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

JEMILLO CRISTOPHER ADRIAAN[**]

INTRODUCTION AND CONTEXT

In terms of the preamble to the Maintenance Act 99 of 1998 (the Maintenance Act), the South African Law Reform Commission (the SALRC) is investigating, in addition to the recovery of maintenance for children, the reform of the entire South African maintenance system. Two of the areas identified by the SALRC for reform are:

(a) The Maintenance Act does not stipulate when an application for future child maintenance may be made;[1]

(b) The Act does not indicate who will be responsible for administering the benefits that are eligible for attachment or the execution of a benefit under a warrant of execution or order issued under the Act.[2]

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[**] LLB (NMMU), Non-practising attorney.

[1] It is beyond the scope of this article to set out in detail the body of cases identifying the gap relating to lump sum future maintenance due to children. It suffices to state that the cases addressing the gap are *Gerber v Gerber* (WCHC), *unreported* case numbers 12166/07 and 12691/07 of 9 November 2007; *Mngadi v Beacon Sweets and Chocolates Provident Fund & Others* 2004 (5) SA 388 (D); *Soller v Maintenance Magistrate Wynberg & Others* 2006 (2) SA 66 (C); *Magewu v Zozo* 2004 (4) SA 578 (C). The cases are also discussed more fully in the South African Law Reform Commission Issue Paper 28 (Project 100) *Review of Maintenance Act 99 of 1998* (2014).

[2] SALRC Issue Paper 28 Review of Maintenance Act (2014) para 2.63. S 26(4) of the Maintenance Act provides that '[n]otwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under any warrant of execution or any order issued or made under this chapter in order to satisfy a

As regards the first area identified for law reform and following the lead of the Constitutional Court case of *Bannatyne v Bannatyne*[3] with reference to s 28 of the Constitution of the Republic of South Africa, 1996 and the best interests of children,[4] the courts[5] have tried to fill some of the gaps and have allowed the attachment of the proceeds of immovable property, pension benefits and annuities for purposes of providing for the future maintenance of children.[6]

The basis upon which future maintenance orders have been made to date is by the courts granting anti-dissipation interdicts. In terms of such interdicts, the maintenance debtor's assets are attached to secure the future maintenance of children and the institutions are ordered to retain amounts from the net amount available for distribution. In all the cases,[7] the specific institutions[8] were ordered to retain a certain amount on behalf of the maintenance debtor and to pay over periodical future maintenance to the children's caregivers for the benefit of the children. The orders dealt with either the full net amount or a substantial portion of the maintenance debtor's assets. With this remedy, the maintenance debtor is prevented from freely dealing with his/her property until such time as his/her maintenance obligations are fulfilled, which will be at some time in the future. The funds remain the

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maintenance order.'

[3] 2003 (2) SA 363 (CC).

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

[5] See the cases mentioned in supra note 1.

[6] Bonthuys E 'Child maintenance and child poverty in South Africa' (2008) *THRHR* 196.

[7] Supra note 1.

[8] Ie the maintenance debtors' pension funds, except in the case of *Burger* and *Gerber* supra note 1 where the court interdicted an attorney's firm and ordered the sheriff and a receiver to retain the proceeds from a sale of immovable property.

property of the maintenance debtor and the child merely has a *spes* in the lump sum to be paid in the future.[9]

The second area identified by the SALRC, namely who will be responsible for administering the benefits after a future maintenance order has been made, has not received as much attention – more particularly the issue whether the Guardian's Fund[10] section of the Master (the Fund) is the appropriate receptacle to administer the funds for future maintenance. The Fund has limited powers, as it may only accept funds in terms of the Administration of Estates Act 66 of 1965 (The Estates Act),[11] other law[12] or an order of court.[13]

Some years prior to the SALRC Issue paper, the court in *Government Employees Pension Fund v Bezuidenhout* (the *Bezuidenhout* case)[14] ordered that a lump sum earmarked for the future maintenance of children be paid from the Government Employees Pension Fund to the Fund.[15] Maintenance courts now use this decision as precedent on the

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[9] *Soller* supra note 1 para 24.

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

[11] Examples of funds the Master is allowed to accept in terms of the Estates Act are set out in ss 35(12), 43(6) and 93 of the Act.

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

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

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

[15] Other traces of requests by applicants for funds to be paid to the Fund appear in *Coughlan v Kossar* case number 15209/2016 (WCHC), unreported judgment delivered on 25 November 2016 and *Mbhele v Mbhele* (2010) ZAKZPHC available at http://www.saflii.org/za/cases/ZAKZPHC/2010/29.html (accessed 8 December 2020), although it was not ordered that a lump sum be paid to the Fund.

issue of payment of lump-sums earmarked for the future maintenance of children into the Fund.[16]

The critical question to be explored in this article is whether or not the Fund is the appropriate receptacle to administer lump-sum future maintenance for children.[17] If so, what reform is required, if any, in order to promote and give effect to the best interests of the child principle?

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

Generally, the management of a minor's property is the preserve of his/her guardian.[18] It may however sometimes happen that a minor has no natural guardian and, if he/she has property, the court may appoint a tutor/curator to administer such property.[19] The high court as the upper guardian of minors cannot order that substantial funds be paid to a guardian without regard first being had to the circumstances

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

[17] This was the question directly asked in the SALRC *Issue Paper 28 Review of Maintenance Act* para 2(a)(iii) some 10 years after the decision in the *Bezuidenhout* case.

[18] The term 'guardian' refers to a parent or any person who administers and safeguards a minor's property and property interest as granted by the high court in terms of s 24 of the Children's Act 38 of 2005 or granted in terms of a valid will of the deceased parent. With regard to the management of a minor's property, see s 1(1) read with s 18(3)(a) of the Children's Act; *Ex Parte Oppel and Another* 2002 (5) SA 125 (C); De Jong M 'A better way to deal with the maintenance claims of adult dependent children upon their parents' divorce' 2013 *THRHR* 662.

[19] Meyerowitz D *The Law and Practise of Administration of Estates and Their Taxation* (2010) para 21.1.

under which such funds are likely to be administered and applied.[20]

As soon as it is decided in a particular case that the interests of the minor are, on balance, best served by the payment of the moneys other than to the guardian, the court should move to enquire into the best receptacle for the administration of the funds due to a minor.[21] The court may order payment to a trust,[22] a tutor dative/curator *bonis*,[23] a receiver[24] or to the Fund.

(a) Comparison between the different receptacles

In the case of *Dube NO v Road Accident Fund*[25] the trust structure was favoured as a protective and flexible vehicle for the administration of a minor's funds. The court commented that a trust accommodates a more inclusive approach as opposed to other receptacles such as the Fund and the appointment of a curator.[26]

The *Dube* case requires that the trust instrument be submitted with the application prior to the court approving such an arrangement. This appears to indicate the court's fear that, should the court not have sight of the trust deed, the trust may be susceptible to abuse and may not secure the child's protection. In *Dube*, the court ordered that the Road Accident Fund must provide an undertaking covering the reasonable costs of creating the trust, limited to the prescribed tariffs set out in s 84(1)(b) of the Estates Act. The court further ordered

[20] *Dube NO v Road Accident Fund* 2014 (1) SA 577 (GSJ) para 18.
[21] Ibid para 21.
[22] In terms of s 1 of the Trust Property Control Act 57 of 1988.
[23] In terms of s 72(1) of the Estates Act.
[24] In terms of the *Gerber* supra note 1 para 12.
[25] *Dube* supra note 18.
[26] Ibid para 22.

that the remuneration of the trustees be determined by the aforesaid prescribed tariff and also cover the cost of furnishing security by the trustee.[27] For purposes of clarity, these are the costs charged by a tutor/curator in terms of the Estates Act.

However, in the unreported case of *Modiba obo Ruca; In Re: Ruca v Road Accident Fund*[28] the court favoured the appointment of a curator over the creation of a trust. In this regard the court made the following comments comparing the creation of a trust to that of a curator:

> 'The creation of a trust with a financial institution avoids the conditions that accompany the appointment of a curator *bonis*, with resultant potential detriment to, and diminishing of the effective protection of vulnerable victims. Other than provided for specifically in the trust deed, trustees of a financial institution's trust are not required to report to the Master annually on the performance of their duties. The Master does not comment upon the suitability of the individuals administering the trusts with financial institutions. The court is denied the benefit of the Master's comment upon the suitability of the person who might be appointed as curator *bonis,* as no such appointment is envisaged by the practice under discussion. When a trust is created, the fees charged by the patient's legal representatives are not subject to the Master's scrutiny, as they are when a curator *bonis* is appointed.'[29]

Similarly, the court in *Molete v MEC for Health, Free*

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[27] Ibid para 27.

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

[29] Ibid para 40.

State[30] favoured the appointment of a curator over the creation of a trust.[31] The court stated:

> 'The protective remedy of curatorship has many recognised and undesirable downsides. However burdensome inroads thereof may be to [sic] parent and child relationship, great caution has to be exercised not to accentuate the disadvantages or to underplay the advantages of the remedy. A damaged relationship can be repaired but a lost fortune can be hard to recover. A family feud about missing wealth can permanently destroy close relationships in the end. Some balancing act of the conflicting triangle of interests is required in order to do some damage control. In doing so, a court has to bear in mind that the overriding consideration above all others is the best interest of the minor. The Constitution enjoins the courts and everyone else to accord those interests supreme protection.'[32]

The court then ordered – pending the appointment of a curator – that the funds be paid to the Fund and the Master be authorised to pay to the parents of the minor periodically, in his/her unfettered discretion, amounts which he/she considers necessary for the minor's maintenance, education or any other legitimate cause.[33] Despite the court's favouring the appointment of a curator, it made the following favourable remarks in respect of funds to be paid into the Fund:

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

[31] Ibid para 62.

[32] Ibid para 64.

[33] Ibid para 70.

> 'Whatever the rate[34] may be, the point remains that the proposed creation of a trust does not make a sound investment proposition. This is particularly so in the light of the alternative we have in our law that the minor's award can be kept in "The Guardian's Fund" where his account will not be debited with any charges whatsoever as administration costs but will, instead, earn interest. Currently the applicable rate of interest offered by "The Guardian's Fund" is 6.5%[35] per annum. The minor's capital will handsomely grow instead of being systematically and drastically depleted as already demonstrated in the aforegoing paragraph.'[36]

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

It is also important to note that in both matters above the applicants were able to foot the costs incidental to the creation of the trust and the appointment of a curator, which appears to be the court's main consideration in coming to its ultimate decision. In matters relating to future maintenance this will however not be possible since the maintenance debtor

[34] The rate of the management fee of the trust.

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

[36] *Molete* supra note 27 para 57.

from whom the funds are being claimed is not an independent party but the very person who is responsible for the child's maintenance. Deducting costs from the maintenance debtor's funds or from the funds destined for the child will in effect reduce the benefit the child may receive from the maintenance funds. The costs in respect of the administration will therefore have to be footed from the very funds the maintenance creditor seeks relief from. Having regard to the aforesaid, the appointment of a tutor/curator and the creation of a trust will not be the most appropriate receptacle in future maintenance matters.

The salient difference between the different receptacles and the receiver is that there is no authority for the receptacle being available in cases where the parties are not married. Maintenance claims in favour of children may arise from claims of single parents.[37] It is therefore not an all-encompassing remedy. The appointment of a receiver is therefore not the appropriate receptacle.

Depositing maintenance funds into the Fund alleviates the risk that the funds will be used for a purpose other than complying with maintenance obligations towards children.[38] The amounts deposited into the Fund will stay in line with inflation and the increasing maintenance needs of growing children because the amounts will earn interest calculated on a monthly basis and compounded annually at 31 March.[39]

With payment into the Fund, the risks and costs that are normally attached to alternative constructions such as a

[37] Sonnekus JC 'Onderhoudsbeveiliging vir minderjariges 'n lastige koordloop-kuns as die onderhoudspligtige met sy bates feitelik emigreer' 2017 *TSAR* 1.

[38] Ibid at 397.

[39] Ibid at 402. Supra note 35.

trust to control the funds due to the child are avoided.[40] Any objection by the maintenance debtor that the maintenance creditor will mismanage the lump sum will fall away should the lump sum be paid into the Fund.[41]

The Fund has specialist staff with legal qualifications[42] and is an expert in dealing with a lump sum to be paid in favour of children as it deals with such sums from deceased estates and other sources. Furthermore, the Fund is allowed to pay maintenance to children.[43] Applications to the Fund for maintenance payments are made on an application form directly by the guardian or caregiver.[44] This direct access reduces the involvement of an independent third party which is required in the case of a trust or curatorship. The inroads into the private realm of the guardian and child will therefore be reduced or avoided. No security costs are payable in respect of funds deposited into the Fund as opposed to charges flowing from the other receptacles of lump sums.

Having regard to the above it is submitted that the Fund is the best and most appropriate receptacle of lump-sum future maintenance due to children.

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

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[40] Ibid at 402.

[41] Ibid at 404.

[42] S 2(2) of the Estates Act.

[43] S 90(1) of the Estates Act authorises the Master to pay to the natural guardian or to the tutor or curator so much of the money standing to the credit of the minor or other person in the Fund as may be immediately required for the maintenance, education or other benefit of the minor or other person or any of his dependants.

[44] Meyerowitz op cit note 19 para 21.29.

(b) Challenges that will be experienced by the Fund

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

(i) Earning of interest

In the *Bezuidenhout* case the judge stated that the court can order the Master to deposit a pension benefit in the Fund in the name of the father (respondent) for the benefit of his dependants. The court further ordered that the moneys would lie in the Fund and earn interest.[45]

The Estates Act provides that interest shall be allowed on sums of money received by the Master for account of any minor (amongst other categories of beneficiaries).[46] The Estates Act is therefore explicit on the categories of persons entitled to interest – which excludes majors. The Act further provides that when the Master receives or accepts any money, he must open in the books of the Fund an account in the name of the person to whom the money belongs or the estate of which that money forms part.[47]

Although the funds are for future maintenance in favour of a child, the child does not become the owner of the funds save insofar as each month's maintenance is due and payable. The funds in fact belong to the maintenance debtor and the child merely has a *spes* in the lump sum to be paid in

[45] *Bezuidenhout* supra note 14 para 24.
[46] S 88(1) of the Estates Act.
[47] S 86(2) the Estates Act. See also Meyerowitz op cit note 19 para 25.1.

the future.[48] According to the rules of the Fund, the account must be opened in the name of the maintenance debtor to whom the money belongs, who is ordinarily a major. This results in direct conflict between the court order and the provisions regulating the Fund. The Master is now charged with opening in his/her books an interest-bearing account in the name of a major, which contravenes the Estate Act. Such action will also go against serving the child's best interest by denying the child interest on the funds. This will include a major dependent child whose funds were deposited into the Fund whilst the child was still a minor.[49]

Compared to the provisions of the Estates Act, there is a direct conflict between interest being earned in respect of minors' funds as opposed to no interest being earned in respect of majors' funds. Even if the court orders that interest must be earned on the funds, the Fund will be acting *ultra vires*, as the Estates Act does not allow interest on funds received in respect of majors.

(ii) Future maintenance due to a major

The common law duty of support does not end when a child reaches majority; it ends when the child becomes self-supporting.[50] From a constitutional perspective, the same principles applying to minor children should also apply to safeguarding the interest of major dependent children.[51]

In the *Mbhele*[52] case, the court was faced with the situation where future maintenance was due to a major. The

[48] *Soller* supra note 1 para 24.
[49] See *JG v CG* 2012 (3) SA 103 (GSJ).
[50] *Bursey v Bursey* 1999 (3) SA 33 (SCA) at 38.
[51] De Jong 2013 THRHR 660; *JG* supra note 47 with reference to the Constitutional Court case of *Bannatyne* supra note 3.
[52] *Mbhele* supra note 12.

court held that the answer lies in the common law, rendering it unnecessary and inappropriate to decide whether the Fund is the appropriate, or permissible, receptacle for the receipt of moneys to provide for the maintenance needs of a dependent major.[53] The court therefore acknowledged that a major is entitled to maintenance,[54] but ordered that the funds be paid directly to the major instead of to the Fund.[55]

In terms of the Estates Act, whenever a person becomes entitled to receive any money from the Fund, he/she must apply to the Master for payment.[56] Ordinarily, the minor, upon reaching the age of 18 (being the age of majority), is entitled to receive payment of capital and interest.[57] The deed may direct otherwise and the attainment of majority may not be sufficient.[58] The deed may be any will or written instrument disposing of money. It may also include a court order. The major will, however, in his/her own right directly become entitled to periodic payments of funds for his/her maintenance as he/she is no longer a minor.

The Master in the *Mbhele* case, however, refused to accept the payment into the Fund on the ground that the child was already a major at the time of the application.[59] It appears self-evident that the court took cognisance of the provisions regulating the Fund and ordered that the major receive the lump sum directly instead of it being paid into the Fund. The court held that the answer lies in the common law which provides that the major receive the lump sum directly instead

[53] Ibid para 13.
[54] Ibid para 14.
[55] The order was made on condition that the major was not found incapable of managing his own affairs.
[56] S 89 of the Estates Act. See also Meyerowitz op cit note 19 para 25.3.
[57] Meyerowitz op cit note 19 para 21.30.
[58] Ibid para 21.30.
[59] *Mbhele* supra note 12 para 7.1.

of it being paid into the Fund, except if it was shown that the major was unable to manage his/her own affairs.[60] It can be deduced that the court refrained from making an order for the funds to be paid over to the Fund in respect of a major dependent child as such an order would be in direct contravention of the common law and the Estates Act.

REFORM SUGGESTION TO ADDRESS CURRENT CONFLICT

To resolve the challenges regarding the earning of interest and payments for dependent major children highlighted in the preceding paragraphs, it is recommended that ownership in the funds held by the Fund, be transferred to the child. This construction will allow for the effective administration of future maintenance funds in the Fund in line with the Estates Act.

To enable the transfer of ownership to the child, it is necessary to consider an alternative to the approach of granting an anti-dissipation interdict and conferring no more than a *spes* in the lump sum on the child in all instances.

There appeared to be no firm provision or precedent for the proposition that a lump sum may be attached to secure future monthly maintenance payments.[61] However, authority for the approach of ordering a lump sum without resorting to the granting of an anti-dissipation order is found in *Bleazby* v *Bleazby*.[62] In this case the court approved the payment of a lump sum to a building society in the joint names of the maintenance creditor and a nominee of the maintenance debtor

[60] *Mbhele* supra note 12 para 13.
[61] *Burger* supra note 1 para 13 and 15.
[62] *Bleazby v Bleazby* 1947 (2) SA 523 (C).

for the future maintenance of the maintenance debtor's child. The court regarded this to be the safest way of getting any maintenance at all from the maintenance debtor, who had proved to be unreliable. The court however specifically indicated that the child's right to claim further maintenance should not be prejudiced should the amount be exhausted.[63] It is therefore clear that a lump sum was allowed where the maintenance debtor has proved to be unreliable.

In the Supreme Court of Appeal case of *Oshry NNO V Feldman,*[64] delivered after the cases dealing with future maintenance, the court had to determine whether a lump sum was competent in terms of the Maintenance of Surviving Spouses Act 27 of 1990. Although the case applied to maintenance in favour of a major person (surviving spouse), the court made relevant general *dicta* relating to maintenance matters in terms of the Maintenance Act which are also applicable to children.[65] The court specifically held that the Maintenance Act does not exclude the payment of maintenance by way of a lump sum. [66] The only difference between a claim for maintenance in respect of a child and that of a surviving spouse is that the claim of a child will not be in full and final settlement of the maintenance debtor's maintenance obligation as indicated in the *Bleazby* case above.

In analysing the case of *Coughlan v Kossar,*[67]

[63] Ibid at 523-525.

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

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

[66] *Oshry* supra note 64 para 51-54.

[67] *Coughlan* supra note 12. In this case, the maintenance creditor

Professor Sonnekus points out that the position in Germany is that the recovery of future maintenance is classified as a vested right (and not merely a *spes*) as soon as the maintenance debtor does not pay maintenance. He submits that, under these circumstances, a maintenance creditor's entitlement to part of his/her property may be restricted and, in appropriate circumstances, the court has the inherent jurisdiction to limit the ownership of the funds in the best interest of a child.[68] By comparing the use of anti-dissipation interdicts in South Africa to the position in Germany, Sonnekus indicates that in instances where the maintenance debtor has already made attempts to circumvent the payment of maintenance, there is no longer any uncertainty over the children's right to future maintenance. It is at this stage that the children's rights to future maintenance vest and it is possible actuarially to calculate the amount of the maintenance.[69] Professor Sonnekus' view is supported and is also in line with the *Bleazby* case.

Transfer of ownership is further competent in deceased estate claims of children against their deceased parent's estates. In terms of the common law, where minors are involved, payment of a lump sum in respect of future maintenance may be made but the funds are paid into the

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instituted proceedings to have an actuarily calculated amount of the maintenance debtor's investment attached and paid over to the Fund for the future maintenance of the minor children. In determining whether an anti-dissipation order may be granted, the court held that it had not been shown that the maintenance debtor was acting *mala fide* with the intention of evading his maintenance obligations.

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

[69] Sonnekus 2017 *TSAR* 398.

Fund.[70] If a lump sum is agreed to, it may be agreed that the ownership in the funds be transferred to the child.[71] Upon the child's coming of age the unused portion is paid out directly to him/her. In the event of his/her death, the amount is paid to his/her estate.[72]

In the case of *Du Toit NO v Thomas NO and Others*[73] the high court inter alia had to decide whether the Maintenance Act is applicable to an executor in a deceased estate. The court held that children of both living and deceased parents are entitled to the same cheap and effective maintenance relief. The court further stated that should this not be the case then inequality before the law would exist.[74] The court therefore acknowledged that children in *inter vivos* maintenance matters are entitled to the same remedies as those applicable in deceased estate maintenance matters and *vice versa.* It is submitted that the remedy of transfer of ownership as it exists in deceased estate maintenance matters should therefore also apply in *inter vivos* maintenance matters, failing which inequality before the law would exist.

In the case of *Mbhele*[75] the court ordered that a lump sum in respect of future maintenance be paid directly to a major child who was in need of maintenance as opposed to

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[70] Master's Directive No. 29 dated 17 November 1992; Meyerowitz op cit note 19 para 21.31; Bouwer APJ *Die Beredderingsproses van Bestorwe Boedels* (1978) at 330.

[71] Bouwer op cit note 70 at 330 where the author states: 'Die minderjarige word dan reghebbende [ten opsigte van] die geld.'

[72] Ibid at 330. It is important to note that Bouwer uses the word 'mondig' and not 'meerderjarig'. This suggests that the same principle applies to a child who is a major but not yet self-supporting. This is similar to the position in *inter vivos* maintenance matters since a parent's common law duty of support does not end when a child reaches the age of majority but only when the child becomes self-supporting.

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

[74] Ibid para 33-35; S 9(1) of the Constitution provides that '[e]veryone is equal before the law and has the right to equal protection and benefit of the law'.

[75] *Mbhele* supra note 12.

ordering payment directly to the Fund.[76] Such a direct payment to the major child means that the major becomes the owner of the lump sum. By implication, the court acknowledged that the transfer of ownership in future maintenance matters is competent with regard to major children in need of support. This construction of transferring ownership to the dependent major child in terms of remedies available at common law will achieve harmony between future maintenance orders and the provisions regulating the Fund in respect of major children.

The same principles applied in the above matters and the same constitutional principles used in the cases[77] where the attachment of a lump sum was ordered may be used in support of the transfer of ownership to dependent children. The first principle relates to the application of s 28(2) of the Constitution, which provides that the child's best interests are of paramount importance in every matter concerning the child. Secondly, in terms of s 9 of the Children's Act, the standard that the child's best interests are of paramount importance must be applied in all matters concerning the care, protection and well-being of a child. Thirdly, s 6 of the Children's Act provides that the Children's Act is applicable to all legislation involving children, including the general principles applicable to all legislation involving children and measures by organs of state which includes the child's rights as set out in the Bill of Rights.

[76] Ibid para 19. The order was on condition that a *curator bonis* is not appointed.

[77] Supra note 1.

CONCLUSION

Transferring ownership to the child and framing the court order accordingly will ensure that there is harmony between the provisions of the Estates Act and the court order. The moneys will earn interest, but the Master will only make payments in terms of court orders, which may change from time to time as the circumstances change.[78]

As has been indicated, no interest is earned on funds held in the Fund on behalf of major dependent children if the funds are deposited into the Fund when the child in need of maintenance has already reached the age of majority. Interest will however be earned in respect of a major whose funds were deposited whilst he/she was a minor.[79] In other words a minor will become entitled to payment on majority (unless there are any restrictions in terms of the court order such as a restriction to administer the funds until the child is self-supporting) and will be entitled to interest up to the date of payment.[80] To achieve harmony between the position in respect of these majors and the provisions of the Fund, the position as set out above with regard to the transfer of ownership should apply in respect of a major dependent child. The salient difference however is that the funds will be paid directly to the major instead of into the Fund.

What has been suggested in this article is merely an interim solution. A permanent solution requires an amendment to the Maintenance Act in line with the suggestions.

It is worth repeating the statement by the

[78] *Bezuidenhout* supra note 14 para 24.
[79] S 88(2) of the Estates Act; See also Meyerowitz op cit note 19 para 25.2.
[80] Meyerowitz op cit note 19 para 25.2.

Constitutional Court in the case of *Bannatyne v Bannatyne*[81] that:

> '[I]t is a function of the state not only to provide a good legal framework, but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws they implement are important mechanisms to give effect to the rights of children protected by section 28 of the Constitution. Failure to ensure their effective operation amounts to a failure to protect children against those who take advantage of the weaknesses of the system.'[82]

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

[81] *Bannatyne* supra note 3.
[82] Ibid para 28.