

Recent developments

The constitutionality of the Fee Exemption Regulations in South African schools: A critical analysis of *Michelle Saffer v Head of Department, Western Cape Education Department*

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Summary

This article examines the Western Cape High Court decision in Michelle Saffer v Head of Department, Western Cape Education Department. This case explores crucial issues prevalent in contemporary society surrounding custodial parents, who primarily are women, and confirms the nature of the burdens associated with their roles with respect to their children post-divorce. The article argues that section 40(1) of the South African Schools Act and Regulation 6(2) of the Fee Exemption Regulations infringe the dignity of custodial parents and indirectly preclude the children of divorced parents from realising their right to education. It further asserts that Le Grange J failed to take sufficient account of the underlying inequitable gender power dynamic that exists between custodial parents and non-custodial parents, and that the Fee Exemption Regulations place an unnecessary and discriminatory burden on custodial mothers who no longer are married. For this reason, section 40(1) of the Schools Act and Regulation 6(2) are shown to be unconstitutional and therefore invalid to the extent of its unconstitutionality.

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Key words: *custodial mothers; South African Schools Act; discrimination; unconstitutionality*

1 Introduction

The right to education is entrenched in the South African Constitution in section 29(1), and is given effect to by the South African Schools Act (Schools Act).¹ Distinct from other socio-economic rights, the realisation of the right to basic education is immediately achievable and is not subject to any internal limitation demanding that the right be 'progressively realised', or subject to 'available resources'.² The Constitutional Court has highlighted that education not only is a human right but is an essential agent that contributes to the fulfilment of other human rights by supporting the elevation of individuals out of poverty and permitting them to contribute to their community.³ This goal is confirmed in the Preamble of the Schools Act, which emphasises the importance of transforming South African schools, redressing past injustices established by the apartheid education system and achieving an environment that promotes the values of the Constitution.

The first part of the article establishes the facts in the Western Cape High Court case of *Michelle Saffer v Head of Department, Western Cape Education Department*.⁴ Part 2 considers the position that custodial mothers find themselves in post-divorce relative to their former husbands. Part 2 is imperative to the article as it establishes the context of this analysis. It frames the lenses through which the reader should heed and criticise the prevailing legislation. This context will help the reader to understand the obstacles pertaining to the prevailing enactment. Part 3 then considers section 40(1) of the Schools Act, and Regulation 6(2) of the Fee Exemption Regulations,⁵ where I examine whether either takes into consideration the position of custodial mothers post-divorce. Therefore, it is the constitutionality determination section. In part 4 I argue that in terms of section 40(1) of the Schools Act, when it comes to all divorced or separated biological parents sharing joint liability over children who are attending state schools, the court should recognise that this section should be consistent with the rules surrounding the common law duty of support whereby a parent owes a duty of support, *pro rata*,

1 Act 84 of 1996.

2 *Governing Body of Juma Masjid Primary School & Others v Essay NO & Others (Centre for Child Law & Another as Amicus Curiae)* 2011 (8) BCLR 761 (CC) [2011] ZACC 13 para 37.

3 *Governing Body of Juma Masjid Primary School* (n 2) para 37.

4 *Michelle Saffer v Head of Department, Western Cape Education Department & Others* (Case 18775/13).

5 Regulations relating to the exemption of parents from the payment of school fees in public schools, promulgated in GN 1052 of Government Gazette 29311 of 18 October 2006 (Regulations).

according to his or her means. This requirement is vital considering the financial disadvantages that women face after their divorce. Part 5 determines whether section 40(1) of the Schools Act and Regulation 6(2) indirectly limit the right to education of the child of divorced parents, by allowing schools to deny him or her a place when the custodial parent does not furnish it with the necessary information. I conclude by suggesting an appropriate remedy that the court could apply on appeal. It should be emphasised that this article is limited to heterosexual relationships.⁶

It should be recognised that since the time of writing the Supreme Court of Appeal in *Head of Department: Western Cape Education Department & Another v S*⁷ overturned the Western Cape High Court's decision by providing practical solutions to the issues discussed below by applying legitimate interpretative aids to the impugned legislation, leaving it constitutionally compliant in terms of achieving gender equality. Nevertheless, the article remains relevant despite the Supreme Court of Appeal's judgment as it speaks to important constitutional and jurisprudential issues facing single mothers in society because of the impugned legislation that were not addressed by the Supreme Court in its judgment and were left open for further discussion in the Western Cape High Court decision. Therefore, the article should be read solely within the context of the Western Cape High Court decision, where these issues were addressed in depth and where they were not resolved as they should have been.

2 Facts of the case

The applicant, Michelle Saffer, the divorced biological mother and custodial parent of ZG, was a reporter for a local community newspaper. As a source of income, Ms Saffer received an annual salary from her employment and maintenance payments from her ex-husband, MG. In 1999 Ms Saffer and MG drew up a divorce consent paper which dealt with the proprietary rights, including maintenance, and the liability of both parents regarding school fees. MG was liable to pay 50 per cent of ZG's school fees, school uniforms, tuition costs, books, stationary, equipment and extramural costs reasonably incurred. In 2010 an amendment was made to their agreement regarding parental rights and obligations towards ZG, with both parents consenting to the addition of an addendum to the original consent paper. Among other things it was agreed that Ms Saffer would 'furnish MG with copies of ZG's school reports and any

6 The resources used in this article addressed important issues concerning heterosexual relationships. Therefore, the article will be limited to heterosexual relationships.

7 *Head of Department: Western Cape Education Department & Another v S (Women's Legal Centre as Amicus Curiae)* (1209/2016) [2017] ZASCA 187 (13 December 2017).

corresponding documentation received by her which relates to ZG's progress at school or any problems that she may be experiencing'.⁸

Ms Saffer could not afford the school fees at her daughter's school and expressed the desire to apply for an exemption. However, difficulties arose at the point where the exemption form required both parents to complete it on the last page. Ms Saffer contested that as a custodial parent receiving maintenance from MG and, given her difficult history with him, it was unreasonable of the school to expect her to acquire that information from him. Ms Saffer requested that her financial position be considered separately from that of MG. The school responded to Ms Saffer's application stating that the gross income of both biological parents must be considered when applying for financial assistance, according to section 40(1) of the Act and Regulation 6(2), read together with the definition of the phrase 'combined annual gross income of parents' in Regulation 1. Section 40(1) of the Act provides that '[a] parent is liable to pay the school fees determined in terms of section 39 unless or to the extent that he or she has been exempted from payment in terms of this Act'. The school reiterated that to process the application the school governing body (SGB) required MG to provide the school with his income information. Only once the information from both parents was received would the school consider her application.

Ms Saffer responded by saying that the school's failure to provide her with conditional exemption was an unsympathetic disregard of her financial position as the sole breadwinner in her family and that the cooperation of MG was beyond her control. The school failed to process her application and stated that from the information they possessed of their income as a family unit Ms Saffer was not entitled to an exemption. Ms Saffer then responded by saying that she was not a 'family unit' with her daughter's biological father; the two lived separate lives and the school could not demand the completion of a joint exemption application. Ms Saffer felt deeply offended and humiliated. The school threatened legal action against Ms Saffer for outstanding school fees, and Ms Saffer later received a letter of demand and then a summons to appear in court. Ms Saffer then applied for an exemption again, which was rejected.

Ms Saffer then appealed to the Head of Department. The matter was considered and her appeal in respect of the 2012 school fees was upheld. In May 2013, however, Ms Saffer received another letter of demand from the school in respect of the 2013 school fees due to her failure to qualify for an exemption. Ms Saffer appealed to the Head of Department against the school's failure to grant her a fee exemption for the 2013 school year. After consideration of Ms Saffer's appeal by the Head of Department the school was requested to consider her fee exemption application and to advise accordingly of its decision. The school again refused to consider and make a decision on her

8 *Saffer* (n 4) para 16.

application based on the financial information of only one parent. The Head of Department averred that in the absence of a decision by the school it could not exercise its powers as an appeal body.

In September 2013 Ms Saffer's attorneys demanded that the SGB make a decision on her exemption application within 14 days. That same month Ms Saffer received a letter of demand from the school's attorney for arrears school and related fees for 2013. In that same month the Chairperson of the SGB informed Ms Saffer that her application for an exemption had been declined.

On 13 September Ms Saffer's attorneys addressed a letter to the Head of Department in respect of her appeal. The Head of Department accordingly was requested to decide Ms Saffer's appeal. The Head of Department replied to Ms Saffer's attorneys that her right to appeal in terms of the Act had been forfeited as she had failed to institute the appeal within the prescribed period of 30 days after receipt of the SGB's notices of its decision dated 16 July 2013. The Head of Department also stated that since the governing body had instituted legal proceedings against her the Department could not intervene in the matter.

3 Background to the position of custodial mothers in society post-divorce

The material shows that upon the breakdown of a marriage or similar relationship almost always it is mothers who become the custodial parent and have to care for the children. This situation places an additional financial burden on them and inhibits their ability to obtain remunerative employment. Divorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched.⁹

The greatest asset of numerous middle or working class couples is not property but the earning capacity of the spouses.¹⁰ This asset consists of professional qualifications, promotions, pensions and retirement and medical benefits.¹¹ In circumstances during the marriage where mothers bear the burden of primary care of the children, fathers are able to be both model workers and parents. Mothers normally construct their careers to accommodate the needs of their children and the careers of their husbands by doing part-time or comparatively non-burdensome work. This pattern involves the

9 *Bannatyne v Bannatyne* 2003 (2) BCLR 111 (CC).

10 E Bonthuys 'Labours of love: Child custody and the division of matrimonial property at divorce' (2001) 64 *Journal of Contemporary Roman-Dutch Law* 192 at 199.

11 Bonthuys (n 10) 199.

refusal to work overtime or opting for jobs that are well-suited to family life.¹² Inevitably, this situation becomes problematic at the time of the marital breakdown. Families headed by a female custodial parent are driven to radically downgrade their standard of living and many find themselves sinking into poverty.¹³

The courts have recognised this reality and appear to be sympathetic to the predicament of the wife. Evidence in support of this premise is discernible in *Kooverjee v Kooverjee*¹⁴ where, after the divorce, the father of the children maintained a stable income and lavish property, displaying no signs of financial difficulty.¹⁵ The mother, on the other hand, had an income that was insufficient. She became the custodial parent, and in her testimony it was admitted that she was not able to devote sufficient time to her business to make it more profitable while she bore the primary responsibility of her two children. She could work only part-time. The Court granted her the remedy of spousal maintenance. In *Beaumont*¹⁶ the court *a quo* described the wife as having directly and indirectly contributed to the maintenance and increase of her ex-husband's estate by assisting him in almost every part of his life. The Court acknowledged that the disparity between her and her ex-husband's estate was 'in no small measure due to the contribution made by the defendant to the maintenance and increase in the plaintiff's estate'.¹⁷ Again, the Court provided a suitable remedy to address those circumstances. Further recognition of the existing inequality during and after marriage was provided by O'Regan J in *President of the Republic of South Africa and Another v Hugo*.¹⁸

There is no doubt that the goal of equality entrenched in our Constitution would be better served if the responsibilities for child rearing were more fairly shared between fathers and mothers. The simple fact of the matter is that at present they are not. Nor are they likely to be more evenly shared in the near future. For the moment, then, and for some time to come, mothers are going to carry greater burdens than fathers in the rearing of children. We cannot ignore this crucial fact.

The attitude of many non-custodial parents who are liable for the payment of maintenance causes them to evade their obligations to their dependants, particularly in circumstances where children are

12 Bonthuys 195.

13 DG Stewart 'Single custodial females and their families: Housing and coping strategies after divorce' (1991) 5 *International Journal of Law, Policy and the Family* 297.

14 2006 (6) SA 127 (C) (*Kooverjee*).

15 *Kooverjee* (n 14) para 11.1.1.

16 *Beaumont v Beaumont* 1985 (4) SA 171 (W) paras 177D-G.

17 *Beaumont* (n 16) paras 178I-J.

18 (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997) para 113.

being raised in single-parent households.¹⁹ A prevalent explanation for this attitude is that they believe that the custodial parent wastes the maintenance money she receives and squanders it on herself instead of their children.²⁰ However, the malice does not stop there. The burden placed on mothers to approach the court in times when the non-custodial parent defaults on his maintenance payments has a detrimental impact on the dignity of the custodial parent.

In circumstances where the father is in arrears the option of attachment of the property for the purpose of securing payment of maintenance is available. Despite this remedy, the assets are sometimes spitefully disposed of by the defaulter to frustrate the maintenance court proceedings.²¹ Furthermore, the difficulty of tracing the defaulter in circumstances where he lives in a rural area or township remains a reality. Even if he is found and confronted by a policeman the defaulter can claim that he is not the person described on the subpoena or inform those who live with him to deny that he lives there.²² At times defaulters change their jobs to avoid garnishee orders because each order must be presented to his current employer. Once this happens the burden is placed back on the custodial mother to begin again the entire process of approaching the court.²³ This account is an indication of the intractable nature of the relationship that exists between custodial mothers and their ex-husbands.

Custodial mothers not only lack the resources to care for their children after their divorce but they are also confronted with a reluctance on the part of their ex-husbands to engage with them or contribute financially for the benefit of their children. As a result of the demotion of the non-custodial parent to a secondary role in the lives of their children, these parents, mostly fathers, can withdraw from the lives of their children after the divorce to the point where contact is lost completely.²⁴ This breakdown could be due to a feeling of resentment because of their value being limited to the payment of child support and allocated times for 'visitation'.²⁵ Inevitably, this inaction by the non-custodial parent then leaves the custodial mother in a disadvantageous position where the care of the children is her primary responsibility with little or no support being offered by her ex-husband.

19 M de Jong 'Ten-year anniversary of the Maintenance Act 99 of 1998: A time to reflect on improvements, shortcomings and the way forward' (2009) 126 *South African Law Journal* 14.

20 As above.

21 *Bannatyne* (n 9) 4.

22 S Burman & S Berger 'When family support fails: The problems of maintenance payments in apartheid South Africa: Part 1' (1988) 4 *South African Journal on Human Rights* 201.

23 Burman & Berger (n 22) 205.

24 DD Meyer 'The constitutional rights of non-custodial parents' (2006) 34 *Hofstra Law Review* 1469.

25 As above.

4 Constitutionality of section 40(1) and Regulation 6(2)

The applicant in *Saffer* sought a declaration that section 40(1) of the Schools Act and Regulation 6(2), read together with the definition of the phrase 'combined annual gross income of parents' in Regulation 1 of the Fee Exemption Regulations, are inconsistent with the Constitution and invalid and infringe her right to equal protection and benefit of the law as well as her right to dignity.

Section 172(1)(a) of the Constitution provides that when deciding a constitutional matter within its power a court 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency'.²⁶ Simply stated, given the importance of the rule of law, a court is obliged, once it has determined that a provision of a statute is unconstitutional, to declare that provision to be invalid to the extent of its inconsistency with the Constitution.²⁷

Section 40(1) and Regulation 6(2), read together with the definition of the phrase 'combined annual gross income of both parents' in Regulation 1, generate practical difficulties for custodial mothers who no longer are married, and who no longer have an amicable relationship with their former spouses, yet are burdened with the duty to pay school fees for their children. The Fee Exemption Regulations contains an established formula for evaluating whether an applicant is eligible for a partial or total exemption when it comes to the payment of school fees.²⁸ To be considered for an exemption, the combined annual gross income of both parents must be furnished to the school. There would be no setback when applying for an exemption in circumstances where both parents of the child are still married or living in the same household. However, in circumstances where the parents are divorced or separated and there has been a breakdown in the relationship to the extent that the desire of the non-custodial parent to communicate and co-operate is non-existent, this prerequisite places the custodial mother in a burdensome and prejudicial position where she is still required to access the information pertaining to her former spouse's financial position. Inevitably, this requirement has a degrading and humiliating effect. As shown above, the reality that many custodial mothers are confronted with does not consist of the happy ending envisaged by the Constitution. Many non-custodial fathers are uncooperative, vindictive

26 P de Vos & W Freedman (eds) *South African constitutional law in context* (2014) 393.

27 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) 17.

28 In terms of Regulations 6(4) and 6(6), a partial exemption ranging between 7% and 97% is granted to the parents if the learner's school fees plus any additional monetary contributions to be paid to the school are 3,5% or more, but less than 10% of the combined annual gross income of the learner's parents.

and at times malicious in their attitudes and actions. Despite this reality section 40(1) and Regulation 6(2) compel custodial mothers to depend on their ex-husbands regardless of the degrading and humiliating outcome.

Le Grange J defended Regulation 6(2) by asserting that the phrase 'combined annual gross income of parents' is in the best interests of the child.²⁹ According to the Court, it encourages both parents to comply with their legal duty to support their children, thus rendering the differentiation established between persons who are single or divorced and those who share a joint household rationally connected to a legitimate government purpose.³⁰ Le Grange J referred to *Fish Hoek Primary School v GW*,³¹ in which it was emphasised that both parents are liable to pay the school fees of their children and that this liability promotes the achievement of gender equality.³² However, this reasoning is problematic and the manner and relevance in which this precedent was used is incognisant and immaterial to the burdensome reality facing many South African custodial mothers. The Court failed to recognise that despite the existence of liability or a duty of support many non-custodial parents do not fulfil this duty. In circumstances where the non-custodial father withdraws from the life of the child and fails to comply with his common law duty of support Regulation 6(2) attempts to encourage compliance with this duty, but in actuality will fail dismally. Failing to recognise this reality has the potential to harm the custodial parent and child when no exemption is granted. Furthermore, section 305(4) of the Children's Act³³ already provides an incentive for a parent to support their child by postulating the consequence of a parent being guilty of an offence in circumstances where they do not maintain their child. In cases where this provision is contravened section 305(6) of the same Act imposes a fine or imprisonment for a period not exceeding ten years. The fear of receiving a fine or potential imprisonment encourages the non-custodial parent to support his child. Consequently, the impugned legislation cannot be considered to be rationally connected to the legitimate government purpose of having both parents take financial responsibility in the life of the child. In *Fish Hoek* the Court held:³⁴

Historically mothers have been the primary care-givers of children in this country. That continues to be so. It is almost always mothers who become custodial parents and have to care for children on the breakdown of marriage or other significant relationships. That places an additional financial burden on them and the sad reality is that they then become overburdened in terms of responsibilities and under-resourced in terms of means.

29 *Saffer* (n 4) para 115.

30 As above.

31 2010 (2) SA 141 (SCA).

32 *Fish Hoek Primary School* (n 31) para 14.

33 Act 38 of 2005.

34 *Fish Hoek Primary School* (n 31) para 13.

The Court in *Bestuursligaam van Gene Louw Laerskool v JD Roodtman*³⁵ confirmed, and unfortunately reinforced, the reality that the burden to pay school fees rests on the custodial mother regardless of the non-custodial father's common law duty of support. Counsel for the non-custodial father proposed, and the Court concurred, that a non-custodial father did not fall within the definition of 'a parent' for the purposes of suing a parent for arrear school fees. Rather, the Court said that the obligation to pay school fees rested on the custodial parent, which in this instance was the mother of the learner.³⁶ In the end, considering that custodial mothers are more likely to bear the burden of paying schools fees while the father of the child abdicates responsibility, it palpably is unfair to consider the income of both parents as if they were a 'family unit'. In reality this consideration reduces the custodial mother's chance of receiving an exemption when the father of the child is unsupportive.

As far as the dignity-based challenge was concerned Le Grange J rejected the applicant's contention that the burden placed on her to acquire the necessary information from her ex-husband was an infringement of her dignity.³⁷ The Court's reason for this was that in 2010 the applicant consented that paragraph 1 of the original consent paper be substituted with an extensive recordal of the co-parental responsibilities and rights of both parents regarding ZG. In this addendum both parents agreed to remain involved in all aspects of ZG's life.³⁸ It was further agreed between the parties that MS would 'furnish MG with copies of ZG's school reports and correspondence or documentation received by her which relates to ZG's progress at school or any problems that she may be experiencing'.³⁹ Le Grange J asserted that because MS agreed that she was under a legal obligation to forward school correspondence relating to ZG to MG and because she accepted to remain co-holder of the parental responsibilities the contention made by her that her dignity had been infringed and that she felt deeply offended because of the burden placed on her to communicate with her ex-husband and acquire his financial information consequently was unsound.⁴⁰ Essentially, the Court questioned the genuineness of her claim on the basis that the applicant was comfortable enough at the time to agree to an amendment which ensured the potential for further communication between herself and her ex-husband.

35 [2003] 2 All SA 87 (C).

36 *Bestuursligaam van Gene Louw Laerskool* (n 35) 26.

37 *Saffer* (n 4) para 116.

38 *Saffer* para 118.

39 As above.

40 *Saffer* (n 4) para 120.

The right to dignity ultimately is entrenched in section 10 of the South African Constitution⁴¹ and is believed to be an essential value fortifying our constitutional scheme.⁴² In *Dawood* it was established that dignity could be considered not only a 'value' fundamental to our Constitution but is also a justiciable and enforceable right that must be revered and safeguarded.⁴³ In *Makwanyane* O'Regan J stated that 'recognising a right to life and dignity is an acknowledgment of the intrinsic worth of human beings: Human beings are entitled to be treated as worthy of respect and concern.'⁴⁴ The right therefore implies that there is an expectation to be protected from conditions or treatment that offend an individual's sense of his or her worth in society.⁴⁵ Specifically, treatment that is abusive, degrading, humiliating or demeaning is a violation of this right.⁴⁶ Khampepe J declared certain provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act⁴⁷ relating to the criminalisation of consensual sexual conduct with children of a certain age invalid due to this criminalisation of consensual sexual conduct being a form of stigmatisation which was degrading and invasive.⁴⁸ The human dignity of adolescents targeted by the impugned provisions clearly was infringed. In *S v Williams*⁴⁹ Langa J declared section 294 of the Criminal Procedure Act, which dealt with the sentence of juvenile whipping, invalid due to the cruel, inhuman and degrading treatment experienced by the accused. In *Khumalo*⁵⁰ it was mentioned that an individual's dignity comprises not only how he or she values or regards him or herself but also includes how others value or regard him or her.

As discussed in part 3 of this article non-custodial fathers can be malicious and vindictive when confronted by the custodial mother post-divorce. One must not look at the circumstances surrounding Ms Saffer in isolation when making a decision on the constitutionality of the provision in question. Instead, it is appropriate to take into consideration the struggles faced by women in society as whole as this provision has the potential to affect many others. In a society where a woman's bargaining power is suppressed or overpowered through violence, intimidation or humiliating treatment by her male counterpart it should be the objective of society to protect those women from such incidences, and not subject them to such treatment. Where domestic violence is the cause of divorce one might

41 Constitution of the Republic of South Africa, 1996.

42 *Dawood* (n 27) para 34.

43 *Dawood* para 35.

44 *S v Makwanyane* 1995 (3) SA 391 (CC) para 144.

45 De Vos & Freedman (n 26) 457.

46 As above.

47 Act 32 of 2007 (Sexual Offences Act).

48 *Teddy Bear Clinic for Abused Children & Another v Minister of Justice* 2013 (12) BCLR 1429 (CC) para 55.

49 1995 (7) BCLR 861 (CC) (9 June 1995).

50 *Khumalo v Holomisa* 2002 (8) BCLR 771 (CC) para 27.

assume that leaving the abusive male partner will increase a woman's safety. This is not always the case. In many cases, intimate partner violence does not end at divorce.⁵¹ In fact, abuse often worsens post-separation. In some cases, intimate partner violence-perpetrating non-custodial fathers use custody and parenting time arrangements to abuse mothers and/or children.⁵² Even in cases where domestic violence is not the cause of the divorce a simple breakdown of the marriage can result in a non-custodial mother being vulnerable to malicious and vindictive attitudes from the non-custodial father. In *Rosen v Havenge*⁵³ the relationship between the custodial mother and non-custodial father had broken down to such an extent that the non-custodial father frustrated the joint decision-making process as co-guardian when he refused to be co-operative when it came to an application for a passport for their minor child to travel to Mauritius on holiday. The non-custodial father also wrote letters to the minor child purposefully describing the custodial mother in uncomplimentary terms and belittled her in the eyes of their minor child.⁵⁴ This case is relevant as it speaks to the negative consequences of divorce and the risk that women face when they are confronted by their ex-husbands. Ultimately, exposing any mother to this type of humiliating treatment would amount to an infringement of her dignity.

Inevitably, conflict and turmoil are the consequence of many broken-down relationships. Often the conflict generated by the breakdown of the marital relationship spills over into the parenting relationship.⁵⁵ Placing a woman in a situation where she is forced to confront somebody who is abusive undermines her need to be treated with respect. There can be no doubt that the existence of a statutory provision which ignores this fact and places a burden on a custodial mother, in this particular case Ms Saffer, to retrieve the financial information from the non-custodial father in circumstances where the relationship has irretrievably broken down and where there is a risk that she might suffer from abusive, degrading, humiliating or demeaning treatment at the hands of the non-custodial father inescapably leaves her vulnerable to having her right to dignity infringed. Furthermore, Ms Saffer is the sole breadwinner in her family. She receives maintenance from MG as both bear a common law and statutory obligation to support their daughter. However, that is the extent of their relationship. MG's willingness to cooperate with her is beyond her control. Despite Ms Saffer's need to be independent of her ex-husband and her desire to move on and forge a new

51 AM Zeoli & EA Rivera 'Post-separation abuse of women and their children: Boundary-setting and family court utilisation among victimised mothers' (2013) 28 *Journal of Family Violence* 3.

52 As above.

53 [2006] 4 All SA 199 (CC) (*Rosen*) para 34.

54 *Rosen* (n 53) para 20.3.

55 *TC v SC* (20286/2017) [2018] ZAWCHC 46 para 2.

autonomous path in life, this obligation treats ex-spouses as a 'family unit' binding them together in an unwanted relationship where ex-spouses must be dependent on each other's cooperation. Therefore, it can be degrading for both individuals on each occasion where a person's individuality and personal liberty are limited beyond the duty to support the child.

The difficulty with the Court's reasoning in this instance is that it failed to determine the constitutionality of Regulation 6(2) due to the existence of a prior agreement between the applicant and her ex-husband. The agreement should not have taken precedence over the discussion of the constitutional issue at hand. The Court failed to take into consideration the dissimilarity between the impersonal relationship established between the parents by the agreement, which as its main purpose links each parent to the wellbeing of their child, and the insuperable criterion established by Regulation 6(2), which requires the custodial parent to exit a space where she feels safe and communicate further with the non-custodial parent, opening up the possibility of abuse. The agreement is impersonal in the sense that furnishing your ex-husband with copies of school reports and any correspondence or documentation does not require the mother to see or communicate extensively with her ex-husband. This communication or correspondence can take place through media such as e-mail or any other intermediary device. The Court in this instance should have looked more broadly at the effect of Regulation 6(2) on the South African community and questioned whether the burden placed on a custodial mother in circumstances where there is no amicable relationship between the parents of the child has the potential to infringe her dignity. As argued above, this potential does exist.

To further determine whether a legislative provision which differentiates between people on a listed ground amounts to unfair discrimination, section 9(3) of the Constitution must be examined. According to *Harksen v Lane*,⁵⁶ to determine whether a differentiation amounts to unfair discrimination in terms of section 9(3) a two-stage analysis must be observed. First, it must be determined whether the differentiation amounts to discrimination and, second, if it does, it must then be determined whether the discrimination amounts to unfair discrimination.⁵⁷ In terms of section 9(5) of the Constitution discrimination on one or more of the grounds listed in subsection (3) is unfair, lest it can be established that the discrimination is fair.⁵⁸

To determine whether a differentiation amounts to discrimination section 9(3) of the Constitution sets out 16 prohibited grounds of discrimination. If a legislative provision differentiates against an individual or group based on one of these grounds, this differentiation

56 *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC).

57 *De Vos & Freedman* (n 26) 444.

58 As above.

will amount to discrimination. The determination of whether a differentiation has occurred on a listed ground must be made objectively. In this case indirect discrimination takes place. Indirect discrimination takes place when certain requirements, conditions or practices, while appearing neutral, actually have an effect or result that is unequal or that disproportionately affects a group defined in terms of a listed or analogous ground.⁵⁹ As discussed above, section 40(1) of the Schools Act and Regulation 6(2), read together with the definition of the phrase 'combined annual gross income of parents' in Regulation 1 of the Fee Exemption Regulations, do differentiate between individuals on the specified ground of gender due to it indirectly and disproportionately affecting custodial mothers. Therefore, because there is a distinction based on one of the 16 listed grounds there is an assumption that this differentiation amounts to discrimination.⁶⁰

In order to determine whether the discrimination is fair or not, different factors must be considered. According to *Harksen*⁶¹ these factors include (a) the position of the complainants in society: whether they have suffered in the past from patterns of disadvantage; whether the discrimination in the case under consideration is on a specified ground or not; (b) the nature of the provision or the purpose sought to be achieved by it; and (c) any other relevant factors: whether the discrimination has affected the rights of the complainants; whether it has led to an impairment of human dignity, or an impairment of a comparably serious nature.

In terms of criterion (a) the discrimination under consideration is on a listed ground. Mokgoro J recognised in *Bannatyne* that it is almost always mothers who become the custodial parent upon the breakdown of the marriage and that divorced or separated mothers are often faced with the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means.⁶² Fathers, rather, remain actively employed and generally become economically enriched. These disparities undermine the achievement of gender equality which is a founding value of the Constitution.⁶³ In *Volks NO v Robinson*,⁶⁴ Skweyiya J acknowledged that structural dependence of women in marriage and in relationships of heterosexual unmarried couples is a reality in our country and in other countries. Many women become economically dependent on men and are left destitute and suffer hardships upon the death of their male partners.⁶⁵ Traditionally, the consequences of cohabitation relationships are that women are taken advantage of and the essential

59 De Vos & Freedman (n 26) 448.

60 De Vos & Freedman 444.

61 *Harksen* (n 56) para 44.

62 *Bannatyne* (n 8) para 29.

63 *Bannatyne* para 30.

64 *Volks NO v Robinson & Others* 2005 5 BCLR 446 (CC)

65 *Volks* (n 64) para 63.

contributions by women to a joint household through labour and emotional support are not compensated for.⁶⁶ Ultimately, the courts have recognised that mothers and women in general remain less powerful and vulnerable in their relationships and in society and often become worse off when families break down. In terms of criterion (b) Le Grange J mentions that the purpose of the provision is to encourage both parents, post-divorce, to comply with their legal duty to support their children. However, as discussed above, this reasoning is incognisant of the burdensome reality facing many South African custodial mothers. Despite the existence of a duty of support, many non-custodial parents do not fulfil this duty.

Furthermore, in terms of *Pillay*⁶⁷ it was stated that according to the principle of reasonable accommodation, 'failing to take steps to reasonably accommodate the needs' of individuals on the foundation of race, gender or disability will amount to unfair discrimination.⁶⁸ At the core of this principle is the understanding that an authoritative body must take positive steps, and perhaps encounter further hardship or expense, in order to permit all individuals to participate and appreciate their rights equally, without being pushed to the margins of society. To accommodate custodial mothers, despite the effort, steps must be taken by the legislature to amend section 40(1) of the Schools Act and Regulation 6(2), to ensure that this provision reflects the values of dignity and equality in our society. Ultimately, it is the duty of the legislature, which has the means to deliberate different possibilities and to make its decision.⁶⁹ Finally, in terms of criterion (c), as discussed above, the exemption scheme violates the dignity of women by effectively excluding them from obtaining fee exemptions in the absence of the non-custodial parent's financial information. In conclusion, it is clear that section 40(1) of the Schools Act and Regulation 6(2) amount to unfair discrimination in terms of section 9(3) of the Constitution.

5 Liability (joint or joint and several) of all divorced or separated biological parents

The Court faced a critical issue as to whether section 40(1) with respect to divorced or separated biological parents should be interpreted as imposing joint liability rather than joint and several liability for the payment of the school fees where their children are attending state schools.⁷⁰ Joint liability, or *pro rata* liability, is the liability of each co-contractor to pay his or her proportionate share of

66 *Volks* para 64.

67 *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC).

68 *Pillay* (n 67) para 71.

69 *Prince v President of the Law Society, Cape of Good Hope & Others* 2002 (2) SA 794 (CC) para 84.

70 *Saffer* (n 4) para 88.

a debt.⁷¹ Joint and several liability, or liability *in solidum*, is the liability pertaining to each co-contractor to make the complete performance of the obligation himself. The creditor would then need to claim the whole amount of the debt from any of the co-debtors.⁷² Once that takes place the creditor's rights of recovery are ceded to the co-debtor who has performed. The latter then has the right to claim his proportionate share of the debt from the other co-debtors.⁷³ Counsel for the applicant argued that a strong presumption existed for an interpretation in favour of joint liability and that if section 40(1) were to be interpreted as imposing joint and several liability on divorced or separated persons, it would continue to regard them as a 'household unit', thus infringing their rights to dignity and equal protection of the law.⁷⁴ Contrary to this, the respondents asserted, among other things, that joint and several liability applied and that if one parent pays or is compelled to pay the full amount of the school fees, then that parent has a common law right of recourse against the other parent.⁷⁵

Among other cases, the Court referred to prominent decisions of both the Constitutional Court (the *Bannatyne* case)⁷⁶ and the Supreme Court of Appeal (the *F v F* case)⁷⁷ on the duty of the courts to recognise the burden placed on custodial parents to care for their children and that courts should be aware of the possibility that a difference in treatment between custodial parents and their non-custodial counterparts potentially can and does constitute unfair gender discrimination.⁷⁸ In his deliberation of the issue surrounding the intention of the legislature Le Grange J referred to *Bhyat v Commissioner for Immigration*,⁷⁹ where it was stated that when attempting to determine the intention of the legislature when construing an Act of Parliament 'the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the legislator could have intended'.

Section 39(2) of the Constitution states that when interpreting any legislation, and when developing the common law or customary law every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. Single-parent households are more likely to suffer financial difficulties than households that have both parents

71 JTR Gibson *South African mercantile and company law* (2003) 80.

72 Gibson (n 71) 81.

73 *Gerber v Wolson* 1955 (1) SA 158 (A).

74 *Saffer* (n 4) para 91.

75 *Saffer* 93.

76 *Bannatyne* (n 8) para 29.

77 *F v F* 2006 (3) SA 42 (SCA) para 12.

78 *Saffer* (n 4) para 101.

79 1932 AD 125 at 129.

present.⁸⁰ In terms of the emotional impact this has, single parents are more likely to be under greater stress and have significantly greater anxiety as a result of earning less, but having a greater responsibility than their non-custodial counterparts.⁸¹ Furthermore, single mothers typically earn less than their male counterparts. The law does account for and address these issues by promoting a *pro rata* duty of support. Where a child has two parents, the parents share the duty of support *pro rata* according to their means.⁸² *Pro rata* denotes proportional – the parent who earns more (or possesses more means in other things) is obligated to furnish more child support than the other parent.⁸³ The scope and content of the duty of support is different for all children; it depends on the standard of living of the child's family. The cost surrounding education has been held to be included in the duty of support.⁸⁴

Le Grange J correctly asserts that to interpret section 40(1) as imposing joint and several liability would be detrimental to custodial mothers and it is in the best interests of the child that the liability of a parent to pay school fees must be regarded as joint liability. More specifically, this assertion refers to liability to the school, and not the liability for school fees between parents.⁸⁵ To not do this would unnecessarily burden the mother to furnish the school with money she does not possess, and then claim from the non-custodial parent who has an uncooperative attitude. This position has the potential to significantly harm the custodial parent. To address the disparity in earning capacities between custodial and non-custodial parents each parent should be liable to the school according to his or her means. In circumstances where the non-custodial father earns more his duty to furnish the school with fees would be greater, thus placing a greater but separate burden on him. This argument is in line with the transformative notion of substantive equality as determined by section 9(3) of the Constitution.⁸⁶ However, this situation did not apply in the judgment due to the agreement established at the time of the divorce between Ms Saffer and MG, equally dividing their responsibility to ZG.

6 A child's right to education

Section 28(2) of the Constitution provides that a 'child's best interests are of paramount importance in every matter concerning the child'. Section 9 of the Children's Act provides that '[i]n all matters

80 J Barone 'How the law fails single mothers' (2016) Law School Student Scholarship Paper 763 6, http://scholarship.shu.edu/student_scholarship/763 (accessed 22 April 2019).

81 As above.

82 A Barratt & W Domingo *Law of persons and family* (2012) 191.

83 As above.

84 *Mentz v Simpson* 1990 (4) SA 455 (A).

85 *Saffer* (n 4) 32.

86 De Vos & Freedman (n 26) 422.

concerning the care, protection and well-being of a child the standard that the child's best interests is of paramount importance must be applied'. As determined in *Minister of Welfare and Population Development v Fitzpatrick*,⁸⁷ it is essential that this standard should remain flexible as individual circumstances will establish which factors capture the best interests of a particular child.⁸⁸

The South African education system is confronted with numerous obstinate difficulties.⁸⁹ An unassailable education system is fundamental to the advancement of the proficiencies of individuals and for the comprehensive advancement of society overall.⁹⁰ On the contrary, an inadequate education system limits the development of human personality and the individual's sense of dignity.⁹¹ It debilitates the potential for democratic participation and unbiased social and economic transformation.⁹² Contemplating South Africa's former education system, former Deputy Chief Justice Moseneke held:⁹³

Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly deep social disparities and resultant social inequality are still with us.

In the constitutional era the right to basic education imposes both a positive and a negative obligation on the state to provide for education. In terms of this positive obligation the state is expected to take effective measures to guarantee that every child has access to educational facilities and that every child profits from their right to education.⁹⁴ Conversely, this negative obligation imposes a duty on the state and its outfits not to obstruct a child's access to education.⁹⁵ Yet, the burden derived from section 40(1) of the Schools Act and Regulation 6(2) has the ability indirectly to limit or infringe a child's right to education. In instances where a custodial mother does not qualify for an exemption due to her inability to furnish the school with the combined annual gross income of both parents the child suffers

87 2000 (3) SA 422 (CC) (*Fitzpatrick*).

88 *Fitzpatrick* (n 87) para 18.

89 Y van Leeve 'Mobilising the right to a basic education in South Africa: What has the law achieved so far?' (2014) *Equal Education* 1.

90 As above.

91 As above.

92 As above.

93 *Head of Department: Mpumalanga Department of Education & Another v Hoerskool Ermelo & 2 Others* [2009] ZACC 32.

94 C Churr 'Realisation of a child's right to a basic education in the South African school system: Some lessons from Germany' (2015) 18 *Potchefstroom Electronic Law Journal* 2413.

95 As above.

when the mother cannot afford to keep him or her in the school. This circumstance is contrary to the promotion of the best interests of the child and amounts to an infringement of the right to education.

The task of any court is to determine whether this limitation is justifiable. This process entails a weighing-up of the nature and significance of the right that is limited with the degree of the limitation against the importance and purpose of the limiting measure.⁹⁶ It is essential not to restrict the right needlessly by embracing an unreasonably narrow interpretation of the right since this has the potential to terminate precipitately the enquiry to the detriment of the litigant.⁹⁷ After the content and scope of the right have been established the subsequent enquiry should investigate whether the limiting measure infringes the right as purported.⁹⁸ According to *Walters*, this enquiry involves establishing 'the meaning and effect of the impugned enactment' to determine whether it limits the safeguarded right.⁹⁹ This element of the threshold enquiry more often than not is a fact-specific undertaking and focuses on the nature and breadth of the relevant limiting measure.¹⁰⁰ The second stage of the enquiry determines whether this limitation is justified. If the court determines that it is not, then the provision will be declared unconstitutional, and consequently invalid.¹⁰¹ In this enquiry two questions must be asked: Does the limiting measure fulfil a legitimate purpose? Is there a rational connection between the limiting measure and its avowed purpose? These tests are applied because if an established measure fails these two questions, then it can never justifiably limit a right.¹⁰² As seen above, both questions have been answered in the negative. Furthermore, in terms of the purpose of the relevant provision it has been established that less restrictive alternatives exist which act as incentives for both parents to contribute towards their child, namely, sections 305(4) and 305(6) of the Children's Act. It may be argued that these two sections of the Children's Act are less restrictive because neither provision actively infringes any constitutional rights. They are activated only in consequence of the failure to adhere to the duty of support of the child. Therefore, it is submitted that section 40(1) of the Schools Act and Regulation 6(2), read together with the definition of 'combined annual gross income of parents', evidently do not meet the requirements of section 36(1) and should be declared invalid.

96 *Ex Parte Minister of Safety and Security & Others: In Re S v Walters & Another* (CCT28/01) [2002] ZACC 6; 2002 (4) SA 613; 2002 (7) BCLR 663 (21 May 2002) paras 26-27.

97 De Vos & Freedman (n 26) 357.

98 De Vos & Freedman 359.

99 As above.

100 As above.

101 De Vos & Freedman (n 26) 360.

102 De Vos & Freedman 364.

7 The appropriate remedy

Before establishing the suitable remedy that the Court should apply, a separate but noteworthy issue should be recognised. The refusal to resolve these disputed concerns in the High Court raises questions pertaining to access to courts in South Africa. Section 34 of the Bill of Rights affirms that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'.¹⁰³ However, socio-economic circumstances reflecting enormous imbalances due to colonial and apartheid era marginalisation have led to many citizens being excluded from a fair determination of their rights.¹⁰⁴ The cost of litigation, the sophistication of its procedure and its time-consuming nature remain factors impeding access to justice.¹⁰⁵ For a single custodial mother who has a job that limits the availability of financial resources to the care of her children and herself, the thought of approaching a court is a luxury she cannot afford. Regarding many custodial mothers, financial income comes with an expiration date. The need for and importance of a declaratory order was confirmed by Ackermann J in *Fose v Minister of Safety and Security*:¹⁰⁶

I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context, an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.

The granting of effective relief requires a highly critical analysis, acknowledging that how a judgment is written is a fundamental part of the judgment itself.¹⁰⁷ Hence, I would argue that the failure of the High Court to identify and resolve the issues in question at the outset results in a devastating and emotionally frustrating consequence for custodial mothers, inevitably contributing to their disempowerment. This result could have been avoided.

Relevant to the determination of the remedy that the Court should apply, the doctrine of separation of powers and the division of power

103 Sec 34 Constitution of South Africa.

104 E Hurter 'Access to justice: To dream the impossible dream?' (2011) 3 *Comparative and International Law Journal of Southern Africa* 408.

105 Hurter (n 104) 409.

106 1997 (3) SA 786 (CC) (*Fose*) para 69.

107 S Moreland 'Talking about rape – and why it matters: Adjudicating rape in the Western Cape High Court' (2014) 47 *SA Crime Quarterly* 7.

between the different branches of government in accordance with this doctrine must be acknowledged by the reader. As the guardian of the Constitution it is the duty of the judiciary to interpret the Constitution and give substance to the notion of separation of powers and its limits.¹⁰⁸ The case of *Doctors for Life* confirms the following:¹⁰⁹

Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values'. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations.

The courts should be cognisant of the restrictions on judicial authority and must stay away from matters that are relevant to the other branches of government. This entails the judiciary not interfering in the practices of other branches of government unless specifically so mandated by the Constitution.¹¹⁰

Section 172(1)(b)(ii) of the Constitution allows a court provisionally to suspend the effect of a declaration of invalidity in the interests of justice and equity once it has found the law to be inconsistent with the Constitution.¹¹¹ A suspension of an order of invalidity is a tool used by the Constitutional Court to circumvent 'separation of powers' strains that can arise when declaring legislation invalid.¹¹² If the court takes this route, the invalid provision remains operational on condition that Parliament rectifies the defect within a stipulated period of time.¹¹³ Once the defect is remedied the declaration of invalidity dissolves and the amendment is given validity. If this remedy does not take place the declaration of invalidity will be given effect to at the expiry date of the stipulated period of time and the ordinary implications attached to this pronouncement will arise.¹¹⁴ The time afforded to Parliament to amend the defect hinges on the intricacy and diversity of the statutory and policy options available to Parliament.¹¹⁵ It is likely that the Court will apply this remedy on appeal.

However, the potential use of this remedy by the Court is debatable. The Court will not suspend an order of invalidity in circumstances where the impugned provision unmistakably is inconsistent with a fundamental right and indefensible under the

108 De Vos & Freedman (n 26) 103.

109 *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC) para 38.

110 De Vos & Freedman (n 26) 103.

111 De Vos & Freedman 403.

112 De Vos & Freedman 404.

113 De Vos & Freedman 403.

114 As above.

115 As above.

general limitation clause that there is no reason to retain it, even provisionally.¹¹⁶ In *Bhe*¹¹⁷ the Constitutional Court held that individuals subject to the relevant provision should not be required to remain patient to be alleviated from the burden of inequality and unfair discrimination.

Given the difficulty surrounding the application of regulation 6(2) in connection with the responsibilities of divorced or separated parents regarding the payment of school fees, in the interim the burden of attaining the necessary financial information in the case of divorced or separated parents should fall on the financial officer of the school. This should apply only in cases where the custodial parent does not feel comfortable to retrieve the necessary financial information from their former partner in order to reduce the burden placed on the financial officer. A stable legislative amendment would give effect to the achievement of equality as promised by the Constitution and would represent a ground-breaking triumph in the emancipation of custodial mothers in a society that takes their role for granted. In a patriarchal community this amendment will be a stepping stone in the realisation and preservation of the right to dignity and equal respect which many women have been denied for so long. Moreover, it is recommended that the stipulated period in which this amendment should take place should coincide with the start of the ensuing school year.

8 Conclusion

Custodial mothers are overburdened with responsibilities that attach to their perceived role in society. The weight on single mothers to raise their children devoid of support from their non-custodial counterparts is intolerable. As a single mother the duty to balance a career and the care of her children equates to an insurmountable task which she has no choice but to conquer. Together with this, the fact that the law contributes to this load by placing women in positions of disadvantage and discomfort is disquieting. It is the duty of the courts and the legislature to strive to counteract perpetual gender-based stereotypes that are prevalent in society and to supplement this duty with empowering structures authorised to eradicate the burdens commonly placed on custodial mothers. Although the law requires fathers to contribute financially to the well-being of their children, many custodial mothers face an uphill battle when it comes to securing the cooperation of the non-custodial parent.

This article illustrates the unconstitutional nature of section 40(1) of the Schools Act and Regulation 6(2) of the Fee Exemption Regulations

116 De Vos & Freedman (n 26) 404.

117 *Bhe & Others v Khayelitsha Magistrate & Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR (1) (CC) (15 October 2004) para 108.

pertaining to the burden it places on custodial mothers in circumstances where there has been a breakdown in the relationship between herself and the father of the child. This impugned provision has the potential to infringe her dignity by placing her in an uncomfortable position, requiring her to confront the non-custodial parent regardless of the potential for abuse. Furthermore, it has been shown that this impugned provision has the ability indirectly to limit or infringe a child's right to education. In circumstances where the custodial mother does not qualify for an exemption due to her failure to furnish the school with the combined annual gross income of both parents, it will be the child who suffers.

As established in *Fose v Minister of Safety and Security*,¹¹⁸ it is the duty of the court to provide effective relief, within the limits of the Constitution, when a constitutional right has been infringed. In light of this duty, it would be fitting for the Court to suspend an order of invalidity to give the legislature an opportunity to amend the provision. In the interim it is recommended that the burden of attaining the necessary financial information should be placed on the financial officer of the school. However, to lighten this burden placed on the financial officer it is recommended that this method should be used only in circumstances where the custodial parent does not feel comfortable to approach the non-custodial parent.

118 *Fose* (n 106) para 69.