

# **A grandchild's claim to maintenance against a deceased estate**

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# The issue in context

A maintenance need could arise in a number of situations:

- **Testate succession:**

1. The grandparent effectively disinherits the grandchild by disinheriting his or her parents
2. The grandparent leaves an inheritance to the grandchild but the inheritance is not enough to cater for the reasonable maintenance needs of the grandchild

- Were these scenarios to apply to a **child** of the deceased, the child would be able to claim maintenance from their parent

- **Intestate succession**

3. The grandparent leaves a generous inheritance for the grandchild, but the will fails for formalities and cannot be condoned in terms of the Wills Act
4. The grandparent leave a generous inheritance for the grandchild, but the will/bequest fails because it falls foul of a black-letter principle of the law of succession
5. Where the grandparent does not leave a will

# Statistical data highlighting the issue

- ✿ 20% of South African children are orphans – 2.48 million are paternal orphans, 600 000 maternal orphans and 600 000 double orphans
- ✿ UNICEF 2007 Report: 38.2% of young South African children live in households where a grandparent is the head of the household
- ✿ Stats SA 2009 estimates the number of children living with grandparents to be 1,5 million

# Common law attitude to maintenance claims of grandchildren

- ✿ Carelse v Estate De Vries (1906) 23 SC 532
- ✿ Hoffmann v Herdan 1982 (2) SA 274 (T)
- ✿ Lloyd v Menzies 1956 (2) SA 97 (N)
- ✿ [Glazer v Glazer 1963 (4) SA 694 (A)]
- ✿ Barnard v Miller 1963 (4) SA 426 (C)

# How have the grandchildren's rights been infringed? – constitutional arguments

- ✿ Equality – s 9

- ✿ Rights of the Child – s 28

- ✿ *Grootboom* held that the state's obligation is normally fulfilled by “passing laws and creating enforcement mechanisms for the maintenance of children”

- ✿ Socio-economic rights

# Obligation to develop the common law?

## 8. Application

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection(2), a court -

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right

(b) ...

# Learning from foreign jurisdictions

- ✿ Option 1: Family maintenance
- ✿ Option 2: Expanding the definition of the child to include the grandchild
- ✿ Option 3: Equitable adoption (constructive adoption)
- ✿ Option 4: Legitimate portions

# Questions for consideration

- ✿ Should the grandchild's claim rank equally with other maintenance claims?
- ✿ Is it necessary to establish that the grandparents maintained the grandchild during their lifetime in order for a posthumous claim for maintenance to succeed: New Zealand, Ontario, England (Inheritance Act 1975)?
- ✿ How does one reconcile the maintenance obligations of living relations with those of the deceased grandparents?
- ✿ What factors should be considered when determining the quantum of maintenance?