



**University of Cape Town**

**Faculty of Law**

**WHEN PARENTS DIE: LOCATING CHILDREN'S RIGHT TO  
ECONOMIC SECURITY IN SOUTH AFRICA'S LAWS OF  
SUCCESSION AND GUARDIANSHIP**

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CHNGRA009

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Word Count: 25,397

1 October 2020

Research dissertation presented for the approval of Senate in partial fulfillment of the requirements for the Master of Laws (LLM) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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## **Acknowledgments**

Endless thanks to friends in Cape Town who made my LLM year memorable, especially those who toiled with me in the library, brought me coffee, translated Afrikaans case law and kept me laughing and honest.

Thank you to my supervisor, Mohamed Paleker, whose insights and encouragement guided this project to completion.

I am indebted to the South African academics whose scholarship made this esoteric enterprise of connecting children's rights and succession law possible, and to the activists whose advocacy made it meaningful.

To my friends and family, whose unconditional support gave me the courage to wander away for a while: your love is my home.

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## **LIST OF ABBREVIATIONS**

ACRWC	African Charter on the Rights and Welfare of the Child
AEA	Administration of Estates Act 66 of 1965
Constitution	Constitution of the Republic of South Africa, 1996
CRC	UN Convention on the Rights of the Child
MSSA	Maintenance of Surviving Spouses Act 27 of 1990
PFA	Pension Funds Act 24 of 1956
TPCA	Trust Property Control Act 57 of 1988

## CHAPTER 1

### INTRODUCTION

‘Early law viewed children primarily as agents for the devolution of property within an organized family setting.... It might not be an exaggeration to say the social role of children was primarily seen as furthering the interests of the family group as a whole and over time by maintaining and perhaps extending the family's land-holding.’

John Eekelaar, ‘The Emergence of Children’s Rights’<sup>1</sup>

South Africa’s era as a constitutional democracy has coincided with the recognition of children as independent rights-holders within its legal system. Signature and ratification of the Convention on the Rights of the Child (CRC)<sup>2</sup> and the African Charter on the Rights and Welfare of the Child (ACRWC)<sup>3</sup> demonstrated the Republic’s commitment to children’s rights on the international stage. South Africa’s Constitution features a dedicated section on children’s rights,<sup>4</sup> and enshrines the principle that the best interests of the child are ‘of paramount importance’ in every matter concerning the child.<sup>5</sup> Whereas Roman-Dutch and English law historically conceptualised children as their parents’ property<sup>6</sup> or as conduits of family property,<sup>7</sup> children today enjoy enforceable legal rights to property and material support. South African law has decisively deemed the interests of children worthy of constitutional

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<sup>1</sup> Eekelaar ‘The Emergence of Children’s Rights’ (1986) 6 *Oxford J of Legal Studies* 161 at 163.

<sup>2</sup> South Africa signed the CRC in 1993 and ratified it on 16 June 1995: <https://indicators.ohchr.org/> accessed 26 November 2019.

<sup>3</sup> Signed by President Nelson Mandela in 1997 and ratified on 7 January 2000. See African Union ‘List of Countries Which Have Signed, Ratified/Accessed to the African Charter on the Rights and Welfare of the Child’ <https://au.int/en/treaties/african-charter-rights-and-welfare-child> accessed 20 November 2019.

<sup>4</sup> Section 28, Constitution of the Republic of South Africa, 1996. Section 28 incorporates key provisions of the CRC: Sloth-Nielsen ‘Children’s Rights in the South African Courts: An Overview since Ratification of the UN Convention on the Rights of the Child’ (2002) 10 *Int’l J Child Rts* 137 at 139.

<sup>5</sup> Section 28(2), Constitution. South African law implemented the best interests principle in the 1940s but only in relation to family and welfare cases: Skelton ‘Chapter 11: Constitutional protection of children’s rights’ in Boezaart (ed) *Child Law in South Africa* (2017) at 345.

<sup>6</sup> Freeman ‘Taking Children’s Rights More Seriously’ (1992) 6(1) *Int’l J of Law, Policy and the Family* 52 at 54. See also Walsh ‘Advancing the Interests of South Africa’s Children: A Look at the Best Interests of Children Under South Africa’s Children’s Act’ (2011) 19 *Mich St U Coll LJ Int’l L* 201 at 215.

<sup>7</sup> Per Pollock and Maitland, early English law recognised infants only in their instrumental value as heirs: ‘The law had not even been careful to give the father a right to the custody of his children; on the other hand, it had given him a right to the custody of his heir apparent, whose marriage he was free to sell.’ Eekelaar (n 1) 163.

protection as legal rights. Children's rights encompass both their need for protection and their right to autonomy.<sup>8</sup> In the celebrated words of Justice Sachs, in contemporary South Africa every child is to be 'constitutionally imagined' as an individual with inherent dignity, 'not merely as a miniature adult waiting to reach full size' or 'a mere extension of his or her parents, umbilically destined to sink or swim with them.'<sup>9</sup>

Reflecting the progression of children's rights, today it is possible to study 'child law' in South Africa as an 'autonomous discipline encompassing both private and public law.'<sup>10</sup> Children's rights reconfigure both the 'public' relationship between the state and children and the status of children within the 'private' sphere of the family—unsettling law's traditional private/public dichotomy.<sup>11</sup> Umbrella children's legislation enacted in 2005 introduced changes to South Africa's legal lexicon that elevate children's interests within the parent-child relationship.<sup>12</sup> For example, 'parental responsibilities and rights' has replaced traditional common law concepts of 'parental authority' and 'parental power.'<sup>13</sup> Pieterse proposes that the constitutionalisation of children's rights 'requires that parental rights and entitlements be seen as flowing from their constitutional responsibilities towards children, and that fulfilling such responsibilities and exercising the concomitant rights are viewed as necessary prerequisites for the meaningful exercise by children of their constitutional rights.'<sup>14</sup>

A child-focused shift is evident in South Africa's maintenance law. Whereas maintenance was once viewed as a women's issue (i.e. a mother's claim against the father), the legislature and the Constitutional Court have now firmly established

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<sup>8</sup> Skelton 2017 (n 5) 341. The law's historical treatment of children as 'passive objects of protection' means that modern children's rights are primarily associated with autonomy-enhancing rights, e.g. the right to participate in legal proceedings: Vandenhoele 'Chapter 2: Children's rights from a legal perspective' in Vandenhoele, Desmet, Reynaert et al (eds) *Routledge International Handbook of Children's Rights Studies* (2015) at 50-1.

<sup>9</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 18.

<sup>10</sup> Boezaart (ed) *Child Law in South Africa* (2009) Preface. The publication to date of two editions of Boezaart's treatise *Child Law in South Africa* (2009 and 2017), and its 2000 predecessor *Introduction to Child Law in South Africa*, underscores this point.

<sup>11</sup> Pieterse argues that some interpretations of children's rights have reinforced the neo-liberal emphasis on private welfare responsibility and justified contraction of the state's obligations towards children: Pieterse 'Reconstructing the Private/Public Dichotomy - The Enforcement of Children's Constitutional Social Rights and Care Entitlements' 2003 *J of SA L* 1.

<sup>12</sup> Children's Act 38 of 2005.

<sup>13</sup> Heaton 'Chapter 3: Parental responsibilities and rights (ss 18-41)' in Davel & Skelton (eds) *Commentary on the Children's Act* (looseleaf, updated to August 2019) Introduction.

<sup>14</sup> Pieterse (n 11) 7.

maintenance as a children's issue.<sup>15</sup> The preamble to the Maintenance Act 99 of 1998 explicitly references South Africa's CRC obligations and its commitment 'to give high priority to the rights of children.'

However, despite increased recognition that maintenance in the circumstances of parental absence and family dissolution directly implicates children's rights, virtually no attention has been paid to maintenance in the circumstance of parental death as a children's rights issue. This contribution seeks to fill this gap. Just as a child's economic vulnerability typically increases upon family dissolution, the same occurs when a parent or caregiver dies, exacerbating the psycho-emotional vulnerability. The child's need for maintenance persists and may even increase, but the source of maintenance instantly changes, from a living payor to the property left by that payor, if any. Death instantly activates new legal rules, moving the applicable framework from family law to succession law and introducing new processes and actors (e.g. Master of the High Court, executors, trustees, guardians, pension administrators). This change in legal framework may in itself pose a barrier to children's access to maintenance.

This contribution considers South Africa's laws of succession from a children's rights perspective. Placing the child's economic security at the centre of the enquiry, a deliberate connection is drawn between the legal regimes of maintenance and succession. Succession is broadly defined to include sources of private economic support that may become available upon the death of a parent, including pension benefits and monies secured through a maintenance claim brought against an estate.<sup>16</sup>

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<sup>15</sup> Moodley 'Maintenance as a child's rights issue—an analysis of recent decisions that give substance to the 'best interests of the child standard'' in Sloth-Nielsen & Du Toit (eds) *Trials & Tribulations, Trends & Triumphs: Developments in International, African and South African Child and Family Law* (2008) at 188. Moodley reviews the codification of the child's right to maintenance in the Maintenance Act 99 of 1998 and the Constitutional Court's decision in *Bannatyne v Bannatyne and the Commission for Gender Equality (Amicus Curiae)* 2003 (2) SA 363 (CC) (*Bannatyne*). The Court in *Bannatyne* did not lose sight of the gendered dimension of maintenance, recognising that enforcing maintenance 'not only secures the rights of children, it also upholds the dignity of women and promotes... equality and non-sexism' (para 30).

<sup>16</sup> Other sources include life policy proceeds and delictual damages for loss of support. Due to space constraints, these sources will not be reviewed here. Additionally, children may be entitled to public forms of support, such as cash grants payable to caregivers, discussed in Kruger 'Chapter 2: Maintenance for children' in Boezaart 2017 (n 5) 41. The Child Support Grant has been the subject of significant research and commentary; see, e.g., Lund *Changing Social Policy: The Child Support Grant in South Africa* (2008), Patel, Knijn & Van Wel 'Child Support Grants in South Africa: A Pathway to Women's Empowerment and Child Well-being?' (2015) 44 *J of Social Policy* 377, Grinspun 'No small

The first two chapters set the social and legal backdrop. Chapter 2 provides a brief overview of the social and economic context of children and families in South Africa today, focusing on aspects most pertinent to children's rights in maintenance and succession. Chapter 3 provides the legal context. The first half outlines the international, regional and domestic legal frameworks governing maintenance and reviews the progression of maintenance law reform in South Africa. It will be contended that children's right to maintenance is one component of a broader right to economic security that binds both the state and parents. Since children's right to economic security persists beyond parental death, succession law must be understood as a domain that directly engages this right. Some implications of the African child's *duty* to provide support will be considered. The second half of Chapter 3 reviews South Africa's laws of minority and guardianship, which regulate the scope of children's autonomy within the legal system and the parent-child relationship. Incongruencies between the guardianship schemes in the 2005 Children's Act and the Administration of Estates Act 66 of 1965 will be examined. Having shown that the law grants guardians significant power to alter children's legal and economic positions, the chapter concludes by considering the standard of care expected of guardians and the remedies available to children.

Chapters 4, 5 and 6 turn to an examination of the rights of children in South Africa's laws of succession. Chapter 4 begins by outlining the children's substantive rights in testate and intestate succession, before turning to an inspection of the procedural mechanisms designed to secure children's interests in estates. Generally, executors' and guardians' actions are controlled through oversight by the Master's office and the High Court, the requirement of security, and the institution of the Guardian's Fund. Owing to their legal incapacity, children depend on guardians to represent and protect their interests in estates. Potential gaps in protection are identified.

More and more, a pension is one of the most valuable assets a person owns upon death. Chapter 5 examines the law of pension death benefits from a children's rights perspective. Under section 37C of the Pension Funds Act 24 of 1956, pension boards

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change: The multiple impacts of the Child Support Grant on child and adolescent well-being' in Delany, Jehoma & Lake (eds) *South African Child Gauge 2016 (Child Gauge 2016)*, available at <http://www.ci.uct.ac.za/ci/child-gauge/2016>, accessed 16 July 2019, and Hall & Skelton 'Introducing the Child Support Grant top-up for orphaned children living with family members' in *Child Gauge 2016*. This dissertation focuses on private sources of support.

are charged with distributing death benefits to the beneficiaries and dependants of fund members. Boards' decisions are reviewable by the Pension Funds Adjudicator ('Adjudicator'). It will be argued that the Adjudicator's decisions evince a 'parental power' approach to guardianship that is untenable within a children's rights paradigm. The approach of courts in maintenance cases involving the pensions of living payors will be reviewed in contrast, and reasons the 'parental power' conception of guardianship persists will be considered. Finally, the case will be made for pension death benefits to be paid periodically to minors' guardians.

It is long-established in South African law that children may claim maintenance from their parents' estates. Chapter 6 examines the substantive and procedural aspects of this common law right, identifies current weaknesses, and suggests ways to enhance the right's furtherance of children's economic security.

The concluding chapter reviews the findings and recommendations made in the dissertation. Having demonstrated the law's reliance on the institution of guardianship to give effect to children's rights in succession, the need to reform guardianship in conformity with modern children's rights norms is reiterated.

## CHAPTER 2

### **SOCIAL CONTEXT: Families, Orphans and Child Poverty in South Africa**

There are 19.6 million children under 18 years old in South Africa, constituting 35% of the total population.<sup>17</sup> A phenomenon that distinguishes South Africa internationally is the low rate of parental co-residence with biological children.<sup>18</sup> While in all other countries in the world, children are more likely than not to live with both of their parents, in South Africa, only 34.4% of children live with both parents, and 20.9% live with neither parent.<sup>19</sup> 41.4% live with their mother only.<sup>20</sup> Parental absence does not necessarily indicate neglect, given the significant child-rearing role assumed by kin in African families: almost all children in South Africa live with at least one adult, and the vast majority live with two or more adults.<sup>21</sup> Of the 4.1 million children who lived with neither parent, almost all lived with kin.<sup>22</sup>

Household composition in South Africa is characterised by ‘fluidity, mobility and dispersion’<sup>23</sup> for reasons cultural and historical. Hall and Richter observe that

‘it has always been common [...] for children to spend time at the home of their grandparents as a way of strengthening family attachments and intergenerational learning, as well as to provide companionship and draw on the capacity of non-working family members to provide care and support.’<sup>24</sup>

At the same time, the contribution of colonial and apartheid policies to the fragmentation and disruption of non-White families in South Africa is undeniable,

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<sup>17</sup> Based on mid-2017 government statistics: Hall & Sambu ‘Demography of South Africa’s Children’ in Hall et al (eds) *South African Child Gauge 2018 (Child Gauge 2018)*, available at <http://www.ci.uct.ac.za/ci/child-gauge/2018>, accessed 11 March 2019 at 132. The Children’s Institute at the University of Cape Town analyses government statistics to produce child-centred data on a range of indicators including care arrangements, abuse and protection, income poverty and social grants, education, health and nutrition, housing and basic services: Children’s Institute ‘Welcome to Children Count’ <http://childrencount.uct.ac.za/>, accessed 26 November 2019.

<sup>18</sup> Hall & Richter ‘Introduction: Children, families and the state’ in *Child Gauge 2018* (n 17) 25.

<sup>19</sup> Based on 2017 data: Hall & Sambu (n 17) 133. South Africa is an outlier ‘even by African standards’ when it comes to its high rate of parental absence from children’s households: Hall & Richter (n 18) 25.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid 133.

<sup>22</sup> Hall & Mokomane ‘The shape of children’s families and households: A demographic overview’ in *Child Gauge 2018* (n 17) 33.

<sup>23</sup> Clark ‘Child Maintenance and the Role of the South African State’ (2000) 8 *Intl J Child Rts* 307 at 307.

<sup>24</sup> Hall & Richter (n 18) 25-6.

with the most severe and lasting effects felt in African families and households.<sup>25</sup> Contemporary reasons for parental absence from children's households, some of which are traceable to the effects of pre-apartheid and apartheid policies, include

‘non-marital childbearing, adult employment strategies and labour migration, urban housing constraints, limited availability of affordable care, schooling opportunities, choices about who is best placed to provide care for children, divorce or separation, and any combination of these.’<sup>26</sup>

Parental absence may also result from death. The Children's Institute classifies orphans into three mutually exclusive categories. A ‘maternal orphan’ has a deceased mother and a living father; a ‘paternal orphan’ has a deceased father and a living mother; a ‘double orphan’ has two deceased parents.<sup>27</sup> In 2017, there were 2.8 million orphans in South Africa, of whom 505,000 were double orphans.<sup>28</sup> There were three times as many paternal orphans as maternal orphans.<sup>29</sup> The majority of orphans are cared for by adult relatives despite significant financial constraints.<sup>30</sup> The Children's Institute observes that ‘the poorest households carry the greatest burden of care for orphans. Close to half (49%) of all orphans are resident in the poorest 20% of households.’<sup>31</sup> In 2017, 65% (12.8 million) of all children lived below the ‘upper-bound’ poverty line, the official measure marking the minimum resources required to meet basic nutritional and other essential needs.<sup>32</sup>

Connected to poverty, chronically high unemployment in South Africa undermines children's economic security.<sup>33</sup> The Children's Institute reports that in 2017, 30% (5.9

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<sup>25</sup> Among the policies implemented to disrupt and restrict the family and economic lives of African, coloured and Indian communities were labour force segregation, land dispossession, land ownership segregation, migrant labour, influx control and the homeland system: *Report of the Lund Committee on Child and Family Support* (1996) 15-6, and Hall & Richter (n 18) 26.

<sup>26</sup> Hall & Mokomane (n 22) 39.

<sup>27</sup> Hall & Sambu (n 17) 134.

<sup>28</sup> *Ibid.*

<sup>29</sup> 1,728,000 paternal orphans and 530,000 maternal orphans: Hall & Sambu (n 17) 134.

<sup>30</sup> Hall & Mokomane (n 22) 36. In light of the diversity of family forms and household structures in South Africa, it should be remembered that children who do not live with their parents are not necessarily orphans.

<sup>31</sup> Hall & Sambu (n 17) 135.

<sup>32</sup> Hall & Sambu ‘Income poverty, unemployment and social grants’ in *Child Gauge 2018* (n 17) at 137.

<sup>33</sup> Statistics South Africa reported an official unemployment rate of 29.1% in the third quarter of 2019: <http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2019.pdf> accessed 27 November 2019. Since Statistics South Africa defines the labour force to include persons ages 15 to 64, youth

million) of South African children lived in households with no working adults.<sup>34</sup> Adult employment yields benefits to children beyond household income, such as health insurance, unemployment insurance and parental leave.<sup>35</sup> Besides enabling parents to support their children, employment provides the opportunity to accumulate assets and savings for their future maintenance in the event of parental death. The effective mobilisation of private sources of wealth for the maintenance of orphans is all the more crucial given the extensive need for and finitude of public resources.

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between ages 15 to 18 are captured by this figure. Inability to encounter work prevents youth from becoming self-sufficient, prolonging their dependency on family and the state.

<sup>34</sup> Hall & Sambu (n 32) 139.

<sup>35</sup> Hall & Sambu (n 32) 139.

## CHAPTER 3

### LEGAL CONTEXT

#### 3.1. Establishing Children's Right to Economic Security

The following subsections will review the international, regional and domestic laws that entrench maintenance as a child's right, and the efforts undertaken to reform South Africa's maintenance system. It will be argued that the right to maintenance is one component of children's broader right to economic security, the responsibility for which rests on parents and the state. The child's duty to provide support will be introduced, with its implications for children's right to support in succession will be inspected in subsequent chapters.

##### 3.1.1. Children's Right to Maintenance and Economic Security in International Law

International and South African law proclaim that children grow up best in families. The preamble to the CRC states *inter alia*:

‘Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding....’

Correspondingly, the CRC mandates state parties to respect the role of family in rearing children. Article 7 frames parental care as a child's right: every child has the right ‘to know and be cared for by his or her parents.’ Article 5 obliges states to respect the responsibilities, rights and duties of family and community members in their provision of ‘appropriate direction and guidance’ to the child.

South Africa is also a state party to the ACRWC, the world's only regional children's rights treaty. The ACRWC was developed to complement the CRC while accounting

for ‘regional specificities,’<sup>36</sup> including ‘the heightened importance of family to the African child,’<sup>37</sup> the distinct role of children within African families and communities,<sup>38</sup> and the importance of the extended family in child-rearing.<sup>39</sup> Like the CRC, the ACRWC preamble stresses the importance of family to a child’s upbringing:

‘RECOGNIZING that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding....’

Further echoing the CRC preamble, Article 18(1) of the ACRWC deems the family to be ‘the natural unit and basis of society,’ and obliges state parties to protect and support the establishment and development of the family. Article 19 stipulates that every child is entitled to the ‘enjoyment of parental care and protection.’ Both the CRC and the ACRWC enshrine the ‘best interests of the child’ as a guiding legal principle for all decisions affecting children.<sup>40</sup> Where the CRC requires that the best interests of the child be ‘a primary consideration’ in decision-making,<sup>41</sup> the ACRWC requires that it be ‘*the* primary consideration.’<sup>42</sup> South Africa is required to implement the ACRWC’s higher standard.<sup>43</sup>

The sphere of autonomy afforded to the family in the child rights treaties implies corresponding duties on the part of family members. Parents bear the ‘primary responsibility’ for their children’s upbringing and development,<sup>44</sup> which includes the

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<sup>36</sup> Sloth-Nielsen ‘Chapter 15: Children’s Rights Litigation in the African Region: Lessons from the Communications Procedure Under the ACRWC’ in Liefwaard & Doek (eds) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015) at 251.

<sup>37</sup> Binford ‘The constitutionalization of children’s rights in South Africa’ (2016) 60 *New York Law School LR* 333 at 341.

<sup>38</sup> Sloth-Nielsen 2015 (n 36) 251.

<sup>39</sup> Kaime *The Convention on the Rights of the Child: a cultural legitimacy critique* (2011) at 25.

<sup>40</sup> The Committee on the Rights of the Child (CRC Committee) interprets the child’s best interests as a threefold concept: a substantive right, an interpretive legal principle, and a rule of procedure for all decision-making that affects a specific child, an identified group of children or children in general, depending on the case in question. See Committee on the Rights of the Child ‘General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)’ CRC/C/GC/14 para 6.

<sup>41</sup> Article 3(1) CRC.

<sup>42</sup> Article 4(1) ACRWC.

<sup>43</sup> Both the ACRWC (Article 1(2)) and the CRC (Article 41) require state parties to respect provisions that are more conducive to the realisation of children’s rights, whether contained in domestic or international law.

<sup>44</sup> Article 18(1) CRC and Article 20(1) ACRWC.

responsibility ‘to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.’<sup>45</sup> States’ duties are secondary and supplemental to parental duties. In child-rearing, the state’s role is to ‘render appropriate assistance’ to parents and other guardians.<sup>46</sup> As for ensuring children an adequate standard of living, state parties are to provide material assistance and support programmes to parents only ‘in case of need.’<sup>47</sup>

Two additional provisions in the CRC (with no parallels in the ACRWC) allocate the primary responsibility for children’s financial support to parents. First, Article 26(2) suggests that the state’s provision of social security benefits to children may be circumscribed by the parental duty of maintenance:

‘The benefits should, where appropriate, be granted, *taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child*, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.’ [Emphasis added]

Secondly, Article 27(4) requires states to ‘take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad.’<sup>48</sup>

The foregoing provisions emphasise parents’ primary financial duty for raising their children. States are to enforce performance of that duty and to provide assistance in circumstances of need.<sup>49</sup> In this dissertation, the right to ‘economic security’ is used to describe children’s right to the resources and conditions necessary for their

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<sup>45</sup> Article 27(2) CRC, Article 20(1)(b) ACRWC.

<sup>46</sup> Article 18(2) CRC, Article 20(2)(b) ACRWC.

<sup>47</sup> Article 27(3) CRC, Article 20(2)(a) ACRWC. The *travaux préparatoires* of the CRC confirm that the intended objective and scope of Article 27 is to allocate primary responsibility to parents: Sharon Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (1999) at 459-60.

<sup>48</sup> To date, Burkina Faso is the only African country to have signed (not ratified) the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. See Hague Conference on Private International Law ‘Status Table, Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance’ <https://www.hcch.net/en/instruments/conventions/status-table/?cid=131>, accessed 25 November 2019.

<sup>49</sup> Detrick (n 47) 466; Eide ‘Article 27: The right to an adequate standard of living’ in Alen, Vande Lanotte, Verhellen et al (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (2006) §3-5.

upbringing and development, whether the duty-bearer is the state, parents or others. It is submitted that the existence of such a right is plainly established in the CRC and the ACRWC. The right to maintenance refers more narrowly to the economic support that parents and other relatives are obligated to provide.

The right to economic security centres the child as the right-holder instead of the identities or capacities of the duty-bearers. The relevant life is that of the child, not the parent's; thus, the child's economic security must be secured before, after, and despite a parent's death. This seemingly over-scrupulous point is important, given that the child rights treaties do not appear to extend the duty of maintenance beyond a payor's life. While the CRC and ACRWC address the duty of child maintenance in a range of circumstances—separation and divorce,<sup>50</sup> parents living abroad,<sup>51</sup> and children born outside of marriage<sup>52</sup>—they are silent on the duty of maintenance for orphaned children. Scholarly commentaries interpreting the parental responsibility provisions in the CRC and ACRWC similarly presuppose living parents.<sup>53</sup>

Under international law, therefore, it appears that children only enjoy the right to maintenance from living relatives. There is no parental duty to make financial provision for children upon death, nor state duty to implement systems for maintenance recovery from deceased estates. International law's agnostic position towards the duty of maintenance in death stands in contrast to the domestic laws of many jurisdictions, including South Africa, which expect decedents to make provision for their dependants.

This chapter now turns to a consideration of children's rights in South Africa's Constitution and the evolution of the law of maintenance.

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<sup>50</sup> Article 27(4) CRC, Article 18(2) ACRWC.

<sup>51</sup> Article 27(4) CRC.

<sup>52</sup> Article 18(3) of the ACRWC stipulates that 'no child shall be deprived of maintenance by reference to the parents' marital status.'

<sup>53</sup> E.g. Eide (n 49), Detrick (n 47) 464-6. In its third General Comment (CRC/GC/2003/3), the CRC Committee elaborated on the state's obligations under Article 27 towards children orphaned by HIV/AIDS, but not parents' obligations.

### 3.1.2. Children's Rights in the Constitution and the *Grootboom* Decision

Children enjoy all rights contained in the Bill of Rights except the rights to vote and to stand for public office.<sup>54</sup> Section 28 enshrines additional child-specific rights. The inclusion of section 28 marked 'the first time that children's rights were robustly and comprehensively recognized in the express language of a nation's Constitution.'<sup>55</sup> The CRC's influence is evident.<sup>56</sup> Section 28 'constitutionalises' major features of the CRC, establishing the treaty's authority in South African law.<sup>57</sup> Section 28(2) stipulates that a child's best interests are of 'paramount importance' in every matter concerning the child. This standard is interpreted as exceeding what is required under the CRC and the ACRWC.<sup>58</sup> While the best interests of the child principle existed in South African law before the CRC and the Constitution,<sup>59</sup> section 28(2) has extended its field of application beyond family law to all matters concerning children.<sup>60</sup>

Of relevance to the right to economic security, section 28 enshrines children's right to parental or family care and to 'to basic nutrition, shelter, basic health care services and social services.'<sup>61</sup> The interplay between children's rights to parental care and to shelter, and the allocation of duties between parents and the state, were addressed in the ground-breaking Constitutional Court decision in *Government of the Republic of South Africa v Grootboom (Grootboom)*.<sup>62</sup>

The case involved the eviction of a group of families, numbering 510 children and 390 adults, from their informal homes on a tract of private land.<sup>63</sup> Rendered homeless, the families sought a court order requiring the State to provide them with adequate shelter

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<sup>54</sup> Currie & de Waal (eds) *The Bill of Rights handbook* 5th ed (2005) 600.

<sup>55</sup> Binford (n 37) 334.

<sup>56</sup> During the constitution drafting process, the CRC was cited in the submissions of civil society and political groups and relied upon by the section 28 drafting committee: Skelton 'Chapter 2: South Africa' in Liefwaard & Doek (n 36) at 14-5.

<sup>57</sup> Sloth-Nielsen 2002 (n 4) 139. Further, sections 39(1)(b) and 233 of the Constitution require courts to interpret the Bill of Rights and legislation in a manner consistent with international law.

<sup>58</sup> Heaton 'An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context' (2009) 34(2) *J for Juridical Science* 1 at 4.

<sup>59</sup> Binford (n 37) states at fn 100 that the best interests criterion had been an established principle in South African family law and dependency cases since the case of *Fletcher v. Fletcher* 1948 (1) SA 130 (A). In an even earlier case, *Cronje v Cronje* 1907 TS 871, the appellate court stated that the main consideration in a custody dispute was the best interests of the children: Walsh (n 6) at 215-6.

<sup>60</sup> Heaton 2009 (n 58) 3.

<sup>61</sup> Section 28(1) (b) and (c), Constitution.

<sup>62</sup> 2001 (1) SA 46 (CC).

<sup>63</sup> *Grootboom* (n 62) para 4.

along with access to water and sanitation until they obtained more permanent housing.<sup>64</sup> The Bill of Rights guarantees everyone access to adequate housing, subject to the qualification that ‘the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.’<sup>65</sup> The High Court granted relief to the applicants based not on the right of everyone to housing in section 26, but on the right of children to shelter in section 28, finding that section 28(1)(c) obliged the State to provide basic shelter to children if their parents were unable to do so.<sup>66</sup> The High Court recognised that unlike section 26, ‘section 28(1)(c) is drafted as an unqualified constitutional right.’<sup>67</sup> As it was not in the children's best interests to be separated from their parents, the High Court ruled that the State needed to provide shelter ‘of such a nature that the parents may join their children.’<sup>68</sup>

All levels of government affected by the High Court order appealed.<sup>69</sup> While it was held that the State had breached the applicants’ section 26(2) rights,<sup>70</sup> it is the Constitutional Court’s overturning of the High Court’s interpretation of section 28 that warrants discussion here.

In a unanimous judgment, the Constitutional Court scrutinised the ‘anomalous result’ produced by the High Court’s reasoning, which had the effect of granting parents with minor children an ‘on demand’ right to shelter under section 28(1)(c), while childless adults, no matter how needy, would only enjoy the qualified right to housing under section 26.<sup>71</sup> The Court rejected the respondents’ argument that section 28’s unqualified framing made children’s socio-economic rights directly enforceable against the State, finding that such an interpretation would undermine the ‘carefully constructed constitutional scheme for progressive realisation of socio-economic rights.’<sup>72</sup> The Court ruled that the socio-economic rights in section 28(1)(c) must be

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<sup>64</sup> Ibid.

<sup>65</sup> Section 26(1) and (2), Constitution.

<sup>66</sup> At a minimum, shelter was to include tents, portable latrines and a regular supply of water: *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C) at 295.

<sup>67</sup> Ibid 292.

<sup>68</sup> Ibid 293.

<sup>69</sup> *Grootboom* (n 62) para 4.

<sup>70</sup> The State’s failure to address the situation of those in most desperate need of housing fell short of the threshold of ‘reasonable legislative and other measures’ required by section 26(2): *Grootboom* (n 62) para 69.

<sup>71</sup> Ibid para 71.

<sup>72</sup> Ibid paras 71-2.

interpreted in light of the child's right to family and parental care in section 28(1)(b). Section 28(1)(c) describes the scope of care to which children are entitled, while section 28(1)(b) defines those with primary responsibility for providing that care: parents and families.<sup>73</sup> The Court ruled definitively that the State does not have a primary obligation to provide shelter to children who are in the care of their parents or families.<sup>74</sup> Rather, the State's obligation towards such children is limited to providing 'the legal and administrative infrastructure necessary' to ensure their rights, which 'would normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse.'<sup>75</sup>

In *Grootboom*, the Constitutional Court consolidated the principle that parents bear primary responsibility for their children's economic needs, with the State's obligation being secondary and supplementary. The judgment dispelled prior hopes that section 28 put children in South Africa in a stronger position than adults to claim socio-economic entitlements against the State. The *Grootboom* decision has been roundly criticised for rendering the inclusion of section 28(1)(c) in the Constitution 'almost entirely without purpose.'<sup>76</sup>

Since, under both international treaty and domestic constitutional law, the responsibility for children's economic needs rests first and foremost on parents, maintenance is of vital importance to children's economic security. It is to the law of child maintenance that this Chapter now turns.

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<sup>73</sup> Ibid paras 76-7. Sloth-Nielsen points out the Court's strained logic when it comes to the final entitlement listed in section 28(1)(c), social services. While the parental duty of support may reasonably comprise nutrition, shelter and health care, 'it is only on a strained reading that one could view the common law duty of support of parents towards their children as encompassing the provision of social services': Sloth-Nielsen 'The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of *Grootboom*' (2001) 17 *SAJHR* 210 at 225-6.

<sup>74</sup> *Grootboom* (n 62) para 77.

<sup>75</sup> Ibid para 78.

<sup>76</sup> Pieterse (n 11) 11.

### 3.1.3. Reform of Child Maintenance Law

South Africa is in the middle of a decades-long reform of its maintenance law. In 1996, the committee commissioned to investigate child support policy options offered up this grim prognosis:

‘The [parental maintenance] 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>77</sup>

An issue paper by the South African Law Reform Commission (SALRC) in 1997 recognised that poor enforcement of parents’ maintenance obligations directly strained the social welfare system.<sup>78</sup> The issue paper attributed ineffective enforcement to a ‘low measure of social disapproval’ towards defaulters and inimical attitudes within the legal system, where attorneys, prosecutors and magistrates did not regard maintenance cases as important or worthy of their time.<sup>79</sup>

The Maintenance Act 99 of 1998, which repealed the Maintenance Act 23 of 1963, sets out a scheme for the granting and enforcement of maintenance orders, including civil and criminal remedies.<sup>80</sup> One of the Maintenance Act’s main innovations is the introduction of maintenance investigators empowered to investigate complaints and gather evidence relating to maintenance.<sup>81</sup> The preamble to the Maintenance Act signals a commitment to treat maintenance as a child’s right and to align the law of maintenance recovery with international standards, explicitly acknowledging that ‘the recovery of maintenance in South Africa possibly falls short of the Republic’s international obligations in terms of [the CRC],’ and that the legislation constitutes only ‘a first step in the reform of the entire South African maintenance system.’<sup>82</sup>

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<sup>77</sup> Lund Committee on Child and Family Support *Report of the Lund Committee* (n 25) 35.

<sup>78</sup> South African Law Reform Commission *Issue Paper 5: Review of the Maintenance System* (1997), available at <http://www.justice.gov.za/salrc/ipapers.htm>, accessed 3 August 2019 at 39.

<sup>79</sup> *Ibid* 14, 16.

<sup>80</sup> The Maintenance Act applies to all persons who are under a legal duty to maintain any other person: section 2(1).

<sup>81</sup> *Bannatyne* (n 15) para 25; section 6 Maintenance Act.

<sup>82</sup> According to Wamhoff and Burman, when the Maintenance Act was enacted ‘there was no time for a basic rethinking of the whole system—political pressure required immediate action—so the proposals that emerged were rather attempts to prevent the worst abuses of the system and oil the enforcement machinery.’ Wamhoff & Burman ‘Parental maintenance for children: How the private maintenance system might be improved’ (2002) 28.2 *Social Dynamics* 146 at 148.

Nevertheless, it remains in force some 22 years hence.<sup>83</sup> Amendments were introduced in 2015 to address some identified weaknesses in existing enforcement procedures.<sup>84</sup> Despite praise of the Maintenance Act as a ‘very comprehensive and thorough piece of legislation’<sup>85</sup> that establishes clear procedures for the investigation and adjudication of complaints,<sup>86</sup> it is widely felt that the maintenance administration system is under-resourced and functions poorly.<sup>87</sup>

While the Maintenance Act regulates the procedural aspects of maintenance recovery, the parental duty of child maintenance originates in the common law.<sup>88</sup> Early recognition of maintenance as a child’s right may be traced to the common law rule that a parent may not waive the maintenance claims of children.<sup>89</sup> Some commentators have remarked that the inclusion of the duty of maintenance under the rubric of ‘parental responsibilities and rights’ in the 2005 Children’s Act<sup>90</sup> appears to detract from the common law position, which treated the duty of maintenance as separate from parental authority, such that persons deprived of parental authority (e.g. unmarried fathers and rapists) were still liable for maintenance.<sup>91</sup> However, Schäfer argues that rather than displacing the common law maintenance duty, the Children’s Act has added a second statutory basis for imposing the duty on anyone who assumes parental responsibilities and rights.<sup>92</sup> The formulation of parental duties in the Children’s Act reinforces the *Grootboom* ratio that the responsibility for children’s support rests primarily on parents.<sup>93</sup> The scope of maintenance encompasses the

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<sup>83</sup> Only in 2011 was the SALRC commissioned to review the Maintenance Act: Proudlock & Rohrs ‘Recent Developments in Law and Policy Affecting Children’ in *Child Gauge 2018* (n 17) 10. An issue paper was published in 2014: SALRC *Issue Paper 28: Review of the Maintenance Act 99 of 1998* (2014), available at <http://www.justice.gov.za/salrc/ipapers.htm>, accessed 16 July 2019. To date, no final report has been published.

<sup>84</sup> Maintenance Amendment Act 9 of 2015; Clark & Van Zyl *Handbook of the South African Law of Maintenance* 4<sup>th</sup> ed (2016) 63.

<sup>85</sup> Clark & Van Zyl (n 84) Preface.

<sup>86</sup> Proudlock & Rohrs (n 83) 10.

<sup>87</sup> Proudlock & Rohrs (n 83) 10; Bonthuys ‘Child Maintenance and Child Poverty in South Africa’ (2008) 71 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 194 at 196; Kruger (n 16) 62.

<sup>88</sup> Kruger (n 16) 43. Section 2(2) of the Maintenance Act provides that the Act ‘shall not be interpreted so as to derogate from the law relating to the liability of persons to maintain other persons.’

<sup>89</sup> Skelton & Carnelley (eds) *Family Law in South Africa* (2010) §20.4.4.3, citing *Shields v Shields* 1946 CPD 242.

<sup>90</sup> Sections 1(1) and 18(2), Children’s Act.

<sup>91</sup> Kruger (n 16) 39; Schäfer *Child Law in South Africa: Domestic and International Perspectives* (2011) §8.4.4.

<sup>92</sup> Schäfer (n 91) §8.4.4.

<sup>93</sup> Bonthuys ‘Parental Rights and Responsibilities in the Children’s Bill 70D of 2003’ (2006) 17 *Stellenbosch L Rev* 482 at 483.

necessities of life such as food, shelter, clothing, medical care and education, but is not confined to bare necessities only; the appropriate scope depends on the family's standard of living.<sup>94</sup>

The high rate of parental absence from children's households, outlined in Chapter 2, means that at any given time, some 10 million children in South Africa have a living parent with whom they do not reside.<sup>95</sup> Such parents are the main 'targets' of the maintenance enforcement system. Optimising maintenance recovery would generate inflows of funds from parents into a significant number of children's households and reduce pressure on the social welfare system.

Bonthuys cautions against overstating the potential of private maintenance to alleviate child poverty, pointing out that the fathers of the poorest children are least likely to be able to pay maintenance.<sup>96</sup> She emphasises the constitutional dimension of the right to maintenance:

'We need to perceive children's rights to maintenance not primarily as an individual right to be asserted against parents in the realm of private law, but as a constitutional public law right as against the community and that we should therefore focus equally on the system of social welfare in order to alleviate child poverty.'<sup>97</sup>

Just as the traditional private/ public law divide is unsettled by children's right to maintenance, it is submitted that the law's compartmentalisation of children's right to economic security into separate legal fields (e.g. succession, pension, insurance), with parental death made the pivotal event, betrays the law's failure to be truly child rights-centred.

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<sup>94</sup> Domingo & Barratt 'Part 2: Family law – Chapter 2: Parent and child' in Barratt (ed) *Law of Persons and the Family* 2<sup>nd</sup> ed (2017) 190.

<sup>95</sup> I arrive at this rough estimate by subtracting the total number of maternal, paternal and double orphans in South Africa (2.8 million) from the total number of children who do not reside with both parents (12.8 million), using figures cited in Chapter 2. This estimate is under-inclusive, because not all maternal and paternal orphans reside with their surviving parent.

<sup>96</sup> Bonthuys 2008 (n 87) 209.

<sup>97</sup> Bonthuys 2008 (n 87) 209.

### 3.1.4. The African Child's Duty of Support and Reciprocal Support Duties

The child's right to maintenance must be appreciated together with the child's *duty* to provide maintenance, a distinctly African concept, and the broader set of support obligations recognised in South African law.

Article 31 of the ACRWC lists numerous responsibilities owed by African children to their families, society, the state, and various communities, including the responsibility 'to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need.' This duty to assist extends beyond but encompasses financial maintenance, and is qualified by the child's age, abilities and evolving capacities.<sup>98</sup> Sloth-Nielsen and Mezmur show that Article 31 is rooted in African tradition and the African Charter on Human and Peoples' Rights,<sup>99</sup> and encapsulates an 'African normative consensus on children's rights.'<sup>100</sup>

South African law has long recognised that children (both major and minor) owe a duty of support to their parents, grandparents and siblings, a duty grounded in filial piety.<sup>101</sup> In fact, South African law imposes a reciprocal duty of support between ascendants and descendants *ad infinitum*, subject to the rule that support must first be sought from a nearer relation.<sup>102</sup> A minor child's duty to support a parent depends on the child's financial ability and proof of indigence by the parent.<sup>103</sup>

Echoing Article 31 of the ACRWC, the Children's Act provides broadly that 'every child has responsibilities appropriate to the child's age and ability towards his or her family, community and the state,' but does not elaborate on the nature or scope of

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<sup>98</sup> African Committee of Experts on the Rights and Welfare of the Child (ACERWC) *General Comment on Article 31* (2017) paras 59, 61.

<sup>99</sup> Organization of African Unity (OAU) *African Charter on Human and Peoples' Rights* (27 June 1981).

<sup>100</sup> Sloth-Nielsen & Mezmur 'A Dutiful Child: The Implications of Article 31 of the African Children's Charter' (2008) 52(2) *Journal of African Law* 159 at 187.

<sup>101</sup> Clark & Van Zyl (n 84) at 14, citing as authorities Voet and case law dating to 1893.

<sup>102</sup> Clark 'Chapter 10 – Duties of support of living persons' in Van Heerden, Cockrell & Keightley (eds) *Boberg's Law of Persons and the Family* 2nd ed (1999) at 234, 252 (*Boberg's*).

<sup>103</sup> Clark & Van Zyl (n 84) 14. The case law is unsettled as to the level of need that constitutes 'indigence': Clark & Van Zyl (n 84) 14-5 and Kruger (n 16) 49.

those responsibilities.<sup>104</sup> Commentaries on the section are laconic; none suggests that it modifies the common law position.<sup>105</sup>

In addition to the duty to support others, South African law has historically expected minors with means to support themselves. Indeed, some commentators present the duty of self-support as one that precedes and qualifies the parental duty of support:

‘Children who have the means to support themselves cannot require their parents to do so; the parents are entitled to apply the children’s income to their maintenance before using their own resources for the purpose.’<sup>106</sup>

The scope of children’s duties of support has evident implications for children’s *right* to economic security in succession. Whether modern authorities like the CRC, ACRWC, Bill of Rights and the *Grootboom* decision, with their emphasis on state and parental responsibility for children’s support, have contracted children’s duties of support to any extent has not been the subject of commentary.

### 3.2. Legal Capacity of Minors and Guardianship in South African Law

The following subsections review the laws of legal minority and guardianship in South Africa. Guardianship enables minors to enter into binding transactions and participate in legal proceedings despite their incapacities at law. As will be discussed in subsequent chapters, it is primarily through the institution of guardianship that children’s rights are effectuated in succession.

#### 3.2.1. Legal Capacity of Minors

Under South African law, all persons have legal capacity—the capacity to have rights and obligations.<sup>107</sup> The extent of that capacity may be limited due to various factors, a significant one being age.<sup>108</sup> Legal capacity has three components: the capacity to be held accountable for crimes and delicts, the capacity to perform juristic acts, and the

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<sup>104</sup> Section 16, Children’s Act.

<sup>105</sup> E.g. Boezaart ‘Chapter 2: General principles (ss 6-17)’ in Davel & Skelton (n 13) §16. A Juta Law Online search found this section had not been judicially considered in any reported decision as of 21 January 2020.

<sup>106</sup> Clark ‘Chapter 10’ (n 102) 245-6. See also Van Heerden ‘Chapter 19 – Personal and proprietary aspects of the parental power’ in *Boberg’s* (n 102) 707.

<sup>107</sup> Heaton & Roos *Family and Succession Law in South Africa* (2012) at 45.

<sup>108</sup> *Ibid* 45.

capacity to litigate.<sup>109</sup> This dissertation will focus on the latter two capacities, which are most relevant to succession.

South African law confers differential legal status and capacities on children based on age.<sup>110</sup> All children have the legal capacity to own both moveable and immoveable property.<sup>111</sup> A child under the age of 7 is an *infans* with no personal capacity to perform juristic acts,<sup>112</sup> to transfer ownership in property,<sup>113</sup> or to sue or be sued in their own name.<sup>114</sup> A parent or guardian must conclude a contract or enact a property transfer on behalf of an *infans* and represent an *infans* in a lawsuit.<sup>115</sup> Rights or duties arising from the contract, transfer or court order accrue to the *infans* and not the guardian.<sup>116</sup>

Minors age 7 and older enjoy some capacity to perform juristic acts. They can improve their legal position (i.e. acquire rights or terminate duties) without a guardian's assistance but generally cannot worsen their legal position (i.e. acquire duties or relinquish rights) without a guardian's assistance.<sup>117</sup> These two principles govern minors' capacities to contract and to acquire and alienate property.<sup>118</sup> Unassisted, a minor can only enter into contracts that confer rights and impose no obligations.<sup>119</sup> Assistance may take the form of a guardian entering an agreement on a minor's behalf or consenting to a contract that a minor enters personally.<sup>120</sup> In the latter case, consent must be informed, which requires the guardian having knowledge of the contract's material terms and the surrounding circumstances.<sup>121</sup> Barratt observes that the law is

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<sup>109</sup> Ibid 45.

<sup>110</sup> Section 17 of the Children's Act reduced the age of majority from 21 to 18 years, effective 1 July 2007, bringing minority in South African law in line with the CRC and ACRWC, as well as the definition of 'child' in section 28(3) of the Constitution: *ibid* at 41.

<sup>111</sup> Van Heerden traces children's ability to own property to the decline of fathers' authority in Roman-Dutch law: 'Chapter 19' (n 106) 686-7.

<sup>112</sup> Boezaart *Law of Persons* 6th ed (2016) §4.4.2.

<sup>113</sup> Barratt 'Part 1: Law of persons – Chapter 4: Minority' in Barratt (n 94) 62.

<sup>114</sup> Boezaart 2016 (n 112) §4.4.2.

<sup>115</sup> Barratt (n 113) 43, 63, 74.

<sup>116</sup> Boezaart 2016 (n 112) §4.4.2.

<sup>117</sup> Barratt (n 113) 42. Statutes govern minors' capacity to perform specific juristic acts, e.g., minors over age 16 may make a will unassisted, and minors over 14 can be witnesses to a will (sections 4 & 1 Wills Act 7 of 1953): Barratt (n 113) 71.

<sup>118</sup> *Ibid* 43-4, 62-3.

<sup>119</sup> *Ibid* 44.

<sup>120</sup> Boezaart 2016 (n 112) §4.5.2.2.1.

<sup>121</sup> Barratt (n 113) 44.

‘not overly particular’ about the timing or form of assistance.<sup>122</sup> Once assisted, the minor incurs full contractual liability.<sup>123</sup>

Under South African law, the capacity to acquire or alienate property is distinct from the capacity to contract.<sup>124</sup> Transfer of ownership does not depend on the existence of a valid contract, but on the fact of delivery and the existence of a ‘real agreement’ whereby the transferor and transferee each have the intention of passing ownership.<sup>125</sup> A minor may accept ownership (i.e. acquire a benefit) unassisted but cannot transfer ownership without a guardian’s assistance.<sup>126</sup> Specific legislated requirements apply to dealing with minors’ immovable property.<sup>127</sup>

In litigation, a minor may be represented by a guardian or may litigate in their own name with a guardian’s assistance.<sup>128</sup> In either case, the legal consequences arising from the action bind the minor, not the guardian.<sup>129</sup> The minor bears the costs of litigation unless the court finds that the guardian acted unreasonably.<sup>130</sup>

As seen, guardianship is used to ‘overcome’ children’s legal incapacities. A guardian is empowered to significantly alter a child’s legal position. The following subsection reviews the legal framework for the assumption of guardianship and recent changes to guardianship law.

### 3.2.2. The Evolution of Guardianship

At common law, ‘guardianship’ carries a wide and a narrow meaning.<sup>131</sup> The wider meaning equates guardianship with parental authority over the child’s property and person (i.e. custody) and is synonymous with ‘natural guardianship.’<sup>132</sup> Guardianship

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<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid 63.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid 64.

<sup>127</sup> All co-guardians must consent to the alienation or encumbrance of a child’s immovable property: section 18(3)(c)(v) Children’s Act. Approval of transactions by either the High Court or the Master of the High Court is required: section 80 Administration of Estates Act 66 of 1965.

<sup>128</sup> Boezaart 2016 (n 112) §4.5.3.2. In limited circumstances a minor may have full capacity to litigate, e.g. when a claim is brought against a minor for the maintenance of his child: Boezaart 2016 (n 112) §4.5.3.1.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Heaton (n 13) §18.

<sup>132</sup> Van Heerden ‘Chapter 14 – How the parental power is acquired and lost’ in *Boberg’s* (n 102) fn3. Schäfer contends that natural guardianship was ‘adopted unnecessarily from English common law,’

in the narrow sense means the capacity to administer a minor's property and to assist a minor in legal proceedings and in performing juristic acts.<sup>133</sup> The Children's Act codifies the narrow meaning of guardianship.<sup>134</sup>

Under Roman-Dutch and English law, a father's rights to a legitimate child were superior to a mother's, the father being regarded as a child's primary protector.<sup>135</sup> This position prevailed in South African law until the enactment of the Guardianship Act 192 of 1993, the purpose of which was to establish the equal guardianship of mothers and fathers and align domestic legislation with international obligations.<sup>136</sup> The Guardianship Act established that both parents in a marriage had guardianship of their child, and each was competent to perform guardianship duties independent of the other, except for a specified list of acts that required joint consent.<sup>137</sup>

Rather than altering children's legal capacities, legislative changes to the law of guardianship have been aimed at establishing formal equality between parents, on the basis of gender in the Guardianship Act and marital status in the Children's Act. The Children's Act incorporates the Guardianship Act's amendment,<sup>138</sup> makes guardianship a component of 'parental responsibilities and rights,'<sup>139</sup> and allows unmarried biological fathers to automatically acquire the full complement of section 18 parental responsibilities and rights if they meet certain conditions set out in section 21(1).<sup>140</sup> Previously, only biological mothers and married biological fathers obtained

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since Roman-Dutch law had already supplied South African law with a 'unified concept of parental authority': (n 91) §8.4.3.1.

<sup>133</sup> Heaton (n 13) §18.

<sup>134</sup> See section 18 of the Children's Act.

<sup>135</sup> Walsh (n 6) 214.

<sup>136</sup> Namely, Article 16(1) of the Convention on the Elimination of All Forms of Discrimination Against Women and Article 18(1) of the CRC: Van Heerden & Clark 'Parenthood in South African Law - Equality and Independence - Recent Developments in the Law Relating to Guardianship' (1995) 112 *SALJ* 140 at 140.

<sup>137</sup> Sections 1(1) and 1(2), Guardianship Act; Van Heerden 'Chapter 19' (n 106) 687. Previously, the father's word was determinative when there was a difference of opinion between the mother and father of a legitimate child: Van Heerden & Clark (n 136) 140. The Divorce Act 70 of 1979 and the Matrimonial Affairs Act 37 of 1953 empower courts to make orders granting guardianship, including sole guardianship, in respect of a child of married parents who are divorcing, divorced or living apart.

<sup>138</sup> Section 19, Children's Act. Section 313 repealed the Guardianship Act.

<sup>139</sup> Along with the responsibilities and rights of care (custody), contact (access) and maintenance: section 18(2), Children's Act.

<sup>140</sup> Bonthuys 2006 (n 93) 486. The legislature's concern with strengthening the position of unmarried fathers was demonstrated in two earlier laws that augmented their standing in adoption proceedings: the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997, and the Adoption Matters Amendment Act 56 of 1998.

automatic parental duties and rights.<sup>141</sup> The Children's Act leaves the incidents of guardianship essentially unchanged.<sup>142</sup>

Besides codifying the common law position that biological mothers and married biological fathers are automatic guardians of their children<sup>143</sup> and extending automatic guardianship to unmarried biological fathers in certain circumstances, the Children's Act expands the pool of persons who may become guardians. 'Any person having an interest in the care, well-being and development of a child' may apply to the High Court for guardianship.<sup>144</sup> Further, a parent who is a child's sole guardian may appoint a 'fit and proper person' in their will to succeed as guardian.<sup>145</sup> Guardianship may also be conferred in a 'parental responsibilities and rights agreement.'<sup>146</sup> In summary, under the Children's Act, biological parents are generally automatic guardians, while other parties may become guardians via a court or testamentary appointment, or by agreement with an existing guardian.<sup>147</sup>

The Children's Act does not stipulate the standard of care for a guardian.<sup>148</sup> At common law, a guardian is obligated to act as a *bonus et diligens paterfamilias*, a prudent and diligent person, and is delictually liable to the child for negligent or fraudulent action.<sup>149</sup> The High Court, as upper guardian of all minors, may intervene in guardians' exercise of their duties<sup>150</sup> and may even assume guardians' duties, e.g. by ratifying a contract<sup>151</sup> or acting for minors in litigation.<sup>152</sup>

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<sup>141</sup> Heaton (n 13) §18. Previously, unmarried fathers only had the duty of maintenance, and needed to apply to the court to be granted parental authority.

<sup>142</sup> Ibid.

<sup>143</sup> Sections 19 and 20, Children's Act.

<sup>144</sup> Section 24, Children's Act.

<sup>145</sup> Sections 27(1) and (2), Children's Act. More than one guardian may be appointed: section 27(4). Transfer of guardianship is automatic upon the parent's death and the appointed person's acceptance—no court process is necessary: section 27(3).

<sup>146</sup> Section 22, Children's Act.

<sup>147</sup> The High Court, a divorce court in a divorce matter, or a children's court may terminate, extend, suspend or restrict parental responsibilities and rights: section 28, Children's Act.

<sup>148</sup> Himonga 'Chapter 11 – Children (minors)' in Du Bois (ed) *Wille's Principles of South African Law* (2007) 211.

<sup>149</sup> Heaton 'Chapter 3: Parental responsibilities and rights' in Boezaart 2017 (n 5) 81.

<sup>150</sup> Ibid 99.

<sup>151</sup> The High Court has consented to a minor's agreement when the parent or guardian acted 'in a disinterested or unreasonable manner' or when the parents were deceased: Boezaart 2016 (n 112) §4.5.2.2.1.

<sup>152</sup> This happened exceptionally in *Vista University, Bloemfontein Campus v Student Representative Council, Vista University* 1998 (4) SA 102 (O). It is more usual for the Court to appoint a curator *ad litem* to act for minors: Boezaart 2016 (n 112) §4.5.3.2.

Section 31(1) of the Children’s Act requires a person exercising parental responsibilities and rights to consider a child’s views and wishes before making a major decision concerning the child, ‘bearing in mind the child’s age, maturity and stage of development.’ This duty applies to any decision ‘which is likely to significantly change, or to have an adverse effect on, the child’s living conditions, education, health, personal relations with a parent or family member or, generally, the child’s well-being’; such a broad definition likely captures guardians’ decisions.<sup>153</sup> At common law, guardians may act unilaterally, e.g. enter a contract or commence litigation on behalf of a minor, and transact and invest as they deem fit.<sup>154</sup> Section 31(1) arguably incorporates consideration of the minor’s views or wishes into guardians’ duty of care.

Section 31(1) brings into relief divergent depictions of guardianship in the literature. When guardianship is presented as a component of ‘parental responsibilities and rights,’ the decision-making onus of the guardian is emphasised:

‘neither s 10 nor s 31(1) transfers the power or the duty to make a decision to the child. The child simply has the right to participate and to have due consideration afforded to his or her views and wishes....’<sup>155</sup>

By contrast, when guardianship is conceived as a means of surmounting legal incapacity, minors are depicted not as peripheral participants but as primary actors who conclude contracts, transfer property and perform other juristic acts, with guardians ‘assisting’ to perfect their actions in the eyes of the law.<sup>156</sup>

### 3.2.3. Comparing Guardianship under the Children’s Act with Curatorship and Natural Guardianship

While section 18(1) of the Children’s Act provides that all parental responsibilities and rights (care, contact, maintenance and guardianship) need not vest in the same person, the ‘package’ of guardianship responsibilities and rights is non-severable. A guardian assumes all the responsibilities and rights listed in section 18(3), and cannot

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<sup>153</sup> Section 31(1)(b), Children’s Act.

<sup>154</sup> Van Heerden ‘Chapter 19’ (n 106) 688.

<sup>155</sup> Heaton 2017 (n 149) 95.

<sup>156</sup> E.g. Barratt (n 113) 43-55; Boezaart 2016 (n 112) §4.5.2.2.

be appointed to deal with a single transaction or lawsuit or on a time-limited basis. This non-severability can be contrasted with curatorship at common law, which distinguishes a curator *bonis* from a curator *ad litem*, corresponding respectively to the distinct legal capacities of property administration and litigation.<sup>157</sup> A curator *bonis* may be appointed for a general or limited purpose, while a curator *ad litem* is appointed to act in a specific case only.<sup>158</sup> Chapter IV of the Administration of Estates Act (AEA) governs the appointment, duties and powers of a curator *bonis* (referred to simply as ‘curator’ in the AEA).<sup>159</sup>

The AEA establishes a scheme for the appointment of ‘tutors’ and ‘curators’ for minors and other persons.<sup>160</sup> A tutor looks after both the person and the property of a minor, while a curator is appointed to administer property only.<sup>161</sup> A tutor or curator for a minor may be appointed by will or court order, but may not administer property without first being granted letters of tutorship or curatorship by the Master of the High Court.<sup>162</sup> Section 76(1)(b) of the AEA sets out the powers that may be conferred by letters of curatorship, which include the authority ‘to perform any particular act in respect of the property’ and ‘to carry on, subject to any law... any business or undertaking of the person concerned.’<sup>163</sup> Such wording indicates that a curator may have broad authority to contract, transfer ownership, and perform other juristic acts in administering a minor’s property.<sup>164</sup>

In addition to tutors and curators, the AEA retains ‘natural guardian’ as a third category of persons who hold powers and duties in respect of minors’ persons and property.<sup>165</sup> No definition of natural guardian is supplied in the legislation, and thus the common law applies. Generally, natural guardians enjoy wider latitude of action

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<sup>157</sup> Boezaart 2016 (n 112) §6.6. A third type of curator, the curator *personae*, is responsible for making personal care decisions.

<sup>158</sup> Olivier & Denson ‘Part 1: Law of persons – Chapter 6: Other factors affecting status and capacity’ in Barratt (n 95) 99-100.

<sup>159</sup> Boezaart 2016 (n 112) §6.6.2.

<sup>160</sup> Sections 71 to 85, AEA.

<sup>161</sup> Meyerowitz *The Law and Practice of Administration of Estates and Their Taxation* (2010) §21.1.

<sup>162</sup> Sections 71, 72(1)(a) to (d), AEA. The Master of the High Court may initiate a search for potential curators if a minor requires a curator to administer their property: section 73(1)(a).

<sup>163</sup> Section 76(1)(b)(i) and (iv), AEA.

<sup>164</sup> Section 76(2) requires the Master to grant such powers to a curator as are stipulated in a will, written instrument or court order.

<sup>165</sup> See Schäfer’s critique in n 132.

under the AEA than tutors and curators.<sup>166</sup> Commentators disagree on how ‘natural guardianship’ at common law and in the AEA is to be interpreted in the wake of legislative changes to guardianship. Section 1(1) of the Guardianship Act explicitly mentioned natural guardianship, providing that both married parents had ‘equal natural guardianship,’ while the Children’s Act omits the term. Meyerowitz gives natural guardianship the definition it held at common law prior to the 1993 Guardianship Act—the ‘father of a legitimate child or if the father is dead or the court has awarded the sole guardianship to her, the mother,’ or ‘in the case of an illegitimate child... the mother’<sup>167</sup>—notwithstanding that this text was published in 2010, after the Children’s Act had come into force.<sup>168</sup> By contrast, Van Heerden, writing in 1999 (after the Guardianship Act had come into force but before the Children’s Act) takes into account the Guardianship Act’s amendment and interprets natural guardians to include married biological mothers.<sup>169</sup>

Another point of confusion is whether a guardian appointed by the court or testamentary instrument under sections 24 and 27 of the Children’s Act respectively constitutes, for the purposes of the AEA, a natural guardian or a curator.<sup>170</sup> Heaton takes the position that section 27 of the Children’s Act and section 72(1) of the AEA both deal with the appointment of a ‘testamentary guardian or custodian for a child.’<sup>171</sup> But the scope of guardians’ responsibilities and rights under the Children’s Act are more expansive than those of tutors or curators. Besides the administration of a minor’s property, a guardian must assist with administrative, contractual and other legal matters (i.e. serve as a curator *ad litem*), and give or refuse consent on behalf of the child in certain matters.<sup>172</sup> Himonga observes that a testamentary guardian under the Children’s Act ‘steps into the shoes of the appointing deceased parents,’ while a testamentary tutor’s responsibilities are limited to property administration.<sup>173</sup> As a practical matter, if testamentary or court-appointed guardians constitute tutors or

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<sup>166</sup> Sections 77, 78 and 83 of the AEA impose certain security and accounting obligations on tutors and curators that do not bind natural guardians: see Van Heerden ‘Chapter 19’ (n 106) 688-9.

<sup>167</sup> Meyerowitz (n 161) §20.2.

<sup>168</sup> 1 July 2007: Heaton (n 13) §18.

<sup>169</sup> Van Heerden ‘Chapter 19’ (n 106) 687-9.

<sup>170</sup> Himonga observes ‘it is unclear how the institution of tutorship is affected by the Children’s Act’: (n 148) 210.

<sup>171</sup> Heaton (n 13) §27.

<sup>172</sup> Section 18(3)(b) and (c), Children’s Act.

<sup>173</sup> Himonga (n 148) 210-1.

curators, they must obtain letters of tutorship or curatorship from the Master of the High Court and comply with security and annual accounting obligations.<sup>174</sup>

Schäfer remarks it is unfortunate that the Children's Act failed to follow the lead of the UK's Children Act 1989 in explicitly abolishing the category of natural guardianship.<sup>175</sup> It is submitted that a conceptually coherent reading of the Children's Act and the AEA would interpret natural guardianship to encompass all parents with automatic guardianship rights and responsibilities, as well as testamentary and court-appointed guardians.

To conclude, this section of Chapter 3 has shown that a guardian is endowed with significant authority to alter a child's legal and economic positions. The Children's Act has expanded the classes of parents upon whom automatic guardianship is conferred, and implemented processes for the attainment and loss of guardianship by parents and non-parents, but has not altered the scope of guardianship. Guardians now have a duty to consider minors' views and wishes in major decisions. It has been argued that the Children's Act's guardianship scheme fits uneasily with the pre-existing institutions of tutorship, curatorship and natural guardianship, categories that persist in the AEA.

The three chapters that follow will discuss and evaluate how guardianship operates within the legal regimes governing estate succession, the distribution of pension benefits, and children's maintenance claims against estates.

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<sup>174</sup> Sections 71(1), 72(2), 77, 78 and 83, AEA.

<sup>175</sup> Schäfer (n 91) §8.4.3.1.

## CHAPTER 4

### CHILDREN'S RIGHTS IN SUCCESSION OF ESTATES

Viewing succession through the prism of children's right to economic security highlights that children have both substantive and procedural rights in estates. This chapter begins with a brief overview of children's substantive succession rights but will focus on procedural rights, the latter being most affected by minors' legal incapacities. The sections that follow will examine mechanisms set out in the AEA to oversee the conduct of executors and guardians in their administration of deceased estates and minors' property, highlighting gaps that may prejudice children's rights.

#### 4.1. Overview of Substantive and Procedural Rights

Minors have legal capacity to own movable and immovable property, and age does not affect their capacity to inherit.<sup>176</sup> Illegitimacy is no longer grounds for denying inheritance rights.<sup>177</sup> The *nasciturus* fiction applies to render a child conceived before and born alive after a parent's death capable of inheriting.<sup>178</sup> Major and minor dependants have the right at common law to seek maintenance from deceased estates.<sup>179</sup> This gives disinherited minors substantive rights in their parents' estates to the extent of their dependency.

Intestate succession laws favour spouses and descendants over ascendants and other relations. When a person who dies intestate is survived by spouses and/ or descendants, other relations will not inherit.<sup>180</sup> In this way, intestate succession corresponds, albeit imprecisely, to the primary support obligations owed by a deceased in life. Minors usually inherit from intestate estates as members of the descendant class, as children of the deceased or as descendants of a predeceased child of the deceased.<sup>181</sup> Spouses take priority over descendants by operation of two rules. First, spousal entitlements under matrimonial property laws are deducted before an intestate

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<sup>176</sup> Paleker 'Chapter 7: Capacity to inherit' in Jamneck et al (eds) *The Law of Succession in South Africa* 3<sup>rd</sup> ed (2017) §7.2.2.

<sup>177</sup> Section 1(2), Intestate Succession Act 81 of 1987.

<sup>178</sup> See Paleker 'Chapter 7' (n 176) §7.2.3 and Meyerowitz (n 161) §19.4.

<sup>179</sup> Maintenance claims against estates are discussed in Chapter 6.

<sup>180</sup> Section 1(1)(a) to (c), Intestate Succession Act.

<sup>181</sup> It is rare for minors to inherit as spouses, although persons under age 18 who have reached puberty are permitted to marry in South Africa: Barratt (n 113) 66, 79.

estate is determined, reducing the size of the estate available for distribution pursuant to intestacy.<sup>182</sup> Secondly, the Intestate Succession Act stipulates that a surviving spouse is entitled to whichever is greater of a ‘child’s share’ or an amount fixed by the Minister of Justice<sup>183</sup> (currently R250 000<sup>184</sup>). A child’s share is calculated by dividing the value of the estate by the number of surviving children and predeceased children survived by descendants, plus the number of surviving spouses.<sup>185</sup> This means that where a child’s share is valued below R250 000, a spouse will inherit a larger portion of the estate than a descendant. Where an estate is valued below R250 000, the estate devolves entirely to the surviving spouse(s) and descendants inherit nothing.<sup>186</sup>

Turning to procedural rights, all deceased estates in South Africa are administered in accordance with the AEA and related regulations, under the supervision of the Master of the High Court.<sup>187</sup> The AEA also regulates the administration of the property of minors, mentally incapable persons and absent persons, both in and outside of the succession context.<sup>188</sup>

The Master of the High Court is a statutory office appointed by the Minister of Justice under section 2 of the AEA for every provincial division of the High Court in South Africa.<sup>189</sup> The Master’s office supervises the entire estate administration process, notably executors’ performance of their duties.<sup>190</sup> One of the Master’s primary tasks is scrutinising executors’ accounts to facilitate a proper and complete accounting of the estate.<sup>191</sup> Additionally, the AEA allocates to the Master certain judicial and quasi-judicial functions.<sup>192</sup> The Master is empowered to determine whether the alienation or

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<sup>182</sup> Paleker ‘Chapter 2: Intestate succession’ in Jamneck et al (n 176) §2.8.3.

<sup>183</sup> Section 1(1)(c), Intestate Succession Act. Also called a ‘child’s portion’ in section 1(4)(f).

<sup>184</sup> GNR 921 GG 38238 of 24 November 2014.

<sup>185</sup> Section 1(4)(f), Intestate Succession Act as amended by the courts: see Paleker ‘Chapter 2’ (n 182) §2.8.3.

<sup>186</sup> Paleker ‘Chapter 2’ (n 182) §2.8.3.

<sup>187</sup> This has been the case since the Constitutional Court’s decision in *Bhe and Others v Khayelitsha Magistrate and others* 2005 (1) SA 580 (CC) ended separate treatment of the intestate estates of black persons and required a unitary system for all estates: Rautenbach ‘Chapter 16: Administration of estates’ in Jamneck et al (n 176) §16.2.3.

<sup>188</sup> Section 4(2), Chapters IV-VI AEA; see Meyerowitz (n 161) §1.4.

<sup>189</sup> Rautenbach (n 187) §16.3.1.3. The Master’s office consists of the Master, Deputy and Assistant Masters and trained examiners. ‘Master’ and ‘Master’s office’ are used interchangeably in this dissertation.

<sup>190</sup> Ibid.

<sup>191</sup> Meyerowitz (n 161) §1.4.

<sup>192</sup> E.g. the Master may pronounce on jurisdiction (section 4(1)) and determine the merits of objections (sections 34(4), 35(9)).

mortgaging of a minor's immovable property (up to prescribed values) is in the minor's interest, and to authorise or refuse a proposed transaction or encumbrance.<sup>193</sup> The Master may also consent to the partition of immovable property on a minor's behalf.<sup>194</sup> In performing such functions, the Master may be said to be exercising the powers of an upper guardian.<sup>195</sup> Every appointment, decision, ruling, order, direction or taxation made by the Master is reviewable by or appealable to the High Court.<sup>196</sup> Lastly, the Master's office also serves as an office of record that preserves information and documentation related to every deceased estate within the Master's territorial jurisdiction.<sup>197</sup>

Minors rely on tutors and curators (hereafter 'legal guardians') and natural guardians to secure their entitlements from deceased estates and to administer their property.<sup>198</sup> The AEA uses several mechanisms to oversee the actions of executors and natural and legal guardians and to circumscribe the scope of their discretion: supervision by the Master and the High Court, the Guardian's Fund, and the requirement of security. These mechanisms will be reviewed in the following sections, first as they apply to surviving relatives, executors and trustees, and secondly as they apply to natural and legal guardians, following the usual chronology of an estate administration.

## 4.2. Responsibilities of Surviving Relatives, Executors and Trustees

### 4.2.1. Preliminary Duty to Inform the Master's Office

When a person dies within South Africa leaving property or a testamentary document, the deceased's surviving spouse(s), or if there is no surviving spouse, the nearest relative or connection living in the district where the deceased was ordinarily resident upon death, is required to give notice of the death to the Master within fourteen days.<sup>199</sup> The full names of the deceased's children and whether they are major or minor

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<sup>193</sup> Section 80, AEA. Per GNR 920 GG 38238 of 24 November 2014, the Master may authorise the alienation of a minor's immovable property valued below R250 000, and may authorise a mortgage not exceeding R250 000. Sales or encumbrances exceeding R250 000 require court authorisation.

<sup>194</sup> Section 94, AEA.

<sup>195</sup> As Meyerowitz observes: (n 161) §1.7.

<sup>196</sup> Section 95, AEA.

<sup>197</sup> Section 5(1), AEA; Meyerowitz (n 161) §1.9.

<sup>198</sup> As discussed in subsection 3.2.3, the AEA retains the category of 'natural guardian,' and it is unclear how the guardianship scheme in the Children's Act fits with the AEA.

<sup>199</sup> Section 7(1)(a), AEA. Sections 7(1)(b), (2) and (3) stipulate alternate methods by which a death may be reported to the Master.

must be identified on the prescribed death notice form.<sup>200</sup> The informant is also required to submit an initial inventory of the deceased's property.<sup>201</sup> The prescribed inventory form requires listing the names and addresses of all persons having an interest in the estate as heirs.<sup>202</sup> Further, anyone possessing a document being or purporting to be a will must deliver it to the Master for registration as soon as they become aware of the testator's death.<sup>203</sup>

It is suggested that the prescribed death notice form be amended to require birth dates for all minor children of the deceased, and the inventory form amended to require birth dates for all minor heirs. Collecting this information at the outset of an estate administration would enable the Master's office to better track minor parties, whose interests in estates receive distinct treatment under the AEA and who moreover enjoy distinct constitutional rights.<sup>204</sup>

#### 4.2.2. Requirement of Security

An executor has authority to administer and represent an estate only after obtaining letters of executorship from the Master.<sup>205</sup> Before letters of executorship are granted, executors must furnish security in an amount fixed by the Master, subject to exemptions specified in section 23 of the AEA. Security is not required if the executor is the parent, child or surviving spouse of the deceased, or if the testator has directed the Master to dispense with the requirement of security in the will.<sup>206</sup> The amount of security is in the Master's discretion but is usually set at the total value of the estate assets stated in the inventory.<sup>207</sup>

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<sup>200</sup> Schedule 1, Form A 'Death Notice,' Regulations promulgated under section 103 in GNR 473 GG 3425 of 24 March 1972, available at <https://www.justice.gov.za/master/forms.html>, accessed 13 December 2019.

<sup>201</sup> Section 9(1), AEA. Additionally, the Master may order any person to make an inventory: section 9(2).

<sup>202</sup> Schedule 1, Form B 'Inventory,' GNR 473 (n 201), available at <https://www.justice.gov.za/master/forms.html>, accessed 13 December 2019.

<sup>203</sup> Section 8(1) AEA.

<sup>204</sup> The prescribed form for liquidation and distribution accounts does require executors to list the full names and birth dates of minor heirs, but those are submitted towards the end of the administration process: section 5(1)(e)(ii)(a), GNR 473 (n 200).

<sup>205</sup> Section 13(1), AEA. An estate valued below a prescribed amount (R250 000 per GNR 920 (n 194)) may be administered without the appointment of an executor, with the Master giving directions for its liquidation and distribution: section 18(3).

<sup>206</sup> Section 23(1) and (2), AEA. Even if an exemption is met, the Master retains discretion to require security for 'any good reason': section 23(2).

<sup>207</sup> Section 23(1), AEA; Meyerowitz (n 161) §9.7.

Security serves to protect creditors, heirs and all other persons having a claim on the estate from maladministration. If the executor fails to properly administer the estate, the Master may enforce the security and recover the actual loss to the estate from the executor or sureties.<sup>208</sup> Such protection is lost when an executor is exempted from furnishing security. Where the exemption is based on a direction in a will, the principle at play is respect for testamentary freedom. The justification is less apparent when the parents, children and surviving spouses of a deceased are exempted. The autonomy of action it enables within the immediate family sphere may be welcome. Yet it is often within the unequal power relations and partialities of the family where conflicts of interest arise and the safeguard of security is especially beneficial.<sup>209</sup> Further, the blanket exemption applies irrespective of the beneficiaries entitled to inherit, who may comprise persons outside of the deceased's immediate family.

Exempting immediate family members from posting security also contradicts a presumption in South Africa's law that legally-trained professionals make more competent executors than laypeople, a presumption expressed in two places. First, regulations promulgated by the Minister of Justice exhibit a preference for estate administration by attorneys, notaries, conveyancers and law agents.<sup>210</sup> Secondly, the Cape Town Master's office (and possibly others) has a practice of requiring a nominated executor who is a natural person with little or no estate administration experience to nominate a qualified person to assist with the administration as a precondition for granting letters of executorship or dispensing with security pursuant to section 23(1) of the AEA.<sup>211</sup> Meyerowitz contends there is no lawful basis for such a requirement.<sup>212</sup> Nevertheless, the practice implicitly recognises that security protects against the negligence of lay executors, protection that is removed by the section 23(1) exemption for family members.

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<sup>208</sup> Section 23(5), AEA; Meyerowitz (n 161) §12.46.

<sup>209</sup> Further, where a testator has not exempted an executor from the requirement of security, it may be argued that the statutory exemption violates testamentary freedom.

<sup>210</sup> The regulations are entitled 'Regulations prohibiting the liquidation or distribution of the estates of deceased persons by any person other than an Attorney, Notary, Conveyancer or Law Agent' GNR 910 GG 967 of 22 May 1968. Meyerowitz at (n 161) §8.4 fn 1 questions the constitutionality of these regulations.

<sup>211</sup> Meyerowitz (n 161) §9.1.

<sup>212</sup> *Ibid.*

The exemption from posting security for surviving spouses in intestate estates has the most potential to disadvantage minors, since surviving spouses are co-heirs alongside descendants in intestate estates.<sup>213</sup> Further, many surviving spouses are also the surviving natural guardians of minor descendants. A surviving spouse who is the executor of an intestate estate and the natural guardian of surviving children faces multiple conflicts of interest between their positions as executor, co-heir, and natural guardian. Without the safeguards of security or an independent guardian, minor descendants in this scenario are wholly dependent on the Master to ensure the executor does not favour their own interests over those of co-heirs. The exemption is justifiable if the value of an estate does not exceed the amount fixed under section 1(1)(c) of the Intestate Succession Act, since only surviving spouses would inherit and descendants would not. As it stands, the blanket exemption leaves the descendant class vulnerable to executor negligence.

Security may also be imposed to protect minor beneficiaries' interests in testamentary trusts. The administration of trusts is governed by the Trust Property Control Act 57 of 1988 (TPCA). As with executors, even when a trust instrument exempts a trustee from security, the Master retains discretion to require security if there are sound reasons to do so.<sup>214</sup> The Master has promulgated a memorandum setting out information that trustees must provide to inform the Master's decision on security, including the ages of trust beneficiaries, the relationship of the trustee to beneficiaries, and the probable duration of the trust.<sup>215</sup>

#### 4.2.3. Supervision by the Master and the High Court

An executor's duties, generally, are to collect estate assets, settle liabilities, and distribute the estate to legatees and heirs in accordance with the deceased's will or the Intestate Succession Act.<sup>216</sup> An executor is a fiduciary acting in a representative

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<sup>213</sup> Unless the estate is valued below the amount fixed under section 1(1)(c) of the Intestate Succession Act, as discussed in section 4.1.

<sup>214</sup> Section 6(2)(b) read with section 6(3)(d), TPCA.

<sup>215</sup> Form JM21 available at [https://www.justice.gov.za/master/m\\_forms/JM21.pdf](https://www.justice.gov.za/master/m_forms/JM21.pdf), accessed 20 December 2019. Section 4(1) of the TPCA requires a trustee to lodge the trust instrument with the Master before assuming control of trust property. The Master's website states that 'all the requirements listed on form JM21 have to be lodged' when registering a testamentary trust: <https://www.justice.gov.za/master/trust.html>, accessed 20 December 2019.

<sup>216</sup> Meyerowitz (n 161) §12.24.

capacity for the estate and must act legally and in good faith.<sup>217</sup> The Master may intervene at various points throughout the winding-up process, either *ex mero motu* or at the executor's invitation, and certain actions and transactions must come before the Master or the High Court for approval or adjudication. These are described below.

*(a) Bank accounts:* An executor is required to open a bank account once in receipt of estate funds in excess of R1 000.<sup>218</sup> There is no general duty to furnish the Master with particulars of the estate account, but the information may be requested by the Master.<sup>219</sup> Section 28(5) of the AEA gives the Master (and any surety) the same right to information about estate bank accounts as the executor, including the right to examine vouchers. Further, the Master may halt withdrawals and make withdrawals subject to the Master's consent, or require that account funds be paid over to the Guardian's Fund.<sup>220</sup> Presumably the Master would only take the investigatory and injunctive steps envisioned in section 28 upon receiving an allegation of mismanagement, but the section does not set out a process by which such information may be relayed to the Master.<sup>221</sup> Section 46 of the AEA penalises an executor for failing to pay over funds to the Master or to deposit funds into a bank account in accordance with section 28, making the executor personally liable to pay double the amount back to the estate.

*(b) Creditors' claims:* An executor who disputes a creditor's claim may, after requiring the claimant to lodge an affidavit setting out details of the claim, seek the Master's consent to have the claimant or another connected person examined under oath.<sup>222</sup>

*(c) Review of estate accounts and oversight of objections process:* The Master's review of executors' accounts and oversight of the objections process is a key control protecting the interests of minor beneficiaries. An executor is required to submit liquidation and distribution accounts in a prescribed form within six months of

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<sup>217</sup> Meyerowitz (n 161) §12.20.

<sup>218</sup> Section 28(1), AEA.

<sup>219</sup> Section 28(2), AEA.

<sup>220</sup> Section 28(6), AEA. The Guardian's Fund is discussed in subsection 4.3.2 below.

<sup>221</sup> This may be contrasted with section 22(1) of the AEA regarding executor appointments, which provides that anyone with an interest in the estate may lodge a written objection with the Master, and thereafter may apply to the Court for an order restraining the grant of letters of executorship.

<sup>222</sup> Section 32(1), AEA.

obtaining letters of executorship, unless the Master has granted an extension of time.<sup>223</sup> The executor must advertise that the account is lying open at the Master's office for inspection after the Master has examined it.<sup>224</sup> The Master advises the executor that the account has been examined by sending a 'query-sheet,' which may require amending the account.<sup>225</sup> The distribution account must list all minor heirs with birthdates, which presumably enables the Master's office to review the account with an eye towards protecting the minors' interests and to ensure that the distribution of their shares meets legal requirements.<sup>226</sup>

Once the estate account is advertised as lying open for inspection, the period for making objections by persons interested in the estate commences.<sup>227</sup> Sections 35(7) to (10) of the AEA set out the timing of various procedural steps to be taken by the Master, the executor and an objector in relation to objections. The Master has jurisdiction to pronounce on the merits of an objection and to direct the executor to amend the account or take other relevant action.<sup>228</sup>

Section 46 of the AEA provides a statutory remedy when an executor uses or knowingly permits a co-executor to use estate property other than for the estate's benefit. Such an executor is to pay into the estate an amount double the value of the property so used, subject to the Master's discretion to relieve the executor from liability based on good cause shown.<sup>229</sup>

*(d) Proof of distribution:* Section 35 requires a distribution 'forthwith' once all objections have been resolved and the requisite period for the account to lie open for inspection has expired.<sup>230</sup> The executor is to lodge with the Master proof of distribution in the form of receipts and acquittances, and deeds of registration for immovable property.<sup>231</sup> The executor must register immovable property to which an

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<sup>223</sup> Section 35, AEA. The prescribed form is set out at section 5 of GNR 473 (n 200). The Master may require an interim account pursuant to section 35(2).

<sup>224</sup> Section 35(5)(a), AEA.

<sup>225</sup> Meyerowitz (n 161) §12.12, §12.13.

<sup>226</sup> Namely sections 39-40, 42-45 of the AEA and requirements in the Deeds Registries Act 47 of 1937.

<sup>227</sup> Section 35(7), AEA. Accounts are to lie open for inspection for no less than 21 days: section 35(4).

<sup>228</sup> Section 35(9), AEA. Per section 35(10) the Master's decision is reviewable by the court on a motion.

<sup>229</sup> Section 46, AEA. Meyerowitz points out that a literal reading would make an executor liable to pay into the estate twice the value of an improperly-used asset that has not depreciated or been used up (e.g. house or car), rather than twice the value of the benefit obtained. This lack of proportionality would constitute good cause for granting at least partial relief from liability: (n 161) §12.19.

<sup>230</sup> Section 35(12), AEA.

<sup>231</sup> Section 35(12), AEA.

heir is entitled in the heir's name,<sup>232</sup> including immovable property inherited by a minor.<sup>233</sup> The distribution of movable property to minors and the administration of minors' immovable property will be examined more fully in section 4.3.

*(e) Mode and conditions of sale of estate assets:* Subject to the terms of a will, an executor has discretion to determine whether to liquidate estate assets and which and how many assets to liquidate, subject to the rule that assets in residue must be sold before bequeathed assets.<sup>234</sup> An executor is only required to liquidate what is necessary to satisfy estate liabilities.<sup>235</sup> Unless a will directs otherwise, all heirs with an interest in a property must give written approval of the mode and conditions of sale prior to sale.<sup>236</sup> However, where a minor, absentee or person under curatorship is interested in the property, the Master must approve the manner and conditions of the proposed sale.<sup>237</sup> The Master performs the role of an upper guardian when acting for a minor under this section.

*(f) Section 38 'taking over':* Finally, the Master has discretion to determine whether to approve the 'taking over' of an estate or portion thereof by a surviving spouse under section 38 of the AEA.<sup>238</sup> In approving a taking over, the Master must be satisfied that security is given for the shares of minor heirs and that no prejudice will result to any interested person.<sup>239</sup>

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<sup>232</sup> Section 39, AEA.

<sup>233</sup> Section 25, Deeds Registries Act; Paleker 'Chapter 7' (n 176) §7.2.2.

<sup>234</sup> Meyerowitz (n 161) §12.27, §12.28.

<sup>235</sup> Meyerowitz (n 161) §12.27.

<sup>236</sup> Section 47, AEA. The heirs' written consent is not required for 'property of a class ordinarily sold through a stockbroker or a bill of exchange or property sold in the ordinary course of any business or undertaking carried on by the executor.' The executor may seek the Master's approval when the heirs cannot agree: section 47(b), AEA. On its face, section 47 applies to both movable and immovable property and is not confined to assets above a certain value.

<sup>237</sup> Section 47(a), AEA. Section 49(1) provides that the purchase of an estate asset by an executor or a connected person (e.g. spouse) is void unless it has been approved by the Master or the court. Meyerowitz notes that where there is a minor heir, the court must be satisfied that the purchase price is a fair one: (n 161) §13.14.

<sup>238</sup> Meyerowitz (n 161) §13.3 to §13.5. A 'taking over' is a special procedure under section 38, not to be confused with a redistribution agreement between a surviving spouse and beneficiaries, or the purchase of estate assets by a surviving spouse.

<sup>239</sup> Section 38(1), AEA. Meyerowitz states that where minors' shares must be secured, the Master issues a special certificate making the transfer of property subject to the simultaneous passing of a mortgage bond in a specified amount in the Master's favour: (n 161) §13.5.

### 4.3. Responsibilities and Rights of Natural and Legal Guardians

The AEA interposes natural or legal guardians to act on behalf of minor heirs and property owners. The AEA disregards the common law distinction between *infantes* and minors age 7 and older with respect to their differentiated capacities to contract and to transfer property. All persons under the age of majority are treated the same in the AEA. Specifically, the common law rule that minors age 7 and older may acquire a benefit unassisted<sup>240</sup> is superseded by the AEA provisions governing the distribution of minors' inheritances, which prevent children of all ages from receiving movable property or money from estates directly.<sup>241</sup>

Minors rely on guardians to assert their interest in a timely and proper estate administration at various stages of the process. Before turning to an examination of the AEA provisions governing guardians' dealings with minors' property, the following section reviews actions guardians may take on behalf of minors during the estate administration process.

#### 4.3.1. Discretionary Actions During Estate Administration

(a) *Repudiating succession benefits*: De Waal contends that South African law permits a natural or appointed guardian to repudiate a succession benefit on behalf of a minor without court approval.<sup>242</sup> He advises, however, that court approval be obtained out of an abundance of caution in three instances: (1) where the bequest is immovable property; (2) where the bequest only benefits the minor (repudiation in such a case being tantamount to a donation of the child's property); and (3) where the repudiation would result in the guardian deriving a benefit.<sup>243</sup> It is difficult to fathom why approval would be granted in the latter two scenarios, since a court must find the proposed repudiation to be in the best interests of the child.<sup>244</sup>

(b) *Objecting to issuance of letters of executorship (section 22 AEA)*: Any person with an interest in an estate object to the issuance of letters of executorship to a nominated

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<sup>240</sup> As discussed in subsection 3.2.1.

<sup>241</sup> Sections 43 to 45, AEA.

<sup>242</sup> De Waal 'Repudiation of Benefits on Succession on Behalf of Minors' (1993) 4 *Stell LR* 232 at 237.

<sup>243</sup> *Ibid* 238.

<sup>244</sup> The repudiation of a bequest of immovable property may be in a minor heir's interest, if, for example, the property is encumbered to such an extent that accepting the gift would result in no net gain.

executor. A minor heir, who may have legitimate cause for objection (e.g. concern over a conflict of interest), relies on their guardian to file an objection on their behalf. While section 22 grants the Master authority to refuse letters of executorship *ex mero motu*, as an institutional body, the Master does not have independent knowledge of facts pertaining to the appropriateness of a nominated executor—these must be supplied by the interested parties.

*(c) Seeking a court order requiring executor's accounts or vouchers (section 36 AEA):* Any person with an interest in the liquidation and distribution of an estate may, in the face of an executor's noncompliance with statutory accounting obligations and after giving at minimum one month's notice, apply to the court for an order directing the executor to lodge accounts or vouchers. A minor heir relies on their guardian to take this step.<sup>245</sup>

*(d) Inspecting and objecting to executor's accounts (section 35(7) AEA):* Any person interested in an estate may object to the executor's liquidation and distribution accounts. There are often facts known only to beneficiaries (e.g. omission of assets from the accounts) that must be raised via objections; the Master, as an institutional body, cannot be expected to gain knowledge of such information independently. A minor beneficiary depends on their guardian to inspect the accounts on their behalf and to lodge a timely and adequate objection when necessary.

*(e) Seeking accounts from and court orders against trustees (sections 16, 19, 20 TPCA):* Trustees are obliged to keep accurate and proper accounts of the property under their administration, and trust beneficiaries are entitled to accounts and information.<sup>246</sup> The TPCA authorises the Master to call upon a trustee to account.<sup>247</sup> The Master or any person with an interest in trust property may thereafter apply for a court order directing a recalcitrant trustee to comply with the Master's prior request or to perform a duty,<sup>248</sup> and may also apply for an order removing the trustee from

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<sup>245</sup> Section 36 also authorises a Master to seek an order *ex mero motu*.

<sup>246</sup> Meyerowitz (n 161) §23.32.

<sup>247</sup> Section 16(1), TPCA.

<sup>248</sup> E.g. a beneficiary may compel a trustee to invest funds properly: Meyerowitz (n 161) §23.34.

office.<sup>249</sup> Minor beneficiaries of trusts depend on their guardians to take these steps to enforce the proper administration of trust property by trustees.

It is submitted that a guardian's general obligation to 'administer and safeguard the child's property and property interests'<sup>250</sup> includes attending to the steps outlined above when a minor has an interest in an estate. A guardian's diligence or neglect can significantly impact the minor's substantive entitlements. Delay and maladministration can result in the dissipation or depreciation of assets. Risk to the minor is increased when the executor or trustee has been exempted from furnishing security, or when a conflict of interest leaves the minor without a disinterested representative (e.g. when a natural guardian is also the executor and/ or a co-beneficiary. While the Master is authorised to take independent action against executors and trustees, as an institutional body the Master is under an informational deficit and is unlikely to initiate investigatory or enforcement procedures without receiving pertinent information from parties with knowledge. Currently, the actions outlined above lie entirely within the discretion of guardians. A greater degree of monitoring or intervention may be desirable, e.g. to pre-empt conflicts of interest. Interventions should bear some relation to the degree of risk to the minor and the value of the property at stake.

The subsections that follow will examine mechanisms in the AEA that regulate natural and legal guardians in their dealings with minors' property, namely, the requirement of security, the Guardian's Fund, and supervision by the Master and the High Court.

#### 4.3.2. Requirement of Security and the Guardian's Fund

The AEA restricts minors' ability to receive and enjoy property due to them from estates. In respect of natural guardians' dealings with minors' property, the AEA distinguishes between movable and immovable property; treatment of the latter will be discussed in the next subsection.

Section 43(1) of the AEA frames the receipt of a minor's movable property (including money) from an estate as an entitlement of the natural guardian:

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<sup>249</sup> Section 20(1), TPCA.

<sup>250</sup> Section 18(3)(a), Children's Act.

‘The natural guardian of a minor shall... be entitled to receive from the executor for and on behalf of the minor, any movable property to which the minor is, according to any liquidation and distribution account in any deceased estate, entitled.’

This entitlement is subject to the terms of a will, and contingent on the guardian furnishing security to the Master’s satisfaction, unless security is expressly exempted in a will.<sup>251</sup> Security protects the minor’s interest in the guardian handing over the inheritance when the minor becomes entitled to it, and thus in the inheritance being properly invested and administered.<sup>252</sup> When the property in question is money, if the natural guardian fails for whatever reason to furnish security within two months of the estate becoming distributable, the executor must pay the money into the Guardian’s Fund (described below).<sup>253</sup> There is a lacuna in the legislation as to what happens if the movable property in question is *not* money and no natural guardian furnishes satisfactory security.<sup>254</sup> An executor has neither a duty to liquidate a movable asset nor a duty to keep possession of it. Meyerowitz suggests that an executor in such a position may sell the asset and deposit the proceeds into the Guardian’s Fund, or apply to the court to have a curator appointed.<sup>255</sup>

A natural guardian who receives a minor’s movable property is obliged to use it for the minor’s benefit or to safeguard it for future use.<sup>256</sup> The Master may at any time call upon a natural guardian to account for their administration.<sup>257</sup>

Every tutor or curator must lodge security to the Master’s satisfaction in order to be granted letters of tutorship or curatorship, unless the court or testamentary instrument

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<sup>251</sup> Section 43(2), AEA.

<sup>252</sup> Van Heerden ‘Chapter 19’ (n 106) 701.

<sup>253</sup> Section 43(6) read with section 35(13), AEA; Meyerowitz (n 161) §20.2. A natural guardian who subsequently furnishes satisfactory security may, upon the Master’s direction, receive the sum out of the Guardian’s Fund on behalf of the minor: section 90(2). An exception is carved out for cash inheritances under R20 000 under the *Chief Master’s Directive 2 of 2019 re: Payment of Minor’s Inheritance into the Guardian’s Fund of 16 April 2019*.

<sup>254</sup> Meyerowitz (n 161) §20.4; Van Heerden ‘Chapter 19’ (n 106) 703.

<sup>255</sup> Meyerowitz (n 161) §20.4.

<sup>256</sup> Paleker ‘Chapter 7’ (n 176) §7.2.2. Section 4.4 considers when a minor’s inheritance may be applied towards maintenance.

<sup>257</sup> Section 43(3), AEA.

directs otherwise.<sup>258</sup> Unlike for natural guardians, the AEA does not limit legal guardians' duty to furnish security to movable property only.<sup>259</sup>

The requirement of security serves as a powerful control to ensure the proper administration of minors' property, and can disincentivise guardians from assuming the responsibility in the first place. The existence of the Guardian's Fund ensures that the absence of a qualified guardian does not leave a minor's money or other movable property in limbo. The Master administers the Guardian's Fund, and the terms of its administration are found in Chapter V of the AEA. The Guardian's Fund holds and administers money payable to the Master on behalf of various persons, including minors.<sup>260</sup> The Guardian's Fund is designed to offer security over profitability.<sup>261</sup> Interest is payable on funds held for minors.<sup>262</sup>

#### 4.3.3. Supervision by the Master and the High Court

Natural and legal guardians must apply or account to the Master or the High Court before taking certain actions related to minors' inheritances or property. This subsection examines the AEA provisions dealing with redistribution agreements, minors' immovable property, accounting obligations, and the purchase of minors' property by guardians.

##### *(a) Redistribution Agreements*

Beneficiaries with vested rights in an estate may reach a 'redistribution agreement' to arrange a different division of estate assets than set out in a will or under intestacy rules.<sup>263</sup> A guardian represents a minor heir in such an agreement.<sup>264</sup> The commentaries disagree on the circumstances when redistribution agreements require the Master's or the court's approval. Section 5(1)(e) of the regulations made under

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<sup>258</sup> Section 77(1) and (2), AEA; Meyerowitz (n 161) §21.9. The costs of security are paid from the minor's property: section 77(4), AEA.

<sup>259</sup> Only a natural guardian who furnishes the requisite security (unless exempted from doing so) has the right under section 43(1) to take possession of a minor's inheritance money. Section 82 requires a tutor or curator to forthwith pay any money received on behalf of a minor to the Master, subject to certain exceptions. A tutor or curator does not have the option of furnishing security to retain possession of a minor's money.

<sup>260</sup> Meyerowitz (n 161) §20.4.

<sup>261</sup> Van Heerden 'Chapter 19' (n 106) 717-8.

<sup>262</sup> Section 88(1), AEA.

<sup>263</sup> Rautenbach (n 187) §16.3.2.2.5; Meyerowitz (n 161) §12.31.

<sup>264</sup> Meyerowitz (n 161) §12.31.

section 103 of the AEA provides that a redistribution agreement must accompany the liquidation and distribution account that the executor submits to the Master's office.<sup>265</sup> From this, Rautenbach infers that the Master must approve the agreement, and posits further that 'special requirements must be met in the case of minor beneficiaries.'<sup>266</sup> Meyerowitz, however, suggests that only a redistribution agreement in which a minor gives up an interest in immovable property requires the approval of the Master or the court.<sup>267</sup>

*(b) Minors' Immovable Property*

The AEA limits the ability of guardians to alter minors' rights in immovable property by requiring that certain dealings come before the Master or the court.

A natural guardian may not alienate or mortgage a minor's immovable property without authorisation from either the Master or the court.<sup>268</sup> A legal guardian may alienate or mortgage a minor's property if authorised to do so in a testamentary instrument, otherwise, authorisation by the court or the Master is necessary.<sup>269</sup> The Master or the court must be satisfied that a proposed alienation is in the minor's interest.<sup>270</sup> In the case of a mortgage, the Master must be satisfied that the proposed mortgage 'is necessary for the preservation or improvement of the property or for the maintenance, education or other benefit' of the minor.<sup>271</sup> The partition or subdivision of a minor's immovable property must also be approved by the Master.<sup>272</sup>

Besides alienation, mortgaging, partition and subdivision, the AEA is largely silent on the practical aspects of owning immovable property, such as the payment of property rates, insurance, utilities and capital repairs. As discussed in subsection 4.2.3,

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<sup>265</sup> GNR 473 (n 200).

<sup>266</sup> Rautenbach (n 187) §16.3.2.2.5.

<sup>267</sup> Meyerowitz (n 161) §12.31.

<sup>268</sup> Section 80(1), AEA. The Master may authorise the alienation of a minor's immovable property valued below a prescribed amount (currently R250 000: GNR 920 (n 193)). The Master may authorise a mortgage amount not exceeding R250 000. Sales or mortgages above the prescribed amounts require court authorisation.

<sup>269</sup> Section 80(1), AEA. The Master's jurisdiction is limited to prescribed amounts set out in GNR 920 (n 193).

<sup>270</sup> Section 80(2)(a), AEA and Meyerowitz (n 161) §21.24 and §21.25. Meyerowitz states that the court must be satisfied 'beyond all reasonable doubt' that a proposed alienation is to the minor's advantage.

<sup>271</sup> Section 80(2)(b), AEA. Per Meyerowitz, similar evidence should be submitted in an application to the court: (n 161) §21.25.

<sup>272</sup> Section 94, AEA. A natural guardian cannot consent on the minor's behalf, and section 94 does not displace the court's power to order a partition or division of a minor's property: Meyerowitz (n 161) §21.27.

immovable property from an estate devolving to a minor is to be registered in the minor's name. Legal title provides a measure of protection, however, a guardian's failure to attend to carrying costs and upkeep of an immovable property can entail serious consequences. The AEA implicitly recognises that guardians are responsible for the upkeep of minors' immovable property in two provisions. First, section 80(2)(b) states that the Master may authorise a mortgage on a minor's property up to the prescribed amount<sup>273</sup> if the mortgage is 'necessary for the preservation or improvement of the property.'<sup>274</sup> Such a mortgage may be necessary if the minor has no cash to fund carrying costs. Secondly, if a minor has money in the Guardian's Fund, section 90(1) authorises the Master to pay to the minor's guardian a sum up to the prescribed amount<sup>275</sup> 'for any investment in immovable property within the Republic.'

Unlike for movable property, once an estate is distributed, the AEA does not give the Master ongoing jurisdiction to oversee natural guardians' administration of minors' immovable property.<sup>276</sup> This is not the case with legal guardians. Since tutors and curators must lodge annual accounts,<sup>277</sup> the Master may review their administration of immovable property on an ongoing basis. It is submitted that when the Master becomes aware of immovable property devolving to a minor heir, e.g. when reviewing an executor's distribution account, the Master should enquire about a plan for upkeep and the payment of carrying costs.

*(c) Purchases of Minors' Property by Natural and Legal Guardians*

As with executors,<sup>278</sup> the AEA deems a self-dealing transaction by a tutor, curator or connected person void unless it has been authorised in a will or by the Master or the court.<sup>279</sup> While there is no correlating provision for natural guardians, they are required to avoid conflicts of interest between their personal and fiduciary capacities, and a self-dealing transaction is *prima facie* a conflict of interest. Thus, a natural guardian

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<sup>273</sup> R250 000 per GNR 920 (n 193).

<sup>274</sup> Meyerowitz elaborates that such mortgages may be for the purposes of paying rates and taxes, repairs, and improvements such as additional buildings, dams and irrigation works: Meyerowitz (n 161) §21.25.

<sup>275</sup> R250 000 per GNR 920 (n 193).

<sup>276</sup> Section 43(3) of the AEA empowers the Master to call upon a natural guardian to account for their administration of movable property at any time.

<sup>277</sup> Section 83, AEA. Discussed in this subsection at (d).

<sup>278</sup> Section 49(1), AEA. Discussed in subsection 4.2.3 n 238.

<sup>279</sup> Section 81, AEA.

who seeks to purchase a minor's property must be prepared to demonstrate that it benefits the minor.<sup>280</sup>

*(d) Legal Guardians' Obligations to Account*

The Master has ongoing jurisdiction to review the actions of legal guardians, whose authority to act derives from letters of tutorship or curatorship granted by the Master.<sup>281</sup> A tutor or curator must submit to the Master an initial inventory of all of the minor's property to be taken care of or administered.<sup>282</sup> An updated inventory must be submitted whenever a tutor or curator comes to know of any additional property belonging to the minor.<sup>283</sup> Further, legal guardians must submit yearly accounts to the Master, which must include a statement of all property under their control at the end of each accounting period, with supporting vouchers, receipts and acquittances.<sup>284</sup>

As discussed in subsection 3.2.3, it is unclear whether a testamentary or court-appointed guardian under the Children's Act constitutes a natural guardian or curator under the AEA. As shown, their status determines the scope of their obligations as well as the Master's jurisdiction to oversee their property administration.

#### 4.4. Using Minors' Inheritances for Maintenance

Commentators are unanimous that minors' inheritances may be used for their own support.<sup>285</sup> This subsection reviews relevant provisions in the AEA before considering whether and when this is consistent with maintenance as a child's right.

Several provisions in the AEA refer directly to the use of a minor's property for maintenance. Section 80(2)(b) provides that the Master may approve a mortgage on a minor's immovable property for the purpose of 'maintenance, education or other benefit.' For a minor with money in the Guardian's Fund, section 90(1) allows the

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<sup>280</sup> Natural guardians who seek to purchase minors' immovable property remain subject to the requirement in section 80(1) that the Master or the court approve the alienation of a minor's property, as discussed in this subsection at (b).

<sup>281</sup> Section 71, AEA.

<sup>282</sup> Section 78(1)(a), AEA.

<sup>283</sup> Section 78(1)(b), AEA.

<sup>284</sup> Section 83(1)(a), AEA.

<sup>285</sup> See: Clark 'Chapter 11 – Duties of support of deceased estates' in *Boberg's* (n 102) 275, Kruger (n 16) 52.

Master to pay money out for the purposes of (*inter alia*) ‘maintenance, education or other benefit.’<sup>286</sup> Thirdly, section 82(c) carves out exceptions to the general rule that legal guardians must pay any money received belonging to a minor to the Master; one such exception allows them to retain money that is immediately required for the minor’s maintenance or education. It is also interesting to note that at common law, a natural guardian is entitled to apply so much of a minor’s money as is immediately required towards maintenance or education.<sup>287</sup>

The AEA provides no guidance on the criteria to be met in order to use a minor’s property for their maintenance or education. The determinations under sections 80(2)(b) and 90(1) are made by the Master, while the decision whether and to what extent funds are ‘immediately required’ for maintenance is made by legal and natural guardians already with possession of the minors’ property.

To properly account for minors’ right to receive *and* their limited duty to provide maintenance,<sup>288</sup> it is submitted that the following factors are relevant to determining whether and to what extent the use of minors’ property for their own maintenance is justified:

- (1) If the property in question is an inheritance, whether the estate belonged to a parent or individual who owed the minor a legal duty of maintenance; and
- (2) whether any living person owes the minor a duty of maintenance.

Rules developed at common law demonstrate the salience of these considerations. At common law, a distinction is drawn between use of a minor’s capital and income for their own support. A minor’s duty of self-support binds their income, whether generated through employment or investment, but a minor’s capital may only be drawn upon for maintenance if the minor’s income combined with parental support is insufficient, and court approval must be obtained.<sup>289</sup>

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<sup>286</sup> There is no limit to the payments that may be authorised out of interest, but payments out of capital cannot in aggregate exceed the prescribed amount of R250 000 (GNR 920 (n 194)): Van Heerden ‘Chapter 19’ (n 106) 718 and Meyerowitz (n 161) §12.29, §12.30.

<sup>287</sup> Any portion not immediately required for maintenance or education must be invested in ‘prudent yet profitable securities’: Van Heerden ‘Chapter 19’ (n 106) 711.

<sup>288</sup> Discussed in subsection 3.1.4.

<sup>289</sup> Clark ‘Chapter 10’ (n 102) 245-6; Van Heerden ‘Chapter 19’ (n 106) 707-8.

Additionally, certain inheritances are given distinct treatment at common law. Courts have held that the benefits a child receives from the estate of a deceased parent, both capital and income, must be factored in when determining the sources of the child's maintenance and the scope of the surviving parent's maintenance duty.<sup>290</sup> This position recognises that minors' inheritances are, in most cases, not pure gifts or windfalls. If the deceased owed a duty of maintenance to the child while alive, the inheritance, either in entirety or in part, is a source of the child's maintenance after death. This is most true in the case of a deceased parent, but given the imposition of support duties on non-parent relations (e.g. grandparents and remoter ascendants) in South African law,<sup>291</sup> most testamentary dispositions in favour of minors arise within a relationship to which the law assigned a maintenance duty while the deceased was alive.<sup>292</sup> Allowing a child's inheritance to be used for maintenance in such cases enforces the estate's support duty and ensures that the surviving parent does not bear a disproportionate burden of support. By the same token, requiring court approval can ensure that a surviving parent—who in many cases would be the natural guardian entitled to take control of the minor's inheritance under section 43(1) of the AEA—does not evade their support obligation by drawing solely upon the child's inheritance for the child's maintenance.

A child-centred approach to children's entitlements in succession would aim to prevent the unjustified dissipation of their property, while ensuring that their maintenance needs are adequately met. The AEA does not set out factors to guide courts and the Master in their adjudication of requests to use minors' property

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<sup>290</sup> Clark 'Chapter 10' (n 102) 246.

<sup>291</sup> Discussed in subsection 3.1.4.

<sup>292</sup> In South African law, apart from the parent-child relationship, the right to maintenance from a living relative does not extend to a right to maintenance from the relative's estate even if a *de facto* support relationship existed. Mackintosh and Paleker, noting courts' ambivalence towards recognising grandchildren's maintenance claims against grandparents' estates, argue for the development of the common law to permit such claims in cases where the grandchild's parents are unable to fulfil their maintenance duties: Mackintosh & Paleker 'A Grandchild's Claim to Maintenance from a Deceased Grandparent's Estate' (2014) *Acta Juridica* 41 at 41. In the recent case of *Van Zyl v Getz* [2020] ZASCA 84, the appellant asked the Supreme Court of Appeal to develop the common law to recognise a duty of support on the part of a grandparent's estate, citing sections 9, 10 and 28(2) of the Bill of Rights. The court declined, finding that the evidentiary record was insufficient to justify altering the common law rule, as the appellant had failed to establish that the minor's overseas parent was financially unable to provide support (paras 47-9). The court emphasised parents' 'special role and responsibility' in raising their children in South African law, and held that support duties only fall to remoter relations when parents are unable to fulfil them (para 57). Further, the court raised the issue of institutional competence, opining that Parliament was better suited to enact a change to the common law that would have widespread policy and constitutional ramifications (paras 58-9).

(inheritances or otherwise) for the purpose of maintenance. Setting out factors would promote certainty and consistency in decision-making, as well as the development of jurisprudence that transparently interprets the interplay between parents' and minors' support duties.

## CHAPTER 5

### CHILDREN'S RIGHTS IN PENSION BENEFITS

With the enactment of the Pension Funds Act 24 of 1956 (PFA), South Africa became the first country in the world with comprehensive legislation governing retirement funds.<sup>293</sup> As the PFA definition of 'pension fund' indicates, the main purpose of a retirement fund is to provide a benefit to its members upon retirement or to their dependants upon death.<sup>294</sup> Pension funds have an inherent social function: enabling workers to save for retirement and dependants reduces pressure on the public purse to support needy seniors, widows and orphans.<sup>295</sup>

Children benefit from pensions by qualifying as the dependants of fund members. Lehmann argues that most working South Africans are the 'fortunate poor,' earning formal income but owning little additional property, because most of their savings are locked into compulsory work pensions.<sup>296</sup> Pension benefits may constitute the most sizeable asset that a working person leaves upon death and the main source of support for dependants. As such, pension entitlements are an important non-public source of funds for the fulfilment of children's right to economic security.

This Chapter examines the PFA scheme governing the distribution of pension death benefits. It will be argued that the decisions of the Pension Funds Adjudicator ('Adjudicator')<sup>297</sup> regarding the payment of death benefits to minors reflect an outdated 'parental power' conception of guardianship that is out of step with a

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<sup>293</sup> Hanekom (ed) *Manual on Retirement Funds and Other Employee Benefits* (2016) §1.2. There were approximately 3,200 registered retirement funds in South Africa as of 2016: Hanekom §1.5.1. The majority are subject to the PFA, but some are regulated by other legislation; for a list, see Hunter, Esterhuizen, Jithoo et al *The Pension Funds Act, 1956: a commentary on the Act and selected notices, directives and circulars* (2010) at xvii. This chapter focuses on funds governed by the PFA.

<sup>294</sup> Section 1(1), PFA and Downie *Essentials of Retirement Fund Management* (2016) at 6-7.

<sup>295</sup> In 2016, over 2.9 million seniors received South Africa's old age means-tested social assistance monthly grant: Downie (n 294) 8.

<sup>296</sup> Lehmann 'Testamentary Freedom versus Testamentary Duty: In Search of a Better Balance' (2014) *Acta Juridica* 9 at 21. Examining the treatment of death benefits under the PFA, Lehmann concludes that the working poor enjoy little testamentary freedom in South Africa today.

<sup>297</sup> Insertion of Chapter VA into the PFA in 1996 established the office of the Pension Funds Adjudicator, whose mandate is to resolve complaints in a 'procedurally fair, economical and expeditious manner' (section 30D). The Adjudicator is empowered to make any order which a court of law may make (section 30E(1)(a)), thus performing a quasi-judicial function and constituting an administrative tribunal: Davidson 'Chapter 9.24.1-6' in Hanekom (n 293) §9.24.4. A body of pension law jurisprudence interpreting section 37C (the distribution of death benefits) has developed since the Adjudicator's mandate began: Hunter *et al* (n 293) xxviii.

children's rights paradigm. Legislation and courts have established that child maintenance lays a priority claim against pensions, whether the pension member is deceased or alive. But divergent approaches to guardianship result in differential protection of those maintenance payments in the two bodies of case law.

### 5.1. Rights of Dependants in Section 37C of the Pension Funds Act

Considered 'one of the most important social security elements' of the PFA, section 37C regulates the main interest of dependants in pension funds.<sup>298</sup> It stipulates that a lump sum benefit payable by a retirement fund on a member's death does not form part of the member's estate and must be distributed in accordance with the terms of section 37C, not the member's will or the Intestate Succession Act.<sup>299</sup> Hussain J of the South Gauteng High Court explained:

'Section 37 of the Act was intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. The section specifically restricts freedom of testation in order that no dependants are left without support.'<sup>300</sup>

Section 37C places the duty to distribute a lump sum death benefit on the board of a pension fund. Distribution entails three steps. First, the board must determine the pool of potential beneficiaries by identifying the deceased member's dependants and nominees.<sup>301</sup> Section 1 of the PFA defines 'dependant' broadly to include legal dependants, factual dependants, spouses, children, and future dependants.<sup>302</sup>

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<sup>298</sup> Hunter *et al* (n 293) xix. Section 37C was introduced in a 1976 amendment.

<sup>299</sup> A retirement fund is not required to provide for the payment of a lump sum death benefit, but when it does, section 37C applies: Hunter *et al* (n 293) 683. A 2007 amendment to section 37C(1) explicitly excludes pensions payable to a member's spouse or child from the application of section 37C: Jeram 'Chapter 9.15 – Disposition of lump sum death benefits in terms of section 37C: An analysis of the case law' in Hanekom (n 293) §9.15.4. The rules of a retirement fund determine the calculation of the lump sum benefit. It typically consists of the member's fund credit (contributions plus investment returns less deductions) and an insured benefit that is usually a multiple of the member's salary: Jeram 'Time for a change to payment of minors' death benefits' (2014) 29(4) *Insurance and Tax* 1.

<sup>300</sup> *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705-6.

<sup>301</sup> Section 37C(1), PFA. The High Court has held that the board must undertake a 'thorough and credible investigation' to locate beneficiaries: Jeram 'Chapter 9.15' (n 299) §9.15.5.6.

<sup>302</sup> A future dependant is someone for whom 'the member would have become legally liable for maintenance, had the member not died': section 1(1) PFA. For a detailed discussion of each category of dependants, see Jeram 'Chapter 9.15' (n 299) §9.15.5.

Secondly, the board must effect an equitable distribution of the death benefit.<sup>303</sup> The PFA does not define ‘equitable distribution.’ The Adjudicator has consistently called for boards to consider the following non-exhaustive factors: the amount available for distribution, beneficiaries’ ages, beneficiaries’ relationships with the deceased, the extent of dependency, the deceased’s wishes, and beneficiaries’ financial circumstances.<sup>304</sup> Legal liability for maintenance and any existing maintenance orders are taken into account as part of ‘extent of dependency.’<sup>305</sup> Where there are multiple minors, the board must consider their ages and the likely duration of their respective periods of dependency.<sup>306</sup> The board must weigh all relevant factors and not fetter its discretion by adopting rigid policies.<sup>307</sup> Given section 37C’s social purpose, distribution to dependants supersedes nominees, and an equitable distribution does not need to include all nominees.<sup>308</sup>

Once the recipient beneficiaries have been identified and an equitable division determined, the board must decide on the appropriate mode of payment.<sup>309</sup> A death benefit may be paid to (1) a beneficiary directly (rarely appropriate for minors<sup>310</sup>); (2) a trustee of a trust nominated by the member, major beneficiary, guardian, curator or caregiver;<sup>311</sup> (3) a guardian, curator or caregiver;<sup>312</sup> or (4) a registered beneficiary fund.<sup>313</sup> Additionally, the board may retain a minor beneficiary’s benefit in the pension fund’s own portfolios and pay it out in instalments, with reasonable interest added.<sup>314</sup>

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<sup>303</sup> Section 37C(1), PFA.

<sup>304</sup> Hunter *et al* (n 293) 691; Dyani & Mhango ‘Reflections on Recent South African Pension Jurisprudence on Death Claims’ (2011) 32 *Industrial LJ* 2385 at 2388.

<sup>305</sup> Jeram ‘Chapter 9.15’ (n 299) §9.15.7.3.3.

<sup>306</sup> *Ibid* §9.15.7.3.4.

<sup>307</sup> Hunter *et al* (n 293) 691. When reviewing a board’s decision under section 37C, the Adjudicator applies a deferential standard, reviewing for the proper exercise of discretion: Jeram ‘Chapter 9.15’ (n 299) §9.15.7.3.7.

<sup>308</sup> Jeram ‘Chapter 9.15’ (n 299) §9.15.2. Payment may be made to the deceased member’s estate only when there are no dependants or nominees, or when there are only nominees and estate debts exceed assets, but only to the extent necessary to pay off debts: section 37C(1)(c) and (b), PFA.

<sup>309</sup> Section 37C(2), PFA.

<sup>310</sup> This has become rarer since the Children’s Act lowered the age of majority from 21 to 18 years: Hunter *et al* (n 293) 696.

<sup>311</sup> Section 37C(2)(a)(i), PFA.

<sup>312</sup> Section 37C(2)(a)(ii), PFA. Hunter *et al* interpret caregiver to include *de facto* caregivers who are not guardians: (n 296) 699-701.

<sup>313</sup> Section 37C(2)(a)(iii) and (b), PFA. Beneficiary funds (defined in section 1, PFA) are a species of pension fund introduced in 2008 to receive section 37C death benefits and to administer, invest and pay them to beneficiaries, usually minors: Jeram ‘Chapter 9.15’ (n 299) §9.15.8.1.

<sup>314</sup> Section 37C(3), PFA.

Disputes over boards' decisions about the mode of payment of minor beneficiaries' pension benefits have come before the Adjudicator in many cases. The next section considers the approach to guardianship taken in these cases.

## 5.2. Payment of Minors' Death Benefits to Guardians

The Adjudicator has consistently held that a death benefit payable to a minor under section 37C must be paid to the minor's guardian unless a board has cogent reasons to 'deprive' the guardian of the right to administer the funds.<sup>315</sup> Commentators generally affirm this position. For example, Jeram states that once a board has decided against direct payment to a minor, 'the consequent enquiry is whether payment should be made directly to the guardian of the minor.'<sup>316</sup>

The Adjudicator in *Ramanyelo v Mine Workers Provident Fund*<sup>317</sup> set out four factors for boards to consider when deciding whether to make payment to a guardian:

1. the amount of the benefit;
2. the guardian's ability to administer the funds;
3. the guardian's qualifications (or lack thereof) to administer the funds; and
4. use of the benefit to provide for the minor until the age of majority.<sup>318</sup>

A Senior Assistant Adjudicator observed in 2007 that complaints brought before the Adjudicator revealed a pattern of pension boards paying minors' benefits into trust without first investigating the viability of payment to guardians.<sup>319</sup> The Adjudicator has repeatedly held that a board's total failure to consider payment to a guardian constitutes an improper exercise of discretion.<sup>320</sup>

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<sup>315</sup> E.g. *Lebepe v Premier Foods Provident Fund and Others* [2007] 3 BPLR 325 (PFA) para 5.9; *Baloyi v Ellerine Holdings Limited Staff Pension Fund* [2005] 7 BPLR 606 (PFA) para 14, *Dhlamini v Smith & another* [2003] 7 BPLR 4894 (PFA) para 21.

<sup>316</sup> Jeram 'Chapter 9.15' (n 299) §9.15.8.1.

<sup>317</sup> [2005] 1 BPLR 67 (PFA).

<sup>318</sup> *Ibid* para 16.

<sup>319</sup> MacKenzie 'Who will guard the Guards? An appraisal of minors' pension benefits placed into trust' (2007) 22(4) *Insurance and Tax* 40 §2.4. MacKenzie highlights the pecuniary interests that may have motivated some pension funds to prefer payment to trusts rather than guardians. These incentives (and the underlying conflicts of interest) may have diminished in the wake of 2008 legislative changes requiring beneficiary funds to be registered and regulated under the stricter rules of the PFA: Swanepoel 'Chapter 9.1' in Hanekom (n 293) §9.1.4.

<sup>320</sup> Jeram 'Chapter 9.15' (n 299) §9.15.8.1 fn 402; *Ramanyelo* (n 317) para 17; *Lebepe v Premier Foods Provident Fund and Others* (n 315) para 5.10.

Nothing in the text of section 37C dictates that payment to a guardian should be preferred over the other modes of payment listed. The Adjudicator's 'guardians' rights' approach echoes section 43(1) of the AEA, which frames the receipt of a minor's movable property from an estate as a natural guardian's 'entitlement.'<sup>321</sup> A critical difference, however, is that the natural guardian's right to receive a minor's movable property from a deceased estate under section 43(1) of the AEA is contingent on the guardian furnishing security.<sup>322</sup> In contrast, the PFA imposes no requirement of security nor oversight of a guardian's use of a minor's death benefit once it is disbursed.<sup>323</sup>

It is submitted that the Adjudicator's approach to guardianship reflects an outmoded 'parental power' model that is incompatible with the children's rights paradigm that has been progressively embraced in South African law. Part of the problem may lie in the legislature's failure to clarify the effect of the Children's Act on the institutions of curatorship, tutorship and natural guardianship, which originated in the parental power era.<sup>324</sup> Furthermore, as observed in subsection 3.2.2, the incidents of guardianship in the Children's Act did not depart in any fundamental way from the schemes that preceded it, notwithstanding the Children's Act's ostensible goal of transforming existing laws to enhance children's rights. As a result, children's rights within guardianship remain obscured, even in cases where their economic security is at stake.

The Adjudicator's scrutiny of pension boards' 'deprivation' of the right of guardians to administer children's benefits obscures the fact that guardianship itself deprives minors of the right to manage their own property. In a children's rights framework, restricting autonomy is justifiable if it furthers children's other interests, for example, their interest in the proper management of their property when they lack the requisite capacity. Two of the *Ramanyelo* factors recognise this interest to some extent by requiring assessment of a guardian's financial competency. However, the premise that financial acumen ensures the proper use of a minor's funds is questionable. As Jeram points out, 'one may have a guardian who is very well qualified in finances... but does

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<sup>321</sup> Discussed in subsection 4.3.2.

<sup>322</sup> Section 43(2), AEA.

<sup>323</sup> Hunter *et al* contend that unless a board, when paying out a minor's death benefit, knew or ought reasonably to have known that a guardian was incapable of managing the minor's financial affairs, it bears no liability for a guardian's subsequent mismanagement of the benefit: (n 293) 698-9.

<sup>324</sup> As discussed in section 3.2.3.

that really mean he/ she will use the monies in the best interests of the minor children?’<sup>325</sup>

The Adjudicator’s preference for direct lump sum payment of the section 37C benefit to guardians overlooks the value of periodic payment in achieving the provision’s underlying social purpose: providing for dependants. Section 37C contemplates two modes of payment that enable periodic payment to a guardian: by a registered beneficiary fund,<sup>326</sup> or by the pension fund itself.<sup>327</sup> With these two modes of payment, the capital is professionally invested, and the guardian’s responsibility is limited to managing and using periodic payments for the minor’s maintenance. Where the value of a minor’s benefit is high, requiring administration over a long investment horizon, periodic payment to a guardian may strike the appropriate balance between ensuring the preservation of benefits for the duration of children’s dependency and giving a role to guardians in the administration of their children’s property.<sup>328</sup>

In maintenance cases with living payors, periodic payment is the norm. Certainly, most payors need to work to meet their support obligations and can only ‘pay as they earn,’ but even when lump sums are available, courts have ordered maintenance be paid monthly. It is now established that courts can order the attachment of pension funds, annuities, and proceeds from the sale of immovable property to secure the payment of future child maintenance.<sup>329</sup> In making such orders, courts do not accept that custodial guardians are automatically entitled to receive maintenance as a lump sum. Rather, courts have ordered pension funds to withhold members’ benefits and to make monthly maintenance payments to custodial parents.<sup>330</sup> The pension fund in

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<sup>325</sup> Jeram 2014 (n 299).

<sup>326</sup> Section 37C(2)(a)(iii) and (b), PFA.

<sup>327</sup> Section 37C(3), PFA.

<sup>328</sup> The fourth *Ramanyelo* factor recognises the value of ensuring the section 37C benefit is available over the period of a minor’s dependency, but the Adjudicator’s jurisprudence shows that this factor is usually disregarded when a guardian is found who is not otherwise disqualified.

<sup>329</sup> In *Mngadi v Beacon Sweets and Chocolates Provident Fund and Other* [2003] 7 BPLR 4870 (D) at 4879, Nicholson J, recognising that the Maintenance Act provided remedies for maintenance arrears but not future maintenance, found that the court was nevertheless empowered to devise ‘innovative remedies’ to enforce constitutional rights, which included children’s right to maintenance as protected by section 28 of the Constitution. The decisions in *Magewu v Zozo and others* [2004] 3 All SA 235 (C), *Soller v Maintenance Magistrate, Wynberg and Others* [2006] 1 BPLR 53 (C) and *Burger v Burger and Another* 2006 (4) SA 414 (D) reinforced this authority. See also discussions in Moodley (n 15) 190-1 and Bonthuys 2008 (n 87) 196.

<sup>330</sup> *Mngadi v Beacon Sweets and Chocolates Provident Fund and Other* (n 329) at 4880; *Magewu v Zozo and others* (n 329) at 243.

*Government Employees Pension Fund v Bezuidenhout and another* ('*Bezuidenhout*'),<sup>331</sup> faced with such an order, objected to being burdened with administrative duties outside of its normal functions.<sup>332</sup> The appellate court agreed, directed the pension fund to deposit the member's benefit into the Guardian's Fund instead, and directed the Master to make monthly maintenance payments to the custodial parent from the deposited funds.<sup>333</sup> It now appears to be routine for courts to make *Bezuidenhout*-style orders that require the Guardian's Fund and the Master to administer periodic child maintenance payments from deposited pension monies.<sup>334</sup>

The complex administrative procedure devised in *Bezuidenhout*, which expends public resources, would be avoided if courts followed the Adjudicator's lenient approach to guardianship and simply authorised pension funds to pay out lump sums to custodial guardians. Courts' preference for the periodic payment of future maintenance from pensions demonstrates that the Adjudicator's expansive interpretation of guardianship is not inevitable and calls into question the advisability of paying out section 37C benefits to minors' guardians in a lump sum, without the safeguard of security. Indeed, Jeram recommends mandating the payment of all minors' death benefits to beneficiary funds or trusts that would then pay maintenance to guardians in instalments, which he observes would bring section 37C in line with the trend of mandatory annuitisation in pension law.<sup>335</sup> The AEA's use of security and accounting obligations to protect minors' inheritances in the hands of guardians brings into relief the lack of similar safeguards in section 37C of the PFA. Since a pension increasingly constitutes the most valuable asset a working South African may leave behind, this discrepancy merits legislative attention.

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<sup>331</sup> Unreported judgment of the Transvaal Provincial Division, Appeal No 2113/04 (2006).

<sup>332</sup> As described in Lamprecht 'The Payment of Money for Maintenance into the Guardian's Fund' (February 2010) 5 *The Judicial Officer (Journal of the Judicial Officers' Association of South Africa)* 4 at 5.

<sup>333</sup> Discussed by the court in *Mbhele v Mbhele* [2010] ZAKZPHC 29 (KZN HC) para 11.

<sup>334</sup> The Chief Master of the High Court issued two directives in 2017 and 2018 to ensure uniformity of practice among the Master's offices in respect of future maintenance funds deposited pursuant to *Bezuidenhout*-style orders: *Chief Master's Directive 1 of 2017 re: To ensure uniformity in respect of the way in which the Guardian's Fund deals with Future Maintenance Funds deposited with the Master*, and *Chief Master's Directive 1 of 2018 re: Interest on future maintenance and age of majority for purposes of Sec 91 Adverts as from 01 April 2018*.

<sup>335</sup> Jeram 2014 (n 299). The objective of reforms mandating the annuitisation of other pension benefits is the preservation of private savings to fund members' retirements. The same preservation objective is equally valid for pension benefits that are intended for dependants' maintenance.

## CHAPTER 6

### CHILDREN'S CLAIMS FOR MAINTENANCE AGAINST ESTATES

It is long-established in South African common law that the right of children to maintenance binds their parents' estates.<sup>336</sup> This Chapter considers the substantive and procedural aspects of children's right to maintenance from estates, identifying gaps in protection.

#### 6.1. Substantive Rights

A parent's duty to support a child does not terminate at death but transmits to the deceased estate.<sup>337</sup> Maintenance claims rank after creditors' claims but before the entitlements of beneficiaries.<sup>338</sup> To succeed, the claimant must demonstrate need, and any benefits received from the parent's estate, whether capital or income, and whether on intestacy or by will, are taken into account.<sup>339</sup> Some decisions suggest that an estate's liability arises only when the surviving parent cannot adequately support the child.<sup>340</sup> However, commentators observe that since parents during their lifetime share the burden of child support proportionate to their means, the same principle should apply after a parent has died.<sup>341</sup> In calculating support, the child's accustomed standard of living and the estate's means are taken into account.<sup>342</sup>

Maintenance from an estate may be payable while the estate administration is ongoing. Section 26(1A) of the AEA empowers an executor, with the Master's consent, to release estate funds 'to provide for the subsistence of the deceased's family or household' before the executor's account has lain open for inspection. The court in *Du Toit v Thomas* found that this section vests an executor with not only the discretion

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<sup>336</sup> Clark & Van Zyl (n 84) 19. The estates of both fathers and mothers are liable: *Carelse v Estate De Vries* (1906) 23 SC 532 and *Goldman v Executor Estate Goldman* 1937 WLD 64. Major children are not precluded: *Hoffmann v Herdan* [1982] 3 All SA 48 (T). The right of surviving married spouses to maintenance from estates is enshrined legislatively: Maintenance of Surviving Spouses Act 27 of 1990 (MSSA).

<sup>337</sup> *Du Toit v Thomas and others* [2015] JOL 33337 (WCC) para 17.

<sup>338</sup> Clark 'Chapter 11' (n 285) 275. A spousal maintenance claim ranks equally with a child's, and the claims abate proportionately if necessary: section 2(3)(b), MSSA.

<sup>339</sup> Clark 'Chapter 11' (n 285) 275; Meyerowitz (n 161) §21.31. Although not mentioned by commentators, non-estate benefits payable to a child upon a parent's death, such as pension benefits and life insurance proceeds, are likely also counted as assets that reduce a child's need.

<sup>340</sup> Discussed in Clark & Van Zyl (n 85) 19, Meyerowitz (n 161) §21.31.

<sup>341</sup> Kruger (n 16) 52, Meyerowitz (n 161) §21.31.

<sup>342</sup> Clark & Van Zyl (n 84) 19, Clark 'Chapter 11' (n 285) 276.

but the *responsibility* to alleviate family hardship pending estate distribution, which includes paying child maintenance.<sup>343</sup> Meyerowitz posits that the executor's power under section 26(1A) 'does not embrace a member of the family or household who is not a beneficiary or creditor.'<sup>344</sup> However, this is disputed by the *Du Toit* decision. In that case, the court recognised that the child claimant had a maintenance entitlement over and above her entitlement as heir, and gave no indication that maintenance paid under section 26(1A) constituted an early distribution of her inheritance or would be capped at her total entitlement as beneficiary.<sup>345</sup> Furthermore, the court grounded the executor's duty towards dependants in constitutional and maintenance law.<sup>346</sup> This suggests that the relief available under section 26(1A) is not only temporal but substantive, and available to disinherited dependants.

The Supreme Court of Appeal has ruled that the proceeds of life policies in respect of which there are unrevoked nominated beneficiaries cannot be 'clawed back' into an estate for the purpose of satisfying a spousal maintenance claim.<sup>347</sup> The ruling likely applies to children's maintenance claims also, which rank equally with spousal claims in priority of payment.<sup>348</sup> This means that even when a deceased parent's estate is insufficient to meet the needs of a dependent child, the child has no remedy against life policy proceeds payable or paid to a nominated beneficiary. Injustice may result whereby dependants' needs are left unmet while a non-dependent beneficiary receives life policy proceeds. As shown in Chapter 5, section 37C of the PFA demonstrates the legislature's willingness to constrain testamentary freedom in the pension arena to give effect to maintenance rights. Life insurance policies may warrant the same treatment.<sup>349</sup>

Finally, while children lacking sufficient parental support have the right to be maintained by a living grandparent, the case law conflicts on whether children can

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<sup>343</sup> [2015] JOL 33337 (WCC), affirmed on other grounds [2016] JOL 36040 (SCA) paras 21-22, 28.

<sup>344</sup> Meyerowitz (n 161) §12.2A.

<sup>345</sup> *Du Toit* (n 343) para 3.

<sup>346</sup> *Du Toit* (n 343) paras 17-8, 31.

<sup>347</sup> *Oshry v Feldman* [2011] 1 All SA 124 (SCA) paras 45-7.

<sup>348</sup> See n 338.

<sup>349</sup> In the author's home jurisdiction of Ontario, Canada, the statute that enables dependants to claim support from an estate contains a powerful 'clawback' provision that deems the capital value of certain transactions part of an estate for the purpose of paying dependants' support (section 72 *Succession Law Reform Act*, RSO 1990 c. S. 26). Designated life insurance policy proceeds are captured by this provision.

claim maintenance from their grandparents' estates.<sup>350</sup> Mackintosh and Paleker argue for courts to develop the common law to recognise such a right, citing socio-economic and constitutional imperatives.<sup>351</sup>

## 6.2. Procedural Aspects

To vindicate their right to maintenance from deceased estates, minor children must have the representation or assistance of a guardian or curator *ad litem*.<sup>352</sup> Timely action is usually critical, as children may lack immediate necessities without maintenance, and the distribution and dissipation of estate assets may frustrate maintenance recovery. While a minor's maintenance claim is preserved as a *condictio indebiti* action after an estate has been distributed, unjust enrichment must be proved, and recovery is limited to the amount by which the defendant heirs are enriched.<sup>353</sup>

Uncertainty surrounds several important procedural aspects of minors' maintenance claims against estates, which are explored below.

### 6.2.1 Application of the Maintenance Act and Jurisdiction of Maintenance Courts

Courts have disagreed on whether minors' maintenance claims against estates fall within the purview of the Maintenance Act and maintenance courts.<sup>354</sup> In *NB v Maintenance Officer, Butterworth*,<sup>355</sup> the court decided that the Maintenance Act did not apply to the investigation of maintenance claims against estates, holding that a claimant who is dissatisfied with an executor's response to a maintenance claim should resort to the 'perfectly sound and expedient remedies' in the AEA, rather than 'expect maintenance courts to become embroiled in complex and lengthy matters pertaining to the administration of estates and the rights and duties of executors.'<sup>356</sup>

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<sup>350</sup> Clark 'Chapter 11' (n 285) 271-2 and fn 16; Mackintosh & Paleker (n 292) 50-56.

<sup>351</sup> Mackintosh & Paleker (n 292) 75-77; see also discussion in n 295.

<sup>352</sup> To overcome their legal incapacity, as discussed in subsection 3.2.1.

<sup>353</sup> Clark & Van Zyl (n 84) 19. Surviving spouses cannot claim maintenance from an estate after distribution: section 2(2) MSSA. In practice, the *condictio indebiti* is rarely relied upon to recover maintenance from heirs. Mackintosh & Paleker found only one reported case where the remedy was successfully invoked: (n 292) 53.

<sup>354</sup> Kruger (n 16) 53.

<sup>355</sup> 2014 (6) SA 116 (ECM).

<sup>356</sup> *Ibid* paras 4, 8, 22, 26.

The court in *Du Toit* took an opposite view, holding that not allowing the same maintenance remedies to a child with a deceased parent as a child with living parents would result in inequality before the law.<sup>357</sup> The court held that an executor's duty to 'provide for the subsistence of the deceased's family or household' while in charge of estate property under section 26(1A) of the AEA, brought executors within the ambit of the Maintenance Act.<sup>358</sup> Citing children's constitutional and international rights, the court emphasised that the Maintenance Act was enacted to provide children with fair and equitable maintenance remedies, including access to the 'cheap and effective' relief of maintenance courts, as opposed to the costlier route of the High Court prescribed under the AEA.<sup>359</sup> While the court in *Butterworth* focused narrowly on the capacities of maintenance courts, the court in *Du Toit* emphasised their constitutional purpose.<sup>360</sup>

#### 6.2.2. Parties to Settlement or Trial of a Minor's Maintenance Claim

There is uncertainty as to whether other beneficiaries must be parties to a minor's maintenance claim against an estate. Section 2(3)(a) of the Maintenance of Surviving Spouses Act (MSSA) provides that the proof and disposal of spousal maintenance claims shall be dealt with in accordance with the provisions of the AEA, subject to certain exceptions.<sup>361</sup> This suggests that a spousal maintenance claim is lodged with the executor in the same manner as creditors' claims under section 29 of the AEA, and that the executor may demand proof or dispute or reject claims in accordance with sections 31, 32 and 33. However, unlike with ordinary creditors' claims, section 2(3)(d) of the MSSA stipulates that an executor 'shall have the power to enter into an agreement with the survivor and the heirs and legatees having an interest in the agreement' to settle a surviving spouse's maintenance claim. The wording in this provision is permissive, suggesting that an executor is not required to seek the consent of affected beneficiaries before deciding a spousal maintenance claim. In *Van Rooyen Friedrich and others v Smit and others*<sup>362</sup> the executor did not first consult affected

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<sup>357</sup> *Du Toit* (n 343) paras 34-5. The court took pains to distinguish the *Butterworth* case factually (paras 43-45), but the key legal findings contradict.

<sup>358</sup> *Ibid* para 32.

<sup>359</sup> *Ibid* paras 31, 33-4.

<sup>360</sup> For Kruger, the reasoning in *Du Toit* is superior: (n 16) 54.

<sup>361</sup> Exceptions listed in section 2(3)(b), (c) and (d), MSSA.

<sup>362</sup> [2017] JOL 37564 (SCA).

beneficiaries before allowing a spousal maintenance claim, which had the effect of significantly diminishing the estate remaining for distribution. The beneficiaries thus objected to the executor's liquidation and distribution account, which was pursued in the High Court (trial and full bench) and ultimately prevailed in the Supreme Court of Appeal. Although the executor's finding that the spouse was entitled to maintenance was overturned, his authority to consider and allow the claim in the first place was not disputed. In practice, affected beneficiaries will always have an opportunity to be heard in the resolution of maintenance claims against estates, either during the negotiation of a settlement under section 2(3)(d) of the MSSA, or through the objection process once the executor's accounts have been lodged with the Master.

While children's maintenance claims against estates have no legislated procedural requirements, the principles underlying sections 2(3)(a) and (d) of the MSSA appear equally applicable to children's claims.<sup>363</sup>

### 6.2.3. Approval of the Master or Court

As discussed in Chapter 4, one way the AEA protects minors' pecuniary interests is by assigning a supervisory function to the Master and the court over certain conduct of executors and guardians. Whereas section 26(1A) of the AEA requires the Master's consent to a pre-distribution subsistence payment, the requirement of approval for the final settlement of a minor's maintenance claim is found in case law. In *Davis' Tutor v Estate Davis*, the court opined that an executor has legal authority to reach an agreement with a minor's tutor regarding maintenance, but that the executor may also refer the matter to the court after an agreement is made.<sup>364</sup> The court held that a maintenance agreement reached between an executor and a minor's tutor is always subject to the approval of the Master and confirmation of the court.<sup>365</sup> The requirement of court confirmation enables the High Court to perform its duty as upper guardian<sup>366</sup> and to take into account the interests of beneficiaries.<sup>367</sup>

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<sup>363</sup> A redistribution agreement, discussed in subsection 4.3.3, may be another an appropriate way to settle a minor's maintenance claim if the minor is also an estate beneficiary.

<sup>364</sup> 1925 WLD 168 at 172.

<sup>365</sup> *Ibid.*

<sup>366</sup> Meyerowitz (n 161) §21.31.

<sup>367</sup> *Davis' Tutor v Estate Davis* (n 364) 174.

A maintenance agreement may be submitted to the Master at the same time as the executor's liquidation and distribution accounts, at which time beneficiaries may lodge objections.<sup>368</sup> The case law does not illuminate the type of evidence that should be filed with the Master or the court when seeking approval of a maintenance agreement. It is also not clear what standard or factors would apply to an assessment of a maintenance agreement. The *Davis* decision suggests only an agreement that makes 'totally inadequate provision' for a minor may be disallowed—a low bar.<sup>369</sup>

The MSSA specifically addresses the common scenario of a conflict of interest between 'the interests of the survivor in his capacity as claimant against the estate of the deceased spouse and the interests in his capacity as guardian of a minor dependent child of the deceased spouse.'<sup>370</sup> In such a case, section 2(3)(c) provides that 'the Master may defer the claim for maintenance until such time as the court has decided on the claim.' It is unclear whether 'the claim' refers to the spouse's claim, the minor's, or both. This provision implies that the High Court is more competent than the Master to safeguard a minor's interest where the minor's guardian has a conflict of interest, though the wording is permissive rather than obligatory—the Master *may* defer adjudication to the court. It is unclear whether this provision precludes out-of-court settlement in every case where the guardian has a conflict of interest.

#### 6.2.4. Mode of Payment of Minor's Maintenance

Maintenance payable to a minor from an estate constitutes 'movable property to which the minor is, according to any liquidation and distribution account in any deceased estate, entitled' under section 43(1) of the AEA. As such, a minor's natural guardian is entitled to receive the maintenance sum, subject to the duty in section 43(2) to furnish satisfactory security.<sup>371</sup> If there is no natural guardian, the sum may be paid into the Guardian's Fund or be administered by a tutor or curator, who must also furnish satisfactory security.<sup>372</sup>

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<sup>368</sup> As was done in *Van Rooyen Friedrich and others v Smit and others* (n 362).

<sup>369</sup> *Davis' Tutor v Estate Davis* (n 364) 172.

<sup>370</sup> Section 2(3)(c), MSSA.

<sup>371</sup> As discussed in subsection 4.3.2.

<sup>372</sup> Section 77, AEA, as discussed in subsection 4.3.2.

Maintenance from an estate may be paid to a minor's guardian in a lump sum, or the executor may set aside an amount from which to make periodic payments, using the interest earned thereon plus any portion of capital as is necessary.<sup>373</sup> In *Davis*, the court fixed a monthly maintenance entitlement for the minor, and ordered the executor to set aside a capital sum that would generate sufficient income to pay the monthly maintenance.<sup>374</sup> The court ordered the capital sum be 'invested by agreement between the tutor dative and the executrix and with the concurrence of the Master of the Supreme Court.'<sup>375</sup> In *In re Estate Visser*,<sup>376</sup> the primary estate beneficiary, who inherited a farm property, was ordered to pay maintenance for the deceased's children periodically using income generated by the farm.<sup>377</sup> Meyerowitz contends that periodic payment is preferable, because it is difficult to determine *ex ante* the total amount of maintenance a minor requires and when a minor may become self-supporting, in which event any remaining funds should be distributed to the heirs and legatees.<sup>378</sup>

Periodic payment ostensibly makes maintenance responsive to a child's evolving economic circumstances, but the schemes in *Davis* and *Visser* can create legal and operational uncertainties. Would such a scheme constitute a trust under the TPCA? Is a court or an executor entitled at law to create a trust with estate property and to appoint the executor (or a beneficiary, if following *Visser*) as trustee? Further, such an arrangement binds a minor and their guardian to a relationship with the trustee for the duration of the minor's dependency, which may be many years. As in cases with living support payors, periodic payment shifts the risk of non-payment and the burden and cost of enforcement onto minors and guardians.<sup>379</sup> It is not clear, furthermore, whether minors in these cases may access the remedies in the Maintenance Act, or if the AEA or TPCA govern exclusively.

The periodic payment schemes in *Davis* and *Visser* differ from those ordered by courts securing future maintenance against pension benefits<sup>380</sup> in one important respect: in

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<sup>373</sup> Meyerowitz (n 161) §21.31.

<sup>374</sup> *Davis' Tutor v Estate Davis* (n 364) 174.

<sup>375</sup> *Ibid.*

<sup>376</sup> 1948 (3) SA 1129 (C).

<sup>377</sup> Clark 'Chapter 11' (n 285) 277 fn 42. The beneficiary granted a mortgage to the Master as security.

<sup>378</sup> Meyerowitz (n 161) §21.31.

<sup>379</sup> As discussed in subsection 3.1.3, enforcement remains weak in South Africa's maintenance system.

<sup>380</sup> I.e. cases like *Bezuidenhout* (n 331), discussed in section 5.2.

the latter cases, a lump sum is first set aside *as the minor's property*, with periodic payment imposed for the purposes of ensuring sufficient funds for the duration of a minor's dependency and limiting maladministration by a guardian. In contrast, as Meyerowitz's explanation suggests, the preference for periodic payment in estate maintenance cases is motivated by a concern that minors not be overcompensated future maintenance to the perceived detriment of heirs and legatees. Periodic payment is used as a 'wait and see' approach to avoid the calculation of a minor's lump sum entitlement and to preserve the entitlements of heirs. It is submitted that this approach is incongruent with modern developments in maintenance and succession law, which prioritise support of one's dependants over testamentary freedom. Furthermore, it is submitted that the difficulty of calculating lump sum future support is overstated, as courts are routinely able to do so in actions for loss of support,<sup>381</sup> accounting for contingencies and probabilities, such as the likelihood of a dependant becoming self-sufficient while still a minor.

It is submitted that children's right to maintenance from an estate is best fulfilled by combining the certainty of a lump sum secured as the minor's property with the benefits of periodic payment, namely ensuring funds for the duration of the minor's dependency and limiting potential maladministration. Existing mechanisms in the AEA can protect minors' interests in maintenance funds from estates, obviating the need for the type of quasi-trust arrangements devised in the *Davis* and *Visser* cases, which both predate the enactment of the AEA. Again, unlike pension death benefits,<sup>382</sup> the payment of maintenance from an estate to a natural or legal guardian is subject to the safeguard of security.<sup>383</sup> Thereafter, the AEA grants the Master continuing oversight powers: natural guardians may be called upon at any time to account for their administration of minors' money received from an estate,<sup>384</sup> while legal guardians must submit accounts on an annual basis.<sup>385</sup> The requirement of security plus the spectre of oversight serve to limit maladministration. When a guardian cannot or will not furnish security, the sum is paid into the Guardian's Fund,<sup>386</sup> and the Master

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<sup>381</sup> Kruger (n 16) 54.

<sup>382</sup> Under section 37C of the PFA, discussed in Chapter 5.

<sup>383</sup> Sections 43(2) and 77, AEA.

<sup>384</sup> Section 43(3), AEA.

<sup>385</sup> Section 83(1)(a), AEA.

<sup>386</sup> Section 43(6), AEA read with section 35(13); Meyerowitz (n 161) §20.2.

may be ordered to make periodic maintenance payments, following the *Bezuidenhout* line of cases.<sup>387</sup>

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<sup>387</sup> Discussed in section 5.3.

## CHAPTER 7.

### CONCLUSION

South Africa has made a constitutional commitment to treat the best interests of children as paramount in all matters concerning them.<sup>388</sup> It is now undisputed that children have a right to maintenance that imposes concomitant duties on the State, parents and relatives. This dissertation has reviewed steps taken by Parliament to strengthen the private maintenance system as well as the efforts of courts to stringently enforce maintenance recovery. In policy and research, children's constitutional right to maintenance is primarily configured in the circumstances of parental absence or recalcitrance, with little attention paid to the continuity of that right in the circumstance of parental or caregiver death.

This dissertation has asserted that children enjoy the right to economic security throughout childhood, and thoroughgoing child-focused legal reform requires breaking down conventional silos to establish that right across legal fields. It has been shown that children's right to economic security in the wake of parental or caregiver death cuts across the laws of maintenance, minority, guardianship, succession, pensions and trusts, and that procedural law affects substantive rights. The shift in South African pension and succession law towards prioritising duties of support over testamentary freedom enhances orphans' economic security. Nevertheless, various gaps in protection remain. Specific recommendations have been made:

- that the Master's office be informed of and track minor parties at the outset of an estate administration;<sup>389</sup>
- that the statutory exemption from furnishing security for certain categories of executors be reconsidered, in light of the heightened risk of children's interests being jeopardised in conflicts of interest;<sup>390</sup>
- that legislation provide greater guidance on the use of children's assets for their own maintenance, in order to promote certainty and consistency and prevent the unjustified dissipation of minors' property;<sup>391</sup>

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<sup>388</sup> Section 28(2), Constitution.

<sup>389</sup> See subsection 4.2.1.

<sup>390</sup> See subsection 4.2.2.

<sup>391</sup> See section 4.4.

- that security and oversight mechanisms be used to protect minors' pension benefits under section 37C of the PFA<sup>392</sup> and maintenance funds secured from estates;<sup>393</sup>
- that life insurance proceeds be made a potential source of funds to satisfy children's maintenance claims;<sup>394</sup> and
- that uncertainties in the law of maintenance claims against estates be resolved, including the jurisdiction of maintenance courts, the applicability of the Maintenance Act, and the evidentiary standard applied by when approving settlements.<sup>395</sup>

More generally, it is submitted that South Africa's laws of legal minority and guardianship ought to be reviewed in light of modern children's rights norms. Guardianship is inherently protectionist, premised on the idea that children require special legal protection by reason of age. Historically, this has produced a paternalistic 'parental power' model of guardianship. The modern conceptualisation of children as autonomous rights-bearers does not controvert their need for special protection, but demands that measures be justified with reference to their interests and rights, not those of their parents. The Children's Act has widened the circle of persons entitled to obtain guardianship, but has not transformed the scope of guardianship nor clarified how the statutory scheme interacts with the common law and the pre-existing institutions of natural guardianship, tutorship and curatorship set out in the AEA. This is brought into relief in the succession context, where one finds conflicting case law, disparate interpretations of guardianship, and the persistence of a 'guardians' rights' approach. Recognising children's right to economic security requires reassessing the presumptions underlying the laws of minority and guardianship, and implementing a system with oversight and accountability measures that empowers guardians to help children secure and exercise that right.

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<sup>392</sup> See section 5.2.

<sup>393</sup> See subsection 6.2.4.

<sup>394</sup> See section 6.1.

<sup>395</sup> See section 6.2.

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