

FAMILY LAW UPDATE: THE DUTY TO MAINTAIN CHILDREN AND THE CONSEQUENCES OF FAILING TO DO SO

Several recent judgments have reinforced the necessity for compliance with court orders relating to childcare and maintenance. A few of the more important judgments are discussed below.

Every parent has a legal duty to support or maintain their child/ren. The duty to maintain is based on blood relationship, adoption, or the fact that the parties are married to each other. The obligation on each parent to provide reasonable maintenance for the essential needs for their children extends to, *inter alia*, **clothing, housing, food, education and medical care**. The Children's Act 38 of 2005 (the "**Act**") requires, *inter alia*, that every matter involving a child must be conducted in a fashion that considers the best interests of the child as a paramount concern.

In general, a divorce settlement agreement or maintenance order will set out the terms of the maintenance agreement between parties which may include details relating to the primary care giver and financial contributions, terms relating to care and contact and the educational and medical needs of the children. Children are entitled to such support until the age of majority, which is 18 years old, alternatively until they become self-sufficient.

Many factors are taken into consideration when determining the terms of the maintenance order including the parents' earning capacities and the child's needs.

In a recent judgment delivered in the matter of ***MBJ V MBP (04303/2019) [2022] ZA GPJHC11***, Justice M Matsemela dismissed an application for leave to appeal against the order granted finding the applicant to be in contempt of an earlier court order. In terms of the earlier court order, the Applicant was ordered to, *inter alia*:

- (i) pay maintenance;
- (ii) pay the school fees and educational expenses of the minor children;
- (iii) put the children on a medical aid and
- (iv) provide the respondent with a vehicle.

The court concluded that the father had the right to approach the maintenance court and have the original order amended if he truly had financial difficulties and his failure to do so and his failure to fully disclose his financial position to the court constituted a willing contempt of the court order.

In ***Simon Roy Arcus v Jill Henree Arcus (4/2021)[2022] ZASCA 9*** Justice AJA Smith had to decide whether a maintenance order fell within the term 'other debt' as defined in the Prescription Act 68 of 1969, which states that these debts prescribe after a period of three years, or if the order should fall within the term 'judgment debt' in terms of which the debt would prescribe after a period of thirty years.

It was concluded that an order for maintenance would only prescribe after a period of thirty years because these orders are for immediate living expenses which should be enforced and that the judgment creditors should never be placed in a position where they have a false or misplaced sense of security or safety by having an order that can so easily be evaded.

In another recent judgment by Justice AA Crutchfield in ***ND v PT (2592/2020) [2022] GPJHC 13*** the court considered whether a parent was in contempt of a court order for failing to comply with directives set out in the court order regarding contact with a minor child. The contact was to take place by way of video calls, to allow the Applicant's mother to facilitate the contact and to generally make the child available for visitations. The Respondent refused to comply with the order of contact and moved to Cape Town with the Applicant's son without his knowledge. The court reviewed several important judgments all of which reiterated the duty of the court to sit as the upper guardian of a child which requires courts in making decisions regarding children to ensure that the best interests of a child remain of paramount importance.

The court was of the view that the Respondent disregarded the role of the father as a parent at a time when attachment is critical to the long-term emotional wellbeing and psychological health of the child. Failure to establish a relationship between a child and a parent is not in the best interests of the child as the longer contact is denied the more difficult it is to form that bond later in the child's life.

The court ruled that the Respondent acted in bad faith by intentionally going against the court order and this constituted contempt of the court order. She was ordered to comply with the original order

within ten days of the judgement and was committed to prison for a period of twenty days, which was suspended for a year on condition that she complied with the court order.

It is clear that our courts consider compliance with court orders very seriously, as these are put in place to provide protection to those most vulnerable in our society whose best interests should be of primary concern.

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