

# UNISA

UNIVERSITY OF SOUTH AFRICA

## PVL102-R

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### FAMILY LAW

Duration : 2 Hours

100 Marks

**EXAMINERS :**

**FIRST :**

PROF M DE JONG

MRS S JACOBS

MS TT NOMVELA

PROF J HEATON

**SECOND :**

PROF JM POTGIETER

This paper consists of 7 pages.

**IMPORTANT INFORMATION: PLEASE READ THIS PARAGRAPH CAREFULLY.**

**YOU MUST ANSWER ALL THE QUESTIONS.** Please ensure that you number your answers correctly. If you do not know the answer to a particular question, please write down the number of the question in your examination script and leave a few lines open before starting the next answer.

**QUESTION 1**

Indicate whether the following statements are true or false:

**PLEASE DO NOT WRITE THE CORRECT ANSWER ON THE EXAMINATION PAPER AND ATTACH IT TO YOUR ANSWER SCRIPT BECAUSE IT MIGHT GET LOST.**

- (a) The courts are entitled to order specific performance of an engagement contract. (1)
- (b) Although marriage is a voluntary union based on agreement, it is generally acknowledged that it (marriage) is not a contract. (1)
- (c) A person who has been declared mentally ill can conclude a perfectly valid marriage during a clear moment (*lucidum intervallum*). (1)
- (d) If the parents of a minor refuse to consent to the minor's marriage, the commissioner of child welfare may grant the required consent. (1)

**[TURN OVER]**

- (e) If a minor marries without the required parental consent, the parents may apply for the annulment of the marriage before the minor attains majority, provided that the application is made within six months from the date on which they became aware of the existence of the marriage. (1)
- (f) An adoptive parent may not marry his or her adopted child. (1)
- (g) A civil marriage between cousins is absolutely forbidden. (1)
- (h) A man may conclude a civil marriage with his former wife's sister. (1)
- (i) If a voidable marriage is not set aside by a court order, it remains a valid marriage. (1)
- (j) A spouse who is a minor when he or she marries, attains majority and retains it even if the marriage is dissolved before he or she turns 21. (1)
- (k) The reciprocal duty of support that exists between spouses terminates automatically when the spouses live apart while they are married. (1)
- (l) Legally the husband is no longer the head of the family. (1)

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**QUESTION 2**

Answer the following questions on breach of promise:

- (a) Name one situation when breach of promise occurs. (1)
- (b) In which court case did the court hold that damages for breach of promise are calculated on the basis of positive and negative interest? (1)
- (c) What must the plaintiff (the "innocent" party) prove in order to succeed with an action for satisfaction for personality infringement based on breach of promise? (2)
- (d) Which three rules on the return of engagement gifts (*sponsalitia largitas* and *arrahae sponsalitiaae*) operate when one of the parties to the engagement commits breach of promise? (In your answer you have to indicate which of these gifts may be retained and which must be returned by the parties.) (3)

[7]

**QUESTION 3**

Certain assets do not form part of the joint estate of spouses who are married in community of property and become or remain the spouses' separate assets. Name any five of these assets.

[10]

[TURN OVER]

**QUESTION 4**

Mr and Mrs Botha were married out of community of property in 2000. They did not expressly exclude the accrual system in their antenuptial contract. At the time of their wedding Mr Botha's liabilities exceeded his assets while Mrs Botha had R5 000 in cash. Mr Botha died last week.

At the time of his death, the net value of Mr Botha's estate was R50 000. It consisted of the following:

- \* R5 000 he received as satisfaction for pain and suffering after being involved in a motor vehicle accident *excluded*
- \* R6 000 he received as compensation for the loss of income he sustained while recovering in hospital after the accident *included*
- \* R14 000 he received as compensation for damages caused to his vehicle during the accident *— included*
- \* R25 000 he received as a donation from his mother *— excluded*

The net value of Mrs Botha's estate at the time of Mr Botha's death was R30 000 and included, *inter alia*, the following:

- \* R6 000 she inherited intestate from her father *excluded*
- \* R4 000 she received as a donation from Mr Botha during the subsistence of their marriage *— included*

Suppose that during the subsistence of the marriage, money depreciated to such an extent that, in terms of the consumer price index, R2,00 now has the same value as R1,00 had at the beginning of the marriage. Indicate by doing the necessary calculations, whether Mrs Botha has any claim against Mr Botha's estate. Discuss your answer by explaining your calculations. [18]

**QUESTION 5**

Answer this question by writing only the number of the correct answer in your **answer script**, for example: (a) 1.

**PLEASE DO NOT MARK THE CORRECT ANSWER ON THE EXAMINATION PAPER AND ATTACH IT TO YOUR ANSWER SCRIPT BECAUSE IT MIGHT GET LOST.**

- (a) In terms of the Maintenance of Surviving Spouses Act 27 of 1990, the surviving spouse in a marriage which is dissolved by death has a claim for maintenance against the estate of his or her deceased spouse. Which **one** of the following statements is **false**?
- [1] The Maintenance of Surviving Spouses Act 27 of 1990 bestows a maintenance claim upon each and every surviving spouse regardless of the date the marriage was dissolved by death.
  - [2] The maintenance claim may arise regardless of the matrimonial property system which operated in the marriage.
  - [3] The maintenance claim arises only in so far as the surviving spouse is unable to provide for his or her reasonable maintenance needs from his or her own means and earnings.
  - [4] The maintenance claim terminates when the surviving spouse dies or remarries. (2)
- (b) Section 4(2) of the Divorce Act 70 of 1979 contains guidelines on when a marriage is regarded as having broken down irretrievably. Which **one** of the following instances is **not** one of the guidelines in section 4(2)?
- [1] The parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action.
  - [2] The defendant suffers from an incurable mental illness or is continuously unconscious.
  - [3] The defendant has committed adultery and the plaintiff finds it irreconcilable with a continued marriage relationship.
  - [4] The defendant has been declared an habitual criminal in terms of a sentence of a court and is undergoing imprisonment as a result of such sentence. (2)
- (c) In which **one** of the following court cases did the court issue a divorce decree in terms of the Divorce Act 70 of 1979 while ordering the husband, who refused to grant his wife a Jewish religious divorce, to maintain his wife until such time as their marriage was terminated by the granting of a *get*?
- [1] *Levy v Levy*
  - [2] *Amar v Amar*
  - [3] *Schwartz v Schwartz*
  - [4] *Coetzee v Coetzee* (2)

- (d) In order to establish when a marriage can be considered as having broken down irretrievably, our courts use the subjective and the objective approach to determine whether the *consortium* has been terminated or seriously violated. Which **one** of the statements is **false**?
- [1] A purely objective approach means that the court pays attention to the facts and circumstances of the marriage in question, taking into consideration the reasons why the plaintiff is suing for a divorce. -
  - [2] A purely subjective approach means that the court only considers the fact that the plaintiff is suing for divorce, without taking either the history of the marriage or the present state of the marriage into account. -
  - [3] A purely subjective approach will result in a marriage being regarded as having broken down irretrievably when the plaintiff sues for divorce.
  - [4] A purely objective approach means that the court only pays attention to the facts and circumstances of the marriage in question, without taking into consideration the reasons why the plaintiff is suing for divorce. (2)
- (e) In terms of section 7(7)(a) of the Divorce Act 70 of 1979, the pension interest of a spouse is deemed to be part of his or her assets upon divorce. Section 7(7)(a) does **not** apply to a white couple who were married
- [1] in community of property before 1 November 1984.
  - [2] out of community of property subject to the accrual system on or after 1 November 1984.
  - [3] on or after 1 November 1984 in terms of an antenuptial contract which excludes community of property, community of profit and loss and the accrual system.
  - [4] before 1 November 1984 in terms of an antenuptial contract which excludes community of property, community of profit and loss and the accrual system. (2)

[10]

**QUESTION 6**

Mr and Mrs Roux, both whites, were married subject to complete separation of property in 1998. In 2000, shortly after the birth of their twin sons, Kobus and Deon, Mr Roux donated a luxury motor vehicle to Mrs Roux. (No mention is made of this donation in the spouses' antenuptial contract.) Mrs Roux, an architect, resigned from her job because she wanted to take care of the children herself. After Mrs Roux resigned, Mr Roux started working after hours to support his family properly. The fact that Mr Roux was seldom at home, drove Mrs Roux to have an affair with their neighbour. As Mr Roux found Mrs Roux's adultery irreconcilable with a continued marriage relationship, he immediately sued her for divorce. He also sought an order in terms of section 9 of the Divorce Act 70 of 1979 declaring the motor vehicle which he had donated to Mrs Roux a patrimonial benefit of the marriage which Mrs Roux has to forfeit. Mrs Roux, who opposes the divorce action, intends requesting, amongst other things, a redistribution order in terms of section 7(3)-(6) of the Divorce Act and rehabilitative maintenance. Although the spouses cannot reach consensus on the division of their assets, they agree that Mrs Roux will have custody of Kobus while Mr Roux will have custody of Deon.

[TURN OVER]

- (a) Distinguish between a redistribution order which may be made in terms of section 7(3)-(6) of the Divorce Act and a forfeiture order which may be made in terms of section 9 of the Divorce Act by briefly explaining what each entails. You should then clearly indicate how the two orders differ from each other in **meaning**. (5)
- (b) Does the court have the power to grant a redistribution order in favour of Mrs Roux in this case? Answer "yes" or "no" and give a reason for your answer. (2)
- (c) Mr Roux's attorney has told him that, currently, it is unclear whether the motor vehicle Mr Roux donated to Mrs Roux can be regarded as a patrimonial benefit of the marriage which Mrs Roux may forfeit upon divorce. Indicate whether this advice is correct and explain your answer with reference to case law and the opinion of legal authors. (9)
- (d) Briefly explain what is understood by the term "rehabilitative maintenance". (2)
- (e) Explain with reference to authority (legislation and case law) whether Mrs Roux's misconduct (adultery) plays any role when the court decides whether to award maintenance to her. (3)
- (f) Briefly explain what is meant by the term "custody". (2)
- (g) Briefly explain the duties of the family advocate in terms of the Mediation in Certain Divorce Matters Act 24 of 1987 and indicate with reference to case law whether, in this case, the family advocate ought to apply to the court for permission to institute an investigation. (6)

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**QUESTION 7**

Rearrange the second column below and rewrite the rearranged second column in your answer script so that the cases listed there match the statements set out in the first column, for example:

(i) *Krugel v Krugel*. The statements in the first column all deal with the interests of the children of divorcing parents.

Statement	Case
(i) As the quality of a parent's role is not simply determined by gender, a father can be just as good a "mother" as the child's biological mother, and conversely, the mother can be just as good a "father" as the child's biological father.	<i>Krugel v Krugel</i>
(ii) Custody of a young child is a responsibility as well as a privilege which has to be earned. It is not a gender privilege or right.	<i>Ex parte Critchfield</i>

[TURN OVER]

(iii) It would be unconstitutional to place "undue (and unfair) weight" upon maternity when balancing it against the other relevant factors and "the court must be astute to remind itself that maternity can never be, willy-nilly, the only consideration of any importance in determining the custody of young children".	<i>Van der Linde v Van der Linde</i>
(iv) In deciding whether or not to order joint custody, the court has to consider whether input from both parents, "even if that input is at times disharmonious" is not preferable to an uninvolved parent.	<i>V v V</i>
(v) In view of the equality clause of the Constitution it is legally wrong to describe homosexual orientation as abnormal.	<i>Madiehe (born Ratlhogo) v Madiehe</i>

[10]

**QUESTION 8**

Briefly explain the meaning of the following terms:

- (a) Guardianship which is not a component of parental power  
 (b) *Curator ad litem*

(2)

(2)

[4]

TOTAL: [100]