REPORTABLE

CASE NO.: (P) I 2684/2005

CHRISTINE MAIN N.O *versus* **GIDEON FREDERIC JOHANNES VAN TONDER N.O. AND ANOTHER**

DAMASEB, JP

2005.11.09

CASE STATED I.T.O RULE 31:

Conflicts of law & claim for maintenance against a deceased estate by a major child resident in Germany

- Conflicts of Law rule in respect of a claim for maintenance: domiciliary Law of claimant
- *Lex fori* determines domicile of Claimant for maintenance.
- There being a presumption against change of domicile, the party alleging that it has changed bears the *onus* of proving that it did on a preponderance of probabilities.
- The law recognises a claim for maintenance in favour of an indigent major child against the estate of the deceased parent.

REPORTABLE

CASE NO. (P) I 2684/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CHRISTINE MAIN N.O **PLAINTIFF**

and

GIDEON FREDERIC JOHANNES VAN TONDER N.O **1ST DEFENDANT**

MASTER OF THE HIGH COURT **2ND DEFENDANT**

CORAM: **DAMASEB, JP**

Heard on: 2005.10.31

Delivered on: 2005.11.09

JUDGMENT

DAMASEB, JP: [1] This case involves a claim for maintenance on behalf of a mentally disabled adult female without legal capacity, against the estate of her deceased father. The plaintiff is the *curator bonis* and *litis* of the adult female (Sylvia Wirtz, resident in a mental institution in Germany.) The claim

is against the first defendant (in his representative capacity) as executor of the estate of the late Hans Heinrich Wilhelm Wirtz (the deceased).

[2] A claim for maintenance was lodged against the estate of the deceased for and on behalf of Sylvia, but was not admitted by the executor. A Combined Summons was then issued in the High Court to enforce the claim for maintenance. The pleadings having closed and the matter being ripe for trial, the parties agreed to state a case to this Court in terms of Rule 33(1) and (2) of the Rules of Court. It is that stated case that this Court is now called upon to decide. The estate of the deceased is registered with the second defendant under Master's reference number 855/ 2001. The issue of jurisdiction does not arise and the matter proceeded on the basis that the Court has jurisdiction.

[3] I propose, at the outset, to set out the stated case in full. It reads as follows:

"IN ACCORDANCE WITH AN AGREEMENT THE PLAINTIFF AND FIRST DEFENDANT HEREBY RECORD THEIR WRITTEN STATEMENT OF FACTS AND QUESTIONS OF LAW IN THE FORM OF A SPECIAL CASE FOR THE ADJUDICATION BY THE ABOVE HONOURABLE COURT AS FOLLOWS:

A: THE QUESTIONS OF LAW

1. What law governs the claim for maintenance instituted by the Plaintiff, namely?

a) the *lex situs* of the estate of the late Hans Heinrich Wilhelm Wirtz, or

b) the l*ex fori* of the Plaintiff's claim; or

c) the *lex loci domicilii* of "the deceased" as at 30 March 1951; or

d) the *lex loci domicilii* of "the deceased" at the time of his death on 2 October 2001;

e) the l*ex loci domicilii* of Silvia Therese Wirtz at the time of the death of the deceased?

2. In the event of the court finding that the l*ex loci domicilii* of Silvia Therese Wirtz is the determining factor, the Court must determine her *lex domicilii.*

3. Should the Court find that the Namibian law is the applicable law the court is to determine whether or not a claim of maintenance lies against the estate of the deceased?

B. THE FACTS AGREED UPON

4. During his lifetime the late Hans Heinrich Wilhelm Wirtz, hereinafter referred to as "the deceased", was domiciled in Namibia.

5. On the 2nd of October 2001, the date of his death, "the deceased" was domiciled in Namibia.

6. "The deceased" was the natural father of the said Silvia Therese Wirtz.

7. The natural mother of the said Silvia Therese Wirtz had predeceased the late Hans Heinrich Wilhelm Wirtz.

8. Silvia Therese Wirtz was a legitimate child of "the deceased".

9. The said Silvia Therese Wirtz was born on 30 March 1951 in Namibia, and is a South African citizen.

10. The said Silvia Therese Wirtz has been mentally disabled since early childhood. Since then Silvia had no legal capacity to act and as such she has since then never been able to maintain herself.

11. The said Silvia Therese Wirtz was transferred to Germany by her grandmother during June 1957, when she was placed in the custody of "Haus Höri", a house for specially disabled persons in Gaienhofen, Germany. The deceased acquiesced in this decision and course of action.

12. The said Silvia Therese Wirtz was subsequently transferred to "Am Bruckwald" institution in Waldkirch, Germany, during or about 1993.

13. The said Silvia Therese Wirtz has been residing in the aforesaid institution since.

14. The "the deceased", during his lifetime, was liable and could be compelled to maintain the said Silvia Therese Wirtz.

15. "The deceased" maintained the said Silvia Therese Wirtz for a limited period after the death of Silvia's grandmother.

16. "The deceased" stopped maintaining and paying for the expenses incurred by Silvia at the aforementioned institutions and at the time of his death paid no maintenance to her.

17. The said Silvia Therese Wirtz remained so mentally disabled on the 2nd October 2001 the date on which "the deceased" passed away.

18. The said Silvia Theresa Wirtz remains mentally disabled.

19. Apart form the deceased, who as the natural father of Sllvia Therese Wirtz was her guardian, no guardian was at any stage appointment for Silvia Therese Wirtz.

20. Ms Christine Main is duly appointed curator *bonis* and *litis* of Silvia Therese Wirtz by virtue of a judicial appointment of the Guardians Court, Waldkirch, Germany on the 22nd of January 2001 as per Annexure "A" and "A1" hereto."

[4] The order of Curatorship granted by the German Court on 22 January 2001to the plaintiff in her capacity as *curatrix* of Sylvia Wirtz, in relevant part, reads as follows:

> "**The functions in the said capacity comprise:**
> *Property administration;*
> *Giving consent to medical operations if and when these become necessary;*
> *The right to determine the place of residence;*
> *Representing the person so placed under curatorship in the application proceedings for naturalization.*
>
> *Within the scope of her functions, the Curatrix shall represent the person under curatorship in any matter in and out of Court".*

[5] The plaintiff is represented by Mr. Geier, while Mr. Coleman acts on behalf of the first defendant. I am indebted to both counsel for their submissions, both written and oral. The clarity of the submissions facilitated the speedy

preparation of the Court's judgment. That stands to the credit of both counsel.

[6] Mr. Coleman in his written heads of argument submits as follows:

> "3.5 Therefore, if this court finds that the applicable legal system is German, it is the end of the matter. Conversely, if the Court finds the applicable legal system is Namibian and it recognises maintenance claims, the matter proceeds to trial for the plaintiff to prove her case."

Mr. Coleman further submits (vide para. 4 of the heads of argument) that:

> 'It appears that it is contended on behalf of plaintiff that the lex domicilii of Sylvia Wirtz should be the applicable set of laws. This contention is accepted on behalf of defendant. In any event, it is submitted it is the state of the law.'

[7] Both counsel rely for this proposition on E Spiro, *Law of Parent and Child*, 4th edn, p506, where the following is said:

> 'Since the parents' duty to maintain their children is interlocked with their right and duty to care for their person, the conflict's rule should in both instances be the same, ie the domiciliary law of the child.' I agree.

The concession is properly made, and I do not find it necessary to deal in any further detail with this aspect of the matter. The result of this concession

disposes of the first question of law to be resolved: to the effect that the law which governs the claim for maintenance instituted by the plaintiff is the *lex loci domicilii* of Sylvia Therese Wirtz at the time of the death of the deceased. [8] What falls for decision now are questions 2 and 3 of the questions of law stated for the court's decision. I proceed to that task.

What then is Silvia's domicile?

[9] Although not incorporated in the stated case, it is clear from the contentions filed by and on behalf of the parties that they are *ad idem* that if I were to find that the domicile of Sylvia is German , the plaintiff's claim must fail as German law does not recognise a claim for maintenance against a deceased estate. I will, for present purposes, accept that to be the correct position in German law. The plaintiff contends that the *lex fori* (in casu being Namibian law) must determine Sylvia's domicile. That contention is not disputed by the defendant, and, again, properly so. (As to which See: E Spiro, op cit, p 484; LAWSA, vol. 2, and the authorities collected at footnote 9.)

[10] It is common cause that from early childhood to date of the filing of the maintenance claim in this Court, Sylvia always suffered from a mental disability. When Sylvia was born in Namibia on 30 March 1951, both her parents were domiciled in Namibia. Therefore, being legitimate issue, Sylvia acquired a domicile of origin of her father who was her guardian: See *Hull v McMaster and the SA Mortgage and Investment Co (1866) 5 S 220 225;*

Banubhai v Chief Immigration Officer Natal (1913) 34 NLR 251 264; Ex Parte Van Dam 1973 2 SA 182 (W) 182-183.

[11] It is common cause that Sylvia left Namibia for Germany with her grandmother during June 1957 (barely 5 years after she was born), with the full knowledge and acquiescence of the deceased. The agreed facts, although they say the mother of Sylvia predeceased the deceased, do not tell us when exactly she died. It is common cause, however, that no guardian had ever been appointed for Sylvia. I am satisfied that because Sylvia had at all material times suffered from a mental incapacity, and was, for that reason, unable to form the necessary *animus mamendi* to determine her own domicile, in law only her deceased father had the legal capacity and competence to change Sylvia's domicile. As the learned authors of LAWSA, op cit, at para 531 observe (a proposition of law with which I am in full agreement):

> "A person who is insane is incapable of acquiring a domicile while he is so afflicted; he retains the domicile he had when he became insane. An insane person who has a domicile of dependence, i.e. a wife or a child, will continue to follow the domicile of the person on whom she is dependent.''

[12] Mr. Coleman submits that the deceased indeed changed Sylvia's domicile and relies on the following factors in support of that proposition:

the deceased at the time of his death no longer maintained Sylvia and she was therefore not dependent on him (in fact he only maintained her for a limited period of time during his lifetime); the assumption of the role of *curatrix* by the plaintiff in respect of Sylvia coupled with the fact that Sylvia had no connection with the deceased, or Namibia, for over 48 years. Mr. Coleman then poses a rhetorical question:

> "In addition, Sylvia's grandmother took her to Germany in 1957 – with the acquiescence of her father. Was the choice to change domicile not exercised then?"

[13] The obvious question that leaps to one's mind in response to Mr. Coleman's rhetorical question is: exercised by whom? Sylvia could not have exercised that choice; nor could her grandmother have. As I have already pointed out above, only the deceased could have exercised the choice and, there being a presumption against change of domicile, the *onus* rested on the defendant who wished to displace that presumption, to establish such change on a preponderance of probabilities: See LAWSA, op cit, para 533 and the authorities collected at footnotes 1 & 2.

[14] It is generally accepted that residence is presumptive evidence of domicile but only if accompanied by the necessary *animus.* (More of this infra).

There are a host of reasons why the deceased may have chosen to send Sylvia to Germany with her grandmother: Convenience: as being a widower taking care of her himself may have stood in the way of a profession or trade; he may have wanted to remarry and did not wish Sylvia to be a burden on his wife; Sylvia would be better provided for by the German State than would otherwise be the case in Namibia, etc, etc. This is only conjecture of course (but reasonably possible conjecture at that). Any one or other of these possible explanations may have accounted for why the deceased chose to agree to Sylvia going to Germany in the first place and, in my view, demonstrate that the deceased's intention in acquiescing to Sylvia going to Germany may not necessarily have been in order to change her domicile.

[15] I come to the conclusion, therefore, that there is not sufficient evidential material before me to come to the conclusion that the deceased sent Sylvia to Germany with the *animus* of changing her domicile. With the greatest possible respect, the letter of curatorship of the German Court is limited in scope and effect, and I do not see anything in it which approximates a power to alter the domicile status of Sylvia. All it does is to give the power to the *curatrix* to change the residence of Sylvia. It is not even clear what "residence" is referred to: Is it residence in the sense of the institution where she is to be confined, or does it refer to residence of a country? If indeed it is the latter, which seems to be what Mr. Coleman is suggesting - (and I will accept that to be the case), why was it then done only in January of 2001?

The timing of it, in my view, strengthens the inference that until January 2001, the deceased still made decisions in respect of the 'residence' of Sylvia. That may very well not be so (and if the defendant chose to ventilate the issue through *viva voce* evidence such may indeed have proved otherwise) - but based on the material before me I am unable to come to a contrary conclusion. As regards Mr. Coleman's suggestion that the deceased was not maintaining Sylvia as at the date of his death, and that an adverse inference must be drawn therefrom against Namibian domicile; I have only this to say in agreement with Mr. Geier's contention in rebuttal during argument: the fact that a person under a legal obligation to maintain another person does not in fact maintain the person he should maintain, is no proof (a) that such maintenance is not needed, and (b) does not absolve the person under such obligation from such legal duty.

[16] The defendant bearing the *onus*, and having chosen to have the factual issue of domicile determined on a stated case basis (without *viva voce* evidence) to establish the *animus* of the deceased at the time of sending Sylvia to Germany, I am compelled to hold that he has failed to discharge the *onus* of proving, on balance of probabilities, that Sylvia's domicile was changed to that of Germany by the deceased at any time between when she went to Germany, and the death of the deceased. As regards the question whether Sylvia's domicile did not change from January 2001 onwards, I am compelled to conclude that the period between the assumption of

curatorship by the plaintiff and the death of the deceased is too short a period to come to the conclusion that the change in country -residence from Namibia to Germany, assuming that is the nature of the power given to the *curatrix* in terms of the letter of curatorship, is presumptive evidence of change of domicile. The reason for this is that residence, without more, does not prove *animus* (as to which see *Ochberg v Ochberg's Estate* 1941 CPD 15 39 ; *Baker v Baker* 1945 AD 708 715) ; but the longer the residence the greater its probative value in regard to the element of *animus* : Van *Straaten v Van Straaten* 1911 TPD 686 688 -689; *Cooke v Cooke* 1939 CPD 314 316; *Smith v Smith* 1952 4 SA 750 (O) 754.)

[17] The views I have expressed thus far must make it plain that I hold the view that, because of the death of the last surviving of the parents, the plaintiff as *curatrix* of Sylvia can and could, in the exercise of the power to change Sylvia's residence in terms of the letter of executorship, change Sylvia's domicile. The defendant bore the evidential burden, and the *onus*, of establishing that domicile had changed. I am not satisfied that he discharged the burden to the appropriate standard of proof.

[18] I wish to add (albeit in parenthesis only) that it appears that Roman – Dutch authorities (as to which see LAWSA, op cit, para 527 and the old authorities collected at footnote 2) recognised the possibility that a person could have more than one domicile. LAWSA *supra* suggests (para 528

footnote 11) that these old Roman-Dutch authorities have not been rejected in modern case law and, it would seem, probably still reflect the position at common law.

[19] I come to the conclusion that Sylvia was domiciled in Namibia on the date of the death of the deceased. That conclusion disposes of question 2 of the questions of law stated for my decision.

Is Sylvia entitled to claim maintenance from the deceased's estate?

[20] At common law a duty of support is terminated upon the death of the person on whom it rests, except that an indigent minor child (legitimate or illegitimate) can claim support from the estate of a deceased parent subject to proof of the need for support. (*Carlese v Estate De Vries* (1906) 23 SC 532.)

It was accepted by the highest Court in South Africa (the constitutional predecessor of the Supreme Court of Namibia) that extending the duty of support to the estate of a deceased parent in favour of an indigent minor child was predicated on a wrong interpretation by De Villiers CJ of Groenewegen's text, *De Legibus Abrogatis, ad Dig* 34 .1.15, in the seminal case of *Carlese v Estate De Vries supra.* The point is pertinently made in *Glazer v Glazer NO* 1963 (4) SA 694 (A) at 706 H – 707 C as follows:

> "In a number of cases, such as *Carlese v Estate de Vries,* (1906) 23 S.C. 532, *Davis' Tutor v Estate Davis.* 1925 W.L.D. 168. In re *Estate Visser,* 1948 (3) SA 1129(C), and *Christie, N.O v Estate Christie and Another,* 1956 (3) SA 659 (N), our Courts have held that a child is entitled to maintenance out of the estate of the deceased parent. LUDORF, J., pointed out in the Court below, and it is conceded by counsel for the applicant, that these cases are founded mainly on a mistaken reading of Groenewegen, De Leg. Abr., ad Dig. 34.1.15, who there deals with alimenta under contract or legacy and not with maintenance generally. (Cf. Prof. Beinart, supra, p. 96). I shall assume that, this error notwithstanding, these decisions have passed into settled law."

[21] In South Africa, the principle has been further extended to major children as long as they are in need of support. As was put in *Hoffman v Herdan NO and Anor* 1982 (2) SA 274(T) at 275 H-276 A:

> "In my view, the rule stated in Carlese's case, albeit based upon the mistaken reading of Groenewegen, does not exclude major children.''

(See also: *Ex parte Jacobs* 1982 (2) SA 276 (O) at 278 E-F; *B v B and Anor* 1997 (4) SA 1018 (SECL) at 1020 G-H.) This extension, represented in such cases as *Hoffman*, Mr. Coleman submits, is not part of Namibian law and this Court should not embed it into our law.

[22] To the extent that in *Glazer, supra,* the Appellate Division (the constitutional predecessor of our Supreme Court) recognised the existence in the common law of the duty on a deceased parent's estate to support an indigent minor child, it is binding on this Court. Only the Namibian Supreme Court can now unsettle the extension of the common law as represented by *Carlese* and confirmed in *Glazer. Glazer's* case is however not authority for the proposition that a major indigent child is entitled to support from a deceased parent's estate. That issue appears unresolved by the highest Courts in both Namibia and South Africa. Such authority as there is on the issue is South African High Court authority which is not binding on this Court, although representing persuasive authority.

[23] Should Namibia depart from the extension sanctioned by the High Court in South Africa, as contended for by Mr. Coleman?

A departure from the extension sanctioned by the High Court in South Africa in favour of indigent major children of the deceased can , in my view, only be justified on the basis of retaining the distinction between, on the one hand, a duty to maintain a major child in need while one is still alive and, on the other hand, the duty of maintaining a major child from a deceased's estate; and to hold that it is permissible to found liability for maintenance in respect of the former, but not the latter. Mr. Coleman has not referred me to any basis either in principle or public policy why, in this day and age, such a distinction is justified and ought to be perpetuated. I can myself conceive of none.

[24] I regard it as of great significance that the common law always recognised a parent's duty to maintain his or her offspring even after the age of majority , as long as the parent was able to do so and the child in need of maintenance : *Raicman's Est v Rubin* 1952 1 SA 127 (C); *Kemp* 1958 3 SA 736 (D); *Ex parte Pienaar* 1964 1 SA 600 (T) *Smit* 1980 3 SA 1010 (O); *Hoffmann v Herdan* 1982 2 SA 274 (T).

[25] In the realm of maintenance, it seems to me, the legal convictions of the community seem to lean in favour of the weaker members of the family. I associate myself with the remarks of by Professor Dr. W Nieboer when he said:

"*Do we not judge the 'ethical standard' of a community according to what it does for its 'weaker' members?*",
quoted by A Kruger in his work *Mental Health Law in South Africa,* 1980. The best evidence of the *bonis mores* of the community is the legislation passed by their elected representatives. Although entitlement to maintenance from a deceased estate is not a category included or dealt with therein, the Maintenance Act, 9 of 2003 provides some evidence of the legal convictions of the community in respect of maintenance in favour of the weaker members of a family. It provides, *inter alia*, that the legal duty to maintain *'must not be interpreted so as to derogate from the law relating to the duty*

of persons to main other persons': s 2. It then embeds into statute law the obligation at common law for a parent, on application to court and subject to proof of need, to maintain a child well beyond the age of majority: s 26 (2). I cannot disregard this progressively humanitarian approach when considering the invitation by Mr. Coleman not to extend the common law to cover a major child in need of support from the estate of a deceased parent.

[26] In my view, once it is accepted that the common law recognises a duty of support resting on living parents to maintain their offspring regardless of age, as long as the children are in need and the parents can afford it, extending that duty to the estate of a parent must follow. It cannot be in the public interest that the offspring of a deceased should be left without support and rely on the community or on charity, while the estate of the deceased parent is possessed of sufficient means to support such child. It appears that that, besides his wrong reading of Groenewegen, was the public policy consideration on which De Villiers CJ based his conclusion in *Carlese* to found a duty of support in favour of minor children against a deceased parent's estate. As his Lordship put it (at 537): an

> "unnatural father possessed of ample means might bequeath all his property to strangers, and leave his own legitimate offspring unprovided for and a burden on the rest of the community"

[27] I am prepared to recognise in our common law an obligation on a deceased parent's estate to maintain a major child of a deceased parent, as long as the estate has the means to do so and the child is in need of maintenance.

[28] Both counsel are agreed that costs should follow the result. Accordingly I order as follows in respect of the stated case:

1. The *lex domicilii* of Sylvia Therese Wirtz at the time of the death of the deceased governs the claim for maintenance instituted by the plaintiff.

2. The *lex domicilii* of Sylvia Therese Wirtz is Namibia.

3. Sylvia Therese Wirtz was domiciled in Namibia on the date of the death of her deceased father Hans Heinrich Wilhelm Wirtz.

4. A claim for maintenance is competent on behalf of Sylvia Therese Wirtz against the estate of her deceased father Hans Heinrich Wilhelm Wirtz.

5. Costs are granted in favour of the plaintiff.

DAMASEB, JP

ON BEHALF OF THE PLAINTIFF: **Mr. H. Geier**

Instructed By: **Behrens & Pfeifer**

ON BEHALF OF THE 1ST DEFENDANT: **Mr. G. Coleman**

Instructed By: **Chris Brandt Attorneys**