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Does the estate of a deceased grandparent have an obligation to support a grandchild?

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[Phillipa Susan van Zyl NO v Getz \(548/19\) \[2020\] ZASCA 84](#)

The mother of a child asked the [Supreme Court of Appeal](#) (“SCA”) for a ruling obliging the estate of a grandparent of her child to maintain the child.

Both parents were alive. The mother could not afford to maintain the child and the father had moved to the United States. No serious steps were taken to find him and establish his financial means.

Two common law rules govern the legal duty of support of grandchildren by grandparents. The first basic rule provides that where a grandchild is in need of support, his or her grandparent will have a legal duty to maintain him or her, only if both parents are unable to support the child and the grandparent is able to provide support. The rule is not clear where the parents or one of them is able but unwilling to support the grandchild, or cannot be found. The second rule as set out in [Barnard NO v Miller 1963 \(4\) SA 426 \(C\)](#) is that a legal duty to support a grandchild is not enforceable against a grandparent’s deceased estate.

The court was asked to develop the common law to recognise a duty of support on the part of a grandparent’s deceased estate.

The current legal position regarding the duty of support

At law, liability to maintain is based on three factors: firstly, the claimant’s inability to support himself or herself; secondly, his or her relationship to the person from whom he or she claims support; and thirdly, the latter’s ability to provide support.

The common law and Section 18(2) of the [Children’s Act 38 of 2005](#) recognise that parents are the primary caregivers of their children by imposing on them a duty of support insofar as they can do so. There is a reciprocal duty of support between parents and children. If parents are unable to support their children who need support, other relatives including grandparents, may be obliged to support them. But that duty is imposed first upon a nearer relative before it moves to remoter ones.

The liability of the grandparent’s deceased estate for the support of the grandchildren is not clear, so the SCA was asked to develop the common law but it declined to do so. It found that on a factual level, the mother’s case was deficient. The appellant sought on the stated facts to impose a duty to support a grandchild on a grandparent’s deceased estate where the parent of a child cannot be traced. But the mother did not take reasonable steps to locate the whereabouts of the father after he left South Africa to live in the United States or that she had exhausted all reasonable options open to her to find him.

The child’s father, who is primarily responsible for the child’s maintenance, may be able to financially support the child. This would render it unnecessary to develop the common-law

rule. Financial inability by a person from whom maintenance is sought must be established before that obligation is assumed by, or transferred to, another person.

The court's finding

The court found that if it recognised the claim against a deceased grandparent's estate – as a general principal – this had the potential to compete with the heirs of a deceased grandparent. It could also compete with other claims for maintenance that may arise, including by a surviving spouse or child.

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