

PART I: THE BEGINNING OF LEGAL PERSONALITY

- ✓ A natural person's legal personality begins at birth.
- ✓ Before birth the foetus merely forms part of the mother's body without attaining any legal capacity / power.

The Legal Requirements For The Beginning Of Legal Personality / Subjectivity Are:

- 1) The birth must be fully completed. This means that there must be a complete separation between the body of the mother and the foetus. However for the birth to be complete it's not necessary that the umbilical cord be severed.
- 2) The child must be alive after separation from the mother's body, even if only for a short period. Legal subjectivity is not obtained by a stillborn foetus or a foetus which dies during birth.

Q : How do we determine whether a child has lived after birth?

A : S: 29 (1) of Criminal Procedure Act 1977: If a person is charged with killing of a newly born child, that child is deemed to be born alive, if it is proved that the child breathed.

- However this section is not absolute in that the Act does not set out material requirements to determine life after birth.
- Our courts thus rely on medical evidence to prove that a child was born alive. In medical practice the hydrostatic test is used to determine whether the child did breathe after birth. The child's lungs are cut up into small pieces and placed in a bowl of water, if they float it is an indication that there was oxygen in the lungs and that the child did breathe.
- 3) Some authors maintain that a person must be viable before legal subjectivity is conferred on him.
- ✓ This means that child must have reached such a stage of development that an existence independent of the mothers body is possible.
- ✓ So if a child is born prematurely / is deformed and it was inevitable right from the start, that child will not be a legal subject even if he had been completely separated from the mother's body and he had actually lived for a while.

- ✓ Notice of birth must be given in surname of mother, but this child can be registered in surname of father at joint request of both parents .
- ✓ If the parents of an extra - marital child marry each other after registration of child's birth, the birth register will be altered and the birth will be registered as if the parents were legally married at the time of birth to each other.

ILLEGITIMATE / EXTRA MARITAL CHILD

- ✓ In so far as a child who is born as a result of artificial fertilization to a woman who is party to a same sex life partnership is concerned it qualifies as a child who is born of married parents .
- ✓ Notice of their birth must be given under surname of either parent or both parents jointly as a double barrel surname .

LEGITIMATE CHILDREN

- ✓ In terms of the Birth and Deaths Registration Act of 1992, a child's parents /guardians or any person authorized by the parent has 30 days within which to give notice to Director General of Home Affairs [Dept of Home Affairs] of the child's birth.
- ✓ No birth may be registered unless a fore name and surname has been assigned to a child.

B) Registration of Births

- ✓ However this concept is vague and leads to many problems and thus it is not accepted as a requirement for legal subjectivity in South Africa.

THE INTERESTS OF THE UNBORN CHILD / NASCITURUS

Q: What is a Nasciturus?

A: Is a conceived, but unborn child / foetus.

Q: What is a Nasciturus fiction?:

A: It is where the foetus / unborn child is regarded a living person, although it has not yet been physically born. In order for the application of the Nasciturus fiction to operate there is a condition that the interest concerned must be to advantage of the unborn child.

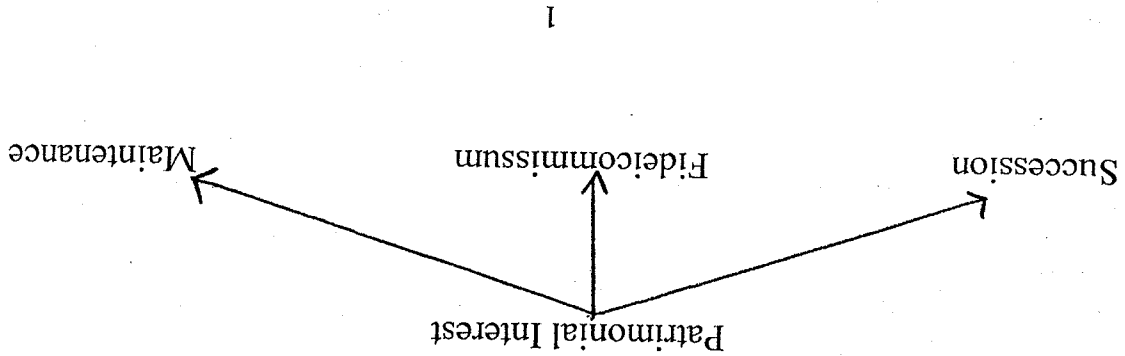
REQUIREMENTS FOR THE APPLICATION OF THE FICTION?

- 1) The child must have been conceived at the time when the benefit would have accrued to him.
- 2) The child must later be born alive.

IN ABEYANCE

✓ If it appears that had the Nasciturus already been born alive it would have certain rights, those rights are kept in abeyance ie: put on hold until the Nasciturus does become a person / until it is certain that no person has developed from the Nasciturus.

INTEREST TO BE TAKEN IN TO ACCOUNT

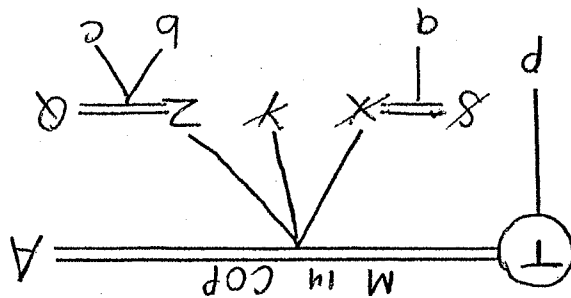


1 : PATRIMONIAL INTERESTS

A : SUCCESSION

- ✓ Testate Succession: is where the Testator dies and leaves a valid will.
- ✓ Intestate Succession: is where the Testator dies without leaving a will.

1 : INTESTATE SUCCESSION



✓ Q : The testator was married in community of property to Anna; they have 3 children X, Y, Z, and an illegitimate child "P" from the testator's previous marriage

✓ X is married to S, and they have a child "a", and thereafter "X and S" are killed by "a".

✓ Y dies before the testator, without marrying.

✓ Z is married to Q, and they have two children "b and c".

A : By virtue of being married in community of property, Anna first gets half of the testator's estate first.

✓ Then the balance of the estate is divided amongst his 4 children and Anna who is treated as a 5th child.

✓ Child P although illegitimate will inherit as a natural child would for the purpose of succession since a distinction is no longer drawn between them.

- ✓ The fact that "Y" dies before the testator means that instead of dividing the testator's estate in 5, it would be divided in 4 since "Y"'s share accrued back to the estate.
- ✓ "Z and Q"'s share goes to them and their children get nothing unless they leave their children something by means of a valid will.
- ✓ The fact that "a" was found guilty of murdering his parents "X and S". He will receive nothing as our criminal law is based on the principle that the hand that draws the blood never benefits of its victims. So "X and S"'s share will accrue back to the estate.
- ✓ So in the end after Anna takes 50%, the other part of the estate will be divided amongst "P, Z, and Anna).
- 2: Testate Succession.**
- The Law of Succession Amendment Act 43 of 1992, provides that if a testator, bequeaths a part of his estate to his children in his will, children who were conceived at the time of his death and who are later born alive are included unless an intention to contrary is evident from the will.
- ✓ The most important factor when dealing with the Nasciturus is to determine the intention of the testator.
- ✓ The Succession Act, actually just reaffirms the Nasciturus fiction.
- Q : What happens when the testator generalizes and leaves his estate to "my children" who are alive at the time of my death and the wife is expecting another child?
- ✓ The conceived child that is born after the death of the testator will be able to inherit as the other child.
- ✓ *In Ex Parte Boedel Steenkamp 1962, the testator left his estate to his daughter and her children of the first generation in equal shares. He added a condition that the grandchildren had to be alive at the time of his death.*
- ✓ The court held: That a Nasciturus that was conceived before the death

person who caused the death of his father.
 damages owing to the loss of maintenance after his death, against the
 result of of another person's delict, may institute the claim for
 • In our law there is a rule that the *Nasciturus* of a father, who died as a

maintenance.
defendant due to the infringement of her and her child's right to
was pregnant with their first child. She claimed damages from the
the defendant, at the time of the bread winners' death; the claimant
mine accident, which was negligently caused by another employee of
 • *In Chisholm v ERP 1909, the plaintiff's husband had died in a*

• A delict is an unlawful / wrongful culpable act, which causes a person
 to suffer patrimonial loss .

A : By way of delictual claim.

Q : How can maintenance be claimed?

C : DEPENDANTS ACTION FOR LOSS OF SUPPORT / MAINTENANCE

C and D are the *fideicommissariis*

B is the fiduciary

This institution is called a *fideicommissum*

“ I leave my farm to my son B subject to the proviso that the farm must
 devolve on B's eldest son C after B's death and after C's death on his
 eldest son D ”

B : FIDEICOMMISSUM

of the testator, but only born thereafter is also entitled to inherit

- *In Road Accident Fund v Mtati / Mobo 2005 (6) SA 215 SCA a pregnant women was injured in a motor vehicle accident and her brain damage.*
 - *Who is an unborn child, who is later born with a physical defect / What concerns us is whether this principle also applies to a victim grounds of the delict committed against him.*
 - *Delict and the victim has a right to claim damages from him on the physical integrity of another person, the guilty person commits a*
 - *So where a person's unlawful and culpable / negligent act violates the physical integrity.*
- A : Physical integrity.**
- Q : What is this "Personality Interest?"**

2: PRENATAL INJURY

- *A : No, In Shields v Shields 1946, here the parents of the unborn child agree that the father of the child would not be held responsible for paying maintenance for the child after his birth. The court held: that a mother could not waive her unborn child's rights to claim maintenance and the agreement was contra bonos mores .*
- Q : May the parents of an unborn child validly agree that the father will not be held responsible for the maintenance of the child after his birth?**

If a pregnant wife divorces the father of her unborn child the court may provide for the child's maintenance in the divorce order to avoid the need for legal proceedings after the child's birth .

MAINTENANCE AFTER BIRTH

- *The court here held: that by applying the Nasciturus Fiction in an action for damages, an unborn child is in the same position as other children.*
- *The basis on which damages is calculated is that the child is placed in the same position he would have been in, had his father not been killed.*

If a woman is pregnant at the time of divorce the court can include an order regarding guardianship and care in the divorce order to prevent

✓ *Care* (custody) refers to a parent's capacity to control the child's daily life

✓ *Guardianship* refers to a parent's capacity to administer their child's estate on his behalf and to assist him in performance of valid juristic acts.

Guardianship and Care are 2 components of parental responsibilities .

3: GUARDIANSHIP AND CARE

- ✓ Van der Merwe and Jobert support the view that legal subjectivity does not start at birth, but at conception.
- ✓ They argue that should a situation arise where it would have been to the advantage of the unborn child has it already been born alive, all the rights that a normal person would have acquired must be given to that unborn child.
- ✓ So their interests are at issue that unborn acquire Legal Subjectivity at conception.
- ✓ However they also add that the Nasciturus must be later born alive to enjoy this protection.

Rule:

The father alleged that the accident had caused the brain damage. He instituted a claim against the RAF on the child's behalf. The RAF Istly said that an unborn child is not a person and is therefore not entitled to compensation and 2ndly because the unborn child is not a person the driver does not owe a duty of care to an unborn child. The court a quo dismissed the special plea. The Supreme court of appeal held that the ordinary rules of the law of delict should be used to determine whether the child has a claim. The court went on to add that the child's pre-natal injuries becomes complete when the child is born alive. Thus it is unnecessary to use the nasciturus fiction to prove a claim for pre-natal injuries .

A pregnancy may be terminated at the joint request of the women during the 1st 12 weeks of the gestation period .

From the 13th week to the 20th week it may be terminated if a doctor after consulting with the women is of the opinion that

- 1 : the continued pregnancy will pose a risk of injury to the womens physical or mental health .
- 2 : there is a risk that the foetus will suffer a severe physical or mental abnormality .
- 3 : the pregnancy resulted from rape or incest .
- 4 : the continued pregnancy will affect the womens social or economic circumstances .

Circumstances in which a pregnancy may be terminated

✓ The Nasciturus fiction can obviously not be used because an aborted foetus will never be born alive.

4: TERMINATION OF PREGNANCY

Further legal proceedings once the child is born alive .

However parental responsibilities cannot come into existence before the child's birth

A pregnant woman clearly cannot have parental authority over part of her own body, and most especially how could custody be exercised over a child who has not in actual fact been born yet

Nor can a child's father or the mother's same sex civil union partner have parental responsibilities and rights over part of the mother's body

Also if a father does not have the right to stop the mother from terminating her pregnancy how could he ever have parental responsibility in respect of a foetus .

✓ So if a parent wanted to negotiate a benefit for his/her child, he would have to use a contract for the benefit of a 3rd party .

✓ Example: Parent (A) enters into a contract with somebody else (B), in terms of which (B) undertakes to keep open an offer to contract with the unborn child (C) after his/her birth / to make an offer to (C) after his/her birth. (C) Is not a party to the contract, only A & B are and it does not matter that C does not yet exist.

✓ In *Christian Lawyers Association of South Africa v Minister of Health, 1998(11) BCLR 1434 T* the plaintiffs contended that human life starts at birth conception and that the Choice on Termination of Pregnancy Act contravenes s: 11 of the constitution which guarantees the right to life. The court held that no provision of the constitution bestows legal personality or protection on the foetus and that the constitution does not qualify a woman's right to make decisions about reproduction and her right to control her body in

Before the introduction of the bill of rights into our law our courts held that a foetus does have a right to life and it can be enforced on its behalf.

CONSTITUTIONAL ISSUES DEALING WITH TERMINATION AND THE FOETUS RIGHTS TO LIFE

From the 21st week onwards the pregnancy may be terminated without the consent of the her guardian if the pregnancy would

- 1 : endanger the woman's life
- 2 : result in malformation of the foetus
- 3 : pose a risk of injury to the foetus

If she is mentally disabled / in a continuous state of unconsciousness to the extent that she is incapable of understanding and appreciating the nature of her act, and the gestation period is less than 21 weeks her pregnancy may be terminated if her guardian / spouse grants consent.

If the pregnant woman is a minor, the doctors must advise her to consult with parents / guardian before the pregnancy is terminated, but if she does not want to do it, the termination may not be denied.

An abortion can only take place with the informed consent of the pregnant women

Consent

After the 20th week thereafter if the doctor or midwife believes that it

- 1 : it would endanger the woman's life
- 2 : result in severe malformation of the foetus .
- 3 : pose a risk of injury to the foetus .

Our law grants rights and obligations only to legal subjects. An allegation that human life begins at conception is insufficient to argue that a foetus has a right to life because human life is not the determinant for legal personality. Because the unborn child does not have any rights prior to birth the issue of a conflict between the unborn child's constitutional rights and those of the pregnant women does not arise.

6 : IS THE NASCITURUS A LEGAL SUBJECT

JOURBET

- ✓ He believes that the Nasciturus fiction should not have been applied and rather the rule applied.
- ✓ The rule is that whenever a situation arises where it would have been to the advantage of the nasciturus had it already been born, all the rights conferred upon people who have already been born alive are also conferred on the foetus.
- ✓ In terms of a foetus is a legal subject as from the date of his conception whenever his interests are at stake.
- ✓ In saying that its use was necessary, he said that its application should be limited to the law of succession.
- ✓ He said that the elements of a delict (i.e.: Act / Conduct, unlawful, fault, cassation, and damages) can occur independently, so a normal delictual action i.e.: action ex lege Aquilia could have solved the problems.
- ✓ He said that the child has an action after its birth based on the fact that the wrongdoer's action in the past is causally linked to the loss which the child experiences now and in the future.

BOBERG

- ✓ He says that the fiction can be used in actions based on pre-natal injuries.
- ✓ He adds that the child does not only suffer that damages at birth, but it has already started suffering damage while still a foetus i.e.: in its prenatal state.
- ✓ This process continues until its birth and thereafter.

order to protect the foetus.

✓ This view is based on the assumption that the focus is a person in the legal sense; it has rights which can be infringed.

FICTION

- ✓ Cronje / Heaton / Jordan / Davel support the view that legal subjectivity does not start at birth and not at conception.
- ✓ They state that should a situation arise before the unborn child's birth where it would have been to its advantage had it already been born alive, by using the fiction its interest are protected by keeping it in abeyance. As soon as the Nasciturus is born alive the benefit that was kept in abeyance is then allowed to it.
- ✓ The use of the fiction, this leads to the fact that the unborn child will only acquire legal subjectivity

5: STERILISATION

The Sterilisation Act 44 of 1998 permits the voluntary sterilization of anyone who is 18 yrs and capable of consenting.

- ✓ Before consenting to the sterilization the person must be made aware of the procedure / consequences / risks / and reversible and irreversible consequences.
- ✓ A minor may only be sterilized if failure to perform the sterilization would jeopardize his life or impair his health.
- ✓ The procedure may only be performed with the consent of the persons parent, spouse, civil union partner, guardian, or curator.
- ✓ Where the person is mentally disabled which renders her incapable of consenting to the sterilization, it may only be done with the consent of the parent / spouse / curator / guardian.
- ✓ The desirability of the sterilization must be valued by a panel consisting of psychiatrist / psychologist / social worker / nurse.

THE END OF LEGAL PERSONALITY

INTRODUCTION

❖ Question: How does our law determine whether a person is legally dead?

Answer:

- Firstly the legal subjectivity of man is terminated by death. A dead person can share no rights / obligations, but our law protects the body and regulates the disposal of it. The deceased assets are also protected by requiring that his estate be administered to.
- Our law is uncertain as to how / when to determine a person's death so our courts rely on medical evidence to determine whether a person is dead and moment of death.

PROOF OF DEATH

✓ When a person dies and his body is found and identified, his death is proved by death certificate signed by a doctor.

✓ In private law this proof of death has two consequences :

A) The deceased estate can be admin and disturbed

B) The surviving spouse can remarry.

✓ The problem arises when a person disappears & it is uncertain whether he is alive.

A presumption of death can then be pronounced to settle this dispute.

We have 2 types of presumption of death orders viz :

1 : Common Law presumption of death

2 : Statutory presumption of death

A) COMMON LAW PRESUMPTION OF DEATH

- ✓ In terms of common law any interested party i.e.: Creditor / Spouses / Child of that missing person can apply to the high court to have a presumption of death order made for that missing person.
- ✓ After the application has been heard a return date for finalization of the order is set.
- ✓ It is then ordered that all interested parties be given notice of the rule nisi and that it be published in the local news paper and the Government Gazette. In doing so it is ensuring that ample opportunity is given to all interested parties to either support the application or object to the notice of the court before the order is finalized.

- 1) The application must be brought in the jurisdiction where the missing person was domiciled.
- 2) Applicant will have to prove on a balance of probabilities that the missing person is dead.

- ✓ English law states that if a person is missing for seven years and over an order presuming him dead can be made
- ✓ *South African Law however said in Re Beaglehole 1908 TS, Court held: that his fixed period of time is required to grant a presumption of death order.*

- ✓ 2) *Ex Parte Pieters Court held: that although the time period for which a person has disappeared is a factor to be taken into account when considering a presumption order, a mere prolonged absence will not persuade the court to issue the order*
- Q: *What then are the factors that the court will take into account*
- A: 1) *Origin of person.*

- 2) *Length of his absence from home.*
- 3) *His trade & Occupation.*

- 4) *Did he follow an ordinary peaceful occupation?*
- 5) *Was he engaged in a dangerous trade / business?*
- 6) *The fact of him not being heard of for any number of years.*

Our court says that the facts of each case will determine whether a

- ✓ If a court pronounces a presumption of death, it does not mean that the person is dead. There is a rebuttable presumption that he is dead.
- ✓ This means that if further evidence is brought to court which made the original presumption order that, that person is not dead, the order can be set aside.

3) EFFECT OF AN ORDER OF PRESUMPTION OF DEATH

- ✓ If the accident involves loss of life, then the procedure in S: 18 of Inquest Act must be followed.
- ✓ S: 12 state that if an aircraft is involved in an accident in / above the rep / its waters, the Minister of Transport may order an investigation into the accident.

AVIATION ACT 74 OF 1962

- ✓ This has the same effect as an order presuming the death of the person by a Judge of a High Court.
- ✓ S: 18 provides that if the corpse of the person has not been found / has been destroyed and evidence proves beyond a reasonable doubt the person is dead, the Magistrate must record his findings in respect of
 - 1) Identify the deceased person
 - 2) The cause of the death
 - 3) The date of death
 - 4) Whether the death was caused by an act / omission caused by another person.
- ✓ S: 5(2) provide that where it is suspected that a person died of unnatural causes, Magistrate can hold an inquest to determine the cause of the death.

INQUEST ACT 58 of 1959

(B) STATUTORY PRESUMPTION OF DEATH

presumption order will be granted.

✓ After a person is presumed dead, his estate can be administered and divided amongst his heirs, but our courts in acting with caution request the heirs to furnish security for the property they receive in that should the missing person return his estate will be intact in value .

✓ A presumption of death order does not automatically terminate a marriage.

✓ S: 1 of Dissolution of Marriages on Presumption of Death Act 23 of 1979: provides that the court which makes the presumption of death order can also make an order dissolving a marriage at the request of the remaining spouse.

✓ This order to dissolve the marriage can be made at the same time that the presumption of death order is made or at a separate time.

✓ A Court however is not bound to grant such an order, but has discretion to refuse it.

✓ If the order is made, the marriage is dissolved as if the person actually died.

4) PRESUMPTIONS REGARDING THE SEQUENCE OF DEATH

✓ Where several people die in the same disaster (calamity), it is important to determine who died first to estate whether one inherited from the other, since a person can only inherit from another if he is alive at the time of the others death.

✓ In terms of Roman Dutch Law: The following presumptions came into operation when members of the same family died in the same disaster.

1) Where a parent & child died & child was under puberty, it was presumed that child died first or if child was over puberty, it was presumed that parent died first.

2) Husband always survived his wife.

- ✓ If a deceased stipulates in his valid will how & where he wishes to be finally laid to rest, his instruction must be followed.
- ✓ Where he just mentions his wishes verbally, there must be clear proof of such wishes before it is carried

6) DUTY TO BURY A DECEASED

- ✓ Every death must be reported to the Department of Home Affairs.

5) REGISTRATION OF DEATH

- If there are no witnesses to testify that the person died before the other, a court can do nothing but find that they died simultaneously.
- Q : Does South Africa follow these presumptions?
A: No, the rule is that if the sequence in which people died cannot be proved on a balance of probabilities, there is no presumption of either survival / simultaneous death.
- ✓ English Law however rebuts these presumptions by saying that a older person dies first, irrespective of whether they were members of the same family or not.

STATUS

The word "status" is from the latin word "STARE" which means "ones standing in law"

LEGAL CAPACITY

It refers to ones capacity to have rights and duties. Ones persons legal capacity does not differ from that of others because of personal qualities or wealth etc. The only thing that differs one persons legal capacity from that of others is one having more rights than another does.

CAPACITY TO ACT

Refers to the capacity to perform valid juristic acts. A juristic act is an act to which the law attaches consequences.

One acquires the capacity to act at the age of 18.

CAPACITY TO LITIGATE

It refers to a persons ability to be party to a law suit ie : locus standi

CAPACITY TO BE HELD ACCOUNTABLE FOR CRIMES AND DELICTS

A crime is an act prohibited by law.

A delict is an unlawful wrongful act which causes a person to suffer damages.

Fault is the common element to both the offences. Fault exists in intention and negligence. Intention is a subjective enquiry where we ask only what that particular persons mindset was with regard to that result occurring. Negligence is tested against the reasonable man where we ask would any reasonable person from the community have done what he did in those circumstances. In testing intention and negligence we are trying to ascertain accountability. Here we ask 2 questions

- (1) Did he know the difference between right and wrong
- (2) Did he act accordingly

DOMICILE

✓ Because legal systems differ, it becomes necessary to establish which legal system determines a persons status i.e.:

- 1) His legal capacity
- 2) His capacity to act
- 3) Capacity to litigate
- 4) His capacity to be held accountable for crimes & delicts

✓ The law which determines a persons status is that law in force at the place where that person is domiciled i.e.: lex domicilii

✓ Domicile: is the place where a person is legally deemed to be permanently or constantly present to exercise his rights & fulfill his obligations even in the event of his factual absence.

IMPORTANCE OF DOMICILE

1) Whether a child is legitimate / illegitimate is determined by the domicile of its parents at time of birth of child.

2) A persons domicile determines whether he is capable of entering into a contract.

3) It helps determine the system of law used in interpretation of a will.

4) The domicile of a man at time of marriage determines whether he & a woman may enter into a marriage & the matrimonial property regime that will govern that

marriage.

5) Domicile determines the jurisdiction of a court as regards the law of procedure.

6) It is a factor in determining the international jurisdiction of a foreign court in order to recognize & enforce an order of such a court.

3 RULES ABOUT DOMICILE

1) No one can be without a domicile at any given time.

2) No one can have a domicile in more than one place at the same time.

3) A persons domicile is never changed without proof.

KINDS OF DOMICILE

A) DOMICILE OF ORIGIN

✓ S:1(2) of domicile act, provides that a domicile of choice is acquired by a person if he is lawfully present at a particular place & has the intention to settle there for

2) The animus requirements is problematic. At common law the necessary animus was described as not to leave the place or to permanently reside at that place.

(ANIMUS)

B) The person must have the intention of settling there for an indefinite period ie :

- 3) Persons who are deported from South Africa lose their in this country even if they intend returning because their return would be unlawful.
- 2) The Act requires only lawful presence, a prohibited immigrant can therefore not acquire a domicile of choice despite having the intention of settling there permanently.
- 1) With regard to the 1st requirement no specific period of physical residence is required but the person must not just be visiting the place. If it is estate that a person had the intention of residing at a specific place, that he was physically present there, & his residence was lawful, it is irrelevant whether his residence there was of a short duration.

A) The person must actually settle at the particular place ie : (FACTUM).

REQUIREMENTS OF DOMICILE OF CHOICE

- ✓ Previously at Common law a wife acquired the domicile of her husband at marriage & she followed that domicile as often as he changed it, irrespective of whether she was present at that place or whether she had the intention of residing there permanently.
- ✓ It is the domicile which a person who has the capacity to act chooses for himself to exercise his free will.
- ✓ s : 1 (1) of the Domicile Act of 1992 states that every person who is over the age of 18 or under 18, who by law has the status of a major is competent to acquire a domicile of choice, regardless of a persons sex or marital status.

B) DOMICILE OF CHOICE

✓ A persons domicile of origin, is that which the law assigns to him at birth.

Q: What is the domicile of a person who has abandoned his domicile of origin but has not yet acquired a new domicile?

A: The Domicile Act 3 of 1992:states that no person shall loose their domicile of origin until she has acquired a new domicile.