
Approaches to the Determination of Maintenance

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1 Background

1.1 The Problem

The determination of maintenance payable by a non-custodian parent in respect of his or her child is a legal procedure which, while it ought to be simple and mundane, is fraught with intricate difficulties. A large part of the problem arises out of the fact that in each case, in order to make an equitable decision, the interests and rights of the child, the non-custodian parent and the custodian parent must all be carefully balanced and this can only be done if the decision-making authority is able to determine the following:

1. the needs of the child;
2. the ability of the custodian parent to support the child;
3. the ability of the non-custodian parent to support the child;
4. the division of maintenance responsibility between a custodian and non-custodian parent; and
5. what payment is required by a non-custodian parent in order to realise that division of responsibility.

That sounds simple enough until one considers that somehow the following information must be factored in to the decision:

1. regarding the needs of the child:
 - the cost of housing the child with the custodian parent (as opposed to the cost of the custodian parent being housed alone);
 - the cost of food for the child;
 - the cost of clothing for the child;
 - the cost of medical care for the child;
 - the cost of schooling for the child; and
 - the cost of the child's extra-curricular activities and entertainment;
2. regarding the ability of the custodian parent to support the child:
 - the income and assets of the custodian parent; and
 - the deductions that must be made against such income and assets in respect of liabilities, the needs of the custodian parent and other obligations of the custodian parent;
3. regarding the ability of the non-custodian parent to support the child:

- the income and assets of the custodian parent; and
 - the deductions that must be made against such income and assets in respect of liabilities, the needs of the custodian parent and other obligations of the custodian parent;
4. regarding the division of maintenance responsibility between a custodian and non-custodian parent:
- the relative means of the custodian and non-custodian parents.

It is at this point that the real difficulties present themselves. They include the following questions and issues:

1. What constitutes a “need” of the child? Which items are needs and which items are luxuries are dependent upon the standard of living that is considered acceptable. The standard of living to be applied is subjective in that it may be affected by the country the child is in, the social status of the parents, the particular area (rural or urban) in which the child resides and the economic climate in the country at the time – it may also be affected by the opinion of the presiding officer;
2. What portion of the parent’s income is available for maintaining the child? This is also subjective because it requires the presiding officer to decide which expenses by the parent can be legitimately deducted as necessary expenses. Again the presiding officer’s view will be affected by the local conditions, social status of the parents and the local economic climate at the time;
3. In what circumstances must a parent be required to realise assets in order to maintain a child? Again, this depends on views of standard of living and personal circumstances – e.g. what size and standard of house the parent requires, whether a personal car is the only form of transport acceptable;
4. The income available for maintaining the child is affected where a parent has other children to maintain who may not be in the same household as the child for whom maintenance is being determined;
5. The time a child spends with a non-custodian parent makes it more difficult to determine what the non-custodian parent must pay in order to realise a correct division of the maintenance responsibility;
6. What standard and level of education is to be provided can only be determined on a subjective basis relating to the norms of the surrounding society and/or the standard of living of the parents and/or the ability of the child;
7. There are many possible “exceptional circumstances”, which require a completely different approach – e.g. children with special physical or mental needs, children with chronic medical conditions and children with special sports talents;
8. The circumstances of the parties change from time to time and the economic environment in which they operate also changes.

Added to all of this is the fact that children of every class in every country require maintenance both regularly and expeditiously. Therefore the challenge to be met by any system of maintenance is the need to take proper cognisance of all of the above factors while ensuring that the process is cheap, simple and short.

In order to simplify maintenance proceedings, many jurisdictions make use of a formula to ascertain what child maintenance should be paid by a non-custodian parent. However, in South Africa there are currently no formula guidelines for presiding officers to use to determine quantum in child support cases – decisions are based on discretion. Having regard to the publicised failings of maintenance courts in South Africa¹, the question arises whether or not the introduction of a more structured or more formulaic approach would significantly improve the efficiency and effectiveness of the process.

Therefore the purpose of this paper is as follows:

1. To describe the principles and process of determination of maintenance in South African courts;
2. To analyse different types of formulae;
3. To build a theory of maintenance models;
4. To investigate whether a codification of the existing principles of maintenance in South Africa would be effective in addressing some of the failings of the existing system of maintenance; and
5. To investigate whether a formula-based approach would be desirable in South Africa and, if so, what principles should govern that approach.

It is important to note that this paper avoids:

1. a detailed analysis of the failings of South African maintenance courts. The failings of South African maintenance courts are already well recorded in papers such as *Implementation of the Maintenance Act* (published by the Gender Commission) and *A Baseline Cost Study on the Appointment of Maintenance Investigators in terms of the Maintenance Act, 1998 (Act No. 99 of 1998)* by Barberton *et al*.² Accordingly, these works are referred to where appropriate;
2. a detailed survey of the formulae used in various jurisdictions around the world. In this regard the following include excellent surveys of Child Support Formulae:
 - 2.1. *Child Support Schemes: Australia and Comparisons* (published by the Child Support Agency, Australia);³ and
 - 2.2. *Expedited Child Support* (by Mary McDonald).⁴

¹ *Implementation of the Maintenance Act in Magistrates Courts*. Commission on Gender Equality: Braamfontein, Johannesburg, 2004, and Barberton, C. R. M.; Grieve, A. R.; Kinghorn, C.; Gibb, S. *A Baseline Cost Study on the Appointment of Maintenance Investigators in terms of the Maintenance Act, 1998 (Act No. 99 of 1998)*. 2002.

² *Ibid*.

³ *Child Support Schemes: Australia and Comparisons*. Child Support Agency: Australia, 2001. This report is available on www.csa.gov.au/publications/schemes98-99.pdf.

Therefore, the aim of this paper is not to analyse the detail of each and every formula, but rather to identify the principles by which the various formulae work, for the purposes of building a formula modelling theory.

1.2 The Constitutional Imperative

The Constitution of the Republic of South Africa⁵ guarantees certain basic socio-economic rights for children.⁶ Among these is “Every child has the right to basic nutrition, shelter, basic health care services and social services”.⁷ The Constitution also guarantees that “Everyone has the right to a basic education”.⁸

These rights enshrined in the Constitution place an obligation on parents, in the first instance, to properly provide for their children.⁹ However, they also place an obligation on the state in the following respects:

1. The right to basic education and to social services is a right which the state is in a position to provide and which the parents are not in a position to provide;
2. Where children are orphaned or abandoned or in state care, the state is required to fulfil these rights;¹⁰
3. Where parents are unable to fulfil their obligations, the state is obliged to step in and fulfil the constitutionally guaranteed obligations.¹¹ In this regard, there are some discrepancies in that the *Grootboom* case¹² gives the impression that the state is not required to step in while the children are still being cared for by the parents (even if the parents are not able to provide the constitutionally guaranteed rights). It remains to be seen whether or not this contention can be sustained having regard to the following facts:
 - 3.1. This effectively nullifies the constitutional guarantee with respect to all children who are in the unfortunate position of having very poor parents but not unfortunate enough to have no parents or to be abandoned;
 - 3.2. Many of the guarantees of s.28 of the Constitution contain items with which only government can deal and, indeed, the same clause which contains the rights to basic nutrition and shelter, also contains the rights to social services and basic health care services;
4. It is submitted that the state has an obligation to ensure that proper mechanisms are in place to ensure that parents do fulfil their obligations to the extent that they are able to.

⁴ MacDonald, Mary. *Expedited Child Support*. Department of Justice, Canada: Canada, 1997.

⁵ Act 108 of 1996.

⁶ *Ibid.*, s.28.

⁷ *Ibid.*, s.28(1)(c).

⁸ *Ibid.*, s.29(1).

⁹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁰ *Ibid.*

¹¹ Coetzee, Erika & Streak, Judith (Eds.). *Monitoring Child Socio-Economic Rights in South Africa: Achievements and Challenges*. Idasa Publishing Department; Cape Town, 2004, p.2.

¹² *Government of the Republic of South Africa v Grootboom* op cit.

Having regard to the above, it is imperative that the system of child maintenance be effective in ensuring that parents fulfil their maintenance obligations, and that there is a safety net for those children whose parents are unable to properly provide for them.

Nevertheless, it must be noted that the state's obligations to a child, as a child, cease at the age of 18 since a child is defined in the Constitution as being under the age of 18.¹³ In contrast, the parent's obligations continue in terms of the common law until such time as the child is self-supporting.¹⁴

2 The South African Discretionary Approach

2.1 Statute Law

The South African approach to the determination of maintenance is based upon common law, but has basic principles legislated in the Maintenance Act 99 of 1998. The applicable section for determination of maintenance is section 15 of the Act, which states that:

1. "a maintenance order for the maintenance of a child is directed at the enforcement of the common law duty of the child's parents to support that child" (s.15(1));
2. "[t]he duty extends to such support as a child reasonably requires for his or her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care and education (s.15(2));
3. "the maintenance court shall, in determining the amount to be paid as maintenance in respect of a child, take into consideration" the following (s.15(3)(a)):
 - 3.1. "that the duty of supporting a child is an obligation which the parents have incurred jointly";
 - 3.2. "that the parents' respective shares of such obligation are apportioned between them according to their respective means;" and
 - 3.3. "that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage."
4. "Any amount so determined shall be such amount as the maintenance court may consider fair in all the circumstances of the case" (s.15(3)(b)).

It is important in analysing s.15 to note not only the details it contains but also the details that are missing. The following principles are set out:

1. all parents have a duty to support their children (s.15(3)(a));
2. the amount of support required is the amount required to ensure the child's "proper living and upbringing" and includes "food, clothing, accommodation, medical care and education" (s.15(2));

¹³ Act 108 of 1996, s.28(3).

¹⁴ *Smit v Smit*. 1979 (2) SA 854 (A).

3. the items covered by the support must be “reasonably” required (s.15(2));
4. the duty is divided between the parents “according to their respective means” (s.15(3)(a)(ii)); and
5. the court’s decision is based on fairness, taking into account all the circumstances of the case (s.15(3)(b)).

However, the following issues remain to be resolved:

1. s.15(3)(b) imports a good deal of discretion into the court’s decision as it allows the court to take account of any circumstance which may have an impact on the fairness of it’s decision. The court is not restricted to a limited set of criteria on which it makes its decision. This imports a level of uncertainty into the decision;
2. s.15(1) states that the section is meant only to provide a mechanism for enforcement of common law rights – it does not purport to set out those rights in full and it specifically states that those rights must not be construed to be limited in any way by the application of the section. This means that the Act cannot be a guide to the issues to be resolved;
3. each of the terms quoted from s.15(2) above are imprecise in that there is no definition of a “proper living and upbringing”, nor is there any indication of the quantity or quality of “food, clothing, accommodation, medical care and education” required. Therefore the level of support required is imprecise;
4. s.15 does not anywhere limit the level of support to a level affordable by the parents. It only uses the means of the parents to ascertain the apportionment of the maintenance between them. Therefore the limits to the level of support are not stated at all;
5. in s.15(3) the apportionment of maintenance between the parents “according to their respective means” is imprecise as “means” is not defined. It does not state whether or not means includes assets or only income and, if assets are included, what weighting is to be given to assets as against income. Therefore it is unclear, for example, how maintenance obligations are to be divided between a parent with a large estate but no income and a parent with no significant assets but a large income.

It is apparent from the comments above that, although the statute law seems to make an attempt to set out the principles behind the determination of maintenance, it does so imperfectly and imprecisely and ends up referring back to common law. Therefore it is to common law and to court decisions that we must turn in order to fully understand the principles currently at work in the determination of maintenance.

2.2 The Common Law Position

The common law rights of a child to maintenance and how that maintenance is to be calculated are set out in many reported cases. The following is a summary of the current common law position. There is no case which deals with all the principles and some of the cases state very general principles whereas others state very specific principles. Therefore

the cases below are ordered from the general to the specific and the difficulties of the current dispensation are only discussed after all of the principles have been laid out.

2.2.1 The General Principles

The general principles are best stated in *Herfst v Herfst*¹⁵ as follows:

“The general principles are that a child of divorced parents is entitled to be maintained by them, and they are correspondingly obliged to provide it with everything that it reasonably requires for its proper living and upbringing according to their means, standard of living and station in life. That obligation attaches to both parents jointly, but, *inter se*, their respective shares of that obligation are apportioned according to the financial resources and circumstances of each of them.”

It is readily apparent that s.15 of the Maintenance Act borrows much of its language from this decision. The principles set out in the above paragraph can be stated as follows:

1. A child is entitled to receive from its parents everything it requires for its proper living and upbringing;
2. There are two interdependent limits on the child’s entitlement, which are:
 - 2.1. the maintenance must be “reasonably” required; and
 - 2.2. this reasonable maintenance must be in accordance with the parents’ “means, standard of living and station in life”;
3. As far as the child is concerned, it is a joint obligation – the child does not worry about how the maintenance is apportioned between the parents, nor is he or she required to look to one parent for certain things and to the other parent for other things; and
4. As between the parents the obligation is apportioned according to their “financial resources and circumstances”.

These are general principles that apply to all child maintenance cases and not merely to those where the parents are divorced.

2.2.2 Method of Application

The method by which the above general principles are applied is set out in *Douglas v Douglas*¹⁶, where it is stated that the factors to be considered are:

1. “the needs of the child”;
2. “the social status of the parties”;
3. “the ability of the parent obliged to pay maintenance to do so”; and
4. “if need be, the ability of the other parent to maintain the child”.

¹⁵ 1964 (4) SA 127 (W) at 130C.

¹⁶ [1996] 2 All SA 1 (A) at 12d.

Why the words “if need be” are inserted is unclear. However, the judgement goes beyond just setting out these principles; it also states how the principles are to interact with each other. It is stated that:

“[t]he point of departure ... must be the children’s needs. Once that has been established, the ability of the party obliged to pay maintenance (and also that of the other parent) should be established. The children’s needs can then be adapted accordingly, if necessary.”

From this it is clear that:

1. The child’s needs are established first. What are considered “reasonable needs” will be influenced by the “social status” of the parties (what *Herfst v Herfst* refers to as “standard of living and station in life”);
2. The ability of each of the parents to cover those needs must be investigated (and, by implication, the contribution of each determined); and
3. If necessary, the needs of the child must be adapted to fit the actual means of the parents (as opposed to their “social status”).

2.2.3 The Extent of the Child’s Right

As is apparent from the analysis of the abovementioned cases and the statute law, the child is entitled to be provided with its “needs” – i.e. everything required for its “proper living and upbringing”. The term “need” in the above contexts does not mean basic needs or needs defined in terms of constitutional rights. The “needs” of the child are defined with relation to the parents’ “standard of living and station in life”. This means that both the list of items that constitute “needs” and the quantity and quality of the items provided will vary according to the social status of the parties.

This principle is best illustrated in the sphere of education. In *Watson v Watson*¹⁷, it was held that fees for private schooling could be claimed where it was in the best interests of the child and the parent could afford it. This was especially so where the child had been at a private school for some time before the parties were divorced. Similarly, in *Smit v Smit*¹⁸, it was held that a child was entitled to claim for university fees where this was compatible with the means and position of the parties. This was especially so since the child had already commenced university studies for which the parents had paid.

The following points clearly arise from this:

1. The greater the means and standard of living of the parents, the better the quality of life and upbringing the parents will be required to provide for the child;
2. The needs previously covered by the parents and the quality of the provision of those needs has an influence on the needs that will be included in a maintenance order and the quality of provision that the maintenance order will require.

¹⁷ 1979 (2) SA 854 (A).

¹⁸ 1980 (3) SA 1010 (O).

2.2.4 The Period of the Child's Right

The child is entitled to maintenance until it is capable of supporting itself. This is clear from *Smit v Smit*¹⁹, where the court held that:

1. the father was required to continue paying for the son's university education, which he had started prior to reaching the age of majority having regard to:
 - 1.1. the means of the father;
 - 1.2. the means of the child; and
 - 1.3. the fact that the father had started the child on a course not yet completed.
2. further, that having regard to the father's duty to keep the son at university, it was also the father's obligations to continue feeding, clothing and otherwise maintaining the son just as he had done before the son reached the age of majority.

Similarly, if a child becomes self-supporting before reaching the age of majority, then the duty of a parent to maintain the child falls away. However, the duty will not fall away where the child has become self-supporting because of the failure of the parent to perform his duty to support the child.²⁰

It should also be noted that the duty of parents to support their children extends even to the grandchildren.²¹

It is therefore clear that:

1. the duty of support applies until such time as the child is able to support itself;
2. the duty of support does not weaken just because a child reaches the age of majority;
3. grandparents can be called upon to support their grandchildren where their children are not able to do so; and
4. an analysis of the child's needs must include a deduction of the child's means, where applicable.

These principles are especially important for children who have special needs and all the more so in the light of the fact that the age of majority looks set to be lowered to 18 years, in line with the constitutional definition of a child.

2.2.5 Extent of the Parent's Obligations

From the discussion of *Herfst v Herfst* and *Douglas v Douglas* above, it is clear that the obligations of a parent are limited by the parent's means. However, this still leaves the means of a parent to be defined. This involves an analysis of what resources are included in "means" and also what obligations can be deducted in order to establish what is available for the child.

¹⁹ Ibid.

²⁰ *Russell v Boughton* 1955 (2) SA 229 (SR).

²¹ *Landman NO v Landman* 1954 (2) SA 215 (W)

In *Ncubu v National Employers General Insurance Company Ltd*²², it was stated that:

1. “aside from the bare necessities of life, a parent is not liable to provide any particular aspect of maintenance, even if he is able to afford it, unless the circumstances of *inter alia* the parent justify it”;
2. “if the parent is financially unable to provide any aspect of maintenance required by the child, then he is under no obligation to do so”; but
3. “where circumstances dictate it, a parent will have to use capital, or borrow money or seek credit if he is able to do so, or even sell assets” in order to maintain a child.

Similarly, in *Jakins v Burton*²³, it was held in relation to a testamentary trust that it is better for children to have a happy, comfortable home and enjoy a good education than that they should receive a substantial inheritance when they reach majority.”

The principles from these decisions are clear:

1. A parent’s duty to maintain is limited by his or her ability to maintain, based on his or her means;
2. A parent is not obliged to pay for something just because they can – it must be reasonably necessary, given the parents’ social standing and circumstances; and
3. A parent’s means do, however, include assets and he or she may be required to maintain a child out of capital, borrowings or even from the proceeds of sale of an asset.

A parent’s means are also not merely limited by the extent of his or her assets and income. They are also limited by his or her liabilities and expenditure. However, here it is clear that the liabilities and expenditure that can be deducted against the means of the parent must be legitimate, given the circumstances of the parent. This principle can be seen in the following cases:

1. In *Green v Green*²⁴, it was held that “[t]he acquisition of capital assets cannot take precedence over an obligation to maintain a minor child.”
2. In *Mentz v Simpson*²⁵ the Appeal Court made it quite clear that maintaining your step-children is not a reason to deprive your children.

The effect of these principles is that, for a liability or expenditure to qualify as a deduction against the assets and income of the parent, the liability or expenditure must be necessary and reasonable. Therefore a parent is not permitted to buy an extra house (or even a larger house) and use the bond repayments to reduce the amount available for maintenance, nor can a parent take on obligations which are not his to take up and expect to be able to reduce the amount available for maintenance.

²² 1988 (2) SA 190 (N) at 196A-D.

²³ 1971 (3) SA 735 (C).

²⁴ 1976 (3) SA 316 (RAD).

²⁵ 1990 (4) SA 455 (A).

2.2.6 Division of the Maintenance Obligation between the Parents

Although *Herfst v Herfst* clearly states that the maintenance obligation is apportioned between the parents according to their respective means, that is not the end of the question. The issue of custody also has an impact on the division of maintenance. Obviously the non-custodian parent is the one who pays the maintenance, while the custodian parent absorbs expenses on a daily basis and thus maintains the child. However, in *Zimelka v Zimelka*²⁶, the question arose as to whether or not the non-custodian parent is entitled to a deduction against his or her maintenance obligations for the periods of time that the child is in his or her care. In that case, the court decided that the non-custodian parent was so entitled. Clearly this is the only sensible arrangement as it would be inequitable to have the non-custodian parent both paying his full share of maintenance and then maintaining the child in kind for half the school holidays and weekends of the year (in total about 12 weeks).

2.2.7 Variation of the Court Order

In *Beukes v Beukes*²⁷, the court held that a maintenance order can be changed with “sufficient cause” and that “sufficient cause” was not limited to a change in circumstances.

Similarly, in *Green v Green*²⁸ it was held that:

“if, as a result of inflation or an increase in the cost of living, it proves impossible for a custodian parent to maintain his or her child on the maintenance ordered, that is a circumstance which would justify an application under the Act for an increase in maintenance. If, on investigation, it is shown that the other parent is able to make a contribution which will make it possible for the custodian parent to properly maintain the child, the court may make an order increasing the maintenance.”

In *Zimelka v Zimelka*²⁹ the court held that:

“an order for maintenance will be made or altered if good cause exists; good cause exists if the order or contribution sought:

1. is reasonably required by the custodian parent; and
2. the other party is financially able to make a significant contribution, or a further significant contribution, if the non-custodian parent is already making a contribution.”

In *Watson v Watson (supra)*, it was held that a parent can ask for a child’s maintenance order to be varied even a very short time after the original order is obtained – and even if the parent’s motives for accepting the original maintenance order were doubtful (e.g. to get an agreement on an order for divorce). The court was of the view that the issue of the child’s needs objectively proven should not be coloured by the actions or bad faith of the parents.

It is clear from these judgments that the attitude of the courts is a very practical one – i.e. if the child’s needs (as defined in relation to the parents’ means and standard of living) require an

²⁶ 1990 (4) SA 303 (W).

²⁷ 1995 (4) SA 429 (O).

²⁸ 1976 (3) SA 316 (RAD).

²⁹ 1990 (4) SA 303 (W).

adjustment in maintenance, for whatever reason, and the parent paying maintenance can afford it, then the maintenance must be adjusted accordingly. Thus:

1. a maintenance order can be varied with “sufficient cause” or “if good cause exists”;
2. inflation or an increase in the general cost of living is sufficient reason to vary a maintenance order;
3. an order can be varied even a short time after it has been granted; and
4. the previous bad faith of a parent will not militate against the variation of the order as the order is for the benefit of the child.

However, having established the requirement of “sufficient cause”, the courts will also use it to reduce a child’s maintenance or to reappportion the maintenance between the parents. Therefore, if the child’s needs decline (e.g. he starts earning money or finishes his education) or if the circumstances of a parent change (e.g. one parent gets a promotion or loses a job or contracts a chronic disease resulting in large medical bills), then the maintenance will be reduced or reappportioned between the parents, as necessary.

2.2.8 Summary and Limitations of the Common Law Principles

As is apparent from the above, the South African approach to the determination of maintenance of children can be characterised as follows:

1. Firstly, it sets out a framework of fundamental principles;
2. Then it deals with all the other issues (such as the period of the child’s right, the extent of the parents’ obligations, the duty of grandparents, etc.) on an *ad hoc* basis.

The approach is, of course, designed to ensure that the court takes account of the individual circumstances of each child.

The following principles can be identified:

1. the starting point is the needs of the child;³⁰
2. the child is entitled to be provided with everything it requires for its proper living and upbringing;³¹
3. the child’s needs are limited to what is reasonable, taking account of the standard of living and status of the parents;³²
4. the child’s needs are also limited by the parent’s ability to pay maintenance;³²
5. the obligation to maintain the child is divided between the parents according to their means;³¹

³⁰ *Douglas v Douglas* op cit.

³¹ *Herfst v Herfst* op cit.

³² *Herfst v Herfst* op cit; *Douglas v Douglas* op cit; *Watson v Watson* op cit; *Smit v Smit* op cit.

6. the means of the parents include both income and assets – and the ability to borrow money;³³
7. although legitimate liabilities and expenditure can be deducted from an assessment of a parent's means, a parent cannot avoid his or her maintenance liabilities by taking on unnecessary obligations or purchasing unnecessary assets;³⁴ and
8. the maintenance can be adjusted at any time in order to take account of any change in the circumstances of the parents or the child or any change in the economic environment in which the parties find themselves.³⁵

Although the case law does answer some of the questions left by the statute law, this approach retains the following disadvantages:

1. The court is not restricted to a limited set of criteria on which it makes its decision, but will take into account any circumstance which may have an impact on either the child's needs or the parents' abilities to meet those needs. As noted in the discussion on the statute law, this imports a level of uncertainty into the decision;
2. As in the statute law, there is no definition of a "proper living and upbringing", nor is there any indication of the quantity or quality of "food, clothing, accommodation, medical care and education" required for a child. Therefore the level of support required is imprecise. In this regard, it should be noted that the court does not even bracket families by income level and then have a definition of these terms for each income bracket – each child's needs are considered individually. Again, this imports uncertainty into the decision;
3. The term "means" is still not fully defined. Although it is clear that assets are included, it is not clear what weighting is to be given to assets as against income. This means that it is not possible to give a Rand value to a person's means in a given year, in which case it will often not be possible to define the extent to which the parents' means are a limit on the maintenance available for the child. As noted under the statute law, this problem also makes it unclear how maintenance obligations should be divided between parents as the means of each parent will be uncertain. For example, if one parent has a large estate but little or no income and the other has a small estate but a large income, there is no guideline as to how the maintenance obligation should be apportioned.
4. Legitimate expenses remain undefined. This can either result in illegitimate expenses being allowed as a deduction against the income of a parent or it can result in legitimate expenses being disallowed. For example, a Magistrate may find it difficult to decide whether or not expenditure on a new motor vehicle should be allowed and it is difficult to define when exactly it should and when it shouldn't. A Magistrate's decision could also be influenced by his culture or system of beliefs – for example, a religious Magistrate may allow tithes as a deduction against income (which should not be allowed).

³³ *Ncubu v National Employers General Insurance Company Ltd* op cit.

³⁴ *Green v Green* op cit; *Mentz v Simpson* op cit.

³⁵ *Beukes v Beukes* op cit; *Green v Green* op cit; *Zimelka v Zimelka* op cit; *Watson v Watson* op cit.

3 The South African Discretionary Approach In Practice

As noted above, the information required to make a proper decision as to the maintenance of a child is extensive and detailed. To provide a court with such information is both challenging and time-consuming and, if legal representation is to be used to assist in this challenge, it could be very expensive. For a poor and illiterate person (the person whose child's need of maintenance is probably the most serious) the challenge may prove too much, the length of time involved may be severely detrimental to the child and the expense of legal representation would certainly be prohibitive. Even for middle class people legal representation in maintenance court is likely to be limited because the cost is so high compared with the relief being sought. Therefore a very large proportion of the people who apply to maintenance courts for relief are likely to have no legal assistance to overcome the challenge of providing proper information that will aid the court in its decision.

In South Africa, instead of addressing this problem by altering the calculation of maintenance (by introducing a standard or a formula, for example), the legislature has chosen to address the problem by altering the proceedings which inform the calculation. Although maintenance proceedings are civil proceedings the proceedings in maintenance court have been altered so as to deviate substantially from ordinary civil proceedings. These deviations include:

1. Utilising an enquiry process instead of a trial process³⁶. The purpose and effect of this is to give the Magistrate a more active role in the proceedings. As a court of enquiry, the court may, of its own volition, subpoena documents, call witnesses or question witnesses. This obviously helps make up for the difficulties an unrepresented party experiences in making or presenting his or her case. It also means that the court is able to act in the best interests of the child, which interests may become clouded in a dispute between parents who each have their own agenda.
2. Provision of a Maintenance Officer to receive and manage complaints and to run the enquiry³⁷. The Maintenance Officer is the officer of the court who places all the documentation before the court and attempts to place a full picture of the circumstances of the parties before the Magistrate so that a proper decision can be made. If the court wishes to obtain certain information, it will instruct the Maintenance Officer to obtain it. The intention is obviously that the Maintenance Officer will do the work that legal representatives would normally do, thus reducing the burden on the parties and allowing them to receive guidance as to what materials are required in order for the court to make a decision.
3. Provision of a Maintenance Investigator to investigate cases and to obtain documentation and information required for the enquiry under the guidance of the Maintenance Officer³⁸ (see s.5 of the Act). The Maintenance Investigator has a similar role to the Investigating Officer in a criminal case – it is his job to respond to the needs of the Maintenance Officer and to provide him with the information he

³⁶ Maintenance Act 99 of 1998, ss.9-11.

³⁷ Ibid., s.4 & Chapter 3.

³⁸ Ibid., s.5.

requires for presentation before the court. As such, he clearly takes on much of the responsibility that the parties would normally carry.

In practice, the courts have introduced a further step to the process, designed to assist in resolving maintenance disputes. As a matter of practice the Maintenance Officer attempts to mediate between the parties and to reach some sort of settlement, which can then be made an order of court. This makes the process less formal and easier on the parties.

However, although these steps certainly reduce the burden on the parties, the following problems remain:

1. The information provided to the court and to mediating Maintenance Officers is often inadequate due to one or more of the following problems:
 - 1.1. Many people in South Africa do not have formal employment and therefore it can be difficult to prove their income;³⁹
 - 1.2. Where there are multiple families involved, not all the parties are before the court. Ordinarily a maintenance matter deals with a child (or children), a custodian parent and a non-custodian parent. However, it is quite common for the non-custodian parent to have other children who are either in his or her custody or are in the custody of a third party. It is also common for the custodian parent to be caring for children that are not related to the non-custodian parent in question. In such cases, the needs of those children and the maintenance payable for those children have an impact on the maintenance payable in the matter before the court. This is especially so where the needs of the children are very different or where the maintenance paid to the other children is paid by agreement, rather than based on a finding of a court. Ideally these decisions should be made together so that all the children receive an appropriate amount of maintenance. This does not happen and therefore it is impossible for the court to make a properly informed order;
 - 1.3. Many of the Maintenance Officers have no legal training and are therefore ill-equipped to properly present each case to the court;⁴⁰ and
 - 1.4. Maintenance Investigators have only been introduced recently and their impact is likely to be reduced by the fact that so many of the Maintenance Officers do not have sufficient legal background to guide their investigations. As a result they are only likely to provide the court with certain standard items of information.⁴¹
2. Due to the difficulty in obtaining information in so many cases and due to a lack of availability of qualified Maintenance Officers to appear in maintenance courts,

³⁹ Barberton *et al*, op cit, para.5.3.5 .

⁴⁰ Ibid., para. 5.1.

Implementation of the Maintenance Act in Magistrates Courts, op cit, p.13.

⁴¹ Ibid., paras. 6.2 & 6.3.

cases often take an inordinate length of time.⁴² Such delays can have a detrimental effect on the welfare of the children for whom maintenance is sought.

3. In general, maintenance courts are often short-staffed or staffed with poorly qualified, inexperienced and/or unmotivated staff.⁴³
4. In poor communities, especially those in rural areas or in informal settlements, it can be very difficult to trace a non-custodian parent.⁴⁴
5. The issue of assets is rarely addressed in an adequate fashion.⁴⁵ As pointed out above, the valuation and weighting of assets in deciding how much is available to maintain a child or how the parents should divide their responsibility is a problem. As a result, assets are rarely considered, except where a party has defaulted and his assets are attached for arrear maintenance or where a party has clearly reduced his maintenance by spending money on new assets. This means that parents with very little asset value are being disadvantaged as against parents who have significant assets.
6. Similarly, access to loan funding is largely ignored, probably because it is so difficult for a court (without the benefit of a bank official's testimony, for instance) to calculate what loan funding any individual could reasonably support. However, this problem only has significant application to the better-heeled end of the maintenance court "market".⁴⁶
7. Where the needs of the child or children exceed the means of the parents, the custodian parent will bear a disproportionate share of the maintenance responsibility. There are many instances in South Africa where the parents cannot afford to provide the child with food, clothing and shelter, the non-custodian parent pays little or no maintenance and yet somehow the custodian parent manages to feed, clothe and house the child. In such cases, the court finds that the non-custodian parent has insufficient income to allow an order to be made – but in failing to make an order, it places the entire obligation on the custodian parent, who is equally unable to meet the needs but must somehow try to do so. Effectively there is no division of responsibility.
8. Related to the previous point, there is a danger that a Maintenance Officer attempting to settle a matter may approach the matter on the basis that the custodian parent should be paid what she needs "to come out at the end of the month". In other words, the non-custodian parent is only required to pay what is required as a top-up to cover the maintenance needs of the child that the custodian parent cannot pay. This is clearly an incorrect approach as it leads to the income of the custodian parent being totally swallowed up before the non-custodian parent is obliged to make any payment or to increase his payment. Unfortunately the approach even appears to creep into some of the judgments referred to above – e.g. in *Green v Green*, *supra*, it was stated that:

⁴² *Ibid.*, para. 5.3.2.

⁴³ *Implementation of the Maintenance Act in Magistrates Courts*, op cit, pp.13-19.

⁴⁴ *Ibid.*, para. 5.3.4.

⁴⁵ *Ibid.*, para. 5.3.5.

⁴⁶ *Ibid.*

“if ... it proves impossible for a custodian parent to maintain his or her child on the maintenance ordered, that is a circumstance which would justify an application ... for an increase in maintenance”.

Similarly, in *Zimelka v Zimelka*,⁴⁷ at 306D-E, it was held that:

“good cause [for an order for maintenance to be made or altered] exists if the order or contribution sought:

1. is reasonably required by the custodian parent; and
2. the other party is financially able to make a significant contribution, or a further significant contribution”.

Where these statements fall short is in that they tend to support an approach that looks at the needs of the custodian parent (including the child) and then ask whether the non-custodian parent is able to help out. The correct approach is to identify the needs of the child and then to divide the responsibility between the parents according to their means.

9. The period for which a non-custodian parent takes care of the children does not seem to be given the weight it should be given in that:

9.1. It is often overlooked altogether;

9.2. When it is dealt with, the justice is very rough and often draws no distinction between those maintenance factors which are residence related (such as food, water and electricity) and those which are not (such as medical expenses and school fees). This comes from not having a definite guideline or formula to calculate how maintenance should be adjusted to take account of this factor; and

9.3. Even when it is included it may not make provision for deviation from the anticipated time period for which the non-custodian parent takes care of the children (in which case it will fail to allow an adjustment to the deduction against the non-custodian parent's income).

10. Criminal proceedings required to enforce maintenance orders and to deter parents from defaulting in their duties are poorly conducted and ineffective. This is largely due to the fact that criminal proceedings are dealt with by the ordinary criminal courts which are themselves overburdened and understaffed and which generally do not give high priority to maintenance proceedings.

In summary, it would appear that the lofty ideals of dealing with each case according to its individual circumstances are lost in the hurly burly of a court which is:

1. often ill-staffed;
2. often poorly provided with information;

⁴⁷ Op cit at 306D-E.

3. often experiences difficulties obtaining formal information of any type;
4. often has difficulties getting the parties to court;
5. has no guidance on dealing with assets as opposed to income;
6. often finds itself faced with children's needs which exceed the means of the parents;
7. often has no way of fairly dividing responsibility between parents because poverty or lack of information prevents the court from seeing "means" against which it can make an order; and
8. often has no effective means of enforcing its order.

In addition to all those problems, when it comes to actually determining maintenance, Maintenance Officers and even Magistrates often have no idea of how to determine maintenance quantum, nor does there seem to be due consideration given to calculating the amount to be paid. In many cases the amount is simply suggested by one of the parties, the Maintenance Officer or the Magistrate and that becomes the accepted amount. In this regard, if the accepted amount is suggested by the child's mother, it is more likely to be over R300,00, if suggested by the father, it is more likely to be R100,00 to R300,00; if suggested by the Magistrate or the Maintenance Officer, it is more likely to be under R100,00.⁴⁸ It is rather worrying that the lower assessments come from the court personnel responsible for protecting the interests of children.

More often than not the maintenance order granted is a reflection not of the child's needs, but of the father's ability to pay – or very often the father's *professed* ability to pay.⁴⁹

Having regard to all the above deficiencies and the short-comings detailed in *Implementation of the Maintenance Act* (published by the Gender Commission) and *A Baseline Cost Study on the Appointment of Maintenance Investigators in terms of the Maintenance Act, 1998 (Act No. 99 of 1998)* by Barberton *et al*,⁵⁰ it is all too clear that the theoretical principles of maintenance in South Africa have very little practical application outside of the High Court.

4 Formula-Based Approaches

Rather than attempting to find a personalised solution to each complex set of circumstances, as noted above many countries have decided to standardise levels of maintenance by introducing formulae with tables, which allow a maintenance decision to be made on the basis of either the total family's income or the income of the non-custodian parent only.

Various different formulae are analysed below in order to illustrate the types and complexities of formulae that can be introduced and to demonstrate their characteristics.

⁴⁸ *Implementation of the Maintenance Act in Magistrates Courts*, op cit, p.61.

⁴⁹ *Ibid*, pp.61-62

⁵⁰ *Ibid*. Barberton *et al*, op cit.

4.1 Michigan, USA – a Complex Formula

In the United States of America, federal law requires each State to devise its own set of child maintenance guidelines to assist in determining quantum in child support cases. This means that the formulae used vary from state to state. Federal law also requires that the guidelines be reviewed at least once every four years. In the state of Michigan comprehensive guideline formulae and tables have been implemented and they are reviewed every year.⁵¹

Michigan's system requires that a maintenance order be made in the following way:⁵²

1. a "Base Support" figure must be calculated for the non-custodian parent using tables and the appropriate formula;
2. the Base Support figure must be adjusted according to the period of time each parent has the child staying with them each year;
3. additional items such as health care and child care must be added and apportioned between the parties; and
4. if there is to be any deviation from the formula, such deviation must be strongly motivated.

The following discussion seeks to deal with each of these steps and then to discuss the foundation principles of the approach.

4.1.1 The Base Support Tables and Formulae

In order to calculate maintenance for middle to higher income families, Michigan State uses a "Base Support" formula that can be summarised as follows⁵³:

1. The net income of the parents is aggregated to ascertain the "Monthly Family Net Income", thus:

$$\text{Net Income}_{\text{Family}} = \text{Net Income}_{\text{Custodian}} + \text{Net Income}_{\text{Non-custodian}}$$

2. A table is then used to ascertain what the appropriate level of Base Support for that family is – based on the number of children and the Monthly Family Net Income. It is important to note that the child support is calculated per family and not per child as each additional child costs less to support. Thus:

$$\text{Net Income}_{\text{Family}} \longrightarrow \text{Table}_{\text{Family Size}} \longrightarrow \text{Base Support}_{\text{Family}}$$

3. The responsibility for the Base Support is then divided between the parents according to their income thus:

$$\text{Base Support}_{\text{Non-custodian}} = \text{Base Support}_{\text{Family}} \times \text{Net Income}_{\text{Non-custodian}} / \text{Net Income}_{\text{Family}}$$

⁵¹ Ibid., p.1.

⁵² *2004 Michigan Child Support Formula Manual*. Friend of the Court Bureau: Lansing, 2004.

⁵³ Ibid., para. 3.01. This description breaks down the formula into easy steps. The full formula and tables are set out in Annexure B.

From non-custodian parents whose net income is below the poverty line defined in terms of the United States HHS Poverty Guidelines (currently \$776 per month), Michigan State requires payment of Base Support calculated in the following manner:

1. If the net income of each parent is below the poverty line, the Base Support payable by the non-custodian parent is 10% of his net income;
2. However, if the custodian parent's net income is above the poverty line, the non-custodian parent's contribution is reduced to 9%. If custodian parent's net income is \$900 or more, the non-custodian parent's contribution is reduced to 8% and for every \$450 further increase in the custodian parent's income, the non-custodian parent's contribution will decrease by a further 1%. This is fully set out in a "Poverty Level Income Adjustment Table";⁵⁴
3. There is a minimum payment of \$25.⁵⁵ This means that it is not possible for a non-custodian parent whose net income is below the poverty line to pay 3% or less, even though the Poverty Level Income Adjustment Table provides for payments to decline down to 1%.

Where the non-custodian parent's net income is above the poverty line, but still low, the Base Support contribution of the non-custodian parent is calculated as follows:

1. For the first \$776 (income up to the poverty line) the non-custodian parent's Base Support contribution is calculated as for a parent whose net income is below the poverty line. Any amount over the poverty line is all allocated to the child. If the Poverty Level is \$776, the calculation can be represented as follows:

$$\text{Base Support}_{\text{Non-custodian}} = (\$776 \times \text{Contribution \%}_{\text{Per Custodian Income}}) + (\text{Net Income}_{\text{Non-custodian}} - \$776)$$

2. This calculation is only valid where it yields a result which is lower than the Base Support responsibility calculated using the Base Support formula for middle to higher income families. As soon as the Base Support formula for middle to higher income families yields a lower result, that formula must be used.

Examples of each of the above formulae are set out in Annexure A.

4.1.2 Adjustments and Additional Maintenance Items

The following adjustments and additions are made to the Base Support obligations of the non-custodian parent:

1. Where there is more than one family, the following must be born in mind:
 - 1.1. The net income of each parent must be calculated net of any existing court order for the maintenance of another spouse and/or family;⁵⁶
 - 1.2. Where a parent has maintenance obligations to other biological or adopted children, his or her net income must be multiplied by an adjusting percentage,

⁵⁴ Ibid., para. 3.02. The table is set out in Annexure A.

⁵⁵ Ibid., para. 3.02 (C) & (D). See the poverty formula set out in Annexure A.

⁵⁶ Ibid., para. 2.13.

depending on the number of such other children – these percentages are set out in a table;⁵⁷

2. An adjustment is made for the number of days in the year which the children spend with the non-custodian parent (“Parenting Time Support Abatement”). The adjustment is calculated thus:⁵⁸

$$\text{Base Support}_B = ((\text{Days}_A^2 \times \text{Base Support}_B) - (\text{Days}_B^2 \times \text{Base Support}_A)) / (\text{Days}_A^2 + \text{Days}_B^2)$$

In the event that such an adjustment is not made (if, for example, the time spent with the non-custodian parent is irregular) then the support order must contain a “Parenting Time Support Abatement” provision, which allows a non-custodian parent to claim a 50% abatement on the Base Support (calculated daily) for 6 or more consecutive overnights with the non-custodian parent. It should be noted that the abatement is 50% of the daily Base Support - there is no abatement in respect of Child Care or Medical Care.

3. Health Care for the children must be added to the Base Support and consists of three components – Health Insurance, Ordinary Health Care and Extraordinary Health Care.⁵⁹ All health care expenses are divided between the parties according to their percentage contribution to the Monthly Family Net Income, rounded to the nearest 10% - and never to be less than 10% or more than 90%.⁶⁰ In addition, the follow details apply:⁶¹

3.1. Health Insurance must be provided wherever possible. However, private health care coverage should not be required if:

- 3.1.1. the cost exceeds 5% of the provider’s gross monthly income;
- 3.1.2. the provider’s net income is less than 133% of Poverty Level; or
- 3.1.3. the provider’s share of Base Support, Ordinary Health Care and Health Insurance together will exceed 50% of his or her net income.

The division of responsibility for Health Insurance will result in an adjustment to the non-custodian parent’s support payments depending on what premiums each parent is paying. If the non-custodian parent’s premiums include less than his share, then his monthly maintenance payment will be increased; if his premiums include more than his share, his monthly maintenance payments will be decreased.

- 3.2. An amount (currently \$289 per year) is awarded to each child for “Ordinary Health Care” as this is the average cost of routine health care for a child. The non-custodian parent’s share of this amount will be added to his monthly maintenance payments. No accounting is required in respect of this amount.

⁵⁷ Ibid., para. 2.15. See Annexure A for the table.

⁵⁸ Ibid., para. 3.06.

⁵⁹ Ibid., para. 3.07.

⁶⁰ Ibid., para. 3.07(A)(5).

⁶¹ Ibid., para. 3.07(B).

- 3.3. A custodian parent can also require a non-custodian to pay his share of any expenses not covered by health insurance or the ordinary health care budget (labelled "Extraordinary Health Care"). However, he or she will need to account for the ordinary health care expenditure in order to show that the expense is not covered.
4. A Child Care Support payment is required where a parent incurs work-related child care expenses.⁶² The parents will have to show that the expenses are actual, predictable and reasonable. Such expenses are divided between the parents according to their percentage contribution to the Monthly Family Net Income, rounded to the nearest 10% - and never to be less than 10% or more than 90%. The Child Care Support could result in an adjustment up or down of the maintenance paid by the non-custodian parent, depending on which parent's child care costs are highest.

Accordingly, the total maintenance payable by a non-custodian parent in respect of a family is made up of the following:

1. Base Support;
2. Less Parenting Time Support Abatement;
3. Health Insurance Adjustment;
4. Ordinary Health Care;
5. Extraordinary Health Care; and
6. Child Care Adjustment.

4.1.3 Deviations from the Formulae

Deviations from the above formulae are not permitted unless the application of the formulae would have "an unjust and inappropriate result", in which case the court may exercise its discretion to determine a just and appropriate result.⁶³

Examples of circumstances in which a court may exercise this discretion are:⁶⁴

1. A child having special needs;
2. A child having extraordinary educational expenses;
3. A parent being a minor;
4. Exceedingly high levels of debt reducing the income available;
5. Property being awarded in lieu of maintenance for the benefit of the child;

⁶² Ibid., para. 3.08.

⁶³ Ibid., para. 1.04(D)(4).

⁶⁴ Ibid., para. 1.04(D)(5).

6. A parent imprisoned without income or assets;
7. Parents facing extraordinary expenses relating to themselves or a dependent;
8. Parents earning income in a range that the formulae do not adequately cover (usually higher incomes);
9. Parents having varying amounts of irregular bonus income;
10. The ability and willingness of a third party to supply reasonable and appropriate health care coverage; and
11. Where extra health care expenditures are anticipated (e.g. orthodontic treatment), the ordinary health care figure can be increased.⁶⁵

However, when a court exercises such discretion it is required to include the following in the maintenance order:⁶⁶

1. How much the maintenance would have been if the child support formula had been used;
2. How the order deviates from the formula;
3. The value of property or other maintenance awarded instead of a monetary maintenance payment, if applicable; and
4. The reasons why the application of the formula would result in “an unjust and inappropriate result”.

4.1.4 The Basis and Ideology of the Formula

The formulae and tables used in Michigan represent the following approach to maintenance:

1. The maintenance a child requires is both related to and limited by the standard of living and, especially, the income of the parents. This is reflected in the fact that the calculation is a calculation based on the income of the parents;
2. An objective level of maintenance can be specified for each level of income – rather than attempting to provide an individualised (and therefore subjective) response to every child’s maintenance needs;
3. Certain items are so important that they must be decided separately based on actual costs to parents. In this respect, health is so important that it is not only separated out, but it is divided into Health Insurance, Ordinary Health Care and Extraordinary Health Care – all of which must be properly covered by the maintenance order;
4. Maintenance obligations should be apportioned to parents strictly in accordance with their income; and

⁶⁵ Ibid., para. 3.07(C)(3)(c).

⁶⁶ Ibid., para. 1.04(C).

5. Maintenance obligations should be factually driven rather than policy driven (i.e. they should reflect the circumstances of the parties rather than a state policy).

The formulae used in this approach are neither complex nor particularly innovative. The complexity lies in the tables which provide the following information:

1. An adjusting percentage to take account of a parent's other children;
2. A breakdown of income into brackets to which different percentages of maintenance are applied (the Base Support Table and the Poverty Level Income Support Table);
3. How maintenance should be increased in relation to the number of children in the family; and
4. The average Ordinary Health Care Expenditure associated with one child.

At the root of this information is an economic model which estimates child-rearing expenditures. The model was created in 1984 using 1972-1973 data and is updated annually to take account of inflation.⁶⁷ It is the model which sets out the relationship between family income and expenditure on children and thus creates the tables which provide the figures to be entered into the various formulae.

The following comments need to be made with regard to the Michigan State formula approach:

1. It reduces uncertainty in that:
 - 1.1. Every component of the maintenance paid is calculated objectively as it is related to family income, rather than subjectively with relation to the individual circumstances;
 - 1.2. It sets out clear guidelines for medical needs by providing a fixed figure for Ordinary Health Care and by setting income-related limits to the level of insurance (and hence the standard of medical care) required. At the same time, it manages to retain flexibility by allowing claims for "Extraordinary Health Care" and providing clear guidelines as to how those are to be divided;
2. It also reduces the number of factors to be taken into consideration as (unless deviation from the formulae is sought), the only things that need to be proven are the income of each parent, the medical insurance paid by each parent, any child care expense and the division of parenting time between the parents. This not only simplifies the process of ascertaining what items of maintenance should be covered, but it also reduces uncertainty about the amount payable (the more figures have to be proved, the more uncertain the outcome is);
3. It does away with the need to analyse whether a particular item is a "luxury" or a "need" or to any debate over the quality of provision required as it simply produces a figure based on the income of the parties. The maintenance figure produced by the formulae decides what items can be included as "needs" and the quality of

⁶⁷ Venohr, op cit, p.2.

items, rather than the “needs” and quality of items deciding what the figure should be;

4. The use of this formula should make a reasonable decision more affordable. The relatively few items of information required and the lack of ambiguity in those items should reduce the need for legal representation both in number of cases and in number of hours;
5. In the light of the fact that the approach makes direct statistical links between Basic Support and family income, it does not actually analyse the needs of the individual child. Instead it creates a maintenance norm based on family size and income. On the one hand, this could be seen as positive as it establishes an objective norm and thus creates a definite right. However, on the other hand, the norm is merely based on the collective actions of all the people in that income bracket which means that one’s view of the desirability of the approach will depend upon how cynically one views average human nature;
6. The model takes proper account of the period for which the non-custodian parent cares for the children and provides a definite formula to calculate that. In addition, it makes an effort to distinguish between those items that are affected by residence and those which are not in that it excludes the medical and child care payments from the “Parenting Time Support Abatement” formula;
7. The model also provides a sensible approach to maintenance payments by parents living below the poverty line. As pointed out in the chapter relating to South Africa, in the discretionary model it is difficult to insist that somebody pays maintenance if they have very little income. However, this inevitably means that somebody who is just as limited in means bears the entire burden for maintenance of the children. In this formula model even parents living below the poverty line are required to make some contribution to the maintenance of their children, even if that contribution ends up being a mere 4% of their own income after taking account of the other parent’s income. It is submitted that this is the correct approach since allowing a parent to pay no maintenance is to place the interests of the parent above the child, which is constitutionally unconscionable;
8. This model does not take account of the income of any children. In fact, children’s income is specifically excluded.⁶⁸ In a sense this is an obvious extension of the fact that the model does not start with the child’s “needs”, as the South African model does, but the child’s needs are inherently accounted for in the formulation of the tables. However, excluding children’s income also has a practical benefit in that it makes it impossible for a parent to use a child’s income as an excuse for reducing maintenance when it may be that the child is required to earn an income because of the parent’s failure to pay sufficient maintenance;
9. A formulaic model is inherently better equipped to deal with the problem of multiple families than the discretionary model. As noted in the analysis of the shortcomings of the South African system, the discretionary model is hampered by the fact that families competing for the same income are not present before the same court in order to have their subjective circumstances properly accounted for in making competing maintenance orders. Where a formula is used, because the

⁶⁸ 2004 Michigan Child Support Formula Manual, op cit, para. 2.03.

outcome is much more objective, it is easier to make proper allowance for competing families as the families are not required to present their subjective circumstances in order to reach a decision;

10. Nonetheless, the manner in which a competing family's claim for maintenance is accounted for in the Michigan model is slightly awkward. Where there is a maintenance order, it is deducted from net income at the beginning of the calculation, which is sensible enough. However, where there is no maintenance order an adjustment factor is applied to the net income in order to take account of the competing claim. Clearly this adjustment factor can represent nothing more than a calculated average expected adjustment required. Given the fact that the income of the other parent of the competing family is an unknown, the adjustment is hardly more than a thumbsuck estimate or average. This also means that a series of variations of court orders will be required as follows:
 - First Family A will obtain a maintenance order based on a net income adjusted by a percentage to take account of Family B's claims;
 - Family B may then obtain a maintenance order, which will be based on a net income reduced by the value of Family A's maintenance order;
 - Family B's maintenance order may well differ substantially from the adjustment to net income which was used to calculate Family A's maintenance claim. As a result, the net income on which Family A's order was calculated will change. If this would result in a change of maintenance in excess of \$25, the court order must be changed to reflect that;
 - However, a change in Family A's order will alter the net income applicable to Family B and could result in the necessity to change Family B's order;
 - This process would continue until the change in maintenance is less than \$25 – the larger the original change, the longer it will take to reach equilibrium.

Clearly this is an undesirable feature of this formulaic approach. However, it is difficult to conceive how it can be avoided as there could be an almost endless string of interlinked families involved.

11. The model also does not deal well with parents whose earnings are just above the poverty line and to whom the ordinary Base Support Formula does not apply. The current formula for such parents requires that all income over the poverty line be paid as maintenance for the children. While this places children in the position they should occupy constitutionally, it also means that any increase in the non-custodian parent's income does not increase the parent's disposable income at all. This operates as a disincentive to hard work and the winning of promotion and/or salary increases;
12. The model is also slightly problematic at upper incomes in that the tables only go to a certain income level, after which the marginal rate of maintenance remains the same for each additional dollar earned. This leads to applications for deviations from the formula as a matter of course in high income cases. As a result, the latest review of the Michigan guidelines has recommended that the formula cease to apply to the highest (open-ended) income bracket and that a discretionary

approach be taken to those matters. There is some sense in that on two counts: firstly, it simply recognises the reality that these cases are being decided on a largely discretionary basis anyway; and, secondly, the extra expense that may be associated with a discretionary approach can be afforded by those in that income bracket and is more readily justified in terms of the amounts that are likely to be disputed;

13. The model could also be seen to be deficient in that it takes no account of assets, as opposed to income. Therefore it would prejudice a high income earner with low asset value as against a low income earner with high asset value;
14. To the extent that the Michigan State model seeks to allocate maintenance obligations according to factual circumstances rather than state policy, it is hampered by the age of the data and model. As has already been noted, the model is a 1984 model and it is based on 1972-1973 data. Clearly adjustments for inflation are not completely adequate in updating the data and the model as spending patterns are bound to change over time. Ironically, it is the attempt to carefully reflect factual circumstances that leads to the model being dated and therefore a poor reflection of factual circumstances. Obviously it is difficult, time-consuming and expensive to gain wide enough survey data of the right type in order to create a model. Building a model also takes time and effort. As a result, a factually based formula will always struggle to be as factual as one would like because its model and data will always be dated;

4.2 United Kingdom – a Simple Formula

In the United Kingdom, a very simple formula is applied – probably for two reasons:

1. Maintenance is collected and distributed by the Child Support Agency and, based on previous British experience with the Department of Social Security, it would be difficult for the Agency to administer a complex maintenance formula; and
2. The arrangement in the United Kingdom must be seen against a background of a welfare state with a sophisticated social grant system.

The United Kingdom formula is actually little more than a percentage which takes account of the following:

1. The number of children for whom maintenance is sought;
2. The income of the non-custodian parent; and
3. The number of other children living with the non-custodian parent to whom the non-custodian parent owes a duty to maintain.

After that, the only thing that remains is for the maintenance obligation to be adjusted for time spent in the care of the non-custodian parent.

The following discussion deals with the application of the formula.

4.2.1 The Basic Maintenance Calculation

There are four different calculations of basic maintenance, depending on the income level of the non-custodian parent. These are as follows:

1. Basic Rate⁶⁹

The basic rate of maintenance:

- 1.1. applies to non-custodian parents whose net income is £200 or more per week;
- 1.2. requires that the non-custodian parent pay 15% of net income for maintenance of one child, 20% for two and 25% for three or more; and
- 1.3. if the non-custodian parent has other children living with him or her, to whom he or she owes an obligation of maintenance (“relevant other children”), then his or her net income for the purposes of this calculation must be reduced by 15% for one “relevant other child”, 20% for two and 25% for three or more.

2. Reduced Rate⁷⁰

The reduced rate of maintenance:

- 2.1. applies to non-custodian parents whose net income is between £100 and £200 per week;
- 2.2. requires that the non-custodian parent pay maintenance of 5% of the first £100 of his net income (i.e. £5) plus a percentage of his net income over £100 – 25% for one child, 35% for two and 45% for three; and
- 2.3. if the non-custodian parent has other children living with him or her, to whom he or she owes an obligation of maintenance (“relevant other children”), then the percentage applied to the net income over £100 is reduced according to a simple table, taking account of whether he has one, two or three relevant other children living with him.

3. Flat Rate⁷¹

The flat rate of maintenance:

- 3.1. applies to non-custodian parents whose net income is not more than £100 per week;
- 3.2. requires that the non-custodian parent pay maintenance of £5 a week.

4. Nil Rate⁷²

⁶⁹ *Child Support: A Technical Guide*. Child Support Agency: United Kingdom, 2003, para. 4.2.

⁷⁰ *Ibid.*, para. 4.3.

⁷¹ *Ibid.*, para. 4.4.

⁷² *Ibid.*, para. 4.5.

The nil rate of maintenance requires no payment and applies to the following people, among others:

- 4.1. people whose income is less than £5 a week;
- 4.2. full-time students or school pupils;
- 4.3. prisoners;
- 4.4. people in a care or nursing home; and
- 4.5. other people who receive certain state grants.

4.2.2 Adjustments to Basic Maintenance

The only adjustment to Basic Maintenance that falls within the formula is an adjustment for shared care, which is adjusted as follows.⁷³

1. The non-custodian parent's net income (before deduction for any relevant other children) cannot exceed £2 000 per week for the purposes of the maintenance calculation;⁷⁴
2. For a parent paying maintenance on the basic or reduced rate:
 - 2.1. a reduction of $\frac{1}{7}$ is allowed for every 52 nights the child spends with that parent up to 156 nights;
 - 2.2. if the child spends 175 nights or more with that parent a reduction of $\frac{1}{2}$ plus £7 is allowed; but
 - 2.3. the minimum that can be paid is £5;
3. A parent paying maintenance on the flat rate, who pays that rate because of certain state grants he or she receives, does not pay any maintenance if the child spends 52 nights or more with him or her;
4. There is no deduction for shared care for parents who pay maintenance on a flat rate due to the level of their income;
5. Where more than one child is involved and the different children spend different amounts of time with the non-custodian parent, the maintenance must be allocated equally to each child and then the deductions must be made against the individual child's allocations.

As far as multiple families are concerned, there is no real adjustment. The formula treats all children not living with the maintenance payer as if they were all one family and then requires that the maintenance be allocated equally among the children.⁷⁵

⁷³ *Ibid.*, para. 4.7.

⁷⁴ *Ibid.*, para. 4.9.

⁷⁵ *Ibid.*, para. 4.6.

4.2.3 Deviations from the Formula

Most of the deviations from the formula have to do with carry over provisions from previous legislation or circumstances created by very specific United Kingdom regulations.⁷⁶ However, there are 2 important occasions when there are deviations from the above formulae.

1. When it is suspected that a non-custodian parent is trying to hold up the process by not producing information regarding his income, an interim maintenance award is made requiring payment of £30 for one child, £40 for two and £50 for three per week;⁷⁷
2. If the non-custodian parent's net income exceeds £2 000 per week, the custodian parent can apply for "top-up" maintenance, which is a discretionary award.⁷⁸

4.2.4 The Basis and Ideology of the Formula

The formulation of maintenance in the United Kingdom represents the following approach to child maintenance:

1. Maintenance is decided on the basis of the question "What should the non-custodian parent pay?" without asking "What does the child need?" In this regard it should be noted that:
 - 1.1. the words "should ... pay" as opposed to the words "does ... need" tell us that maintenance obligations are driven by policy, rather than factual need (whether subjectively or objectively determined);
 - 1.2. the approach deals with the non-custodian parent only and does not consider the non-custodian parent's responsibilities;
2. Although the level of maintenance required for each level of income is objectively determined, there is no attempt to determine the child's needs either individually or by way of an average;
3. This formula is much simpler than the Michigan formula and therefore the amount of maintenance to be paid is so easily calculated that there is almost no uncertainty;
4. The number of factors taken into account is reduced to two – the non-custodian parent's income and the number of days for which the non-custodian parent has care of the child – and therefore also decreases uncertainty;
5. Just as in the Michigan State formula, there is not longer any need to debate what is a luxury and what is a need as the amount is set by policy, not in relation to the individual child's needs;
6. The formula is cheap and easy to administer;

⁷⁶ Ibid., chap 6.

⁷⁷ Ibid., para. 4.8.

⁷⁸ Ibid., para. 4.9.

7. The formula has no problem coping with multiple families as it simply counts the number of children and applies a percentage and that percentage must then be allocated equally among the children;
8. There is some attempt to compensate for time the children spend with the non-custodian parent, though this is quite rough. However, the imprecise nature of the calculation is not of any concern, having regard to the fact that the original maintenance figure is policy made and has very little connection with the reality of the parties' circumstances;
9. The income of the children is not taken into account. However, that is to be expected in the light of the simple, policy-driven approach of this formula;
10. Assets are not taken into account, but that is to be expected, having regard to the policy-driven intentions of the formulae;
11. The formula deals fairly well with poverty in that it still requires anyone who earns any sort of income outside of a special government grant to make at least a small contribution to maintenance of his or her children. However, having regard to the involvement of the Child Support Agency in the transfer of funds, the question does arise whether or not the payment of the amount of £5 amounts to anything more than an expensive administrative burden;
12. Again this formula provides for discretion to be applied at the top end of the income scale, where a "top-up" can be applied for. On the one hand this makes sense in that the amounts involved could justify the time and expense involved. However, it is a little incongruous to place a discretionary "top-up" in a policy-driven regime;
13. The purpose of this system of maintenance only seems to be to top up the state grant system.

4.3 Other Jurisdictions

A number of other jurisdictions contain variations or mixtures of the two approaches already discussed above. Some examples include:

4.3.1 Australia and New Zealand⁷⁹

The models used in Australia and New Zealand are both fairly similar to the United Kingdom model in that:

1. They require a maintenance payment of a fixed percentage of income;
2. The percentage is adjusted according to the number of children to be supported; and
3. The process is administered by a Child Support Agency.

⁷⁹ MacDonald, Mary. *Expedited Child Support. Department of Justice, Canada: Canada, 1997, Child Support Schemes: Australia and Comparisons. Child Support Agency: Australia, 2001.*

New Zealand's model is closer to the United Kingdom model, subject to the following differences:

1. The model requires a deduction of a living allowance from the non-custodian parent's income before applying the support percentage; and
2. Although the system implemented by the Child Support Agency, which falls under Inland Revenue, the courts do still play a role.

Australia's model differs from the United Kingdom model in the following respects:

1. It considers the income of both parents, rather than just the income of the non-custodian parent; and
2. As in New Zealand, the courts still play a significant role, even though the process is run through the Child Support Agency in the Inland Revenue Office.

4.3.2 Canada⁸⁰

The Canadian model is a hybrid model.

On the one hand that Canadian model is like the United Kingdom model because it ignores the income of the custodian parent and makes an assessment based only on the income of the non-custodian parent.

On the other hand, the Canadian model is like the US model in that:

1. It has income tables which inform the non-custodian parent of how much he or she will have to pay;
2. The income tables are stepped (i.e. parents with different levels of income pay different rates);
3. The tables form a guideline for the court, but, under special circumstances, exceptions can be made and the income of the custodian parent may be included in the assessment.

4.3.3 Scandinavian Countries⁸¹

The maintenance models of the Scandinavian countries are very like the United Kingdom's, only they are even more welfare based. The salient features of their models are:

1. Simple percentages or flat rates of maintenance are levied against the non-custodian parent's income;
2. Only the non-custodian parent's income is considered;

⁸⁰ MacDonald, Mary, op cit.

Child Support Schemes: Australia and Comparisons., op cit.

⁸¹ MacDonald, Mary, op cit.

Child Support Schemes: Australia and Comparisons., op cit.

3. Strong welfare benefits are available for children whose parents cannot support them properly;
4. There are even welfare benefits for when a child's non-custodian parent defaults in his maintenance payment!

4.4 Maintenance Modelling Theory

There is a tendency to attempt to assess formulae on an individual basis, by comparing the outcomes of each formula in different scenarios. This is especially the case in America where the arguments surrounding formulae tend to turn on the statistical validity of the economic model underpinning the formula, rather than the aims and values inherent in the formula. It is submitted that this approach is not very useful as it is not possible to say which outcome is better in each individual scenario as doing so requires a value judgment. Comparing different formula by comparing their outcomes in different scenarios can only really demonstrate how consistently any particular formula performs compared to any other.

Another tendency is to assess formulae in terms of very specific things, such as, whether or not the formula takes account of the income of the custodian parent.

However, it is submitted that it is much more profitable to analyse a maintenance formula in terms of the intention behind the formula, its approach to the problem, what it seeks to achieve, how it attempts to do so, and then how well it achieves its aims. This involves looking not so much at the peculiar characteristics of the formula as the mindset which those characteristics demonstrate. In order to do this, it is necessary to analyse the following:

1. Whether the formula's approach is objective, subjective or policy-based;
2. The nature of the inputs required by the formula;
3. The nature of the outputs produced by the formula; and
4. The extent to which the formula allows for deviation and/or application of discretion.

It is the relationship between these factors that produces the array of maintenance models that appear around the world.

4.4.1 Type of Approach – Subjective, Objective or Policy

The most important factor in classifying a maintenance model, is the analysis of the intended outcome of the model. However, it is also important to note that models will often contain aspects of more than one approach because there is a range or spectrum of approaches, rather than three strict categories.

▪ *The Subjective Approach*

It is simplistic to view approaches to maintenance in terms of "formula" or "discretion" only. In South Africa we have seen that the approach is broadly discretionary and requires a subjective look at each individual's case. However, even the South African approach has a formula which can be stated as follows:

$$\text{Maintenance}_{\text{Non-custodian}} = \text{Needs of children} \times \text{Available Means}_{\text{Non-custodian}} / \text{Available Means}_{\text{Total Family}}$$

Of course, some adjustments must be made in that the needs of the children must not be allowed to exceed the available means of the total family, the obligations of the parents to other children must be deducted from their means and there must be an adjustment for time spent with the non-custodian parent. What makes the South African approach so uncertain is not the lack of a formula, but the fact that the figures you put into the formula are so subjective and particular to each individual circumstance.

The aim of this formula is, in fact, to create a unique maintenance order, tailored precisely to the needs of the family under consideration.

- ***The Objective Approach***

In the United States and Canada an attempt has been made to take the above formula (or a similar one) and analyse all the different factors and relate them to income so as to reduce lifestyle to a dollar figure. Effectively the idea is to remove the uncertainty from the formula by applying objective (or research-based) averages instead of attempting to cater to each individual's subjective circumstances. Nevertheless, the formula does not completely exclude subjectivity because it still requires discretion to be exercised in deciding when to deviate from the formula and, as noted earlier, there may be room for the re-introduction of a discretionary approach at high income levels. However, it is important to note that the intention behind this type of formula is to replace the subjective reality of the South African approach with a justifiable objective average reality so as to reduce uncertainty.

The aim of this type of formula is to create a generic maintenance order which reflects a norm or average which is statistically associated with the income level of the family under consideration.

- ***The Policy Approach***

In the United Kingdom and Scandinavia the approach is entirely different. There is no attempt to convert the reality of the needs of the children into a monetary value for which the parents are responsible. Instead, maintenance is approached in much the same way as a tax or levy and is related only to the income of the non-custodian parent. There is no attempt to find out what the child needs or what the custodian parent can afford and there is no attempt to replace those unknowns with a realistic figure. The maintenance formula is policy-based, rather than reality-based. However, even here, there is some discretion applied in certain situations (for example, when an application is made for a top-up from high income parents).

The aim of this type of formula is to create a generic maintenance order which is a reflection of the policies of the state in terms of welfare and/or parental responsibility.

The Australian model would appear to have aspects of both the United States model and the United Kingdom model. There is an attempt to take account of all the factors when it comes to accounting for the family income, but the percentage multiplier at the end of the process would appear to be more policy driven than an attempt to estimate the intersection of need and means.

Similarly, the formulae used in New Zealand and Canada, which ignore the custodian parent's income, seem more policy driven – though Canada's stepped approach could be seen either as an attempt to import some objective reality or as a more sophisticated policy aimed at achieving a "fairer" distribution of income.

4.4.2 Inputs

The nature of the inputs required by an approach or formula is an important characteristic of the formula. In the South African situation, the needs of the child have to be assessed and a subjective decision must be made as to exactly what those needs are and what would constitute luxury. The inputs are incredibly complex in that they include all the family expenses and there is no line of definition to say what is legitimate expense and what is not.

In the Michigan State approach, the needs of the child are tied to the income of the family by means of the statistical analysis which underpins the tables used for the Michigan State approach. In other words, the inputs are simpler because the tables interpret the information according to known averages, rather than leaving the presiding officer to make a subjective assessment of the needs of the child. The result may not be as tailor-made for the child, but it is certainly arrived at a lot more quickly and cheaply.

In the United Kingdom the inputs are even simpler because there is no attempt to interpret them in a way that ties them to the needs of the child.

It should be noticed that every model requires some inputs and without those inputs it is useless. Even in the United Kingdom the income of the non-custodian parent is required to calculate maintenance.

4.4.3 Outputs

The nature of the inputs and the formula determines the nature of the outputs. The nature of the outputs in the South African model is that they should be related to the particular situation that the particular child and its parents are in. However, due to the complexity of the issues and the possibility of critical information not being placed before the court and due to the subjective nature of the assessment, it may be impossible for the presiding officer to know exactly how well or how badly they fit the situation.

The nature of the outputs in a Michigan State model is that they are an average related to the relatively simple inputs entered in the formula. They may not fit perfectly, but they are an approximate fit. They are an attempt to meet the assessed needs of the child. There is an important advantage to the Michigan model with regard to outputs. In the South African model the presiding officer is required to decide what the legitimate needs of the child are (in other words, the child's needs are an input). In the Michigan model the income level of the parties converts to a dollar amount and then the parents are allowed to decide what the child's needs are within the confines of that dollar amount – so the assessment of needs is an output with a dollar value, rather than an input that is very difficult to ascertain!

The nature of the United Kingdom outputs is simply that they are a policy-determined payment that may be an extremely poor fit for the circumstances.

4.4.4 Deviation & Discretion

As has been demonstrated, even the strictest formulae allow for deviation (and therefore the application of discretion) in specific circumstances. However, it should be noted that deviation is more commonly a feature of needs-based formulae (either subjective or objective formulae), rather than policy-driven formulae.

It is important, for example, that the Michigan model allow for deviations because it is attempting to provide a reasonable fit for the circumstances of the child and it may be that the child's circumstances are so different as to require a different approach – which is why there is a long list of circumstances where deviation is allowed. That is the only way that special needs children, for example, can be catered for.

However, in the United Kingdom approach, since there is no attempt to relate the maintenance to the need and the amount paid is policy-based, there is far less of an attempt to allow for deviation or the exercise of discretion. However, in the United Kingdom creating a perfect or even reasonable fit for each case is not so important because there are state grants available (especially for the special needs child) and therefore it is not necessary to deviate from the formula.

It is important to note that in the Michigan formula discretion is associated with a deviation from the norm, whereas in the South African situation discretion must be exercised in every case in order to decide what needs and expenses are legitimate and what the standard of living of the parties ought to be, and so on. In the Michigan model discretion is only exercised where there is something palpably different about the matter which requires it to be dealt with differently.

This raises the question whether it is better to have a formula where the exercise of discretion is restricted but used in a manifestly fair and just manner, as in the Michigan model or whether it is better to have a formula where the exercise of discretion is unrestricted and indeed so pervasive as to be willy-nilly and nobody can tell whether or not it was exercised in a fair and just manner.

The question also arises whether or not judicial discretion in maintenance matters involving poor families is too expensive a luxury to indulge in.

However, as becomes apparent from the discussion above, there is some sense in leaving decisions relating to high earners to the discretion of the presiding officer for two reasons:

1. The highest income bracket specified in any formula will always be open-ended and therefore likely to generate odd decisions; and
2. Those in the highest income bracket can afford to pay for the luxury of judicial discretion.

4.5 Choosing the Decision-Maker

The various examples displayed above demonstrate three different types of fora for maintenance determination, which are as follows:

1. A court. This is the position in South Africa – all maintenance applications are dealt with in the Magistrate's Court.

2. A civil service office. This is the position in the United Kingdom, where maintenance is dealt with by the Child Support Agency.
3. A mixture of the two. This is the position in Australia, New Zealand and Canada, where a government agency deals with maintenance and those matters which cannot be resolved go to court.

Clearly a subjective model such as the one found in South Africa can only properly be resolved in a court because the complex decisions which have to be made leave plenty of room for uncertainty. In contrast, a simple, policy-based model can be dealt with in any of the above fora and is probably best situated in a civil service office as it leaves very little room for a legal challenge. A simple objective model could also be dealt with in any of the above fora – but a more complex one would be more likely to require court intervention and should therefore be situated either in a court or in an agency that has easy access to court.

5 A Suitable Model for South Africa

Having analysed the different approaches to maintenance, it remains only to apply these approaches to the South African situation in order to determine problem areas, recognise advantages and, hopefully, find ways of improving delivery of maintenance to South African children.

5.1 Codifying the Current Principles

The easiest way to proceed would be to simply legislate the current principles (i.e. to do exactly what the current Maintenance Act has avoided doing.⁸² However, it is submitted that this approach would serve no purpose other than to create an appearance of doing something about the problem for the following reasons:

1. The principles themselves are subjective in that they attempt to take into account the subjective circumstances of each family. This attempt to create a tailor-made maintenance order is expensive, time-consuming and too complex to be properly applied in maintenance courts (especially maintenance courts as poorly resourced as those in South Africa);
2. The application of the principles is subjective in that it will always be influenced by the background, experience and world view of the presiding officer (and of the Maintenance Officer in the informal mediation process);
3. Codifying the principles might be of limited assistance if the principles were not well known but this is not the case – the principles are well known but are often not applied or misapplied anyway;
4. Codifying the principles would only be of assistance if the codification also set out how the principles interact with one another and what weight should be given to different principles in different circumstances. It is submitted that it would be impossible to do this without actually creating a formula;

⁸² Act 99 of 1998, s.15(1); see also 2.1 above.

5. The principles require further development. This means that the codification would either have to fully develop the principles to cover every area in which there is currently a lack of clarity (probably an impossible task) or it would have to allow the courts to continue to develop the principles, in which case the codification is an exercise in futility as it will not reflect such further common law developments;
6. Codifying the principles would not deal with the most pressing problems currently facing maintenance courts, namely:⁸³
 - 6.1. failure to get the non-custodian parent to court;
 - 6.2. a lack of quality information (and often a lack of any type of information); and
 - 6.3. an inability to enforce maintenance orders.

Codifying the principles is therefore unlikely, by itself, to improve significantly the effectiveness of maintenance courts.

5.2 Problems in Applying Formula-Based Approaches in South Africa

Although the maintenance court problems identified in this paper seem to point to a need for certainty and simplification, applying a formula-based approach in South Africa is not without problems.

5.2.1 Applying the Michigan State Approach

The Michigan State approach is attractive from a South African perspective for the following reasons:

1. The formula takes account of all the different factors that the South African approach accounts for except for assets – and, as noted earlier, in practice the South African approach takes little account of assets;
2. The formula is objective in that it does not attempt to deal with the subjective circumstances of every individual case and in that it is applied in an objective manner using objective inputs to obtain an objective output;
3. The number of inputs into the formula is relatively small and therefore proceedings would be greatly simplified and there would be less room for dispute, which would shorten proceedings and reduce the number of matters going to trial, thus reducing the burden on courts;
4. The application of the formula to each individual case would be a relatively inexpensive process;
5. There is provision for deviation from the model where it is clearly required.

However, the following problems and doubts can be identified in the application of this approach in South Africa:

⁸³ Barberton *et al*, *op cit*, Chapter 5.

1. Although the formula itself is not complicated, the tables which it uses are derived using a complex economic model which is based on detailed economic data relating to household expenditure. In South Africa such detailed data does not exist. Therefore implementation of this type of formula requires both an extensive, and expensive survey on which the economic model can be based;
2. Having regard to the extremely skewed distribution of wealth in South Africa and the likelihood of extreme variations in expenditure patterns between rural and urban communities, for example, it may be impossible to create one model for the whole country. This would further complicate the collection of data capable of supporting multiple models;
3. In Michigan the data is more than 30 years old and the model is more than 20 years old. This lack of updates (apart from accounting for inflation) is a function of both the expense and time required to gather data and develop a new model. In Michigan's relatively stable social, economic and political environment the age of the data and model are not so important. However, in South Africa, where the social, economic and political environment are in a state of flux and where both the government and the constitution of the land aim to bring about radical adjustments, new data and new models are likely to be required much more frequently. This represents a problem on two fronts: firstly, it would be expensive; secondly, by the time new data is collected and a new model is developed, both the data and the model could be significantly out of date;
4. The economic model on which Michigan State's formula and table are based only reflects people's actual spending patterns and does not make any correction for inappropriate spending behaviour. It is questionable whether the spending patterns of the South African public (especially at both extremes of the range of incomes) are appropriate – or that they reflect the priority given to children in the Constitution. For example, is it appropriate that people who live in a shack spend money on television and hi-fi sets when they do not have sufficient funds to feed and clothe their children? It would seem therefore that such an economic model could be undesirable on policy and/or constitutional grounds;
5. This model would be as ineffective as the current South African discretionary approach in the face of a lack of information. As pointed out earlier, maintenance courts often make decisions based on entirely inadequate information – including a lack of proper information on a person's salary. This is a function both of South Africa's relatively large informal economy and of the inadequacies of the maintenance court itself. This severely limits the impact of the formula on both proceedings (there will still have to be far too many financial enquiries) and on outcomes (without proper information, the order will be flawed no matter what process is used).

5.2.2 Applying the United Kingdom Approach

The United Kingdom approach is a very tempting approach to take for the following reasons:

1. It is extremely simple;
2. In general, it reduces the inputs required to just two – the non-custodian parent's income and the time the children spend with the non-custodian parent;

3. It does not require complex modelling, but only a policy decision on how much non-custodian parents should pay at different salary levels;
4. It allows for a discretionary “top-up” in high income cases.

However, this approach has limited applicability in South Africa since:

1. It is only really suitable when placed against the background of a social welfare system, which allows the income of the custodian parent to be ignored without the child’s needs being severely prejudiced. In South Africa it is important to take account of the income of all parties because the social welfare system is not nearly so well developed;
2. Although this model could work on the basis of one piece of information (the non-custodian parent’s income), it is that critical piece of information which South African maintenance courts so often lack. Once again, the system is prejudiced by the informal nature of the employment of so many South Africans, together with the inadequacies of the maintenance court’s structure and procedure when faced with the need to extract such information.

5.3 Developing a South African Formula

It is submitted that:

1. The fact that the problems of the South African maintenance courts will not **all** be solved by a formula approach to maintenance is not by itself a reason to discard the formula approach. It would be extremely negative and unhelpful to approach the problem on the basis that the other problems of the maintenance system will never be addressed. Therefore, speaking on the premise that steps are being taken and will continue to be taken to cure the other ills of the system, a formula approach should be implemented, as – if appropriately specified - it would represent a significant improvement to the current subjective approach to determining maintenance;
2. From the preceding analysis, a formula approach is desirable in South Africa for application to cases involving lower and middle income parents in that it should reduce uncertainty and thus also reduce the length and cost of proceedings, the pressure on court rolls and it should improve the quality of maintenance orders;
3. Having regard to the levels of poverty in South Africa and the lack of a fully developed welfare system, any formula implemented must take account of both the needs of the child as well as the income of the entire family – it will not be sufficient to link maintenance to the income of a non-custodian parent only;
4. The gathering of extensive data and the production of a detailed economic model, with continuous updates are inappropriate to the South African situation in its continuing state of flux;
5. It is desirable that the number of inputs required to determine maintenance be reduced to not more than income, number of children and parenting time per year;

6. It is desirable that the measure of inputs required to determine maintenance be objectively defined in Rand terms, number of children or number of days, rather than being subjectively defined in terms of intangibles such as “standard of living”;
7. Again, having regard to the lack of a fully developed welfare system in South Africa, it is important that deviations from a formula be allowed but that:
 - 7.1. they only be allowed where the circumstances obviously require them;
 - 7.2. that they be allowed only to the extent to which they are required; and
 - 7.3. the reason for and extent of any deviation be specifically set out in the maintenance order.
8. It is desirable that a discretionary approach remain available at the highest income levels where a discretionary approach is affordable, can operate effectively and is desirable in order to overcome the difficulties experienced with open-ended income brackets. However, such discretionary orders should not be allowed to reduce the child’s total maintenance level below that required at the highest income bracket associated with the formula.
9. It is desirable that even non-custodian parents living below the poverty line be required to make some contribution to the maintenance of their children – especially where the custodian parents also live below the poverty line.

The above submissions would suggest a formula approach along the following lines:

1. The approach must consist of three parts:
 - 1.1. a table which relates a level of income to a level of maintenance;
 - 1.2. a formula which divides that required maintenance between the parents according to their share of net family income; and
 - 1.3. deviations and exceptions;
2. The table should be a mixture of the United Kingdom approach and the Michigan State approach as follows:
 - 2.1. Like the Michigan State approach, it should apply different maintenance rates to different income brackets;
 - 2.2. Like the Michigan State approach, the income assessed should be the family income, rather than just the income of the non-custodian parent;
 - 2.3. Like the United Kingdom approach, the maintenance rates should be based on policy, rather than on an economic model supported by survey data;
 - 2.4. Like both approaches, it should take account of the number of children to be supported by the assessed income.
3. The formula should be a Michigan State style of formula in the following respects:

- 3.1. It should take account of the income of the whole family;
 - 3.2. It should take the maintenance figure required by the table and apportion the responsibility for maintenance between the parents according to their means;
 - 3.3. It should take account of time the children spend with the non-custodian parent – if this time is readily ascertainable and forms a significant proportion of any given year;
 - 3.4. It should deal separately with medical expenses and child care costs;
 - 3.5. It should allow for deviations from the formula where these are obviously required;
 - 3.6. It should apply only to lower and middle income levels;
 - 3.7. Even people living below the poverty line should make some token payment of maintenance;
4. The deviations should follow the Michigan State example and the exceptions the United Kingdom example in the following respects:
 - 4.1. Where the formula requires adjustment in order to avoid a patent injustice, deviations should be permitted to the extent necessary provided that the court order reflects the extent of the deviation and the reason for it;
 - 4.2. A discretionary approach should be adopted for the top income bracket, subject to the requirement that the total maintenance obligations to the child should not be reduced below the level required by the application of the tables and formula to the lowest level of income in that bracket.

5.4 Deciding On a Forum

In view of the fact that the model described above is principally a policy-driven one, it may be tempting to suggest that the civil portion of the maintenance determination process should be taken out of the court room and moved into a civil servant's office. This is especially attractive when one considers the staff, courts, prosecutors and Magistrates this could free up. However, such an approach would not fit the current reality in South Africa. In view of the difficulties in bringing non-custodian parents before court and the even greater difficulties in obtaining reliable information regarding the financial circumstances of parents, it seems certain that a fully functional maintenance court with Maintenance Officer and Maintenance Investigator (as envisaged by the Maintenance Act⁸⁴) will be required for some time yet in order to provide a means of extracting the information required to make a maintenance decision.

This would seem to militate against moving maintenance matters out of the courts.

⁸⁴ Act 99 of 1998.

6 Conclusion – A More Holistic Approach

While in search of improvements to the South African model of maintenance determination, it is impossible to ignore a number of other challenges, the most obvious of which are:

1. the other existing weaknesses in maintenance courts; and
2. the state's co-existing constitutional responsibility to ensure the fulfilment of children's rights.

6.1 Fix the Courts

In any analysis of the system of maintenance in South Africa, the real issue at stake is getting funds to needy children. However, it is apparent from the analysis of the South African maintenance approach in practice⁸⁵ that many of the stumbling blocks to a full-functioning system of maintenance have nothing to do with the theory of determination of maintenance. It seems clear that until the following issues are addressed, an efficient and effective maintenance court will be a pipe-dream, no matter what model of maintenance determination is followed:

1. The poor qualifications of many Maintenance Officers in terms of legal knowledge, ability to present matters in court and ability to give instructions to Maintenance Investigators;
2. The lack of sufficient Maintenance Investigators;
3. The failure to implement all areas of a Maintenance Investigator's function as defined in the Act;
4. The lack of training of the greater part of maintenance court staff;
5. The failure of the current system to locate and bring non-custodian parents to court;
6. The lack of quality information provided to the court in order to make a decision; and
7. The failure of the criminal courts to provide a means of ensuring compliance with maintenance orders.

Clearly, no matter what formula or decision-making tools are used by presiding officers:

1. the tools cannot be used where the system fails to bring a party before the court;
2. a maintenance order which is granted without proper evidence of what the parties earn is going to be seriously deficient; and
3. a maintenance order which cannot be enforced is worthless.

⁸⁵ Chapter 3 above.

Essentially, until the problems of maintenance of court are addressed holistically rather than on an ad hoc basis, the court will remain ineffective. It is imperative that a master plan be developed so that each aspect of the problems can be dealt with in a reasoned manner and with due regard to the plans intended to meet the other problems.

Perhaps some different thinking is required. May be community courts could play a maintenance role having regard to the fact that they are more likely to be able to perform the following:

1. to secure the attendance of the non-custodian parent;
2. to ascertain how the parties make a living;
3. to implement inventive ways in which the non-custodian parent can fulfil his obligations to maintain his or her children;
4. to bring community pressure to bear upon both parents to fulfil their obligations.

6.2 The State's Obligations

The current approach to maintenance only deals with the obligations of the parents and completely ignores the obligations of the state. However, it has been submitted already in this paper that government has obligations to ensure that the basic needs of children are met if:⁸⁶

1. they are orphans or abandoned;
2. their parents are unable to provide for their constitutionally guaranteed rights; or
3. their parents fail to meet their obligations.

In the first two instances the obligation is an obligation to provide the child with the missing guaranteed rights as defined in the Constitution. In the last instance the obligation is to provide properly functioning mechanisms to protect the children's rights and to ensure that parents do indeed meet their obligations.

In at least some of these obligations the state is failing dismally and this exacerbates the parlous situation in which children, and especially poor children, find themselves. However, although South Africa does not have the sort of welfare system that is available in Scandinavian countries, the United Kingdom or New Zealand, it does have a number of measures to alleviate the situation of the poorest children. The problem is that, unlike in the Scandinavian countries, the welfare system South Africa does have does not link up in any way with the maintenance process. In this regard:

1. a Maintenance Magistrate could be empowered to order a child care grant for a child or, at the very least, to order the guardian apply for a child support grant and that the Department of Social Development assist the guardian to do so;

⁸⁶ See Chapter 1.2 above.

2. a Maintenance Magistrate could be empowered to order that a child be declared exempt from school fees, subject to a process of review. In this regard, many parents are not clear about their rights to not pay school fees and do not know how to respond when schools insist that they pay fees.

In ways like these it should be possible for maintenance courts to ensure that even if a child's needs are not fully met by the parents, that the state performs its obligations

6.3 Conclusion

Having regard to all the problems which beset maintenance courts and to the necessity to provide a system that is workable, affordable and fair, a formula-based approach to determination of maintenance is not only feasible in South Africa, but desirable in order to reduce the subjectivity and uncertainty in decisions. On that premise, it would also be desirable for the South African Law Reform Commission Committee on Maintenance to reconvene in order to consider the issue. However, without reform of the court structure and systems administering maintenance in South Africa, altering the approach to determination of maintenance is likely to have only limited impact on the real problem of securing maintenance for children.

Annexure A: Selection of Child Support Formulae and Tables Applied in Michigan State, USA

General Care Support Tables:⁸⁷

General Care Support Table: One Child						
Monthly Family Net Income	Percentage Allocated	Base Support	+	Marginal Percentage	over	Income Level
\$1,013	25.5%	\$258.32	+	24.17%	over	\$1,013
\$1,627	25.0%	\$406.75	+	17.49%	over	\$1,627
\$2,218	23.0%	\$510.04	+	16.66%	over	\$2,218
\$2,847	21.6%	\$614.95	+	14.64%	over	\$2,847
\$3,697	20.0%	\$739.40	+	13.92%	over	\$3,697
\$5,250	18.2%	\$955.50	+	12.37%	over	\$5,250
\$6,470	17.1%	\$1,106.37	+	11.23%	over	\$6,470
\$8,133	15.9%	\$1,293.15	+	10.00%	over	\$8,133

General Care Support Table: Two Children						
Monthly Family Net Income	Percentage Allocated	Base Support	+	Marginal Percentage	over	Income Level
\$1,013	39.4%	\$399.12	+	36.22%	over	\$1,013
\$1,627	38.2%	\$621.51	+	26.19%	over	\$1,627
\$2,218	35.0%	\$776.30	+	23.69%	over	\$2,218
\$2,847	32.5%	\$925.28	+	22.50%	over	\$2,847
\$3,697	30.2%	\$1,116.49	+	21.75%	over	\$3,697
\$5,250	27.7%	\$1,454.25	+	20.28%	over	\$5,250
\$6,470	26.3%	\$1,701.61	+	17.01%	over	\$6,470
\$8,133	24.4%	\$1,981.45	+	15.00%	over	\$8,133

⁸⁷ 2004 Michigan Child Support Formula Manual op cit, para. 3.01.

General Care Support Table: Three Children						
Monthly Family Net Income	Percentage Allocated	Base Support	+	Marginal Percentage	over	Income Level
\$1,013	49.4%	\$500.42	+	47.28%	over	\$1,013
\$1,627	48.6%	\$790.72	+	35.09%	over	\$1,627
\$2,218	45.0%	\$998.10	+	30.52%	over	\$2,218
\$2,847	41.8%	\$1,190.05	+	28.75%	over	\$2,847
\$3,697	38.8%	\$1,434.44	+	27.98%	over	\$3,697
\$5,250	35.6%	\$1,869.00	+	23.40%	over	\$5,250
\$6,470	33.3%	\$2,154.51	+	19.61%	over	\$6,470
\$8,133	30.5%	\$2,480.57	+	19.00%	over	\$8,133

General Care Support Table: Four Children						
Monthly Family Net Income	Percentage Allocated	Base Support	+	Marginal Percentage	over	Income Level
\$1,013	55.6%	\$563.23	+	52.68%	over	\$1,013
\$1,627	54.5%	\$886.72	+	39.86%	over	\$1,627
\$2,218	50.6%	\$1,122.31	+	34.31%	over	\$2,218
\$2,847	47.0%	\$1,338.09	+	33.08%	over	\$2,847
\$3,697	43.8%	\$1,619.29	+	31.97%	over	\$3,697
\$5,250	40.3%	\$2,115.75	+	24.92%	over	\$5,250
\$6,470	37.4%	\$2,419.78	+	23.22%	over	\$6,470
\$8,133	34.5%	\$2,805.89	+	22.00%	over	\$8,133

General Care Support Table: Five or More Children						
Monthly Family Net	Percentage	Base	+	Marginal	over	Income

Income	Allocated	Support		Percentage		Level
\$1,013	60.8%	\$615.90	+	52.68%	over	\$1,013
\$1,627	59.5%	\$968.07	+	39.86%	over	\$1,627
\$2,218	55.0%	\$1,219.90	+	34.31%	over	\$2,218
\$2,847	51.2%	\$1,457.66	+	33.08%	over	\$2,847
\$3,697	48.0%	\$1,774.56	+	31.97%	over	\$3,697
\$5,250	44.4%	\$2,331.00	+	24.92%	over	\$5,250
\$6,470	40.7%	\$2,633.29	+	23.22%	over	\$6,470
\$8,133	37.3%	\$3,033.61	+	22.00%	over	\$8,133

General Care Support Formula:⁸⁸

The non-custodian parent’s general care support obligation calculation formula is:

$$\{A + [B \times (C - D)]\} \times (E / C) = G$$

Note: if E > P and C < I then support is calculated (C x J)/(E/C) = G

For the purposes of this formula:

- A = Base support for Family Income (General Care Support table, column 3)
- B = Marginal Percentage (General Care Support table, column 4)
- C = Actual Total Net Family Income (add net incomes of parties, rounded to nearest whole dollar)
- D = Income Level (General Care Support table, last column)
- E = Non-custodian Parent Allowable Net Income (round to nearest whole dollar)
- G = Non-custodian Base Support – using table calculation (round to nearest whole dollar)
- P = Poverty Level Income⁸⁹
- I = Table Family Income Amount lowest level
- J = Percentage Allocated (General Care Support table, column 2)

⁸⁸ Ibid., para. 3.01(A).

⁸⁹ Ibid., para. 3.02(A).

Example: Using General Care Support Formula, calculate the base support amount for the five children in this family:

Step 1: Calculate monthly family net income.
 Noncustodial parent earns \$2,200 net per month.
 Custodial parent earns \$1,600 net per month.
 Add the parents' net incomes to determine the total net family income:

$$\$2,200 + \$1,600 = \$3,800$$

Step 2: Calculate noncustodial parent's share of the base support obligation.

$$\begin{aligned} &\{ \$1,774.56 + [35.83\% \times (\$3,800 - \$3,697)] \} \times (\$2,200 \div \$3,800) = G \\ &\{ \$1,774.56 + [.3583 \times (\$103)] \} \times (.5789) = G \\ &\{ \$1,774.56 + [\$36.90] \} \times (.5789) = G \\ &\{ 1,822.46 \} \times (.5789) = \$1,049 \text{ Base Support per month.} \end{aligned}$$

Poverty Level Income Calculation:⁹⁰

For non-custodian parents whose income is less than the officially defined poverty level, the following formula is used to calculate their general care support obligation:

$$E \times K = L \quad (\text{provided } L \text{ is not less than } \$25)$$

For the purposes of this formula:
 E = Non-custodian Parent Net Income of poverty level or less (round to nearest whole dollar)
 K = Percentage Adjustment from Poverty Level Income Percentage Adjustment Table based on Custodial Parent Income
 L = Non-custodian Parent Monthly Base Support Amount (round to nearest whole dollar amount)

Poverty Level Income Percentage Adjustment Table:⁹¹

Poverty Level Income Percentage Adjustment Table			
Custodial Net Income	% Adjust	Custodial Net Income	% Adjust
\$0 - \$776	10%	\$2,250 - \$2,699	5%
\$777 - \$899	9%	\$2,700 - \$3,149	4%
\$900 - \$1,349	8%	\$3,150 - \$3,599	3%
\$1,350 - \$1,799	7%	\$3,600 - \$4,049	2%
\$1,800 - \$2,249	6%	\$4,050 or more	1%

Example: Using the noncustodial parent poverty level income calculation, figure the total monthly base support amount for three children in this family.

⁹⁰ Ibid., para. 3.02

⁹¹ Ibid., para. 3.02(C).

Step 1: Calculate monthly net incomes.

Noncustodial parent earns \$600 net per month.

Custodial parent earns \$1400 net per month.

Step 2: Calculate the monthly base support amount using the poverty level income calculation.

$(\$600 \times 7\% \text{ (or } \$25 \text{ whichever is more)}) = L$

$\$42.00 = L$

Low Level Income Calculation:⁹²

For non-custodian parents whose income is low, but exceeds the officially defined poverty level, the following formula is used to calculate their general care support obligation:

$(P \times K) \text{ (or } \$25, \text{ whichever is more)} + (E - P) = M$

if $M < G$ then $M = L$

if $M > G$ then $G = L$

For the purposes of this formula:

P = Poverty Level Income

K = Percentage from the Poverty Level Income Percentage Adjustment Table

E = Noncustodial Parent Net Income (round to nearest whole dollar)

M = Noncustodial Support-using Low Income Adjustment calculation

G = Noncustodial Support-using General Care Support Formula

L = Base Support Amount (round to nearest whole dollar amount)

Example: Using the noncustodial parent low income calculation, figure the base support amount for four children in this family.

Step 1: Calculate net monthly incomes.

Noncustodial parent earns \$950 net per month.

Custodial parent earns \$1,300 net per month.

Step 2: Calculate the total monthly support amount

$[\$776 \times 8\% \text{ (or } \$25)] + (950 - 776) = M$

$[\$62.08] + (\$174) = M$

$\$236 = M$

Step 3: The base support amount is the lesser of the results from the low income calculation formula and from the General Care Support calculation formula:

$M = \$236$

$G = \$478 = \{ \$1,122.31 + [34.31\% \times (\$2,250 - \$2,218)] \} \times (\$950 \div \$2,250)$

Therefore, the base support amount for this example is \$236.

Adjusting Percentages for Other Minor Children:⁹³

⁹² Ibid., para. 3.02(D)

⁹³ Ibid., para. 2.15.

Other Minor Children
Percentages Applied to Net Income

Number of Children	Adjustment Percentage
1	89.6%
2	84.1%
3	79.8%
4	77.3%
5 or more	75.2%

Where there are other children, the net income of the family is multiplied by the appropriate percentage above in order to calculate the amount to be used for calculating child support.

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