



## Can a major child claim maintenance from his deceased parent's estate?

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In South African law a testator may freely decide on the succession of his/her estate and can include almost any provision in a will which is not illegal or against public policy. This is known as the principle of freedom of testation. The Court must enforce the provisions of such will according to the maxim "the will of the testator has to be complied with".

The principle of freedom of testation has always been protected by our law in the sense that an individual who was not included as a beneficiary in a will cannot claim against a deceased estate where the deceased had left a valid will. However, it can be said that claims for maintenance indirectly limit a testator's freedom of testation.

In terms of the common law and the Maintenance Act 99 of 1998, the primary responsibility to support a child is vested in the parents. The correlative right of a child to such maintenance does not arise out of any principle of inheritance, but out of the family relationship between parent and child.<sup>1</sup> The duty of support is apportioned between the parents in accordance with their respective means.<sup>2</sup>

<sup>1</sup> Van Zyl v Serfontein 1989 (4) SA 475 (PD) at 477 G – I; Hoffman v Herdan NO & Another 1982 (2) SA at 74 (T) at 275 H.

<sup>2</sup> Section 15(3)(a) of the Maintenance Act.



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On the death of either one or both parents, the legal remedy under South African law is to render a deceased parent's estate liable for a child's maintenance,<sup>3</sup> regardless of whether the child's parents were married.<sup>4</sup> In principle, the obligation of a parent to support a child can only be terminated by the child's death and not by the parent's death.<sup>5</sup>

In terms of the parent's maintenance obligation it is important, from the outset, to take note that minority is not the basis of the parent's liability to maintain a child. It is rather the necessity for support which is the defining criteria.<sup>6</sup> The maintenance and education of minor children remains an obligation on the estate of the parent and does not stop with the passing of the testator.<sup>7</sup> This obligation is a common law obligation and depends on the needs of the child in the particular circumstances and will cease when the child is able to support himself/herself.<sup>8</sup> If the child is only partially able to support himself, then the parents must make up the deficiency.<sup>9</sup> A major child who is unable to adequately support himself/herself, is also entitled to claim support from his/her deceased parent's estate.<sup>10</sup> The duty of support therefore continues even after the child has reached majority.<sup>11</sup>

The burden of proving that a child is unable to support himself/herself, rests on the child claiming the maintenance as well as the amount of support required,<sup>12</sup> especially after the child has become a major.<sup>13</sup>

In terms of a major child claiming from his/her deceased parent's estate, the case of *Ex parte Jacobs* is noteworthy. In this case a major daughter claimed maintenance from her deceased father's estate.

The Court held that the duty of support rested in the first place on her husband. The Court further held that a claim for maintenance against her father can only arise if her husband was unable or incapable of fulfilling his maintenance obligation. From this it is clear that the Court has placed some limitations on a major child when claiming maintenance against his/her deceased parent's estate.

It should be noted that our Courts have on a previous occasion held that the obligation to pay maintenance primarily falls on the living relatives of the child before the parent's estate will be liable.<sup>14</sup>

<sup>3</sup> Carelse v Estate de Vries (1906) 25 SC 532; Lloyd v Menzies NO and Others 1956 (2) SA 97 (N); Glazer v Glazer NO 1963 (4) SA 694 (A) at 706 H – 707 A.

<sup>4</sup> Section 15(3)(a) of the Maintenance Act; L Van Zyl Handbook of the South African Law of Maintenance 2ed (Durban: LexisNexis 2005) at 16.

<sup>5</sup> *Ex parte Insel and Another* 1952 (1) SA 71 (T).

<sup>6</sup> *Ex parte Jacobs* 1982 (2) SA 276 (E).

<sup>7</sup> Carelse v Estate de Vries (1906) 25 SC 532; *Ex parte Burstein* 1941 CPD 87; *Ex parte Insel* 1952 (1) SA 71 (T); Glazer v Glazer NO 1963 (4) SA 694 (A); Bank v Sussman 1968 (2) SA 15 (O); Hoffman v Herdan 1982 (2) SA 274 (T); *Ex parte Jacobs* 1982 (2) SA 276 (E).

<sup>8</sup> Carelse v Estate de Vries (1906) 25 SC 532.

<sup>9</sup> *In re Estate Visser* 1948 (3) SA 1129 at 1137.

<sup>10</sup> Daviss Tutor v Estate Davis 1925 WLD 168; Hoffmann v Herdan 1982 (2) SA 274 (T); *Ex parte Jacobs* 1982 (2) SA 276 (E).

<sup>11</sup> Kemp v Kemp 1958 (3) SA 736 (D) at 737.

<sup>12</sup> Gliksmann v Talekinsky 1955 (4) SA 468 (W) at 469; Osman v Osman 1992 (1) SA 751 (W) at 754H.

<sup>13</sup> Hoffman v Herdan NO and Another 1982 (2) SA 274 (T) at 275.

<sup>14</sup> Bank v Sussman 1968 (2) SA 15 (O).

In this sense it is clear that there is no general rule applicable when a major child wants to claim maintenance from his/her deceased parent's estate. The surrounding circumstances must always be considered.

Finally, it should always be borne in mind that a child's claim for maintenance follows that of creditors in order of preference,<sup>15</sup> but are preferred to the claims of heirs and legatees.<sup>16</sup>

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<sup>15</sup> *Ritchken's Executors v Ritchken* 1924 WLD 17; *In re Estate Visser* 1948 (3) SA 1129 (C).

<sup>16</sup> *Daviss Tutor v Estate Davis* 1925 WLD 168; *Goldman v Executor Estate Goldman* 1937 WLD 64; *Ex parte Este Pitt-Kennedy* 1946 NPD 776.