

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 Nascturus?

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

Q: What is a Nascturus 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 Nascturus fiction to operate there is a condition that the interest concerned must be to advantage of the unborn child.

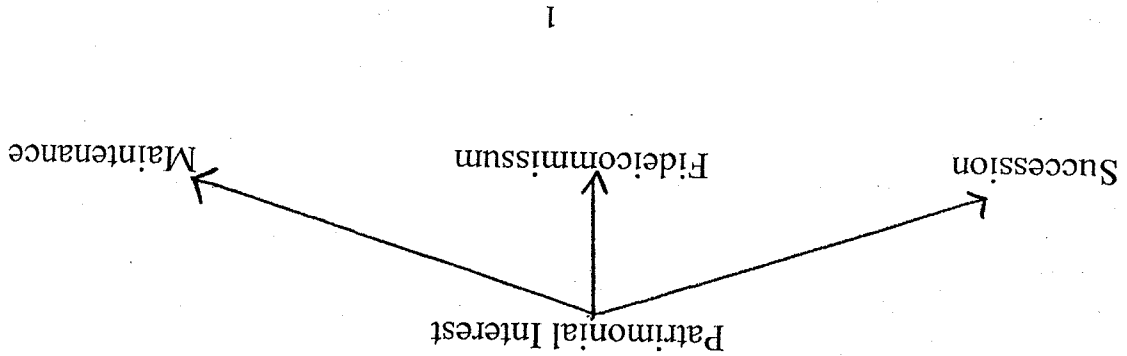
REQUIREMENTS FOR THE APPLICATION OF THE FICTION?

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

INTEREST TO BE TAKEN IN TO ACCOUNT

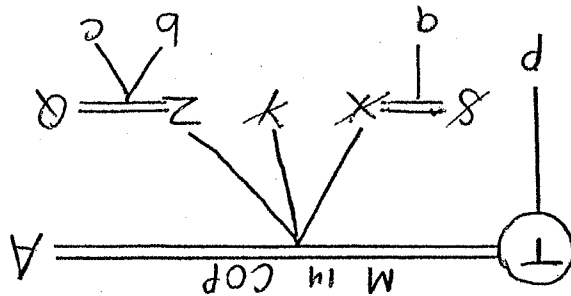


1 : PATRIMONIAL INTERESTS

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 : INTESATE 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

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

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

• 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 *fideicommissaris*

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.*

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:

child was later born with brain damage and a mental disability .
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 childs 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 childs 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 .

- ✓ 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.

BOBERG

- ✓ 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.

JOURBERT

6 : IS THE NASCITURUS A LEGAL SUBJECT

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 .

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

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.

✓ 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 .

✓ It is the domicile which a person who has the capacity to act chooses for himself to exercise his free will..

✓ 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.

REQUIREMENTS OF DOMICILE OF CHOICE

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

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.

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 .
3) Persons who are deported from South Africa lose their in this country even if they intend returning because their return would be unlawful .

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

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.

✓ 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

an indefinite period.

C) DOMICILE BY OPERATION OF LAW

S : 2 (1) of the Domicile Act states that anyone who does not have capacity to acquire a domicile of choice is domiciled at the place with which he is mostly closely connected . ie :

✓ Children below 18

✓ Mentally ill persons .

DOMICILE OF A CHILD

S : 2 (2) has a rebuttable presumption that if a minor has his home with 1/both of his parents , the parental home is the minors domicile .

The Act deems "parents " to include both adoptive parents and parents who are not married to each other .

A domicile is assigned only to a minor if he or she is unmarried .

DOMICILE OF A MENTALLY INSANE PERSON

Previously it was contended that an insane person retained the domicile he had when he became insane.

This was objected to by many authors who stated that it would be more effective for an insane person to follow the domicile of his curator.

The Domicile Act now provides that insane person will now be domicile at the place with which he is more closely connected .

THE STATUS AND LEGITIMATION OF EXTRA MARITAL CHILDREN

1) PARENTAL AUTHORITY OF THE MOTHER

The mother of the child attains full parental responsibility of the child upon giving birth. If she is unmarried and a minor, her guardian is her child's guardian.

2) PARENTAL AUTHORITY OF THE FATHER

Often said that the father of an illegitimate child has no relationship with his child except that he is obliged to pay maintenance and the child is entitled to claim it.

GUARDIANSHIP AND CUSTODY (CARE)

In terms of the Children's Act of 2005 if the mother of an illegitimate child is deprived of her guardianship/custody rights the father of the child can be awarded those same rights.

The Children's Act of 2005: an unmarried father automatically has parental responsibility and rights if:

1. At the time of the child's birth, he is living with the mother in a permanent life partnership or;
2. If he was not living with the child's mother, he consents to be identified as the child's father and
 - He has attempted/ contributed to the child's upbringing.
 - He has contributed/ attempted to contribute towards the child's maintenance for a reasonable period.

ACCESS/CONTACT

In terms of the Children's Act of 2005 the term access has now been changed to contact.

Contact refers to maintaining a personal relationship with the child and communicating with him/her on a regular basis if he lives with someone else.

The communication may take place in person eg. By visiting the child/via another medium eg telephone, post/e-mail.

ADOPTION

It is a formal process where parental responsibility is terminated in the biological parent and vested in the adoptive parent.

In *Fraser v children's court Pretoria North* the constitutional court declared s18 (4) (d) of the Child Care Act of 1983 unconstitutional on the grounds that it unjustly discriminated unfairly against unmarried fathers and their right to equality.

The court has since changed the position to give unmarried fathers the same rights as any other natural father would have.

MAINTENANCE

Our Common law provides that both unmarried parents must support their child and the duty is apportioned between them according to their respective means.

If neither parent/their estate are unable to support their child, the duty of support passes to the child's maternal grandparents in terms of *Motan v Joosub*.

However, the position now in terms of *Petersen v Maintenance Officer 2004* is that if parent/ maternal grandparents are unable to support the child his parental grandparents will have to do so.

THE RIGHT TO INHERIT

1) INTESTATE SUCCESSION

The fact that a child is born of unmarried parents does not affect its capacity to inherit intestate from its parents.

2) TESTATE SUCCESSION

Both mother and father may benefit their natural and adulterine children in a will. Incestuous children should also be able to inherit testate from both parents, because punishing children for the crimes of the parents unjustifiably violates s 28(2) of the Constitution, which require that the child's best interests must be paramount.

THE LEGITIMATION OF EXTRA-MARITAL CHILDREN

The legitimation of an extra-marital child may take place by:

- The subsequent marriage of the child's parents to each other.
- Indirectly by adoption.

CHILDREN BORN OF PARENTS UNMARRIED

A legitimate child is a child born to parents who were legally married to each other at the time of conception, or at any time during pregnancy/birth.

An illegitimate child is the opposite.

CATEGORIES OF CHILDREN BORN OF UNMARRIED PARENTS

An extra-marital child is classified in terms of the relationship between the parents at the time of conception.

- A) Incestuous children: born to parents who were incapable of marrying each other at the time of conception because they were too closely related by blood.

- B) Adulterine children: one/both of the parents were married to someone else at the time of conception.

- C) Natural children: children whose parents validly have been married to each other.

ARTIFICIAL FERTILIZATION/INSEMINATION

Artificial fertilization refers to conception which occurs in a way other than through sexual intercourse.

Eg.

- 1. Is a man is infertile and his wife conceives a child by having another man's sperm inserted into her without sexual intercourse.
- 2. If a woman's ovum and the donors sperm are united outside the woman's body and fertilized ovum is then implanted and the child is conceived by using another woman's ovum (i.e. surrogate motherhood)

If a child is born through artificial fertilization to a single woman, she is a child born of unmarried parents.

If a child is born to woman with the semen of her husband/civil union partner, she is a child born of married parents.

In *J v Director General Department of Home Affairs 2003*, a child was conceived through artificial insemination to a same sex couple and was being discriminated against on the basis of their relationship. The court said that a child who is born to a same sex civil union partner is regarded as a child born to married parents.

PROOF OF PARTERNITY

PRESUMTION OF PARTERNITY

a) MARRIED PARENTS

Our law recognises the rebuttable presumption that a child born of a marriage is that of the husband i.e. it is presumed that the child is legitimate.

Latin maxim: pater est quem nuptiae demonstrant i.e. marriage indicates who the father is/the husband to the mother is presumed to be the father of the child.

This presumption is rebuttable because evidence could always be led that the husband of the mother is not the father of the child i.e. that the child is illegitimate.

This presumption could be rebuttable by proving that the husband was impotent/sterile at the time of conception.

This presumption can be rebuttable by any interested person, not only the mother/husband of the child.

Of paramount consideration is always what would be in the best interests of the child.

So the child could also rebut this presumption where it would be in his best interests to do so.

b) This position previously was that if the mother named a certain name as the father of the child and he admitted/ it was proved that he had sex with her at any time, he was presumed to be the father of the child. It did not matter how long before the intercourse took place.

The Children's Status Act 1987 changed this situation to that when it proved that the father of the extra marital child had sex with the mother of the child at any time when the child could have been conceived, he is presumed to be the father of the child, unless on a balance of probabilities the contrary is proven.

CORROBORATION OF THE MOTHER EVIDENCE

Previously our courts did not accept the mother's evidence regarding proof of intercourse without corroboration.

This rule was rejected by the AD in 1981 and it said that the evidence of the mother in paternity cases should be very carefully scrutinized. The Judge referred to the cautionary rule of practise which was evolved to assist the courts in criminal proceedings concerning sexual cases.

CAUTIONARY RULE requires that the court recognises the inherent danger of relying upon such evidence given by the mother and secondly recognised that existence of some safe guard reducing the risk of a wrong conviction. Such a safe guard may be found in corroboration, the absence of contradictory evidence.

REBUTTABLE PRESUMPTION OF PATERNITY

There are various factors that can be taken into account when proof is needed that a man is not the father of a particular child

- 1) absence of sexual intercourse
- 2) sterility
- 3) physical features
- 4) contraceptives
- 5) exceptio plurium concubentium

WHAT IS EXCEPTIO PLURIUM CONCUBENTUM?

A man admits that he had sexual relations with a woman during the time conception could possibly have taken place, but alleges and proves that at the time, another man/ or other men also had sexual intercourse with her. He raises the exceptio as a defence.

Because of the difference of opinion of the applicability of the exceptio, it can safely be accepted that it does not form part of our law today

It would be of no use to a man to prove that other men had sexual relations with the women

In **F v L 1987**, the woman had sexual relations with two men during the period of conception; she then married one of them. A few years later the other man applied for an order declaring him to be the father of the child. Court held: that the child was by virtue of at least two presumptions deemed to be the child of the mother's husband. Firstly in terms of the presumption pater est quem nuptiae demonstrant that the mother's husband is deemed to be the father of the child and secondly by virtue so presumption of fatherhood upon admission of sexual intercourse, it is presumed that both men are the child's father.

The law gives the mother the right to appoint the father and she chose her husband as the father of the child. The court held that it knew of no principle that gives the jilted lover the right to interfere with her choice nor would it be in the public's interest to create such a right. Held: that the applicant had no right to bastardise the child and have himself declared the father of the child.

BLOOD TESTS

In the past blood tests were not often used in SA in paternity disputes, since the courts held that they could not compel a mother and child to submit to such tests.

They have however accepted blood tests as sufficient proof of paternity where the tests were done voluntarily.

In *M v R 1989*, the father of an extra-marital child applied for an order compelling the mother to submit herself and the claim for blood tests, so that their blood could be treated together with his to establish whether is the father of the child. court held: as upper guardian of all minors it can consent to blood tests being performed on a minor and it can order that the minor have the test contrary to a parents wish. an unmarried father applied for an order compelling the child's mother to submit herself and the child to a blood test. as far as the child was concerned judge Kotze held: the high court as upper guardian for all minors may consent to blood test being performed on the minor even if the child's guardians oppose the test. The child best interest must determine whether the court will make the order. In this regard the court must not take cognisance only of the child's immediate circumstances and ignores everything else; as this would entail disregarding other objective considerations like the fact that the court must always strive to establish the truth and that everyone puts a high premium on his /her right to privacy. Thus the child best interests must be paramount but not be the only consideration, the child mother had married three years after the child's birth and the child loved and accepted his mother's husband as his father. The mother and husband were planning to tell the child the following year that the applicant was actually his father. For judge Kotze this was the decisive factor.

He was of the opinion that if this disclosure were made to the child and it subsequently appeared that the applicant was not the father, the child would suffer extreme psychological damage, which should be avoided at all costs. The judge felt that it was crucial for the child's development and happiness that clarity as regards the applicant's paternity should be obtained. He accordingly made an order that a blood sample be taken from the child and be tested.

In *S v L 1992*, the appellant was the mother of a ten year old of whom she alleged the respondent was the father. Since the child's birth, the respondent from time to time paid maintenance for him, but never admitted paternity. He admitted that he had sexual intercourse with the mother at the time the child was conceived but was not the only one.

When the mother applied for an increase in maintenance from the respondent, he opposed it and requested that she and the child have a blood test done to establish whether he is the father. Although the mother had previously consented to the test, she refused it when the matter went to court. Respondent applied to court for an order compelling her and the child to have test done, an order was granted.

The application was based on two grounds. firstly, the applicant relied on a clause in an agreement between him and his wife in terms of which they had undertaken to submit to blood test in order to establish the child's paternity. The court refused to make an order for specific performance in respect of this agreement, inter alia, because the papers before it contained no details of the test to be done on the mother. The court therefore did not know how much of the human body would be removed and from where it would be removed.

The second ground on which the applicant based his case was that the court has inherent power to regulate its own procedures. On this basis it was argued that the court could order an unwilling adult to submit to a blood test because the court may search for and collect evidence which is a procedural matter.

The court further held it does not have the power to interfere with the decision of a child's parent not to submit the child to blood tests even if the courts would have come to a different decision. It also helped that the alleged father had approached the wrong forum. He should not have approached the HC for an order requiring the mother and child to submit to blood tests. He should have instead proceeded in the maintenance court and adduced proof of the mother's refusal in the court. If her refusal were found to be without adequate reason the applicant could have relied on the presumption in the children's status act that the refusal "aimed" at concealing the truth regarding the paternity of the child. He would then in all probability not have been ordered to pay maintenance for the child.

Today our courts are hesitant to order blood tests on the ground that such an order violates a person's constitutional rights to privacy its S 14 and their right to physical integrity S12(2)

However it must be borne in mind that an infringement of these rights would be justifiable if it were in the best interests of the child to determine paternity by ordering person to undergo blood tests.

S28 of the constitution; child's best interest shall be paramount in all matters concerning the child.

GESTATION PERIOD

To establish whose a child's father it is often necessary to determine the period of gestation

In Roman law it was accepted that a child born between 180-300 days after the marriage was conceived during the marriage.

In our law today there is no fixed gestation period. Our courts make a decision on an adhoc basis (for a specific purpose), relying on medical evidence as to when conception would possibly have taken place.

AGE - MINORITY

INTRODUCTION

✓ Age is one of the most important factors influencing a person's status, ie : before the law gives him capacity to act legally, he must be able to comprehend the nature & consequences of his actions.

✓ Before reaching the legal age of majority of 18 years, a minor lacks the intellectual ability to experience & participate independently in legal or commercial dealings.

1) A child below 7 (infans) has absolutely no capacity to act, nor is he criminally or delictually liable for his acts.

2) Children between 7 - 14 are rebuttably presumed not to be criminally liable .

3) In the case of delicts children between the age of 7 and puberty (ie 12 for girls and 14 for boys)are rebuttably presumed not to be delictually liable .

4) Children between the age of 7 and 18 have limited capacity to act ie : they must act assisted by their parents .

5) Girls between the age of 12 and 15 and boys between the age of 14 and 18 must obtain the consent of the Minister of Home Affairs .

3) Children over 10 must consent to their adoption.

4) Children over 12 can receive free condoms , receive proper medical advise , under medical examination .

6) At 16 a person may make his own will.

7) At 14 he may witness a will.

8) At 16 he can open a bank account.

9) At 18 he can take a life insurance policy on your life and pay its premiums .

CHILDREN & THE CONSTITUTION

✓ S: 28 of Constitution provide that a child's best interests are of paramount importance in every matter concerning the child . special protection for children.

✓ Many authors say that restricting a child's capacity to act infringes on his other constitution rights, but others argue that it does not amount to unfair discrimination on the basis of age: the object of these restrictions is ultimately to protect these minors.

CHILDREN'S ACT 38 of 2005

The Act enhances children's rights even further. The rights that a child has in terms of the Act supplement those that the Constitution confers on the child.

The Act seeks to give effect to the child's constitutional rights to family or parental care, to social services, to be protected from maltreatment, neglect, abuse, as well as to have his best interests considered in every instance concerning him.

The Act also seeks to give effect to the obligations in terms of international instruments such as the African Charter on The Rights and Welfare of The Child and the United Nations Convention on The Rights of The Child.

- Please study the rest of this section as is from the study guide as it is new so it is done well in the guide.

LEGAL STATUS OF AN INFANS

Q: Who is an infans

A: A person below the age of seven.

Q: Who is a minor?

A: A person below the age of 18 (which is majority on our law).

✓ We speak generally about a minor as someone below 18.

A) CAPACITY TO ACT

✓ An infans has absolutely no capacity to act & cannot conclude any juristic act.

✓ If there is consensus between an infans & another person, the person will be

ignored by law, but the act can lead to legal consequences, Eg: if an infans destroys someone's property the owners' right of ownership to it will cease, but this will not change the actions of the infans into a juristic act.

✓ An infans cannot conclude a juristic act even with the assistance of his guardian,

His guardian has to act for him on his behalf.

✓ Certain acts such as engagements cannot be entered into by the guardian on his behalf.

✓ An infans cannot accept a donation; this must be accepted on his behalf by the Master of the High Court / guardian / court.

B) CAPACITY TO LITIGATE

✓ All infans have no loans stands & cannot be a party to a law suit even if he is assisted by his guardian.

✓ The guardian must act for him and on his behalf.

C) CRIMINAL & DELICTUAL CAPACITY

✓ Since an infans is completely unaccountable in law he can never be criminally / delictually liable for liability based on faults.

- ✓ He may be liable for delicts not based on fault, Eg : He is owner of a domestic animal that has caused damage and may incur vicarious liability if his servant, in executing his duties commit's a delict.
- ✓ When we speak of fault. We say that he must have acted negligently / intentionally.
- ✓ The capacity to be at fault is accountability, we say that a person can only be accountable if he can differentiate between right & wrong & act accordingly.
- ✓ Since an infans does not have this ability, he is not accountable.
- ✓ An infans does not have the capacity to be at fault .

LEGAL STATUS OF A MINOR

- ✓ Minors between the ages of 7 - 18 have limited capacity to act / contract.
- ✓ This means that a minor cannot be liable for the fulfillment of a contract if he is not assisted by a guardian in concluding that contract.
- ✓ A minor can however enter into a contract without assistance of his guardian if that contract will improve his position, ie : he must acquire rights only & the other party must incur the duties.
- ✓ When a minor has entered into a contract without the assistance of his guardian, we can say that the contract is partially valid since the guardian has to decide whether the minor should repudiate / honor the contract. The contracting party has no option but to abide by the guardians decision.
- ✓ The contract only becomes fully valid when the guardian ratifies the contract.
- ✓ If a minor has performed in terms of an unassisted contract and the contract is repudiated, the minor may recover whatever he performed.
- ✓ Property other than money is recovered by the rei vindicatio and money by a condictio indebiti.
- ✓ The value of the minors performance is reduced by the amount that the minor was unjustly enriched by the other partys performance.

There are various statutory exceptions to the rule that a minor cannot incur contractual liability where he has not been assisted by his guardian.

- 1) A minor who has attained the age of 18 may without consent of guardian insure his own life & pay premiums.
- 2) A minor over 16 may become a member of a bank / building society.
- 3) Deposits in the name of minor in post office savings bank may be repaid to him after the age of 7

ASSISTANCE BY PARENT / GUARDIAN

- ✓ As a rule we know that a minor who contracts without his guardian's assistance cannot be held contractually liable.
- ✓ But we have also seen that there certain remedies available to an adult who has contracted with such a minor i.e.: negotiorum gestio.
- ✓ But where a minor acts with his guardian's assistance he is liable ex-contratu as if he were a major.

THE TWO FORMS THE GUARDIANS ASSISTANCE TO THE MINOR MAY TAKE ARE

- 1) The guardian can contract on behalf of the minor. He will however not be able to conclude an ANC / a contract that will come into operation after he attains majority.
- 2) The minor can enter into a contract himself with consent of his guardian / the guardian may ratify the contract after it has been concluded. The consent may be given expressly / tacitly, if the guardian is aware of an agreement that the minor concluded the accepts it, we can say that he tacitly consents to it.

- ✓ The guardian does not need to know each and every term of the nature and essential terms.
- ✓ It is the duty of the guardian to ensure that the minor enters into only legal transactions that are beneficial to him.
- ✓ If he is unable to / unwilling to do so, that court can order him to do so / it can itself give the required consent.
- ✓ If a contract to which the guardian has consented has not been concluded, he may withdraw his consent.

RATIFICATION

- ✓ A minor when he attains majority may ratify a contract concluded without his guardian assistance.
- ✓ The guardian may expressly / tacitly ratify a contract initially concluded by the minor without his consent.
- ✓ Ratification validates the contract with retrospective effect.
- ✓ Guardian cannot ratify a contract, which he could not initially enter into.

- ❖ Can a minor / guardian ratify an ANC that was entered into without consent, after marriage?

Answer:

- Edelman held an ANC concluded without consent is void and cannot be ratified by the minor / guardian after the marriage has taken place.

LIABILITY OF THE GUARDIAN

- ✓ As a rule a guardian acting in his capacity as guardian does not incur personal liability towards a 3P of the minor.
- 1) He will however be personally liable on a contract if the minor acted as his agent / he ratifies a contract that the minor concluded as his agent.
- 2) He will be liable if he has guaranteed performance by the minor / if guardian has bound himself as surety.

MINORS CONTRACTUAL CAPACITY

ASSISTANCE BY THE GUARDIAN

The guardians assistance to the minor may take the ff 3 forms viz :

- 1 . The guardian can enter into the contract on behalf of the minor .
- 2 . The minor can enter into the contract himself with the consent of the guardian .
- 3 . The guardian can ratify the agreement after it has been concluded .

LIABILITY OF THE GUARDIAN

When a guardian acts he always acts in an official capacity .

He will incur personal liability

1 . if he acted as the minors agent

2 . if he guaranteed performance ie : he bound himself as a surety to the minor

RATIFICATION

It means to validate with later effect .

FRAUDULENT

MISREPRESENTATION

✓ It is generally agreed that a minor who fraudulently misrepresented himself to be a major or to have the necessary consent and thereby leads another person to contract with him, ought to be liable on the ground of the misrepresentation caused.

✓ There is however no consensus on what basis a minor should be liable but the 2 possibilities that exist are:

- 1) A minor can be held liable on the basis that the contract he concluded is enforceable ie: contractual liability.
- 2) He can be held liable for the wrongful act he committed ie: delictual liability.

✓ The various authors have different approaches with regards to these 2 points.

A) CONTRACTUAL LIABILITY

- 1) Roman/Dutch law denies the minor the remedy of restitutio in integrum ie: to return to the previous condition. This means that the minor could not claim back the performance he had already performed in terms of the contract.

✓ The restitutio is only applicable to contracts which the minor has concluded with assistance of the guardian but which is prejudicial to him.

This implication that there is a binding contract is unacceptable for 2 reasons viz

A) In Roman Dutch law it was practice to apply for the restitutio also where a minor had contracted without consent.

B) That the contracts concluded by a minor without the assistance of the guardian is unenforceable. It is unnecessary for a minor to reclaim performance by the restitutio. He can reclaim the performance by means of the rei vindicatio or the condictio indebiti.

REI VINDICATIO

Is an action where an owner can claim his property from a person who has unlawful possession of it.

CONDICTIO INDEBITI

Is an action where by a minor can reclaim from an adult the sum of the money which he paid to the adult but which he did not actually owe. He was not contractually liable to pay that money so he can reclaim it by means of condictio indebiti

2) Some writers like Joubert argues that the fraudulent minor is bound in terms of the contract by means of an estoppel.

An estoppel means that if someone misrepresents that a certain state of affairs exist and another person acts to his disadvantage in consequences of this misrepresentation then the deceiver is not allowed to raise the true facts as a defense.

✓ In this case the minor is bound by the pretence he created that he is an adult. He is not permitted to rely on the true facts that he is in fact not contractually liable.

✓ The minor will not be able to raise his minority as a defense and avoid contractual liability, he will have to fulfill his obligation in terms of the contract

3) We look at case of Louw v MJ + H Trust 1975, court held that a minor who had bought a motorcycle from an adult without the assistance of his guardian, could not claim the purchase price. The reason the court gave was that he misrepresented himself to be an adult.

Cronje + Heaton + Boberg criticize this decision in saying that the court should have permitted him to reclaim in terms of the condictio indebiti that part of the purchase price already paid, he was not bound by the contract he should have been allowed to reclaim the money.

4) Cronje + Heaton say that it is incorrect to hold the fraudulent minor liable in terms of a contract. This liability defeats the object of limiting a minor's capacity to act. Holding him contractually liable would mean that by acting fraudulently he could change his status and attain full capacity to act.

B) DELICTUAL LIABILITY

- ✓ Cronje and Heaton say that a fraudulent minor must only be held delictually liable.
- ✓ A minor who in misrepresenting himself prejudices another person, gives that person a right to claim damages from him.
- ✓ A delict is a wrongful, culpable act which causes damage to another.
- ✓ Delictual liability of minors exists completely independently from contractual liability.
- ✓ If a minor openly claims to be a major or to have the necessary consent or to be emancipated there is no doubt that he is committing a misrepresentation.
- ✓ The other party does not have to enquire into the truth of the statement, all he has to do is accept at face value whatever is said by the minor.
- ✓ Once it has been established that the minor committed a misrepresentation the onus is on the minor to prove that the other party was not misled.
- ✓ The misrepresentation must have been the cause that induced the other party to enter into the contract with the minor and obviously the other party must have suffered loss.

UNDUPLICATE ENRICHMENT

Q : What is it?

Answer:

- It occurs where one person obtains a patrimonial benefit at the expense of another person without a valid legal ground existing for the transfer of the benefit.
- The general rule in our law is that a person may not be unduly enriched at the cost of another.
- Where a person does unduly benefit at the expenses of another, our law obliges the recipient to return to the prejudiced party the amount by which his estate has been and remains enlarged.
- This rule also applies where a minor contracts with an adult without the necessary permission.
- If the adult has already performed in terms of the contract and the minor in turn refuses to perform, the minor becomes enriched at the expense of the adult by the already delivered performance. The adult can hold the minor liable on the grounds of undue enrichment for repayment of the amount by which he was enriched.

THE BENEFIT THEORY

- The so called benefit theory was introduced into our law in Nel V Divine Hall 1890 where the court held that once the contract is the benefit of the minor the minor is contractually liable.

- Edelstein v Edelstein 1952 (3) AD – the Supreme court of Appeal rejected the so-called benefit theory and said that a contract of a minor who acted without assistance can never be valid, because it is to his benefit. However the minor is liable for the extent to which he has been unduly enriched.

HOW IS THE EXTENT OF THE MINORS ENRICHMENT CALCULATED ?

- 1) The moment at which the calculation must be based, is the moment when the other party institutes his claim ie : at litis contestatio .

2) The amount by which the minors estate is increased owing to the performance by the other party .

3) The amount by which the other party's estate is decreased

4) The minor is then liable for the lessor of the 2 amounts .

5) If the minor has lost the performance he received/ sold the thing / decreased its value the following apply:

- ✓ If the minor has lost the thing/ it was stolen, the prejudiced party is not entitled to anything.
- ✓ If it has been decreased in value. The minor is liable only for the decreased value.
- ✓ If he sold the object / performance before litis contestatio, he is liable for the price he received when he sold it.
- ✓ If the proceeds from the sale are still with the minor on date of litis contestatio, he is liable for as much of it as he has during litis contestatio.
- ✓ If the minor has used the proceeds for purchasing necessaries, he is liable for the purchase price, even if he has used up the necessaries and nothing remains .

Q : What are Necessaries?

A: Food, clothing, accommodation.

- The reason the minor is liable for these necessaries is, he would have had to purchase them from his own estate anyway. So by savings on these expenses he is unduly enriched at the cost of another party.
- It must be established whether the minors estate is larger then it would have been had he not received the performance from the other party.
- Example: Sam, a minor has an estate of R10 000. He receives from John a benefit R5 000 with which he buys necessaries.
- At the time of institution of the claim for undue enrichment by John his estate is R10 000 + R 5000 = R 15000 (- R5000) for necessaries
- $$\begin{array}{r} \text{R10000} \\ - \text{R 5000} \\ \hline \end{array}$$
- Had it not been for the performance, he received from John estate would have been 10000-5000 = R 5000 (* He would have spend his own R5000 on necessaries.)

RESTITUTIO IN INTEGRUM

Q : What does it mean?

A : It means to return to the previous condition .

Each party must return to the other what he received in terms of the contract.

This remedy is available where a minor initially contracted without the necessary consent but where the guardian subsequently ratified the contract.

REQUIREMENTS FOR APPLICATION OF THIS

REMEDY

- 1) The minor should have concluded the contract with the assistance of his guardian or guardian should have concluded the contract on his behalf.
- 2) The contract should have been prejudicial to the minor at the moment it was made.

Q : When is the Restitutio remedy not available to a minor?

A : * When he fraudulently represented himself to be a major.

* When he wished to escape bond of marriage / civil / criminal liability.

* A minor is declared a major .

* A minor who has ratified a contract after attaining majority.

Q : What can be reclaimed by this remedy?

A : The purpose of this remedy is to put both parties in the position they would have been in had they never entered into the contract.
• Each party returns everything received under the contract as well as any proceeds / advantages derived from the contract.
• He must also compensate the other party for any loss he suffered as a result of the contract.

Q : Who can seek restitution?
 A : Before the minor attains majority, he can seek restitutio himself with assistance of his guardian .
 If guardian fails to assist him, a curator may be appointed to do so, or
 Minor may wait until he attains majority and then apply for the remedy himself.

Q : For how long is the remedy effective?

A : It prescribes at most three years and at least one year after the date upon which the minor becomes a major.

MINORS CAPACITY IN OTHER TYPES OF JURISTIC ACTS

1) MINOR'S CAPACITY TO MAKE AGREEMENTS OTHER THAN CONTRACTS

The principle that a minor may improve his position but not encumber it without his guardians consent also applies to other agreements.

A minor can enter into a valid agreement with someone else if his debt is extinguished, but he cannot without assistance enter into a valid agreement with a person if that persons debt to the minor is extinguished.

2) CAPACITY TO MAKE A WILL

Minor of 16 could make a valid will.
Minor of 14 could witness a will.

3) THE MINORS CAPACITY TO MARRY

Boys below the age of 18 and girls below the age of 15 must obtain the consent of the Minister of Home Affairs in addition to their guardians consent.
If the guardian is absent the commissioner of child welfare must provide his consent.
The minor could also approach the high court for consent to marry.

4) MINORS DELICTUAL & CRIMINAL LIABILITY

- ✓ A delict is a wrongful, culpable act causing damage to another.
- ✓ A crime is an act prohibited by law.
- ✓ In both concepts the element of fault exists ie : the minor must have acted intentionally or negligently.
- ✓ The capacity to be at fault is accountability.
- ✓ Fault may be attributed to a minor over the age of 7.
- ✓ A person can be held accountable only if he possessed the mental ability to
- ✓ 1) distinguish between right and wrong &
- ✓ 2) act accordingly.
- ✓ The capacity to act ie : the capacity to perform valid juristic act, has nothing to do with accountability.

- ✓ Before one has the capacity to act, one must be able to understand the nature and consequences of ones actions.
- ✓ Accountability on the other hand concerns the capacity to distinguish between right and wrong.
- ✓ A minor may be accountable even though he does not have the capacity to act.

TERMINATION OF MINORITY

The attainment of majority had been fixed by the Age of Majority Act of 1972 at 21 years.

It has now in terms of the Childrens Act of 2005 been dropped to 18

MARRIAGE

A person, who enters into a valid marriage or a customary marriage before he turns 18 attains majority.

If the marriage is dissolved by death / divorce before she turns 18, her minority, status does not revive ie : she remains a major.

A void marriage does not terminate the minority of the parties.

VENIA AETATIS

Venia Aetatis refers to the concession to act as a major, granted to a minor in terms of Common law by the sovereign.

Venia Aetatis was granted by the executive authority (sovereign)

The effect of it is to make the minor a major in law with the exception that he cannot alienate his immovable property or burden it with a mortgage unless this capacity was expressly conferred.

RELEASE FROM TUTELAGE

Release from tutelage refers to the authority the courts had to confer full capacity on a minor.

These orders had more or less the same effect as the Venia Aetatis.

Today our law is not clear whether the Age of Majority has replaced the venia Aetatis and release form tutelage.

Act dies not expressly repeal either.

EMANCIPATION

A minor is emancipated if his guardian grants him freedom to contract independently to enter into contracts .

This occurs where the minor participates in a commercial enterprise as an economically independent person .

Here when the minor acts he incurs liability like a major .

Emancipation occurs in one of 2 ways viz :

1) Express emancipation : where the parent makes a declaration before the court that he has emancipated his child from parental responsibility .

2) Tacit emancipation : occurs when a minor lives apart from his parents and manages his life financially .

The problem is whether emancipation only applies to transaction in connection with his trade / occupation or whether he can act beyond the scope of such business.

Cases deal with the matter differently.

In Dickens v Daley 1956, court held that it depended on the facts and circumstances of the case whether the minor was emancipated regarding all contracts / only to conclude contracts dealing with his occupation / business. If the minor's parent / guardian have given him complete freedom of action it's his mode of living, and earning his livelihood, he is emancipated for all intents and purposes.

In Watson v Koen 1994, court held that the extent of the emancipation is a question of fact depending on the circumstances of each case. Factors which may be taken into account are the fact that the minor lives on his own, his age, relationship between minor and parent / guardian.
The court here accepted that a general emancipation can exist to all contracts, not only contracts connected to the minor's occupation or business, but that it should be clearly proved.

What has to be proved on the probabilities is a clear, certain and firmly estate situation from which it appears absolutely clearly that there was indeed a tacit granting of complete discharge from parental authority.

DIVERSE FACTORS WHICH AFFECT STATUS

MENTAL ILLNESS

The fact that a person has been declared mentally ill or is detained in an institution does not directly affect his capacity to act / litigate the question is whether a person is mentally ill for the purposes of private law.

The Supreme Court of Appeal in Lange v Lange 1945 AD 332 said that a person is mentally ill for the purposes of private law :

1) If he cannot understand what he is doing/ cannot realize what the legal consequences for his actions are or

2) Where he does realize what the consequences of his actions are but is motivated by delusions which are a result of his mental illness.

It is thus clear that a person who has not been declared mentally ill has no capacity to act if he is in fact mentally ill and a person who has been declared mentally ill does not have capacity to act if he is not mentally ill at the time when a juristic act is performed.

If a person is mentally ill for the purpose of private law, all juristic acts entered into by that person are invalid unless they were performed during a lucidum interallum ie : Lucid interval .

When a person is declared mentally ill a curator is appointed to act on his behalf . There are various different types of curators appointed to act on behalf of a mentally ill person viz :

1) curator persona : to look after his person

2) curator bonis : to look after his estate

3) curator ad litem : to assist him with regard to litigation

INABILITY TO MANAGE ONE'S OWN AFFAIRS

The court appoints a curator bonis for anyone who owing to some physical defect is not capable of managing his own affairs.

This applies to persons who are deaf / mute / blind / senile / seriously ill.

The fact that a curator has been appointed for that person does not result in that person losing his capacity to act altogether.

A prodigal is a person with normal mental ability but who is not capable of managing his own affairs; he squanders his assets in an irresponsible and reckless way as a result of a defect in his power of judgment / character.

A court can order a curator bonis to administer his assets.

Prodigality does not affect a persons status .

A prodigal regains full capacity to act and litigate as soon as he abandons his prodigal tendencies and the court revokes the curatorship otherwise he cannot litigate without the curators consent .

Prodigality normally goes hand in hand with gambling / alcoholism.

A mere declaration that a person is a prodigal is not enough to deprive the person of his capacity to act.

It must be coupled with an order restraining the person from administering his own affairs.

The effect of the order is to make the person's capacity to act similar to that of a minor ie : he has limited capacity to act.

PRODIGALITY

It refers to liquor and drug intoxication

If a person has been influenced to the extent that he does not know what he is doing, those acts are void.

Intoxication affects a person's capacity to act only for as long as the intoxication lasts.

To determine whether a person lacks the capacity to perform an act due to intoxication will take us into an enquiry into the level and degree of intoxication that affects his power of reasoning .

INTOXICATION

If at any given moment the person is physically and mentally capable of managing his own affairs he can enter into a valid juristic act.

The curator need only assist such a person in so far as such assistance is necessary ie : if the person while performing the juristic act is not capable of managing his own affairs.

- He can divorce unassisted by the curator
- Being declared a prodigal infringes upon his constitutional rights to dignity and privacy but the infringement is justifiable if he has children to support.

INSOLVENT

- A person is an insolvent if his liabilities exceed his assets. If the person is sequestrated as a result of his estate of affairs the sequestration affects his status.
- When a person is declared insolvent, he is divested of his estates and it vests in the master until a trustee is appointed. Even though a trustee is appointed he does not lose all his capacity to act, he is only not allowed to deal with assets in the insolvent estate.
- All civil proceedings by / against the insolvent are suspended until a trustee is appointed to act on behalf of him, but for the rest of the insolvent retains capacity to litigate.
- If an insolvent commits a delict after the sequestration, the compensation must be paid out of the assets he acquired after the sequestration and that fall outside the insolvent.