sup>32</sup> Maintenance was rarely sought for a child before the child's birth, even though the law allows a woman to request contributions towards the costs of ante-natal care and the expenses associated with childbirth.<sup>33</sup>

d) *Relationship between complainant and respondent*<sup>34</sup>

The maintenance court is utilised primarily by single mothers. However, there seems to be a misperception in some parts of the country that the maintenance procedure is available *only* to single mothers.<sup>35</sup>

---

<sup>32</sup> This is a rough approximation, based on the fact that children begin first grade in government schools in the year that they turn seven.

Age Groups of all Children at Date of Complaint

AGE		per cent
Infant:	0-2 years	31
Toddler:	3-4 years	16
Young child:	5-7 years	18
Child:	8-11 years	18
Adolescent:	12-15 years	12
Young adult	16 years and older	6
Total		100

About 65 per cent of the children for whom maintenance was sought were roughly pre-school age (age 7 or below).

<sup>33</sup> Interviews and group discussions indicated that many maintenance problems in respect of older children are tied to the expenses of school fees and school uniforms.

<sup>34</sup> The research indicated that in only 9 per cent of cases were the complainant and the respondent were at some stage married to each other.

<sup>35</sup> Of the cases where a marriage had existed at some point between the complainant and respondent, 70 per cent stated that they were separated, 3 per cent divorced, and 27 per cent still living together. However, in Namibia some couples refer to themselves as "divorced" when they mean only that the relationship has come to an end, not necessarily that they have gone through the legal process of obtaining a divorce order.

e) *The termination of the support*

In most cases, the father ceased to provide support for the child's maintenance<sup>36</sup> sometime between the birth of the child and the child's first birthday.<sup>37</sup> This pattern is obviously influenced to some extent by the size of the family. In cases involving more than one child,

<sup>36</sup> A study conducted by the Social Sciences Division of the Multi-Disciplinary Research Centre at the University of Namibia calculated the poverty datum line - the amount of money needed to meet the most basic daily subsistence requirements as being N\$115 for an adult male or female in 1992, 75 per cent of that amount for a child aged 6-15, and 50 per cent of that amount for a child aged 0-5. This amount of money was considered to be the minimum amount needed to provide basic food, clothing and shelter, and to provide for basic personal hygiene and health care. It does not take into account the costs of education for children. (G Van Rooy *et al*, *Household Subsistence Levels in Namibia: A Pilot Study in Three Selected Communities*, (University of Namibia, Feb. 1994) at 38-39, 9-12.)

<sup>37</sup>

Age Group of Child at Date Respondent Ceased to Provide Support	per cent
Born after support ceased	7
Born in month support ceased	47
1-6 months	8
7-12 months	3
1-2 years	3
2-3 years	5
3-4 years	5
4-7 years	8
7-11 years	6
11-15 years	7
15 years and older	2
<b>Total</b>	<b>100</b>

Total amount of maintenance requested per month

	MEAN	MEDIAN	MODE	MIN	MAX
Amount requested per month	N\$187	N\$150	N\$100	N\$20	N\$1100

Amount of maintenance requested per month per child

	MEAN	MEDIAN	MODE	MIN	MAX
Amount requested per month	N\$135	N\$100	N\$100	N\$58	N\$1000

Total Amount of Maintenance Requested by Year of Complaint

	MEAN	MEDIAN	MODE	MINIMUM	MAXIMUM
1988	117	100	100	30	600
1989	136	100	100	30	780
1990	185	150	100	30	1000
1991	181	150	150	20	500
1992	214	165	150	50	1100
1993	238	200	100	50	750
<b>Total</b>	<b>187</b>	<b>150</b>	<b>100</b>	<b>20</b>	<b>1100</b>

the relationship between the mother and the father obviously tended to continue longer, making the average age of the eldest children in such families higher at the time that support ceased. The maintenance court appears to be used as a last resort. The average time which elapsed between the date the father ceased to provide financial support and the date on which the mother made a complaint to the maintenance court was almost three years. Only about one-quarter of complainants went to the maintenance court within a year of the date on which maintenance ceased. About one-third of the complainants waited more than two years from the date on which support ceased to seek help from the maintenance court. Some complainants had sought assistance from the maintenance court as long as ten years.

f) *Amounts of maintenance sought*

The amounts requested are modest<sup>38</sup> in comparison to the actual costs of raising a child. It appears that the usual amounts of maintenance requested per child during 1988-1993 were not far above the 1992 poverty line for children,<sup>39</sup> although the amounts of maintenance requested have risen somewhat over the years.<sup>40</sup>

g) *Use and effectiveness of subpoenas or summons*

Once a complaint is laid with the maintenance court, the respondent is ordered to appear in court on a given date by means of a summons or a subpoena. Maintenance courts were found to be inconsistent in their use of these two different documents.<sup>41</sup> The overall success rate for

---

<sup>38</sup> The total amounts of maintenance requested ranged from N\$20 per month to N\$1100 per month, with the mean (average) amount requested being N\$187 per month, the median (middle value) being N\$150 per month (meaning that half of the cases involved requests above this amount and half below this amount) and the mode (most frequently occurring amount) being N\$100 per month.

<sup>39</sup> See Diane Hubbard *Maintenance, a Study of the Operation of Namibia's Maintenance Courts* (1995) 49.

<sup>40</sup> For example, the total amounts of maintenance requested (which should not be confused with the amount of maintenance requested *per child*) rose from an average of N\$117 per month in 1988, to an average of N\$181 per month in 1991, to an average of N\$238 per month in 1993.

<sup>41</sup> The differences in practice probably stem from different interpretations of section 4(2) of the Maintenance Act 23 of 1963 which states: "Any person to be summoned as a witness shall be summoned in the manner in which a person may be subpoenaed to appear before a magistrate's

service of summons or subpoenas was fairly high.<sup>42</sup> The success rate was predictably very high in the cases where only one subpoena was issued. In cases where a third or a fourth subpoena was issued, the success rate for service was also very high. In a third of such cases, the subpoena could not be served because the respondent could not be found at the address given by the complainant, or because the address was insufficient. In some cases, the subpoena had expired before it could be served. Research indicated that many court personnel reported problems with the police in regard to the service of subpoenas.<sup>43</sup> Problems seemed to be particularly common when the respondent resided in another jurisdiction. Court personnel also alleged that police tended to protect their colleagues and friends - for example, by keeping a subpoena until after the date has expired and then returning it to the maintenance court. In several areas, the police have reportedly stated that they could not serve subpoenas because they lacked transport. However, the task of the police is sometimes made more difficult by liable persons who assume a different identity or conceal themselves when the police arrive with a subpoena.<sup>44</sup> Furthermore, a perception has developed amongst the public that the courts are ineffectual, which discourages women from approaching the maintenance court to complain about lack of service or from continuing with maintenance cases.<sup>45</sup>

---

court in a criminal trial". The respondent is also a "witness" for the purposes of the Act. See *Foster v De Klerk en Andere* 1993 (1) SA 596 (O).

<sup>42</sup> 76 per cent. The overall success rate for serving the first summons issued was 75 per cent while the success rate for the second summons served was 74 per cent.

<sup>43</sup> See Diane Hubbard 'Maintenance, A study of the Operation of Namibia's Maintenance Courts (1995) 59.

<sup>44</sup> This point was raised, for example, at a group discussion that included a police representative. Legal Assistance Centre, 1 July 1993.

<sup>45</sup> For example, one woman came to the Legal Assistance Centre's advice office in Keetmanshoop to discuss the possibility of obtaining maintenance for her two children. One of the fathers was a police officer in Windhoek and the other a police officer in Walvis Bay. She had not approached the maintenance court, however, because she had been told by a friend that it was useless to bring a maintenance case against police officers. One prosecutor suggested that the police should identify specific personnel to take responsibility for maintenance subpoenas, especially in respect of those cases where more than one jurisdiction is involved. The Legal Assistance Centre also believes that it would help to alleviate such problems if one central police officer was made responsible for supervising police action on maintenance cases, and for following up complaints from court personnel, legal representatives and members of the public.

*h) The high incidence of consent agreements*

A surprising aspect disclosed by the research was the frequency with which such negotiations resulted in the signing of a consent agreement,<sup>46</sup> which offers some hope for mediation in Family Courts.<sup>47</sup> Furthermore, with regard to the case files which involved maintenance complaints, many were resolved by consent agreements.<sup>48</sup> The high proportion of consent agreements indicates a need to formalise and standardise this process to ensure that parties are not pressurised into agreements. Maintenance officers sometimes play a very active role in attempting to secure an agreement. While this is not a negative factor in itself, it may be perceived by some complainants and respondents as undue pressure. This factor arises in many South African cases.

*i) Comparison between consent agreements and orders resulting from enquiries*

In the cases involving consent agreements, respondents fell into arrears in a third. In the cases involving maintenance orders at the end of court enquiries, respondents fell into arrears in a fifth. It seems that many women feel pressurised in consent negotiations to settle for less than the amount of maintenance which they have requested, since, in the cases involving consent agreements, the complainants settled for less than they had initially requested in most cases.

---

<sup>46</sup> 93 per cent of the 460 cases in which the file indicates that consent negotiations took place resulted in a maintenance order by consent.

<sup>47</sup> See ID Schäfer 'Alternative Divorce Procedures in the interests of children: some comparative aspects' (1988) 51 *THRHR* 297 at 305.

<sup>48</sup> 72 per cent.

Consent was reached on the requested amount in few of the cases.<sup>49</sup>

j) *Private consent agreements*

It was reported by court personnel in Swakopmund and Otjiwarongo that women often withdraw maintenance complaints because a private agreement was reached with the father outside the court and not converted into a formal maintenance order. The same complainants often approach the court with a fresh complaint subsequently, however, because of failure to comply with the private agreements by liable parents. This indicates a need for public education on the desirability of formalising consent agreements as court orders, so as to facilitate access to enforcement mechanisms. The same would apply to South Africa.

<sup>49</sup>

Comparison Between Amount Requested and Amount Obtained

	CONSENT	MAINTENANCE	TOTAL
	per cent	per cent	per cent
Received less	79	97	80
Received amount requested	17	3	16
Received more	4	0	4
Total	100	100	100

In those cases where women agreed to compromise, maintenance payments agreed upon were NS93 per month less than requested on average, with the majority of cases involving a NS50 per month reduction. Most complainants who "got more than they asked for" received payments of NS100 per month more than they requested, but it must be kept in mind that the number of cases in this category was small.

Comparison Between Amount Requested and Amount Obtained

	MEAN	MEDIAN	MODE	MINIMUM	MAXIMUM
CONSENT					
Received less	-93	-70	-50	-850	-5
Received amount requested	0	0	0	0	0
Received more	108	50	100	10	800
MAINTENANCE ORDER					
Received less	-169	-100	-100	-550	-20
Received amount requested	0	0	0	0	0
TOTAL					
Received less	-99	-70	-50	-850	-5
Received amount requested	0	0	0	0	0
Received more	108	50	100	10	800

Therefore, although complainants may feel obliged to accept less than they have requested in consent negotiations, there is no evidence that the consent procedure tends to result in a less advantageous result for complaints than a maintenance enquiry.



k) *Legal representation*

In the vast majority of cases, neither the complainant nor the respondent was represented at the enquiry by a lawyer. However, where there was legal representation, this was more often on behalf of the respondent than on behalf of the complainant. Complainants had legal representation only in situations where the respondent had legal representation as well, whereas in 5 per cent of all cases the respondent had legal representation while the complainant was assisted only by the maintenance officer. Although the maintenance officer's function is to assist the complainant, it is apparent from the experience of the Legal Assistance Centre that maintenance officers in some maintenance courts, as in South Africa, do not possess adequate knowledge of maintenance law, while others are not very zealous in their efforts to fulfil their duties. Furthermore, in cases where the complainant does receive satisfactory assistance from the maintenance officer, the respondent may feel disadvantaged. Although the parties to a maintenance dispute would be entitled to seek legal aid, there is probably limited scope for obtaining legal assistance through this channel. Legal aid was given to only three persons in Namibia in respect of maintenance cases during the period 1 April 1994 - 31 March 1995.<sup>50</sup>

l) *Postponements*

A common reason for a postponement is that one of the parties failed to appear in court. Another reason is a denial of paternity by a liable parent and request for a paternity test. A third reason is that the court does not have access to adequate information to decide the case (for example, because the respondent did not bring proof of his wages). Postponements seem to be the primary cause of the lengthy delays of which so many women complain.

---

<sup>50</sup>

Information from Mr Ndjoze, Director, Windhoek Legal Aid Board, March 1995.

The average number of postponements was two, while most cases involved at least one postponement.<sup>51</sup>

m) *Warrants and arrests*

Warrants were issued in most, but not all of the cases in which the respondent fell into arrears.<sup>52</sup> The arrest rate is relatively low.<sup>53</sup> With respect to about one-third of the warrants issued, the failure to make an arrest appears to have been due to difficulties in locating the person in question. This provides support for the possibility of authorising the court to obtain

<sup>51</sup> Diane Hubbard 'Maintenance a Study of the Operation of Namibia's Maintenance Courts (1995) 45.

Number of Postponements

	per cent
One	52
Two	26
Three	12
Four	10
Total	100

Average Number of Postponements

	MEAN	MEDIAN	MODE	MINIMUM	MAXIMUM
Postponements	2	1	1	1	4

<sup>52</sup> 89 per cent: while this percentage is relatively high, there would seem to be no reason why warrants are not issued in *all* cases in which there are arrears. However, it is possible that there were cases in which payments resumed before a warrant could be issued. Although respondents fell into arrears more than 4 times in more than one-third (37 per cent) of all arrears cases, there were only 2 cases in which more than 4 warrants were issued.

<sup>53</sup> Arrests occurred in respect of only about 51 per cent of all warrants (101 arrests, compared to a total of 220 warrants issued).

Warrants Issued and Arrests Made

	ARREST MADE	NO ARREST MADE
	per cent	per cent
First warrant	52	48
Second warrant	52	48
Third warrant	36	64
Fourth warrant	40	60

photographs of persons who are subject to maintenance orders, to facilitate later identification.<sup>54</sup>

However, with respect to about another one-third of the warrants issued, no reason was given

---

<sup>54</sup> Cf s 5(5) of the South African Maintenance Act 23 of 1963, as amended.

for the failure to make an arrest, indicating either a failure to keep adequate records or else a failure by the police to make reasonable efforts to arrest the offender.<sup>55</sup>

<sup>55</sup> Reasons for Not Arresting Respondent

	per cent
Changed work address	5
Changed home address	4
Unknown at work address	6
Unknown at home address	5
Unknown at home and work address	10
Date has expired	10
Court date given	6
Warrant cancelled	11
No arrest/no reason given	30
Other	12
Total	100

Reason for No Arrest After Warrant Issued

	per cent
<b>FIRST WARRANT</b>	
Changed work address	6
Changed home address	4
Unknown at work address	6
Unknown at home address	4
Unknown at work and home address	12
Date has expired	7
Court date given	7
Warrant cancelled	9
No arrest / no reason given	32
Other	12
Total	100
<b>SECOND WARRANT</b>	
Changed work address	5
Changed home address	5
Unknown at work address	5
Unknown at home address	10
Unknown at work and home address	10
Date has expired	15
Warrant cancelled	10
No arrest / no reason given	20
Other	20
Total	100
<b>THIRD WARRANT</b>	
Unknown at work address	14
Date has expired	14
Warrant cancelled	43
No arrest / no reason given	29
Total	100
<b>FOURTH WARRANT</b>	
Date has expired	33
Court date given	33
No arrest / no reason given	33
Total	100

n) *Time lapse between arrears and issue of first warrant*

Data on the time lapse between the date on which the respondent first fell into arrears and the date on which the first warrant was issued shows that while 70 per cent of all warrants were issued within 1-2 months of the date of arrears, 14 per cent were issued 2-4 months after the date of arrears, 11 per cent were issued 5-10 months later, and 5 per cent were issued more than 10 months later.<sup>56</sup> These figures must be treated with caution, however, because in relation to the date of arrears and the issue of warrants, the court records are not always consistent about which date is recorded as the date on which the respondent fell into arrears.<sup>57</sup> Nevertheless, it can be said that the time lag between the date of arrears and action by the court appears to be a key cause of the accumulation of arrears.

o) *Time lapse between issue of warrant and successful arrest*

Although the majority of successful arrests were made within one month of the issue of the warrant, there were a significant number of problem cases which entailed longer delays. In the case of the first warrant issued, 2-6 months passed before an arrest was made in 10 per cent of the cases. In the case of the second warrant issued, 30 per cent of the cases involved a time

---

<sup>56</sup> Number of Months Between Date of Arrears and Date the First Warrant was Issued

	per cent
Within same month	56
1-2 months	14
2-4 months	14
5-10 months	11
>10 months	5
Total	100

<sup>57</sup> For example, there were cases where a warrant for arrears was issued before the date on which the respondent fell into arrears, indicating that the date which was recorded in the case file was not the date of the first occasion of arrears. All of the cases which involved warrants dated before the date of arrears have been excluded from the calculations of the percentages which are cited, but these cases point to the possibility of further inconsistencies which may be harder to detect.

lapse of 3 months or more between the issue of the warrant and the arrest.<sup>58</sup> Evidence indicates that similar types of problems experienced in respect of service of subpoenas for initial maintenance complaints apply to the service of subpoenas and warrants of arrest in arrears cases.

*p) Low Incidence of Criminal Proceedings*

Criminal proceedings took place in only half of the cases in which arrears were outstanding. The data on service of warrants indicates that the respondent could not be located in about one-third of the arrears cases in which warrants were issued. Payments may have resumed in some cases, thus obviating the need for criminal proceedings. However, it seems clear that there were an unacceptably high number of cases where the respondent fell into arrears without suffering any consequences.

---

<sup>58</sup> Number of Months Between Date Warrant was Issued and Date Arrest was Made \*

	per cent
FIRST WARRANT	
Within same month	73
1-2 months	16
2-3 months	5
3-4 months	3
4-5 months	1
5-6 months	1
Total	100
SECOND WARRANT	
Within same month	30
1-2 months	40
2-3 months	10
3-4 months	10
10 months	5
14 months	5
Total	100
THIRD WARRANT	
Within same month	75
5-6 months	25
Total	100

\* This data is drawn from only 59 of the 79 cases involving criminal proceedings

q) Sentencing

The Namibian maintenance courts were found to be reluctant to impose sentences of imprisonment which might cause the defendant to lose their jobs and consequently be unable to continue with the required maintenance payments.<sup>59</sup> Suspended sentences were considered to be the most appropriate sanctions for convictions on a charge of failure to comply with a maintenance order. An alternative sentence is periodical imprisonment, which can be imposed in the form of weekend imprisonment, so as not to interfere with the defendant's ability to continue earning wages. However, some magistrates reported that they did not wish to impose a sentence of periodical imprisonment because, if the defendant fails to appear at the prison at the required times, the only logical option is arrest and a sentence of continued imprisonment, which may lead to interference with the defendant's capacity to work. The most common outcome in the cases where the accused was found guilty was a sentence which was totally or partially suspended.<sup>60</sup> Orders for the payment of the amount in arrears were issued in most of

---

<sup>59</sup> Diane Hubbard *Maintenance, a Study of the Operation of Namibia's Maintenance Courts* (1995) 75.

<sup>60</sup> Suspended sentences of 2-6 months suspended for 1-5 years were imposed in 71 per cent of the cases - in a few cases in combination with a fine. The most frequently imposed sentence was three months imprisonment suspended for three years, which was the outcome in 37 per cent of the cases involving suspended sentences. Periodical imprisonment was seldom utilised, appearing as a result in only about 7 per cent of the cases. There was one case in which a sentence of two months' continuous imprisonment was imposed. In every other case involving periodical imprisonment, a sentence of 200-600 hours of periodical imprisonment was suspended in its entirety for 4-5 years. To put this in perspective, a sentence of periodical imprisonment for 600 days would equal 25 24-hour days. If 48 hours were served in prison each weekend, this would be equivalent to spending every weekend in prison over a period of about three months. By the same measure, periodical imprisonment for 200 hours would be equivalent to spending every weekend in prison over a period of about one month. Although some magistrates and prosecutors who were interviewed thought that periodical imprisonment was an option which could be more frequently utilised, others doubted that it would be possible to get the necessary degree of cooperation from the police to make weekend imprisonment workable. Looking at an overview of all the cases, there were only 2 cases in the entire sample (about 3 per cent of all the cases) where the convicted men spent time in prison, and only 9 cases (about 13 per cent) where fines were imposed. In the remaining 84 per cent of cases involving convictions, suspended sentences were served at a later date and, no actual punishment was experienced. Stronger signals are required to indicate that defaulting on maintenance payments will be taken seriously by the courts. It was not possible to extract data from the case files on the follow-ups to suspended sentences, which should be promptly implemented once it is clear that the respondent has no intention of complying with a maintenance order.

the cases where the accused was found guilty of a failure to pay.<sup>61</sup>

There was no clear correspondence between the amount of arrears owing and the payment schedule which was ordered; for example, larger amounts of arrears did not necessarily mean higher monthly instalments. The instalments were probably more strongly influenced by the liable person's ability to pay. In general, the higher the accumulation of arrears, the more likely it is that the court will order payment in relatively small monthly instalments instead of in a lump sum. For example, the average amount of arrears covered by an order for lump sum payment was less than half of the average amount covered by an order for monthly payments.

<sup>61</sup> The orders for payment of arrear maintenance covered amounts ranging from NS120 to NS2800, with an average of NS880. Most of the orders (83 per cent) directed that the arrears be paid off in monthly instalments ranging from NS10 to NS500, rather than in a lump sum.

#### Amount of Arrear Maintenance Awarded

	per cent
1-299	12
300-599	29
600-999	24
1000-1499	17
1500-1999	12
>2000	7
Total	100

#### How Arrears to be Paid Off

	# CASES	per cent
Monthly	48	83
Lump sum	10	17
Total	58	100

The average order for payment in instalments directed the payment of NS963 in arrears in monthly instalments of NS83 (over almost a year).

#### Amount of Arrear Maintenance to be Paid Off Monthly

	# CASES	per cent
1-49	14	30
50-99	14	30
100-149	12	26
150-500	6	13
Total	46	100



There appeared to have been no cases in which property of any sort was attached for the payment of arrears. Several courts reported the use of somewhat unorthodox (but effective) methods in cases where a respondent has fallen into arrears. More than one magistrate stated that even before the accused is asked to plead, the possibility of a prison sentence is emphasised. The defaulter is then given a limited time period to come forth with the total amount of arrears owing. If the arrears are paid off within the appointed time, then the criminal case does not proceed.<sup>62</sup>

r) *Garnishee orders*

In terms of the existing Namibian law, garnishee orders may be issued by the court whenever a defendant is found guilty of failure to make payments as required. This is regarded as one of the most effective ways to ensure compliance with a maintenance order but it is seldom utilised.<sup>63</sup> Interviews with magistrates in different areas suggested that the failure to utilise this option stems from a misunderstanding of the law. For example, magistrates frequently commented that they did not use such orders because respondents did not request them.<sup>64</sup>

## 9.6 *Suggestions for Law Reform*

The recommendations by the Commission are as follows:<sup>65</sup>

---

<sup>62</sup> For example, in the one case observed by the researcher, the accused was given 45 minutes to come up with the amount owing if he did not want the criminal case to proceed. He soon returned with the money. Another court used the technique of remands in a similar fashion. Where a respondent has fallen into arrears, the case will be remanded before the trial proceeds to give him a chance to pay the amount owing. If the arrears are high, the case will be remanded at least twice to allow for two "instalments". If the arrears are paid off, the case is removed from the roll.

<sup>63</sup> Garnishee orders were issued in only about 10 per cent of all cases where the defendant was found guilty of a failure to pay. These were most often used in instances where the defendant was employed by the state.

<sup>64</sup> The use of such orders may be increasing, at least in Windhoek. Court statistics for 1994 show that sentences for failure to comply were handed down in about 95 cases, while orders were issued in about 38 cases (Information provided by the Windhoek Maintenance Court to UNICEF Namibia, March 1995.)

<sup>65</sup> The relevant clause of the draft amendment bill attached hereto (Annexure "A") is referred to in brackets.

- 1 That maintenance officers should retain a discretion to institute maintenance enquiries or to refuse to do so, where there is an existing order. An enquiry shall be held upon every initial application (where there is no existing order). [Clause 4]<sup>66</sup>**

When a complaint is made to a maintenance officer, it often appears as if a maintenance enquiry would be fruitless, especially where the respondent is unemployed. It has, however, been shown that maintenance officers and clerks overlook the possibility of other forms of income and livelihood when determining whether to proceed with an enquiry. If it is made obligatory to institute an enquiry whenever a complaint is made, it is feared that the maintenance court rolls will be clogged with frivolous applications for increases or decreases in existing orders.

Where there is no existing maintenance order, it shall be compulsory for the maintenance officer to institute an enquiry in a maintenance court after investigating such complaint. The court will judge the merits of the complaint. Where there is, however, an existing order and the complainant applies for an increase, a decrease or setting aside of the order, the maintenance officer may investigate the complaint and decide whether to institute an enquiry or to refuse to do so. If new facts of altered circumstances or relevant additional information are presented, a new enquiry will be instituted. However, if the applicant cannot present relevant new facts which might alter the presiding officer's decision then the maintenance officer may refuse to institute an enquiry afresh.

- 2 That a person other than a parent who is responsible for the daily care of a child, has the right to bring a complaint to the maintenance court and to receive maintenance payments directly. [Clause 4(2), 5(4)(a)(ii)]**

Children are frequently left with their grandparents or other extended family members as primary caretakers for their daily care, whilst the custodian parents of the child live and work elsewhere. These primary caretakers will be able to demand maintenance payments from both

---

<sup>66</sup> Cf Section 6(2) of South African Maintenance Act 99 of 1998.

the mother and the father, and a court will be able to make an order most suitable to the immediate needs of the child. Under the Act as it now stands, many maintenance payers complain that the maintenance money is paid to the custodian (e.g. mother) who lives far from the child and that the funds are not in fact utilised for the maintenance of the child. If such a situation exists, the court would be able to make an order that the maintenance be paid directly to the primary caretaker or clerk of the court or other officer or institution in the region where the child is living. The maintenance records will also be transferred to the magistrate's court of that region for record purposes. Such a recommendation might be a worthwhile consideration in the South African context. This was considered by the Lund Committee and is now contained in section 4 of the South African Social Assistance Act<sup>67</sup> but only in respect to the right to receive state maintenance grants.

- 3 That a Maintenance Court may grant judgement in a claim for pregnancy and birth related expenses and in addition thereto also for actual proven past expenses, which judgement may be amplified by a court order for settlement in monthly instalments, alternatively it may be executed as a civil judgement. [Clause 5(4)(a)(ii)]**

The Commission recommends that a maintenance court may grant judgement against a respondent only in respect of his or her proportionate/pro rata liability for pregnancy and birth related expenses actually proved and other past maintenance expenses actually proved, and interest on these. The normal burden of proof upon a balance of probabilities will rest upon the applicant. These claims are further restricted as follows. The applicant (claimant) has to address past (retroactive) expenses at the time of the respondent's first appearance in the maintenance court, subject to the provisions of the Prescription Act. He or she cannot claim these expenses at any later hearing. A mother's claim in respect of pregnancy and birth related expenses furthermore has to be made within twelve months from date of birth of the child. A maintenance court judgement in respect of the two kinds of expenses already incurred shall have the effect of a civil judgement. This means that property may be attached and sold in execution of the judgement.

---

<sup>67</sup>

59 of 1992, as amended by s3 of Welfare Laws Amendment Act 106 of 1997.

**4 That the Act should clearly stipulate that both natural parents of a child are liable to maintain the child and that other persons may be liable to maintain the child by principles of common law or principles of customary law. [Clause 5]**

The above subsection has been rephrased so that a marriage under customary law is regarded as having the same consequences as a civil marriage in respect of the duty to maintain. Thus, a husband and wife under a civil marriage and under a customary marriage or union both have a duty to maintain each other during the marriage and after dissolution. Clause 5 furthermore deals with the duty of a natural parent to support his or her child and makes all natural parents legally liable to maintain their children in accordance with Article 15 of the Namibian Constitution, whilst expanding the concept of a person legally liable to maintain to include customary law. This approach would give a maintenance court the authority to apply a customary law for the purposes of determining legal liability to support where a customary law environment is evident. For the purposes of clarity, a court will, firstly, apply the principles of common law. Only if it is proven that these principles do not apply to the relationship of the complainant, respondent and/or the person to be maintained, will the court apply the principles of the customary law which apply to the particular relationship. It is hoped that the proposed amendment will support harmonisation of the customary and common law in this field and accommodate the practices of people in areas where the maintenance procedure as contained in this Act is rarely employed. As the traditional courts have no system of record keeping it is recommended that jurisdiction in maintenance matters be limited to the Magistrate's Courts. This is a measure which might be applied in a South African context.

**5 That legal representation be allowed to the parties at maintenance enquiries, e.g. by a friend or family member. [Clause 5A(2)]**

The amendment makes it clear that any party to a maintenance enquiry may be represented at the enquiry by a legal practitioner or any other person who has been authorised to represent him or her. As some applicants and respondents neither qualify for Legal Aid assistance, nor are able to afford the fees of a lawyer, the amendment makes it possible to use a para-legal or knowledgeable friend as a representative. This right is limited to maintenance enquiries where the procedure is of an investigative nature. In criminal proceedings, where a person is charged

with non-compliance of a maintenance order, representation for the accused will be limited to legal practitioners. This measure might be adopted in South Africa where the litigants are particularly poverty-stricken or illiterate.

- 6 That written statements be admitted in evidence under certain conditions, without the personal appearance in court of the person making the statement. [Clause 5A(3A)]**

The aim of this amendment is to make the maintenance procedure as speedy and simple as possible. This section would allow a court to accept written statements of a person's assets such as livestock or wages (an employer's statement). As these provisions regarding admission and objection are somewhat complicated, subsection (3A)(i) has been inserted. This would bestow a discretion on a presiding magistrate as to the procedures where the objections were not lodged as prescribed, because of a lack of knowledge or ability of any of the parties. This is a measure worthy of consideration under careful judicial surveillance.

- 7 That guidelines be set for assessing needs, ability to pay, value of contributions and calculation of maintenance. [Clause 5A(3B)]**

The Legal Assistance Centre report suggested that statutory guidelines be set to indicate what expenses should be considered in assessing maintenance needs and the abilities of all maintenance contributors to pay. It was hoped that maintenance courts would be able to conduct such matters with greater uniformity and that all the circumstances of each case would be fully presented to the court. The provisions of the clause approve the award of a new maintenance order against a respondent who is unemployed if he or she possesses sufficient assets or income from informal employment.

- 8 That orders for payment in kind be allowed both for settlement of arrears and for payment of maintenance instalments - if the complainant agrees thereto and such appropriate assets are available. [Clause 5A(4)(aa)]**

Payment in kind refers to payment by delivery of goods or livestock as an alternative to

payment with money. On the one hand, where both the applicant and the respondent live in a rural setting far from a suitable collection point and/or shops and where the respondent does not earn a salary, payment in the form of produce, such as milk and crops or poultry or livestock at regular intervals, might be more appropriate to the circumstances of both parties. In particular, where a liable person has fallen into arrears and he or she has attachable assets, such as livestock, he or she should be able to deliver such assets to the complainant in settlement of the outstanding debt instead of having to sell the said assets and deliver the money. As an example, if both parties belong to a rural community, delivery of a goat might be of more value than payment with the proceeds of the sale of such goat. On the other hand, this type of suggestion has met with some objection on the grounds that maintenance orders require ongoing payments, and it is extremely difficult from a maintenance officer's perspective to monitor payments in kind and to prove whether such payments have been made. Furthermore, there may be an urgent need for cash to maintain a child, e.g. to pay for tuition and transport of a child or to provide clothing. Finally, it may be difficult to calculate the value of a payment in kind.

The amendment directs the court to make an order for payment in kind only if the complainant request it. The court would need to consider all relevant circumstances and, in particular, whether it would be possible or practical for the respondent to make such payment in kind. If it seems practical and in the best interest of the beneficiary, such an order may be made. This would also allow for such an order when the complainant and respondent agree to payment in such form and manner. As a maintenance order can always be amended or varied, either of the parties may approach the court to substitute the order for payment in kind for another order, if the arrangement is not successful. This recommendation may be a worthwhile one in a rural South African setting, but its applicability is limited.

**9 That the Act provides for payment in favour of a person who has to be maintained or in favour of a custodian or a primary caretaker and for the punishment of persons who misuse maintenance funds. [Clauses 5A(5)] and 11A]**

Liable persons have resisted the payment of maintenance on the alleged grounds that the maintenance payments are misappropriated. This amendment of the Act will have the effect

that the court will have a discretion to appoint either a parent, custodian or primary caretaker as the recipient,<sup>68</sup> which entitles the person who is the primary care-giver of a child to the payment of a child support grant, subject to certain conditions so as to ensure that the money is correctly applied and reaches the child concerned.<sup>69</sup>

It is suggested that to ensure that the money reaches the child concerned the initial application should be as simple as possible. Regulations should be drafted to incorporate procedures and criteria for the resolution of a conflict in the event of more than one person claiming to be the primary care-giver of the child. The type of criteria that would be relevant for identifying the primary care-giver include: the person who is primarily responsible for feeding the child, seeing to the health and hygiene needs of the child, clothing the child and providing basic education and stimulation for the child.

**10 That a maintenance judgement may be executed by attachment of property and wages. [Clauses 4(a)(ii), 5A(4A) and 11(2)]**

Attachment of property and garnishee orders have always been available as a form of execution of civil judgements. The current Act stipulates that a maintenance order has the effect of a civil judgement, but attachment is apparently hardly ever used as a form of execution, since it is probable that the complainants find it difficult to proceed to execution if they do not have legal assistance to apply for writs of attachment, to deliver them to the messenger of court, to advertise execution sales as prescribed and to settle the various messengers' fees and/or legal practitioner's fees. In South Africa, similarly, a recent study of maintenance cases in the Johannesburg maintenance court revealed that many provisions of the South African

---

<sup>68</sup> Cf Section 4 of Social Assistance Act 59 of 1972 (South Africa); "Primary caretaker" in the draft Namibian Child Care Act (1990) is defined as a person other than the parent or other legal custodian of a child, whether or not related to the child, who takes primary responsibility for the daily care of the child with the express or implied permission of the child's custodian.

<sup>69</sup> The introduction of the concept of the primary care-giver offered the potential to both challenge prevailing gender stereotypes, as well as the nuclear family model embedded in both the Namibian and South African legal systems. It challenges gender stereotypes in that it does not take for granted that women will always be responsible for the daily care and nurturing of children and takes cognisance of the fact that family forms in South Africa and Namibia are fluid with children being cared for not only by parents, but also by relatives and even by persons unrelated to the child.

Maintenance Act relating to enforcement are not applied in practice.<sup>70</sup> In an attempt to address the failure to use this form of execution, the Namibian Law Commission has followed the South African amendments<sup>71</sup> and recommended that the courts be empowered to issue a writ of execution against movable or immovable property to satisfy an order for payment of arrear maintenance. When a maintenance court has granted a judgement for claim of pregnancy and birth-related expenses or birth related expenses as discussed above, or when a maintenance court has convicted a person of failure to pay maintenance, the court may in a summary manner hold an enquiry into all relevant circumstances and, in particular, such person's ability to settle the arrears or judgement amount by a sale of his or her property. In appropriate circumstances, the court will authorise a writ of execution.

**11 That alternative places for payment be expressly allowed, namely, directly to the primary caretaker, curator, Clerk of the Magistrate Court, other officer or to a specified banking account. [Clause 5A(5)]**

The Act currently specifies that a maintenance court may make an order for payment to such officer, organisation or institution and in such manner as may be specified in the order which allows the courts a wide discretion to order maintenance payments to be made at the most suitable place and in the most convenient manner in each individual case. Some courts have, however, interpreted the Act so narrowly that they would not allow payments to be made directly to a beneficiary of the maintenance order. There has been an insistence that payments be made to the clerk of the magistrate's court, and collected at the court by the appropriate person. The Namibian Legal Assistance Centre reported that women have complained about the extra time and expense involved in collecting the money from court, and the problem can be particularly acute in rural areas.<sup>72</sup>

---

<sup>70</sup> See Madelene de Jong 'New trends regarding the maintenance of spouses upon Divorce' (1999) 62 *THRHR* 75 at 86-7.

<sup>71</sup> Cf s26 of the South African Maintenance Act 99 of 1998.

<sup>72</sup> (See Clause 5A(5)(6)). The recommendation of the Namibian Law Commission is that a maintenance court should have discretion to make an order most appropriate to each individual case, which discretion will be influenced by the preference of the beneficiary under the maintenance order. If a respondent and complainant live in proximity to each other, but far from any court building, direct payment to the complainant might be the most suitable order. The



- 12 That default-maintenance orders be made against respondents who fail to appear after due service of process upon him/her. [Clauses 4(3) and 5A(7)]**

The Namibian Law Commission recommended that a maintenance order be competent against respondents in their absence if they failed to appear at a maintenance enquiry in circumstances where a maintenance summons was duly served on them. The possibility of such a default order should be clearly stated on the summons. The new clause provides that the court will proceed with an enquiry and will make an order against the respondent if evidence has been presented to the court that the respondent is liable and able to contribute to the maintenance required by the complainant. This might provide an incentive for respondents to heed summonses, and it could prevent repeated fruitless court appearances by a complainant.<sup>73</sup>

- 13 That a magistrate may summon anyone to appear before the magistrate to be interrogated by the maintenance officer to furnish information which might trace a respondent or assets belonging to him or her. [Clause 7A]**

This recommendation aims at assisting the maintenance officer in locating a respondent and in acquiring information about his or her income and assets. In South Africa, maintenance investigations may be employed in terms of the new Act.<sup>74</sup>

- 14 That a maintenance officer shall await a complaint (formal or informal) before charging a person for failure to comply with an existing maintenance order to pay to the Clerk of the Maintenance Court. [Clause 10A]**

The Legal Assistance Centre report initially recommended that the Act should be amended to

---

maintenance officer will have the authority to request the court to vary the place of payment with immediate effect and the maintenance officer will inform the respondent of such change in place of payment.

<sup>73</sup> Cf Section 18 of the South African Maintenance Act 99 of 1998.

<sup>74</sup> Section 5 of Act 99 of 1998 not yet in force.

require that the maintenance officer should take direct action on arrears, without waiting for charges to be filed by the complainant, where payments are made into the clerk of the court.<sup>75</sup>

Since the records of payments and non-payments are available to the maintenance officer at the court, it was suggested that such an amendment would remove the need for complainants to approach the Court to lay a complaint under oath, as required under the current Act. However, liable persons sometimes make payment directly to the maintenance beneficiary, despite a court order to pay into court. In such cases, the beneficiary would not complain although the court records would seem to indicate non-payment. For this reason and to avoid unnecessary charges against a liable person, the Namibian Law Commission recommended that the maintenance officer should only act when the beneficiary complains of failure to pay, but that informal complaints, thus a telephone call or a letter or another way of notification, would be an acceptable way of complaint. Such an amendment should alleviate the burden of unnecessary travelling expenses for complainants.

**15 That an order to pay interest should be available to a presiding magistrate as a punitive measure, when sentencing a person convicted of failure to pay maintenance. [Clause 11(2)]**

It has been suggested that a person who criminally fails to pay maintenance should be liable to pay interest on the arrears in the same way that interest is payable on any other debt. The Namibian Law Commission supported the principle, but realises that the clerks of court cannot deal with the administrative burden of interest calculations on decreasing and increasing arrears. The recommendation act provides for an order to pay interest on arrears as a separate optional punitive measure. If the magistrate finds the circumstances of the convicted person suitable for such an order (i.e. if the person has sufficient funds to pay his current maintenance plus settle the arrears plus pay interest on the arrears), an order may be made. An 'interest-order' should be more suitable than any fine as the interest money will also be paid to the beneficiary as opposed to the fine which is paid to the state.

---

<sup>75</sup> Diane Hubbard 'Maintenance, a Study of the Operation of Namibia's Maintenance Courts' (1995) 80.

**16 That the court may make an order authorising and compelling employers to deduct maintenance payments from a person's salary, wages, allowances or other forms of remuneration, but only in the following instances:**

- (a) with the respondent's consent**
- (b) after conviction for failure to pay maintenance**
- (c) upon a respondent's default to appear at a maintenance enquiry *prima facie* non-compliance with a court order to make payment to a specific officer, organisation, institution or account. [Clause 12]**

This procedure may be utilised where a respondent voluntarily agrees to this administrative measure; or where a summons has been duly served on a respondent to appear at a maintenance enquiry and the respondent ignores the summons (which contains a warning of the possible results of failure to respond) or where an enquiry is held in his or her absence. If a maintenance order can be made, the magistrate may make the order in the respondent's absence and order that the instalments be deducted from the person's salary or remuneration. Where a person has been convicted of the offence of failure to pay maintenance, the court will endeavour to ensure regular payment and will resort to this administrative measure. Finally, if the court has ordered that maintenance be paid in a particular manner to a specific officer, institution or account and an affidavit is received from such officer or person representing such institution or in control of such account to the effect that the maintenance payments are not received in compliance with the court order, the maintenance officer may apply to the magistrate to issue a garnishee order which will ensure payment in the correct manner. The consent requirement seems unnecessary.<sup>76</sup>

**17 That a maintenance payer be obligated to inform a maintenance officer of his or her change of address [Clause 14]**

This clause will only be effective if it is compulsory for all magistrates to bring the provisions

---

<sup>76</sup> Cf sections 26 and 28 of the new South African Maintenance Act 99 of 1998 in which no consent is required.

of this section to the attention of the person against whom an order is made and rules will have to be accordingly. The draft Bill also provides for admission of documentary evidence of an accused's employment or residential addresses and the fact that he or she is no longer employed or resident there.

**18 That the Costs of Service of Process and the Costs of Tests to determine Parentage be payable by the State or the parties as the Court directs. [Clause 14A)**

The Ministry of Justice has arranged with the Messengers of Court that service of maintenance process will be effected by them for account of the state. This section makes it possible to reclaim these costs from either of the parties if his or her conduct has been wilful and unnecessary costs have been incurred. The court has a discretion therefore to make an order directing any party to refund the state with such costs. Determination of parentage has often presented delays in the maintenance process due to the fact that the blood, or tissue, tests to determine parentage of a child have to be paid for in advance. Where neither the complainant nor respondent could pay for these tests, maintenance enquiries were often postponed for months. The recommendation as reflected in clause 14A facilitates immediate tests since the magistrate may make a provisional order directing the State to pay the costs of the tests.

**9.7 Conclusion**

To date the proposed changes and reforms of the Namibian system have not been implemented. The wheels of change turn very slowly. insofar as Namibian maintenance law reform is concerned. The research findings, however, are extremely useful as a comparative tool in assessing aspects of procedural reform required in South Africa. The Namibian legal system is at least encouraging the examination of the procedural effects of its laws; the extent of the research done into the operation of its laws was illuminating. The level of poverty suggests that some form of social security is urgently required for the welfare of children in addition to improvement of the judicial system of maintenance. Undoubtedly, the AIDS epidemic will affect such children further. The proposed amendments indicate an awareness of the unique situation in Namibia and the background of poverty and lack of resources.

## PART FIVE SYNOPSIS

### CHAPTER 10

#### CONCLUSIONS

##### *10.1 Judicial Maintenance*

###### *a) Complexity of the Issues*

There are not only many types of family in South Africa, but also a great diversity in life style and wealth. In a country where considerable political and socio-economic change is occurring, South Africa's widely heterogeneous society continues to be divided by different languages, religions, races, cultures and historical experiences, and thus reflects divergent expectations about marriage, family life and the position of women in society. The Report of the Lund Committee (1996) states that it is primarily the parents, rather than the state who should shoulder responsibility for the support of children.<sup>1</sup> This approach assumes that it is within the parents' power to support their children, even though it is known that the majority of South Africans live in poverty and could not hope to maintain their children.<sup>2</sup> However, the Report acknowledges that the system 'functions so poorly that the government is unwittingly signalling that financial responsibility by parents for their children is not the main option for child support.'<sup>3</sup>

The state cannot assume that social problems can be located within the individual or the family. The fluidity of households must be taken into account when planning social policy, as well as acknowledgement given to the paid and unpaid caring work of women, the elderly and

---

<sup>1</sup> Executive summary 3.

<sup>2</sup> The Lund Report emphasises that it is only when '... mothers are unable to provide for themselves, and cannot get support from the fathers of their children', (executive 2 Summary) that the state is obliged to offer social security.

<sup>3</sup> At 35, 50-1.

children.<sup>4</sup> In the case of many, particularly rural Black domestic groups, the traditional concepts of 'household' and 'family' have been criticised as being inadequate to describe the complexities of relationships and family responsibilities existing amongst such groups. The traditional nuclear family providing care for biological children is not a viable construct, in that less than forty per cent of South African families live in this way.<sup>5</sup>

In view of this, some investigation into the possibility of a rapprochement between modernistic individualism and traditional extended family ideology is required.<sup>6</sup> South African law is struggling to accommodate the nuclear and extended family forms and it is suggested that increasingly the concept of 'needs'<sup>7</sup> should be an important issue in determining the basis of support. Needs should be prioritised in terms of moral expectations rather than hierarchising persons obliged to and person entitled to support.

#### b) *Feminisation of Poverty*

Statistical analysis demonstrates that in South Africa, as in many other countries, women and children bear the primary burden of the economic impact of divorce.<sup>8</sup> The often impoverished circumstances in which many women and children find themselves following the break-up of

---

<sup>4</sup> See Chris Simon 'Who is eating all my money?' Women and Financial Dependency in Rural Transkei' (1991) 3 *Women's Studies* 7.

<sup>5</sup> Vivienne Bozalek 'Contextualising Caring in Black South African families' (1997) *Social Politics: International Studies in Gender, State and Society*, 2; see too Anna Steyn *Family structures in the RSA*, 1994 (Afrikaans version 1993) she revealed that only 37 per cent of the Black households in South Africa were nuclear families, compared with just over 46 per cent among the Whites and 55 per cent among the Indians. If man/woman structures are included as nuclear families, the total for the Blacks would be barely 40 per cent compared with 61 per cent among the Whites and 70 per cent among the Indians.

<sup>6</sup> See Chris Jones-Pauly 'The Law and Morality of Support in the Wider Family in Germany and Tanzania: Changing Perceptions of Family Forms' in *The Changing Family: Family Forms and Family Law* (1998) 265 at 285.

<sup>7</sup> Supra chapter 4.

<sup>8</sup> See June Sinclair (assisted by Heaton) *Law of Marriage* vol 1 (1996) 139-158. The average total household income for female-headed households was R1141 per month, compared to R2089 for all households and the per capita average income for female-headed households was R243, compared to R468 for all households, although women now constitute nearly 40 per cent of all employees in formal employment in South Africa.

a long-term marriage, and the many sacrifices that women make in what are typically regarded as traditional marriages, have been recognised for a number of years.<sup>9</sup> An equitable distribution of family resources must be achieved between spouses upon divorce, either through spousal and child support, division of property, or a combination of property and support entitlements. The feminisation of poverty is an entrenched social phenomenon. Obviously, there are a multiplicity of economic factors which contribute to such poverty and family law is only one contributory factor. The reduction in income on divorce brings residential moves and poorer housing, less money for recreation and leisure and pressures due to inadequate time and money.<sup>10</sup> Financial hardships in turn cause social dislocation and a loss of familiar networks for emotional support and social services, and intensify the psychological stress for women and children alike.<sup>11</sup> A correlation between divorce and poverty is unquestionable,<sup>12</sup> although men tend to maintain the standard of living they had before the

---

<sup>9</sup> Michelle O'Sullivan 'Stereotyping and Male Identification: 'Keeping Women in Their Place' in Christina Murray et al *Gender and the New South African Legal Order* (1994) 185 at 194-6; see too Janet Kentridge 'Measure for measure: weighing up the costs of a feminist standard of equality at work' in Christina Murray et al *Gender and the New South African Legal Order* (1994) 84. See too the Canadian case of *Moge v Moge* 99 D.L.R.4th 456, 467 (Can. 1992) (discussing the sacrifices made by Canadian women in "traditional" marriages and their lost opportunities resulting from staying at home).

<sup>10</sup> See Madelene de Jong 'New trends regarding the maintenance of spouses upon divorce' (1999) 62 *THRHR* 75 at 80, see too Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985) 323.

<sup>11</sup> In California in the year following the breakdown of a marriage, Weitzman's research indicated that a divorced woman and her children often suffer up to a seventy-three per cent decrease in their previously held standard of living. The ex-husband of the same family may enjoy a forty-two per cent increase from the previous 'family' standard of living. (*Ibid* at 323).

<sup>12</sup> See South African Commission on Gender Equality, *Audit of Legislation* (1998). The interim Constitution established a Commission of Gender Equality. The object of this commission is to promote gender equality and to advise parliament or any other legislature with regard to any laws which affect gender equality and the status of women. The Commission on Gender Equality Act provides for the establishment of such a commission, outlining its power, functions and composition. Its major responsibility is to monitor, review and evaluate laws, policies and practices of organs of state, statutory bodies public authorities and private organisations to promote gender equality and to make recommendations, including recommendations for legislative intervention. South African legislation may be tested against international conventions signed or ratified by parliament and reports made to parliament. The Commission is further to investigate complaints about gender issues and to refer them to mediation or arbitration. If such disputes cannot be resolved in this way they are to be referred to the Human Rights Commission or the Public Protector.

divorce.<sup>13</sup> This socio-economic landscape cannot be disregarded by courts when assessing the economic consequences of divorce. In fact, it is part of the social context which is perhaps amenable to judicial notice.<sup>14</sup>

In terms of the Divorce Act,<sup>15</sup> our courts are required to consider, in awarding maintenance, the existing or prospective means of the parties; the respective earning capacity, financial needs and obligations of the spouses; the standard of living of the spouses prior to the divorce; the conduct of each spouse insofar as it may be relevant to the breakdown of the marriage; whether a redistribution order in terms of the Divorce Act<sup>16</sup> will be made; and any other factor which, in the court's opinion, should be taken into account. In terms of their constitutional mandate to guarantee equality, our courts should take into consideration under 'any other factor' the substantive economic inequality existing between husbands and wives and the extent to which this inequality has resulted from child-rearing. Such consideration would ensure that a mother is left with an ongoing source of support, not relying solely on child maintenance and/or some form of redistribution order, which may be inadequate in the long run.

c) *Costs of child-rearing*

The burden of the cost of raising children is borne, primarily, by the custodial parent. Women and children usually have a common economic reality in that most children live with women and share their economic circumstances. Most women disproportionately assume the direct and indirect costs and responsibilities of child-rearing both during and after a relationship. Unless child support policies recognize existing gender biases and aim at avoiding their further entrenchment, both women and children will continue to live in depressed economic

---

<sup>13</sup> See Report of Lund Committee on Child and Family Support (1996) chapter 5. See too Mairgit Eichler 'The Limits of Family Law Reform' (1991) 7 *Canadian Family Law Quarterly* 63.

<sup>14</sup> See Madelene de Jong 'New trends regarding the maintenance of spouses upon divorce' (1999) 62 *THRHR* 75 at 80; Dana G Steward & Linda E McFadyen, 'Women and the Economic Consequences of Divorce in Manitoba: An Empirical Study,' (1992) 21 *Manitoba Law Journal* 80; see too June Carbone 'Feminism, Gender & the Consequences of Divorce' in *Divorce: Where Next?* (Ed Michael Freeman) (1996) 205.

<sup>15</sup> Section 7 (2) of Act 70 of 1979.

<sup>16</sup> Section 7 (3) of Act 70 of 1979.



circumstances.<sup>17</sup> Obviously, in most families there will not be enough money for the family to prevent undergoing a change in the standard of living after the divorce. However, the key difference which arises as a consequence of divorce is who bears the burden. When families are functioning as a unit, both parents bear the burden of bringing up children. After divorce, the needs of custodial mothers and their right to a certain standard of living, are often overlooked.<sup>18</sup> In many cases, the only way children of divorced parents are able to even come close to attaining a reasonable standard of living is through the many sacrifices made by their custodial mothers.<sup>19</sup>

In order to more equitably distribute the cost of raising children, non-monetary costs must be recognized. The costs of child-rearing include the indirect costs of the increased responsibility of child care falling on a single parent and the cost of time spent on household, childbearing and nurturing tasks; the increased direct costs of services purchased for the first time or increased as a result of the child's needs, including work-related child care, baby sitters, and free time for community, social and domestic commitments, and assistance with household tasks; the hidden increased costs associated with the need for stability and convenience; and the present employment opportunity costs.<sup>20</sup>

The loss of employment opportunity associated with child-rearing suffered by many women,

---

<sup>17</sup> See Sinclair (assisted by Heaton) *Law of Marriage* vol 1 (1996) 148-9; Lesbury van Zyl 'Post-Divorce Support - Theory and Practice' (1989) 22 *De Jure* 71; Sandra Burman and Shirley Berger 'When Family Support Fails: the Problems of Maintenance Payments in Apartheid South Africa' (1988) 4 *SAJHR* 194 and 334, which reveals the plight of single-parent families headed by Black women, where the awards of maintenance are so low and the incidence of default so high that such women are unable to cope.

<sup>18</sup> From February to July 1997, divorce court files in the Transvaal Provincial Division of the High Court were examined. It appeared that the approach of freeing ex-spouses as soon as possible after divorce from the obligation to support each other, predominates in practice. See Madelene de Jong 'New trends regarding the maintenance of spouses upon divorce' (1999) 62 *THRHR* 75 at 77.

<sup>19</sup> See Madelene de Jong 'New trends regarding the maintenance of spouses upon divorce' (1999) 62 *THRHR* 75 at 80. See too Carol J Rogerson, 'Women, Money, and Equality: The Background Issues' in *Equality Issues in Family Law: Considerations for Test Case Litigation* 97, 98-99 (Karen Busby et al eds., 1990). But see Marsha Garrison, 'The Economic Consequences of Divorce', (1994) 32 *Fam. & Conciliation Cts. Rev.* 10, 18-20.

<sup>20</sup> See Sinclair (assisted by Heaton) *Law of Marriage* vol (1996) 1 69.

both during marriage and after divorce, often go unrecognized and may directly contribute its share to the feminisation of poverty. In fact, a major contributing factor to women's economic disadvantage on separation and divorce has historically been, and continues to be, the differential work patterns between men and women during marriage, as well as after the breakdown of the marital unit. These differential work patterns exist even when both the husband and the wife work outside the home. In fact, despite their other obligations, the majority of women carry the main responsibility for the unpaid household duties and child care.<sup>21</sup> In addition, women in the work force are generally less well paid.<sup>22</sup> In South Africa, particularly, this economic reality and the familial division of labour cause many a woman's income to be consistently defined as that of a secondary earner.<sup>23</sup>

d) *Spousal Support*

It might be argued that spousal maintenance only perpetuates the dependency of women upon men, or even, as some commentators suggest,<sup>24</sup> strengthens it. In the cases of *Beaumont v*

---

<sup>21</sup> See Commission on Gender Equality, *An Audit of Legislation* (1998); see too Lund Committee Report on Child and Family Welfare (1996) chapter 1.

<sup>22</sup> See Sinclair (assisted by Heaton) *Law of Marriage* vol 1 (1996) 69; see too Christina Murray and C O'Regan 'Putting Women into the Constitution' in Susan Bazilli *Putting Women on the Agenda* (1991) Johannesburg, Raven Press 33 at 45. See too Madelene de Jong 'New trends regarding the maintenance of spouses upon divorce' (1999) 62 *THRHR* 75 at 79. For the English position see Eileen McColgan *Just Wages for Women* (1997) chapters 2-6; Sandra Fredman *Women and the Law* (1997) 225-283.

<sup>23</sup> See Carol Louw 'What is Sexual Equality (with particular reference to Equality in the workplace)?' (1994) 34 *Codicillus* 19; Joe Campanella 'Some Aspects of Gender Discrimination' in Paul Benjamin, Joe Campanella and Ingrid De Villiers in *Trends in South African Labour Law: Selected Papers from the Labour Law Conference 1991* (Johannesburg, Taylor-Made Administrative Services 1992); Catherine O'Regan 'Equality at Work and the Limits of the Law: Symmetry and Individualism in Anti-Discrimination Legislation' in Christina Murray et al *Gender and the New South African Legal Order* (1994) 64 at 65. Although in 1994 women constituted 30,4 per cent of the economically active population in South Africa, only 16 per cent of those occupied managerial positions. See *Manpower Survey 1994 Occupational information* - released February 1997.

<sup>24</sup> Martha Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago: University of Chicago Press, 1991); Ruth Deech, 'The Principles of Maintenance' (1977) 7 *Fam Law* 229.

*Jeumont*,<sup>25</sup> *Katz v Katz*<sup>26</sup> and *Archer v Archer*,<sup>27</sup> it was accepted that an order for financial provision which achieves a 'clean break' between the parties, implying no ongoing duty of support, is desirable, if circumstances permit. Further, in *Kroon v Kroon*<sup>28</sup> the court held that ongoing maintenance will not be awarded to a woman who is able to support herself. Only 'rehabilitative' maintenance may be awarded to such a woman where she has devoted herself to full-time management of the household and care of the children for years. Such maintenance will be awarded for a period sufficient to enable her to be trained or retrained for employment, but generally, these cases subscribe to the view that the financial obligations between the spouses should be terminated as soon as possible after divorce. In the *Claassens* case,<sup>29</sup> it was stressed that the number of women who are able to support themselves through their own efforts is growing, and such women should no longer be seen as dependent upon their husbands. Lastly, the courts' stance on nominal maintenance awards, as expressed in *Portinho v Portinho*<sup>30</sup> and *Qoza v Qoza*,<sup>31</sup> indicates the increasing reluctance of our judiciary to award maintenance to ex-spouses upon divorce.<sup>32</sup>

However, there are a number of cases that appear to run counter to this trend that maintenance should be available only in extraordinary circumstances and should then be limited to a period sufficient to rehabilitate the recipient's market prospects. These cases stressed the fact that post-divorce maintenance<sup>33</sup> is not only dependent on the common law requirements for maintenance, namely 'need' on the one hand and 'ability to pay' on the other, but also on other factors, such as one spouse's contribution to the household and the upbringing of children. In

---

<sup>25</sup> 1987 (1) SA 967 (A).

<sup>26</sup> 1989 (3) SA 1 (A) at 11.

<sup>27</sup> 1989 (2) SA 885 (E) at 894-895.

<sup>28</sup> 1986 (4) SA 616 (E) at 632.

<sup>29</sup> 1981 (1) SA 360 (N) at 369.

<sup>30</sup> 1981 (2) SA 595 (T).

<sup>31</sup> 1989 (4) SA 838 (C).

<sup>32</sup> Cf ID Schäfer 'Token maintenance' (1980) 43 *THRHR* 57.

<sup>33</sup> Awarded in terms of section 7 of the Divorce Act.

*Nilsson v Nilsson*,<sup>34</sup> it was suggested that the Divorce Act<sup>35</sup> could and should be used by the courts to ensure fairness between the parties, and in *Rousalis v Rousalis*,<sup>36</sup> the court stated that in a case of a lengthy marriage, a wife who, by her employment, assisted her husband to build up his separate estate, should be entitled to far more maintenance in terms of the Divorce Act than one who had merely cohabited with a man for a short period.

The courts therefore acknowledged that post-divorce maintenance awards in terms of the Divorce Act<sup>37</sup> may include a compensatory element. While the ultimate aim may be to abolish spousal maintenance altogether, such a move must occur only when there is no need for support and not be made merely as a concession to the rhetoric of formal sex equality. Before the need for maintenance may be abolished, the state must ensure the equality of partners during marriage, including financial equality; ensure equal participation by both partners in wage-earning activities; ensure that wages are structured to persons as individuals and not as heads of families; ensure treatment of persons as individuals and not as dependants of state agencies; and ensure provision for children by both parents, including financial support and child care.<sup>38</sup>

Even if one takes a different view and one's goal is not to abolish maintenance entirely, but rather to abolish the economic and social disadvantage for women associated with a systemic gender-based division of labour within marriage, similar fundamental changes in the social structure would be necessary. Along with equity in employment salary scales and affordable child-care, an adequate valuation of domestic work would mean it would not be necessary that each partner play exactly the same role in wage earning.<sup>39</sup> Roles in marriage could be adapted

---

<sup>34</sup> 1984 (2) SA 294 (C) at 297.

<sup>35</sup> Section 7 of Act 70 of 1979.

<sup>36</sup> 1980 (3) SA 446 (C) at 450.

<sup>37</sup> Section 7 (2) of Act 70 of 1979.

<sup>38</sup> This is in accordance with section 7 (2) of the Divorce Act 70 of 1979 and with constitutional principles of equality in section 9 of Act 108 of 1996. See too Katherine O'Donovan 'Should All Maintenance of Spouses be Abolished?' (1982) 45 *Modern Law Review* 424 at 428.

<sup>39</sup> See Sandra Fredman *Women and the Law* (1997) 409-411.

based on the partners' actual interests and skills. Maintenance would be seen as a right, expected and earned, rather than as an act of benevolence<sup>40</sup> or based on a notion of women's dependency on men.

In South Africa, spousal support has proved to be largely inadequate, often due to the inability of the liable parent to pay.<sup>41</sup> In this position, compensatory measures in the form of welfare payments to single parent mothers are required to transfer the duty to support the victims of marriage breakdown from husbands to the state. The evidence, however, is that the cost is too high to be sustained, certainly in a country like South Africa which is not wealthy. In view of this, divorce settlements should modify the law of matrimonial property to ensure that, on divorce, women share assets built up during the marriage.<sup>42</sup>

e) *Equality*

Weitzman<sup>43</sup> argues that the equality rhetoric within divorce reform in the United States contributed to the feminisation of poverty. Thus, while equality values have long been considered relevant to support entitlement, there has been much disagreement about how to conceptualise that equality. These arguments parallel general debates about equality in a South African context.<sup>44</sup> In the English context, Eekelaar has argued that other conceptions of equality, which he calls 'equality of result' and 'equality of opportunity,' suffer from inconsistencies and incoherence when applied between former spouses after divorce, and he

---

<sup>40</sup> See Carol Smart, 'Marriage, Divorce and Women's Economic Dependency: A Discussion of the Politics of Private Maintenance' in Michael Freeman (ed), *State, Law and the Family: Critical Perspectives* (London: Tavistock, 1984).

<sup>41</sup> Awards of post-divorce maintenance for Black women are more rare than they are for White women. See Sinclair *Law of Marriage* vol 1 150 fn 399.

<sup>42</sup> See Madelene de Jong (supra footnote 16) at 80; see too Sinclair *Marriage* vol 1 (1996) 147.

<sup>43</sup> LJ Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985).

<sup>44</sup> See Catherine Albertyn & Beth Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248; see too *President of the RSA v Hugo* 1997 (4) SA 1 (CC); *City Council of Pretoria v Walker* 1998 (3) *BCLR* 257 (CC); *Harksen v Lane* 1998 (1) SA 300 (CC); *Prinsloo v van der Linde* 1997 (3) SA 1012 (CC); *Brink v Kitshoff* 1996 (5) *BCLR* 752 at para 41.

therefore seeks to found ideological claims to equality in the children of marriage.<sup>45</sup> He characterises equality of opportunity as the principle that former spouses should be put in the same position after divorce in order to enable them to take equal advantage of opportunities to enhance their positions in the labour market. He recognises the injustice resulting to women from this formal equality approach, but rejects even a lost opportunity award as a means of redress. Eekelaar objects to this type of remedy because he views it as based upon the 'dubious' hypothetical assumption that the woman would have pursued an economically fruitful career had she not married, rather than on the more 'likely scenario' that she would have married someone else.

Another vision of equality has been suggested which is different from Eekelaar's visions of equality of result and equality of opportunity. Fineman suggests that the notion of 'result-oriented equality' which has had some success in the market<sup>46</sup> can be applied within the family. This approach does not require formal equality of financial resources between two spouses irrespective of merit, need or circumstances of the marriage, but rather weighs these factors in a contextual, non-stereotypical light. Ideas of equality are refashioned by locating particular sites of disadvantage or domination, and requiring change to the institutions which sustain them rather than to the individual's circumstances. This vision of result-oriented equality, according to Fineman, seeks individualised and broader social justice for women. It recognises that, in order to alleviate disadvantage and achieve equality, different treatment will sometimes be needed. However, while historical arguments for different treatment have been premised upon women's difference from men, under a result-oriented equality approach, difference of treatment, where appropriate, is desirable not because of women's inherently different internal qualities, but because of the discriminatory qualities of society.

It is this vision of eliminating disadvantage experienced by socially disadvantaged groups, of substantive equality, which may successfully challenge formal equality or same treatment principles which accept male characteristics and realities as the norm to which women must

---

<sup>45</sup> John Eekelaar 'Equality and the Purpose of Maintenance' (1988) 15 *Journal of Law and Society* 188.

<sup>46</sup> Martha Fineman *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (1991).

ascribe in order to achieve the social benefits which men, as the more powerful social group, enjoy. The notion of substantive equality begins by locating the inequalities women face, and then demands that the institutions address women's realities so that the result not only alleviates the particular disadvantage identified, but also challenges rather than legitimates the institution.<sup>47</sup> While retaining the sometimes difficult vocabulary of (formal) equality, this feminist vision draws from broad notions of equity and community and accepts that equality, like all social constructs, has a cultural meaning.<sup>48</sup> In the area of spousal support, in the current social context, it would mean that women would not be disproportionately financially burdened under family law principles by caring for children and maintaining family households when a marital relationship ends. Similarly, women would receive some recognition for their unpaid domestic work which contributes to the economy.

The employment profile of women is often marked by multiple interruptions and sacrifices for the benefit of the family unit, rather than to the benefit of her own career development or job security.<sup>49</sup> In some jurisdictions, highly structured matrimonial property systems, such as the deferred sharing (Zugewinnngemeinschaft) and equalization of pension benefits (Versorgungsausgleich) of the German law have developed;<sup>50</sup> in others, a judicial discretion has developed to redistribute property on divorce, of which the English law provides an example.<sup>51</sup> The South African common law, based on universal community of property and

---

<sup>47</sup> Christine Littleton, 'Reconstructing Sexual Equality' in Smith (ed), *Feminist Jurisprudence* (New York: Oxford University Press, 1993). See too Catherine Albertyn and Beth Goldblatt 'Following the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248.

<sup>48</sup> But see DM Davis 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 *SALJ* 398 for a trenchant critique of the concept of equality as applied by the Constitutional Court in the judgments of *President of the Republic of South Africa and order v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC); and *Harksen v Lane NO and others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

<sup>49</sup> See Aileen McColgan *Just Wages for Women* (Clarendon Press, Oxford) (1997) chapt 2-6.

<sup>50</sup> See the Equality Act of 1957 and subsections 1363ff and 1587ff of the BGB.

<sup>51</sup> See Stephen Cretney and Judith Masson *Principles of Family Law* (1990) (5th edition) ch 19. Mitigating the consequences of a matrimonial property regime that dictated strict separation of property, the Matrimonial Causes Act (1973) recognized the partnership entailed in marriage and made possible, by way of a judicial discretion on divorce, the sharing of assets such as the matrimonial home and even the business assets of the husband, on the basis that the parties

of profit and loss, has incorporated both of these features into its matrimonial property law. Marriages with the standard-form antenuptial contract always excluded sharing. Since 1984 with the enactment of the Matrimonial Property Act,<sup>52</sup> marriage by such an antenuptial contract is based on the accrual system, adopted from the model of the German Zugewinnngemeinschaft, unless this consequence is expressly excluded. The judicial discretion to divide property on divorce was also created in 1984 by the Matrimonial Property Act.<sup>53</sup> It was designed to mitigate the harshness of complete separation of property in marriages which took place before the introduction of the accrual system. Thus, the introduction of the accrual system (which amounts to a deferred sharing of profits of spouses married out of community) and the provision for judicial interference with the consequences of complete separation of property via the transfer of property from one spouse to the other on divorce, have mitigated the potentially harsh consequences that flow from a system which excludes all sharing.<sup>54</sup>

However, in marriages after 1984 the accrual system is occasionally excluded in the antenuptial contract, sometimes in cases which reflect the choice of the party whose estate is most likely to increase (the husband), rather than the informed choice of both parties or in cases where a woman is widowed and left well-off by her deceased husband. In such marriages, the judicial discretion will not be able to remedy any injustice that may flow from the selected matrimonial

---

should as far as possible be placed in the position as if the marriage had not broken down. The Matrimonial Causes Act was amended by the Matrimonial and Family Proceedings Act of 1984. This legislation, inter alia, introduced the 'clean-break' principle, and attenuated maintenance obligations of ex husbands to their former wives. Divorced women immediately became more dependent on the state in order to support the one-parent families headed by them.

<sup>52</sup> 88 of 1984.

<sup>53</sup> The wording of section 36 (which amended section 7 of the Divorce Act 70 of 1979) suggested that it did not apply to a civil marriage governed by the Black Administration Act (that is, a marriage between two Blacks and a marriage between a Black man and a woman of another race) although in one case it was held to apply to a marriage between Blacks *Mathabathe v Mathabathe* 1987 (3) SA 45 (W), cf *Milbourn v Milbourn* 1987 (3) SA 62 (W). It was held further in *Lagesse v Lagesse* 1992 (1) SA 173 (D) that an informal antenuptial contract is sufficient for the application of the discretion. See also *Bell v Bell* 1991 (4) SA 195 (W) and section 7 (9) of the Divorce Act, introduced by the Divorce Amendment Act 44 of 1992.

<sup>54</sup> See June Sinclair (assisted by Heaton) *Law of Marriage* vol 1 (1996) 142.



system.<sup>55</sup> A redistribution of property is permitted by the court on divorce only if the marriage was celebrated with an antenuptial contract excluding all forms of sharing, prior to the commencement of the Matrimonial Property Act.<sup>56</sup> The equivalent provision for the civil marriages of Blacks requires that the marriage was celebrated out of community, prior to the commencement of the Marriage and Matrimonial Property Law Amendment Act.<sup>57</sup>

The inevitable demise of the judicial discretion will therefore occur when all such marriages which took place prior to the commencement of the two Acts have been dissolved. However, many couples are marrying after the two commencement dates, with antenuptial contracts which, by excluding the accrual system, are creating matrimonial property regimes in which no sharing of family assets takes place. In this way, a further group of persons is emerging who are denied access to a redistribution of assets, simply because they married after the cut-off dates.<sup>58</sup> However, in 1990, the South African Law Commission rejected a proposed extension of the judicial discretion which could have improved the position substantially for many women.<sup>59</sup>

Most divorces are undefended and the financial matters are regulated by a settlement incorporated into the court's order. Private ordering of the consequences of divorce depends upon the bargaining process that the law provides for the parties. The fact that the court has the power to intervene to do justice between them by way of its discretion frequently leads to

---

<sup>55</sup> The judicial discretion was created by section 36 of the Matrimonial Property Act 88 of 1984, which amended section 7 of the Divorce Act 70 of 1979. In terms of section 7 (3) of Act 70 of 1979, the court's discretion to redistribute assets on divorce applies only in some marriages, namely: marriages of Whites, Coloureds and Asians concluded before 1 November 1984 and marriages of Blacks before 2 December 1988, which are out of community of property without the accrual system and in which the spouses have reached no agreement about the division of their assets. Furthermore, in terms of section 7 (7) (c) of Act 70 of 1979 the provisions of section 7 (7) (a) regarding pension-sharing are not applicable to parties married out of community of property with exclusion of the accrual system after 1 November 1984.

<sup>56</sup> Act 88 of 1984, which commenced on 1 November 1984.

<sup>57</sup> Act 3 of 1988, which commenced on 2 December 1988.

<sup>58</sup> See *Review of the Law of Divorce* Project 12 of 1990.

<sup>59</sup> See South African Law Commission Report *Review of the Law of Divorce* Project 12 of 1990. This was on the ground that this would introduce uncertainty about the outcome of divorce and interfere with the contractual choice of the parties.

fairer settlements. In these cases, uncertainty may be a better alternative than the injustice derived from complete separation of property.<sup>60</sup> The so-called uncertainty introduced in 1984 for some marriages has not opened the floodgates of litigation, but has in fact improved the basis for the settlement of proprietary issues on divorce by mitigating the effects of choices made ignorantly at the time of marriage.<sup>61</sup> If the purpose of the judicial discretion to order redistribution is to avoid injustice, then the date of one's marriage and the range of the available choices should not fetter the discretion of the court. Whenever complete separation of property applies, the court should be able to intervene in the interests of justice.<sup>62</sup> Constitutionally, the law in this regard unfairly discriminates against those married according to the system of complete separation of property on the ground of the date of their marriage. The discrimination lies in the denial of a remedy to relieve injustice, which remedy is granted to persons married earlier with an identical system.

#### f) *Guidelines*

In the case of divorce where extensive property is involved, it is the outcome of negotiations regarding financial arrangements which is important for the parties. However, concentration on the final settlement disguises the importance of the underlying reasoning process and the theoretical framework of the settlement. If the legal control of financial reallocation of resources is underpinned by a belief in the importance of the satisfaction of rights-based claims, then clear rules are essential so that those rights may be prospectively evaluated. If, on the other hand, the law attempts to fulfil needs and expectations, discretionary procedures will be used to assess their relative importance in the light of competing claims and available resources. One of the most complex decisions which must be made involves the family home, where a settlement must deal with the settling-up of property rights in a substantial capital sum,

---

<sup>60</sup> Thus, it seems the discretion should apply to all marriages, regardless of the proprietary system. Undue harshness can flow from unalterable equal sharing in a marriage in community of property, just as it can result from complete separation of property.

<sup>61</sup> See Mary Ann Glendon *New Family and New Property* (1981) 66; see Discussion Paper 54 (1993) Australian Law Commission, entitled *Equality before the Law*. At paras 8.7-8.10. See further Marcia Neave 'From Difference to Sameness - Law and Women's Work' (1992) 18 *Melbourne University Law Review* 768 at 783; see too Carl E Schneider 'The Tension between Rules and Discretion in Family Law: A Report and Reflection' (1993) 27 *Family LQ* 229.

<sup>62</sup> See June Sinclair (assisted by Heaton) *Law of Marriage vol 1* (1996) at 141-147.

while being sensitive to the importance of the continuing value of the home. The matter is further complicated by the fact that a decision concerning the property rights of two adults must also take account of the needs of the children for a stable and satisfactory home environment. In these cases, certainty is not usually possible: negotiation and compromise are involved in the financial arrangements<sup>63</sup> in which lawyers are important.

It is suggested that guidelines for amounts of support obligations be developed to produce more consistency in the amounts of child support and facilitate the settlement of disputes about child support. Judges should be bound to apply the Guidelines, subject to some degree of discretion. For those who are self-employed or who operate their own businesses, there are often legitimate differences of opinion about how to determine expenses and income, as well as how to treat earnings retained in the business and there is no set of rules that could ever provide a clear and simple solution to establishing the financial position of all self-employed persons. There are also possibilities for liable parents to attempt to conceal a part of their real income in the business that require careful examination.

One of the most controversial issues is that of joint custody where it is essential to allow a court substantial flexibility to establish the amount of child support. In a case where each parent exercises a right of access to, or has physical custody of, a child for not less than forty per cent of the time over the course of a year, a careful adjustment will need to be made. There will be significant scope for argument about whether the forty per cent figure has been reached. Access arrangements may be complex and flexible, making the calculation difficult, with the potential for variation from one year to the next. Children may spend time in boarding schools, also giving rise to potential argument. An apportionment of days might have to be carried out in some cases. The liable parent would have to establish that he or she has custody or access for forty per cent of the time during a year, and if the child is attending a boarding school, this cannot be counted towards his forty per cent.<sup>64</sup> If parties are in a joint

---

<sup>63</sup> See Emily Jackson, Fran Washoff, Mavis Maclean & Rebecca Emerson Dobash 'Financial Support on Divorce: The Right Mixture of Rules & Discretion' (1993) 7 *International Journal of Law and the Family* 230 at 252-3.

<sup>64</sup> See Justice Claire L'Heureux Dubé 'Economic Consequences of Divorce: A View From Canada' (1994) 31 *Houston Law Review* 451.

custody situation, the courts should have a broad discretion to determine child support taking into consideration the Guideline amounts; the increased costs of joint custody arrangements and the means, needs and other circumstances of each spouse and any child.

The discretionary element would allow courts to order a lower amount than the Guidelines require if there is undue hardship and the liable parent seeking to invoke this provision can establish that his or her household has a lower standard of living than the other household. The courts should be sympathetic when it is shown that the undue hardship relates to children such as children of a new partner who require support. However, it is submitted that the courts should exercise caution in determining those circumstances in which a liable parent could derogate from the primary obligation to his or her children, and would have to establish that his or her household had a lower standard of living before the court could even consider the issue of undue hardship.

I submit that the Guidelines should be drawn up to provide detailed figures for the amount of child support up to a certain amount of the liable parent's annual income. Thereafter, the Guidelines should stipulate that the amount shall be a certain percentage of the liable parent's income above the maximum, but also give judges a discretion to vary the amount of child support payable as the court considers appropriate, having regard to the needs and other circumstances of the children, and the financial ability of each spouse to contribute. Guidelines could provide a predictable, expeditious determination of child support in comparison to the present widely discretionary process in which child support is too often haphazardly assessed. The solution proposed via these Guidelines is to replace the arbitrary with the more predictable through the application of fixed amounts designed to reflect a more equitable distribution of the post-separation economic realities of the parents. The Guidelines should specify that the recipient of child support under an order made before the new system has the right to vary the previous order and be reassessed in terms of Guidelines.

In Germany, the Child Maintenance Act sets out two means of calculating maintenance for all

children: firstly, individually calculated maintenance<sup>65</sup> and secondly, set maintenance,<sup>66</sup> which minors can claim from parents not living in the same household as them.<sup>67</sup> Set maintenance is a maintenance payment reflecting the age of the child and calculated from the average of what the parent is able to pay and the average of what the child needs. It is set out in a statutory order of the federal government. The idea behind set maintenance is to save children from having to prove exactly what they need and the parent from having to demonstrate what they can pay. In any case it is open to the parent to provide evidence in a later amendment procedure that the child has need of less maintenance than usual or that the parental income is too low to satisfy the set maintenance. Set payments are recalculated every two years by the Federal Ministry of Justice according to fixed conditions and then published in the Federal Law Gazette.<sup>68</sup> The yardstick for this adjustment is the evolution of the average net income.<sup>69</sup> This system of adjustment means that set maintenance will automatically, i.e. without court procedure, adapt to the changing economic situation in the whole of Germany. Instead of set maintenance, the child can at any time apply to the court for individually calculated maintenance. A court assessment of maintenance can also, as in the case of set maintenance, be later adjusted to conform to the evolving average net income without further court procedure. This approach combines flexibility with some measure of certainty, and might be a way of flexibly applying a 'Guideline' system.

In the United States, two federal laws mandate state child support guidelines.<sup>70</sup> The law also requires that states review their guidelines every four years relative to current economic data

---

<sup>65</sup> Para. 1610 I, II BGB.

<sup>66</sup> Para. 1612a BGV a.a.

<sup>67</sup> Previously legitimate children could only claim for so-called individual maintenance, in which case their minimum requirements would be set out according to the legal regulations applied to illegitimate children.

<sup>68</sup> *Bundesgesetzblatt*.

<sup>69</sup> Support for the idea of using costs of living as a basis for calculation are given by the German Lawyers Association, *FamRZ* 1997, 276; in contrast support for the idea of using a model for adjustment referring to net income is given by Wagner.

<sup>70</sup> The Child Support Enforcement Amendments of 1984 (Pub. L. No. 98-378) required that states adopt guidelines even if they were only advisory, and the Family Support Act of 1988 (Pub. L. No. 100-485) specified that states needed to have guidelines that were legally presumptive.

and patterns of deviation. States are not required to adopt any specific form of guideline, nor are they required to set their guidelines at any particular level. With this level of flexibility, states have implemented guidelines with significant differences in economic parameters and major variations in factors that are considered (eg child care costs) and their approaches to special circumstances, such as shared parenting arrangements. The Family Support Act of 1988 mandated each state to adopt presumptive child support guidelines by October 1989. The guidelines established under this mandate are required to constitute a rebuttable presumption in any judicial or administrative hearing that the amount of support indicated by the formula is appropriate in a given case.

The criteria to support a deviation from the guidelines are established by the state, but must take into consideration the best interests of the child.<sup>71</sup> Deviation from the guidelines must be supported either in writing or specified on the record of the proceeding. Furthermore, the guidelines are to apply to negotiated agreements. A negotiated agreement is to be submitted to the judicial or administrative hearing officer for review and to determine the presumptive amount and whether the negotiated agreement meets deviation criteria.<sup>72</sup> The federal government did not specify that guidelines be enacted by statute, only that they have the status of rebuttable presumptions in the establishment of all child support orders in the state. As a result, seventeen states implemented guidelines by court rule and five by administrative rule, while the remaining twenty-nine enacted them into statute.

The last round of major federal legislation affecting child support in the United States was the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). This law enacted major reforms of the welfare system as well as a prescriptive and sweeping set of mandates upon states for improving the child support enforcement programme. Federal regulations require that state guidelines should as a minimum consider all earnings and income of the non-residential parent; be based on a numeric criteria and result in a computation of the support obligation; and provide for coverage of the child's health care needs. States have

---

<sup>71</sup> 45 CFR 302.56 (g). See Jane C Venohr and Robert G Williams 'The Implementation and Periodic Review of State Child Support Guidelines' (1999) 33 *Family Law Quarterly* 7 at 9.

<sup>72</sup> 56 Fed. Reg. 22,347 (1991).

implemented one of the following four models: Percentage of Obligor Income; Income Sharing; Melson formula; or the Massachusetts/District Columbia hybrid of the percentage of obligor income model. The Percentage of Obligor Income Model is the simplest of the four formulas. It determines the child support order amount by applying a state-determined percentage to obligor income such as one child 17 per cent; two children 25 per cent; three children 29 per cent.

The Income-sharing model is based on the concept that the child should receive the same proportion of parental income the child would have received if the parents lived together. In determining the child support obligation, the parents' income is combined to replicate total income of an intact family. This amount is matched to economic estimates of how much an intact family with the same income and number of children would spend on child-rearing expenditures. This estimate of actual child-rearing expenditures in an intact family forms the basic child support obligation. In turn, the basic child support obligation is prorated according to each parent's income. Barring adjustments for child care, medical expenses, or other factors, the non-residential parent's prorated share is the amount of the child support ordered.

Thirdly, the Melson formula model calculates child support by determining the net income for each parent then by subtracting a self-support reserve (also called a "primary support allowance") is subtracted from each parent's income. The purpose of the self-support reserve is to allow each parent enough income to maintain subsistence. The reserve amount is near the federal poverty level for one person. Secondly, each parent's income less the self-support reserve is applied to the child support obligation calculation. The primary support needs of the child are considered. Similar to the self-support reserve for the parents, the primary support needs of the child represents the minimum amount required to provide a subsistence living for the child. Actual amounts for child care and children's extraordinary medical expenses are added to the above amounts to obtain the total primary support needs. The total primary support needs of the child are prorated to each parent according to his or her share of the combined income. Thirdly, to the extent that either parent has income available after covering the self-support reserve and his or her share of the child's primary support needs, an additional percentage of the remaining income is applied to the child support obligation. A total child support obligation for each parent is determined by adding the amounts in the second

and third stage. The residential parent is assumed to spend his or her obligation directly on the child. The non-residential parent's share is payable as child support.<sup>73</sup>

Massachusetts and the District of Columbia implement a hybrid of the Percentage of Obligor Income and Income Share models. If obligee income is below a specified threshold, a Percentage of Obligor model is applied. If obligee income is above the specified threshold, an Income-Sharing approach is used.

Child support guidelines should address special factors such as work-related child care, out-of-pocket expenses for the child's share of a health insurance premium and the child's extraordinary medical expenses. Guidelines should be consistent with a broad range of estimated child-rearing costs and should be assessed in relation to economic evidence on child-rearing costs and the incidence of deviations to ensure the ongoing adequacy of the guidelines, and to encourage continuing evaluations of their appropriate use and equitable application. New economic studies on child-rearing costs are required to update the economic parameters. As experience with guidelines is acquired, modification and refinement will occur to ensure that they are applied equitably to broader circumstances.

In the United States, there has been a general trend toward more adjustments for shared parenting time, greater protection for low-income obligors, and extension of the guidelines to higher income levels.<sup>74</sup> This trend has made guidelines somewhat more complex but arguably more fair, as they can be equitably used in a greater variety of situations. Review of guidelines is essential to ensure ongoing development and to adopt to more complex patterns of child rearing.

---

<sup>73</sup> As of 1989, three states had implemented the Melson formula: Delaware, Hawaii and Montana. The parameters for Hawaii and West Virginia were generally lower than they are for Delaware.

<sup>74</sup> See Jane Venohr and Robert Williams 'Implementation and Review of State Guidelines' at (1999) 33 *Family Law Quarterly* 7 at 37.



g) *Changing concepts of parenthood*

As patterns of child-rearing change, so do concepts of parenthood. In some jurisdictions,<sup>75</sup> the step-parent is obliged to provide for the children of his spouse for the duration of the marriage, which obligation may be extended to parties living together, but not married, where there are children from a previous marriage. In the Netherlands, doubts have been expressed about the proposition that the 'social' parent's duty to maintain the child should simply end when shared custody is terminated.<sup>76</sup> Arrangements for the child depend upon a regular income and a proposal was therefore made to allow the social parent's obligation to pay maintenance to continue for one year after the shared custody order had terminated.<sup>77</sup> In this way, the maintenance obligations of the ex-partner can co-exist with the maintenance obligations of the biological non-custodial parent and the existing spouse, if any.<sup>78</sup>

The extent of the obligation of each liable person depends upon all the circumstances of the case, particularly ability to pay and the character of the relationship between each liable person and the child. Relevant facts include the length of time which the liable parent lived with the child as part of a family, the presence or absence of contact between the child and the liable person; and whether the child's name changed to that of the liable parent. The advantages for the child and the custodial person of this arrangement are that there are two persons from whom maintenance can be sought, whose liabilities may reduce or increase from time to time, depending upon the needs of the child and their own circumstances.

In New Zealand, the new partner can be liable only where there has been a court order

---

<sup>75</sup> For example, the Netherlands - Article 395 book 1 Civil Code.

<sup>76</sup> Second Chamber of Parliament 1995-1996, legislative proposal 23 714 number 7, at 4 (May 15, 1996).

<sup>77</sup> Article 253w book 1 Civil Code. Article 253w book 1 Civil Code (introduced by legislative proposal 23 714 nr. 13 (March 11, 1997). In this formula an analogy is made with the provision in Article 157(6) book 1 Civil Code for maintenance of an ex-partner of a childless, short-lived marriage. A further extension was made and maintenance liabilities now continue for a period equivalent to the duration of the period during which custody was shared.

<sup>78</sup> However, the custodial parent's unmarried partner is not liable for maintenance in the absence of a joint or shared custody order (Article 395 book 1 Civil Code).

declaring that person to be a step-parent.<sup>79</sup> The idea of being a parent because a child has become a member of the family, even though one of the spouses is not the child's natural or adoptive parent, (a concept previously permitted)<sup>80</sup> has been abandoned. Instead, there is a restrictive mechanism for treating step-parents as parents. This can occur only after a Family Court has declared a person to be a step-parent,<sup>81</sup> a procedure which, because of the inevitable cost and delay, discourages applications. The court must take into account the extent to which the putative step-parent has assumed responsibility for the child, whether that was done knowing that others were the natural parents, the liability of any other person, whether the person was married to another parent of the child (it is not essential for step-parenthood under the new scheme that the step-parent be married to a natural or adoptive parent of the child<sup>82</sup>), and whether the person had ever been a guardian of the child. Liability of step-parents is therefore reserved for the exceptional case. The only unconditional acknowledgement of step-parents is where the step-parent and a natural parent have adopted the child. Such a step-parent adoption has not up until recently totally excluded the maintenance liability of the other natural parent who nevertheless by law loses parental status.<sup>83</sup> Under the child support legislation, however, no child support can be claimed from the parent who is not one of the adopting parents.<sup>84</sup>

In certain cases, the time may be ripe to impose support obligations on those step-parents who have established a social link and close relationship with a child.<sup>85</sup> It seems anomalous to allow and even encourage blended families, and yet to continue to maintain a maintenance system

---

<sup>79</sup> Section 7 of New Zealand Child Support Act, 1991.

<sup>80</sup> See Sections 60 and 62 of the Family Proceedings Act, 1998.

<sup>81</sup> Section 99 of New Zealand Child Support Act, 1991.

<sup>82</sup> See *Sample v Sample* [1973] 1 NZLR 584.

<sup>83</sup> See Section 16(2)(a) *proviso* of the New Zealand Adoption Act 1955.

<sup>84</sup> Section 6(2) of the New Zealand Child Support Act.

<sup>85</sup> H Krause 'Child Support reassessed limits of private responsibility and the public interest' (1989) 2 *Univ of Illinois Law Review* 367 at 386.

which does not recognize the need for a support obligation in those situations.<sup>86</sup> Access to natural parents need not be severed. Many step-parents, however, replace natural parents *de facto*.<sup>87</sup> Perhaps their important role needs encouragement and legal control in order to create a responsible system of family law.

The tendency of family law to compartmentalize custody, maintenance and property rights has impaired the law's ability to effectively resolve the economic problems resulting from marriage breakdown. A more holistic approach is required, taking into account particularly the inter-relationship between custody and the support obligation. There is a high correlation between a parent's willingness to pay and his/her relationship with the child. Obligations which are based on social parenthood may be more enduring.<sup>88</sup> There is considerable complexity in the relationship between children's need for biological parents and social families when step-parents are involved.<sup>89</sup> Step-families *are* families, although different to biological families,<sup>90</sup> as in African social systems, the existence of the extended family unit means that the meaning and concept of parenthood and the consequent liabilities and responsibilities which attach to it differ from that within the biological nuclear family.<sup>91</sup>

The concept of biological parenthood has already been diluted due to the development of artificial means of reproduction. The law of maintenance will also have to deal with changing concepts of parenthood due to the use of artificial means of conception and the legal regulation

---

<sup>86</sup> RM Redman 'The Support of Children in Blended Families: A Call for Change' (1991) 25 *Family Law Quarterly*.

<sup>87</sup> Particularly in South Africa where a step parent marries the custodial parent in community of property and the half of the joint estate is liable for support of children of each spouse.

<sup>88</sup> See Mavis Maclean and John Eekelaar *The Parental Obligation: A Study of Parenthood* (Hart Publishing Press) (Oxford) (1997) 152.

<sup>89</sup> See Rosalind Edwards, Val Gillies and Jane Ribbens McCarthy 'Biological Parents and Social Families: Legal Discourses and Everyday Understandings of the Position of Step-parents' (1999) 13 *International Journal of Law and the Family* 78.

<sup>90</sup> See LD Wardle 'Evolving Rights and Duties of Step-Parents' in *Parenthood in Modern Society* (ed. John Eekelaar and Petar Sarcevic) (1993) 375 at 387.

<sup>91</sup> See R Thandabantu Nhlapo 'Parenthood in African Perspective' in *Parenthood in Modern Society* (1993) (ed. John Eekelaar and Petar Sarcevic) 35 at 36.

of surrogate motherhood.<sup>92</sup> In this realm of the law, parental responsibility has become divorced from that of purely genetic parenthood into various categories of parenthood. The husband of a woman who has a child by means of assisted reproduction using donated sperm is to be treated as the father of the child, unless it is shown that he did not consent to her receiving the donated sperm or a donated embryo and if he can rebut the presumption of paternity stemming from his marriage to her.<sup>93</sup> The duties of child support will need to be redefined by legislation in this area of the law.<sup>94</sup>

*h) Conditioning of Child Support on Access and Termination of Parental Responsibilities*

Custody and access realities cannot be divorced from support obligations. Many fathers may be irresponsible and ex-wives and children may suffer considerable hardship,<sup>95</sup> but the courts have done little to recognize the close correlation between access and the willing payment of support obligations. Conditioning of child support payments on access has been criticized as

---

<sup>92</sup> As proposed by the Final Report of the Ad Hoc Committee on Surrogate Motherhood (October 1998).

<sup>93</sup> See Section 5 of Children's Status Act 82 of 1987. See too English Human Fertilisation and Embryology Act 1990 goes even further by providing, in section 28 (3) that where donated sperm is used for a woman in the course of licensed "treatment services" provided for her and a man together, that man shall be treated as the father of the child. In other words, an unmarried partner can acquire the legal status of father of his partner's child even though he is not the genetic father (and, incidentally, there is no requirement to show that the couple are cohabiting). Furthermore, even where a man is the genetic father of a child, he will not be recognised as such, according to section 28 (6) of the 1990 Act if either (a) he is a donor whose sperm is used for licensed treatment, and whose consent to the use of his sperm has been obtained in accordance with the requirements of Schedule 3 to the Act, or (b) his sperm is used after his death. The effect is that such children born to a woman who has no partner who may take advantage of section 28 (2) or (3) are deemed legally fatherless.

<sup>94</sup> The Final Report of the Ad Hoc Committee (1998) recommends that any child from a surrogacy arrangement is regarded as the legitimate child of the commissioning parents immediately after birth in the case of full surrogacy and six weeks after birth in the case of partial surrogacy. The child born through "full" surrogacy shall not have any claim for maintenance against the surrogate ("gestational") mother or any of her relatives. In cases of partial surrogacy such claim is to be relinquished when the transfer of parentage takes place.

<sup>95</sup> L Weitzman *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985); Hunter 'Child Support Law and Policy: The Systematic Imposition of Costs on Women' (1983) *Harv. Women's Law Journal* 1.

economically and psychologically harmful to the children involved;<sup>96</sup> potentially burdensome to state welfare budgets,<sup>97</sup> biased against women,<sup>98</sup> inconsistent and not in the best interests of the children.<sup>99</sup> It is also alleged to be ineffective although no empirical research has been published indicating this.

A plan to condition the payment of child support on access has been proposed as part of a comprehensive programme,<sup>100</sup> which requires clear notice in advance to all and to be utilized only as a last resort. This proposal does create an incentive for the custodial parent to allow access or custody and could encourage a continuing relationship between the non-custodial parent and the parties' children. However, this proposal only covers the situation of a parent who is willing to pay but denied access, not that of a defaulting parent who is unable to pay but denied access by the custodial parent. Although it has been established that the determining factor affecting child support payments is the willingness of the obliged parent to pay and that the needs of the mother and children appear to have little influence,<sup>101</sup> no guidelines can fully re-address the problem of resource-inadequacy at the lower and middle income levels, especially the need to support two households with resources that are barely equipped to handle one.

The other side of the issue is to consider whether parental responsibilities<sup>102</sup> should be

---

<sup>96</sup> Karen Czapansky 'Making Parents Behave: The Conditioning of Child Support and Visitation Rights' 1984 *Columbia Law Review* 1059 at 1077-9.

<sup>97</sup> Karen Czapansky 'Child Support and Visitation: Rethinking the Connections' (1989) 20 *Rutgers Law Journal* 619 at 620.

<sup>98</sup> Karen Czapansky *supra* at 646.

<sup>99</sup> Karen Czapansky *supra* at 635.

<sup>100</sup> Alison Kitch 'Child Support Payments on Visitation Access: A Proposal' (1991) 5 *International Journal of Law and the Family* 318 at 338-344.

<sup>101</sup> Judith Cassetty *Child Support and Public Policy: Securing Support from Absent Fathers* (1978).

<sup>102</sup> See *First Issue Paper Review of the Child Care Act* (1998) where it was emphasised that South African law is increasingly focussing on parental responsibilities, rather than rights.

terminated because of a parent's failure to pay child support without good cause.<sup>103</sup> What of the Constitutional right of the child to family or parental care?<sup>104</sup> The United States Supreme Court has recognized that the relationship between parent and child should be constitutionally protected from unwarranted governmental intrusion.<sup>105</sup> Carefully considered statutory standards would need to be implemented in accordance with the movement towards parental responsibility,<sup>106</sup> and away from parental rights.

In this regard, a distinction may be drawn between two kinds of responsibility:<sup>107</sup> firstly, there is the practical exercise of responsibility towards children, which involves care and provision for children.<sup>108</sup> Secondly, responsibility may arise directly from the fact that a person is the natural or adoptive parent of the child. In this sense, parental responsibility flows necessarily from the status of being a parent and attaches automatically. The focus here is not so much on how a parent behaves towards a child but on parental autonomy, largely to the exclusion of others. This second sense of responsibility is to some extent, ideological. The continued emphasis on biological ties is becoming increasingly inconsistent with other social and legal trends, especially in South Africa, with the prevalence of the extended family and care-givers who are not biologically related to the child. Family responsibilities are also understood as less binding than they were even a generation ago,<sup>109</sup> due to the changes in family structure, law, social attitudes on divorce, procreation and single parenthood. However, social policy is now

---

<sup>103</sup> See *Klobnack v Abbot* 303 N.W. 2d 149 (Iowa 1981) where the court in Iowa adopted this approach.

<sup>104</sup> See Section 28 (1) (b); See Article 8 of the United Nations Convention on the Rights of the Child. See too JA Robinson 'The Child's Right to Parental and Family Care: Some Brief Remarks' (1998) 19 *Obiter* 329 at 332.

<sup>105</sup> *Stanley v Illinois* 405 U.S. 645 (1972).

<sup>106</sup> See English Children Act, 1989.

<sup>107</sup> Mavis Maclean and John Eekelaar *The Parental Obligation* (1997).

<sup>108</sup> Parents act towards their children, not for the parents' benefit but for the benefit of the children and will include the personal relationship between child and parent, not merely a financially dependent one.

<sup>109</sup> See Vivienne Bozalek 'Contextualising caring in Black South African families' (1997) *Social Politics International Studies in Gender State and Society* (OUP). Harry Krause 'Child Support Reassessed: Limits of Private Responsibility and the Public Interest' (1989) 2 *University of Illinois Law Review* 367 at 392.

constrained by international commitments. Even though the biological link is found to be of little merit, one could not adopt a social policy aimed at the support of social rather than biological parenthood. This would involve a denial of human rights enjoyed reciprocally by biological parents and their children under international conventions.<sup>110</sup>

While fathers have, to some extent, increasingly assumed a more active parental role in the family unit, they often lose this role when the parents' relationship breaks down and the mother has custody of the children. The underlying philosophy of our law is that natural and adoptive parents have a perpetual and almost exclusive obligation towards their children. This, however, is an assumption which departs in many instances from social practice in the late twentieth century and from cultural values.<sup>111</sup> If the assumption of automatic parental responsibility is challenged, then who should be responsible for the support of children?

## 10.2 State Maintenance

It is submitted that there is a need for recognition of the fact that the non-custodial parent owes support commensurate with his/her ability to pay and his/her relationship with the child and the custodial parent owes services and care in an environment conducive to the best interests of the child, commensurate with his or her means and subject to an objective minimum standard.<sup>112</sup> Society bears the residual burden to make up any shortfall on the absent parent's side by providing maintenance. As the Finer Committee proposed in 1974, although an obligation must rest on the parents to support their children (which obligation may extend to step-children), parental obligations should be less onerous. The income and assets of the child should be taken into account in calculating the maintenance and the parents should not be depressed to below a minimum income level. The parents should be entitled to offset against income a sum for personal support which should be indexed to the cost of living, reasonable

---

<sup>110</sup> See Andrew Bainham 'Book Review - The Parental Obligation by Mavis Maclean and John Eekelaar' (1998) 25 *Journal of Law and Society* 294.

<sup>111</sup> Bill Atkin 'Financial Support - The Bureaucratisation of Personal Responsibility' in *Family Law Policy in New Zealand* (1992) (Oxford University Press) (ed Mark Henaghan and Bill Atkin) 210.

<sup>112</sup> H Krause (*supra*) at 398.

housing costs, any additional child and, in special circumstances, an additional allowance for any other child or cohabitee.

The obligation of a parent who lives permanently with a child should be discharged by the support which is actually provided and a parent who does not usually have care of the child should be able to make a deduction for any time spent with the child. Maintenance advances should be index-linked, non-contributory and payable, regardless of the income or assets of the child, custodial parent or any step-parent. The general principle should be to guarantee the child a certain level of support, even where the parent is absent or unwilling to pay. Custodial parents in South Africa are generally denied an adequate standard of living with the result that the future for children looks grim,<sup>113</sup> especially in view of the impact that the AIDS pandemic is likely to have on the economically active workforce in this country.<sup>114</sup> Government policy alternatives require immediate focus and a radical reconceptualisation of our law of maintenance is needed to ensure that the ongoing needs of children and their custodians are met and that past child care responsibilities are compensated.<sup>115</sup>

The United Nations Convention on the Rights of the Child (CRC) recognises the right of every child to benefit from social security.<sup>116</sup> The right of every child to a standard of living sufficient for the child's physical, mental, spiritual, moral and social development.<sup>117</sup> Parents have the primary responsibility to secure these conditions of living, but the State is obliged in cases of need to provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing and to take all appropriate measures to secure the recovery of maintenance for the child. If South Africa is to comply with the CRC, the dimensions of

---

<sup>113</sup> Francis Wilson 'Poverty, the State and Redistribution: Some Reflections' in *The Political Economy of South Africa* (ed by N Nattrass & E Ardington (1990) 229).

<sup>114</sup> Supra 14-17.

<sup>115</sup> C Rogerson 'Winning the Battle, having the War: the Plight of the Custodial Mother after Judgement' in *Issues in Divorce or Separation* (1990) 21.

<sup>116</sup> Article 26.

<sup>117</sup> Article 27.



child poverty will require political and economic restructuring.<sup>118</sup> Both public and private law support regimes need to be child-centered. A child, one of whose parents is absent, has a special need for support which the State has a residual duty to provide. It is a benefit for the child, not the parent, and is therefore unaffected by the presence of a step-parent or cohabitee, although such person may also have a role in providing support.

In implementing a child support scheme, the effects of repartnering and reconstituting families and the position of the extended family will need to be analysed. Following on this, a balance of responsibility will have to be drawn between social and biological parents, family (including extended family) and the State.<sup>119</sup> In New Zealand, government assistance for families is now targeted through the family support tax credit and the guaranteed minimum family income. Some private obligations towards families can now be found in the main statute<sup>120</sup> dealing with child abuse and neglect, and youth-offending. One of the purposes of the Act is '[t]o make provisions for families, and family groups to receive assistance in caring for their children and young persons'. Furthermore, the Act empowers the Family Court to make services, orders and support orders. These orders cannot be made without the consent of the person or organization upon whom they are imposed, and they are designed to offer, not so much financial assistance, as specific help and supervision to those who are caring for the child in question. These orders are signs of the extension of support obligations beyond members of the family, as they may be awarded against community groups and agencies with the necessary expertise and experience.

The CRC recognizes the fact that there is a broad range of persons who may take responsibility for children. States Parties are obliged to respect

'the responsibilities, rights and duties of parents or, where applicable, the members of the

---

<sup>118</sup> See Geraldine van Bueren 'Alleviating Poverty through the Constitutional Court' (1999) 15 *SAJHR* 52.

<sup>119</sup> See Bill Atkin 'Child Support in New Zealand runs into Strife' (1994) 31 *Houston Law Review* 631 who points out that the New Zealand Child Support Scheme introduced in 1992 (Child Support Act of 1991) has been a disaster for failing to consider these issues.

<sup>120</sup> Children, Young Persons and Their Families Act 1989.

extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention'.<sup>121</sup>

The Convention is thus provided with a broad and flexible definition of 'family', reflecting the wide variety of kinship and community arrangements in which children are brought up around the world. Furthermore, the importance of the family is emphasised as the 'fundamental group of society and the natural environment for the growth and well-being of all its members'.<sup>122</sup> Children, for the full harmonious development of their personalities, should grow up in a family environment.<sup>123</sup>

In South Africa, the migrant labour system and influx control measures have had a dramatic effect on family life, particularly with regard to Black families, resulting in the emergence of many 'social families', namely family units in which children are brought up wholly or partly by persons who are not biological or legal parents, including relatives such as grandparents, and other persons who are not related to the child in question.<sup>124</sup> Recent legislative developments in South Africa have given some recognition to the reality of different family structures in this country, in particular the introduction of the new child support grant to replace the state maintenance grant (which is to be phased out over a three year period). In terms of the amendments made to the Social Assistance Act<sup>125</sup> by the Welfare Laws Amendment Act,<sup>126</sup> the child support grant<sup>127</sup> is payable to the child's 'primary care-giver'

---

<sup>121</sup> Article 5 of CRC, 1989.

<sup>122</sup> Preamble to CRC, 1989.

<sup>123</sup> *Ibid.*

<sup>124</sup> Report of the Lund Committee on Child and Family Support (1996)

<sup>125</sup> 59 of 1992.

<sup>126</sup> 106 of 1997.

<sup>127</sup> R100 per month is available for children under the age of seven years who live in households with an income of below R9600 per annum, or R13200 per annum if the child and his or her primary care-giver either live in a rural area or in an informal dwelling. See further the Regulations Regarding Grants and Financial Awards to Welfare Organizations and to Persons in Need of Social Relief of Distress in terms of the Social Assistance Act 1992 (Government

defined as a 'person whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child in question'.<sup>128</sup>

Despite the numerous bureaucratic difficulties that have reportedly been encountered in the administration of the child support grant,<sup>129</sup> the legislative recognition of the notion of the 'primary care-giver' is significant, in that it represents an attempt to grapple with the importance in children's lives of a range of persons other than their biological or legal parents and to ensure that the grant reaches the child in question. However, the support offered in terms of this grant is inadequate; these care-givers require support from society just as society needs the care-givers.<sup>130</sup> New approaches will have to be adopted, including the identification of a minimum core of the government's obligations in relation to this right.<sup>131</sup> Children have specific constitutional protection<sup>132</sup> which is reinforced by South Africa's ratification of the UN Convention on the Rights of the Child.<sup>133</sup> A major focus of the search for community in South Africa must be the alleviation of child poverty, caused by death, divorce or abandonment of parental responsibility.

---

Notice R.418 in Government Gazette 18771 of 31 March 1998).

<sup>128</sup> Section 1 of the Social Assistance Act, as amended by Section 3 of the Welfare Laws Amendment Act. The definition of 'primary care-giver' excludes '(a) a person who receives remuneration, or an institution which receives an award, for taking care of the child: or (b) a person who does not have an implied or express consent of a parent, guardian or custodian of the child'.

<sup>129</sup> See for example, Alison Tilley 'The New Child Support Grant: Theory and Practice' unpublished paper (June 1998).

<sup>130</sup> See Karen Czapanskiy 'Inter-dependencies, Families and Children' (1999) 39 *Santa Clara Law Review* 957.

<sup>131</sup> See United Nations Committee on Economic, Social and Cultural Rights General Comment 3 (1990) UN Doc E/1991/23.

<sup>132</sup> See Section 28 of Act 108 of 1996.

<sup>133</sup> Ratified 13 June 1995.

## BIBLIOGRAPHY

### 1 ARTICLES AND CHAPTERS

Adamchak DJ 'Population Ageing: Gender, Family Support and the Economic Condition of the Older Africans' (1996) 5 *South African Journal of Gerontology* 3

Albertyn, Catherine & Kentridge, Janet 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 *SAJHR* 149

Armstrong, Alice 'School and Sadza: Custody and the Best Interests of the Child in Zimbabwe' (1994) 8 *International Journal of Law and The Family* 151

Armstrong, Alice *Women and Law in Southern Africa Research Trust Struggling over Scarce Resources - Women and Maintenance in Southern Africa* (1992)

Armstrong, Alice et al 'Towards a Cultural Understanding of the Interplay between Children's and Women's Rights: an Eastern and Southern African Perspective' (1995) *International Journal of Law and Children's Rights* 333

Atkin, Bill 'Financial Support: The Bureaucratization of Personal Responsibility' in *Family Law Policy in New Zealand* (eds Mark Henaghan and Bill Atkin) (1992) (Oxford University Press) (Melbourne)

Atkin, Bill 'New Zealand: 1992 Controversy surrounds Policies on Children' (1992) 16 *University of Louisville Journal of Family Law* 377-393

Atkin, Bill 'Child Support in New Zealand Runs into Strife' (1994) 31 *Houston Law Review* 631

Atkin WR and Bridge C A 'Establishing Legal Relationships: Parent and Children in England and New Zealand' (1996) 17 *New Zealand Universities Law Review* 13

Bailey-Harris R 'Child Support: Is The Right the Wrong One?' (1992) 5 *International Journal of Law and the Family* 169

Bainham, Andrew 'Changing Families and Changing Concepts: Reforming the Language of Family Law' in *The Changing Family, Family Forms and Family Law* (ed John Eekelaar and Thandabanthu Nhlapo (Hart-Publishing) (Oxford) (1998) 153

Bainham, Andrew 'The Privatisation of the Public Interest in Children' (1990) 53 *The Modern Law Review* 206

Bainham, Andrew 'Book Review - The Parental Obligation' (1988) 25 *Journal of Law and Society* 294

Bala, Nicholas and Bailey, Martha 'Controversies about Same-Sex Couples and Children' in *International Survey of Family Law* (1997) (Martinus Nijhoff Publishers) 79

- Barrett C; McKerrow N; Strode A 'Consultative Paper on Children living with HIV/AIDS' (January 1999) Paper prepared for the *South African Law Commission Project on the Review of the Child Care Act 74 of 1983*
- Bartlett, Carol and Finlay, Henry 'Child Support in Australia in Family' *State and Individual Economic Security Volume 1* (ed M T Meulders-Klein and John Eekelaar) (E Story Scientia) (Brussels) (1988) 251
- Beinart B 'Liability of a Deceased Estate for Maintenance' 1958 *Acta Juridica* 92
- Bellamy, Clifford 'Child Support Act 1991 Net Effect - Dead or Alive?' (1993) 23 *Family Law* 633
- Bird, Roger 'Child Support Act 1991 - The Regulations' (1992) 22 *Family Law* 448
- Bird, Roger 'Benchmarks - A Guide Through the Changing Maze of the Government's Child Support System' (1998) 5 *Law Society's Gazette* 33
- Bird, Roger 'Child Support: Reform or Tinkering?' (1995) 25 *Family Law* 112 - 114
- Boden, Rebecca and Child, Mary 'Paying for Procreation: Child Support arrangement in the UK (1996) 4 *Feminist Legal Studies* 131
- Bradley, David 'Financial Support for Children - The Swedish Example' (1990) 20 *Family Law* 349 - 351
- Budlender, D 'Women and Men in South Africa' *Central Statistical Service* (1998)
- Burman S and Barratt A 'Welfare Law and Bureaucracy in a Changing South Africa: A Case Study of Maintenance Grants for the Illegitimate' Working Paper no 19 *Centre for Applied Legal Studies* (1993)
- Burman S 'Capitalising on African strengths: Women, Welfare and the law' (1991) 7 *South African Journal on Human Rights* 215 -221
- Burman S 'Illegitimacy and the African Family in a Changing South Africa' (1991) *Acta Juridica* 36 - 51
- Burman S and Berger S 'When Family Support Fails: the Problems of Maintenance Payments in Apartheid South Africa Parts 1 & 11' (1988) 4 (2) & (3) *South African Journal on Human Rights* 194, 334.
- Burrows, David 'Child Support Act 1991: Why we Need to know about it now' (1992) 22 *Family Law* 342
- Cachalia, Azhar 'Citizenship, Muslim family law and a future South African Constitution: A preliminary enquiry' 1993 *THRHR* 392
- Caesar-Wolf B 'Equality for Women in the Regulation of the Economic Effects of Divorce: Legal Concepts and Family Court Proceedings in the FRG' (1987) 15 *International Journal of the Sociology of Law* 1 - 29
- Caldwell J C 'The South African Fertility Decline' (1993) 19(2) *Population and Development Review* 17
- Campbell C 'The Township Family and Women's Struggles' (1990) 4 *Agenda* 1-22

- Carberry F 'The Child Support Scheme: An Evaluation of its Personal Impact' (1992) *Social Security Journal* 43
- Carbone, June 'Feminism, Gender and the Consequences of divorce' in *Divorce Where Next?* (Dartmouth Publishing Company)(Aldershot) (1996) (Ed Michael Freeman) 181 -227
- Carbone, June 'Income-Sharing: redefining the Family in Terms of Community' (1994) 31 *Houston Law Review* 1
- Carrington, Lucie 'Forgotten Family' (1995) 1055 *Community Care* 14
- Chambers, David 'Justifying the Continued use of Jail' in *Making Fathers Pay* (Chicago) (University of Chicago Press) (1979) 241 - 253
- Charlesworth, Stephanie 'The Economic and Social Position of One-Parent Families in Australia and France: A Comparative View' in *Family, State and Individual Economic Security Volume 2 The State* (1988) 631 (ed MT Meulders-Klein and John Eekelaar) (Brussels) (E Story Scientia) 631
- Clark B 'Children's Right To Support - a Public Responsibility?' (1996) *Acta Juridica* 82
- Clark, Brigitte and Roos, Johan 'The Law of Delict and the Illegal Breadwinner' (1986) 49 *THRHR* 91
- Clark, Brigitte & Kerr AJ 'Dependant's Action for Loss of Support: Are Women Married Under Islamic Rites Victims of Unfair Discrimination?' (1999) 116 *SALJ* 20
- Clarke M 'Children's Changing Circumstances: Recent Trends and Future Prospects' (London) *Centre for Population Studies* (1989)
- Cockrell, Alfred 'The Law of Persons and the Bill of Rights in *Bill of Rights Compendium* (Butterworths), (Durban) (1997)
- Corbett, MM 'Aspects of the Role of Policy in the Evolution of our Common Law' 1987 (104) *SALJ* 52
- Corlyon, Judy 'Child Support - whose Responsibility?' (1990) 20 *Family Law* 385<sup>3</sup>
- Cretney, Stephen 'Divorce and the Low Income Family' (1990) 20 *Family Law* 377
- Czapansky, Karen 'Child Support and Visitation: Rethinking the Connections' (1989) 20 *Rutgers Law Journal* 619
- Czapansky, Karen 'Interdependencies, Families and Children' (1999) 39 *Santa Clara Law Review* 957
- Czapansky, K 'Making Parents Behave: the Conditioning of Child Support and Visitation Rights' (1984) *Columbia Law Review* 1059
- Daley S 'In Zambia, the Abandoned Generation' in *New York Times* , Friday September 18 1998

- Deech, Ruth 'Property and Money Matters' in *Divorce Where Next?* (Ed Michael Freeman) Dartmouth Publishing Company) (Aldershot) (1996) 89 -106
- Devenish, George 'Minority Rights and Cultural Pluralism: The Protection of Language and Cultural Identity in the 1996 Constitution' (1999) 62 *THRHR* 201
- Diduck, Alison 'The Unmodified Family: The Child Support Act and the Construction of Legal Subjects' (1995) 22 *Journal of Law and Society* 527 - 548
- Diduck, Alison and Orton, Helena 'Equality and Support for Spouses' (1994) 57 *Modern Law Review* 681 - 702
- Eckard, 'Toegangsregte tot buite-egtelike kinders - behoort die wetgewer in te gryp?' 1992 *TSAR* 122
- Edwards, Susan 'Parental Responsibility: An Instrument of Social Policy' (1992) 22 *Family Law* 113
- Edwards, Susan, Gould, Carol and Halpern, Ann 'The Continuing Saga of Maintaining the Family' (1989) 19 *Family Law* 231
- Edwards, Susan; Halpern, Ann 'Making Fathers Pay' November 30 (1990) *New Law Journal* 1687 -1691
- Edwards, Susan 'The Stark Reality? The Meal Ticket for life' June (1990) *New Law Journal* 821 -822
- Edwards; Rosalind, Gillies, Val; McCarthy, Jane Ribbens 'Biological Parents and Social Families: Legal Discourses and Everyday Understandings of the Position of Step-parents' (1999) 13 *International Journal of Law and the Family* 78
- Eekelaar J and Maclean Mavis 'Maintenance for Children; Facts and Figures' (1986) 136 *New Law Journal* 533
- Eekelaar, John 'A Child Support Scheme for the United Kingdom: analysis of the White Paper' (1991) 21 *Family Law* 15
- Eekelaar J 'Parental responsibility: State of Nature or Nature of State?' (1991) *Journal of Social Welfare and Family Law* 37
- Eekelaar, John 'Third Thoughts on the Child Support Act' (1994) 24 *Family Law* 99
- Eekelaar, John 'Public Law and Private Right: the Finer Proposals' (1976) *Public Law* 64
- Everatt D and Orkin M 'Families should stay together: intergenerational attitudes among South African Youth' (1994) 3 *South African Journal of Gerontology* 43
- Forder, Caroline 'An Undutchable Family Law: Partnership, Parenthood, Social Parenthood, Names and Some Article 8 ECHR Case Law' in *International Survey of Family Law* (1997)(ed Andrew Bainham) (1999) (Martinus Nijhoff Publishers) 259

- Fortin, Jane 'Rights Brought Home for Children' (1999) 62 *The Modern Law Review* 350
- Francis MJD & Freemantle MP 'SANTAM v Fondo Revisited' (1992) 109 *SALJ* 197
- Freedman, Warren 'Islamic Marriages, the Duty of Support and the Application of the Bill of Rights' (1998) 61 *THRHR* 532 - 538
- Freeman, Michael 'The Next Children's Act' (1998) 28 *Family Law* 341
- Funder, Kathleen 'Exploring the Access-Maintenance Nexus' in Kathleen Funder, Margaret Harrison and Ruth Weston (eds) *Settling Down, Pathways of Parents After Divorce* (1993) (Australian Institute of Family Studies, Monograph No 13)
- Giampetro, Andrea 'Mathematical Approaches to Calculating Child Support Payments: Stated Objectives, Practical Results and Hidden 'Policies' (1986) 20 *Family Law Quarterly* 376
- Gillespie, Gill 'Child Support - The Hand that Rocks the Cradle' (1996) 26 *Family Law* 162
- Goldforb, Sally F 'Child Support Guidelines: A Model for Fair Allocation of Child Care, medical and Educational Expenses' (1987) 21 *Family Law Quarterly* 325
- Graycar, Regina 'Family Law and Social Security in Australia: The Child Support Connection' (1989) 1 *Australian Journal of Family Law* 70
- Hahlo H 'The Sad Demise of the Family Maintenance Bill 1969' (1971) 88 *SALJ* 201
- Harlow, Carol 'Accountability, New Public Management and the Problems of the Child Support Agency' (1999) 26 *Journal of Law and Society* 150
- Harrison, Margaret 'Child Support Reforms and Post-Separation Parenting: Experiences and Expectations' (1992) 6 *Australian Journal of Family Law* 22
- Harrison M et al 'Payment of Child Maintenance in Australia: The Current Position, Research Findings and Reform Proposals' (1987) 1 *International Journal of Law and the Family* 93
- Harrison, Margaret 'The Australian Child Support Scheme: Practicalities' in John Eekelaar and Petar Sarcevic (eds) *Parenthood in Modern Society* (1993) 533 - 545
- Harrison, Margaret; McDonald, Peter and Weston, R 'Child Maintenance in Australia' (1987) 1 *International Journal of Law and the Family* 92
- Heaton J 'Family Law and the Bill of Rights' in *Bill of Rights Compendium* (Butterworths, Durban) (1997)
- Hinz MO 'Family Law in Namibia: The Challenge of Customary and Constitutional Law' in *The Changing Family* (1998) (Ed John Eekelaar and Thandabanthu Nhlapo) (Hart Publishing) (Oxford) 139
- Hubbard, Diane 'Maintenance, A Study of the Operation of Namibia's Maintenance Courts' (A Report for



the Legal Assistance Centre for Namibia) (1995)

Hunter 'Child Support Law and Policy: the Systematic Imposition of costs on Women' (1983) 6 *Harvard Women's Journal* 1

Jackson, Emily; Wasoff, Fran; Maclean, Mavis; Dobash 'Financial Support on Divorce: The Right Mixture of Rules and Discretion?' (1993) 7 *International Journal of Law and the Family* 230 -254

Jones-Pauly, Chris 'The Law and Morality of Support in the Wider Family' in *The Changing Family* (Hart Publishing) (ed John Eekelaar and Thandabantu Nhlapo (1999) 280

Kerr A J and Clark, Brigitte 'Dependant's Action for Loss of Support: Are Women Married by Islamic Rites Victims of Unfair Discrimination?' (1999) 116 *SALJ* 20-27

Kerr AJ 'Back to the Problem of a Hundred or More Years Ago: Public Policy concerning Contracts relating to marriages that are potentially or actually polygamous' (1984) 101 *SALJ* 445

Kerr AJ 'Guardianship of Children of Bantu Customary Unions: The Interpersonal Conflict of Law Problem' (1973) 90 *SALJ* 4

Kerr AJ 'Liability in Delict for Wrongful Causing the death of a Native Man Married According to Native law' (1956) 73 *SALJ* 402

Kerr AJ 'Customary Family Law' in Schäfer ID and Clark B (ed) *Family Law Service* (Butterworths) (Durban) (1998)

Kerr AJ 'Back to the Problems of a Hundred or More Years Ago: Public Policy Concerning Contracts Relating to Marriages that are Potentially or Actually Polygamous' (1984) 101 *SALJ* 445

Keyser, Beverley The Law of Persons (1990) *Annual Survey* 3

Kitch, Alison 'Child Support Payments on visit on Access: A Proposal' (1991) 5 *International Journal of Law and the Family* 318 -344

Knights, Emma 'Child Support Update' (1997) 27 *Family Law* 345 - 346

Knights, Emma 'Child Support Update' (1998) 28 *Family Law* 94

Knights, Emma 'Child Support Update' (1998) 28 *Family Law* 606 - 608

Knights, Emma 'Child Support Update' (1998) 28 *Family Law* 744

Knights, Emma 'Child Support Update (1998) 28 *Family Law* 270

Krause, Harry D 'The Child Support Obligation and its Enforcement' in *Family, State and Individual Economic Security' Volume 1 The Family* (1988)(eds M T Meulders-Klein and J Eekelaar) 385 -397

Krause HD 'Child Support Reassessed: Limits of Private Responsibility and the Public Interest' in *Divorce Reform at the Crossroad* (Kay and Sugarman ed) (Yale UPO, New Haven), 1990 175 -181

Kruger, John 'Supporting Single-Parent Households: Situation and Options with regard to State Maintenance Grants in South Africa' Development Bank of Southern Africa Centre for Policy and Information Development Paper 115 (1996)

Kruger, Blackbeard and De Jong 'Die vader van die buite-egtelike kind se toegangsreg - S v S' 1993 *THRHR* 696

Kruger J 'Die toegangsbevoegdheid van die ongetroude vader - is die finale woord gespreek? - B v S' (1996) 113 *SALJ* 8

L'Heureux-Dube, Justice Claire 'Economic Consequences of Divorce: A View from Canada' (1994) 31 *Houston Law Review* 451

Le Roux, Tessa "'We Have Families Too.'" Live-in Domestic workers talk about their lives' (1995) Co-operative Research Programme on Marriage and Family Life Pretoria: Human Sciences Research Council. Report HG/MF-29

Ledogar RJ 'Realizing rights Through National Programmes of Action for Children' in Himes JR *Implementing the Convention on the Rights of the Child* (Martinus Nijhoff Publishers) (The Netherlands) (1995)

Liebenberg, Sandy 'Child Welfare Reforms: Equity with a vengeance' March (1997) *Poverty Profile* 1

Liebenberg, Sandy 'Social Security and Human rights : Current Issues' (1998) 1(2) *Economic and Social Rights in South Africa Review* 10 - 12

Lupton ML 'Medico-Legal Aspects' in *Family Law Service* (ed Schäfer) (1987) J 106-J117

Lupton ML 'Variation of a Spouse's Maintenance' (1992) 109 *SALJ* 591

Lupton ML 'Surrogate Parenting: The Advantages and Disadvantages' (1986) 11 *TRW* 148

Maclean, Mavis and Eekelaar, John 'Child Support: The British Solution' (1993) 7 *International Journal of Law and the Family* 205 -229

MacPherson, Stewart 'Social Security and Social Assistance in Developing Countries' in *Family, State and Individual Economic Security Volume 2 The State* (1988) M T Meulders-Klein and J Eekelaar (Brussels) (E Story - Scientia)

Mbatha, Likhapha 'The Role of Courts in the Development of Customary Law' (1999) 4 *Gender Research Project Bulletin* 7

McKerrow N 'The Current Status, Anticipated Sequelae and Implications of the South African HIV/AIDS Epidemic' input paper to the Report on Poverty and Inequality in South Africa Commissioned by the Office

of the Deputy President (1998)

Mdleleni, Tembeka and Nomonde Mjobo 'Perceptions of Single-Parenting in Children An Exploratory Study' (1995) 7 (1) *Women's Studies* 33 - 40

Meadows, Helen 'Child Maintenance After the 1991 Act' (1994) 24 *Family Law* 96

Meadows, Helen 'Child Support Act 1991 - Setting Aside Clean Break Consent Orders' (1993) 23 *Family Law* 635

Migdal, Stephen 'Child Support - Continuing Presence but Nevertheless Absent?' (1994) 24 *Family law* 646

Millar J and Whiteford P 'Child Support in Lone-Parent Families: Policies in Australia and the UK' (1993) 21 *Policy and Politics* 59

Minow, Martha 'Redefining Families: Who's in and Who's Out?' (1991) 62 *Colorado Law Review* 269

Mostyn, Nicholas 'The Green Paper on Child Support- Children First: a New Approach to Child Support' (1999) 29 *Family law* 95

Myslik, W D et al 'Implications of AIDS for the South African population age profile' (1997) 6(2) *Southern African Journal of Gerontology* 3-8

Ncube, Welshman 'Reallocation of Matrimonial Property at the Dissolution of Marriage in Zimbabwe' (1990)34 *Journal of African Law* 2

Neave, Marcia 'From Difference to Sameness - Law and Women's Work' (1992) 18 *Melbourne University Law Review* 768

Nhlapo, Thandabantu 'International Protection of Human Rights and the Family: African variations on a Common Theme' 3 (1989) *International Journal of Law and the Family* 1 - 20

Nhlapo RT 'Biological and Social Parenthood in African Perspective: The Movement of Children in Swazi Family Law' in *Parenthood in Modern Society: Legal and Social Issues for The Twenty-first Century* (eds John Eekelaar and Petar Sarcevic) (1993) (Martinus Nijhoff) (The Netherlands) 35

Nhlapo T 'Cultural Diversity, Human Rights and the Family in Contemporary Africa: Lessons from the South African Constitutional Debate' in Lowe N and Douglas F (ed *Families Across Frontiers* (Martinus Nijhoff Publishers) (The Netherlands) (1996)

Nicoll A; Timaeus I; Kigadye RM; Walraven G; Killewo J 'The Impact of HIV infection on mortality in children under 5 years of age in sub-Saharan Africa: a demographic and epidemiologic analysis' (1994) *AIDS* 1995

Parker D 'Resources and Child Rights: An Economic Perspective' in Himes JR *Implementing the Convention on the Rights of the Child* (Martinus Nijhoff Publishers ) (The Netherlands) (1995)

- Parker, Stephen 'Child Support: Rights and Consequences' (1992) 6 *International Journal of Law and the Family* 148-168
- Parker S 'Family Law, Rights and Utility' in Eekelaar J and Sarcevic P (ed) *Parenthood in Modern Society* (Martinus Nijhoff Publishers) (Dordrecht )(1993) 547
- Parker, Stephen 'Child Support: Rights and Consequences' in (P Alston, S Parker and J Seymour (Eds)) *Children' Rights and the Law* (Oxford) (Clarendon)(1992)
- Parker, Stephen 'Rights and Utility in Anglo-Australian Family Law' (1992) 55 *Modern Law Review* 311
- Pask, E Diane 'Canadian Family Law and Social Policy: a New Generation' (1994) 31 *Houston Law Review* 499
- Pillay, Karrisha 'The Commission for Gender Equality: What is its Role?' (1998) 3 *Economic and Social Rights in African Review* 13
- Pirrie, James 'The Child Support Act (1995) 25 *Family Law* 640 - 643
- Rae, Maggie 'The Child Support Agency's First Annual Report' July (1994) *New Law Journal* 970
- Reynolds, Pamela 'The Ground of all Making. State Violence, the Family and Political Activists' (1995) *Human Sciences Research Council, Co-operative Research Programme on Marriage and Family Life* HG/MF-24
- Robertson, Jeremy 'Research on Family Group Conferences in Child Welfare in New Zealand' in Hudson, Morris, Maxwell and Galloway *Family Group Conferences: Perspectives on Policy and Practice* (1996) 49
- Robinson JA 'Some Remarks on the Constitution of the Republic of South Africa Concerning the Protection of Families and Children' in Lowe N and Douglas F (ed) *Families Across Frontiers* (Martinus Nijhoff Publishers) (The Netherlands) (1996)
- Robinson JA 'Jerrard v Jerrard, Rubenstein v Rubenstein: Wie is 'regtens verplig' om Onderhoud te Betaal?' 1992 *Obiter* 138
- Rogerson, C 'Winning the Battle, Losing the War: the Plight of the Custodial Mother after Judgement' in *Issues in Divorce or Separation* (1990) 21
- Ross, Fiona 'Umntu Ngumuntu ngabanye abantu: The Support Networks of Black Families in Southern Africa', *Human Sciences Research Council, Co-operative Research Programme on Marriage and Family Life*, Pretoria Report HG/MF-23
- Ross, Fiona 'Diffusing Domesticity: Domestic Fluidity in Die Bos' (1996) 22 *Social Dynamics* 55
- Russell, Margo 'Parenthood among Black Migrant Workers to the Western Cape: Migrant Labour and the

Nature of Domestic Groups' (1995) *Human Sciences Research Council, Co-operative Research Programme on Marriage and Family Life* HG/MF-22

Rwezaura BA 'The Changing Role of the Extended Family in Providing Economic Support for an Individual in Africa' in *Family, State and Individual Economic Security* eds (M T Meulders-Klein and J Eekelaar) (E Story Scientia) (Brussels) (1988) 167 -185

Schäfer ID 'Family Courts - Reconsideration Invited' (1983) *Acta Juridica* 191

Schäfer ID 'Alternative Divorce Procedures in the Interests of Children: Some Comparative Aspects' (1988) 51 *THRHR* 297

Schäfer ID 'The Family Advocate in South Africa' in *Frontiers of Family Law* (ed Andrew Bainham and D Pearl) (1993) (Chancery Law Publishing) 32

Schäfer ID 'The Concept of a Family Court in South Africa (1981) (Unpublished doctoral Thesis) (University of Natal)

Schmidt, Svenne T 'Advance Payment by the State of Maintenance to Children' in *Family, State and Individual Economic Security* Volume 2 (eds M T Meulders-Klein and J Eekelaar) (Brussels) (E Story Scientia) Scientia (1988) 399 - 411

Schneider, Carl E 'The Tension between Rules and discretion in Family Law: A Report and Reflection' (1993) 27 *Family Law Quarterly* 229

Sen, Amartya 'Economic Security: the Family and the State' in *Family, State and Individual Economic Security Volume 1: The Family* (eds M T Meulders-Klein and J Eekelaar) (Brussels) (E Story - Scientia) (1988)

Simkins C 'Household Composition and Structure in South Africa' *Growing up in a Divided Society* (edited Burman S and Reynolds P) (1986) (Johannesburg) (Raven Press) 16 -42

Simkins C and T Dhlamini 'The Problem of Supporting Poor Children In South Africa' in S Burman and E Preston-Whyte (ed) *Questionable Issue: Illegitimacy in South Africa* (1991) 70

Simon, Chris '"Who is Eating all my money?" Women and Financial Dependency in Rural Transkei' (1991) 3 (1) *Women's Studies* 7 - 13

Singer, Peter, Hon Mr Justice 'Has the Children Act 1989 advanced the English Child's Best Interests?' Seminar paper for conference on The Best Interests of the Child: The Changing Concept' January 1999, Cape Town

Sloth-Nielsen J and Van Heerden BJ 'Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional Development in South Africa' (1996) *South Africa Journal on Human Rights* 247

Sloth-Nielsen J 'Chicken Soup or Chainsaws: Some Implications of the Constitutionalisation of Children's

Rights in South Africa' (1996) *Acta Juridica* 6

Sloth-Nielsen, Julia and Van Heerden, Belinda 'New Child Care and Protection Legislation for South Africa? Lessons from Africa' (1997) 3 *Stellenbosch Law Review* 261

Sloth-Nielsen J 'Ratification of the United Nations Convention on the Rights of the Child: Some implications for South African Law' (1995) *South African Journal On Human Rights* 401

Smart, Carol 'Marriage, Divorce and Women's Economic Dependency; A Discussion of the Politics of Private Maintenance' (ed Michael Freeman) *State, Law and the Family, Critical Perspectives* (London: Tavistock) (1984)

Snyman, Ina 'The Family and the Legal System' (1996) 9 *Acta Criminologica* 64

Sonnekus and Van Westing 'Faktore vir die erkenning van 'n buite-egtelike kind' 1992 *TSAR* 232

Sonnekus JC 'Verlengde Onderhoudsaanspraak van die Langslewende Gage - 'n Aan vaarbare Ondergraving van Beskikkingsbevoegheid?' (1990) *TSAR* 491

Sparks, Sue 'Maintenance Research' (1991) *Black Sash*

Spiegel, Andrew; Watson, Vanessa; Wilkinson, Peter 'Domestic Diversity and Fluidity among some African Households in Greater Cape Town' (1996) 22 *Social Dynamics* 72

Stack, Carol 'Cultural Perspectives on Child Welfare' (1983-4) 12 *New York University Review of Law and Social Change* 539 - 547

Steel, Freda M 'Maintenance Enforcement in Canada' (1985) 17 *Ottawa Law Review* 491 - 522

Steyn, Anna 'Family Structures in the RSA' (1994) Co-operative Research Programme on Marriage and family Life *Pretoria Human Sciences Research Council* (Afrikaans version 1993) HG/MF-24

Strom-Bull, Kirsti 'State Support for Children in Norway' in *Family, State and Individual Economic Security Volume 11 The State* (1988) 617

Taylor, Vivienne 'A Price on Children's Protection?' (1997) *Poverty Profile* 4

Van Bueren, Geraldine 'Alleviating Poverty Through the Constitutional Court' (1999) 15 *SAJHR* 52.

Van Der Meide 'Gender Equality and Culture' (1999) 116 *South African Law Journal* 100

Van Heerden, Belinda 'The Parent-Child Relationship' (1999) Unpublished Discussion Paper for the South African Law Commission Project on Child Care Act 74 of 1983

Van Heerden, Belinda and Clark, Brigitte 'Parenthood in South African Law - Equality and Independence? Recent Developments in the Law Relating to Guardianship' (1995) 112 *South African Law Journal* 140

Van Heerden, Belinda 'The Implications of the Concept of the Primary Care-Giver For Concepts of Custody and Guardianship in Common Law and Legislation' (unpublished paper presented at a Seminar on The Concept of the Primary Care-taker) (UWE) (August 1997)

Van Heerden, Frik 'Onderhoudsverpligtinge Voorspruitend uit 'n Gebruiklike Huwelik' (1993) 56 *THRHR* 670

Venohr, Jane and Williams, Robert 'Implementation and Review of State Guidelines' (1999) 33 *Family Law Quarterly* 7

Vorster JH and Rossouw HM 'Poverty Alleviation and the State Maintenance Grant: Some Comments on the Lund Committee on Child and Family Support' (1996) 32 *Social Work* 296 - 307

Walker, Janet 'From Rights to Responsibilities for Parents: The Emancipation of Children' (1990) 20 *Family Law* 380

Wardle, L D 'Evolving Rights and Duties of Step-parents' in *Parenthood in Modern Society: Legal and Social Issues for the twenty first century* (1993) (ed John Eekelaar and Petar Sarcevic) 375

White, Richard 'Practitioner' September 1994 *New Law Journal* 1280

Willenbacher, Barbara and Voegeli, Wolfgang 'Multiple Disadvantages of Single-Parent Families in the Federal Republic of Germany' in *Family, State and Individual Economic Security* Volume 1 (1988) Eds M T Meulders-Klein and J Eekelaar) (Brussels) (E Story Scientia) (1988)

Williams, Robert C 'Guidelines for setting levels of Child Support Orders (1987) 21 *Family Law Quarterly* 281.

Williams, Robert G 'Development of Guidelines for Child Support Orders, Part 2', *Final Report, Report to US Office of Child Support Enforcement*, Policy Studies Inc (March 1987)

Wilson, Francis 'Poverty, the State and redistribution: Some reflections' in *The Political Economy of South Africa* (ed N Natrass and E Ardington) (1990) 229

Zaal FN 'Children and the Courts: How can we Improve the Availability of Legal Forums?' Unpublished paper (1999) for the *South African Law Commission Project on the Review of the Child Care Act 74 of 1983*

Ziehl SC 'Social class and Household structure' (1994) 3 *South African Journal of Sociology* 100

Zinkula, Thomas R 'Termination of Parental Rights' (1982) 67 *Iowa Law Review* 827

## 2. BOOKS:

- Armstrong AK and Nhlapo RT *Law and the other Sex: The Legal position of women in Swaziland* (1985) (University of Swaziland) (Kwaluseni)
- Armstrong AK (ed) *Women and Law in Southern Africa* (1987) (Zimbabwe Publishing Company), (Harare)
- Armstrong, Alice *Struggling over Scarce Resources; Women and Maintenance in Southern Africa* ((1992)
- Bainham, Andrew (editor) *The International Survey of Family Law* 1996 Published on behalf of the International Society of Family Law (Martinus Nijhoff Publishers The Netherlands) (1998)
- Bainham, Andrew (editor) *The International Survey of Family Law* 1997 published on behalf of the International Society of Family Law (Martinus Nijhoff Publishers) (1999)
- Bazilli, Susan *Putting Women on the Agenda* (Johannesburg) (Ravan Press) (1991)
- Bekker S and Hinz MO *Marriage and Customary Law in Namibia* (1995) (Windhoek) CASS)
- Benjamin, Paul; Campanella, Joe and de Villiers, Ingrid (compilers) *Trends in South African Labour Law: Selected Papers from the Labour Law Conference* 1991 (Johannesburg, Taylor-Made Administrative Services 1992)
- Bennett T W *Human Rights and African Customary Law under the South African Constitution* (1995) (Juta Publishing Company) (Cape Town)
- Bennett TW *The Application of Customary Law in Southern Africa* (Cape Town) (Juta Publishing Company) 1991)
- Bird, Roger *Child Maintenance: The Child Support 1991* (Second Edition) (1993) (Family Law) (Bristol)
- Bird Roger *Child Maintenance: The New Law, the Child Support Act 1991* (1991) (Family Law) (Bristol)(first edition)
- Boberg PQR *The Law of Persons* (1977) (Juta Publishing Company) (Johannesburg)
- Bowen, Jan *Child Support, A Practitioner's Guide* (1994) (The Law Book Company Ltd) (NSW)
- Bowen, J *Child Support: A Practitioner's Guide* (1994)
- Brow M *Social Security - Basic Needs* (1994)
- Budlender, Debbie *Women and Men in South Africa* (1998) (CSS Pretoria)
- Burchell, Jonathan *Principles of Delict* (1993)



- Burman, Sandra and Preston-Whyte, Eleanor (eds) *Questionable Issue: Illegitimacy in South Africa* (Cape Town, Oxford University Press) (1992)
- Cachalia, Azhar, Cheadle, Halton; Davis, Dennis; Haysom, Nicholas; Maduna, Penuehl and Marcus, Gilbert *Fundamental Rights in the New Constitution* (Cape Town) (Juta) (1994)
- Cretney, Stephen *Elements of Family Law* (2 edition) (London) (Sweet and Maxwell) (1992)
- Cretney SM and Masson JM *Principles of Family Law* 5 ed (London) (Sweet and Maxwell) (1990)
- Daniels, H MMF, *The Practitioner's Guide* (1994) (Butterworths) (Durban)
- David Bedingfeld *The Child in Need, Children, the State and the Law* (1998) (Family Law) (Bristol)
- DSP Cronje and Heaton J *Casebook on The South African Law of Persons and Family Law* 2 ed (Durban, Butterworths) (1994)
- Eekelaar, John and Maclean Mavis *Maintenance after Divorce* (1986) (Oxford) (Clarendon Press)
- Eekelaar, John *Family Law and Social Policy* (Second Edition) (1984) (London) (Weidenfeld & Nicolson) (1984)
- Eekelaar, John and Nhlapo, Thandabantu (eds) *The Changing Family: Family Forums and Family Law* (1998) (Hart Publishing) (Oxford) *Family Law Service* Schäfer ID and Brigitte Clark (eds) (Durban, Butterworths) (1999) (Original 1987)
- Fineman, Martha Albertson *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (Chicago) (University of Chicago) (1991)
- Finlay HA and Bailey-Harris RJ *Family Law in Australia* 4 ed (Sydney, Butterworths 1989)
- Fredman, Sandra *Women and the Law* (1997) (Clarendon Press) (Oxford)
- Freeman MDA (ed) *Essays in Family Law* 1985 (London) (Stevens and Sons) (1986)
- Glendon, Mary Ann State, *Law and The Family: Family Law in Transition in the United States and Western Europe* (Amsterdam) (North-Holland Publishers) (1977)
- Glendon, Mary Ann *New Family and New Property* (Toronto) (Butterworths) (1981)
- Goldstein, Joseph; Freud, Anna; Solnit, Albert J *Before the Best Interests of The Child* (Burnett Book) (London) (1979)
- Graycar, Regina and Morgan, Jenny *The Hidden Agenda of Law* (Leichhardt, The Federation Press 1990)
- Groenewegen Simon *Tractatus de legibus abrogatis et inusitatis in Hollandia* (1649 (3 ed) (Amsterdam) - (1669)

- Grotius Hugo *Inleiding tot de Hollandsche Rechtsgeleertheit* (1931) ed with notes by Groenewegen and Schorer (Amsterdam) (1767)
- Hoggett, Brenda M and Pearl, David S *The Family, Law and Society* 3 ed (London, Butterworths 1991)
- Hoggett, Brenda and Pearl, David *The Family, Law and Society* (3rd edition) (Butterworths) (London) (1998)
- Iliffe J *The African Poor - a History* (1987) 141
- Joubert W A; Scott, T J (eds) *The Law of South Africa Volume 16* (Durban) (Butterworths) (1992)
- Kersteman F L *Hollandsch rechtgeleert woordenboek* (Amsterdam) (1768)
- MacKinnon, Catherine *Feminism Unmodified: Discourses on Life and Law* (Cambridge Massachusetts) (Harvard University Press) (1987)
- McColgan, Aileen *Just Wages for Women* (Clarendon Press) (Oxford) (1997)
- McGregor OR; Blom-Cooper, L and Gibson, Colin *Separated Spouses* (1970)
- Mnookin RH Child, *Family and State Problems and Material on Children and the Law* (Little, Brown and Company) (Boston) (1978)
- Murray, Christina et al *Gender and the New South African Legal Order* (Cape Town) (Juta Publishing Company) (1994)
- Nasir, J *The Islamic Law of Personal Status* (second edition) (London) (Graham and Trotman) (1990)
- Neethling, J; Potgieter JM ; Visser PJ *Law of Delict* (second Edition) (1994) (Butterworths) (Durban)
- Nhlapo, R T *Marriage and Divorce in Swazi Law and Custom* (1992) (Websters) (Mbabane)
- Ogus A; Barendt E & Wikeley NJ (1995) *The Law of Social Security* (4ed) (London) (Butterworths)
- Parker, Stephen; Parkinson, Patrick; Juliet Behrens *Australian Family Law In Context* (1994) (Sydney), (The Law Book Company)
- Pothier *Oeuvres, Contenant les traites du droit francais* (ed de M Dupin) (Paris) (1824-5)
- Robinson JA (ed) *The Law of Children and Young Persons in South Africa* (Butterworths) (Durban) (1997)
- Sinclair, June (assisted by Heaton) *Law of Marriage Volume 1* (Juta) (Johannesburg) (1996)
- Sinclair, June *An Introduction to the Matrimonial Property Act 1984* (Cape Town) (Juta Publishing Company) (1984)

Sloth-Nielsen J and Van Heerden B 'Signposts on the road to Equality: Towards the New Millennium for Parents, Children and Families in South Africa' in Eekelaar J and Nhlapo T (ed) *The Changing Family: Family Forms and Family Law* (Hart Publishing) (Oxford) (1998)

Sohrab, Julia A *Sexing the Benefit: Women, Social Security and Financial Independence in EC Sex Equality Law* (1997) (Dartmouth Publishing Press) (England)

Spiro, Erwin *The Law of Parent and Child 5ed* (Cape Town) (Juta) (1992)

Spiro E *The Law of Parent and Child* (Juta) Cape Town) (1985)

Standley, Kate *Cases & Materials on Family Law* (1997) (London) (Blackstone Press Limited)

Van Der Keessel *Praelectiones iuris Hodierni ad Hugonis Grotii Introductionem* (edited and translated)

Van Rooy G et al *Household Subsistence Levels in Namibia: A Pilot Study in Three Selected Communities* (University of Namibia), February 1994

Van Der Keessel *Theses Selectae iuris Hollandici et Zelandici*

Van Leeuwen *Het Roomsche Hollandsche Recht* (1664) (12 ed)

Van Leeuwen, Simon *Censura Forensis* (ed Leyden) (1741)

Van Bynkershoek, Cornelis *Quaestiones iuris privati* (Leyden 1744)

Van Bynkershoek, Cornelise *Observationes tumultuariae ed EM Meijers et al* (Haarlem) (1926-62)

Visser P J and Potgieter J M *Introduction to Family Law* (Cape Town) (Juta 1994)

Voet Johannes *Commentarius Ad Pandectas* (The Hague) (1698-1704)

Weitzman Lenore J *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York) (The Free Press) (1985)

Wille's *Principles of South African Law* 8 ed by Dale Hutchison, Belinda van Heerden, D P Visser and CG van der Merwe (Cape Town) (Juta 1991)

Wilson, Francis and Ramphela, Mamphela *Uprooting Poverty: The South African Challenge* (David Philip) (Cape Town) (1989)

Ziehl S C *Family Diversity - A South African Perspective focussing on Whites in Grahamstown* (Unpublished PhD Thesis Rhodes University, Grahamstown)

### **3. STATUTES, BILLS, COMMISSION REPORTS AND GOVERNMENT WHITE AND GREEN PAPERS**

#### **GERMANY:**

Equality Act of 1957

Ss1363 and 1587 of the Bürgerliches Gesetzbuch (BGB)

#### **SOUTH AFRICA:**

Administration of Estates Act 66 of 1965

Apportionment of Damages Act 58 of 1971

Basic Conditions of Employment Act 3 of 1983

Births and Deaths Registration Act 51 of 1992

Births and Deaths Registration Act 40 of 1996

Black Administration Act 38 of 1927

Child Care Act 74 of 1983, as amended

Child Care Amendment Act 96 of 1996

Children's Act 33 of 1960

Children's Act 30 of 1937

Children's Protection Act 25 of 1913

Children's Status Act 82 of 1987

Choice on Termination of Pregnancy Act 92 of 1996

Commission of Inquiry into The Structure and Functioning of the Courts in South Africa, Government Gazette 6761 of 1979, GN 286 of 1979

Constitution of The Republic of South Africa Act 108 of 1996

Constitution of the Republic of South Africa Act 200 of 1993

Department of Welfare Draft Discussion Document on Foster Care Guidelines (1997)

Department of Health Eighth Annual National HIV Sero-prevalence Survey of Women Attending Antenatal Clinics in South Africa (1997) (Pretoria)

Department of Welfare White Paper Government Gazette 16943 Feb 1996

Divorce Courts Amendment Act 65 of 1997

Divorce Act 70 of 1979

Employment Equity Act 55 of 1998

Final Report of the Ad Hoc Committee on Report of The South African Commission on Surrogate Motherhood October 1998 - Working Document

Government Gazette No 18771 R417 31 March 1998

Government Gazette Notice 57 of 1996, Draft White Paper for Social Welfare, Pretoria, Ministry for Welfare and Population Development.

Guardianship Act 192 of 1993

Human Tissue Act 65 of 1983

Income Tax Act 58 of 1962

Insolvency Act 24 of 1936

Intestate Succession Act 81 of 1987

Law of Evidence Amendment Act 45 of 1988

Living in South Africa. Selected Findings of The 1995 October Household Survey 1996, Pretoria

Maintenance Law Reform 'The Way Forward' A discussion Paper published by The Department of Justice (1997)

Maintenance Amendment Act 2 of 1991

Maintenance Orders Act 15 of 1923

Maintenance of Surviving Spouses Act 27 of 1990

Maintenance Act 23 of 1963

Maintenance Act 99 of 1998

Marriage Act 25 of 1961

Marriage and Matrimonial Property Law Amendment Act 3 of 1988

Matrimonial Property Act 88 of 1984

Mediation in Certain Divorce Matters Amendment Act 121 of 1991

Mediation in Certain Divorce Matters Act 24 of 1987

Ministry for Welfare and Population Development Draft White Paper 'A Population Policy' (August 1997)

Natural Fathers of Children Born Out of Wedlock Act 86 of 1997

Reciprocal Enforcement of Maintenance Orders Act 80 of 1963

Reciprocal Enforcement of Maintenance Orders (Countries in Africa) Act 6 of 1989

Recognition of Customary Marriages Act 120 of 1998

Report of the Lund Committee on Child and Family Support (August 1996)

Review of the Law of Divorce Project 12 of 1990

Road Accident Fund Act 56 of 1996

Social Assistance Act 59 of 1992

South African Law Commission 'Review of the Marriage Act', Project 109 (1999)

South African Law Commission Paper 13 Project 110 'The Review of The Child Care Act' (First Issue Paper (1998)

South African Law Commission Issue Paper 5 Project 100 'Review of The Maintenance System' (1997)

South African Law Commission Report on the Introduction of a Legitimate Portion or the Granting of a Right to Maintenance to the Surviving Spouse Project 22 (1987)

South African Law Commission Project 59 'Islamic Marriages and Related Matters' (1999)

South African Law Commission (Project 90) 'The Harmonisation of Common Law and Indigenous Law' (1997) Discussion Paper 74

South African Law Commission 1993 'Report on Surrogate Motherhood' (Project 65)

Welfare Laws Amendment Act 106 of 1997

**THE NETHERLANDS:**

Civil Code, Book 1 , Articles 253w, 395, 157(6).

Second Chamber of Parliament 1995-6, Legislative proposal 23 714 Number 7 (May 15 1996)

**NEW ZEALAND:**

Child Support Act, 1991

Family Proceedings Act, 1998

**NAMIBIA:**

Constitution of Namibia 1990

Reciprocal Enforcement of Maintenance Orders Act 3 of 1993

**AUSTRALIA:**

Attorney-General's Department (1984), A Maintenance Agency for Australia: The Report of the National Maintenance Inquiry, Australia Government Printing Service, Canberra

Cabinet Sub-Committee on Maintenance, Child Support: A Discussion Paper on Child Maintenance (AGPS Canberra, 1986)

Child Support Scheme: An Examination of the Operation and Effectiveness of the Scheme (Australian Government Publishing Service) (1994) (Parliament of the Commonwealth of Australia)

Child Support (Adoption of Laws) Act 1990 (WA)

Child Support Evaluation Advisory Group Child Support In Australia (AGPS, Canberra, 1992)

Child Support Evaluation Advisory Group (1992) Child Support in Australia, Final Report

Child Support Legislation Amendment Act 1995 (Cth)

Child Support (Assessment ) Act 1989 (Cth)

Discussion Paper 54 (1993) (*Australian Law Commission*) entitled Equality Before the Law

Family Law Act 1975

Family Law Reform (Consequential Amendments) Act 1995 (Cth)

Social Security Act 1991

Social Welfare Policy Secretariat, Report on Poverty Measurement, Canberra AGPS (1981) 204

## **ENGLAND:**

Beveridge Report (1942) Report of the Committee into Social Insurance and Allied Services Cmnd 6404

British Agencies for Adoption and Fostering and Association of Directors of Social Services, 'Family Justice - a Structure for the Family Court' The Report of The BAAF/ADSS Family Courts (Denis Allen ed) (1986)

Child Support Act 1991

Child Support (Maintenance Assessments and Special Cases) Regulations 1992

Child Support Act 1995

Child Support Agency National Client Satisfaction Survey 1993 (1994)

Children Act 1989

Department of Social Security 'The Growth of Social Security' (1993)

Divorce Reform Amendment Act 1969

Gingerbread Childcare Commission Report 1995

Government Green Paper 'Reform of Social Security' (1985) Vol 1 para 81 Cmnd 9517

Green Paper Cmnd 3992 'Children First: a New Approach to Child Support'

House of Lords Official Report, 19 March 1992, Co 1588

House of Lords, Official Report, 25 February 1991, Col 812

Human and Fertilisation and Embryology Act 1990

Human Rights Act 1998

Matrimonial Causes Act 1973



Matrimonial and Family Proceedings Act 1984

National Health Service and Community Care Act 1990

Report of the Department of Social Welfare for the Financial Years 1937 -1939 (1940) (UG 151940)

Report of the Committee on One-Parent Families(1974) (Cmnd 5629) (1974) Chair Morris Finer

Report of the Social Security Committee and Report no 2 of the Social and Economic Planning Council  
'Social Security Social Services and the National Income' (UG 14-1944) 20

Social Security Select Committee, First Report, The Operation of the Child Support Act HC (1993-4)

Social Fund Maternity and Funeral Expenses (General) Regulations 1987

Social Security Act 1989

Social Security Administration Act 1992

Social Fund Cold Weather Payments (General) Regulations (1988)

The Operation of the Child Support Act, First Report and Proceedings , HC 69, Session 1993-4 (London HMSO, 1993)

White Paper 'Improving Child Support' Cmnd 2745 HMSO, 1995

White Paper 'Children Come First', Cmnd 1263, vol 2, 1990

#### **NAMIBIA:**

Draft Child Care and Protection Act 1996

Reciprocal Enforcement of Maintenance Orders Act 3 of 1993

#### **NEW ZEALAND:**

Social Security Act 1973

Children, Young Persons and Their Families Act 1989

#### **4. CASE LAW:**

##### **ENGLAND:**

*Crozier v Crozier* (1994) Fam 114

*Hulley v Thompson* (1981) 1 All ER 1128

*Minton v Minton* (1979) AC 593

*R v Social Fund Inspector and Secretary of State for Social Services, Ex Parte Healey, Stitt and Ellison*  
(1992) COD 335, CA

*Richardson v Richardson* (1994) 1 WLR 186

*Sherley v Sherley* (1987) 2 All ER 54

*Hyde v Hyde & Woodmansee* (1866) LR 1 P & D 130

##### **European Court of Human Rights:**

*Malone v UK* (1984) Series A no 82

##### **AUSTRALIA:**

*Axtell and Axtell* (1981) 7 Fam LR 931

*Beck v Sliwka* (1992) FLC 92-296 at 79,254-64 (Full Ct)

*Bolton and Bolton* (1992) FLC 92-309 at 79, 322-3

*Dwyer v McGuire* (1993) 17 Fam LR 42

*Gyselman and Gyselman* (1992) FLC 92-279 at 79,061-81 (Full Ct)

*In the Marriage of Gerges* (1990) 14 Fam LR 35

*In the Marriage of Sobluskys* (1976) 2 Fam LR 11,528

*Vitzdamm-Jones v Vitzdamm-Jones; St Clark v Nicholson* (1981) 148 CLR 383

*Waterhouse v Waterhouse* (1905) 22 TLR 195

## UNITED STATES:

*Estate of Thornton v Caldor* 472 US 703 (1985)  
*Goldman v Weinberger* 106 SC 1310 (1986)  
*Harmon v Dept of Social and Health Services* 951 p22 770 (Wash 1998)  
*Jehovah's Witnesses v King County Hospital* 390 US 598 (1968)  
*R v Keegstra* 1990 3 SCR 697  
*Wisconsin v Yoder* 406 US 205 (1972)  
*Stanley v Illinois* 405 US 645 (1972)  
*Klobnock v Abbott* 303 NW 2d 149 (Iowa) 1981

## SOUTH AFRICA:

*Abbott v Bergman* 1922 AD 53  
*Abrahams v Abrahams* 1981 (3) SA 593 (B)  
*Ally v Dinath* 1984 (2) SA 451 (T)  
*Amod v Multilateral Motor Vehicle Accidents Fund* 1997 (12) BCLR 1716 (D)  
*Amod v Multilateral Motor Vehicle Accidents Fund* (1999) (SCA) (unreported Case No 444/98)  
*B v S* 1993 (2) SA 211 (W)  
*B v S* 1995 (3) SA 571 (A)  
*B v P* 1991 (4) SA 113 (T)  
*Bank v Sussman* 1968 (2) SA 15 (O)  
*Barnard v Miller* 1963 (4) SA 426 (C)  
*Beaumont v Beaumont* 1987 (1) SA 967(A)  
*Behr v Minister of Health* 1961 (1) SA 629 (SR)  
*Bell v Bell* 1991 (4) SA 195 (W)  
*Bethell v Bland and others* 1996 2 SA 194 (W)  
*Beukes v Beukes* 1995 (4) SA 429 (O)

*BJBS Contractors (Pty) Ltd v Lategan* 1975 (2) SA 590 (C)  
*Brink v Kitshoff NO* 1996 (4) SA 197 (CC)  
*Buch v Buch* 1967 (3) SA 83 (T)  
*Carelse v De Vries* (1906) 23 SC 532  
*Chamani v Chamani* 1979 (4) SA 804 (W)  
*Chawanda v Zimnat Insurance Co Ltd* 1990 (1) SA 1019 (ZH)  
*Chodree v Vally* 1996 2 SA 28 (W)  
*Christie NO v Estate Christie* 1956 (3) SA 659 (N)  
*Claassens v Claassens* 1981 (1) SA 360 (N)  
*Coetzee v The Government of The Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC)  
*Constantia Versekering Bpk v Victor* 1986 (1) SA 601 (A)  
*Couper v Flynn* 1975 (1) SA 778 (R)  
*Cullen v Haupt* 1988 (4) SA 39 (C)  
*Davis v Davis* 1993 (1) SA 621 (C)  
*Davis' Tutor v Estate Davis* 1925 WLD 168  
*De Harde v Protea Assurance Co Ltd* 1974 (2) SA 109 (E)  
*De Waal v Messing* 1938 TPD 34  
*Dhlamini v Ferguson* 1985 (4) SA 843 (A)  
*Dhlamini v Multilaterle Motorvoertuigongelukkefonds* 1992 (1) SA 802 (T)  
*Du Plessis & Others v De Klerk* 1996 (3) SA 850 (CC)  
*Duncan v Duncan* 1984 (2) SA 310 (C)  
*Edouard v Administrator, Natal* 1989 (2) SA 368 (D)  
*Erdmann v SANTAM Insurance Co Ltd* 1985 (3) SA 402 (C)  
*Erdmann v SANTAM Insurance Co Ltd* 1985 (3) SA 402 (C)  
*Estate Visser* 1948 (3) SA 1129 (C)  
*Estate de Klerk v Rowan* 1922 EDL 334  
*Evins v Shield Insurance co Ltd* 1980 (2) SA 814 (A)

*Ex Parte Zietsman NO; Estate Bastard* 1952 (2) SA 16 (C)  
*Ex Parte Jacobs* 1950 (2) PH M26 (O)  
*Ex Parte Kedar* 1993 (1) SA 242 (W)  
*Ex Parte Jacobs* 1982 (2) SA 276 (O)  
*F v L* 1987 (4) SA 525 (W)  
*Ford v Allen* 1925 TPD 5  
*Foster v De Klerk NO* 1993 (1) SA 596 (O)  
*Fraser v Naude* (1996) 2 ALL SA 99  
*Gammon v McClure* 1925 CPD 137  
*Gardener v Whitaker* 1993 (2) SA 672 (E)  
*Glass v SANTAM Insurance Ltd* 1992 (1) SA 901 (W)  
*Glazer v Glazer* 1962 (2) SA 548 (W)  
*Glazer v Glazer* 1963 (4) SA 694 (A)  
*Goldman v Executor Estate Goldman* 1937 WLD  
*Govender v Manikum* 1981 (1) SA 1178 (N)  
*Govender v Amurtham* 1979 (3) SA 358 (N)  
*Grasso v Grasso* 1987 (1) SA (C)  
*Green v Green* 1976 (3) SA 316 (RA)  
*Harris and others v Minister of the Interior and another* 1952 (2) SA 428 (A)  
*Hartman v Krogscheepers* 1950 (4) SA 421 (W)  
*Harwood v Harwood* 1976 (4) SA 586 (C)  
*Hayward v Hayward* 1974 (1) PH F3 (C)  
*Hela v Commercial Union Assurance Co* 1990 (2) SA 503 (N)  
*Hlengwa v Maphunulo* 1972 BAC 58 (NE)  
*Hoffman v Herdan* 1982 (2) SA 274 (T)  
*Hofmeyer v Fourie* 1975 (2) SA 590 (C)  
*Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W)  
*Ismail v Ismail* 1983 (1) SA 1006 (A)

*Jameson's Minors v CSAR* 1908 TS 575  
*Jerrard v Jerrard* 1992 (1) SA 426 (T)  
*Kalla v The Master* 1994 (4) BCLR 79 (T); 1995 (1) SA 261 (T)  
*Kanis v Kanis* 1974 (2) SA 606 (RA)  
*Kleinhans v African Guarantee & Indemnity Co Ltd* 1959 (2) SA 619 (E)  
*Kok v Kok* 1974 (2) SA 657 (T)  
*Kroon v Kroon* 1986(4) SA 616 (E)  
*Kruger v Ferreira* 1979 (1) SA 915 (NC)  
*L v J* 1985 (4)B SA 371(C)  
*Lagesse v Lagesse* 1992 (1) SA 173 (D)  
*Lamb v Sack* 1974 (2) SA 670 (T)  
*Langemaat v Minister of Safety and Security* 1998 (3) SA 312 (T)  
*Lebona v President Versekeringsmaatskappy* 1991 (3) SA 395 (W)  
*Legal Insurance Co v Botes* 1963 (1) SA 608 (A)  
*Lotz v Boedel van der Merwe* 1958 (2) PH M16 (O)  
*Makgae v SentraBoer (Koooperatief) Bpk* 1981 (4) SA 239 (T)  
*Mankebe v AA Mutual Insurance Association Ltd* 1986 (2) SA 196 (D)  
*Marendaz v Marendaz* 1955 (2) SA 117 (C)  
*Marine & Trade Insurance Co v Manamah* 1978 (3) SA 480 (A)  
*Mathabathe v Mathabathe* 1987 (3) SA 45 (W)  
*Mavendaz v Mavendaz* 1953 (4) SA 218 (C)  
*Mayeki v Shield Insurance Co Ltd* 1975 (4) SA 370 (C)  
*Mentz v Simpson* 1990 (4) SA 455 (A)  
*Metro Western Cape (Pty) Ltd* 1986 (3) SA 181 (A)  
*Mgumane v Setemane* 1998 (2) SA 247 (T)  
*Milbourn v Milbourn* 1987 (3) SA 62 (W)  
*Milnes v Protea Assurance Co Ltd* 1987 (3) SA 1006 (C)  
*Minister of Police, Transkei v Xatula* 1994 (2) SA 680 (Tka)

*Monamodi v Setraboer (Cooperative) Ltd* 1984 (4) SA 845 (W)  
*Moodley v Gramani* 1967 (1) SA 118 (N)  
*Moshesh NO v Marine & Trade Insurance Co Ltd* 1971 (4) SA 288 (D)  
*Mountford v Mukukumidzi* 1969 (2) SA 56 (RA)  
*Mthembu v Letsela* 1997(2) SA 936 (T)  
*National Media Limited v Bogoshi* 1998 (4) SA 1196 (A); (1998) 4 All SA 347 (A)  
*Nguza v Nguza* 1995 (2) SA 954 (Tk)  
*Nkabinde v SA Motor and General Insurance Co Ltd* 1961 (1) SA 302 (D)  
*Nodala v The Magistrate: Umtata* 1992 (2) SA 696 (Tk)  
*Oberholzer v Oberholzer* 1947(3) SA 294 (O)  
*Oosthuizen v Stanley* 1938 AD 322  
*Osman v Osman* 1992 (1) SA 751 (W)  
*Park v de Necker* 1978 (1) SA 1060 (N)  
*Pasela v Rondalia Versekeringskorporasie van SA Bpk* 1967 (1) SA 339 (W)  
*Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A)  
*Perumal v Naidoo* 1975 (3) SA 901 (N)  
*Pieterse v Pieterse* 1965 (4) SA 344 (T)  
*Plotkin v Western Assurance Co Ltd* 1955 (2) SA 385 (W)  
*Pommerel v Pommerel* 1990 (1) SA 998 (E)  
*President of the Republic of South Africa v Hugo* 1997 (6) BCLR 70 (CC)  
*Purnell v Purnell* 1993 (2) SA 662 (A)  
*R v De Jager* 1953 (2) SA 197 (T)  
*R v Hlengwa* 1958 (4) SA 160 (N)  
*R v Mpaco* 1947 (4) SA 142 (N)  
*R v Coenraad* 1959 (3) SA 938 (C)  
*R v Jack* 1953 (2) SA 624 (A)  
*R v Madichane* 1949 (4) SA 224 (O)  
*R v Glover* 1950 (2) SA 601 (N)

*Rabie v Rabie* 1992 (2) SA 306 (W)  
*Ryland v Edros* 1996 (4) All SA 557 (C)  
*Ryland v Edros* 1997 (1) BCLR 77(C); 1997 (2) SA 690 (C)  
*S v Nel* 1964 (2) PH H196 (GW)  
*S v MacDonald* 1963 (2) SA 431 (C)  
*S v Ward* 1992 (1) SA 265 (B)  
*S v Bedi* 1971 (4) SA 501 (N)  
*S v Jones* 1987 (3) SA 823 (N)  
*S v Mngxaso/ S v Polo* 1991 (2) SA 647 (Ck)  
*S v Clark* 1971 (2) SA 352 (RA)  
*S v Sigalo* 1973 (4) SA 469 (NC)  
*S v Walvaren* 1975 (4) SA 348 (T)  
*S v Qongqo* 1962 (3) SA 252 (E)  
*S v Simpson* 1964 (1) SA 61 (N)  
*S v Kriel* 1939 CPD 221  
*S v F* 1997 (1) SA 796 (O)  
*S v Knoetze* 1976 (1) PH H43 (C)  
*S v Dolman* 1970 (4) SA 467 (T)  
*S v Siyeni* 1963 (3) SA 545 (C)  
*S v Moeti* 1989 (4) SA 1953 (O)  
*S v Gunya* 1990 (4) SA 282 (Ck)  
*S v Barnes* 1967 (4) SA 706 (N)  
*S v Chizengeni* 1989 (1) SA 454 (ZH)  
*S v Maree* 1990 (3) SA 365 (C)  
*S v Dickenson* 1971 (3) SA 922 (E)  
*S v Moeti* 1989 (4) SA 1053 (O)  
*S v Dolman* 1970 (4) SA 467 (T)  
*S v Frieslaar* 1990 (4) SA 437 (C)



*S v Olivier* 1976 (3) SA 186 (O)  
*S v Johardien* 1990 (1) SA 1026 (C)  
*S v Malgas* 1987 (1) SA 194 (NC)  
*S v Miller* 1976 (1) SA 12 (C)  
*Sager v Bezuidenhout* 1980 (3) SA 1005 (O)  
*Salem v Chief Immigration Officer, Zimbabwe* 1995 (4) SA 280 (ZSC)  
*SANTAM v Fondo* 1960 (2) SA 467 (A)  
*SANTAM Insurance v Meredith* 1990 (4) SA 265 (TkA)  
*Schmidt v Schmidt* 1996 (2) SA 211 (W)  
*Seedat's Executors v The Master (Natal)* 1917 AD 302  
*Sekeleni v Sekeleni* (1904) 21 SC 118  
*Severin v Severin* 1951 (1) SA 225 (T)  
*Sher v Sher* 1978 (4) SAS 728 (W)  
*Shield Insurance v Booysen* 1979 (3) SA 953 (A)  
*Singh v SANTAM Insurance Co* 1974 (4) SA 196 (D)  
*Slikilili v Federated Insurance Co Ltd* 1983 (2) SA 275 (C)  
*Steyn v Steyn* 1990 (2) SA 272 (W)  
*Strime v Strime* 1983 (4) SA 850 (C)  
*S v Cronje* 1968 (1) SA 186 (O)  
*Union Government v Warneke* 1911 AD 657  
*Union Government v Lee* 1927 AD 202  
*Van Rij v Employers' Liability Assurance Corporation Ltd* 1964 (4) SA 737 (W)  
*Van Zyl v Steyn* 1976 (2) SA 108 (O)  
*Van Vuuren v Sam* 1972 (2) SA 633 (A)  
*Vaughan No v SA National Trust & Indemnity Co Ltd* 1976 (2) SA 417 (R)  
*Victor v Constantia Insurance Co Ltd* 1985 (1) SA 118 (C)  
*Waterson v Maybery* 1934 TPD 210  
*Weinberg v Weinberg* 1958 (2) SA 618 (C)