



# WEBINAR HANDOUT

Webinar: **THINGS YOU SHOULD KNOW BEFORE YOU APPLY FOR CHILD MAINTENANCE**

Host: Eugene Opperman (Oppermans Inc Attorneys)

Guest speaker: Adv Deon Ruiters (NPA Senior Maintenance Prosecutor)

## **In this lunch hour we cover topics which include:**

- The legislation that deals with child maintenance (short overview)
- The common law of duty of support and who needs to support
- The different forms of maintenance (child maintenance of minor children, major children and spousal maintenance)
- The requirements for the existence of duty of support of children
- Who can be described as a “child”?
- Claiming maintenance from parents, grandparents, brothers & sisters, uncles & aunties, step-parents)
- The need for maintenance and the means to pay maintenance
- Short overview of the maintenance application procedure (this will be discussed in depth in future webinars)
- General information that you need to know before you claim maintenance

## **The legislation that deals with child maintenance (short overview)**

- Children's Act
- Maintenance Act
- Constitution of South Africa
- Divorce Act
- Domestic Violence Act

Sec 18 CA: Parental responsibilities and rights.— (2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right— (a) to care for the child; (b) to maintain contact with the child; to act as guardian of the child; and (d) to contribute to the maintenance of the child.

Sec 15 MA: Duty of parents to support their children

(1) Without derogating from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue.

### The common law of duty of support and who needs to support

Parents and children have a reciprocal duty to support each other. A parent's duty to support his or her child arises by operation of law; the duty is often referred to as arising ex lege (through the operation of the law) and as being sui generis (the only one of its kind).

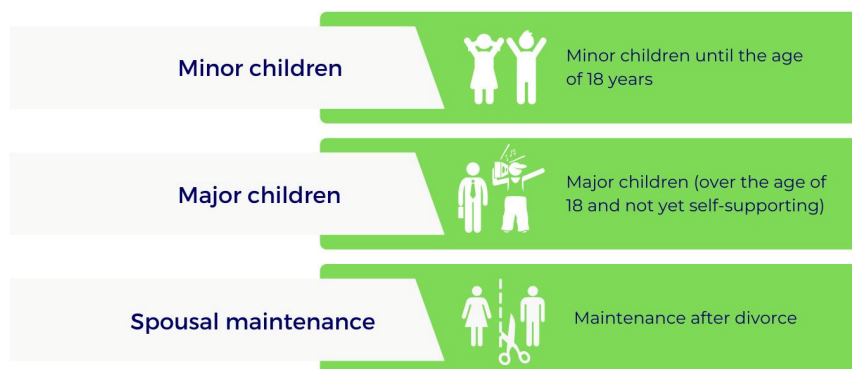
#### Sec 15 MA: Duty of parents to support their children

(1) *Without derogating from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue.*

(2) *The duty extends to such support as a child reasonably requires for his or her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care and education.*

In terms of the common law both parents must support their children proportionately, according to their means. Thus the fact that in the past the father almost invariably was, and today often still is, in the stronger economic position does not mean that the mother has no liability, even though the father has adequate means.

### The different forms of maintenance (child maintenance of minor children, major children and spousal maintenance)



### The requirements for the existence of duty of support of children

In general, the parents are obliged to maintain their children if:

- (a) the person liable to maintain the child must have the means to supply such maintenance;
- (b) the children are incapable of supporting themselves; and

- (c) the relationship between them is of such a nature that the law recognizes the existence of a duty of support.

Parents' duty to support their children is imposed by law and is based on blood relationship. It must be kept in mind that an adopted child must, for all purposes whatsoever, be regarded as the legitimate child of the adoptive parent, as though he was born from the marriage of such parents (see s242(1) and (2) of the Children's Act, 38 of 2005).

This means that the natural children ('blood children' or biological children), are entitled to maintenance from such a parent, but not the stepchildren or children-in-law (through affinity).

### **Who can be described as a "child"?**

Section 17 of the Children's Act, 2005 Act no. 38 of 2005 states that "A child, whether male or female, becomes a major upon reaching the age of 18 years."

NOTE: The Age of Majority Act was repealed by item 3 of Schedule 4 of the Children's Act 38 of 2005, with date of commencement 1 July 2007.

### **Claiming maintenance from parents, grandparents, brothers & sisters, uncles & aunts, step-parents)**

Parents: Both parents have the duty to support their natural children, legitimate or illegitimate, in accordance with their respective means. The parents' duty of support in respect of their natural child is not terminated, for example, their divorce, remarriage, or the fact that the parent does not have the custody or guardianship of the child.

*'parent' as described in the Children's Act, Act 38 of 2005:*

"parent", in relation to a child, includes the adoptive parent of a child, but excludes—

- (a) the biological father of a child conceived through the rape of or incest with the child's mother;
- (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and
- (c) a parent whose parental responsibilities and rights in respect of a child have been terminated;

Case law: *Lamb v Sack* 1974 (2) SA 670 (T): The general principle is that the duty of supporting a child is a duty common to both parents, according to their respective means, and it makes no difference whether such child is born in or out of wedlock. There is no valid reason why the ordinary rule that the burden of support, resting on both parents jointly, is distributable inter se according to their respective means and income, should not also apply in respect of the natural parents of illegitimate children.

Grandparents: If the parents are incapable of supporting the children but the grandparents are, grandparents on both sides of legitimate children are obliged to support their grandchildren.

Case law: *Jade Lee Petersen and the Maintenance Officer of Simon's Town Maintenance Court and Another*: 2004 (2) SA 56(C): "In my view it is necessary, in order to keep our common law in step with the values enshrined in the Constitution, that a duty be imposed on paternal

grandparents to support their extra-marital grandchildren to the same extent to which the maternal grandparents are liable to maintain their extra-marital grandchildren. The imposition of this duty of support would be an incremental step in the development of the common law.”

Brothers and sisters: Brothers and sisters are liable to maintain another if their parents and grandparents are not capable of doing so, including his/her half-brothers and half-sisters. The claimant must prove his/her own indigence and his/her brother's or sister's ability to provide support.

Case law: Oosthuizen v Stanley 1938 AD 322 at 331: Obiter dictum to the effect that Roman-Dutch authority favours a duty between brothers and sisters.

Ex parte Pienaar 1964(1) SA 600(T) at 607E-F: It seems that this duty is not as extensive as that of a parent, for it has been held that a brother has no obligation to provide his brother, who is physically and mentally healthy, with a university education after he attained majority.

Uncles and aunts: There is no duty of support between more remote blood relations in the collateral line or between relations by affinity (include father-in-law and son-in-law).

Stepparents: There is no duty of support between more remote blood relations in the collateral line or between relations by affinity. (e.g. between stepfather and stepchild or father-in-law and son-in-law), although a marriage in community or property may have the practical effect that e.g. a stepfather shares in the support of his stepchild during the existence of the marriage.

Case law: S v MacDonald 1963(2) SA 431 (C): A parent married in community of property is not a person legally liable to maintain his stepchildren even though he undertook liability while there was a consortium.

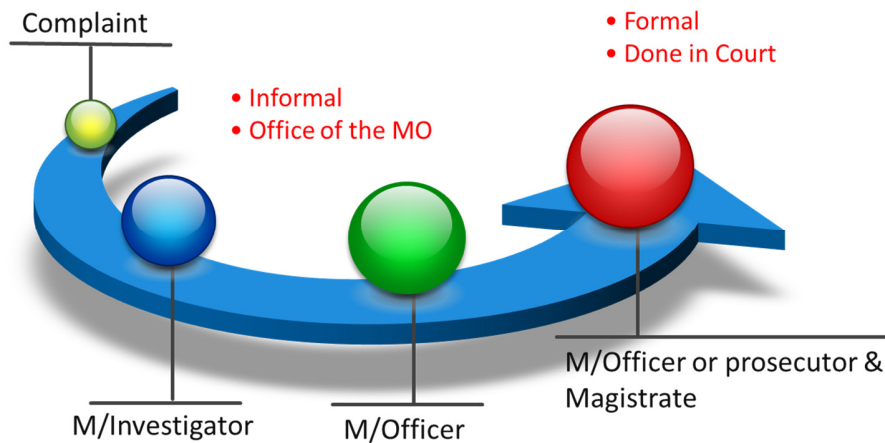
Mentz v Simpson: 1990 (4) SA 455 (A) at 460C: The Court reiterated that a parent's primary duty was to maintain his own children, and that the needs of stepchildren were legally irrelevant to the issue of the maintenance requirements of own children.

Cohabitees: There is as yet no legal duty of support between heterosexual cohabitees in Southern African Law.

### **The need for maintenance and the means to pay maintenance**

In terms of the common law both parents must support their children proportionately, according to their means. Thus the fact that in the past the father almost invariably was, and today often still is, in the stronger economic position does not mean that the mother has no liability, even though the father has adequate means.

**Short overview of the maintenance application procedure (this will be discussed in depth in future webinars)**



**Some questions and answers which will be dealt with in future webinars:**

- Q: My husband re-married and has a new family to support and now claims he cannot pay maintenance.
- A: Although the child(ren) of the second marriage must be considered, this should not prejudice or influence the children of the first marriage. The Maintenance Act provides that the duty to support children exists irrespective of whether a child is born in or out of wedlock or born of a first or a subsequent marriage.
- Q: The child is self-supporting. Should maintenance still be paid?
- A: When a child is self-supporting (employed or earning an income from another source) parents do not have to support this child financially. But bear in mind that even if a child can support himself or herself does not always preclude a parent's duty to provide higher education.
- Q: At what age does maintenance stop?
- A: Contrary to popular belief, a parent's duty to support a child does not stop when the child reaches a particular age. It usually stops when the child becomes self-supporting (being employed or earning an income from another source).
- Q: Is there a duty of children to support their parents?
- A: Yes, parents and children have a reciprocal duty of support. Children have a duty to support their parents and grandparents, but always subject to the rule that support must be claimed from nearer relatives first. In order for a parent to claim support from his/her child(ren), they must be able to prove that they are in need of this support.
- Q: My husband, the main breadwinner just died. Do the minor children have a claim against his estate for maintenance?
- A: Yes, if support is not coming from the surviving parent, the children are allowed to receive maintenance from the deceased parent's estate. In various cases it was held that a widow's means were inadequate to support minor children and the father's estate was held liable. (*Christie v Estate Christie* 1956 (3) SA 659 (N)).

- Q: Can I claim for Spousal maintenance (maintenance for myself) after divorce?
- A: In terms of our law, the reciprocal duty of support is as a result of a marriage and comes to an end when the marriage ends. If there was an existing spousal maintenance order in place during the existence of the marriage (eg. The parties lived apart) that that existing order for the maintenance of a spouse comes to an end when the divorce is granted. Yet, the courts may grant spousal maintenance if the parties agreed thereto as part of a divorce settlement or if the courts deem it necessary.
- Q: Can a normal maintenance court change or vary an order issued by the High Court?
- A: Yes, the Maintenance Act confers on maintenance courts the power to vary or discharge maintenance orders including such orders issued by the High Court (*De Witt v De Witt* 1995 (3) SA 700 (T)).
- Q: In terms of a maintenance order for children, does a child from a first marriage have priority of subsequent children of a second marriage?
- A: The Maintenance Act clearly states that, when children are concerned, the maintenance court, in determining the amount of maintenance to be paid to a child, must take into consideration the fact that a parent's duty to support a child exists whether a child is born of a first or subsequent marriage. There is no legal provision to the effect that a parent's obligation to a child of a first marriage has priority over his or her obligation to another child will have any force or effect.

Disclaimer: Although every measure was taken to ensure that the information contained in this webinar handout is legally correct at the time when it was presented, the information given and presented are ultimately the views of the individual presents and constitutes an opinion and interpretation of certain portions of the law. It should not be construed as legal advice. The information presented are for educational and informative purposes and if you require legal assistance with your legal matter, you are advised to contact a reputable family law practitioner to assist.