

The Beginning of Legal Personality

- Legal personality begins at birth, and a foetus is not considered a legal subject whilst in the womb, it is merely a part of the mother. The law does not confer rights and duties on the foetus.

Legal Requirements For Birth

There are legal requirements for "birth":

1. The child must be born alive, hence it must be breathing (The Criminal Protection Act deems a child is alive if it is breathing)
 2. There must be separation between the mother and child (the umbilical cord need not be severed)
 3. *There is no consensus on the following condition; however some legal experts are of the opinion that the child must be viable: Viability denotes that the child must have been in existence in the mother's womb for a period of at least 6 months and so if the child had to leave the womb at 6 months it would survive independently. An incubator is an accepted mean of aid, but the child should be able to live without reliance on the mother's bloodstream.*
This is not required in South African law
- As soon as the mother and child are separated, that child acquires rights, duties and capacities and is therefore a legal personality.

Registration Of Births

- Registration of births takes place in terms of the **Births and Deaths Registration Act 51 of 1992**
- The child must be registered within 30 days of birth
- One or both parents must register the birth
- If the parents are unable to do so: then it must be done by the person in charge of the child (guardian) or the person asked to do so by the parents.
- Once registration is complete the Director-General or any other authorized official at Home Affairs presents a Birth certificate.
- If registration occurs after the 30-day period, reasons for late registration must be provided, as well as the fingerprints of the child.

Legitimacy Of A Child

Legitimate Children

- ❖ A child is legitimate if it is born in wedlock or if it is born into a customary marriage (a valid marriage)
- A legitimate child will either take its father's surname, or a double-barrel surname including the mother and father's surnames.
- The law does not recognize a religious marriage that is polygamist, but a child born into polygamy is still considered legitimate, for the purpose of registration. There is still debate whether or not the child can inherit from its father.

Illegitimate / Extra-marital Children

- ❖ If a child is born out of wedlock, then that child will be registered under the mother's surname.
- Both parents can request that the child be registered under the surname of the father but the father must acknowledge paternity of the child in writing and the particulars of the father must be provided.
- If the mother dies at the birth of the child, the child will still receive the mother's surname.

- Later, if the legitimate parents of an illegitimate child decide to marry, the birth certificate will be amended and the child will become legitimate which will be shown from date of marriage, according to common law.
- Problems: for the father to acknowledge paternity after registration of the child, the mother must consent. If the mother refuses to consent, then the father can apply to the courts for a declaratory order that will allow confirmation of paternity and dispensing any discontent.

Artificial Insemination

- Children born as a result of artificial fertilization to a woman who is in a same-sex life partnership are classified as legitimate and obtain the surname of either partner or a double-barrel surname comprising both partners' surnames.

Sex Changes

- **Alteration of Sex Description and Sex Status Act 49 of 2003**

Abandoned Children

- An abandoned child is usually given a name and surname and is registered by a social worker.
- If the parents are found, the Birth Register must be amended.

Birth Outside South Africa

- If a child is born outside South Africa and the parents are South African Citizens then the parents must report the birth to the embassy or a diplomat in the other country.

The End of Legal Personality

Significance

- The end of legal personality is very important in our law
- When a person dies, their legal subjectivity ends, they are no longer conferred legal capacities (rights and duties), marriage ends and their estate is wound up and divided accordingly among the heirs (succession takes place)

Requirements for Death

A person is dead according to two opinions:

1. As soon as the brain functioning ceases
 2. The person's lungs stop functioning and their heart stops beating
- Although if a person is brain dead the functioning of their vital organs may be maintained due to assistance from machines, the legal opinion of death is when the brain functioning ceases.

Somatic Death

- A person is declared dead when the brain functioning ceases permanently, this is called Somatic death.
- A scenario in which determining brain functioning ending, would be in a motor accident when it is necessary to know which victim died first, for the purpose of succession.
- If a pregnant woman is in a brain dead state, it must be determined whether or not the foetus is living, in which case the mother may be kept alive by use of machines and the baby can be fed intravenously, until it is ready to leave the womb.

Proof Of Death

- 1) A death certificate signed by a medical practitioner or magistrate is the *prima facie* (at

- first sight) proof that a person has died.
- 2) A death certificate is required for succession to occur.

Presumption Of Death Orders

A presumption of death order is made by a court when a missing person is presumed to be dead. It can take place in two ways:

- 1) Under the common law
- 2) Under a statute (either by the Inquest Act or Aviation Act)

1. Common Law

- A presumption of death order is given under the Common law if a person has died of natural or unnatural causes.
- An application to the court must be made by an interested party to a High Court (the interested party includes a spouse, parent or a child).
- The application must be made to the High Court in the area that the missing person was domiciled at the time of disappearance.
- The court takes certain factors into account to determine if the order may be granted:
 - 1) Circumstances surrounding the disappearance of person
 - ✓ Examples: did the person have a dangerous occupation?
 - ✓ Were there financial difficulties?
 - ✓ Was there a suicide note?
 - 2) The age of the person who is missing
 - ✓ Examples: teenagers may run away from home or young children could have been kidnapped.
 - 3) Length of the disappearance
 - 4) The mental and physical health of the person
- Death must be proved on a **balance of probabilities**, using the above factors.
- A presumption of death order is not permanent and may later be repealed if the person is later found or the order can be refused by other parties.
- The court will grant a 'Rule *nisi*' (a return date).
- This return date is an opportunity for other interested parties to come forward with any objections or evidence.

Requirements for attaining the Presumption of Death Order

The party attempting to get the presumption of death order has to:

- 1) Publish an application on the government gazette and
- 2) Publish a notice in the newspaper of the missing person's residential area.
- 3) This is to say there is a presumption of death and announce the rule *nisi* date, so that people may be informed and be able to come forward.

CASE: Ex Parte Govender (1993)

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- **Legal Questions:** Can a presumption of death order be granted?
- **Facts:** Mr Govender's wife made an application to the court for a presumption of death order after 8 years of her husband's disappearance. She told the court that all attempts to trace him were unsuccessful. At the time of his disappearance he was 56 years old, in good health and had a good relationship with his family. The court then granted a rule *nisi* so any interested parties could lodge objections for the final order not to be made. On this return date the wife submitted further facts to the court: her husband had been experiencing financial difficulties before disappearing and 10 days after the disappearance she found a suicide note, which had been written 5 months prior to the disappearance. Mrs Govender was therefore arguing that Mr Govender had committed suicide.
- **Considerations:** Mrs Govender took 8 years to come forward and she only submitted the suicide note on the return date.
- **Results:** The court ruled that suicide was possible but the facts were insufficient to justify

a presumption of death order. The court was not convinced Mr Govender had actually committed suicide.

Effects Of The Presumption Of Death Order (Common Law)

Division of Estate

- A presumption of death order will result in the estate of the said person being divided among the heirs. However, before the heirs can claim their inheritance, they have to give security (collateral) such as a house or car, to the value of what is given to them from the inheritance.
- This is in the event of the person presumed dead returning, so that they can return to their normal life and will not be left without prior possessions or finances.
- If an heir refuses to give security and the missing person does return, the heir can be sued for 'unjust enrichment'.

Dissolution of Marriages

- If the presumption of death order has been granted, it entitles the spouse to apply to apply for an order to dissolve the marriage,
- The dissolving of marriages is done in terms of the **Dissolution of Marriages on the Presumption of Death Act**.
- According to this act, an application must be made to dissolve the marriage; a marriage does not automatically end when one person dies.
- After the marriage is officially over under the Act, it remains dissolved at all times, even if the missing person returns

2. Statute

- The statutory requirements for a presumption of death order are done in terms of the **Inquest Act** or the **Aviation Act**.
- Unnatural causes ONLY

INQUEST ACT

- If a body is destroyed or cannot be found, then a magistrate must record the following (if possible):
 - 1) Identity of the deceased
 - 2) Date of death
 - 3) Cause or likely cause of death
 - 4) Whether the death was caused by an offence

Process

- 1) It must be proved beyond reasonable doubt that a person is dead.
- 2) This is done by a magistrate, and then reviewed by the High Court.
- 3) If the High Court confirms the death of the person, the presumption of death order is given and this is a rebuttable order.
- 4) Note: the procedure in terms of the Inquest Act does not replace the procedure of the common law. Both routes can be followed simultaneously.

AVIATION ACT

- ❖ This act only deals with death that occurs in an aircraft accident (aeroplane, helicopter, space shuttles)

Process

- 1) One could have a 'joined board of enquiry' and an inquest to establish the cause of death.
- 2) It must be proved beyond reasonable doubt that a person is dead.
- 3) This is done by a magistrate, then reviewed by the High Court.
- 4) If the High Court confirms the death of the person, the presumption of death order is given and this is a rebuttable order.

- 5) The presumption of death order in terms of the Inquest and Aviation Act has the same effect

Effects Of The Presumption Of Death Order (statute)

Division of Estate

- A presumption of death order will result in the estate of the said person being divided among the heirs. However, before the heirs can claim their inheritance, they have to give security (collateral) such as a house or car, to the value of what is given to them from the inheritance.
- This is in the event of the person presumed dead returning, so that they can return to their normal life and will not be left without prior possessions or finances.
- If an heir refuses to give security and the missing person does return, the heir can be sued for 'unjust enrichment'.

Dissolution of Marriages

- If the presumption of death order has been granted, it entitles the spouse to apply to apply for an order to dissolve the marriage,
- The dissolving of marriages is done in terms of the **Dissolution of Marriages on the Presumption of Death Act** (section 2)
- As soon as the presumption of death order comes through, the marriage will automatically dissolve, on the same date.
- The marriage will then remain dissolved for all times and purposes, even in the event of the missing person returning.

Summary of differences between Common Law and Statute

| COMMON LAW | STATUTE |
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| The person dies from any cause (natural or unnatural) | The person dies from unnatural causes |
| Only private individuals are involved, The state is not involved, as there is no state involvement | The state is involved, as it involves the possibility of a crime |
| Burden of proof: balance of probabilities | Burden of proof: beyond reasonable doubt |
| Spouse applies separately to dissolve the marriage | Marriage is automatically dissolved |