

Department of Private Law



Family Law

Only study guide for PVL203V

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Printed and published by the
University of South Africa
Muckleneuk, Pretoria

PVL203V/1/2006-2009

98247514

3B2

The study guide reflects the law as at 1 May 2005.

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Module objectives and learning outcomes

In this module we cover the basic principles of family law. Owing to the fact that the module is pitched at first-year level, it has been structured to suit the unique educational needs of students still new to this field. The purpose of this module is to teach you the basic principles of family law and to equip you with the necessary knowledge, skills, attitudes and competencies to analyse and solve the most basic and common family-law problems. If you follow the study guide (which contains instructions on how to study the module) properly, work through all the activities in the study guide and answer all the questions at the end of each study unit you ought to have all the skills (set out below in the learning outcomes) that we require of you. This module also serves as excellent background should you later enrol for the module in Advanced Family Law (LPL407E) which is an elective and which is presented at an advanced level.

The learning outcomes for this module are the following:

- Recognising the role of family law in everyday life
After you have mastered this module, you should firstly be able to recognise the role of family law in everyday life. This requires an understanding of the most pressing and prevalent issues relating to family law that occur within the South African context. You should be able to demonstrate your ability to identify issues related to family law in real or simulated scenarios. In addition, you should be able to interpret and analyse current family-law issues.
- Thinking critically and analytically within a contextual framework
In the second place, you should have a clear understanding of family law in a variety of contexts. You will therefore have to demonstrate your ability to interpret and explain family-law problems in different contexts, provide an unbiased and balanced perspective on these problems, consider different points of view and critically evaluate them in terms of your knowledge of family law.
- Solving family-law problems
In the third place, you should be able to use appropriate methods and skills to apply your basic knowledge of family law in a variety of contexts. In order to do this, you will have to demonstrate your ability to
 - find the relevant sources and authorities in the prescribed tutorial matter to help you solve family-law problems

- analyse and critically evaluate the relevance and applicability of such legal sources and authorities to a particular family-law problem
 - select the most authoritative legal materials to solve such a problem
 - consider and critically evaluate the different solutions to such a problem
 - provide substantiated responses, based on your knowledge of family law
 - give advice on an appropriate course of action in the field of family law
- Engaging with legal texts relating to family law

Having mastered this module, you should have developed the ability to do research, to raise critical legal arguments and to take responsibility for the legal opinions that you advance. You will therefore be required to demonstrate your ability to

 - read, understand and interpret legal texts regarding family law
 - reflect on the views expressed in such texts
 - use legal texts to support your arguments and solutions to particular problems

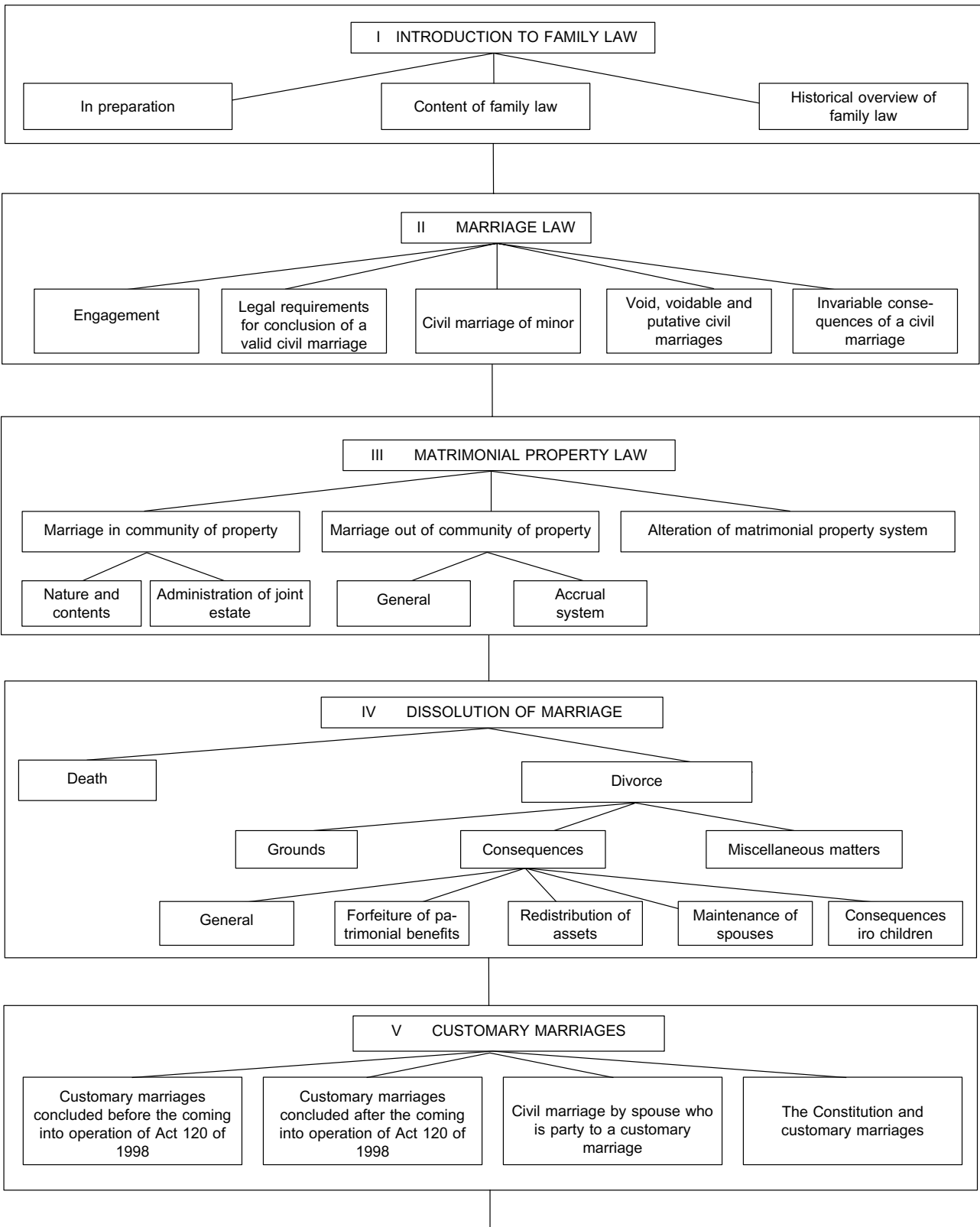
Meeting these four learning outcomes will also equip you with the following skills in the broader sense:

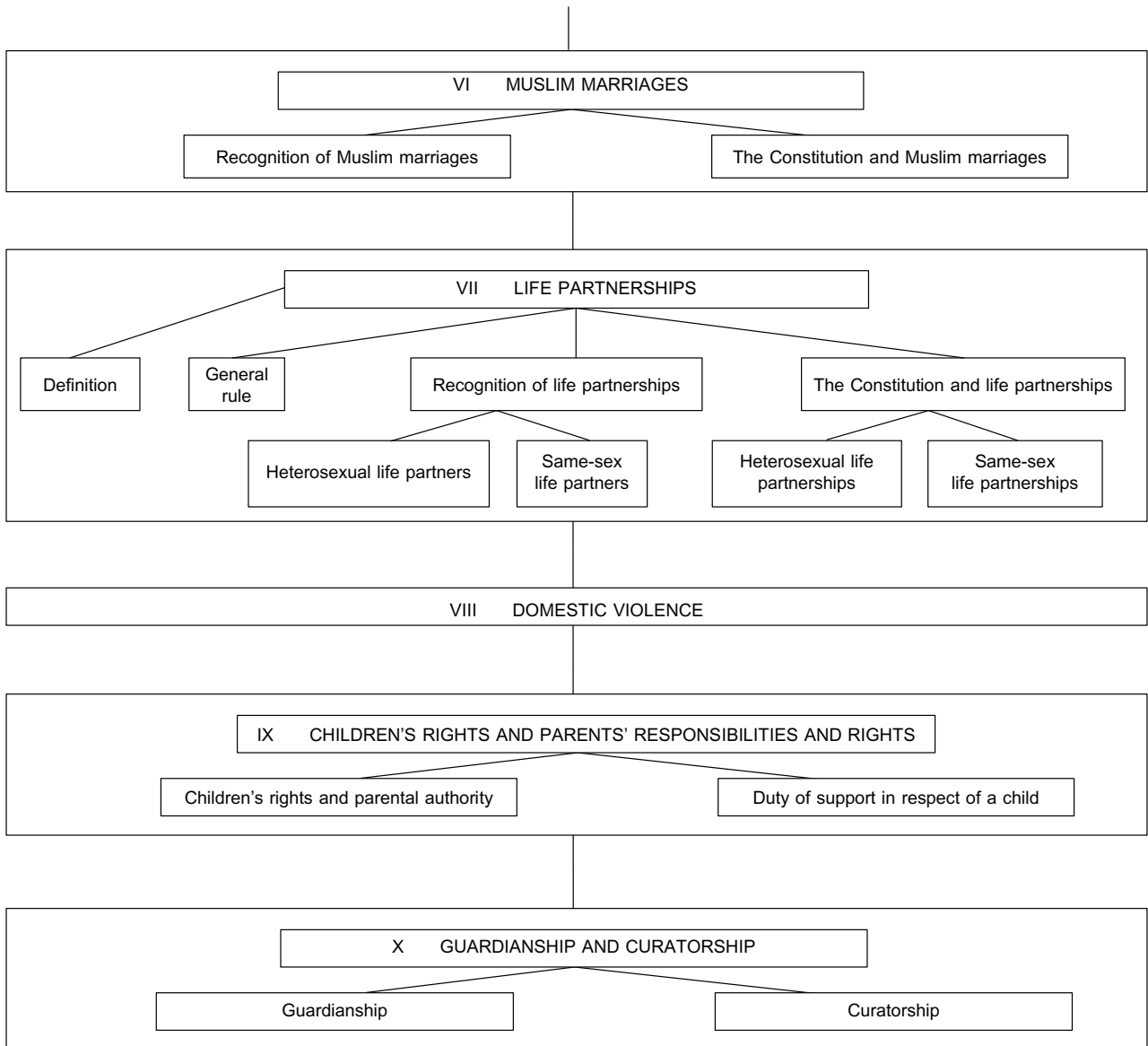
- identifying, analysing and solving legal problems
- managing and organising your life and activities responsibly and effectively
- collecting, analysing, organising and critically evaluating information
- communicating effectively (orally or in writing)

Overview of content of module and module map

In the introduction to this module we discuss how family law works, and its content. We also provide you with a brief historical survey of the law of marriage, after which the following topics are dealt with in detail: marriage law (the engagement, the conclusion of a marriage and the invariable consequences of marriage), matrimonial property law (operation of the different matrimonial property systems and the alteration of the matrimonial property system), dissolution of marriage by death and divorce, the consequences of divorce (for the spouses and the children, and also miscellaneous matters), customary marriages, Muslim marriages, other marriage-like relationships, domestic violence and the parent-child relationship. Lastly, there is also a brief discussion on guardianship and curatorship.

The content of this module can be graphically represented as follows:





Bibliography

Cronjé DSP & Heaton J *South African Family Law* 2ed (2004) LexisNexis
Butterworths Durban

Cronjé DSP & Heaton J *Casebook on South African Family Law* 2ed (2004)
LexisNexis Butterworths Durban

Key to study guide

It is very important that you should understand how to use the study guide correctly. You must realise at the outset that the study guide is not a summary of your prescribed tutorial matter. It is merely a tool to lead and help you through your tutorial matter. Because the study guide is no more than a guide or tool, you will find little of the content of the module in it. What the study guide does contain is a scheme and/or an explanation by means of which you should study the prescribed tutorial matter.

The study guide is designed to help you to go through the work systematically. If you plan your study programme in accordance with the subdivisions in the study guide you will have enough time to

- study all the work
- do revision
- do the assignments
- prepare for the examination

Note, however, that we do not provide you with a study programme for this module. You have to go through the work at your own pace. You will only be able to master this module if you start studying it early in the semester/year and if you study every day. For some study units you will need only a couple of days, while you will have to spend more time on others. You must please not underestimate the scope of this module.

After the table of contents we briefly explain the objectives and learning outcomes of this module. After that we give you a brief overview of the contents of the module as well as a graphic representation of the way in which this module is structured (the module map). Further, at the beginning of each study unit we indicate, by way of the abovementioned module map, what you have already studied and what you will be studying in the particular study unit.

You will see that the study guide is divided into **ten sections**. Each section contains an overview which gives you an outline of the **study units** in that section.

You will notice that each study unit defines its **learning outcomes** in such a way that it indicates in broad terms what you should be able to do when you have completed that particular study unit. The learning outcomes of the study unit is therefore an important guideline on how to approach the tutorial matter.

Under the heading “Prescribed matter” in each study unit in the study

guide you are told what to **read** and what to **study**. If there is no indication of anything to be read, it means that there is nothing to be read. Everything then has to be studied. You must have an in-depth knowledge and understanding of all the sections that have to be studied because questions in the assignments and examination will cover those sections.

The main part of each study unit consists of a discussion of the **content of the study unit**. This is a step-by-step guideline to studying the particular section of the work. The idea is to guide you through the tutorial matter systematically.

In some study units we have pointed out and discussed particularly problematical aspects of the work. By explaining these **problem areas** in the study guide we have tried to help you to understand and master them.

You will also notice that all study units in sections II to X contain **activities**. The aim of these activities is to teach you **study skills**. Please do not think that the activities are examination questions. They bear no relationship to the examination questions or assignment questions. The activities merely serve to assist you in acquiring the skills you need to pass this module. You will not be asked to perform “activities” in the examination. You will be required to answer questions.

Any difficulties you experience with the activities should be solved by the **feedback** which is provided after every activity. The feedback is not a model answer of sorts. It merely serves to indicate to you what the activity required you to do and it shows you how you could have done this.

There are no activities in section I because you do not have to study this section, but only need to read it.

After the discussion of the content of each study unit we provide you, firstly, with some **questions** which you can use to test your knowledge of the particular section of the work. These questions are an important aid and you must ensure that you can answer them properly in order to test whether you are able to apply the content of the particular study unit. In addition, in most of the study units we provide you with an example of a **problem-type question** which is aimed, inter alia, at testing your insight. Please note that these questions are self-test questions. They are there to assist you in testing yourself. They must not be answered and sent to us.

At the end of each study unit you will find a **summary** of what you have learned in the study unit and what will be dealt with in the next study unit.

You will see that there is a broad **margin** down the left-hand side of the pages in the study guide. The purpose of the margin is twofold:

(1) to highlight certain words, concepts or phrases

- (2) to give you a blank space in which to write keywords, notes or questions and in which you can write the references to the pages on which the answers to the questions contained in each study unit are to be found.

In the first case, that is where the note in the margin serves to highlight a word, concept or phrase, the note is printed **in bold in normal type-face**.

If you use your study guide in accordance with the above key, you should find studying Family Law a much easier task than if you try to tackle the work without the assistance given in your study guide.

Glossary

Glossary

This glossary contains a list of technical and legal terms. It is intended as a reference aid to be used when you do not understand a specific technical expression or legal term. You can look up the term or expression here but you need not memorise the explanation. A very important further aid is Hiemstra VG and Gonin GL *Trilingual Legal Dictionary* (1992) 3 ed Juta Cape Town. In that work you will find more terms and expressions.

accrual system	postponed community of profit
<i>a contrario</i>	as a contrast; on the other hand
<i>a fortiori</i>	so much the more
<i>a priori</i>	before the case has been investigated. An <i>a priori</i> argument is an argument based on accepted axioms and not on experience. It is therefore not empirical
<i>a quo</i>	from which. The judgment of a court of first instance or an inferior court or the court appealed from, that is the court before which the matter served before it was brought before the present court
<i>ab initio</i>	from the beginning
absolution from the instance	this means that the plaintiff has not discharged his or her burden of proof, but the claim is not dismissed, so that the defendant cannot raise a plea of <i>res iudicata</i> if the plaintiff institutes the same action later. The plaintiff may therefore institute his or her claim against the defendant on the same cause of action
accrual	the amount by which the value of the spouse's estate at the dissolution of the marriage exceeds the value of the estate at the commencement of the marriage
<i>actio</i>	action
<i>ad hoc</i>	for a specific occasion or purpose
<i>ad idem</i>	agreed
<i>ad infinitum</i>	to infinity

<i>ad litem</i>	for the case or suit
affidavit	sworn statement
affinity	those persons who are related by marriage
affinity in collateral line	exists between a spouse and the blood relatives in the collateral line of the other spouse (in other words, the relationship between you and your spouse's sisters and brothers and their children, and so on)
affinity in direct line	exists between a spouse and all the blood relatives in the direct line of the other spouse (in other words the relationship between you and your mother-in-law, your stepdaughters etc)
<i>aliter</i>	otherwise
<i>animus iniuriandi</i>	intention to infringe personality
antenuptial	before the marriage
<i>arrahae sponsalitiaae</i>	gifts presented to show the seriousness of the promise to marry
ascendants	your ascendants are your forebears or ancestors, that is, your parents, grandparents, greatgrandparents, and so on
blood relatives in collateral line	persons who are blood relatives in the collateral line are persons who are not related in the direct line (in other words they are not ascendants and descendants) but nevertheless have one or more common ancestor
blood relatives in direct line	persons who are blood relatives in the direct line are ascendants and descendants of each other
<i>beneficium</i>	benefit
<i>bona fide</i>	in good faith
<i>boni mores</i>	legal convictions of the community
<i>cadit quaestio</i>	the question falls away
<i>cautio de restituendo</i>	security for restitution
chastise	to punish (can include corporal punishment)
codification	writing down the law in an Act called a Code
<i>coitus</i>	sexual intercourse

common ancestor	a person to whom both parties are related in the direct line
<i>compos mentis</i>	sane; in his or her right mind
<i>condictio</i>	action with which property is recovered
consanguinity (blood relationship)	the relationship that exists between persons who have an ancestor in common, in other words those people who are related by blood
<i>consensus</i>	consent; agreement
consent	parties must reach agreement (<i>consensus</i>)
<i>consortium omnis vitae</i>	an abstraction comprising the totality of a number of rights, duties and advantages accruing to the spouses of a marriage; a collection of a number of legal objects of a particular type of right
<i>contra bonos mores</i>	contrary to good morals
<i>contumelia</i>	insult
crime	offence
<i>Cur adv vult</i> (<i>curia advisari vult</i>)	the court wishes to consider its decision
custody (of a child)	control over the person of the child, responsibility for the child's upbringing and education including deciding with whom he or she may associate and ensuring his or her safety
damages	compensation for patrimonial loss, in other words damage which has an influence on your patrimony
<i>de bonis propriis</i>	out of his or her own pocket
<i>de facto</i>	in fact; judged according to the factual position
<i>de iure</i>	in law; judged according to the law
<i>de lege ferenda</i>	as the law should be (in contrast to the law as it is)
<i>de minimis non curat lex</i>	the law is not concerned with trivialities
<i>de novo</i>	anew
delict	unlawful act

descendants	your descendants are those born of you and your children and their children, and so on
doctrine of <i>stare decisis</i>	also known as the precedent system, to stand by previous judgments
<i>emancipatus</i>	emancipated minor
<i>error</i>	mistake
<i>error in negotio</i>	where there is a mistake regarding the nature of a juristic act
<i>error in persona</i>	where there is mistaken identity regarding a person
<i>ex abundantia cautela</i>	for the sake of greater caution
<i>ex lege</i>	by operation of the law
<i>(ex) mero motu</i>	spontaneously; of own accord
<i>ex parte</i>	as the only interested party
<i>ex post facto</i>	seen in retrospect; in hindsight
<i>facta probanda</i>	facts which must be proved to substantiate the cause of action
<i>facta probantia</i>	facts which prove the <i>facta probanda</i>
family law	that part of private law which deals with the law regulating the legal relationship between spouses, the legal relationship between parent and child, and the legal relationship between a guardian or curator and the person who is subject to guardianship or curatorship
<i>fideicommissum</i>	where the testator leaves property to a person (the <i>fiduciary</i>) subject to the duty of handing it over in full ownership to another person (the <i>fideicommissary</i>) at a certain time or upon the fulfilment of a certain condition
forfeiture of patrimonial benefits	a spouse loses the claim he or she has to the assets of the other spouse (does not lose his or her own property)
<i>functus officio</i>	no longer functioning in an official capacity
guardianship	the capacity of a person to administer a child's estate on his or her behalf and to assist the child in the performance of juristic acts
<i>genus</i>	class

immutability	unchangeability or unalterability
impotence	incapable of having sexual intercourse
<i>in casu</i>	in this case
<i>in esse</i>	existing
<i>in extenso</i>	extensively
<i>in extremis</i>	dying; at death's door
<i>infantes</i>	children below the age of seven
<i>in fieri</i>	in the process of being created
<i>in fine</i>	in the end
<i>infra</i>	below
<i>iniuria</i>	infringement of personality
<i>in limine</i>	in the beginning (of the case)
<i>in loco parentis</i>	in the position of a parent
<i>in re</i>	in the case of
<i>inter alia</i>	amongst other things
<i>inter partes</i>	between the parties
<i>inter se</i>	against one another
<i>interim</i>	in the meantime
<i>in toto</i>	as a whole; in its entirety
<i>in transitu</i>	in transit
<i>intra vires</i>	within the authority (as against <i>ultra vires</i> , which means outside the authority conferred)
<i>in utero</i>	in the womb
invariable consequences (of marriage)	the consequences of a marriage which come into being automatically by operation of law and which cannot be excluded by the parties
<i>ipsissima verba</i>	the exact words
<i>ipso facto</i>	obvious
<i>ipso iure</i>	by operation of law
<i>iudicis est ius dicere non facere</i>	the function of a judge is to state the law, not to create it
<i>iusta causa</i>	just cause
<i>jocalia</i>	small gifts
jurisdiction	authority to hear a case

legislation	things like Acts, proclamations, regulations and ordinances, whether of Parliament or of subordinate legislative bodies, such as municipal councils
<i>lex</i>	law or legal rule
<i>lex loci celebrationis (contractus)</i>	law of the place of celebration (where the contract or marriage was entered into)
<i>lex loci domicilii</i>	law of the place of domicile
<i>litis contestatio</i>	moment when the suit is instituted between the parties; alternatively, the moment when the pleadings are closed
<i>lucidum intervallum</i>	lucid interval
maxim	legal maxim, adage
<i>mutatis mutandis</i>	with the necessary alterations
<i>negotiorum gestio</i>	justifiably acting on behalf of another without having authority to do so
NO (<i>nomine officii</i>)	in an official capacity
<i>non compos mentis</i>	not in full possession of his or her faculties; insane
<i>onus</i>	burden of proof
<i>opere citato (op cit)</i>	in the work quoted
<i>pactum</i>	agreement
<i>pactum successorium</i>	an agreement concerning the devolution of an estate
parental power	the total of the rights and duties of parents in respect of their minor children
<i>pari passu</i>	simultaneously and equally; on equal terms
patrimonial consequences of marriage	consequences relating to the estates of the spouses. In other words whether they are married in community of property, out of community of property and with the accrual system, or out of community of property without the accrual system. These consequences determine how the assets of spouses are distributed upon dissolution of their marriage
<i>pendente lite</i>	pending the trial
<i>per incuriam</i>	a decision which failed to take note of existing legislation

<i>per se</i>	in itself
<i>petitio principii</i>	acceptance of what must still be proved; begging the question
plaintiff	person who institutes an action
polyandry	a woman may have more than one husband
polygamy	a man or a woman may have more than one spouse; is also used (inaccurately) to refer to the case where a man may have more than one wife but a woman may not have more than one husband
polygyny	a man may have more than one wife
positive law	the law which applies in a particular country and which can be enforced
<i>postea</i>	afterwards
postnuptial	after the marriage (“post” means after, “nuptial” means marriage)
predeceased spouse	the spouse who dies before the surviving spouse, in other words the spouse who has died first
<i>pretium succedit in locum rei, res succedit in locum pretii</i>	the price comes in place of the object, the object comes in place of the price
<i>prima facie</i>	at first glance
private law	the law regulating the private relationship between legal subjects on an equal footing
<i>pro non scripto</i>	as if it had not been written
promulgate	publication of an Act in the Government Gazette
putative marriage	when one or both parties are unaware of the defect which renders their marriage void, and believe in good faith that they are lawfully married
puberty	14 years for boys and 12 years for girls
<i>qq (qualitate qua)</i>	in the given capacity
<i>qua</i>	as
<i>quaere</i>	uncertain
<i>quasi</i>	as if
ratify	approve; confirm
<i>ratio</i>	reason; ground

<i>re</i>	in connection with or in the case of
redistribution of assets	the assets or part of the assets of the one party (usually the wealthier spouse) are transferred to the other party (usually the poorer spouse)
<i>rei vindicatio</i>	the action with which an owner may reclaim his or her property from any person if the property has unlawfully been taken from the owner's possession
<i>res</i>	thing
<i>res ipsa loquitur</i>	it speaks for itself
resolutive condition	a certain state of affairs will cease to exist when a certain event occurs (upon the fulfilment of a condition)
respondent	the opposing party in an application or an appeal
<i>restitutio in integrum</i>	return to the previous condition
retrospective	applies in respect of the past
rule <i>nisi</i>	interim order with a return date on which it must be indicated why the order should not become a final order
satisfaction	compensation for non-patrimonial loss, that is, damage which has an influence on your person and not your patrimony
seduction	extra-marital intercourse with a virgin with her consent (defloration)
<i>semble</i>	apparently; it would seem that
<i>separatio a mensa et thoro</i>	separation from bed and board
<i>simul ac semel</i>	simultaneously
<i>sine</i>	without
<i>spes</i>	expectation, hope
<i>sponsalia</i>	promise of marriage; engagement
<i>sponsalitia largitas</i>	gifts made with a view to the marriage
spouses	husband and wife
standard form antenuptial contract	marriage out of community of property as well as profit and loss
<i>stante matrimonio</i>	during the existence of the marriage

<i>stare decisis</i>	decided cases remain authoritative
<i>status quo ante</i>	the previous legal position
sterility	incapable of procreating, ie of having children
<i>stuprum</i>	immorality; extra-marital sex
<i>sub iudice</i>	pending
<i>sui generis</i>	of its own kind
<i>sui iuris</i>	capable of performing juristic acts; having capacity to act
<i>summa ratio</i>	decisive reason
<i>supra</i>	above
suspensive condition	a certain state of affairs will come into operation when a certain event occurs (upon the fulfilment of a condition)
testamentary guardian	guardian appointed in will to succeed natural guardian of child
<i>uberrima fides</i>	utmost good faith
<i>ubi ius ibi remedium</i>	where there is a right, the law affords a remedy
<i>usufruct</i>	a personal servitude that gives the usufructuary a limited real right to use the property of another as well as its fruits, with the duty of eventually returning the property to the owner with the preservation of the substance thereof
<i>uxor</i>	wife
variable consequences (of marriage)	the consequences of a marriage which can be agreed upon by the parties before marriage in an antenuptial contract
<i>verba ipsissima</i>	the exact words
<i>verbis</i>	with words only
<i>vice versa</i>	the reverse of
<i>videlicet (viz)</i>	namely
<i>vinculum iuris</i>	juristic tie; juristic bond
<i>vis</i>	force
<i>vitium</i>	defect
<i>viva voce</i>	orally

void marriage	a marriage which has simply never come into existence; it does not have the legal consequences of a valid marriage and does not affect the status of the parties
voidable marriage	such a marriage remains in force and has all the normal legal consequences of a valid marriage until it is dissolved by a court order; the status of the parties is affected
waive/renounce	give up

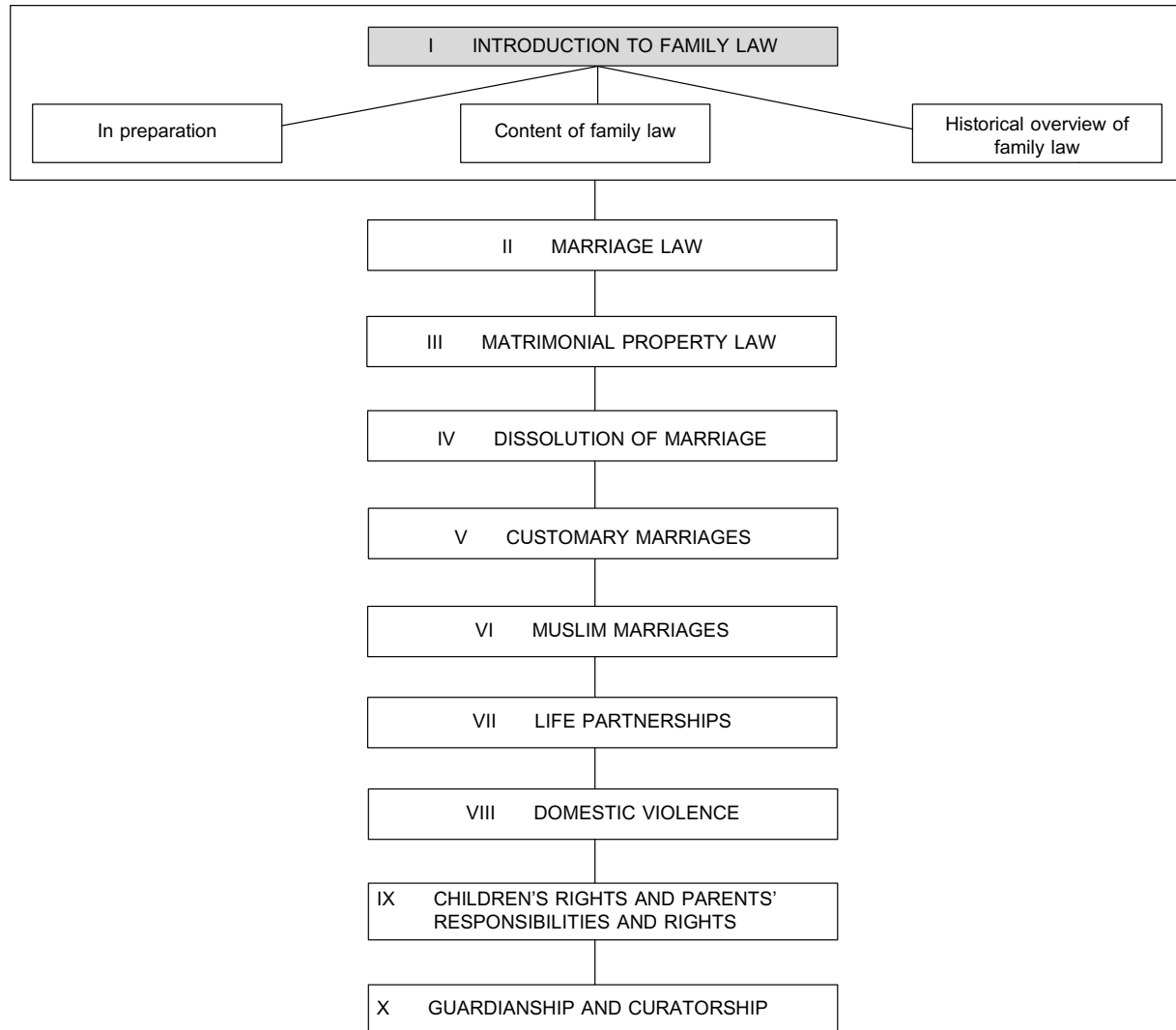
Introduction to family law

Section I

SECTION I

Introduction to family law

MODULE MAP



CONTENT

Overview

Study unit 1: In preparation

Study unit 2: Content of family law

Study unit 3: Historical overview of family law

OVERVIEW

Before you can begin studying the content of the module, Family Law, you should have some general background knowledge to enable you to understand the content of the module better.

We have divided the discussion of the background knowledge into three study units:

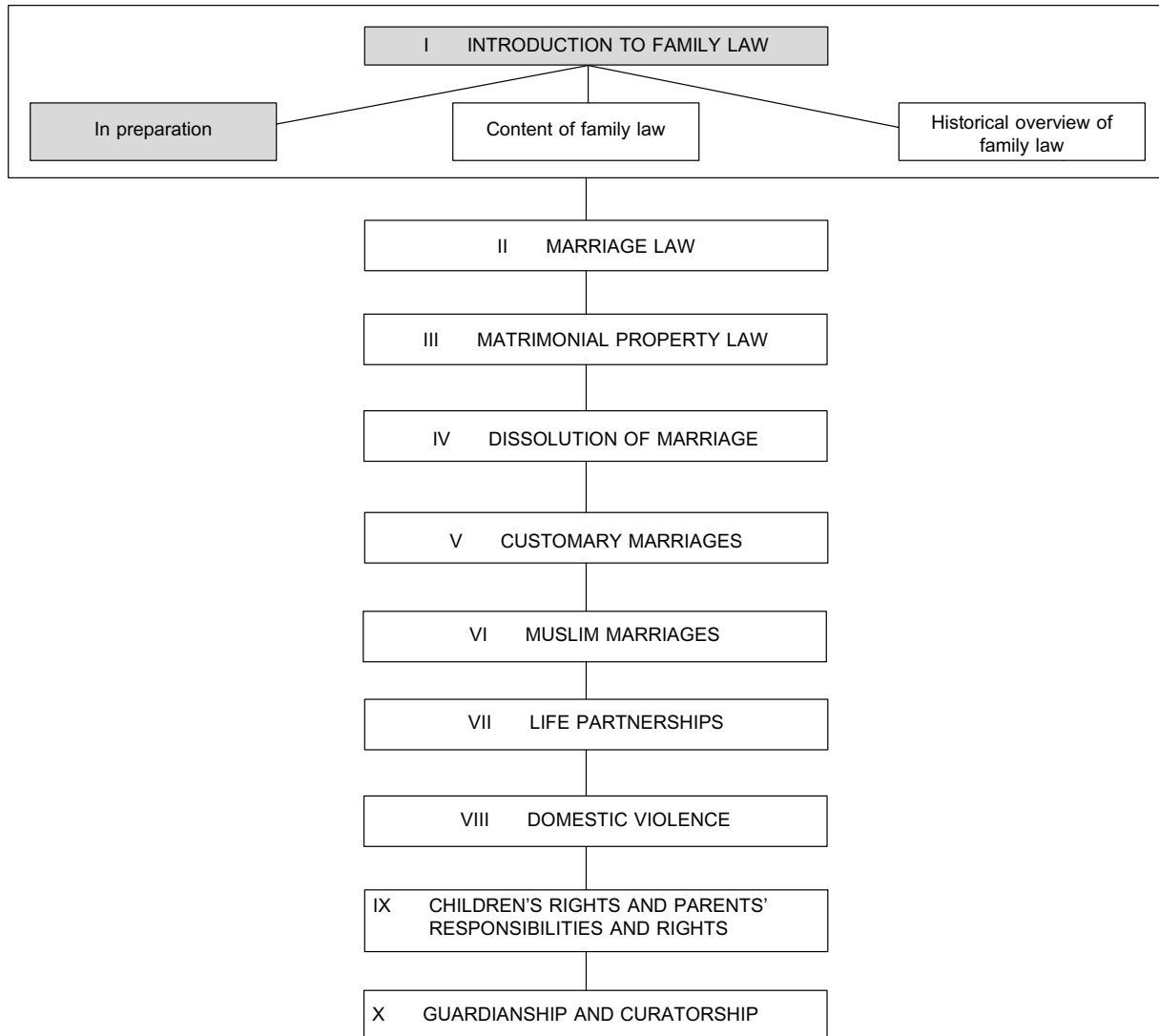
- Study unit 1 explains which sources you have to consult to find the law and in which sequence you should consult them.
- Study unit 2 gives you a general idea of what family law is, what it deals with, and how it fits in with the other branches of the law.
- Study unit 3 explains how the South African family law developed over the years.

You should **carefully** read all the information set out in study units 1 to 3. If you do not understand the background you may find it difficult to grasp the scope and content of this module.

STUDY UNIT 1

In preparation

MODULE MAP



PREFACE

Before you can begin your studies of family law, you have to know which sources you must consult to find the law. In other words, you have to know where to look to find out what the law has to say. Although this study unit provides you with no more than background information you should read it very carefully.

LEARNING OUTCOMES

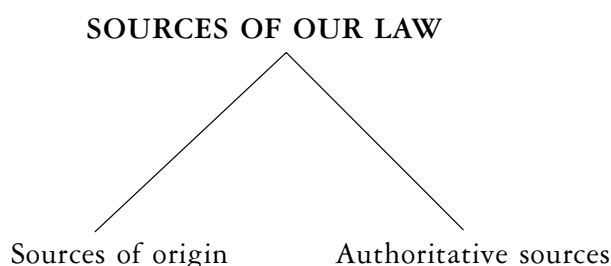
The purpose of this study unit is to provide you with background knowledge which you must have in order to understand the way in which the law, which includes family law, works.

Unless you read this study unit carefully, you may experience difficulties with the module.

CONTENT OF THIS STUDY UNIT

Before you can start studying family law, you should know what the sources of our law are and how much weight to attach to each of the sources of the law.

1 SOURCES OF OUR LAW



Source of origin

It is necessary to distinguish between sources of origin and authoritative sources of law. A source of origin of the law is every fact which gives rise to positive law. (Positive law is the law which applies in a particular country and which can be enforced.) Examples are legislation (Acts, proclamations, regulations and ordinances) whether of Parliament, or of subordinate legislative bodies (such as municipal councils), custom and agreement (such as treaties between states and contracts). (It is often not realised that an agreement creates law for the parties concerned: if Alice buys something from Busisiwe, new law is created regarding Alice's right to claim the thing bought and Busisiwe's right to claim the purchase price.)

Authoritative source

The authoritative sources of our law are the laws, writings, etcetera from which one can determine what the law is. These sources are the authorities of our law. When the legal position in a particular instance has to be determined, the authoritative sources of law have to be consulted and the law must be found in them.

Before we take a closer look at the authoritative sources, we should mention that the sources of origin and the authoritative sources of law

often overlap. The fact from which the law arises can also be an authoritative source of the law. The most obvious example of this is legislation.

Order in which authoritative sources must be consulted

The authoritative sources of law, **IN THE ORDER IN WHICH THEY MUST BE CONSULTED**, are the following:

- (1) statute law
- (2) customary law
- (3) case law
- (4) the works of the old authorities on Roman-Dutch law
- (5) Roman law

Other sources which are not, strictly-speaking, authoritative sources, but which can be consulted because they are helpful in determining what the law says are the following:

- (6) modern textbooks and other academic writing
- (7) foreign law

We will now discuss each of these sources hereunder.

- (1) *Statute law.* Legislation is the most important authoritative source of our law. The law can be found in the statutes, ordinances, proclamations and regulations of the different legislative bodies such as Parliament, municipal councils, and other local governments. Thus, for example, if one has a problem with a divorce-related issue, the Divorce Act 70 of 1979 will be the first place to look to find an answer to the problem.
- (2) *Customary law.* Certain rules of conduct are observed because they have become customary in the sense that they are respected by a substantial group of people. For example, common commercial practice is the embodiment of a customary law. **Customary law does not consist of written rules. It develops from the views of the community and is carried on down from generation to generation.**

In modern communities, where the pace of development is very rapid, custom has little chance to develop into law. Once the need for a particular legal rule arises, the legislature usually steps in and lays down a rule. Nevertheless it is still possible, even today, for a custom to develop into law.

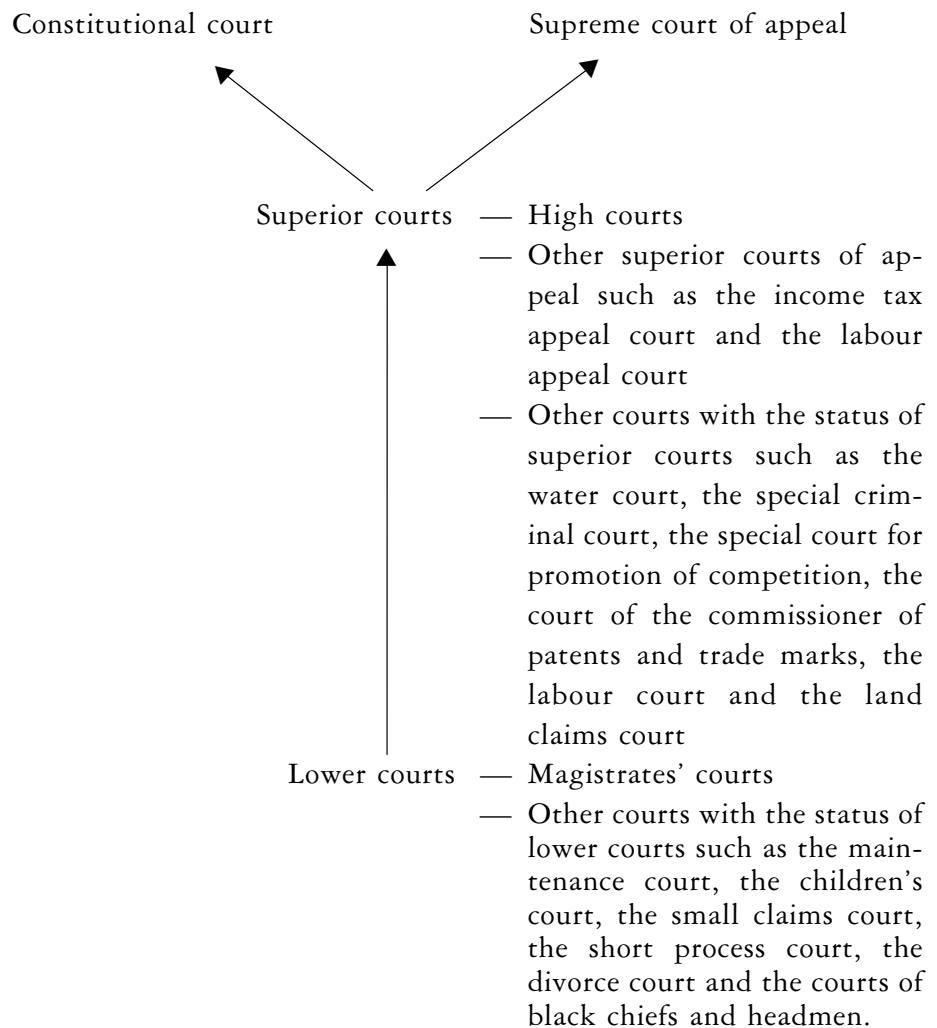
It appears from court cases that the following requirements must be met before a customary rule will be recognised as a legal rule:

- (a) It must be reasonable.
 - (b) It must have existed for a long time.
 - (c) It must be generally recognised and observed by the community.
 - (d) The contents of the customary rule must be certain and clear.
- (3) *Case law.* An important authoritative source of law is known as case

law and comprises the judgments of the Dutch courts until approximately 1809, the judgments of the Cape Council of Justice prior to 1827, the judgments of the courts of the four former provinces (Transvaal, Orange Free State, Cape Province and Natal) dating prior to 1910, and judgments of the South African courts after 1910.

In terms of the Constitution (Constitution of the Republic of South Africa Act 108 of 1996) the South African court structure now looks like this:

SOUTH AFRICAN COURTS



The constitutional court is the highest court in all constitutional matters (s 167(3)(a) of the Constitution), while the supreme court of appeal is the highest court in all non-constitutional matters (s 168(3) of the Constitution).

The high court is the old supreme court and at present consists of the following divisions:

The Cape provincial division, the Eastern Cape provincial division, the

South Eastern Cape local division, the Natal Provincial Division, the Durban and Coast local division, the Northern Cape provincial division, the Orange Free State provincial division, the Transvaal provincial division, the Witwatersrand local division, the Venda high court, the Ciskei high court and the Bophuthatswana high court. Schedule 6 of the Constitution provides that all courts, including their structure, composition, functioning and jurisdiction, must be rationalised in order to establish a judicial system that meets the requirements of the Constitution. It is therefore expected that in the future our high court system will be changed to reflect the country's division into nine provinces. It is likely that each of the nine provinces will have at least one division of the high court. The Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001 is the first step in the process of rationalising the high courts in the country. In terms of this Act, the relevant Minister may change the area over which a high court may have jurisdiction by including therein or excising therefrom any district or part thereof. The Act also empowers a high court to transfer any civil proceedings instituted in that court to another high court. This will be the case where the civil proceedings should have been instituted in the last-mentioned court or would be more conveniently or more appropriately heard or determined in the last-mentioned court.

The high courts of appeal and other courts with the status of superior courts are each instituted in terms of one or other Act.

The magistrates' courts presently consist of the civil courts, the criminal courts and the regional courts established in terms of the Magistrates' Courts Act 32 of 1944.

The other courts with the status of lower courts are also each instituted in terms of one or other Act.

- (4) *The works of the old authorities on Roman-Dutch law.* The works of the old writers on Roman-Dutch law (such as those by Van Leeuwen, Van der Keesel and Grotius) are an important authoritative source of the law.
- (5) *Roman law.* Roman law, too, especially as codified in the *Corpus Iuris Civilis*, still applies as a source of our law in so far as it was received in Holland after the Middle Ages. In this regard the commentaries of the old authorities (such as Voet, who wrote a commentary on the Pandect part of the *Corpus Iuris Civilis*) and of modern writers on Roman law (such as the German authors Windscheid and Von Savigny) are of importance.
- (6) *Modern textbooks and other academic works.* Modern textbooks and other academic works enjoy no authority as sources of law but are often quoted because they help the researcher to determine what the existing law is.
- (7) *Foreign law.* As a last resort, one may refer to foreign law (ie the law of other countries) even though it is not really an authoritative source of

law. Where there is nothing to be found on a particular point in the sources of our law, the judge can turn to the law of other countries to try to find a suitable legal principle.

To summarise

The authoritative sources of our law must be consulted in the following order:

- (1) statute law
- (2) customary law
- (3) case law
- (4) old authorities on Roman-Dutch law
- (5) Roman law

Other sources which can be consulted are

- modern textbooks and other academic works
- foreign law

Now you know what the sources of our law are and their order of precedence. In the case of case law, you also have to understand what the precedent system is and how it works.

2 THE PRECEDENT SYSTEM

The precedent system or doctrine of *stare decisis* (which means “to stand by previous judgments”) implies that if a court has given a particular decision, it and those courts which are subordinate to it are bound by the decision and must in future give the same decision on the same point. The reason for this doctrine is mainly to achieve uniformity in the application of legal rules and to ensure a measure of legal certainty.

Therefore, when a judge has decided what the applicable rule is in a particular case and has interpreted it or, where necessary, has developed it, that application and interpretation or development must be followed in future in all similar cases, for the sake of legal certainty and uniformity. Prior to the coming into operation of the final Constitution on 4 February 1997, a court could not make any new legal rules and the judge’s function was purely to state the law and not to create it. A judge could only determine the existing legal rules and then interpret them. Section 8(3) of the Constitution (Act 108 of 1996) now expressly determines that when applying a provision of the Bill of Rights (contained in ch 2 of the Constitution) to a natural or juristic person, the court in order to give effect to a right in the Bill, must give effect to the common law or, if necessary, develop the common law to the extent that legislation does not give effect to that right. The old rule that it is merely the function of a judge to state the law and not to create it, therefore no longer applies

without qualification. Where a particular case concerns one of the fundamental human rights, it is also part of the judge's function to create law to the extent to which the existing law does not recognise a fundamental human right.

The precedent system is particularly necessary in countries such as South Africa and England where the law has not been codified (ie the law is not written down in an Act — known as a Code — which reflects the state of the law at that point). On the European Continent, where the law is almost completely codified, the precedent system is expressly banned in some of the Codes, but it is none the less applied in practice.

There are two requirements for the operation of a precedent system, both of which the South African system fulfils

- (1) a hierarchy of courts (in other words, the courts are divided into ranks, each rank being bound by the decisions of the rank above it)
- (2) an effective system of law reporting (to enable the lower-ranking courts to see what the higher-ranking courts have held)

The precedent system as applied in South Africa may be briefly explained as follows:

2.1 The constitutional court

The constitutional court is the highest court in all constitutional matters and therefore has jurisdiction in all matters relating to the interpretation, protection and enforcement of the Constitution of the Republic of South Africa Act 108 of 1996. This includes jurisdiction over any matter relating to any violation or threatened violation of a fundamental right entrenched in the Bill of Rights, which is contained in chapter 2 of the Constitution.

Further, section 167(4) of the Constitution lists a number of matters which may be decided only by the constitutional court to the exclusion of all other courts. This list includes, for example, decisions on the constitutionality of any amendment to the Constitution. No other court has any jurisdiction to pass judgment on such matters. However, other constitutional matters can be heard by the supreme court of appeal, the different divisions of the high court and other courts with the status of superior courts. The lastmentioned courts are, however, all bound by the decisions of the constitutional court. Furthermore, section 167(5) of the Constitution determines that when the supreme court of appeal, any division of the high court, or any other court with the status of a superior court makes an order on the constitutionality of an Act, such order will first have to be approved by the constitutional court before it can have any force.

A decision of the constitutional court therefore binds all persons and all legislative, executive and judicial organs of state. Thus every person, every

legislative body, every government organ (eg the civil or public service) **and every court in South Africa** is bound by the decisions of the constitutional court.

2.2 The supreme court of appeal (previously the appellate division)

The supreme court of appeal is the highest court in all non-constitutional matters and is characterised by the following:

- (1) It must follow the decisions of the constitutional court.
- (2) Although it must also follow its own previous decisions, it may deviate from them if it is convinced that in a particular case, a previous judgment was wrong on a particular point. It matters not how many judges handed down the judgment.
- (3) The supreme court of appeal has jurisdiction to hear appeals in any matter, including constitutional matters which do not fall within the exclusive jurisdiction of the constitutional court (s 168(3) of the Constitution). Besides this, the supreme court of appeal can hear any issue connected with an appeal and other matters referred to it in terms of an Act.

2.3 The different divisions of the high court (previously the supreme court)

The high court is characterised by the following:

- (1) All divisions of the high court are bound by the judgments of the constitutional court and the supreme court of appeal and may not deviate from them.
- (2) Where there is no applicable decision by the constitutional court or the supreme court of appeal, the provincial division and any local division within the particular province are bound by all the judgments of the high courts in that province if the court is made up of the same number of judges or more. (The Transvaal provincial division, for example, is bound by its own judgments and by those of the Witwatersrand local division, and the Durban and Coast local division is bound by its own judgments and by those of the Natal provincial division.) This means that (within a particular province) the full bench or a court with more than one judge is never bound by the judgments of a single judge. A single judge is bound by the judgments of a court consisting of one or two or three judges; two judges are bound by the judgments of a court with two or three judges; and three judges (a full bench) are bound only by the judgments of a court with three judges.
- (3) In the absence of a decision on a particular point in the same provincial division or in a local division within the particular province, a provincial or local division is not bound by a decision on the same point in a provincial or local division within another province, although such decisions usually have persuasive force.

2.4 The magistrates' courts and other lower courts

The magistrates' courts and other lower courts are characterised by the following:

- (1) They are bound by the judgments of the constitutional court and the supreme court of appeal and may not deviate from these judgments.
- (2) In the absence of a decision by the constitutional court or the supreme court of appeal, a magistrate's court (or any other lower court) is bound by the judgments of the provincial or local division of the high court of the province in which it is situated, in the following order of precedence
 - (a) a court of three judges
 - (b) a court of two judges
 - (c) a court of one judge
- (3) In the absence of a judgment as mentioned in (2) above, the magistrate's court or other lower court is bound by the judgments of any division of the high court in the same order of precedence as set out above in (2) or of other superior courts, such as the labour appeal court or the water court.
- (4) One magistrate is not bound by the judgments of another, mainly because the judgments of magistrates' courts are not reported.

Any court may deviate from a judgment by which it is normally bound, if the judgment was made *per incuriam*, that is, if existing applicable legislation was overlooked.

In brief

For purposes of the precedent system, the order of importance of our courts is as follows:

- (1) constitutional court
- (2) supreme court of appeal
- (3) superior courts eg the high court (different divisions)
 - (a) three judges
 - (b) two judges
 - (c) one judge
- (4) lower courts

SUMMARY

In this study unit you

- discovered what the sources of origin and the authoritative sources of law are
- learnt how these sources determine where you will look to find the law applicable to a particular problem
- saw how much weight is to be attached to each source
- learnt how the precedent system works

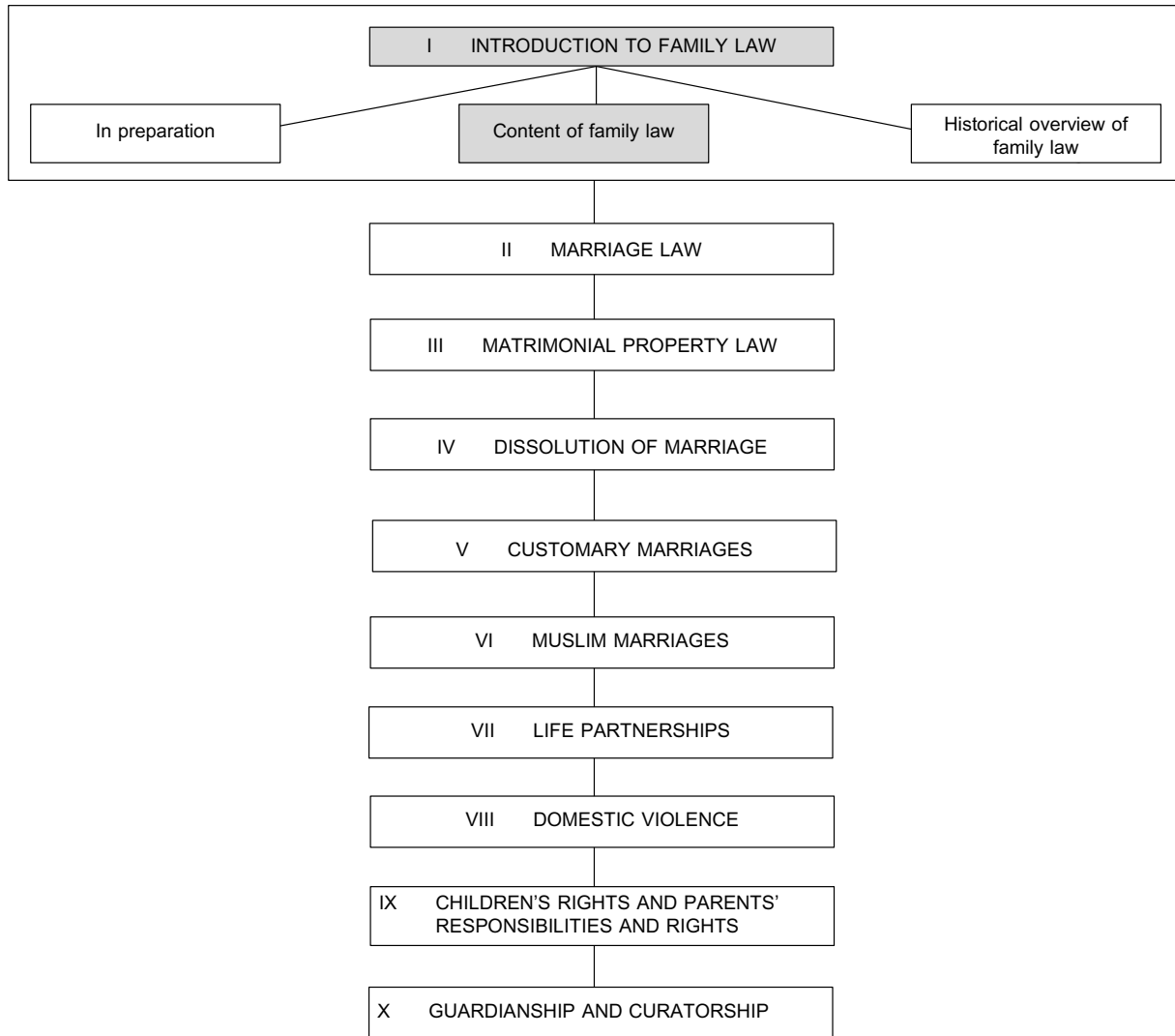
Throughout your studies of family law you must remember what you learned in this study unit. Thus if, for example, a particular section of the work deals with redistribution of assets on divorce you must remember that the law about redistribution of assets is contained, firstly, in legislation, secondly, in case law and, thirdly, in the works of authors. (Customary law and the works of the old authorities on Roman-Dutch law and Roman law are not relevant for purposes of this particular area of family law.) You must also remember that, because of the precedent system, a case which is decided in the supreme court of appeal or the old appellate division (eg *Beaumont v Beaumont*) is binding on all other divisions of the high court, and so on.

In the next study unit we introduce you to family law with some general background information. Here we explain what family law is and how it fits in with the other branches of the law.

STUDY UNIT 2

Content of family law

MODULE MAP



PREFACE

Before you commence with this study unit, you must first have read the first study unit in this study manual carefully. Study unit 1 provides you with essential background knowledge on

- the order in which you must consult the sources of our law
- how the precedent system works

LEARNING OUTCOMES

Before you begin studying family law, you should have a general idea of

- (1) how family law fits into the legal system
- (2) what family law is
- (3) what it deals with
- (4) how it is related to the other branches or fields of law

The purpose of this study unit is to provide you with this general knowledge.

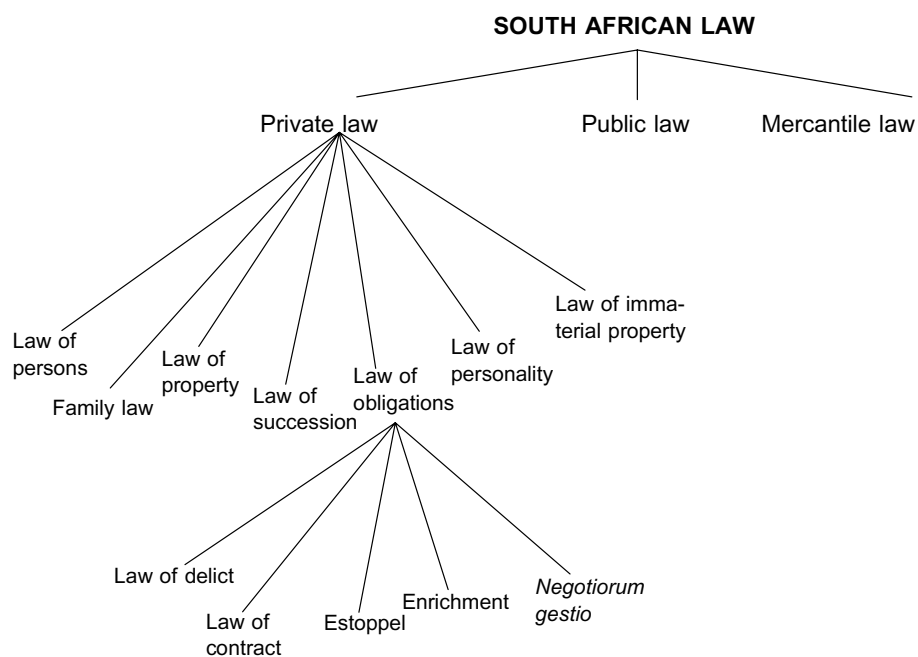
PRESCRIBED MATTER

Read

- Prescribed textbook 3

CONTENT OF THIS STUDY UNIT

1 HOW DOES FAMILY LAW FIT INTO THE LEGAL SYSTEM?



Part of private law

In South Africa, as in many other countries, family law is treated as a separate field of private law. Private law deals with the law regulating the private relationships between legal subjects on an equal footing. The main

branches of private law are family law, the law of persons, the law of property (also known as the law of things), the law of succession, the law of obligations (or the law of contract and the law of delict (estoppel, *negotiorum gestio* and enrichment are also normally included under the law of obligations)), the law of personality and the law of immaterial property.

The other main branches of the law are public law and mercantile law. Public law deals with the law regulating the way in which the state exercises its power in respect of its subjects, that is, it deals with the relations between state and subject. Mercantile law deals with the law regulating commerce and industry. Mercantile law is sometimes classified, not as a separate branch of our law, but as part of private law.

2 WHAT DOES THE CONCEPT "FAMILY" MEAN?

Wide and narrow
meaning

The word "family" has a wide and a narrow meaning. These two meanings are discussed on page 3 of your textbook. If you read this section you will see what the two meanings are.

3 WHICH FIELDS ARE COVERED BY FAMILY LAW?

On page 3 of your prescribed textbook it is indicated which fields are covered by family law. You should carefully read it.

4 ARE THERE ANY LINKS BETWEEN FAMILY LAW AND OTHER BRANCHES OF THE LAW?

We have said that family law forms a separate branch of private law. Family law is not, however, a completely independent field which is divorced from the rest of private law or the other fields of law. Although the law is divided into various fields or branches, this systematisation operates merely to make the law more accessible and easier to grasp. The law cannot be divided into a series of watertight compartments. The various fields are closely related and even overlap in many respects. Family law is related to and sometimes overlaps with a number of other branches of law as discussed hereunder:

(1) Other fields of private law, including the following:

- (a) *The law of persons*: For example, marriage in community of property affects a person's capacity to act.
- (b) *The law of succession*: For example, a surviving spouse qualifies as intestate heir of the predeceased spouse.

- (c) *The law of property*: For example, marriage in community of property results in the acquisition of an undivided half-share in each other's property.
 - (d) *The law of contract*: For example, an engagement is a contract and, with some exceptions, the general principles of the law of contract apply to it.
 - (e) *The law of delict*: For example, adultery is a delict which can result in an obligation to pay damages.
- (2) Public law, including the following:
- (a) *Criminal law*: For example, if a person fails to pay maintenance to his or her spouse and/or children this is a crime.
 - (b) *The law of procedure*: For example, if one spouse wants to divorce the other he or she must follow a prescribed procedure.
 - (c) *Administrative law*: For example, the appointment, duties and powers of a marriage officer are governed by administrative law.
 - (d) *Constitutional law*: For example, the effect of the Constitution and more specifically the Bill of Rights, on family law.

SUMMARY

In this study unit you learned

- what family law is
- how it is related to the other branches of the law

The brief explanations given in this study unit helped you to gain background knowledge on family law.

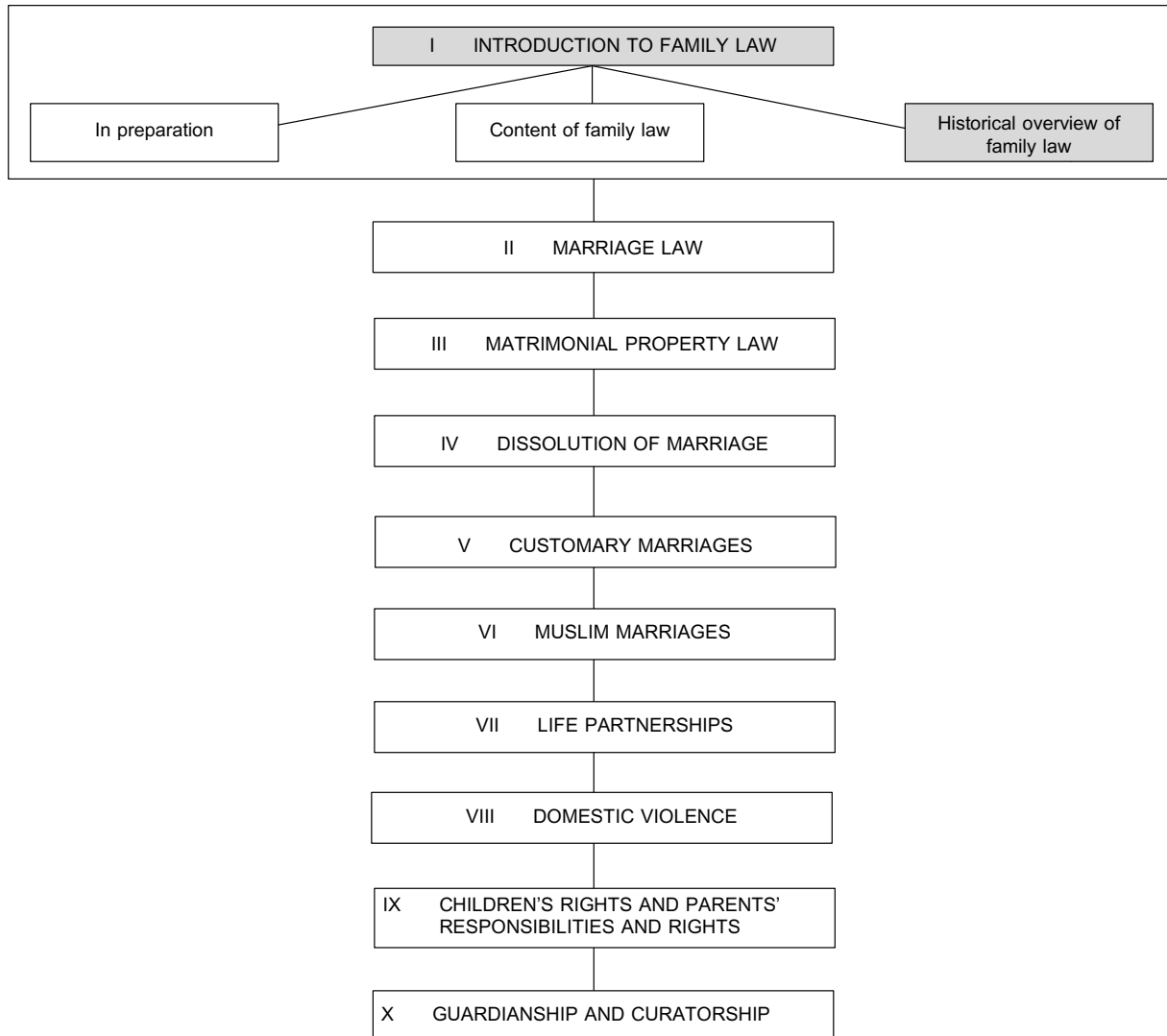
There will be no questions on this study unit in the assignments or the examination.

In the next study unit we shall give you more background information. It deals with the historical development of family law in South Africa.

STUDY UNIT 3

Historical overview of family law

MODULE MAP



PREFACE

Before you read this study unit, you must first have read the second study unit in this study manual carefully. If you do not understand study unit 2 adequately, you may not be able to understand the rest of this module on family law. Study unit 2 provided you with background knowledge on

- what family law is
- what it deals with
- how it is related to the other fields of the law

LEARNING OUTCOMES

We think that it will be to your benefit if, before you begin studying the content of the module Family Law, you have an idea of how South African family law developed over the years. The purpose of this study unit is therefore to give you a very brief overview of the history of South African family law so that you may have insight into how family law developed into the set of legal rules we have today.

PRESCRIBED MATTER

Read

- Prescribed textbook 4–6

CONTENT OF THIS STUDY UNIT

Read the section from your textbook carefully. It provides you with a brief description of engagement, marriage and termination of marriage in Roman law, Germanic law, canon law, Roman-Dutch law and modern-day South African law.

SUMMARY

Now that you have read the section in the textbook, you should have a general idea of the historical development of family law in South Africa. This background knowledge should help you to understand the content of this module better. Note once again that there will be no questions on this study unit in the assignments or the examination.

**HAVE YOU READ THE
“KEY TO THE STUDY GUIDE”
IN FRONT OF THE STUDY GUIDE ?**

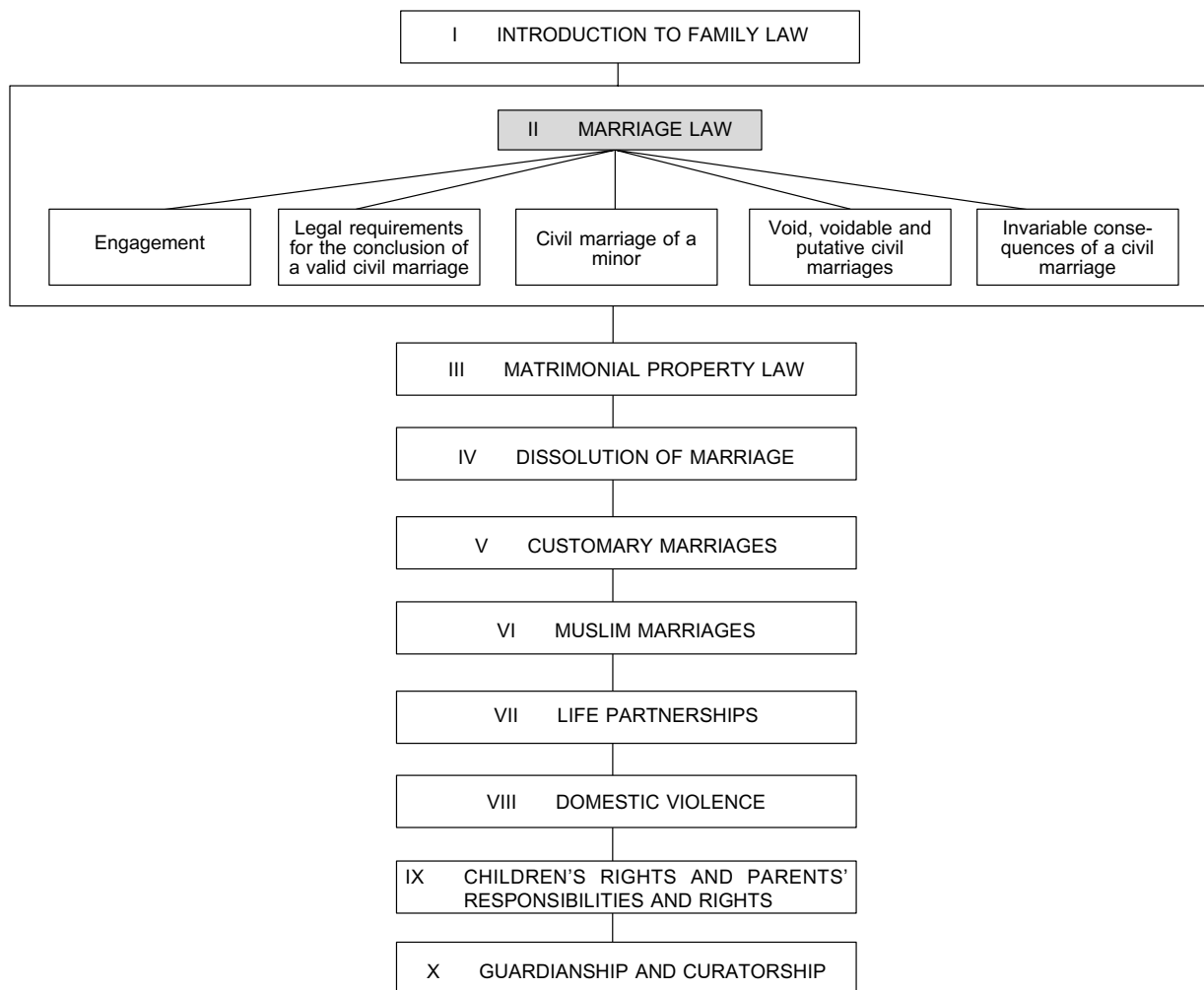
Marriage law

Section II

SECTION II

Marriage law

MODULE MAP



CONTENT

Overview

Study unit 4: The engagement

Study unit 5: The legal requirements for the conclusion of a valid civil marriage

Study unit 6: The civil marriage of a minor

Study unit 7: Void, voidable and putative civil marriages

Study unit 8: The invariable consequences of a civil marriage

OVERVIEW

Section II of Family Law is the first in which you study the actual content of the Family Law module. **This section and all subsequent sections MUST BE STUDIED and not be merely read as in the case of section I.** (There are, however, parts in section II that you merely have to read, but we shall expressly indicate where you may do so.)

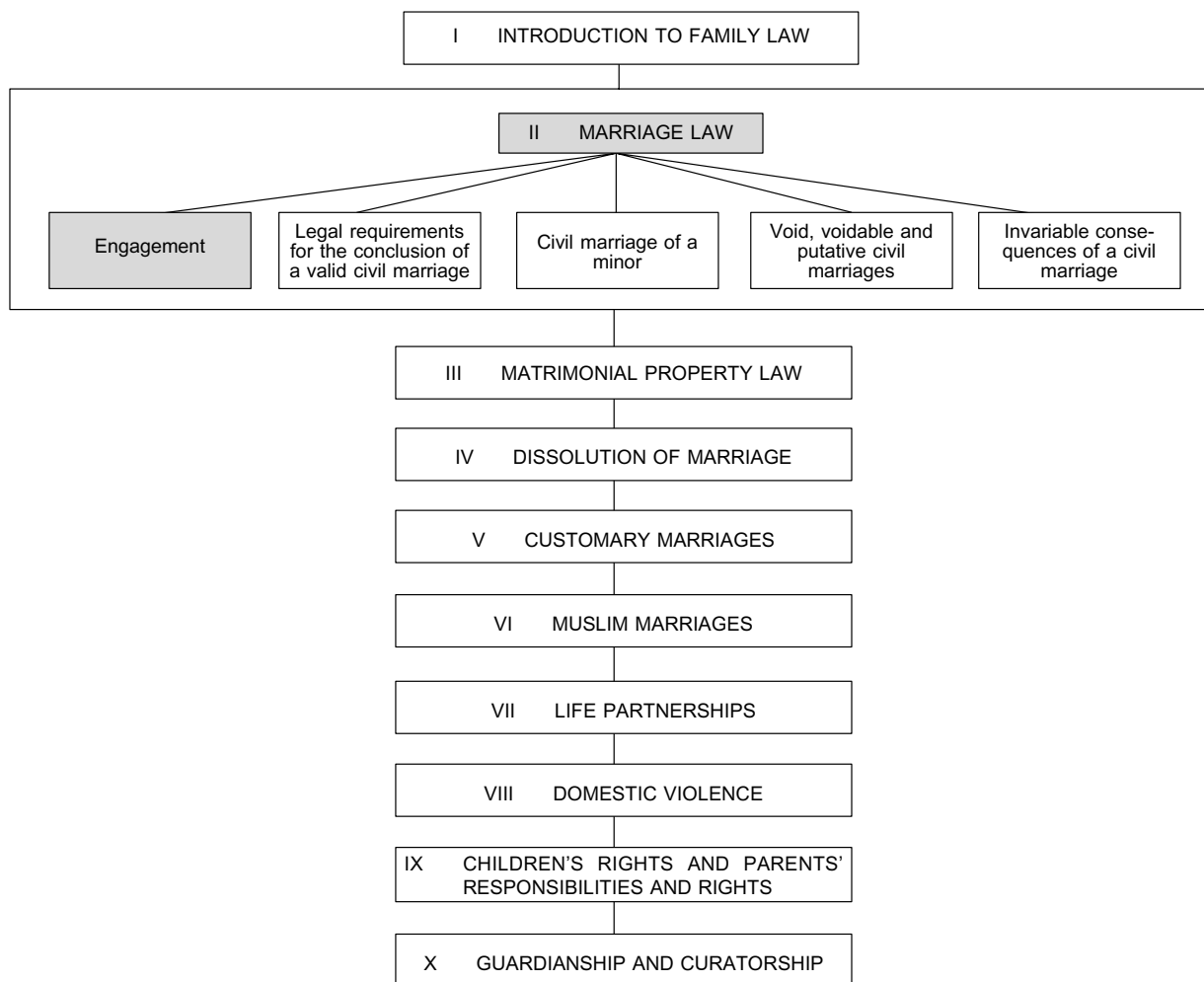
Marriage law is the field of family law which is discussed in this section. The discussion is divided into five study units as follows:

- Study unit 4 deals with the engagement which precedes marriage.
- Study unit 5 explains the legal requirements for a valid marriage.
- Study unit 6 deals with a particularly difficult aspect of the legal requirement of capacity to enter into marriage, namely the marriage of a minor (who has limited capacity to act).
- Study unit 7 covers void, voidable and putative marriages. In these marriages one or more of the legal requirements for a valid marriage were not met.
- Study unit 8 sets out the invariable consequences of marriage.

STUDY UNIT 4

The engagement

MODULE MAP



PREFACE

This study unit is the first in which the actual content of the Family Law module is discussed. You must study this study unit and all subsequent study units, unlike study units 1 to 3 which need only be read. However, before you start this study unit you should have read section I thoroughly. Section I contains general background information which will enable you to understand fully the actual content of this module. You should ensure that you

- understand in what order you should consult the sources of our law, and how the precedent system works (study unit 1)
- what family law is, what it consists of and how it relates to the other branches of our law (study unit 2)

- have an idea of how South African family law has developed over the years (study unit 3)

Let us now look at the engagement that can be defined as a contract between a man and a woman to marry each other on a specific or a determinable date.

LEARNING OUTCOMES

The purpose of this study unit is to enable you to

- (1) define the concept “engagement” and to distinguish it from other contracts
 - (2) explain the legal requirements for an engagement
 - (3) discuss the content and consequences of an engagement
 - (4) distinguish between the different circumstances in which an engagement can be terminated and to discuss some of these circumstances
 - (5) explain the consequences of termination of an engagement with specific reference to
 - (a) the action for patrimonial loss for breach of promise
 - (b) the action for satisfaction for personality infringement
 - (c) the claim for the return of engagement gifts
 - (d) the action on the ground of seduction
-

PRESCRIBED MATTER

Study

- Prescribed textbook 7–16
- *Schnaar v Jansen* in your prescribed casebook 7–9
- *Guggenheim v Rosenbaum* in your prescribed casebook 11–18

CONTENT OF THIS STUDY UNIT

1 DEFINITION OF ENGAGEMENT

Engagement is a contract

The engagement is described in your prescribed textbook on page 7 as a contract between a man and a woman to marry each other on a specific or a determinable date. Although our law at present views an engagement as a contract, an engagement is not a normal contract. It differs in the following respects from other contracts, and although these differences are not dealt with in your prescribed textbook, it is important that you be able to discuss them:

Distinction
between engage-
ment and other
contracts

- (1) A contract of engagement concluded by post comes into existence at the place where and moment when the person who makes the offer learns of the acceptance of the offer by the person to whom it was made. In the case of business contracts, the position is different namely the contract comes into existence at the place where and moment when the letter of acceptance is mailed.
- (2) Not everyone who otherwise has the capacity to enter into contracts in general has the capacity to enter into a contract of engagement. Only persons who are competent validly to marry one another can enter into a contract of engagement with each other. It is generally accepted that a person below the age of puberty (14 years for boys and 12 years for girls) is incompetent to enter into an engagement. Moreover, section 26(1) of the Marriage Act 25 of 1961 provides that a girl under 15 years of age and a boy under 18 years of age require the written consent of the Minister of Home Affairs in order to marry. Where such person concludes an engagement, his or her engagement is regarded as conditional — in other words, the obligation to marry is subject to a positive suspensive condition, namely, that the Minister's consent to the marriage be obtained. The obligations which flow from the contract of engagement will therefore become fully enforceable only once the Minister has granted permission in the prescribed way. In the case of business contracts entered into by a minor the general rule is that only the parent(s)/guardian of the minor needs to give consent. This issue is dealt with in the module on the law of persons.
- (3) In certain circumstances, and for good reasons, an engagement may be terminated unilaterally. The test which is applied, is what a reasonable person would have done in the same circumstances. In the case of other contracts, one party may rescind (unilaterally) only if the other commits breach of contract, and then in specific instances only, for example if the breach of contract is of a serious nature, or if the party has stipulated a right to rescind in the contract.
- (4) In the case of other contracts, and with certain exceptions, one party is entitled to claim specific performance from the other: that is, that the other party must do precisely what he or she undertook to do. If the position were the same in the case of a contract of engagement it would mean that one party would be able to force the other to marry him or her. In South Africa it has been unlawful to force anybody to marry since 1838.
- (5) The method whereby compensation is calculated on breach of contract of engagement (breach of promise) is different from that used in the case of other contracts. The rule for breach of contract is that damages are calculated in accordance with positive interest. In the case of breach of a contract of engagement, damages are calculated in a *sui generis* manner in the sense that damages are calculated in accordance with positive and negative interest. This issue is discussed under point 5 in this study unit.

ACTIVITY

How does the contract of engagement differ from other contracts? Answer this question by filling in the missing words in the table below.

	CONTRACT OF ENGAGEMENT	OTHER CONTRACTS
CONTRACTS CONCLUDED BY POST	A contract of engagement concluded by post comes into existence at the place where and moment when the person who makes the ¹ learns of the ² of the offer by the ³ .	A business contract concluded by post comes into existence at the place where and moment when the letter of acceptance is ⁴ .
CAPACITY TO ACT	Only persons who are ⁵ ⁶ to ⁷ one another can enter into a contract of engagement with each other. For example a girl under the age of 15 years and a boy under the age of 18 years require, save the consent of their respective parents, also the consent of the Minister of Home Affairs, in order to marry.	In the case of business contracts entered into by a minor the general rule is that only the ⁸ of the minor needs to give consent. For example where a girl under the age of 15 years wants to conclude a contract of sale with a boy under the age of 18 years in terms of which the boy for example, sells his radio to the girl, the parties need the assistance of their respective parents only.
WITH-DRAWAL	In certain circumstances, and for good reasons, an engagement may be terminated ⁹ .	A party may resile (unilaterally) from a contract only if the other party commits ¹⁰ .
SPECIFIC PERFORMANCE	To claim specific performance would mean that one party would be able to force the other to marry him or her. In South Africa it is unlawful to ¹¹ anybody to marry. Therefore, ¹² cannot be claimed.	A party is entitled to claim ¹³ from the other party.
DAMAGES	The calculation of damages is ¹⁴ in the sense that damages to be awarded are calculated on the basis of ¹⁵ and ¹⁶ .	The rule in the law of contract is that damages to be awarded are calculated on the basis of ¹⁷ only.

This is a very easy activity. You only have to complete the table by filling

in the missing words. The words which are left out in the text are key words which point to the differences between an engagement contract and other contracts. Since the drawing up of a table is a technique used to structure text in an organised manner, this form has been used for the activity. In particular, when you have to distinguish between two or more concepts or phenomena, etcetera or have to compare them with each other, it is desirable to make use of a table. Those things which you have to distinguish or compare are put next to each other and consequently the differences or similarities are better highlighted.

FEEDBACK

The words you had to fill in are the following:

- | | |
|------------------------------|-------------------------|
| 1 offer | 10 breach of contract |
| 2 acceptance | 11 force |
| 3 person to whom it was made | 12 specific performance |
| 4 mailed | 13 specific performance |
| 5 competent | 14 <i>sui generis</i> |
| 6 validly | 15 positive interest |
| 7 marry | 16 negative interest |
| 8 parent(s)/guardian | 17 positive interest |
| 9 unilaterally | |
-

2 THE REQUIREMENTS FOR A VALID ENGAGEMENT

The next aspect discussed in your prescribed textbook on pages 7–10, is the legal requirements for an engagement.

ACTIVITY

Read the relevant section in your prescribed textbook (7–10) and then list the legal requirements for an engagement.

List means that you have to name a list of things. Listing differs from free-writing in the sense that you list important points or facts, rather than simply write them down in a freely written paragraph. Listing is more in keeping with the way we think in this subject, and you might consider developing and practising this skill. Such a question is usually answered by way of a numbered list: (1), (2), (3) etcetera. Other words we could have used in the place of list are enumerate, name, indicate and state.

FEEDBACK

You should have included the following four points in your list:

- (1) The parties must reach agreement (or consensus) about the marriage.
(That is, they must both consent to getting married.)
 - (2) The parties must have the capacity to act.
 - (3) The engagement must be lawful.
 - (4) The engagement must be judicially and factually possible.
-

Consent

In respect of the discussion of consent (or consensus) on pages 7–9 of your textbook, you must note that material mistake and material misrepresentation exclude consensus. The consequence of a material mistake is that the engagement is void. On the other hand, the consequence of a material misrepresentation is that the engagement is voidable at the instance of the party who was misled. It does not matter whether the misrepresentation was made deliberately or innocently. You should also note that a misrepresentation is not committed only through positive false representations about the truth, but also through a failure to correct an existing misconception or an omission to disclose certain facts in circumstances where there is a duty to speak. You will see that the concept of the duty to speak was discussed in *Schnaar v Jansen*.

ACTIVITY

What is the effect of a material mistake and of a material misrepresentation, respectively, on an engagement? Answer this question by completing the column below.

TYPE OF DEFECT	CONSEQUENCE REGARDING THE VALIDITY OF THE ENGAGEMENT
Material mistake	
Material misrepresentation	

FEEDBACK

The consequence of a material mistake is that the engagement is void whereas the consequence of a material misrepresentation is that the engagement is voidable at the instance of the party who was misled.

ACTIVITY

This activity tests your understanding of the prescribed case *Schnaar v Jansen*. Study the sections on pages 8–9 of your prescribed textbook, as well as pages 7–9 of your prescribed casebook where this case is discussed and then answer the following questions:

- (1) Which of the legal requirements for an engagement formed the basis of the problem in this case?
- (2) What are the facts of this case?
- (3) Which problem did the court have to attend to, in other words what was the legal question in this case?
- (4) When should this case **not** be followed as authority?
- (5) Why, according to Van den Heever, is this decision wrong?

FEEDBACK

- (1) Consensus.
- (2) The plaintiff was engaged to the defendant. The defendant repudiated the engagement after finding out that one of the plaintiff's uncles had murdered his wife, that another uncle had entered into a mixed marriage and that her brother had served a prison sentence for theft. The plaintiff then sued the defendant for breach of promise.
- (3) The court had to decide whether these circumstances (the non-disclosure of certain facts) justified the unilateral repudiation of the engagement.
- (4) If the premise is accepted that any ground which in the light of human experience would make the prospective marriage unhappy, constitutes a good cause for the unilateral repudiation of the engagement, *Schnaar v Jansen* should not be followed.
- (5) According to Van den Heever the decision in *Schnaar v Jansen* is incorrect, as: "An engagement to marry is a contract of *uberrimae fidei* [that is, of the utmost good faith] and a party with a skeleton in his cupboard is obliged to disclose it."

Capacity to act

The discussion of capacity to act on pages 9–10 of the textbook deals mainly with the permission a minor has to obtain from his or her parents in order to become engaged. Lastly, your textbook indicates that persons who do not have the capacity to act due to mental illness cannot become engaged while incapable of acting.

ACTIVITY

Summarise the rules concerning the consent that is needed when a minor wants to conclude a contract of engagement in the following instances:

- (1) where both parents of the minor are alive

- (2) where only one parent of the minor is alive
- (3) where only one parent has guardianship over the minor
- (4) where both parents of the minor are deceased
- (5) where the minor is emancipated
- (6) where the minor has already been married, but is divorced
- (7) where the minor has already been married, but his or her spouse has died
- (8) where the minor has attained majority under the Age of Majority Act 57 of 1972
- (9) where the minor is a boy under 18 years or a girl under 15 years who has already reached the age of puberty (12 years for girls and 14 years for boys)
- (10) where the parents of the minor conclude an engagement on behalf of the minor

FEEDBACK

Instead of giving a full summary of the rules in the form of an essay, it is easier to make use of a table. Once again the text is structured in an organised manner which simplifies the studying of the content.

INSTANCES	PERSON/PERSONS WHOSE CONSENT IS REQUIRED
(1) Where both parents of the minor are alive	Both parents
(2) Where only one parent of the minor is alive	The surviving parent
(3) Where only one parent has guardianship over the minor	Only the parent with sole guardianship
(4) Where both parents of the minor are deceased	The legal guardian
(5) Where the minor is emancipated	Both parents
(6) Where the minor has already been married, but is divorced	No consent required
(7) Where the minor has already been married, but his or her spouse has died	No consent required
(8) Where the minor has attained majority under the Age of Majority Act 57 of 1972	No consent required
(9) Where the minor is a boy under 18 years or a girl under 15 years who has already reached the age of puberty	Minister of Home Affairs and parents
(10) Where the parents of the minor conclude an engagement on behalf of the minor	The minor

Lawfulness and possibility

On page 10 of your prescribed textbook the last two requirements for a valid engagement are discussed. Specially note that an engagement is lawful if both parties are unmarried and that an engagement is possible if the parties are able to marry one another.

3 THE CONTENT AND CONSEQUENCES OF THE ENGAGEMENT

Finalisation of date of marriage

The content and consequences of the engagement are discussed in your textbook on page 11. In this respect you should distinguish between the case where a date for the marriage has been agreed upon and the case where such a date has not been finalised.

Engagement subject to conditions

In the discussion on page 11 we look at the fact that an engagement can be entered into subject to conditions. Note that impossible or unlawful conditions do not render the engagement null and void, but are merely held to be *pro non scripto* (literally: not to have been written). Such conditions are therefore not taken into account at all. Your textbook gives examples of an unlawful condition and a condition which is contrary to the nature of marriage.

ACTIVITY

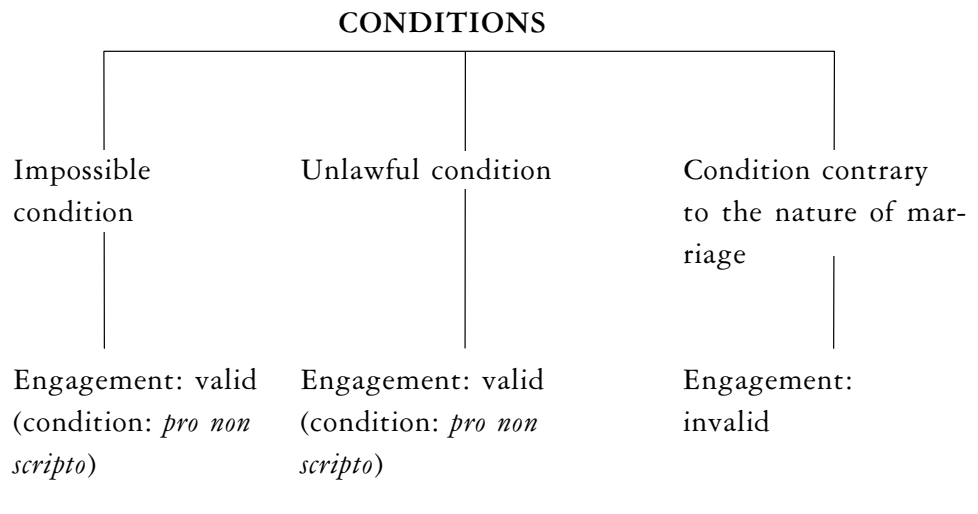
Study the section on page 11 of your prescribed textbook which deals with the engagement concluded subject to conditions and then complete the table below:

TYPE OF CONDITION	EFFECT ON THE VALIDITY OF THE ENGAGEMENT
Impossible condition	
Unlawful condition	
Condition contrary to the nature of marriage	

FEEDBACK

TYPE OF CONDITION	EFFECT ON THE VALIDITY OF THE ENGAGEMENT
Impossible condition	The engagement is valid although the condition is held to be <i>pro non scripto</i>
Unlawful condition	The engagement is valid although the condition is held to be <i>pro non scripto</i>
Condition contrary to the nature of marriage	The engagement is invalid

If it is difficult to study the table you can also make use of a diagram to simplify your studying. Below is an example of a diagram.



4 TERMINATION OF THE ENGAGEMENT

ACTIVITY

Read pages 11–12 of your prescribed textbook and then list the instances in which an engagement can be terminated.

FEEDBACK

You should have included the following six points in your list:

- (1) marriage
 - (2) the death of either of the engaged persons
 - (3) mutual agreement to terminate the engagement
 - (4) withdrawal of parental consent where one of the parties is a minor
 - (5) unilateral and justified termination based on sound reasons
 - (6) breach of promise
-

The last two instances are discussed in detail in your textbook on page 12 because they sometimes occasion difficulties in practice.

Unilateral and justified termination

In your textbook on page 12 you will see that one of the parties may unilaterally and lawfully terminate the engagement if there is a *justa causa* (sound reason) for such termination. Make sure that you understand the meaning of a *justa causa*.

ACTIVITY

On page 12 of your prescribed textbook there is a discussion of the rule that the simple realisation by one of the parties that he or she no longer loves the other party is not considered a *justa causa* for cancelling the engagement. Discuss this rule with reference to the criticism in your textbook.

When you are asked to discuss something it means that you have to write a paragraph or essay on the topic specified. It means that you have to set out and explain the topic with reference to all aspects of the topic, to case law, theories, examples and whatever else is specifically asked for in the question. All you have to **discuss** in this activity are the rule and the criticism on the rule. Instead of the word discuss we could have used words like explain, describe, set out, summarise, advise, consider, write notes on, or we could have asked you what the legal position is.

FEEDBACK

A *justa causa* is a fact or an occurrence which comes about **after** the engagement has been entered into and which, according to human experience, will seriously jeopardise the chances of a happy and lasting marriage. In terms of the rule that is discussed in your textbook, the realisation by one of the parties that he or she no longer loves the other party will **not** seriously jeopardise the chances of a happy and lasting marriage. The termination of the engagement for this reason will thus constitute breach of promise. If it were otherwise it would mean that the engagement would lose its legal recognition as an agreement creating obligations.

This rule can be criticised since this reason (that one of the parties realises that he or she no longer loves the other party) should in fact be the most valid and sensible one for the lawful unilateral termination of the agreement. It is obvious that the possibility of a successful marriage is seriously jeopardised if one of the parties realises, even before the marriage has been entered into, that it will be a mistake.

In addition it is not in the public interest if a person's freedom to conclude a marriage or to terminate an engagement is restricted because there is a possibility that claims will be made against him or her.

Breach of promise Breach of promise, which is discussed on pages 12–15 of your textbook, is the unlawful termination of an engagement. The consequence of breach of promise is that the “innocent” party can withdraw from the engagement.

He or she can also claim damages for breach of contract from the “guilty” party and can claim satisfaction for personality infringement, based on the delict *iniuria*.

ACTIVITY

Read pages 13–15 of your prescribed textbook and then draw a distinction between the action for damages and the action for satisfaction.

FEEDBACK

ACTION FOR DAMAGES	ACTION FOR SATISFACTION
This is the action that can be instituted by an injured party where he or she must be compensated for patrimonial loss he or she has suffered	This is the action that can be instituted by an injured party where he or she must be compensated for non-patrimonial loss he or she has suffered
Patrimonial loss is loss which diminishes your estate	Non-patrimonial loss is loss which does not diminish your estate, but which affects your person or personality

Take care not to confuse the claim for damages for breach of contract (breach of promise) and the claim for satisfaction for *iniuria*. In *Guggenheim v Rosenbaum* the court decided that a clear distinction must be drawn between these two claims, which may be brought in the same action. These two claims will be dealt with separately below in the discussion of the consequences of the termination of the engagement. You must study the discussion of *Guggenheim v Rosenbaum* in your prescribed textbook on pages 13, 14 and 15 and prescribed casebook on pages 11–18.

5 THE CONSEQUENCES OF TERMINATION OF THE ENGAGEMENT

Under the consequences of the termination of the engagement the action for damages based on breach of promise, satisfaction for personality infringement and the return of the engagement gifts, are discussed on pages 13–16 of the textbook.

Action for damages based on breach of contract

In respect of the action for damages based on breach of contract, you must firstly note that the damages awarded are *sui generis*. In other words, damages for breach of promise are awarded differently from the way in which they are awarded in the case of other contracts.

When ordinary contracts are breached, the damages awarded are calculated on the basis of positive interest. Make sure that you know precisely what this means. In the case of breach of engagement, however, the damages awarded are calculated on the basis of both positive and negative interest. That, in the case of breach of the contract of

engagement, the courts calculate the damages on the basis of both positive and negative interest, is clearly illustrated in *Guggenheim v Rosenbaum*. The note on pages 17–18 in your prescribed casebook on the *Guggenheim* case clearly explains what the calculation of damages on the basis of positive and negative interest entails.

ACTIVITY

In less than one page (\pm 350 words), summarise damages based on breach of promise. Include a discussion of *Guggenheim v Rosenbaum* as it is discussed in your textbook and casebook (including the note on pp 17–18 of your prescribed casebook).

FEEDBACK

The rule in the law of contract is that damages to be awarded for proven patrimonial loss are calculated on the basis of positive interest. This means that the “innocent” party is entitled to be awarded damages which will place him or her in the financial position he or she would have been in if the contract had been performed. If this principle were to apply in the case of actions for breach of promise, it would mean that the “innocent” party would have to be placed in the financial position he or she would have been in if the marriage had taken place. Therefore, all that could be awarded in terms of this principle is compensation for prospective loss, that is the lost benefits of the marriage, and compensation for the expenses that the “innocent” party had to incur because the marriage did not take place. This means that the “innocent” party is not compensated for the expenses incurred in order to facilitate the conclusion of the marriage, since these expenses would in any case have had to be incurred, for example the bride’s trousseau, printing of wedding invitations, etcetera.

This principle is however not consistently applied in practice. The rule which indeed applies in terms of *Guggenheim v Rosenbaum* is that both the prospective loss and the actual monetary loss or expenditure incurred or to be incurred are awarded by the courts. By allowing compensation for expenses which were incurred in preparation of the marriage, the court in the *Guggenheim* case allowed the “innocent” party to claim not only positive interest but also negative interest. To award negative interest means to place the “innocent” party in the financial position he or she would have been in if the contract of engagement had never been entered into. The court in the *Guggenheim* case therefore placed the plaintiff partially in the position she would have been in if the marriage had taken place (positive interest) and partially in the position she would have been in if the contract of engagement had never been entered into (negative interest).

It therefore appears that damages *sui generis* (of its own kind) are awarded when breach of a contract of engagement takes place.

Action for satisfaction based on *iniuria* In respect of the action for satisfaction based on *iniuria*, you must firstly note that the plaintiff has to prove infringement (*iniuria*) as well as the intention to infringe (*animus iniuriandi*), in order to succeed with this claim. You should also take note of the method of calculating the amount awarded to the plaintiff as satisfaction. You will see that the *Guggenheim* case is relevant here as well. This matter is discussed under the heading “Satisfaction for personality infringement” on pages 14–15 of your textbook.

ACTIVITY

Name three examples from case law where the court granted satisfaction for personality infringement based on breach of promise. Also indicate from which case each example is derived.

FEEDBACK

Another way to name things (in this case examples) is to list them. In order to simplify the studying of these examples and names of cases, a table is once again used.

EXAMPLE	CASE
(1) The defendant kept the plaintiff on a string and secretly married a third party without first terminating the engagement	<i>Davel v Swanepoel</i>
(2) The defendant secretly entered into a marriage with a third party, without first terminating the engagement	<i>Smit v Jacobs</i>
(3) The defendant, after having concluded an engagement, denied all knowledge of its existence	<i>Guggenheim v Rosenbaum</i>

Return of engagement gifts In respect of the return of engagement gifts, different rules apply in cases where the parties have agreed to terminate the engagement or where the engagement is terminated for a *justa causa*, and where one of the parties has committed a breach of promise. It is important to distinguish between these different sets of rules set out on pages 15–16 of the textbook.

ACTIVITY

List the rules which apply in respect of the return of engagement gifts where one of the parties has committed breach of promise.

You should have included in your list the following three rules, which apply when one of the engaged parties has committed breach of promise:

- (1) The “innocent” party may claim the *sponsalitia largitas* and the *arrhae sponsalitia* which he or she gave. Small, unconditional gifts are not included under this heading and may be retained by the “guilty” party.
 - (2) The “innocent” party may retain the *arrhae sponsalitia* and the *sponsalitia largitas* he or she received.
 - (3) If the “innocent” party claims damages, the value of the gifts retained must be taken into account. Whether the same applies where the “innocent” party claims satisfaction is not clear.
-

6 SATISFACTION AND DAMAGES ON THE GROUND OF SEDUCTION

Action on ground
of seduction

Another action that may play a role at the termination of an engagement is the action for satisfaction and/or damages on the grounds of seduction. This action includes two separate claims, namely the claim for satisfaction for defloration and the concomitant minimising of the woman’s chances of making a suitable and successful marriage, and the claim for damages. Also note the description of seduction in your prescribed textbook on page 16 and the influence that section 9 of the Constitution may possibly have on this action. This matter is discussed on page 16 of the textbook.

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **General**
 - (1) Define the concept “engagement”.
- **Requirements for a valid engagement**
 - (2) List the requirements for a valid engagement.
- **Consensus**
 - (3) Distinguish between *error in persona* and *error in negotio*.
 - (4) Explain what is understood by a “material misrepresentation” with regard to entering into an engagement.
- **Capacity to act**
 - (5) Must an emancipated minor obtain parental consent in order to enter into an engagement contract?

- **Lawfulness**
 - (6) A married person promises to marry another person after obtaining a divorce from his or her current spouse. Is this promise valid? Explain.
- **The content and consequences of the engagement**
 - (7) May an engagement be concluded subject to conditions? Explain.
- **Termination of the engagement**
 - (8) List the different ways in which an engagement can be terminated.
 - (9) Explain what is understood by a *justa causa*.
 - (10) If one of the parties to the engagement commits a breach of promise, what remedies are available to the other party?
- **The action for damages based on breach of contract**
 - (11) Explain what is understood by the calculation of patrimonial loss on the basis of positive interest.
 - (12) Are contractual damages for breach of promise calculated only on the basis of positive interest? Discuss fully with reference to authority.
- **The action for satisfaction in the case of personality infringement**
 - (13) What must the plaintiff prove in order to succeed with an action for satisfaction for personality infringement based on breach of promise?
 - (14) What factors do the courts take into consideration in order to determine the amount to be awarded to the plaintiff as satisfaction?
- **The return of engagement gifts**
 - (15) If one of the engaged parties commits a breach of promise, may the innocent party claim the *sponsalitia largitas* and the *arrhae sponsalitia* which he or she gave to the other party?
- **The action for satisfaction and/or damages on the ground of seduction**
 - (16) Define “seduction”.
 - (17) Mention the two claims comprising an action on the ground of seduction.
 - (18) What influence could section 9 of the Constitution possibly have on this action?

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

Three months ago, Ms Z’s boyfriend asked her to marry him. At that stage, Ms Z lived and worked in Durban, while her boyfriend — a very wealthy business person — lived in Johannesburg. Ms Z missed her boyfriend very much and two months later she resigned from her job in Durban and moved to Johannesburg. In the meantime her boyfriend had

fallen in love with another woman. He is refusing to marry Ms Z and she is very upset about this. She asks you whether she can claim any amount from her boyfriend. Advise Ms Z whether she can claim anything from him

- (1) in respect of her removal costs
- (2) on the ground of the fact that she will no longer marry a wealthy man
- (3) in respect of her hurt feelings.

SUMMARY

In this study unit you learned

- what an engagement is
- what the legal requirements for the engagement are
- what the content and consequences of the engagement are
- the circumstances in which an engagement can be terminated
- the consequences of such termination

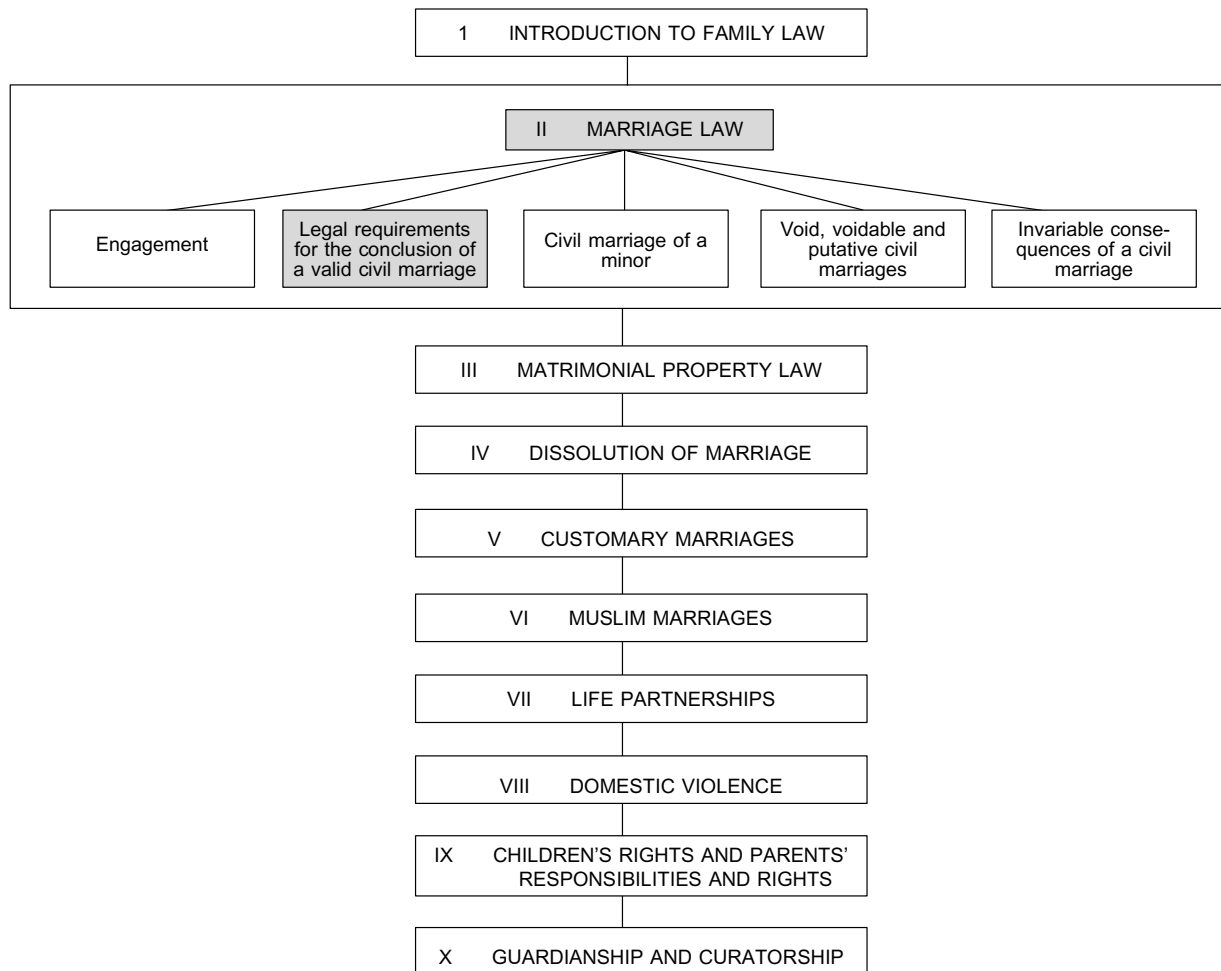
You have also seen that a valid engagement is not a prerequisite for the conclusion of a valid marriage, but that most marriages are preceded by an engagement.

In the next study unit we will discuss the legal requirements for the conclusion of a marriage.

STUDY UNIT 5

The legal requirements for the conclusion of a valid civil marriage

MODULE MAP



PREFACE

In the previous study unit you learned about the engagement, which precedes marriage. We explained

- what an engagement is
- its content and consequences
- the termination of an engagement
- the consequences of termination of an engagement

Now that you know how the law treats the engagement, we can proceed to

marriage itself. First of all you have to know that a marriage is valid only if certain legal requirements are met. This study unit explains what these requirements are.

LEARNING OUTCOMES

The purpose of this study unit is to enable you to

- (1) define the concept of marriage
 - (2) list the legal requirements for a valid marriage
 - (3) explain the factors which have an influence on each of the requirements for a valid marriage
 - (4) explain how each factor influences the requirements for a valid marriage
-

PRESCRIBED MATTER

Read

- Prescribed textbook 35–37 “3.5.1 Marriage officers” and “3.5.2 Formalities preceding the marriage ceremony”

Study

- Prescribed textbook 17–19, 28 (from “3.3 *Consensus*”) – 35, 37 (from “3.5.3 Formalities during the marriage ceremony”) – 39

CONTENT OF THIS STUDY UNIT

1 DEFINITION OF MARRIAGE

Before studying the legal requirements for a valid marriage, you must know what a marriage is and be able to define or describe it.

ACTIVITY

Study the traditional definition of marriage on page 17 of your prescribed textbook and then complete the paragraph below by filling in the missing words.

Marriage is traditionally defined as the legally recognised life-long¹ union between one² and³ woman to the⁴ of all other persons.

FEEDBACK

The words you had to fill in are the following:

- 1 voluntary
 - 2 man
 - 3 one
 - 4 exclusion
-

Marriage is not a contract

You should note that although marriage may look a lot like a contract it is not a contract.

2 REQUIREMENTS FOR A VALID MARRIAGE

It is very important that you study pages 17–19 and 28–35 of your prescribed textbook on what is required for a valid marriage to come into existence. If the requirements are not met the marriage is not valid.

ACTIVITY

Read the main headings in chapter 3 of your prescribed textbook and then list the four legal requirements for a valid marriage.

FEEDBACK

The following four points should have been included in your list:

- (1) capacity to act
 - (2) consensus (agreement)
 - (3) the marriage must be lawful
 - (4) the prescribed formalities must be complied with
-

2.1 Capacity to act

In respect of the first requirement, capacity to act, you should note that some persons are totally incapable of marrying because they have no capacity to act. They include *infantes* (ie children below the age of 7) and mentally ill persons. Certain people may marry but only with the consent of certain other persons. The most important example of the latter class of persons is that of minor children (ie children between 7 and 21 years). Although minors under the age of puberty (12 years for girls and 14 years for boys) may conclude various legal transactions with the assistance of their parents, they are totally incapable of entering into a marriage. A girl under the age of 12 and a boy under the age of 14 are therefore absolutely incompetent to marry. The marriage of a minor is such a complicated matter that we have decided to discuss it in a separate study unit (study

Minor's marriage

unit 6). For purposes of the present study unit, all you need to know in respect of the capacity to act is the effect of prodigality, mental illness and placement under curatorship due to mental disorder or chronic illness on a person's capacity to enter into a valid marriage. These matters are discussed on pages 17–19 in your prescribed textbook.

Prodigal
 Insane person
 Person placed under curatorship

ACTIVITY

What is an *infans*, a minor, a prodigal and a mentally ill person? These concepts appear in your textbook and study guide (glossary).

FEEDBACK

CONCEPT	MEANING
<i>Infans</i>	A child below the age of 7
Minor	A child between the ages of 7 and 21
Prodigal	A person with normal mental ability but who is incapable of managing his or her own affairs because he or she squanders his or her assets in an irresponsible and reckless way as a result of some defect in his or her power of judgment or character
Mentally ill person	A person with a mental disorder or disability who cannot understand the nature and consequences of his or her acts, owing to this disorder

2.2 Consensus

The second requirement for a valid marriage is consensus. This means that the parties must, at the time of entering into the marriage, be in agreement that they want to marry each other. Various factors can have an effect on consensus. These factors are all discussed in your prescribed textbook on pages 28–30.

Mistake In respect of mistake, you should note that only a material mistake excludes consensus. Your textbook explains that it is not clear whether a material mistake renders the marriage void or voidable. It further draws a distinction between a material mistake and a “marriage of convenience”. You must ensure that you know which mistakes are material and which are not.

Misrepresentation Misrepresentation can also have an effect on consensus. It is important to note that only a serious misrepresentation will affect the validity of the marriage. Your textbook explains on page 29 when a misrepresentation will be regarded as serious.

Duress Duress (ie force) also has an effect on consensus. It renders a marriage voidable.

It is submitted in your textbook on page 30 that, although there is no authority on the effect of undue influence on consensus to marry, undue influence should affect the validity of the marriage.

ACTIVITY

Summarise in one page (\pm 430 words) the various factors which can have an effect on consensus, as well as the effect of each factor on the validity of the marriage.

FEEDBACK

One of the legal requirements for the conclusion of a valid marriage is consensus. Our law requires that at the moment of entering into the marriage, both parties thereto must have the will to marry each other. Various factors may have an effect on consensus. These factors are mistake, misrepresentation, duress and undue influence.

In respect of **mistake**, only a **material** mistake excludes consensus. Mistake concerning the identity of the other party (*error in personam*) and mistake concerning the nature of the juristic act (*error in negotio*) are the only forms of material mistake in respect of marriage. *Error in negotio* is the only form of mistake or misunderstanding which occurs in practice. It is, however, not clear whether a material mistake renders the marriage void or voidable. According to some authors the marriage is not void but voidable. According to Cronjé and Heaton (the authors of your textbook) the marriage should be void because consensus is absent. However, they point out that if regard is had to the interests of society and third parties, the marriage ought not to be void, but voidable at the request of the party who was mistaken.

Simulated marriages or so-called “marriages of convenience” must be distinguished from cases of material mistake. The court in *Martens v Martens* held that a simulated marriage is a valid marriage since the man and woman actually had the intention of entering into a valid marriage.

A mistake is not material where one of the parties is mistaken about certain facts concerning the marriage itself or the personal attributes of the other party, unless such misunderstanding was caused by a misrepresentation on the part of the other party. A non-material mistake is irrelevant to the marriage and is therefore not a ground for its dissolution.

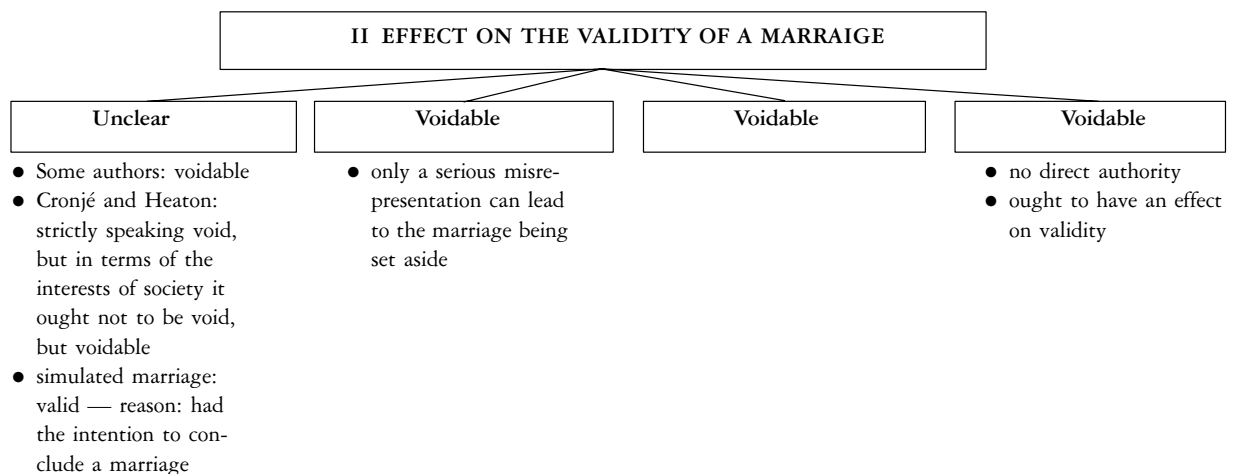
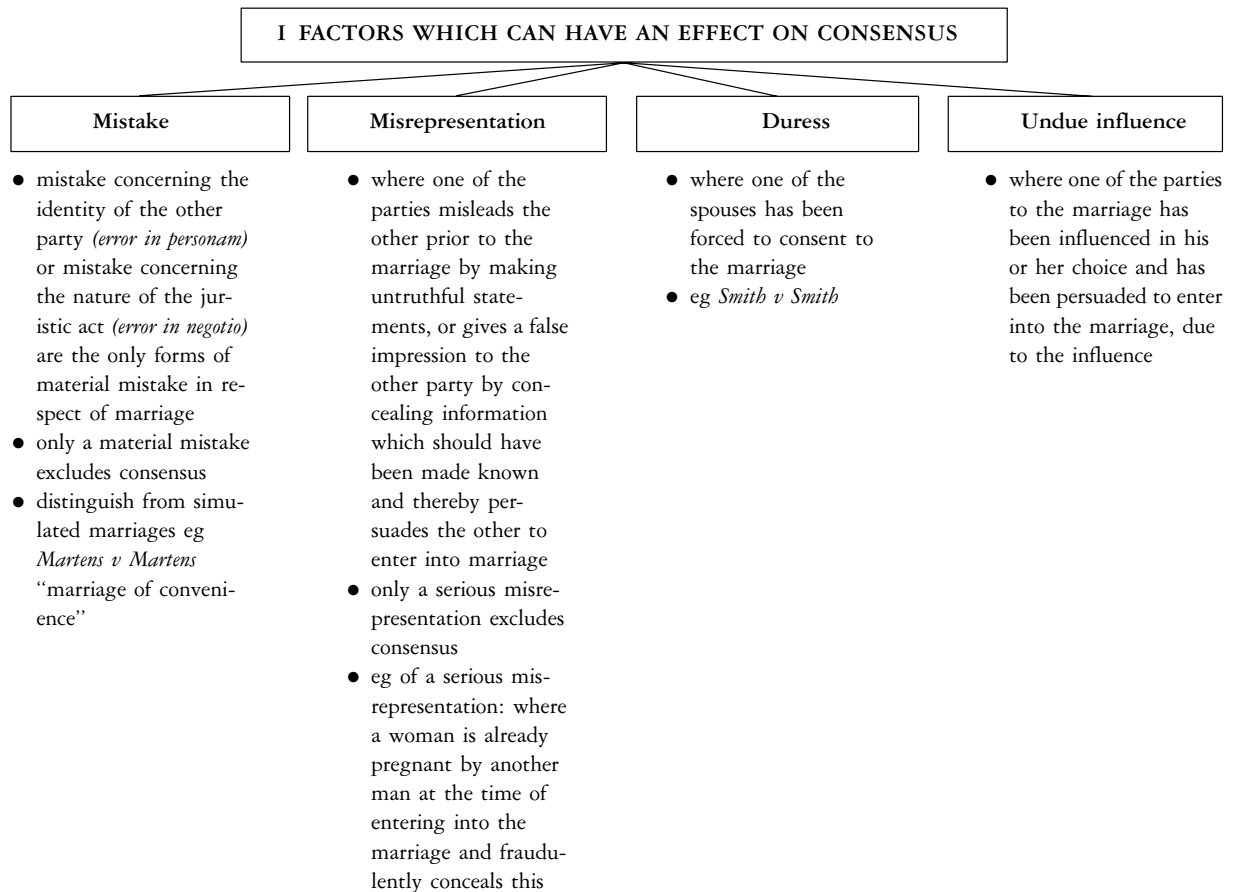
In respect of **misrepresentation**, only a **serious** misrepresentation affects the validity of a marriage. An example of a serious misrepresentation is where a woman is already pregnant by another man at the time of entering into the marriage and fraudulently conceals this. In this case the husband can have the marriage set aside.

Duress (ie force) also has an effect on consensus. Where one of the spouses has been forced, through duress, to consent to the marriage, the marriage is voidable. An example of such a situation is *Smith v Smith* where the bride

had been so threatened and assaulted by her father and future husband that she went through the marriage ceremony in a daze. At her request the court set the marriage aside.

Although no direct authority on this point exists in our law **undue influence** should, according to Cronjé and Heaton, be a ground for setting aside a marriage.

In order to simplify the learning of the content of the text, you can also draw a diagram.



2.3 Lawfulness

A marriage is not valid unless it is lawful for the parties to marry.

Persons already married

On page 30 of your textbook it is explained that a man or a woman who is already married cannot take a second spouse while the marriage still exists.

It is important to remember that this rule only applies to civil marriages. On page 30 of the textbook it is pointed out that in our country many people marry in terms of other systems of law which permit a man to take more than one wife.

Persons of same sex

You will further see on page 30 of the textbook that a man may not marry a man, and a woman may not marry a woman. In this regard, you should take note of the supreme court of appeal's decision in *Fourie v Minister of Home Affairs* 2005 (3) BCLR 241 (SCA), which was delivered after publication of Cronjé and Heaton's work, *South African family law*. In *Fourie*, the supreme court of appeal held that the common-law definition of "marriage" was unconstitutional to the extent that it restricted marriage to persons of the opposite sex. The court developed the definition to open up marriage to persons of the same sex. The court expressly added that same-sex couples must meet the requirements set by the Marriage Act 25 of 1961 for a valid marriage. As the prescribed marriage formula in the Marriage Act refers to "husband" and "wife" same-sex couples can still not be married by a marriage officer who uses that particular marriage formula. The Marriage Act however allows marriage officers who are ministers of religion or who hold a responsible position in a religious denomination or organisation to follow the marriage formula which is usually observed by that denomination or organisation if the particular formula has been approved by the Minister of Home Affairs. In the past, the Minister of Home Affairs refused to approve marriage formulae that referred to same-sex couples. Once a religious denomination or organisation has acquired the Minister's approval of its marriage formula it will be able to marry same-sex couples. No religious denomination or organisation will however be compelled to marry same-sex couples. Until such time as the Marriage Act is amended same-sex couples who do not wish to have a religious marriage ceremony will not be able to get married. (The supreme court of appeal did not consider the constitutionality of the marriage formula in the Marriage Act, as the parties did not dispute the constitutionality of the Act.) This state of affairs clearly amounts to inequality before the law and unequal protection and benefit of the law, which violates section 9 of the Constitution. However, the position may soon change, as the Minister of Home Affairs has lodged an appeal against the supreme court of appeal's decision.

Marriage of transsexual

On page 31 your textbook further explains the difficulties which arise in respect of validity when a person who has undergone a sex-change operation marries.

Adoptive parent and adopted child	On page 31 of the textbook it is stated that a child may not marry the person who adopted him or her.
Prohibited degrees of relationship	Certain people may not marry because they are too closely related to each other. Students often find it difficult to understand this section of the work set out on pages 32–34 of the textbook. We therefore discuss it separately in some detail below under “ Problem area ”.
Guardian and ward	A guardian and his or her ward (ie the minor under his or her guardianship) may marry each other only if the High Court consents to this. Your prescribed textbook on pages 34–35 explains what the consequences of the marriage would be if the necessary consent was not obtained.
Prohibition of mixed marriages	While the Prohibition of Mixed Marriages Act 55 of 1949 still existed, so-called “whites” were prohibited from marrying persons of other races. This Act was repealed in 1985 but all mixed marriages entered into before the repeal were not automatically validated. Your textbook on page 35 explains how validation can be obtained.

2.4 The prescribed formalities

Formalities during ceremony

The final requirement for a marriage to be valid is that the prescribed formalities must have been complied with. Please note again that you only have to read the sections “3.5.1 Marriage Officers” and “3.5.2 Formalities preceding the marriage ceremony” on pages 35–37 in the textbook. The third aspect, namely formalities to be observed during the marriage ceremony has, however, to be studied. When you study pages 37–39 in the textbook, you will see that they relate to personal presence of the groom and bride at the ceremony (ie marriage by proxy is not permitted), the time and place of the wedding, witnesses and the marriage formula. In respect of the venue where the wedding may take place, please study *Ex parte Dow* in the textbook on page 38. When studying the decision in the *Dow* case it should be remembered that, at present, the decision applies only in the Durban and Coast division of the High Court.

ACTIVITY

Study the case *Ex parte Dow* as it is discussed in your prescribed textbook and then answer the following questions:

- (1) Which legal requirement for the conclusion of a valid marriage was at issue in this case?
- (2) What are the facts of this case?
- (3) Which section of which Act was interpreted in this case?
- (4) What does this section provide?
- (5) What is the purpose of this section?
- (6) Why is this decision to be welcomed?

- (1) The requirement that the prescribed formalities for the conclusion of a marriage should be complied with was at issue in this case.
 - (2) The applicant in this case applied for an order declaring his marriage null and void because the wedding had taken place, in conflict with section 29(2) of the Marriage Act 25 of 1961, in the front garden of a dwelling house and not **in** the house.
 - (3) Section 29(2) of the Marriage Act 25 of 1961.
 - (4) Section 29(2) provides that a marriage shall be solemnised in a church or other building which is used for religious services, or in a public office or private dwelling house with open doors and in the presence of the parties themselves, and at least two competent witnesses.
 - (5) The object of the provision is to avoid clandestine marriages.
 - (6) This decision is to be welcomed since only a **material defect** ought to render a marriage void *ab initio*.
-

Registration

The registration of a marriage is discussed on page 39 of the textbook. You only have to know that the marriage register has to be signed by the parties to the marriage, two witnesses and the marriage officer. Should this not be done, the marriage is not invalid.

Problem area

Here we shall look at the degrees of relationship which make a marriage unlawful, since students sometimes find it difficult to understand this section of the work. What we have to say below is merely an attempt to help you to understand what is contained in your prescribed textbook on pages 32–34 under the heading “3.4.4 **Persons who are within the prohibited degrees of relationship**”. Our discussion does not replace those pages, which you must study.

1 Explanation of concepts

**Consanguinity
Affinity**

It was pointed out above that certain people may not marry each other because they are too closely related. These people fall into two categories: those who are related by blood (this is known as blood relationship or consanguinity) and those who are related by marriage (this is known as affinity). The relationship can be in the direct line or in the collateral line.

**Blood relatives in
direct line
Ascendants
Descendants
Blood relatives in
collateral line**

Persons who are blood relatives in the direct line are ascendants and descendants of each other. (Your ascendants are your forebears or ancestors, that is, your parents, grandparents, great-grandparents, and so on. Your descendants are those born of you and your children and their children, and so on.) Persons who are blood relatives in the collateral line are not ascendants and descendants but nevertheless have one or more common ancestor. The common ancestor is a person to whom both

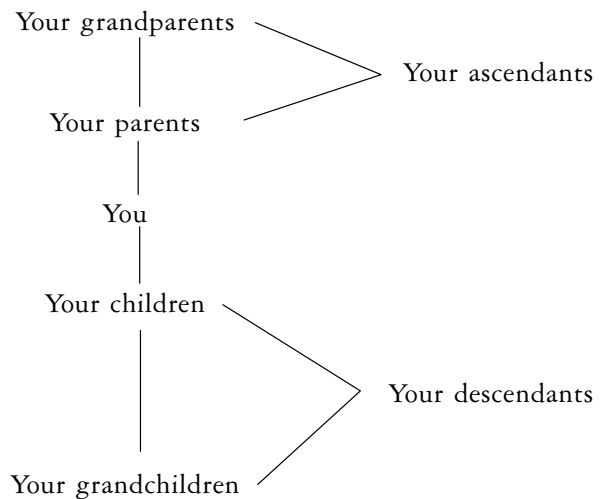
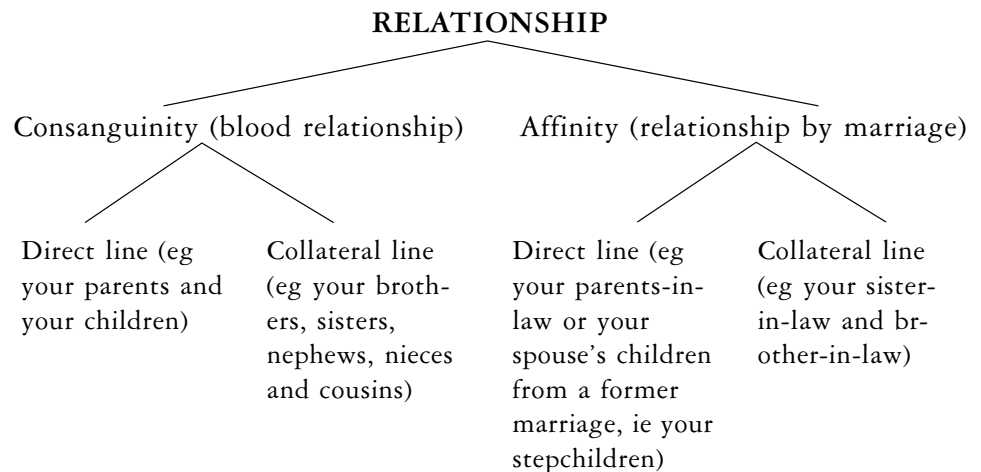
Common ancestor prospective spouses are related in the direct line. Thus, for example, your parents are the common ancestors of you and your brother and your brother's children and their children.

Affinity in direct line Affinity in the direct line exists between a spouse and all the blood relatives in the direct line of the other spouse. In other words, it is the relationship between you and your spouse's parents, grandparents, great-grandparents, children and grandchildren from a previous marriage, and so on.

Affinity in collateral line so on. Affinity in the collateral line exists between a spouse and the blood relatives in the collateral line of the other spouse. In other words, it is the relationship between you and your spouse's sisters and brothers and their children, and so on.

Please study the information in your textbook and the explanations above very carefully to make sure that you understand what the concepts of **consanguinity, affinity, ascendant, descendant, direct line, collateral line, common ancestor**, etcetera mean.

You may find the diagrams below helpful to understand the different categories of relationship.



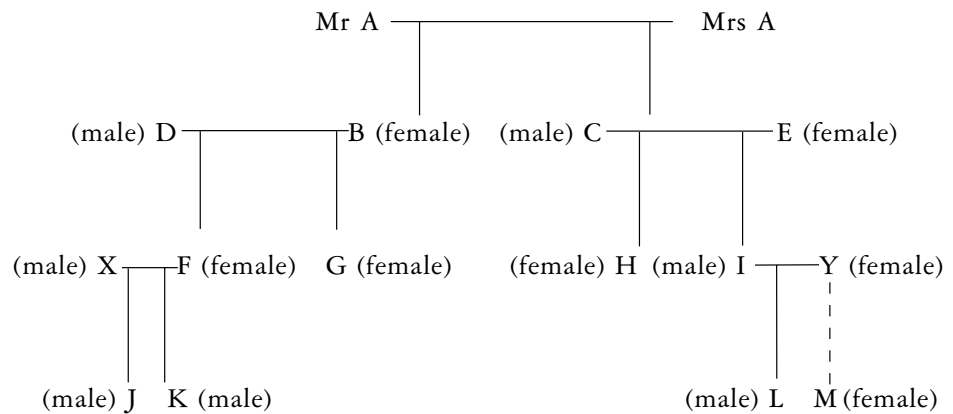
ACTIVITY

A girl, B, and a boy, C, are born of the marriage of Mr and Mrs A. B marries D and two girls, F and G, are born of their marriage. C marries E and a girl, H, and a boy, I, are born of their marriage. F marries X and two boys, J and K, are born of their marriage. I marries Y and a boy, L, is born of their marriage. Y already has a daughter, M, from a previous marriage.

Answer the following questions:

- (1) Indicate which persons are the blood relatives of Mrs A.
- (2) Indicate the ascendants and descendants of F.
- (3) Indicate the common ancestors of B and C.
- (4) Indicate the common ancestor of L and M.
- (5) Indicate the persons related to D by affinity.
- (6) Indicate the persons related to D by affinity in the direct line and in the collateral line, respectively.
- (7) Indicate the blood relatives of F, in the direct line and in the collateral line, respectively.

FEEDBACK



- (1) The following persons are the blood relatives of Mrs A:
B, C, F, G, H, I, J, K and L.
 - (2) The following persons are the ascendants of F: D and B (parents) and Mr and Mrs A (grandparents).
The following persons are the descendants of F: J and K (children).
 - (3) Mr and Mrs A.
 - (4) Y.
 - (5) D's relatives by affinity are Mr and Mrs A, C, H, I and L.
 - (6) D's relatives by affinity in the direct line are Mr and Mrs A.
D's relatives by affinity in the collateral line are C, H, I and L.
 - (7) F's blood relatives in the direct line are Mr and Mrs A, B, D, J and K.
F's blood relatives in the collateral line are G, C, H, I and L.
-

2 Prohibitions

You also have to know which persons are related to each other within the prohibited degrees of relationship and therefore prohibited from marrying each other. Although you should know that the legal rules which regulate this matter can be found in the Marriage Act and Political Ordinance you do not have to know the legislation itself. You therefore need not refer to authority should you get a question in the assignment or the examination dealing with the prohibited degrees of relationship. However, if you study the four rules set out below and can apply them to factual situations, you should be able to answer almost any question on this issue in the assignment or in the examination.

Blood relatives in direct line

Rule 1: Blood relatives in the direct line may not marry.

In terms of this rule, you may never marry your ascendants or descendants. You may thus not marry one of your parents, grandparents, children or grandchildren.

Blood relatives in collateral line

Rule 2: Blood relatives in the collateral line may not marry if either of them is related to their common ancestor(s) within the first degree or generation.

Thus, in terms of this rule, you may not marry your brother or sister or any of their children or grandchildren because you are related within the first degree to the common ancestors: that is, your parents and your brother's or sister's parents are the same people.

Note that this rule does not prohibit you from marrying your cousin. The reason for this is that although you and your cousin are blood relatives in the collateral line, neither you nor your cousin is related to the common ancestor(s) (ie your grandparents and your cousin's grandparents are the same people) within the first degree. You and your cousin are related to the common ancestor(s) within the second degree.

Affinity in direct line

Rule 3: Persons related to each other by affinity in the direct line may not marry.

In terms of this rule, you may not marry your ex-spouse's blood relatives in the direct line. A marriage between you and your ex-spouse's mother or father (ie your parents-in-law) or your ex-spouse's child born from a previous or subsequent marriage is therefore prohibited.

Affinity in collateral line

Rule 4: Persons related to each other by affinity in the collateral line are allowed to marry.

In terms of this rule, you may marry your ex-spouse's brother or sister (ie your brother-in-law or sister-in-law), or cousin, niece or nephew.

3 Calculation of degrees of relationship

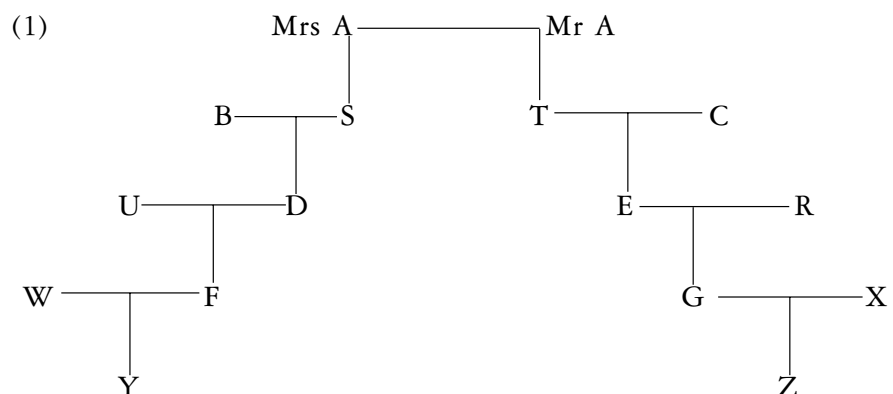
You must make sure that you know how the degrees of relationship are calculated. Briefly put, if you draw a diagram of relationship the degrees are the number of lines between parties. Take, for example, the second diagram on page 33 of your prescribed textbook. B is related to A in the first degree; E is related to A in the first degree; F is related to E in the first degree, and to A in the second degree; G is related to F in the first degree, to E in the second degree and to A in the third degree, and so on.

ACTIVITY

Two children, S and T, are born of the marriage of Mr and Mrs A. S marries B and D is born of their marriage. T marries C and E is born of their marriage. E marries R and G is born of their marriage. D marries U and F is born of their marriage. F marries W and Y is born of their marriage. G marries X and Z is born of their marriage.

- (1) Draw a diagram to indicate the degrees of relationship between the parties.
- (2) Calculate the degrees of relationship between:
 - (a) T and Mr A
 - (b) E and Mr A
 - (c) G and Mr A
 - (d) Z and Mr A
 - (e) Y and Mr A
 - (f) F and Mrs A
 - (g) F and S
 - (h) D and Y
 - (i) S and T
 - (j) B and E

FEEDBACK



- (2) (a) T is related to Mr A within the first degree.
 (b) E is related to Mr A within the second degree.
 (c) G is related to Mr A within the third degree.
 (d) Z is related to Mr A within the fourth degree.
 (e) Y is related to Mr A within the fourth degree.
 (f) F is related to Mrs A within the third degree.
 (g) F is related to S within the second degree.
 (h) D is related to Y within the second degree.
 (i) S is related to T within the second degree.
 (j) B is related to E within the third degree.
-

4 Hint on answering questions on relationship

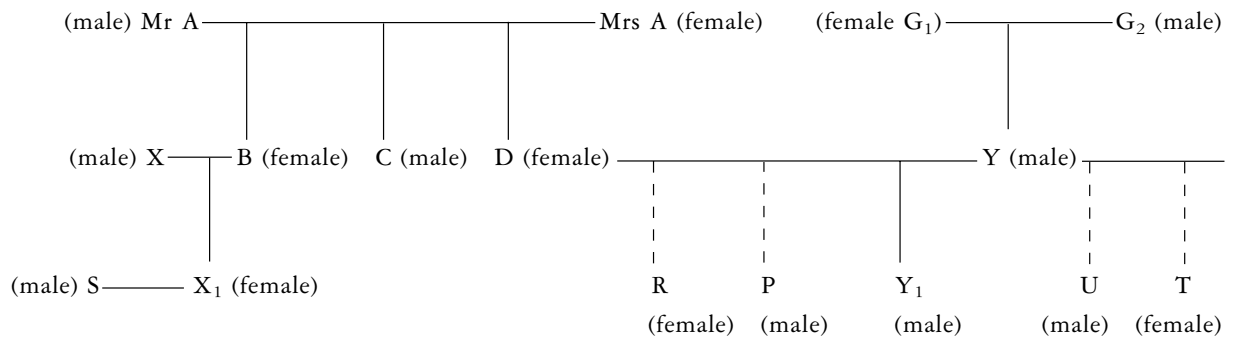
You will not be able to answer a question on relationship correctly unless you draw a diagram of relationship and unless your diagram is correct. Therefore, whenever you get a question on relationship, you should always first draw a diagram of relationship as part of your answer.

ACTIVITY

Two girls, B and D, and one boy, C, are born of the marriage of Mr and Mrs A. B later marries one of her old boyfriends, X, and a girl X_1 , is born of their marriage. D marries her gym instructor, Y, who has a daughter, T, and a son, U, from a previous marriage. T and U stay with their grandmother, G_1 , and grandfather, G_2 , (Y's parents) during the holidays. A boy, Y_1 , is born of the marriage of D and Y and they also adopt another boy, P, and a girl, R. P and R are not related by either blood or affinity. X_1 marries the neighbours' son S.

- (1) Draw a diagram
 (2) and thereafter indicate whether the following persons may marry each other. In each case, give a reason for your answer.
- (a) If Mr A dies, Mrs A and Y_1 ?
 (b) If B dies, X and X_1 ?
 (c) If Y dies, C and D?
 (d) If S and D die, X_1 and Y?
 (e) If B and Y die, X and D?
 (f) If B and Mr A die, X and Mrs A?
 (g) If X dies, B and Y_1 ?
 (h) T and Y_1 ?
 (i) If Y dies, D and P?
 (j) P and R?
 (k) If S dies, X_1 and Y_1 ?
 (l) If Mr A dies, Mrs A and C?
 (m) If Y dies, D and U?
 (n) If Y and G_1 die, D and G_2 ?

(1)



- (2) (a) No, because Mrs A and Y₁ are blood relations of one another in the direct line.
- (b) No, because X and X₁ are blood relations of one another in the direct line.
- (c) No, because D and C are blood relations of one another in the collateral line and are both related to the common ancestors (Mr A and Mrs A) within the first degree.
- (d) Yes, because X₁ and Y are related by affinity in the collateral line.
- (e) Yes, because X and D are related by affinity in the collateral line.
- (f) No, because X and Mrs A are related by affinity in the direct line.
- (g) No, because B and Y₁ are blood relations of one another in the collateral line and B is related to the common ancestors (Mr A and Mrs A) within the first degree.
- (h) No, because T and Y₁ are blood relations of one another in the collateral line and are both related to the common ancestor (Y) within the first degree.
- (i) No, because an adoptive parent may not marry his or her adopted child.
- (j) Yes, because P and R are not related by either blood or affinity.
- (k) Yes, because X₁ and Y₁ are blood relations of one another in the collateral line and are both related to the common ancestors (Mr A and Mrs A) within the second degree.
- (l) No, because Mrs A and C are blood relations of one another in the direct line.
- (m) No, because D and U are relations of one another by affinity in the direct line.
- (n) No, because D and G₂ are relations of one another by affinity in the direct line.
-

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **General**
 - (1) Define “marriage”.
 - (2) Is marriage a contract?
 - (3) List the requirements for a valid marriage.
- **Capacity to act**
 - (4) Is the marriage of a declared prodigal completely invalid? Discuss fully.
 - (5) When is a person regarded as mentally ill for the purpose of concluding a marriage?
 - (6) Is a marriage contracted during a *lucidum intervallum* valid?
- **Consensus**
 - (7) List the forms of material mistake in connection with entering into a marriage.
 - (8) In what circumstances could misrepresentation be regarded as sufficiently serious to render a marriage liable for annulment?
- **Marriage must be lawful**
 - (9) Will the second marriage of a man who honestly believes that he is legally divorced from his first wife, but who is not, be a void marriage? Explain your answer.
 - (10) May a transsexual who has undergone a sex-change operation post-operatively marry a person of the same sex as he or she originally was? Explain your answer with reference to authority.
 - (11) May an adoptive parent marry his or her adopted child? Explain your answer.
 - (12) Explain the concept “consanguinity”.
 - (13) Distinguish between consanguinity in the direct line and consanguinity in the collateral line.
 - (14) Define the concept “affinity”.
 - (15) May blood relatives in the direct line marry each other? Substantiate your answer with reference to an example.
 - (16) May blood relations in the collateral line marry each other? Substantiate your answer with reference to an example.
 - (17) May persons related to one another by affinity in the direct line marry each other? Substantiate your answer with reference to an example.
 - (18) May persons related to one another by affinity in the collateral line marry each other? Substantiate your answer with reference to an example.
 - (19) May persons of different races marry each other? Give authority for your answer.

- **The prescribed formalities**
 - (20) Does non-compliance with section 29(2) of the Marriage Act 25 of 1961 render a marriage void? Substantiate your answer with reference to authority.
 - (21) Is a marriage valid if it is not registered in terms of the provisions of section 29A of the Marriage Act?

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

Mr X and Miss Y plan to marry each other on 9 December. They would like the marriage to be celebrated on the beach at Muizenberg. Advise them whether or not this is possible.

SUMMARY

In this study unit you learned

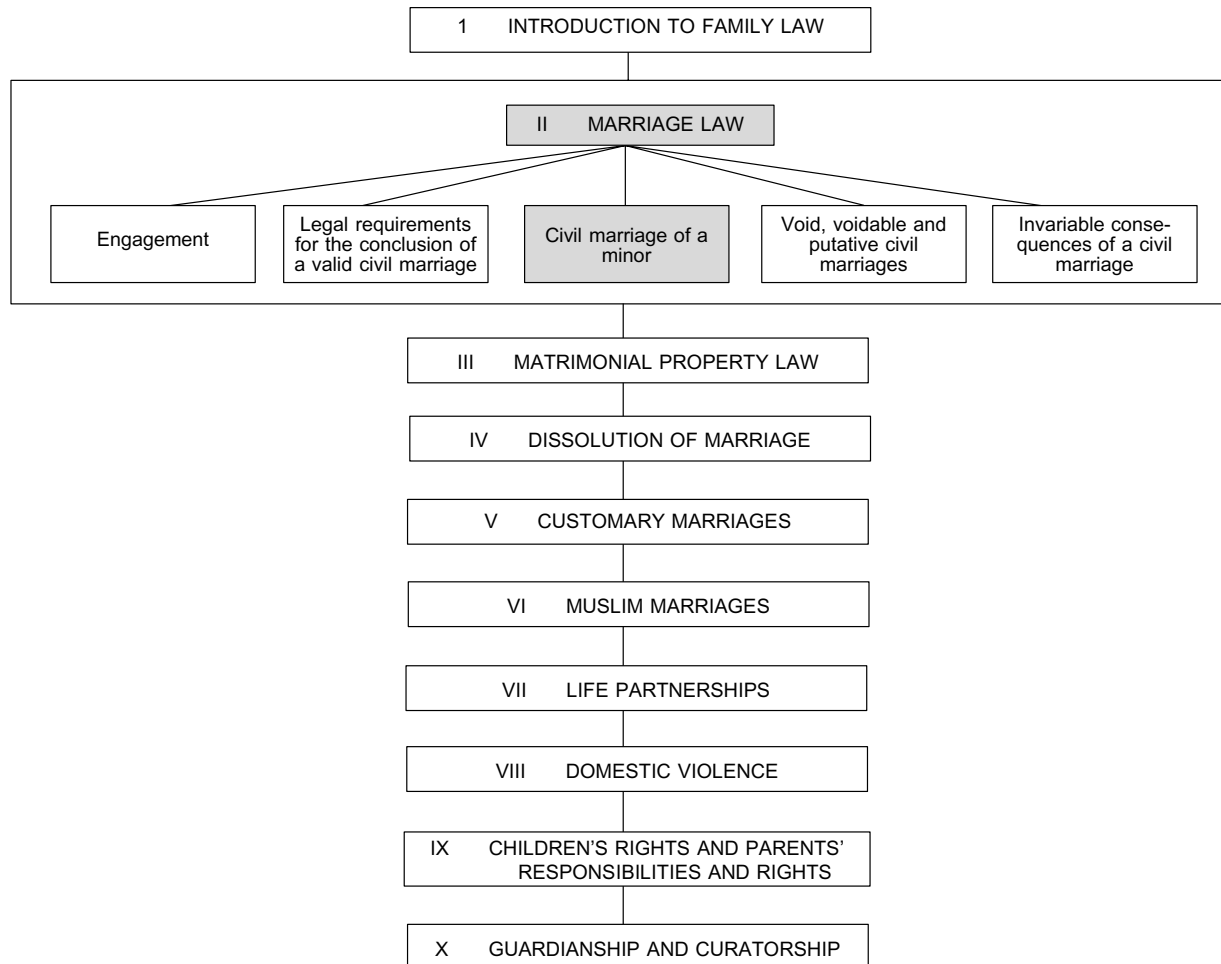
- what a marriage is
- what the legal requirements for a valid marriage are
- what factors can have an influence on each of the requirements
- how these factors influence the requirements for a valid marriage

In the next study unit we concentrate on one particular factor which influences capacity to act, and specifically the capacity to enter into a marriage — that of minority. The position of a minor was referred to briefly in the present study unit but is discussed in detail in the next study unit.

STUDY UNIT 6

The civil marriage of a minor

MODULE MAP



PREFACE

In this study unit we discuss the marriage of a minor. Strictly speaking, the marriage of a minor forms part of the previous study unit, which dealt with the legal requirements for a valid marriage. However, since students often find the section on the marriage of a minor difficult to understand, we decided to discuss it in a separate study unit.

Before you begin to study this study unit, you should have first studied the previous study unit on the legal requirements for the conclusion of a valid marriage. Make sure that you know

- what a marriage is
- what the legal requirements for the conclusion of a valid marriage are, with reference to the factors which have an influence on each of these requirements

LEARNING OUTCOMES

The purpose of this study unit is to enable you to

- (1) indicate whose consent is necessary for the conclusion of the marriage of a minor under specific circumstances
 - (2) explain the effect of failure to obtain the necessary consent on
 - (a) the validity of the marriage
 - (b) the patrimonial consequences of the marriage if it is dissolved on the ground of absence of consent
 - (c) the patrimonial consequences of the marriage if it is not dissolved
-

PRESCRIBED MATTER

Read

- Prescribed textbook 27–28 “(iii) *The effect of the Matrimonial Property Act on a marriage a minor concluded without consent before the commencement of the Act*”

Study

- Prescribed textbook 20–26

CONTENT OF THIS STUDY UNIT

1 THE CONSENT WHICH IS REQUIRED FOR THE MARRIAGE OF A MINOR

Necessary consent

You have already seen in the previous study unit that minors have limited capacity to act, and must therefore obtain the necessary consent in order to have capacity to act for purposes of entering into marriage. We now discuss this issue in detail. In this regard you should firstly note the provisions of sections 12, 24(1) and 27 of the Marriage Act 25 of 1961, which are set out in your prescribed textbook on page 20.

Parties whose consent is needed

The following activity, which very briefly summarises the position as set out in your prescribed textbook, should be of value to you when studying this part of the study unit:

ACTIVITY

Read pages 20–23 of your prescribed textbook and then indicate, by completing the second column, whose consent, in the respective cases in the first column, is needed for the conclusion of a marriage by a minor:

INSTANCES	PERSON/PERSONS/AUTHORITY WHOSE CONSENT IS REQUIRED
If both parents of the minor are alive	
If one of the parents of the minor is deceased	
If both parents of the minor are deceased	
If one or both of the parents of the minor are absent, mentally ill or in any other way not competent to act or if the minor has no guardian	
If one or both of the parents of the minor, the guardian of the minor, or the commissioner of child welfare refuses consent	
If the minor is a boy under the age of 18 years or a girl under the age of 15 years who has already reached the age of puberty	

FEEDBACK

INSTANCES	PERSON/PERSONS/AUTHORITY WHOSE CONSENT IS REQUIRED
If both parents of the minor are alive	Both parents even if they are divorced
If one of the parents of the minor is deceased	The surviving parent
If both parents of the minor are deceased	The legal guardian
If one or both of the parents of the minor are absent, mentally ill or in any other way not competent to act or if the minor has no guardian	The commissioner of child welfare
If one or both of the parents of the minor, the guardian of the minor, or the commissioner of child welfare refuses consent	The high court
If the minor is a boy under the age of 18 years or a girl under the age of 15 years who has already reached the age of puberty	Apart from one of the above parties, the Minister of Home Affairs too

2 THE INSTANCES IN WHICH A MINOR REQUIRES NO CONSENT TO MARRY

On pages 23–24 of the textbook it is explained that there are two instances in which a minor requires no consent to marry, namely

- (1) where a minor has been married before
- (2) where a person under 21 years of age has been declared a major.

3 THE EFFECT OF ABSENCE OF THE NECESSARY CONSENT

On pages 24–27 your prescribed textbook discusses the consequences of lack of consent on the validity of the marriage and the patrimonial consequences of the marriage. You do not have to study the last two paragraphs of this discussion (ie, the last two paragraphs on pp 26–27 of the prescribed textbook on the validity of an informal antenuptial contract and the Perpetual Edict 1540).

Validity of marriage In respect of the discussion on the validity of the marriage on page 24, note that section 24A of the Marriage Act 25 of 1961 provides that a minor’s marriage is not void merely because the necessary consent was not obtained. However, a competent court may dissolve the marriage on the ground of lack of consent on application by the parents or guardian of the minor or the minor himself or herself within certain periods. You must know what these periods are.

Patrimonial consequences In respect of the discussion on pages 24–26, on the patrimonial consequences of a marriage concluded without the necessary consent you must firstly distinguish between cases where the marriage is dissolved on the ground of lack of consent and those where the marriage is not dissolved.

Where marriage is dissolved Where the marriage is dissolved on the ground of lack of consent, the court can make an order with regard to the division of the matrimonial property of the spouses as it deems just. In this regard you should look at the discussion of section 24(1) of the Matrimonial Property Act 88 of 1984 on pages 24–25 in your prescribed textbook.

Where marriage is not dissolved Where the marriage is not dissolved, section 24(2) of the Matrimonial Property Act 88 of 1984 only expressly makes provision for the following two possibilities:

- (1) If the parties have not entered into an antenuptial contract, community of property applies.
- (2) If the parties entered into an antenuptial contract in which the accrual system was not excluded, the antenuptial contract is valid.

Section 24(2) does not expressly provide for an antenuptial contract in which the accrual system is **excluded**. If the parties do enter into such an

antenuptial contract, the question arises whether such contract is valid or invalid. On pages 25–26 of the textbook three opinions on this question are set out:

In the first place there are some authors who, on the ground of the wording of the first part of section 24(2) of the Matrimonial Property Act, are of the opinion that **such antenuptial contracts will be perfectly valid**. Make sure that you know what these authors' argument is. Secondly, there is the counterargument that meaning should also be given to the second part of section 24(2), and that the consequence thereof would be that **such antenuptial contracts would, according to our case law, be invalid**. Thirdly, the authors of your textbook indicate that there is also a third interpretation in terms of which **only the clause in the antenuptial contract which excludes the accrual system will be invalid**.

Finally, you should note the constitutional implications of the view that the accrual system cannot validly be excluded from the minor's antenuptial contract. This issue is discussed in the second paragraph on page 26 of the textbook.

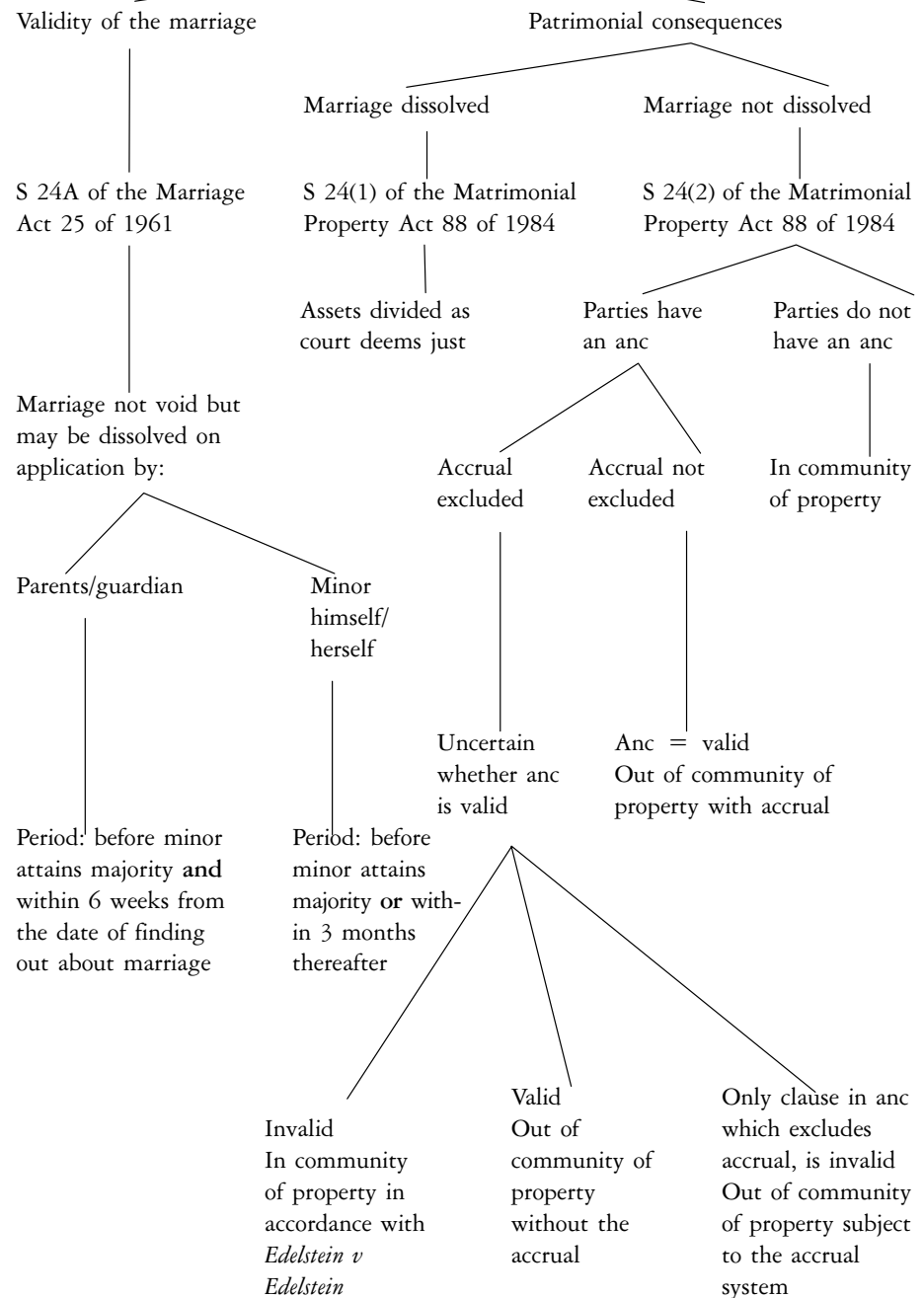
ACTIVITY

Summarise the consequences of a marriage a minor concluded without the necessary consent, regarding the validity of the marriage and the patrimonial consequences of the marriage.

FEEDBACK

We do not provide a summary; you should draw it up yourself. We do, however, provide a diagram in order to simplify the studying of this topic.

CONSEQUENCES OF LACK OF THE NECESSARY CONSENT



QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- Requirement of consent
 - (1) Must both parents consent to the marriage of a minor if the latter wants to get married after his or her parents got divorced?

- (2) Whose consent is needed if a boy of 16 years wants to marry a girl of 14 years?
 - (3) If one or both parents are absent, and the minor cannot obtain their consent for good reason, whose consent will be necessary before the minor can enter into marriage?
 - (4) Whose consent is necessary for the marriage of a minor if one or both parents refuse to give their consent without adequate reason, and contrary to the interests of the minor?
- **Effect of the absence of the necessary consent**
 - (5) Discuss how failure to obtain consent from the parents or guardian affects the validity of the minor's marriage.
 - (6) What will the patrimonial consequences be of a marriage which was dissolved by the court in terms of section 24A of the Marriage Act 25 of 1961 on the ground of lack of parental consent?
 - (7) Discuss the patrimonial consequences of the marriage of a minor entered into without the necessary consent if the marriage is not dissolved by the court in terms of section 24A of the Marriage Act 25 of 1961.

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

X, a man who has already reached the age of majority, and Y, a 19-year-old girl, decide to get married. Because Y's parents are against the proposed marriage, and because X and Y do not have enough money to bring an application in the High Court for the required consent, they get married on 10 June 1995 without any consent, having concluded an antenuptial contract in which the accrual system is excluded. What will the position be with regard to the patrimonial consequences of the marriage if it is not dissolved?

SUMMARY

In this study unit you learned

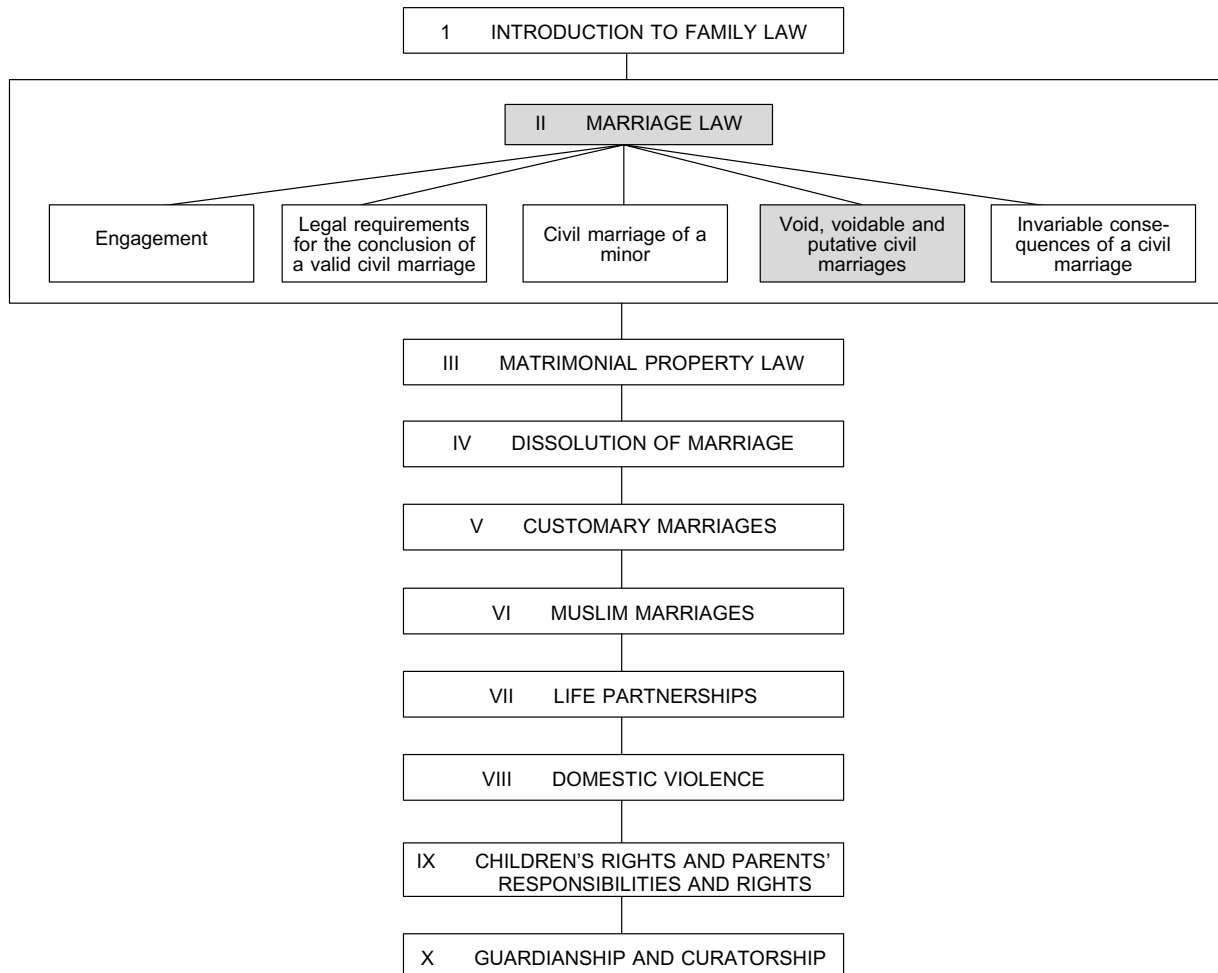
- which parties' consent is needed for a minor's marriage
- what effect failure to obtain the necessary consent has on the validity and patrimonial consequences of the marriage of a minor
- that you must distinguish between the cases where the marriage is dissolved because of absence of consent and those where the marriage is not dissolved

In the next study unit we look at the grounds for voidness and voidability of marriages, and the nature and consequences of a putative marriage.

STUDY UNIT 7

Void, voidable and putative civil marriages

MODULE MAP



PREFACE

In this study unit we look at void, voidable and putative civil marriages. This study unit is closely connected with the previous two study units in which the legal requirements for a valid marriage and the marriage of a minor were discussed. In those two study units you saw that non-compliance with certain requirements renders a marriage void while non-compliance with other requirements renders it voidable. Before attempting the present study unit, you first should have studied the previous two study units properly.

LEARNING OUTCOMES

The purpose of this study unit is to enable you to

- (1) distinguish between void and voidable marriages
 - (2) list the grounds for nullity of marriage and identify the cases that resort under each ground
 - (3) discuss the consequences of a void marriage
 - (4) list and explain the grounds for setting aside a voidable marriage
 - (5) discuss the consequences of a voidable marriage
 - (6) explain the nature of a putative marriage
 - (7) discuss the requirements for a putative marriage
 - (8) discuss the consequences of a putative marriage
-

PRESCRIBED MATTER

Study

- Prescribed textbook 41–48
- *Moola v Aulsebrook* in your prescribed casebook 60–63
- *Solomons v Abrams* in your prescribed casebook 64–66

CONTENT OF THIS STUDY UNIT

1 VOID MARRIAGES

1.1 The definition of a void marriage

Study the definition of a void marriage on page 41 of your prescribed textbook.

1.2 The grounds for nullity

There are two grounds for nullity of a marriage which are discussed in your textbook on page 41, namely

- (1) non-compliance with the formal requirements for a valid marriage
- (2) non-compliance with the material requirements for a valid marriage

You must ensure that you know, and are able to identify, all the cases which resort under each of these grounds.

1.3 The consequences of a void marriage

A void marriage does not have the legal consequences of a valid marriage, and therefore a court order declaring the marriage void is not essential. You must know the consequences of a void marriage as they are explained on page 42 of your prescribed textbook.

2 VOIDABLE MARRIAGES

2.1 The definition of a voidable marriage

On page 42 of your prescribed textbook a voidable marriage is defined as a marriage which can be set aside by the court on the basis of grounds which are present before the wedding, or after. You must know the definition.

2.2 The grounds for setting aside a voidable marriage

Five grounds for voidability of a marriage are discussed in your prescribed textbook on pages 42–45, namely

- (1) minority
- (2) *stuprum*
- (3) material mistake
- (4) impotence
- (5) sterility

Minority

The first ground has already been discussed in study unit 6. Note once again that the marriage of a minor, entered into without the necessary consent, is not void but voidable at the request of the parents or guardian of the minor, or at the request of the minor himself or herself. Study again the section in the textbook on page 24 which deals with the effect of the failure to obtain the necessary consent on the validity of the marriage of a minor.

Stuprum

In respect of the discussion on *stuprum*, it is important to note that a man can apply for the annulment of his marriage only where his wife was pregnant with another man's child at the time of entering into marriage.

ACTIVITY

Read the section on pages 43–44 of your prescribed textbook which deals with *stuprum* and then answer the following questions:

- (1) Indicate whether the following statement is true or false:
Extra-marital intercourse with a third party before the marriage normally does not affect the validity of the marriage.
- (2) Give a definition of *stuprum*.

- (3) When only can a man apply for the annulment of his marriage on the ground of *stuprum*?

FEEDBACK

- (1) True.
- (2) *Stuprum* is extra-marital sexual intercourse with a third party before the marriage.
- (3) A man can apply for the annulment of his marriage on the ground of *stuprum* only if he was unaware that his wife was pregnant with another man's child at the time of the marriage.
-

Material mistake Material mistake as a ground for voidability of a marriage, was discussed in study unit 5. Please study that part of study unit 5 once again and the discussion on pages 28–29 of the textbook.

Impotence In respect of impotence, it is important to note that the one spouse has to prove that the other was already impotent **before** entering into the marriage. Either spouse may apply for the annulment of the marriage, provided that he or she was unaware of the impotence at the time of entering into marriage. Also note the circumstances in which the applicant will fail with an application for annulment.

ACTIVITY

Read the section on page 44 of your prescribed textbook which deals with impotence and then answer the following questions:

- (1) Define impotence in one sentence.
- (2) When is a marriage voidable on the ground of impotence?
- (3) Name the circumstances in which the applicant will fail with his or her application for the annulment of the marriage on the ground of impotence.

FEEDBACK

- (1) Impotence is the inability to have sexual intercourse.
- (2) A marriage is voidable on the ground of impotence when one spouse proves that the other spouse was already impotent before entering into the marriage, and still is impotent, and that the first-mentioned spouse was unaware of the impotence at the time of entering into the marriage.
- (3) An application for the annulment of the marriage, on the ground of impotence, will fail under the following circumstances:
- (a) If the applicant was aware of the impotence, or

- (b) if the applicant condoned the impotence, in other words excused it, or
 - (c) if the impotence was temporary or probably curable.
-

Sterility

In respect of sterility as ground for voidability, you must note the conflicting opinions in our case law.

ACTIVITY

Read the section on pages 44–45 of your prescribed textbook which deals with sterility and then answer the following questions:

- (1) Distinguish between impotence and sterility.
- (2) In respect of the discussion on sterility as a ground for voidability of a marriage, two conflicting opinions exist in our case law. State the names of the two cases.
- (3) What was decided in each of the cases mentioned in (2)?
- (4) Which of the decisions mentioned in (3) is preferred by Cronjé and Heaton?
- (5) Which constitutional court case lends support to Cronjé and Heaton’s view?

FEEDBACK

(1)

STERILITY	IMPOTENCE
When a person is able to have sexual intercourse but cannot procreate children and is thus infertile	When a person is unable to have sexual intercourse

- (2) *Van Niekerk v Van Niekerk* and *Venter v Venter*.
 - (3) In *Van Niekerk v Van Niekerk* it was held that the mere fact of sterility renders the marriage voidable. On the other hand, it was held in *Venter v Venter* that it is not the mere presence of sterility which renders the marriage voidable, but the fraudulent concealment thereof.
 - (4) Cronjé and Heaton prefer the approach in the *Venter* case to that in the *Van Niekerk* case.
 - (5) *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*.
-

ACTIVITY

Place each of the following sets of facts into the correct column of the table below in order to indicate which marriages are void and which are voidable.

- (1) At the time of H and W's marriage, W is pregnant with T's child. After the solemnisation of the marriage H discovers the pregnancy.
- (2) A man of 21 years of age concludes a marriage with an 11-year-old girl.
- (3) At the time of H and W's marriage, W was mentally ill.
- (4) H and W's marriage was solemnised by O who is not a competent marriage officer.
- (5) At the time of the solemnisation of H and W's "marriage" in the magistrate's office, H had the intention of contracting a marriage with W, while W was of the opinion that the transaction was about the registration of an engagement.
- (6) H and W, both 20 years of age, conclude a marriage against the wishes of both their parents, and consequently without their parents' consent.
- (7) After entering into marriage with H, W finds out that H is impotent and was already impotent before contracting the marriage.
- (8) O, a competent marriage officer solemnises the marriage between H and W. O, H and W are the only persons present at the solemnisation.
- (9) H, whose wife is dying, concludes a marriage with W.
- (10) H concluded a marriage with W. At the time of entering into the marriage, W was aware of the fact that she was sterile but concealed this out of fear that H would no longer want to marry her.

VOIDABLE MARRIAGE	VOID MARRIAGE

FEEDBACK

(1); (5); (6); (7) and (10) belong in the first column and (2); (3); (4); (8) and (9) belong in the second column.

2.3 The consequences of a voidable marriage

A voidable marriage remains in force until it is set aside by a court order. Study the discussion of the consequences of a voidable marriage on pages 45–46 of the textbook.

ACTIVITY

Compile a table to indicate the distinction between void and voidable marriages.

FEEDBACK

VOID MARRIAGE	VOIDABLE MARRIAGE
A void marriage never comes into existence (it is void <i>ab initio</i>).	A voidable marriage remains in force until it is dissolved by a court order.
Subject to certain statutory and common-law qualifications,* a void marriage does not have the legal consequences of a valid marriage. This entails, inter alia, the following: — status of the parties: unmarried — children born/conceived during the marriage: illegitimate	A voidable marriage has all the normal consequences of a valid marriage. This entails, inter alia, the following: — status of parties: married — children born/conceived during the marriage: legitimate
For purposes of legal certainty a void marriage should be declared void by the court. The order is merely declaratory	A voidable marriage must be annulled by a court order. The decree is compulsory
* Statutory qualifications: sections 6 and 26(1) of the Marriage Act 25 of 1961. See the discussion of these sections at the top of page 42 in your textbook. Common-law qualifications: putative marriage. See the discussion below.	

3 PUTATIVE MARRIAGES

3.1 The definition of a putative marriage

In certain circumstances a void marriage can also be a putative marriage. Read the section which deals with the definition of putative marriage on page 46 of your prescribed textbook.

ACTIVITY

Indicate when a void marriage will also be a putative marriage.

FEEDBACK

This will happen where, at the time of entering into the marriage, one or both parties were unaware of the defect which renders their marriage void, and believed in good faith that they were lawfully married.

3.2 The requirements for a putative marriage

The requirements for the existence of a putative marriage are discussed on pages 46–47 of the textbook. The first requirement is that one or both parties must, in good faith, be unaware of the defect which renders their marriage void. At common law it was secondly required that all the formalities had to have been complied with at the solemnisation of the void marriage. Today it is, however, not clear whether all the formalities also had to have been complied with at the solemnisation of the void marriage in order to render it a putative marriage. Three court decisions are important in this respect, namely *Bam v Bhabha*, *Moola v Aulsebrook* and *Solomons v Abrams*. Please ensure that you know what was decided about the requirement of proper solemnisation of the marriage in each of these cases. *Moola v Aulsebrook* and *Solomons v Abrams* are the two cases that are prescribed for this study unit. Study these cases in the prescribed casebook. *Bam v Bhabha* is mentioned on page 47 of your textbook, and in the extract from *Moola v Aulsebrook* and the note on *Moola v Aulsebrook* in the prescribed casebook. You must know the approach adopted by the appellate division in *Bam v Bhabha*.

ACTIVITY

How do the consequences of a marriage which is void only, differ from those of a void marriage which is a putative marriage as well?

FEEDBACK

Unlike a marriage which is merely void, the putative marriage has some of the legal consequences of a valid marriage.

3.3 The consequences of a putative marriage

The consequences of a putative marriage are discussed on pages 47–48 of your textbook.

Legitimacy of a child born of a putative marriage

You will note that children born of a putative marriage are legitimate. You will also see that current practice is that when a court is approached to declare a putative marriage null and void, an application is simultaneously made for a declaration that the children born of the marriage are legitimate.

Patrimonial consequences

In respect of the patrimonial consequences of a putative marriage, you must clearly distinguish between the case where both parties are *bona fide* (in good faith), and the case where only one party is *bona fide*.

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **The distinction between void and voidable marriages**
 - (1) Distinguish between a void marriage and a voidable marriage.
 - (2) Discuss the consequences of a void marriage.
 - (3) Discuss the consequences of a voidable marriage.
- **Grounds for nullity and voidability of a marriage**
 - (4) List the grounds for nullity of a marriage.
 - (5) List the grounds for voidability of a marriage.
 - (6) Will a marriage be void if one of the parties at the time of marriage fraudulently conceals that he or she is sterile? Discuss with reference to authority.
- **The putative marriage**
 - (7) Define the concept “putative marriage”.
 - (8) Must all the formalities be complied with at the solemnisation of a void marriage before it can be regarded as a putative marriage? Discuss fully with reference to authority.
 - (9) Are the children born of a putative marriage legitimate? Discuss fully.
 - (10) Fully discuss the patrimonial consequences of a putative marriage.

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

X and Y enter into marriage. Neither is aware that they are related to each other within the prohibited degrees of consanguinity. Fully discuss the nature and patrimonial consequences of the marriage. Note that the parties have no children.

SUMMARY

In this study unit you learned about

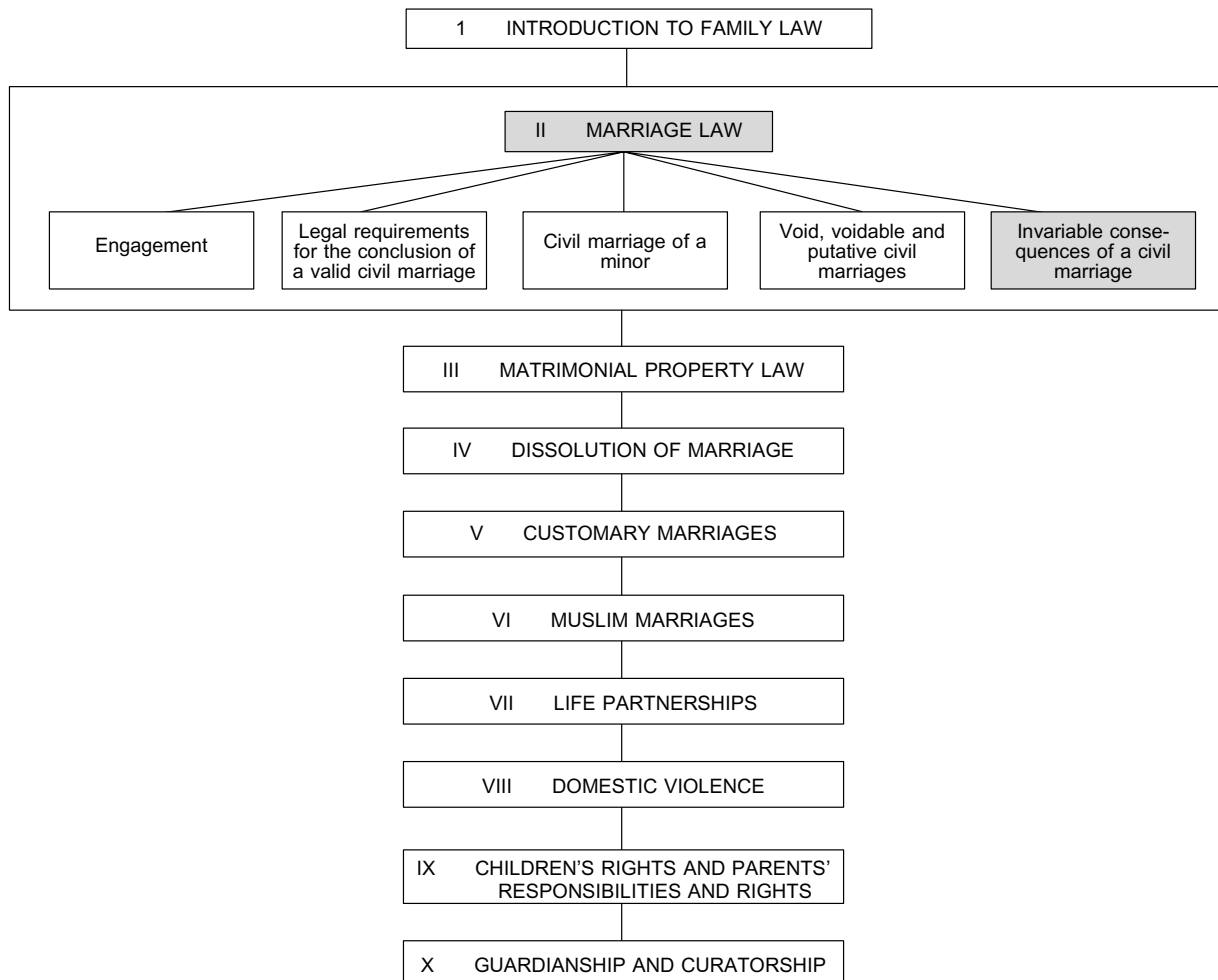
- the distinction between a void and a voidable marriage
- the grounds for nullity of a marriage
- the grounds for voidability of a marriage
- the consequences of a void marriage
- the consequences of a voidable marriage
- what a putative marriage is
- what the consequences of a putative marriage are

In the next study unit, we discuss the invariable consequences of marriage.

STUDY UNIT 8

The invariable consequences of a civil marriage

MODULE MAP



PREFACE

In the previous study units of this section, you learned how a valid engagement and a valid civil marriage come into existence and you learned that a marriage is void or voidable if the prescribed requirements are not met. Before attempting the present study unit you must ensure that you know how a valid civil marriage comes into existence.

The present study unit, as well as the whole of the next section (section III) deal with the consequences of a valid civil marriage. The consequences of marriage can be divided into variable and invariable consequences.

The variable consequences deal mainly with the matrimonial property system which applies to a marriage. The consequences in respect of the

matrimonial property system are variable because the spouses can select which matrimonial property system should apply to their marriage. The next section — section III — deals with matrimonial property law, that is, the variable consequences of marriage.

The present study unit deals with those consequences of marriage which cannot be changed by the spouses. These consequences are therefore known as the invariable consequences of marriage. As is explained at page 49 of your prescribed textbook, these consequences come into being automatically by operation of law and cannot be excluded by the parties. Let us consider the following example: M and W enter into marriage. As a result of the conclusion of the marriage M and W both gain the status of “being married”. The parties can do nothing about this change of status, as it is *ex lege* a consequence of the marriage.

LEARNING OUTCOMES

The purpose of this study unit is to enable you to

- (1) distinguish between the variable and invariable consequences of marriage
- (2) list the invariable consequences of marriage
- (3) explain what each invariable consequence means
- (4) explain how marriage affects the status of the spouses
- (5) explain the meaning and content of *consortium omnis vitae*
- (6) explain the reciprocal duty of maintenance between the spouses with reference to
 - (a) when it arises
 - (b) what its requirements are
 - (c) on whom it rests
 - (d) what it includes
 - (e) from whom debts in respect of support can be recovered by a third party
 - (f) when it terminates
 - (g) how it can be enforced with specific reference to the Maintenance Act 99 of 1998
 - (h) how the duty to contribute to household necessities is linked to it
 - (i) how the spouses’ right to occupy the matrimonial home and use the household assets is linked to it
- (7) explain the capacity to buy household necessities with reference to
 - (a) who has the capacity
 - (b) the requirements for the capacity
 - (c) revocation or limitation of the capacity

- (8) explain what the spouses' right to occupy the matrimonial home entails
 - (9) indicate that, as a result of marriage, both parents acquire equal guardianship over their legitimate children
 - (10) explain the rules in respect of the abolition of the prohibition on donations between spouses
 - (11) explain the rules about a common family name
 - (12) explain that the rule that the husband is the head of the family still forms part of our law today
-

PRESCRIBED MATTER

Read

- Prescribed textbook 50–52 (from the third-last paragraph on p 50, which begins with the sentence “As between the spouses ...”, to just before “5.4 Spousal maintenance” on p 52)
- Prescribed textbook 58–65 (the section under the heading “5.4.3 The Maintenance Act 99 of 1998”)

Study

- Prescribed textbook 49–50, 52–57, 65–68
- Prescribed casebook 91 (the note on *Excell v Douglas*)
- Prescribed casebook 95–96 (the note on *Reloomel v Ramsay*)
- *Bannatyne v Bannatyne* in your prescribed casebook 102–109

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Variable *versus* invariable consequences

In your textbook on page 49 and in the preface to this study unit a distinction is drawn between the variable and invariable consequences of marriage. You must ensure that you know what the distinction is.

ACTIVITY

Distinguish between the invariable and variable consequences of marriage.

INVARIABLE CONSEQUENCES OF MARRIAGE	VARIABLE CONSEQUENCES OF MARRIAGE
<p>These are the consequences of marriage which come into being automatically by operation of the law and which cannot be excluded by the parties to the marriage</p> <p>These consequences mainly concern the person of the spouses</p>	<p>These are the consequences of marriage which can be agreed upon and/or be excluded beforehand by the parties to the marriage, in an antenuptial contract</p> <p>These consequences mainly affect the estates of the spouses and the control they have in this regard</p>

2 THE STATUS OF THE SPOUSES

On page 49 in your textbook seven examples of how marriage affects the status of the spouses, in that they change from being unmarried to being married, are listed. You must memorise these examples.

3 *CONSORTIUM OMNIS VITAE*

What does it mean? Pages 49–50 of your textbook set out exactly what *consortium omnis vitae* means. You must study these two pages so as to be able to explain what *consortium* is. Do not forget about cases such as *Grobbelaar v Havenga* and *Peter v Minister of Law and Order*, which are discussed in the above-mentioned sections in the textbook and which explain what the concept *consortium omnis vitae* means. You should also note that material as well as immaterial things fall under *consortium*. You need only read the remainder of the discussion (ie, from the paragraph beginning with “As between the spouses ...”). You also need only read “5.3.1 The relationship between *consortium omnis vitae*, the right to family life and the right to dignity” on pages 51–52 of the prescribed textbook.

ACTIVITY

Read the section on pages 49–50 of your prescribed textbook which deals with *consortium omnis vitae* and then answer the following questions:

- (1) How is the concept *consortium* described in *Grobbelaar v Havenga*?
- (2) State the name of another case in which this concept is described.

- (1) The concept *consortium* is described in *Grobbelaar v Havenga* as: "... an abstraction comprising the totality of a number of rights, duties and advantages accruing to the spouses of a marriage."
 - (2) *Peter v Minister of Law and Order*.
-

4 SPOUSAL MAINTENANCE

4.1 The reciprocal duty of support between spouses

Maintenance = support First of all you should note that "support" and "maintenance" is the same thing. The two words can be used interchangeably.

Meaning of "reciprocal" Your textbook contains a detailed discussion on pages 52–65 of the reciprocal duty of support between spouses. The duty is reciprocal in that the spouses must maintain or support each other; the one supports the other and vice versa. The same position applies to both spouses — the rules for the husband are the same as those for the wife and vice versa.

When does duty arise? It is stated in your textbook on page 52 that the duty of support arises at the beginning of the marriage, that is, as soon as the marriage has been solemnised. As a general rule, the duty lasts until termination of the marriage. However, there are circumstances in which the duty can end before termination of the marriage. These circumstances will be dealt with below.

Requirements Page 52 of your prescribed textbook deals with the requirements for the duty of support between the spouses. These are

- (1) There must be a valid marriage between the parties.
- (2) The person claiming support must be in need of support.
- (3) The person from whom the support is claimed must be able to provide it.

In respect of the third requirement, see the reference to the case of *Reyneke v Reyneke* on pages 52–53 of the textbook. You need only read the discussion of the *Reyneke* case.

On whom does duty rest? It was pointed out above that the "reciprocal" duty of support means that the spouses must support **each other**. Not only must the husband support his wife, but she must support him. In this respect, you must study the paragraph just before the heading "**(b) Liability as against third parties**" on page 53 of your textbook.

What does support include? You must know what is included in support and how the extent of the duty of support is determined. This is explained in the second paragraph under the heading "**(a) General**" on page 52.

Recovery of debts for support

In the discussion under the heading “(b) Liability as against third parties” on page 53 of your textbook it is explained where debts incurred for maintenance can be recovered from in the case of marriage in community. In the case of a marriage in community of property, the money comes, firstly, from the joint estate. The paragraph explains this, as well as the situation where the joint estate is not big enough to cover the debts. In the case of a marriage out of community of property, the spouse who incurred the debt is liable, unless the debt was incurred in respect of household necessities, in which case the spouses will be jointly and severally liable. (In respect of household necessities see further below.)

In the second paragraph under the heading “(b) Liability as against third parties” it is explained that undue enrichment and *negotiorum gestio* may also be invoked by a third party. You must study that explanation.

When does duty terminate?

The duty of support normally lasts until the marriage comes to an end through divorce or death. However, in terms of the Divorce Act 70 of 1979, the court granting the divorce can grant an order for maintenance to be paid after divorce. (This matter is discussed in study unit 19.) Similarly, in terms of the Maintenance of Surviving Spouses Act 27 of 1990, a surviving spouse can be maintained out of the estate of his or her deceased spouse. (This Act is discussed in study unit 14.) Where the marriage still exists, the duty of support may be terminated only if the spouses no longer live together and if the spouse who claims maintenance is the one who caused the separation. This is explained in the paragraph of your textbook which runs from the bottom of page 53 to the top of page 54.

4.2 Household necessities

Relationship between duty of support and duty to contribute to household necessities

On page 54 of the textbook you will see that the duty to contribute to the purchase of household necessities is so closely linked to the duty of support that it is discussed under the duty of support for the sake of convenience. Make sure that you know in which instances the duty of support and the duty to contribute to the purchase of household necessities overlap and in which instances these duties differ from each other. The relationship between the duty to contribute to household necessities and the duty of support is set out in the following activity:

ACTIVITY

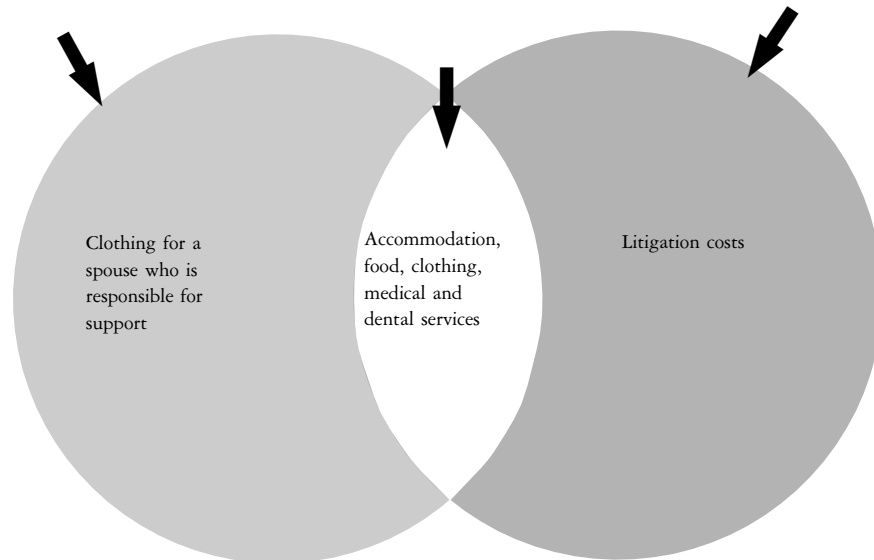
Use circles to draw a diagram which indicates how the duty to contribute to household necessities overlaps with the duty of support in certain instances and differs from it in other instances.

FEEDBACK

Things which are household necessities

Things which are both household necessities and which fall within the duty of support

Things which fall within the duty of support



Your textbook contains a detailed discussion on pages 54–57 of the rules regulating the purchase of household necessities. In addition to what is said in your textbook you must also study the notes on *Excell v Douglas* on page 91 and *Reloomel v Ramsay* on pages 95–96 in your prescribed casebook.

At pages 54–55 of your textbook the reason why it is still important to determine whether a particular item is a household necessary is explained.

Requirements for capacity

On page 55 of your textbook the three requirements for the existence of the capacity to buy household necessities are set out. Each requirement is discussed separately and in detail at pages 55–56 of the textbook. You must study these discussions carefully.

Termination of joint household

In respect of the requirement of the existence of a joint household you must note in particular that where the joint household no longer exists one spouse can no longer bind the other in contract by virtue of the capacity to buy household necessities — when the household terminates one of the requirements for the capacity to buy household necessities is no longer met and therefore the capacity no longer exists. However, this does not mean that one spouse cannot still bind the other on the basis of the **duty of support**. Consequently, liability for a debt incurred by the other spouse will now depend on who was responsible for the termination of the joint

household. You must study page 55 of your textbook and the note on *Excell v Douglas* on page 91 of the casebook in respect of the effect of termination of the joint household on liability for household necessities.

How is it determined whether something is a household necessary?

The capacity to buy household necessities naturally cannot exist if the items bought or services rendered are not household necessities. It is sometimes quite difficult to determine whether something is a household necessary. In this respect you should study pages 55–56 of your textbook as well as the note on *Reloomel v Ramsay* at pages 95–96 of your prescribed casebook.

ACTIVITY

Read pages 55–56 of your prescribed textbook, as well as the note on *Reloomel v Ramsay* on pages 95–96 of your prescribed casebook and then state very briefly what the subjective and objective tests (or approaches), which have been used by the courts to determine whether something is a household necessary, entail.

FEEDBACK

In *Reloomel v Ramsay* the court set out how one should determine whether a particular item is a household necessary. The court emphasised that factors such as the spouses' standard of living, their means, the customs of the people in their area, etcetera must be considered. A problem which arises in this regard is the approach one should take to these factors. Should they be viewed objectively or subjectively?

In *Reloomel v Ramsay* the court used the subjective approach in terms of which the question is viewed from the perspective of the trader. According to this approach the court looks at the facts of which the trader was aware or should reasonably have been aware. If the subjective approach is applied and a wife, for example, buys a pair of shoes for her husband while he already has more than enough shoes, the shoes will still be viewed as household necessities if the trader did not know of the abundant supply of shoes.

Alternatively, the court can adopt the objective approach. In terms of this approach the trader's knowledge of the spouses' circumstances is ignored. The court merely looks at the couple's social background and status, their standard of living, the customs in the area where they live, their means and the existing supply of items in the household, without paying any attention to what the trader knew about these factors. Looking at the example above, the objective approach would mean that it would be totally irrelevant whether or not the trader knew that the husband already had more than enough shoes. The objective approach was applied in

Voortrekkerwinkels (Ko-operatief) Bpk v Pretorius. In this case the court decided that the husband would not be liable if he could show that there was already an adequate supply of the specific commodity in the house.

Revocation or limitation of the capacity

The issue of whether a spouse's power to purchase household necessities can be revoked or limited is discussed on pages 56–57 of the textbook. It is clear that when a court revokes the capacity of one spouse to buy household necessities the other spouse will no longer be liable for household necessities purchased by that spouse.

In respect of revocation you should further note that, on occasion, it has been stated that one spouse can unilaterally revoke the capacity of the other spouse. This view is incorrect. Since the capacity to buy household necessities is not based on agency but arises *ex lege* and is an incident of marriage, one spouse does not have the power to revoke the capacity of the other. This is explained at page 57 of your textbook and at pages 95–96 of your casebook, where the effect of a notice sent to a trader is also explained. In respect of the notice to the trader you should once again look at the objective and subjective tests or approaches.

In respect of the defence of provision of adequate funds or an adequate supply of goods, you should study page 57 of your textbook. There it is explained that the answer to the question whether provision of adequate funds or an adequate supply of goods is a defence depends, according to our case law, on whether the subjective or objective test is applied.

4.3 The Maintenance Act 99 of 1998

Although we indicated at the beginning of this study unit that you only have to read the discussion of the Maintenance Act 99 of 1998 on pages 58–65, you should, however, study the following information in respect of this Act:

- The Maintenance Act expressly provides that it applies in respect of the legal duty of any person to maintain any other person “irrespective of the nature of the relationship between those persons giving rise to that duty”. Thus the application of the Act clearly extends even to a contractual duty of support between persons who are not related to each other by blood or marriage (such as cohabitants).
- The Act provides that the maintenance court may now also make an order for the payment of maintenance by way of a lump sum, and not only by way of periodical payments (as was indeed the case in terms of the old Maintenance Act of 1963).
- In terms of the Act any order made by a maintenance court has the

effect of an order made in a civil action. Thus, for example, maintenance and arrear maintenance may, like any other civil debt, also be enforced in the ordinary courts.

- Further, the Act makes provision for several new and/or improved mechanisms to enforce a maintenance order. The provisions of the Act can be invoked even before a maintenance debtor is convicted of the offence of failing to make a payment in accordance with a maintenance order. The Act provides that if a maintenance debtor fails to make a payment in accordance with a maintenance order within 10 days from the date on which the payment becomes payable, the maintenance creditor may apply for:
 - (1) the authorisation of a warrant of execution against the maintenance debtor's property;
 - (2) an order for the attachment of emoluments due to the maintenance debtor (that is, attachment of his remuneration for employment, such as his salary, wage, or allowance, regardless of whether or not it is expressed in money); or
 - (3) an order for the attachment of any present or future debt owing or accruing to the maintenance debtor.

With regard to the enforcement of maintenance orders you further need to study your prescribed case *Bannatyne v Bannatyne* on pages 102–109 of the casebook.

5 THE MATRIMONIAL HOME

On page 65 of the textbook it is explained that the matter of occupation of the matrimonial home is closely related to the duty of support. Note that, as a result of the marriage, both spouses have the right to occupy the matrimonial home, irrespective of how they are married, and irrespective of which spouse owns or rents the matrimonial home. Further, make sure that you know when and in which manner a spouse may be ejected from the matrimonial home.

6 PARENTAL AUTHORITY

On page 66 of the prescribed textbook it is explained that both parents have equal guardianship over their legitimate child. (Parental authority is discussed in detail in study unit 26.)

ACTIVITY

Indicate whether the following statement is true or false:

Only the father acquires guardianship over his and his wife's legitimate child(ren).

FEEDBACK

This statement is false since both mother and father have equal guardianship over their legitimate child(ren).

7 DONATIONS BETWEEN SPOUSES

At common law spouses were prohibited from making donations to each other. Section 22 of the Matrimonial Property Act 88 of 1984 has changed this rule. You must study pages 66–67 in your textbook on the effect of section 22. You should note that the abolition of the prohibition on donations between spouses does not permit or enable spouses who are married in community of property to make donations to each other, unless the donor spouse donates one of his or her separate assets to the other spouse subject to the provision that the donation must be excluded from the joint estate. The reason for this is set out on page 67 of the textbook. Make sure that you understand it.

ACTIVITY

What is the reason why the abolition of the prohibition on donations does not apply between spouses married in community of property?

FEEDBACK

Spouses who are married in community share everything equally. If one spouse makes a donation from his or her half of the joint estate, to the other spouse, the donated item will simply come out of the joint estate and fall back into it. Thus the donation will have no effect.

8 THE FAMILY NAME

Under this heading on page 67 in your textbook it is explained that a wife can, but need not, assume her husband's surname on marriage. Note that a woman may also keep her own surname or add it to her husband's to create a double-barrel surname. Note further that a husband does not have the same choices regarding his surname. If he wishes to assume his wife's surname or add it to his own he must apply to the director-general for permission to do so. This state of affairs is probably unconstitutional.

9 HEADSHIP OF THE FAMILY

The common-law rule that the husband is the head of the family is discussed on pages 67–68 of the textbook. You should be able to explain whether this rule still forms part of our law today.

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **Invariable consequences of marriage — general**
 - (1) Distinguish between the invariable and the variable consequences of marriage.
 - (2) List the invariable consequences of marriage.
- **Status of the spouses**
 - (3) What does the status of “being married” involve?
 - (4) If a person marries when he or she is 17 years old and divorces when he or she is 19 years old, does that person have the status of a major?
- ***Consortium omnis vitae***
 - (5) Fully discuss what is meant by the concept “*consortium omnis vitae*”.
- **Spousal maintenance**
 - (6) When does the duty of support arise between spouses?
 - (7) What are the requirements for the duty of support to exist between spouses?
 - (8) Does the duty of support rest on the husband only? Explain.
 - (9) If the spouses have separated and are living apart are they still under an obligation to maintain each other? Explain.
 - (10) Can a spouse married in community of property enforce the duty of support against his or her spouse?
 - (11) In which court or courts may the duty of support be enforced?
- **Purchase of household necessities**
 - (12) Is the duty of support the same as the duty to contribute to the purchase of household necessities? Explain.
 - (13) Why is it still of practical importance today to establish whether or not a specific item is a household necessary?
 - (14) List the requirements on which a spouse’s capacity to purchase household necessities depends.
 - (15) Which statutory provisions govern the liability for household necessities of
 - (a) spouses married in community of property,
 - (b) spouses married out of community of propertyExplain what each provision has to say.

- (16) Discuss the concept “household necessities” with reference to authority.
- (17) May one spouse unilaterally and without a court order revoke the other spouse’s capacity to purchase household necessities? Fully discuss with reference to authority.
- (18) If, for instance, a husband is sued on the basis of a contract that his wife concluded for household necessities, would it be a defence either that there already was a sufficient supply of the articles concerned in the house or that he had made sufficient funds available to her? Fully discuss with reference to authority (case law and the opinions of some authors).
- **The Maintenance Act 99 of 1998**

(19) Indicate whether the following statements concerning the Maintenance Act 99 of 1998 are true or false:

 - (a) The Act is also applicable to a contractual duty of support between persons who are not related to each other by blood or marriage (such as cohabitants).
 - (b) The Act provides that the maintenance court may not make an order for the payment of maintenance by way of a lump sum.
 - (c) In terms of the Act any order made by a maintenance court has the effect of an order made in a civil action.

(20) For which new and/or improved mechanisms to enforce a maintenance order does the Maintenance Act 99 of 1998 make provision?
 - **The matrimonial home**

(21) Briefly explain what the spouses’ right to occupy the matrimonial home entails.

(22) When and in which manner may a spouse be ejected from the matrimonial home?
 - **Parental authority**

(23) Who has guardianship over children born to a married couple?
 - **Donations between spouses**

(24) Is a donation between spouses married out of community of property and made on 1 January 1980 regarded as valid today? Give authority for your answer.

(25) Can spouses married in community of property make effective donations to each other? Explain your answer.
 - **Family name**

(26) Must a wife assume her husband’s surname?
 - **Headship of the family**

(27) Does the common-law rule that the husband is the head of the family still form part of our law? Explain briefly.

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

Mr and Mrs Brink were married out of community of property in 1975. During December 1982 the spouses made donations to each other. Answer the following questions:

- (1) Were the donations, made during 1982, valid at that stage? Briefly substantiate your answer.
- (2) Are the donations, made during 1982, valid today? Substantiate your answer with reference to authority.

SUMMARY

In this study unit you learned

- to distinguish between the variable and invariable consequences of marriage
- what the invariable consequences of marriage are
- to discuss each invariable consequence

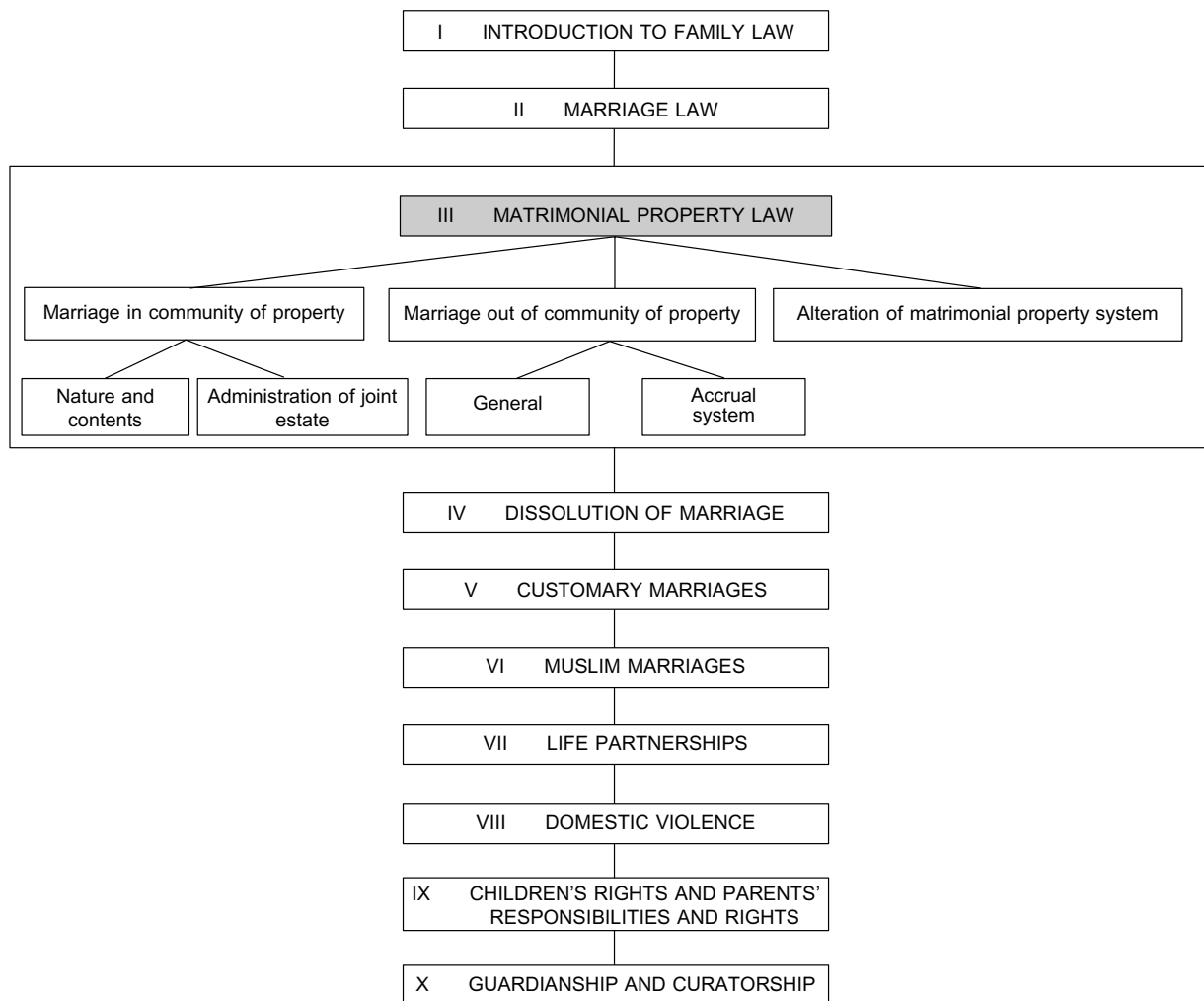
Matrimonial property law

Section III

SECTION III

Matrimonial property law

MODULE MAP



CONTENT

Overview

Study unit 9: Marriage in community of property — nature and contents

Study unit 10: Marriage in community of property — administration of the joint estate

Study unit 11: Marriage out of community of property

Study unit 12: The accrual system

Study unit 13: Alteration of the matrimonial property system

OVERVIEW

In section III we look at the section of family law known as matrimonial property law. Matrimonial property law consists of those legal rules which determine the patrimonial consequences of marriage (ie the consequences regarding the spouses' assets and liabilities). Parties who intend entering into marriage may, within certain limits, **themselves** determine the patrimonial consequences of their marriage. For this reason, these consequences are known as the **variable consequences** of marriage.

Parties may themselves determine the patrimonial consequences of their marriage by selecting the specific matrimonial property system applicable to their marriage. If you should ask the average person on the street what a matrimonial property system is, or rather what the different matrimonial property systems are, he or she will probably not be able to tell you. It is nevertheless very important for a couple planning to get married to be aware of the different matrimonial property systems and also to know what each system entails so that they can decide which system will suit their specific needs best. Therefore in this section we shall explain

- the various matrimonial property systems existing in South Africa today
- when the various systems apply
- what each system entails

Lastly, we shall also discuss the circumstances in which spouses may change their matrimonial property system after marriage.

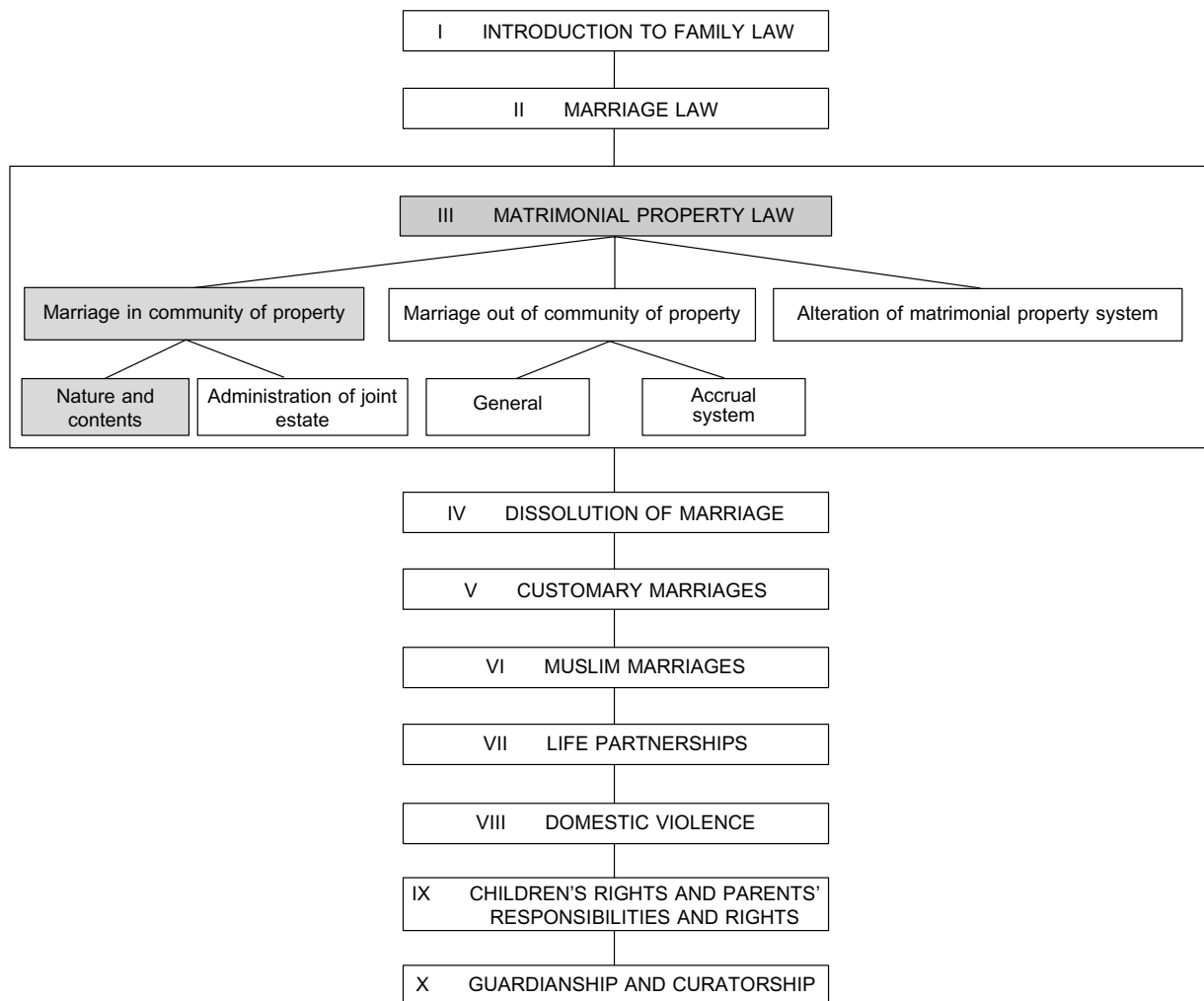
Section III is divided into 5 study units:

- Study unit 9 deals with the nature and contents of a marriage in community of property.
- Study unit 10 deals with the way in which the joint estate has to be administered by spouses married in community of property.
- Study unit 11 deals with marriage out of community of property. Various aspects concerning antenuptial contracts are also discussed.
- Study unit 12 deals with marriage out of community of property with the accrual system.
- Study unit 13 deals with the alteration of the matrimonial property system after marriage.

STUDY UNIT 9

Marriage in community of property — nature and contents

MODULE MAP



PREFACE

Today in South Africa, the three generally applicable matrimonial property systems are

- marriage in community of property
- marriage out of community of property with exclusion of profit and loss and with exclusion of the accrual system (this system is also referred to as complete separation of property)
- marriage out of community of property with the accrual system

Each of these matrimonial property systems determines the patrimonial consequences of marriage in a particular way. In this and the next study unit we shall look at the patrimonial consequences of a marriage where the spouses have decided to marry in community of property. In the present study unit we study the nature and contents of universal community of property. In the next study unit, we shall look at the way in which the joint estate has to be administered.

LEARNING OUTCOMES

After you have studied this study unit, you should be able to

- (1) explain when a marriage is in community of property and when it is not
 - (2) explain what universal community of property means (ie the nature of universal community of property)
 - (3) explain what the joint estate consists of and which assets do not form part of the joint estate (the content of universal community of property)
 - (4) explain liability for joint debts
-

PRESCRIBED MATTER

Read

- Prescribed textbook 69–70 “6.1 Introduction” and “6.2 A brief historical overview of universal community of property”

Study

- Prescribed textbook 70–77
- Prescribed casebook 123–124 (the note on *De Wet v Jurgens*)
- *Nedbank v Van Zyl* in your prescribed casebook 124–129

CONTENT OF THIS STUDY UNIT

1 UNIVERSAL COMMUNITY OF PROPERTY AS THE PRIMARY MATRIMONIAL PROPERTY SYSTEM IN SOUTH AFRICA

Primary matrimonial property system You will see in your textbook on page 70 that the primary matrimonial property system in South Africa is the system of universal community of property. The conclusion of a marriage in South Africa results in community of property.

Rebuttable pre-
sumption

In this regard, there is a rebuttable presumption in our law that when two persons are married, they are married in community of property. You will, however, note in your prescribed textbook that this presumption can be rebutted by proving the existence of certain circumstances. These circumstances are listed and discussed in your textbook under the heading “6.3 The cases where community of property does not arise” (pars (1) to (4) pp 70–71). You must be able to mention these circumstances.

Circumstances
which may rebut
presumption

2 THE NATURE OF UNIVERSAL COMMUNITY OF PROPERTY

Meaning of univer-
sal community of
property

Now that you know when universal community of property arises we can look at the meaning of universal community of property. The nature of universal community of property is discussed on page 71 of your prescribed textbook.

ACTIVITY

Read the paragraph which deals with the nature of universal community of property, on page 71 of your prescribed textbook, and then explain very briefly (in more or less four sentences) what it means when we say that there is universal community of property in a marriage.

FEEDBACK

When you study this section you will see that universal community of property entails that the husband and wife become tied co-owners in undivided and indivisible half-shares of all the assets and liabilities they have at the time of their marriage, as well as of all the assets and liabilities they acquire during the marriage. When they marry, the separate estates of the husband and the wife are automatically merged into one joint estate. Upon dissolution of the marriage, all liabilities are settled from the joint estate and the balance of the joint estate is then distributed equally between the spouses. This view of the nature of universal community of property was confirmed by the appellate division (now the supreme court of appeal) in *Estate Sayle v Commissioner for Inland Revenue* and *De Wet v Jurgens*.

3 THE CONTENT OF UNIVERSAL COMMUNITY OF PROPERTY

What does joint es-
tate consist of?

Under this heading we look at the joint estate and more specifically at the content thereof. The joint estate consists of joint assets and joint liabilities.

3.1 Assets

Joint assets

In your prescribed textbook on page 71 you will see that all the assets which the spouses owned **prior to marriage** as well as all the assets which they obtain **after marriage** form part of the joint estate.

ACTIVITY

Read the first paragraph under the heading “6.5.1 Assets” on page 71 of your prescribed textbook and then indicate whether the statements below are true or false:

- (1) At the moment of contracting a valid marriage in community of property, the spouses become co-owners of everything that either of them owned prior to marriage.
- (2) Ownership of movable assets of which the spouses become co-owners, is transferred by delivery.
- (3) Immovable assets owned by the one party before marriage must be registered in the name of both spouses when they marry in community of property.

FEEDBACK

Statement (1) is true while statements (2) and (3) are both false since the transfer of ownership takes place automatically by operation of law so that delivery of movable property and registration of immovable property are unnecessary.

Separate assets

There are, however, assets that do not form part of the joint estate and which remain the separate assets of the spouses, namely

- (1) assets excluded in an antenuptial contract
- (2) assets excluded by will or deed of donation
- (3) assets subject to a *fideicommissum* or usufruct
- (4) *jocalia* (ie, engagement gifts)
- (5) benefits under the Friendly Societies Act 25 of 1956
- (6) non-patrimonial damages
- (7) costs in a matrimonial action
- (8) assets which replace separate assets

Each of these assets is discussed briefly and clearly in your textbook on pages 72–73.

ACTIVITY

Jacob and Marian are married in community of property. A friend of Marian, Bettie, donates a sewing machine to Marian. Bettie states in the

deed of donation that the sewing machine must be excluded from Jacob and Marian's joint estate. The deed of donation does not contain any further stipulations. Marian, who cannot do needlework, exchanges the sewing machine for a painting at a swop shop. Both Jacob's parents die in a car accident. Jacob's father leaves a will in which he bequeathes his farm and farmhouse, tractor and cow to Jacob. The will further stipulates that these assets are to be excluded from Jacob and Marian's joint estate. The will does not contain any further stipulations. According to Jacob's mother's will she bequeathes R1 000 to Jacob. According to her will this bequest, as well as the fruits of the bequest, should be excluded from Jacob and Marian's joint estate. Jacob later decides to exchange the tractor for a plough. He uses R500 of the R1 000, he inherited from his mother, to erect a barn for the calf recently born of the cow he inherited from his father. Jacob deposits the remaining half of the R1 000 (ie R500) into his savings account.

Read carefully through the above-mentioned facts and then answer the following questions:

- (1) Name the assets which replaced the excluded assets (excluded assets are the assets excluded from the joint estate).
- (2) Name the assets which are the fruits of the excluded assets.
- (3) Complete the table below by making a tick (✓) in column B in order to indicate which assets fall within and which assets fall outside Jacob and Marian's joint estate.

COLUMN A	COLUMN B	
	Fall within the joint estate	Fall outside the joint estate
(a) Painting		
(b) Farm and farmhouse		
(c) Plough		
(d) Cow		
(e) Calf		
(f) The remaining R500		
(g) Interest on R500 — in terms of the pre- scribed interest rate		
(h) Barn		

FEEDBACK

- (1) The sewing machine, which was donated to Marian and which falls outside the joint estate of Jacob and Marian (in terms of the deed of donation), is exchanged at the swop shop for a painting. Jacob uses half of the R1 000 (ie R500), which he inherited and which falls outside the spouses' joint estate (in terms of the will) to erect a barn.

Jacob also exchanges the tractor which is an excluded asset, for a plough. The painting, barn and plough are therefore assets which replaced the excluded assets.

- (2) The calf and interest earned on the remaining half of the R1 000 (ie R500) are fruits of the excluded assets.
 - (3)
 - (a) The painting falls outside the joint estate. When a third party (Bettie) donates something (sewing machine) to a husband or a wife (Marian), subject to the condition that such asset must not fall within the joint estate, and the asset is exchanged, the exclusion will remain valid in respect of the property obtained by the exchange (painting).
 - (b) The farm and farmhouse fall outside the joint estate. Jacob inherited the farm and farmhouse in terms of his father's will, subject to the condition that it should fall outside the joint estate.
 - (c) The plough falls outside the joint estate. When a third party (Jacob's father) bequeathes something (tractor) to a husband or a wife (Jacob), subject to the condition that such asset must not fall within the joint estate, and the bequest is exchanged, the exclusion will remain valid in respect of the property obtained by the exchange (plough).
 - (d) The cow falls outside the joint estate. Jacob inherited the cow under his father's will, subject to the condition that it should fall outside the joint estate.
 - (e) The calf falls within the joint estate. The fruits of a bequest which is excluded from the joint estate will become part of the joint estate. If the testator wants these to be excluded as well, he or she must make a specific stipulation to this effect. Jacob's father did not stipulate in his will that the exclusion should extend to the fruits.
 - (f) The remaining R500 of the R1 000 falls outside the joint estate. Jacob inherited the R1 000 under his mother's will, subject to the condition that it should fall outside the joint estate.
 - (g) The interest on R500 falls outside the joint estate. In terms of Jacob's mother's will, the fruits of the bequest (R1 000 of which only R500 remained) should also be excluded from the joint estate.
 - (h) The barn falls outside the joint estate. When a third party (Jacob's mother) bequeathes something (R1 000, of which he used R500 for the barn) to a husband or wife (Jacob), subject to the condition that the asset should not fall within the joint estate, and the bequest is exchanged (the money is converted into something else, namely the barn), the exclusion will remain valid in respect of the property obtained by the exchange (barn).
-

In respect of the discussion on assets subject to a *fideicommissum* or usufruct on page 72 in the textbook, we feel you may find it useful to have a bit of background on what a *fideicommissum* and a usufruct are.

In the case of a *fideicommissum*, the testator leaves property to a person (the *fiduciary*), subject to the duty of handing it over in full ownership to another person (the *fideicommissary*) at a certain time or upon the fulfilment of a certain condition. This can be explained by means of the following example: X bequeaths a farm to his son, Y, on condition that after Y's death the farm should go to his grandson, Z. While the *fideicommissum* exists, the farm does not form part of any joint estate in which Y or Z may share. Once it is certain that the farm cannot go to Z (because he has died), it falls into Y's common estate. Also, if Y dies and the farm goes to Z, it falls into the joint estate if Z is married in community of property.

A usufruct can be defined as a personal servitude that gives the usufructuary a limited real right to use the property of another as well as its fruits, with the duty eventually to return the property to the owner with the preservation of the substance thereof. This, for example, means that if X bequeaths a farm to Y, subject to *usufruct* by Z, that farm does not become part of Y's joint estate and neither do Z's rights fall into his or her common estate.

Later, in the modules Law of Succession and Law of Property you will learn more about the *fideicommissum* and usufruct.

ACTIVITY

- (A) Mr Botha dies after a four-month illness. In his will he bequeathes his car to his son, S, S being subject to the duty of handing it over in full ownership to his grandson, G, the moment G attains majority.
- (B) Mr Manamela's will reads as follows: "I leave my house to my daughter, D, subject to the condition that my wife, W, may stay on in the house until she dies."

Read the above-mentioned sets of facts carefully and then answer the following questions:

- (1) Which set of facts creates a *fideicommissum*?
- (2) Who is the *fiduciarius* in the set of facts which creates a *fideicommissum*?
- (3) Who is the *fideicommissarius* in the set of facts which creates a *fideicommissum*?
- (4) Who is the usufructuary in the set of facts which creates a usufruct?
- (5) Who is the owner of the car in (A)?
- (6) Who is the owner of the house in (B)?

- (1) The set of facts in (A) creates a *fideicommissum*.
 - (2) S is the *fiduciarius*.
 - (3) G is the *fideicommissarius*.
 - (4) W is the usufructuary.
 - (5) S is the owner of the car until G attains majority. After G attains majority G becomes the owner of the car.
 - (6) D is the owner of the house.
-

Attachment of separate assets

Finally, please note once again that although there is only one joint estate when spouses are married in community of property, the spouses may own separate property which does not fall into the joint estate. The issue of attachment of such separate assets is discussed on page 73 of your prescribed textbook. In this regard, take note of the decision of the supreme court of appeal in *Du Plessis v Pienaar* in which it was held that the creditors of spouses married in community of property can look to the estates of both spouses for recovery of a joint debt. Thus, even the separate assets of a spouse who is married in community of property can be attached for joint debts. The position regarding attachment of separate assets for separate or private debts is explained in the last paragraph on page 73.

3.2 Liabilities

You will note in your prescribed textbook on pages 74–77 that all antenuptial debts and liabilities, as well as debts and liabilities incurred *stante matrimonio* (ie during the existence of the marriage) form part of the joint estate. Thus, the spouses are co-debtors for the debts, as was decided in your prescribed case of *Nedbank v Van Zyl*.

ACTIVITY

Read the prescribed case *Nedbank v Van Zyl* on pages 124–129 as well as the note on *De Wet v Jurgens* on pages 123–124 of your prescribed casebook and then answer the following questions:

- (1) What are the facts of this case?
- (2) What is the legal question in this case?
- (3) What did the court *a quo* and the appellate division (today called the supreme court of appeal) decide?
- (4) What is the importance of this case?
- (5) Why did this case provide a **final** answer?
- (6) Explain briefly what suretyship means.

- (1) Mr and Mrs Van Zyl were married in community of property. During the subsistence of their marriage (*stante matrimonio*) Mrs Van Zyl entered into a written contract of suretyship with the bank (appellant) in terms of which she bound herself to the appellant as surety and co-principal debtor for the repayment on demand of all moneys owed by her husband to the appellant on overdraft, then and from time to time thereafter. Mr and Mrs Van Zyl were divorced two years later. After the divorce Mr Van Zyl defaulted on his obligations to the bank and all the appellant's endeavours to recover the amount from Mr Van Zyl were fruitless. The bank then sued Mrs Van Zyl for the outstanding amount, interest and costs on the basis of the deed of suretyship.
- (2) The court had to decide on the nature of the liability of spouses for joint debts since this would determine whether Mrs Van Zyl was liable in terms of the deed of suretyship.
- (3) In the court *a quo* it was held that spouses who are married in community of property are co-debtors in respect of liabilities that bind the joint estate. After the court applied this rule to the facts it held that the principal debt (the debt to the bank in respect of the overdraft) was the joint obligation of the spouses. By entering into the suretyship, the wife had therefore attempted to stand surety for her own debt. The court accordingly declared the deed of suretyship to be unenforceable. The appellate division (now the supreme court of appeal) upheld the decision of the court *a quo*.
- (4) This case finally made it clear that spouses who are married in community of property are co-debtors in respect of liabilities that bind the joint estate.
- (5) The finding is a final answer since it is a decision of the appellate division (now the supreme court of appeal).
- (6) When a person concludes a contract of suretyship he or she binds himself or herself as surety and co-principal debtor for the repayment on demand of all moneys from a debt the original debtor incurred. We explain this by means of an example. Mr A borrows money from the bank. You sign a contract of suretyship in terms of which you bind yourself as surety and co-principal debtor for the repayment on demand of all moneys owed by Mr A to the bank the moment Mr A is not able to pay his debt. As soon as Mr A is not able to pay his debt, the bank will sue you for the outstanding amount Mr A owes the bank. You are then liable in terms of the contract of suretyship.

Antenuptial debts

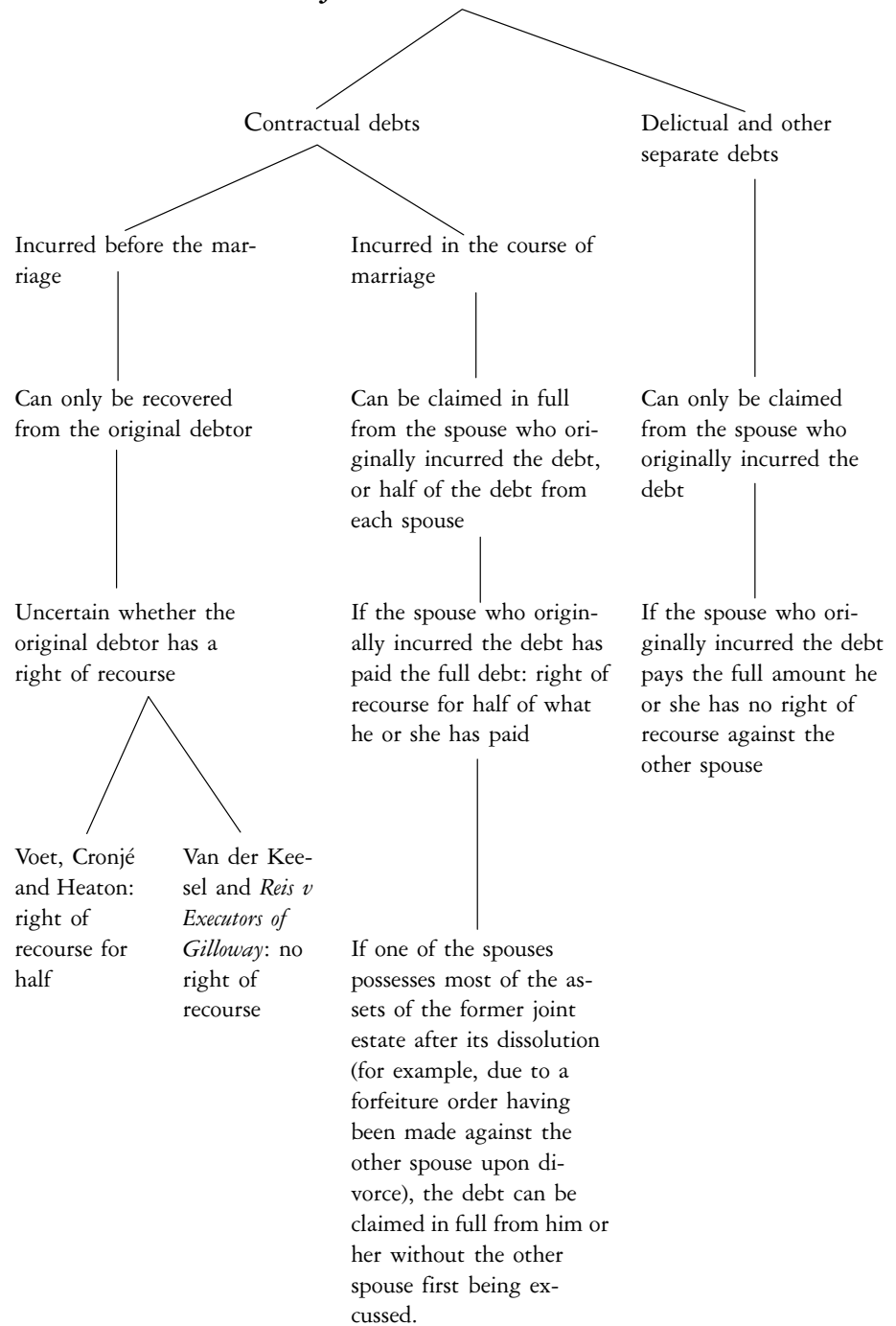
In respect of the discussion on antenuptial debts on page 74 in your textbook, you should note that antenuptial debts include all contractual and delictual debts of the husband and the wife, as well as any maintenance liabilities (iro, eg, children from a previous marriage and even extra-marital children).

Debts incurred during the subsistence of the marriage	Concerning the discussion on pages 75–76 in your textbook on debts incurred during the subsistence of the marriage, you must first of all distinguish between contractual debts, delictual debts and other separate debts.
Contractual debts	You will see on page 75 in your prescribed textbook that a contractual debt can be recovered from the joint estate if the spouse who incurred the debt had the capacity to incur such debt. The consequences of a transaction concluded by a spouse who did not have the capacity to incur the debt are discussed in the next study unit.
Delictual debts	Regarding delictual debts, you must note very carefully the provisions of section 19 of the Matrimonial Property Act 88 of 1984 which are explained in your textbook on page 75.
Delictual liability of spouses <i>inter se</i> (ie <i>as against one another</i>)	In respect of the discussion of debts incurred during the subsistence of the marriage, you must further note on page 75 of your textbook that spouses married in community of property cannot hold each other liable for damages in delict (ie for compensation for patrimonial loss, eg damage to a motor vehicle, medical expenses and loss of income, etc). In terms of section 18(b) of the Matrimonial Property Act one spouse may, however, sue the other for satisfaction for bodily injuries caused either partially or wholly by the other spouse (satisfaction is compensation for non-patrimonial loss, ie, damage which affects your person and not your patrimony, eg pain and suffering, personality infringement, etc). Note that the provisions of section 19 is also applicable here.
Other separate debts	It is further submitted in your textbook on page 76 that section 19 of the Matrimonial Property Act 88 of 1984 should be extended to cover criminal fines and a spouse's maintenance obligations towards his or her parents, siblings, extra-marital children, and children from a previous marriage.
Debts unpaid at dissolution of marriage	Lastly, in respect of joint liabilities, you must note the way in which joint debts, which have not yet been settled when the joint estate is dissolved, must be recovered from the spouses. You will note in your textbook on pages 76–77 that here a distinction is to be drawn between contractual debts, and delictual or other separate debts of the former spouses.
Contractual debts	Please note that in respect of contractual debts a further distinction is made, namely between contractual debts incurred before the marriage and contractual debts incurred during marriage.
Delictual and other separate debts	You should note that delictual and other separate debts which are still outstanding when the marriage has been dissolved, can be claimed only from the spouse who originally incurred the debt, and if that spouse pays the debt, he or she has no right of recourse against the other spouse.

ACTIVITY

Draw a diagram of the rules which apply in respect of debts outstanding upon the dissolution of the joint estate.

DEBTS OUTSTANDING UPON THE DISSOLUTION OF THE JOINT ESTATE



QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **Universal community of property as the primary matrimonial property system**
 - (1) State all the circumstances in which the presumption that all marriages are in community of property, may be rebutted.
- **The nature of universal community of property**
 - (2) Discuss the nature of universal community of property.
- **The content of universal community of property**
 - (3) List the assets which do not form part of the joint estate.
 - (4) Can the separate assets of a spouse married in community of property be used to pay the claims of the creditors of the joint estate? Fully discuss with reference to authority.
 - (5) Can the separate assets of a spouse married in community of property be used to pay the claims of the creditors of the other spouse's separate or private debts?
 - (6) Do all antenuptial debts become joint debts in marriages entered into in community of property?
 - (7) Explain the method a creditor must use to recover damages for a delict committed against him or her by a spouse married in community of property.
 - (8) May one spouse married in community of property hold the other spouse liable in delict in respect of bodily injuries caused either wholly or partially by the other spouse?
 - (9) From whom must a contractual debt, which was entered into prior to the conclusion of a marriage in community of property, but which has not yet been paid at the time of the dissolution of the marriage, be recovered?
 - (10) If a marriage in community of property is dissolved by divorce without a debt incurred by the wife having been fully paid, may the full amount of the debt be claimed from the wife without her ex-husband first being excused? Discuss.
 - (11) From whom must delictual debts which have not been settled after a marriage in community of property has been dissolved, be claimed?

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

A debt which Mary incurred before her marriage in community of property to John, is claimed from her after the marriage has been dissolved. She pays the debt and now asks you whether she has a right of recourse against John (her former spouse). Advise her.

SUMMARY

In this study unit you learned

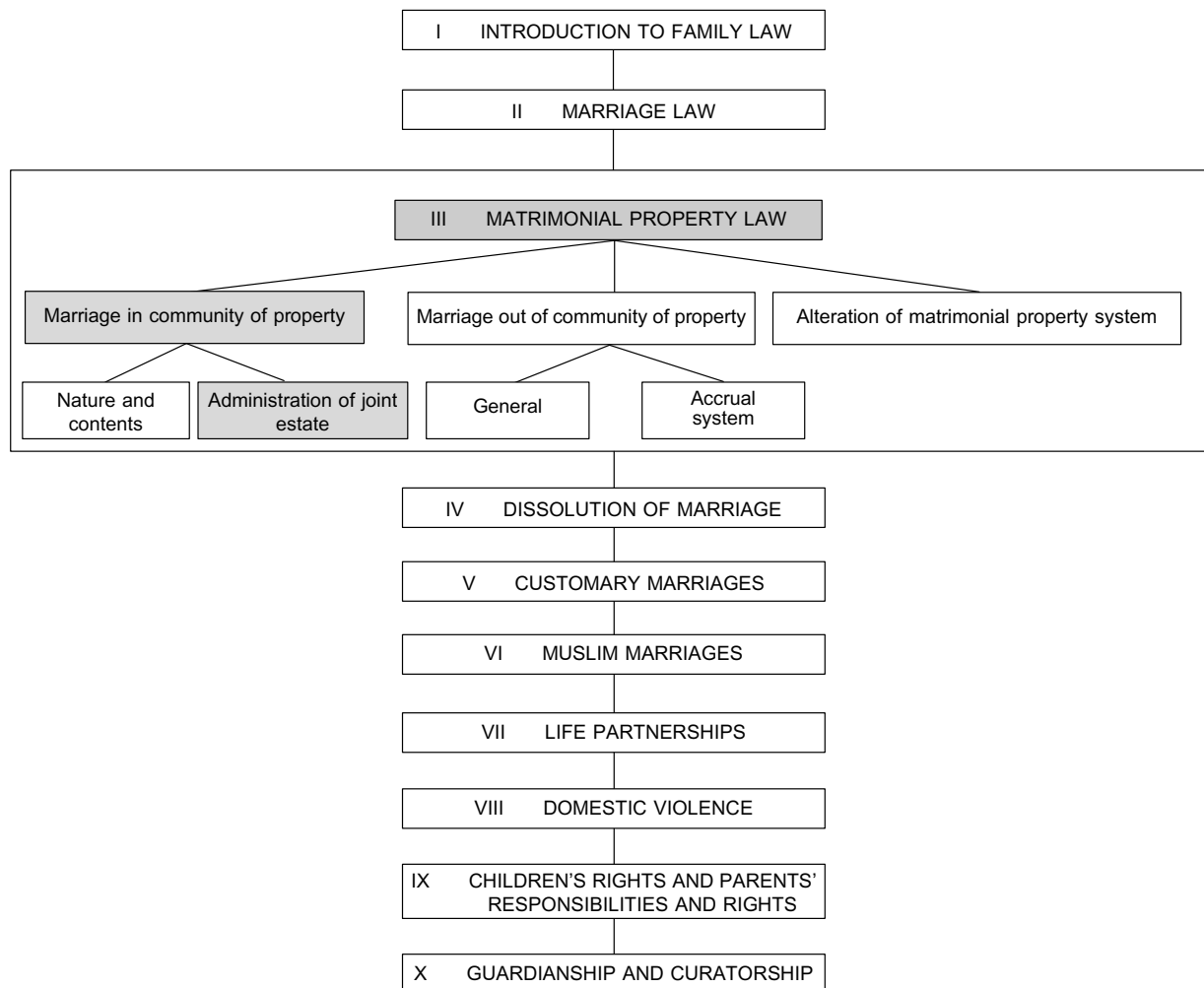
- when a marriage is in community of property
- what universal community of property means
- what the joint estate of the spouses consists of
- that although there is only one joint estate when spouses marry in community of property, the spouses may also own separate property, which does not form part of the joint estate
- how debts must be recovered from spouses who are/were married in community of property

In the next study unit we shall discuss the way in which the spouses' joint estate must be administered.

STUDY UNIT 10

Marriage in community of property — administration of the joint estate

MODULE MAP



PREFACE

In the previous study unit you learned

- when a marriage is in community of property and when community of property does not arise
- what universal community of property entails
- what the joint estate consists of and what falls outside the joint estate
- how joint liabilities may be recovered

In this study unit we discuss the way in which the joint estate is

administered. It is therefore very important that at this stage you should know precisely what the joint estate of spouses married in community of property is, and what this estate consists of.

We also discuss the capacity to litigate of spouses married in community of property. Capacity to litigate is the capacity to appear in a court as a party to a suit.

LEARNING OUTCOMES

After studying this study unit you should be able to

- (1) explain the principle of equal management of the joint estate
 - (2) identify the different forms of consent and the acts that resort under each form
 - (3) identify the juristic acts for which no consent is required
 - (4) explain how third parties who enter into a transaction with a person who does not have the required consent from his or her spouse, are protected
 - (5) list and discuss the remedies one spouse has against the other
 - (a) if the latter concludes transactions with third parties without the required consent
 - (b) if the latter withholds his or her consent unreasonably
 - (c) if the latter prejudices the interests of the other spouse in the joint estate
 - (6) discuss the capacity to litigate of spouses married in community of property
-

PRESCRIBED MATTER

Read

- Prescribed textbook 77–78 “6.6.1 The abolition of the marital power”

Study

- Prescribed textbook 78–87

CONTENT OF THIS STUDY UNIT

1 WHAT WAS THE EFFECT OF THE MARITAL POWER?

You need only read the section under the heading “6.6.1 The abolition

of the marital power” in your prescribed textbook on pages 77–78, to get an idea of what the effect of the marital power was before its complete abolition by section 29 of the General Law Fourth Amendment Act 132 of 1993 on 1 December 1993.

2 THE PRINCIPLE OF EQUAL MANAGEMENT OF THE JOINT ESTATE

Equal concurrent management In respect of the discussion of this matter on page 78 of the textbook it is important that you should first note that in the case of marriage in community of property, the marital power has been replaced by equal concurrent management of the joint estate as envisaged in section 14 of the Matrimonial Property Act 88 of 1984.

Section 14 of Matrimonial Property Act — definition The principle of equal management of the joint estate is defined in section 14 of the Matrimonial Property Act 88 of 1984. Ensure that you know and fully understand the effect of the provisions of section 14 as set out in your prescribed textbook. You will note that husband and wife now have equal

Matrimonial Property Act — no consent except in specific instances powers to manage the joint estate. In this regard, the Matrimonial Property Act states further that **any** spouse in a marriage in community of property may perform **any** juristic act with regard to the joint estate without the consent of the other spouse, except such juristic acts as are specifically excluded by the Act. There are therefore certain juristic acts which a spouse married in community of property may not perform without the consent of the other spouse. You will see in your textbook that the effect of this requirement of joint consent regarding certain juristic acts is that both spouses’ capacity to act with reference to the joint estate is restricted.

3 THE DIFFERENT FORMS OF CONSENT

Forms of consent The different forms of consent that sections 15(2) and (3) and section 17(1) of the Matrimonial Property Act provides for are listed in your prescribed textbook in paragraphs (a) to (d) on pages 79–80 under the heading “6.6.3 The acts for which the consent of both spouses is required”. These forms of consent are the following:

- (1) prior written consent, attested by two competent witnesses, in respect of each transaction separately
- (2) written consent, attested by two competent witnesses, in respect of each transaction separately
- (3) written consent without any further requirements
- (4) oral or tacit consent

Juristic acts which resort under each form The specific juristic acts which resort under each of these forms, are mentioned each time. It is very important that you should know which juristic acts fall under each form of consent, because you may come across

a factual problem in an assignment or examination paper which mentions a number of juristic acts that a spouse married in community of property is planning to perform. You may then be asked to indicate which form of consent has to be obtained for each juristic act.

ACTIVITY

Mr and Mrs Khumalo were married in community of property on 18 February 1995. Mrs Khumalo concludes the following transactions:

- (1) She registers a servitude (a right of way) over the plot belonging to her and Mr Khumalo, in favour of Mr Manamela, the owner of the adjacent plot. The following day Mr Khumalo gives his written consent, which is attested by two competent witnesses, to this transaction.
- (2) She concludes a contract in terms of which she stands surety for debts her brother incurred. While speaking to Mrs Khumalo on the telephone, Mr Khumalo consented to this transaction.
- (3) She concludes a contract in terms of which she burdens the house belonging to her and Mr Khumalo, with a mortgage. Mr Khumalo consented beforehand in writing to this transaction. Mrs Khumalo's mother signed as the only witness.
- (4) She sells a coffee table to her neighbour without obtaining Mr Khumalo's consent. She also sells their broken washing machine since Mr Khumalo wanted to dispose of it the previous day.
- (5) She applies to the court for an interdict forbidding their neighbour to carry on his trade as a mechanic, which he practises until after 21:00 every night. Mrs Khumalo has Mr Khumalo's written consent to take these steps.
- (6) She receives R1 000 from Mr Williams which he owed to Mr Khumalo on account of a business transaction. Mr Khumalo never discussed his business with his wife and also never authorised her to receive the money.
- (7) She concludes a contract in terms of which she purchases land on which she wants to erect chicken-coops and other buildings in order to extend her poultry farm. Mr Khumalo is totally unaware of this transaction.
- (8) She buys securities on the stock exchange without Mr Khumalo's consent.

Indicate in each case whether Mrs Khumalo has acted lawfully in terms of the provisions of the Matrimonial Property Act 88 of 1984. Briefly explain your answer in each case.

FEEDBACK

- (1) Prior written consent, attested by two competent witnesses was necessary for this transaction. Mrs Khumalo therefore did not act

lawfully since Mr Khumalo's written consent, which was attested by two competent witnesses, was obtained only the following day. The Matrimonial Property Act 88 of 1984 specifically requires that the consent should have been obtained beforehand so that ratification by the other spouse is not possible.

- (2) Prior written consent, attested by two competent witnesses was required for the transaction. Therefore, Mrs Khumalo did not act lawfully since the consent of Mr Khumalo, which Mrs Khumalo obtained prior to the transaction, should have been in writing and should have been attested by two competent witnesses.
 - (3) Written consent, attested by two competent witnesses was required for the transaction. Therefore, Mrs Khumalo did not act lawfully since the consent of Mr Khumalo should have been attested by two competent witnesses, while in the present case Mrs Khumalo's mother signed as the only witness.
 - (4) For the alienation of household effects, oral or tacit consent is required. Regarding the coffee table, Mrs Khumalo acted incorrectly since she needed Mr Khumalo's consent for the alienation of furniture which forms part of the joint estate. Regarding the washing machine, she acted correctly since Mr Khumalo tacitly consented to this transaction. He wanted to dispose of it the previous day and therefore we can assume that he has tacitly consented to its disposal by his wife.
 - (5) Written consent without any further requirements is needed to institute legal proceedings. Therefore, Mrs Khumalo acted lawfully since she had Mr Khumalo's written consent.
 - (6) Regarding the receipt of money derived from the other spouse's profession, trade or business, oral or tacit consent is needed. Therefore, Mrs Khumalo did not act lawfully since one spouse may not receive money which is owed to the other spouse on account of his or her profession, trade or business. Since Mr Khumalo never discussed his business with his wife, it cannot be assumed that he gave tacit consent to his wife's receiving the money.
 - (7) No consent is needed for this transaction. A spouse may in the normal course of his or her profession, trade or business conclude a contract to purchase land, without the other spouse's consent. Mrs Khumalo therefore acted lawfully.
 - (8) No consent is required for this transaction. Mrs Khumalo therefore acted lawfully. It was not necessary that Mr Khumalo consent to this transaction.
-

4 ACTS FOR WHICH THE OTHER SPOUSE'S CONSENT IS UNNECESSARY

The acts for which the other spouse's consent is unnecessary are discussed in your textbook on pages 80–81. Regarding the acts mentioned in section

15(6) of the Matrimonial Property Act, you have to note how the requirement that the spouse must have acted in the ordinary course of his or her profession, trade or business is interpreted by the courts. This issue is discussed on page 81 of your textbook.

5 PROTECTIVE MEASURES IN THE MATRIMONIAL PROPERTY ACT IN RESPECT OF THE ADMINISTRATION OF THE JOINT ESTATE

On pages 81–85 your prescribed textbook looks, firstly, at the protection the Act affords to third parties and, secondly, at the protection afforded to the spouses *inter partes*

- (1) when one spouse concludes a transaction with a third party without the necessary consent
- (2) when one spouse's consent cannot be obtained for some reason or other, or when one spouse unreasonably withholds consent
- (3) when one spouse prejudices the interests of the other spouse in the joint estate in another way

5.1 Protection of third parties

The position of third parties who conclude a transaction with a person who has not obtained the necessary consent from his or her spouse, is set out on pages 81–82 of your prescribed textbook. You will see that a distinction is made between third parties who enter into a transaction with a person who does not know, and cannot reasonably know, that the person's spouse had to consent to the transaction or that the necessary consent was not obtained (*bona fide* third parties) and third parties who enter into a transaction with a person, while being well aware that the person's spouse's consent is necessary and has not been obtained (*mala fide* third parties). In this regard you have to note what the court held in *Distillers Corporation Ltd v Modise* regarding the meaning of the words "cannot reasonably know". Further note that *bona fide* third parties enjoy protection in terms of section 15(9)(a) of the Matrimonial Property Act, but that *mala fide* third parties do not enjoy such protection. Although the Act is silent on the consequences of the transaction if the third party is *mala fide*, the court in both *Amalgamated Bank of South Africa Bpk v Lydenburg Passasiersdienste* and *Bopape v Moloto* decided that the transaction is void. Ensure that you understand the discussion on these two cases on page 82 of our prescribed textbook.

ACTIVITY

Draw a table in order to set out the position of third parties who conclude contracts with a person who has not obtained the necessary consent from his or her spouse to whom he or she is married in community of property.

CIRCUMSTANCES	CONSEQUENCES OF TRANSACTION
Third party does not know, or cannot reasonably know, that consent is required from the person's spouse or that the requisite consent has not been obtained	Transaction valid and enforceable by third party in terms of section 15(9)(a) of the Matrimonial Property Act 88 of 1984, as consent is deemed to have been given
Third party knows or should reasonably know that consent is required from the person's spouse and that this consent has not been obtained	The Act is silent on the consequences of the transaction. It seems that the transaction is null and void in terms of case law: <i>Amalgamated Bank of South Africa Bpk v Lydenburg Passasiersdienste</i> ; <i>Bopape v Moloto</i>

5.2 Protection of the spouses *inter partes*

There are various remedies which one spouse may use against the other when

- (1) the latter concludes a transaction with a third party without obtaining the necessary consent
- (2) the latter's consent cannot be obtained, or the latter unreasonably withholds consent
- (3) the latter's conduct seriously prejudices the interests of the other spouse in the joint estate in another way

The following remedies are discussed in your textbook on pages 83–85 in respect of these circumstances:

- (1) application in terms of section 15(9)(b) of the Matrimonial Property Act for an adjustment upon division of the joint estate
- (2) application for authorisation of the transaction by the court when the required consent cannot be obtained or is being unreasonably withheld
- (3) application for suspension by the high court of any power which a spouse may have over the joint estate in terms of the Matrimonial Property Act, for a definite or indefinite period
- (4) application in terms of section 20 of the Matrimonial Property Act for immediate division of the joint estate
- (5) application for the common-law interdict to prevent the other spouse from proceeding with a transaction (which affects the joint estate)
- (6) application for the common-law right of recourse

- (7) institution of the *actio Pauliana utilis* in terms of which an asset of the joint estate, that was alienated in a fraudulent manner, may be recovered
- (8) application for the declaration of one spouse as a prodigal

You must ensure that you fully understand and can discuss the requirements for the application and the granting of each of these remedies.

ACTIVITY

Discuss the requirements for the application and the granting of each of the above remedies which one spouse may use against the other where they are married in community of property.

FEEDBACK

- (1) An application in terms of section 15(9)(b) of the Matrimonial Property Act 88 of 1984 for an adjustment, upon division of the joint estate.
Requirements: (a) The spouse who concludes a transaction with a third party should know or ought to have known that the required consent would probably not be obtained from the other spouse or that the power concerned has been suspended.
(b) The joint estate has to suffer a loss as a result of the transaction.
- (2) An application for authorisation of the transaction by the court when the required consent cannot be obtained or is being unreasonably withheld by a spouse.
Requirement: (a) The court must be satisfied that a good reason exists for dispensing with the other spouse's consent.
- (3) An application for suspension by the high court of any power which a spouse may have over the joint estate in terms of the Matrimonial Property Act 88 of 1984, for a definite or indefinite period.
Requirements: (a) The court must be satisfied that it is necessary for the protection of the other spouse's interests in the joint estate.
(b) The court can only suspend the power on application by the prejudiced spouse.
- (4) An application in terms of section 20 of the Matrimonial Property Act 88 of 1984 for immediate division of the joint estate.

- Requirements: (a) The court should be convinced that the interests in the joint estate, of the spouse who applies to it, are being seriously prejudiced or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse.
- (b) The court should be convinced that no other person will be prejudiced by the order.

(5) Common-law interdict.

- Requirements: (a) One spouse must threaten to alienate an asset from the joint estate — the alienation must therefore not yet have been completed.
- (b) The spouse who intends to alienate an asset of the joint estate must do so with the intention of prejudicing the other spouse.
- (c) The party who applies for the interdict will suffer loss if the interdict is not granted.
- (d) No other remedy (ie the right to adjustment ito s 15(9)(b) of the Matrimonial Property Act) should be available.

(6) Common-law right of recourse.

- Requirements: (a) Assets of the joint estate should already have been alienated by the guilty spouse.
- (b) The guilty spouse should have alienated the assets in fraud of the other — in other words the transaction must have been concluded with the intention to defraud the other spouse; it must not just be an unwise transaction.

(7) The *actio Pauliana utilis*.

- Requirements: (a) Assets of the joint estate should already have been alienated by the guilty spouse.
- (b) The spouse who alienated the assets should have done so with the intention of defrauding the other spouse.
- (c) In terms of the *Laws* case it is further required that it must also be proved that the third party, when entering into the transaction, was aware that the disposal of the assets was in fraud of the other spouse's rights. According to Cronjé and Heaton this view is incorrect.
- (d) It is uncertain whether this remedy is available during the subsistence of the marriage while the joint estate remains undivided, or whether the action can only be brought after dissolution of the joint estate.

Nel case: the action can be instituted only after dissolution of the marriage.

Reyneke case: it seems illogical to grant this right to the innocent spouse, but to delay the ability to enforce it until dissolution of the joint estate by which time the right may be useless.

Cronjé and Heaton: in favour of the decision in *Reyneke*

- (8) An application for the declaration of one spouse as a prodigal. There are two requirements for this application. They are:
- (a) The person must squander his or her assets in an irresponsible and reckless manner.
 - (b) The squandering must be due to a defect in the person's power of judgment or character.

These two requirements are not set out in the textbook and you do not have to know them for purposes of the Family Law module.

6 CAPACITY TO LITIGATE

Capacity to litigate is the capacity to act as a party in a court case

Section 17(1) of Act — instituting legal proceedings

You will note in your textbook on pages 85–87 that section 17 of the Matrimonial Property Act regulates the capacity to litigate of spouses married in community of property. You must ensure that you know, first, what the terms of section 17(1) are and, secondly, what the consequences of non-compliance with the provisions of this subsection are.

Section 17(4) of Act — application for sequestration against both spouses/application for surrender of joint estate by both spouses

Regarding the provisions of section 17(4), you need only know that an application for the sequestration of the joint estate must be brought against both spouses, and that an application for the surrender of the joint estate must be made by both spouses. Although an application for sequestration has to be brought against both spouses, the application will not be dismissed if it is brought against one spouse only, if the applicant satisfies the court that, despite reasonable steps, he or she was unable to establish whether the debtor is married in community of property or the name and address of the debtor's spouse.

Section 17(5) of Act — liability of spouses for debts of joint estate

Lastly, you should note the provisions of section 17(5) of the Matrimonial Property Act. You will see in your textbook on page 87 that section 17(5) stipulates which spouse should be sued when a debt is recoverable from the joint estate. This section of the work is therefore linked to the previous

study unit (study unit 9) where the liability of the spouses for joint debts was explained. A distinction must be drawn between debts incurred for necessities for the joint household, other debts which bind the joint estate and debts in connection with the separate property of a spouse. This distinction is illustrated in the following activity.

ACTIVITY

Draw up a table in order to distinguish between the liability for debts for household necessities, other debts binding the joint estate and debts in connection with the spouse's separate property. In the first column you must write down the type of debt and in the second column you must indicate who the responsible party/ies is/are.

FEEDBACK

DEBT	RESPONSIBLE PARTY/IES
Debts for household necessities	<ul style="list-style-type: none"> ● Both spouses jointly or ● either spouse separately
Other debts binding the joint estate	<ul style="list-style-type: none"> ● Both spouses jointly or ● spouse who incurred the debt
Debts in connection with the spouse's separate property	<ul style="list-style-type: none"> ● Spouse whose separate property it is

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **The principle of equal management of the joint estate**
 - (1) What does the principle of equal management of the joint estate entail?
- **The different forms of consent**
 - (2) Which different forms of consent does the Matrimonial Property Act provide for?
 - (3) Which form of consent is necessary for suretyship?
 - (4) Which form of consent is necessary for receiving credit in terms of a credit agreement as defined in the Credit Agreements Act 75 of 1980?
 - (5) May a husband married in community of property sell a painting which he and his wife bought jointly as an investment, without her consent? Discuss.

- (6) For which acts does the Matrimonial Property Act simply require consent without indicating in what form this consent has to be?
- **Acts for which consent is unnecessary**
 - (7) For which groups of acts is consent unnecessary?
 - (8) How do the courts interpret the requirement that the spouse must have acted in the ordinary course of his or her profession, trade or business?
 - **Protective measures in the Matrimonial Property Act 88 of 1984 in respect of the administration of the joint estate**
 - **Protection of third parties**
 - (9) If a spouse who is married in community of property alienates an asset of the joint estate without the requisite consent of his or her spouse, will the transaction be valid as against the third party? Discuss.
 - **Protection of the spouses *inter partes***
 - (10) Which remedy does one spouse have as against the other if the latter enters into a transaction with a third party while knowing that he or she would not obtain the requisite consent of his or her spouse? Give authority for your answer.
 - (11) What can a spouse do if he or she wants to enter into a transaction and the other spouse withholds her or his consent unreasonably?
 - (12) List the requirements for an application in terms of section 20(1) of the Matrimonial Property Act for the immediate division of the joint estate.
 - (13) Discuss the three common-law remedies that are still available to one spouse in the event of fraudulent conduct of the other spouse.
 - (14) What will the consequences be if one spouse has the other spouse declared a prodigal?
 - **Capacity to litigate**
 - (15) May a spouse married in community of property institute legal proceedings against another person without the written consent of his or her spouse? Discuss.
 - (16) In what circumstances may a spouse married in community of property institute legal proceedings without the consent of the other spouse?
 - (17) Must an application for the sequestration of a joint estate always be made against both spouses? Discuss briefly.
 - (18) What does section 17(5) provide in respect of the liability of spouses for
 - (a) household necessities?
 - (b) other debts that bind the joint estate?
 - (19) Who is liable for debts regarding one spouse's separate property?

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

Mr and Mrs X were married in community of property on 9 December 1993. Mr X wants to conclude the following transactions:

- (1) He wants to have the cracks in the walls of the parties' home repaired and decides to register a bond over the house in order to finance the repairs to the house.
- (2) He wants to institute legal proceedings against the previous owner of the house because he concealed the fact that the walls of the house were cracking.
- (3) He wants to donate the parties' grand piano to his sister because it will get damaged during the repairs to the house.
- (4) He wants to alienate the parties' life insurance policies so that they can afford the new bond instalments.
 - (i) What form of consent must Mr X obtain from Mrs X in each of the above transactions?
 - (ii) What can Mr X do if Mrs X unreasonably withholds her consent with regard to those transactions for which he needs her consent?

SUMMARY

In this study unit you learned

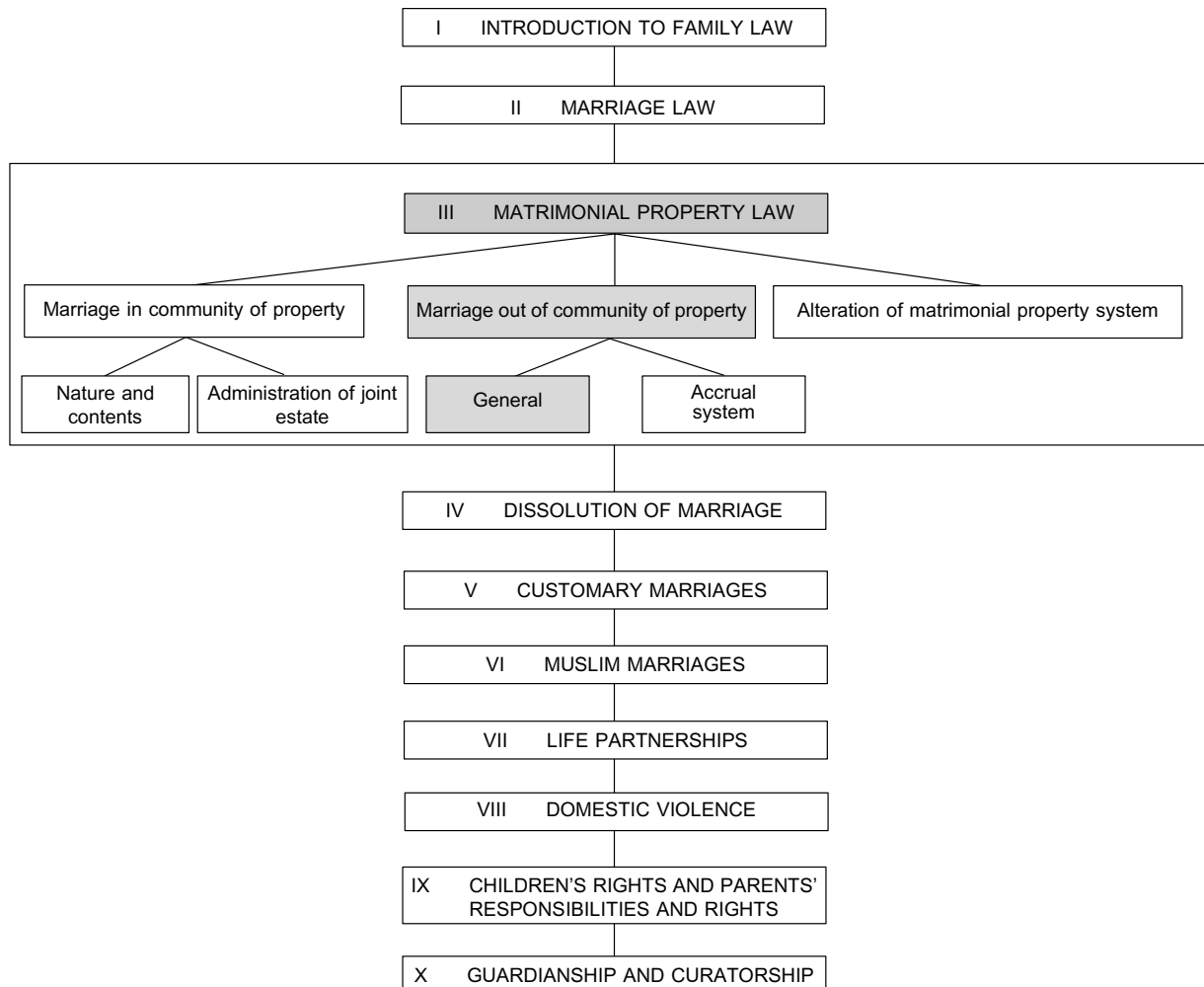
- what the principle of equal management is
- what it entails, namely that one spouse married in community of property may perform certain juristic acts without the consent of the other spouse, and that other juristic acts must be performed with the consent of the other spouse
- that certain protective measures in respect of the administration of the joint estate are contained in the Matrimonial Property Act
- how the capacity to litigate of spouses married in community of property works

You have now finished studying marriage in community of property. In the next study unit we begin our discussion on marriage out of community of property.

STUDY UNIT 11

Marriage out of community of property

MODULE MAP



PREFACE

In the previous two study units you studied marriage in community of property. You learned

- that community of property is the primary matrimonial property system in South Africa
- what the nature of community of property is
- what the content of marriage in community is
- how the joint estate is administered

In this study unit and the next one we deal with marriage out of community of property. This study unit discusses in general what an antenuptial contract is, as well as the different types of provisions usually

found in such a contract. The next study unit (study unit 12) deals specifically with one type of marriage out of community, that is, a marriage to which the accrual system applies. We now look at the purpose, nature, requirements, interpretation, termination, cancellation and amendment of the antenuptial contract, as well as the antenuptial contract of a minor. Lastly we briefly discuss the different matrimonial property systems.

LEARNING OUTCOMES

After studying this study unit you should be able to

- (1) explain what the purpose of an antenuptial contract is
 - (2) explain that an informal antenuptial contract is valid only as between the spouses
 - (3) discuss postnuptial registration of an antenuptial contract
 - (4) discuss the minor's antenuptial contract
 - (5) discuss the contents of an antenuptial contract
-

PRESCRIBED MATTER

Read

- Prescribed textbook 90 “7.1.2 The nature of an antenuptial contract”
- Prescribed textbook 94–96 “7.1.6 The interpretation of an antenuptial contract”, “7.1.7 Cancellation and amendment of an antenuptial contract” and “7.1.8 Termination of an antenuptial contract”
- Prescribed textbook 105–106 “7.5 The advantages and disadvantages of the main matrimonial property systems”

Study

- Prescribed textbook 89–90 “7.1.1 The purpose of an antenuptial contract”
- Prescribed textbook 90–94 “7.1.3 The formalities for the creation of a valid antenuptial contract”, “7.1.4 Additional requirements which apply in respect of the antenuptial contract of a minor” and “7.1.5 The contents of an antenuptial contract”
- Prescribed textbook 96–97 “7.2 Marriage out of community of property and community of profit and loss without the accrual system (that is, complete separation of property)” and “7.3 Marriage out of community of property with retention of community of profit and loss”

CONTENT OF THIS STUDY UNIT

1 THE PURPOSE OF THE ANTENUPTIAL CONTRACT

You do not have to have an in-depth knowledge of the discussion in your textbook on pages 89–90 under the heading “7.1.1 The purpose of an antenuptial contract”. All you have to know is that the purpose of an antenuptial contract is to exclude all or some of the common-law and statutory consequences of marriage, in particular those relating to the matrimonial property system. You must also know that, as is implied by its name (“ante” means before, “nuptial” means marriage), an antenuptial contract must be entered into before marriage.

Antenuptial = before the marriage

2 REQUIREMENTS FOR THE CREATION OF A VALID ANTENUPTIAL CONTRACT

In respect of the discussion in your textbook on pages 90–91 of the formalities for the creation of a valid antenuptial contract, you need only know the following: If an antenuptial contract is not properly executed by a notary and registered at the Deeds Office, it is not valid as against third parties (s 86 of the Deeds Registries Act 47 of 1937). Such an unregistered antenuptial contract is known as an informal antenuptial contract and is valid only as between the spouses (or *inter partes*, that is, between the parties). However, there are circumstances in which postnuptial registration of an antenuptial contract is permitted. Section 88 of the Deeds Registries Act governs such registration. You must study the discussion of section 88 at page 91 of your prescribed textbook.

Postnuptial = after the marriage

ACTIVITY

Mr and Mrs Edwards were engaged on 31 December 1999 and were married three months thereafter. The wedding and honeymoon arrangements kept them so busy that, although they had agreed prior to the marriage to conclude an antenuptial contract, they did not comply with the formalities of notarial execution and registration. Mr and Mrs Edwards are informed by a friend that their antenuptial contract is of no force or effect as against third parties. They are very despondent with the situation and want to know from you whether it is true that their antenuptial contract is not valid as against third parties, what that means and what they can do in order to make their antenuptial contract binding as against third parties. Advise Mr and Mrs Edwards with reference to the relevant legislation.

The Deeds Registries Act 47 of 1937 prescribes the formalities which must be complied with if an antenuptial contract is to be valid as against third parties. In terms of this Act an antenuptial contract must comply with the formalities of notarial execution **and** registration. If these formal requirements are not fulfilled however, the antenuptial contract is, in terms of the Act, of no force or effect as against anyone not a party to it and the marriage is considered to be in community of property in so far as, for example, it affects debtors or creditors of either the husband or the wife.

It has always been, and still is, permissible for spouses who had definitely agreed prior to the marriage to conclude an antenuptial contract, but who had not complied with the requirements of the Deeds Registries Act, to have the contract executed and registered **after** the marriage, with the consent of the high court. This possibility is expressly provided for in section 88 of the Deeds Registries Act. Three requirements must be met before the court will grant consent in terms of section 88:

- (1) The parties must definitely have agreed on the terms of the antenuptial contract before contracting the marriage;
- (2) the parties must provide good reasons for their failure to properly execute and/or register the antenuptial contract, and
- (3) the application must be made within a reasonable time after it has been discovered that the agreement has not been properly executed or registered.

The application, in terms of section 88, can be made by either one or both spouses or even by a beneficiary under a will.

3 ADDITIONAL REQUIREMENTS WHICH APPLY IN RESPECT OF THE MINOR'S ANTENUPTIAL CONTRACT

You must know whose consent or assistance is required for the conclusion of a valid antenuptial contract by a minor. This issue is discussed on pages 91–92 of your prescribed textbook.

4 THE CONTENTS OF THE ANTENUPTIAL CONTRACT

After studying the minor's antenuptial contract, you should study pages 92–93 of the textbook where the contents of the antenuptial contract are discussed. There it is explained that any provision which is not contrary to

the law, good morals or the nature of marriage can be included in an antenuptial contract. Your textbook also gives examples of clauses which would be null and void because they do not comply with this rule.

The remainder of the discussion of the contents of an antenuptial contract deals with the most important provisions which can be found in an antenuptial contract.

Matrimonial prop-
erty system

At page 93 your textbook points out that, normally, the main purpose of an antenuptial contract is to deviate from the automatic matrimonial property consequences of marriage, namely that marriage is in community of property (see study unit 9). Various matrimonial property systems can be agreed upon in an antenuptial contract. The three most common forms of marriage out of community of property are complete separation of property, marriage out of community of property with retention of community of profit and loss and the accrual system. You must study the discussion of the first two forms on pages 96–97 of your prescribed textbook. The third form, that is the accrual system is discussed in the next study unit below.

Right of recourse in
respect of house-
hold necessities

The antenuptial contract can contain provisions regarding a spouse's right of recourse in respect of liability for household necessities. In marriages out of community of property section 23 of the Matrimonial Property Act governs this liability. You must study the discussion on liability for household necessities in your textbook on page 93.

Succession clause

You should note that succession clauses are sometimes included in an antenuptial contract. Your textbook explains on page 93 what a succession clause is and how it can be varied. You must study this explanation.

Marriage settle-
ments

A marriage settlement is sometimes included in an antenuptial contract. A marriage settlement is a donation which one prospective spouse makes to the other in an antenuptial contract, for example, a man may donate the house in which the spouses intend to live to his future wife. The discussion of marriage settlements in your textbook on pages 93–94 must be studied.

ACTIVITY

Is it possible to have an antenuptial contract if you are married in community of property? Give a reason for your answer.

FEEDBACK

Think back to study unit 9 above which explains which assets fall outside the joint estate. There you learnt, *inter alia*, that spouses who are married in community of property, can exclude certain assets from their joint estate in an antenuptial contract. In other words, spouses who are married in community of property **can** have an antenuptial contract. It is therefore

not, as many people wrongly think, **impossible** to have an antenuptial contract if you are married in community of property — it is merely **unusual**.

Hint on answering examination questions on antenuptial contracts

The term “antenuptial contract” is often abbreviated to “anc”. In the examination it would save you some time if you used this abbreviation instead of writing “antenuptial contract” out each time. Please note that the abbreviation is not written in capital letters.

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **General**

- (1) What is the main purpose of an antenuptial contract?
- (2) Can an antenuptial contract be entered into after marriage?
- (3) Is an informal antenuptial contract valid? Explain.
- (4) Explain the provisions of section 88 of the Deeds Registries Act 47 of 1937 in respect of postnuptial registration of an antenuptial contract.
- (5) List the requirements which must be met before an order will be issued in terms of section 88 of the Deeds Registries Act.
- (6) Who must assist a minor in the execution of a valid antenuptial contract? Explain fully.

- **Contents of the antenuptial contract**

- (7) List the most important terms or provisions which are found in antenuptial contracts.
- (8) Discuss the liability of spouses married out of community of property for household necessities.
- (9) What is a *pactum successorium*?
- (10) How can a succession clause in an antenuptial contract be varied?
- (11) What is a marriage settlement?
- (12) What advantage is there to including a donation between spouses in an antenuptial contract?
- (13) What is a reversion clause in respect of a marriage settlement?
- (14) Is a reversion clause in respect of a marriage settlement valid? Discuss with reference to authority.

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

Before their marriage, John and Mary agree that they want to be married out of community of property and of profit and loss and with the accrual system. They approach a notary who draws up an antenuptial contract in accordance with their wishes. John and Mary sign the antenuptial contract ten days before their wedding date. The notary dies before having the antenuptial contract registered in the deeds office. A year after their wedding date, John and Mary discover that their antenuptial contract has never been registered. They approach you for advice. Please advise them

- (1) whether the antenuptial contract is valid as between them and as against third parties
- (2) what they can do to make the contract valid as against third parties

SUMMARY

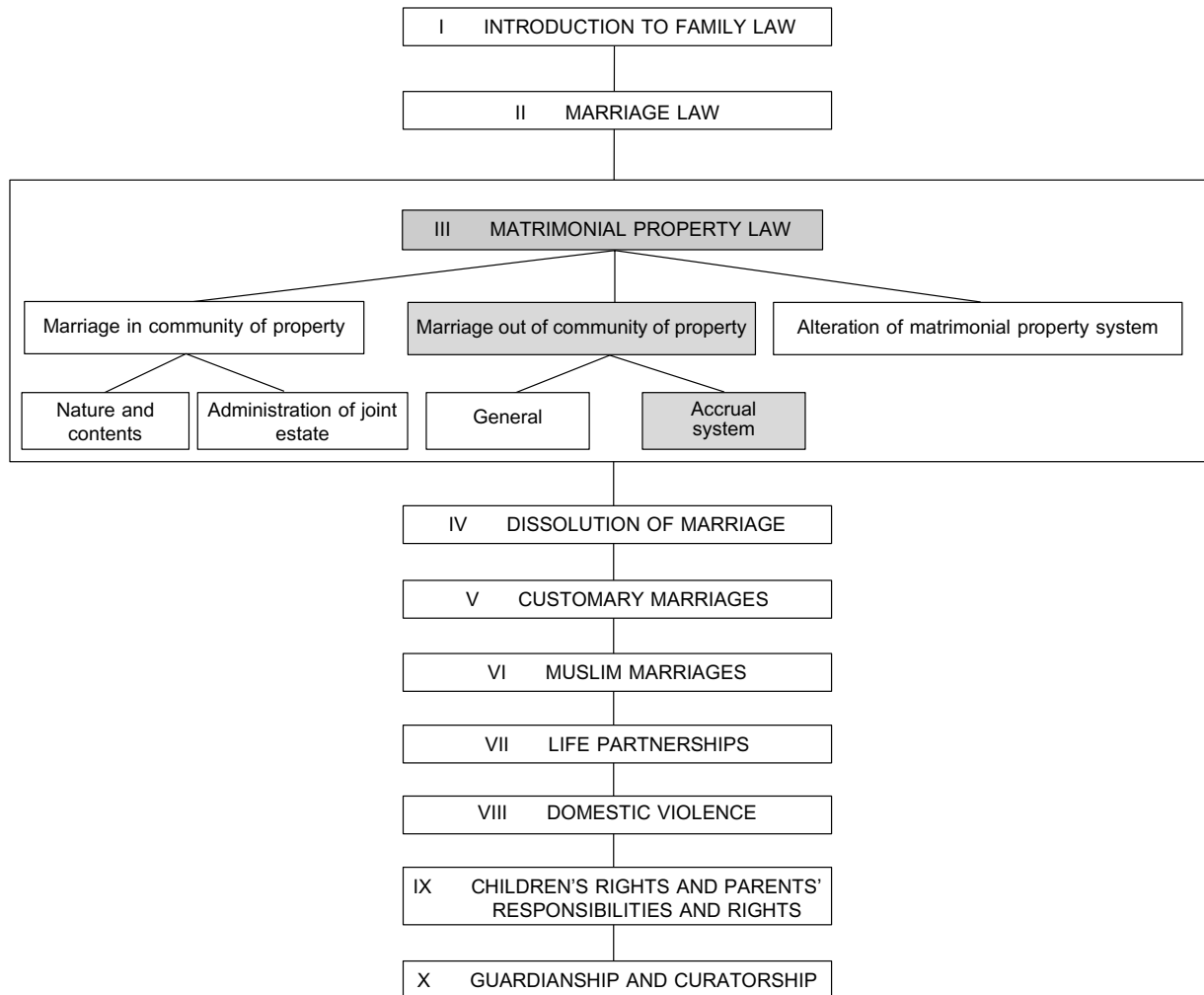
In this study unit you learned about the general rules in respect of marriage out of community of property. We concentrated in particular on the antenuptial contract and its terms.

In the next study unit we discuss a particular type of marriage out of community, namely a marriage to which the accrual system applies.

STUDY UNIT 12

The accrual system

MODULE MAP



PREFACE

In the previous study unit we looked at marriage out of community of property in general. In this study unit we shall look at the accrual system which, in terms of the Matrimonial Property Act 88 of 1984, is applicable to all marriages out of community of property and community of profit and loss, entered into after the commencement of the Act, unless it is expressly excluded in the antenuptial contract (anc). The accrual system can thus be regarded as the secondary matrimonial property system in South Africa. The accrual system is defined as a type of postponed community of profit. This means that, although the spouses each have their own separate estate during the subsistence of their marriage, the

spouse whose estate shows no or the smallest accrual (growth) at the dissolution of the marriage, may legally share in the accrual (growth) of the other spouse's estate.

Take the following set of facts: H and W are married out of community of property. The accrual system is applicable to the parties' marriage. W has been a housewife for the greatest part of their married life — she had no income. H, a very affluent lawyer, is now suing W for a divorce. Because W was not economically active during the marriage, her estate has not grown much since the commencement of the marriage. H was economically active, and his estate grew enormously since the commencement of the marriage. The fact that H and W's marriage is subject to the accrual system, now means that W has an accrual claim against H for half the difference between the accrual in their respective estates at the termination of their marriage.

LEARNING OUTCOMES

After studying this study unit you should be able to

- (1) explain why the legislature has accepted the accrual system
 - (2) explain when the accrual system applies
 - (3) explain what the accrual system entails
 - (4) calculate the accrual of the spouses' estates and to determine the value of the accrual claim of the spouse with the smaller accrual against the spouse with the larger accrual
 - (5) explain how one spouse's right to share in the accrual of the other spouse's estate is protected by the Matrimonial Property Act
 - (6) set out the arrangements which can be made for satisfaction of an accrual claim
-

PRESCRIBED MATTER

Read

- Prescribed textbook 99–100 “(a) Renouncing the accrual claim” and 105–106 “7.5 The advantages and disadvantages of the main matrimonial property systems”

Study

- Prescribed textbook 97–105 up to just before “7.5 The advantages and disadvantages of the main matrimonial property systems”, but excluding “(a) Renouncing the accrual claim” on 99–100

CONTENT OF THIS STUDY UNIT

1 GENERAL

Aim of legislature in introducing accrual system	Under the heading “7.4.1 Introduction” in your prescribed textbook on page 97 one aspect is addressed, namely the aim of the legislature in introducing the accrual system. Since the old standard form antenuptial contract (ie marriage with complete separation of property) was often very prejudicial to the wife, the Matrimonial Property Act created a new matrimonial property system, namely the accrual system. You must be able to explain why it was necessary to introduce the accrual system.
Field of application of accrual system	The discussion in the textbook under the heading “7.4.2 The marriages to which the accrual system applies” deals with the field of application of the accrual system. Firstly, you will see that section 2 of the Matrimonial Property Act provides that the accrual system is automatically applicable to all marriages out of community of property and community of profit and loss, which are concluded after 1 November 1984. Secondly, you will see in your textbook that the accrual system does not automatically apply to marriages out of community of property and of profit and loss, which were concluded before the commencement of the Matrimonial Property Act. However, parties so married were given a limited period in which they could make the accrual system applicable to their marriage by the execution and registration of a notarial contract in terms of the Matrimonial Property Act. After the coming into operation of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 black persons could also make the accrual system applicable to their marriages in this manner.

ACTIVITY

Read page 98 of the textbook, and indicate to which type of marriage the accrual system applies.

FEEDBACK

- (1) Marriages concluded out of community of property and community of profit and loss after 1 November 1984 where the parties did not expressly exclude the accrual system in their antenuptial contract.
 - (2) Marriages where the spouses introduced the accrual system by the execution and registration of a notarial contract.
 - (3) Marriages where the spouses introduced the accrual system in terms of a court order under section 21(1) of the Matrimonial Property Act. (S 21(1) is discussed in the next study unit.)
-

2 WHEN AND HOW ACCRUAL SHARING TAKES PLACE

Accrual system = postponed community of profit In paragraph “7.4.3 When and how accrual sharing takes place” on page 98 of your textbook, you will see that the accrual system can be described as a type of postponed community of profit.

ACTIVITY

Explain very briefly what it means when we say that the accrual system is a type of postponed community of profit.

FEEDBACK

The accrual system is based on the idea that both spouses should upon the dissolution of the marriage, share in the assets accumulated by them during the marriage, without a joint estate having existed between them during the subsistence of the marriage.

Marriage out of community of profit during its subsistence Note that during the subsistence of the marriage it is out of community of property and of profit and loss. Each spouse retains and controls his or her own estate and everything which a spouse acquires during the subsistence of the marriage falls into his or her own separate estate.

Accrual sharing at dissolution of marriage However, on the dissolution of the marriage the spouses share equally in the accrual. Your textbook explains that the accrual is shared as follows: The spouse whose estate shows no accrual or the smaller accrual acquires a claim against the spouse whose estate shows the larger accrual. The claim is for an amount equal to half the difference between the accrual of the respective estates. Suppose the accrual of H’s estate on the dissolution of the marriage is R50 000 while the accrual of W’s estate is only R10 000. The difference between the accrual of the respective estates is R40 000. W then gets a claim for an amount equal to half the difference, namely R20 000.

You will further see in your textbook on page 99 that a spouse’s claim to share in the accrual of the other spouse’s estate arises only at the dissolution of the marriage. The one spouse’s right to share in the other spouse’s accrual eventually cannot be transferred during the subsistence of the marriage. It is not liable to attachment during the subsistence of the marriage, nor does it form part of the insolvent estate of a spouse.

Distinction between claim and right Ensure that you understand the distinction between the accrual claim (that one spouse has against the other spouse [or the estate of the other spouse] upon the dissolution of the marriage for half the difference between the accrual in the respective estates), and the right (a spouse has during the

Accrual and accrual claim relate to value of estate

subsistence of the marriage to share in the accrual of the other spouse's estate). In *Reeder v Softline* the court recognised the difference between the claim and the right. Ensure that you understand the remarks made by the court in this regard. This case also provides authority for the fact that the accrual and the accrual claim relate to the value of an estate, and not the assets in that estate.

Finally, note that you need not study the discussion on pages 99–100 of your prescribed textbook on renunciation of the accrual claim.

3 THE CALCULATION OF THE ACCRUAL

What is accrual?

On page 100 of your prescribed textbook you will see that accrual is basically the growth of a spouse's estate during the subsistence of the marriage. This means that accrual is the amount by which the value of the spouse's estate at the dissolution of the marriage exceeds the value of the estate at the commencement of the marriage. In other words, accrual is the difference between the net end value and the net commencement value of a spouse's estate.

How is accrual calculated?

In terms of the Act, the accrual is calculated with reference to the net value of the two estates at the commencement and at the dissolution of the marriage. The net value means the value after all outstanding debts have been paid, and it includes all amounts which are still owing to the estate. In addition, certain assets are excluded from the accrual in terms of sections 4 and 5 of the Matrimonial Property Act. This means that the value of these assets is not taken into account in the calculation of the accrual.

Steps to be followed to calculate accrual

The steps which you must follow to calculate the accrual of each spouse's estate, and any accrual claim, will now be explained to you briefly:

- (1) First of all you have to determine the net end value of each estate separately. Usually this is given to you in the facts of the question.
- (2) Secondly, you must determine the net commencement or initial value of each estate and subtract this from the respective net end values. When determining the commencement value of the spouses' respective estates, you must take into account the provisions of the Matrimonial Property Act which prescribes a number of methods for proving the initial value of an estate. These methods are discussed on pages 101–102 of the textbook. You should further note that the net commencement values must be adapted according to the weighted average of the consumer price index because the Act provides that the depreciation of money must be taken into account. The net commencement value of an estate must therefore be expressed in terms of the value of money at the dissolution of the marriage. Suppose, for instance, that at the time of entering into a marriage 20

years ago, a spouse declared the initial value of his or her estate to be R10 000. Suppose further that, during the marriage, money depreciated to such an extent that according to the consumer price index, R2,00 20 years ago is now worth only R1,00. The initial value of the estate as adapted by the consumer price index is therefore R20 000. Many students make the mistake of calculating the initial value as adapted by the consumer price index as R5 000 because R2,00 of 20 years ago is now worth only R1,00. To avoid this mistake, you should concentrate only on the **VALUE** of money and not be misled by numbers. Twenty years ago you could have bought a specific asset for R10 000. Because the value of money has depreciated, you now need at least twice as much money to buy the same asset today. The initial value of R10 000 is therefore expressed as R20 000 in terms of the consumer price index. The same **VALUE** which a spouse had in his or her estate at the beginning of the marriage must be subtracted from the net value at the dissolution of the marriage. In any given set of facts (whether in the assignment or the examination) we usually indicate to which extent the value of money depreciated since the time of the conclusion of the marriage. If this is **not** indicated you need not look up the CPI in the *Government Gazette*, but may assume any value with which to adapt the commencement value of the estate. It is usually easiest to assume simply that R2,00 at the time of the conclusion of the marriage is now worth R1,00 in which case you would simply multiply the commencement value by two. You may use the value of your choice — **as long as you remember to state what value you are using**. So, even if we do not stipulate in a set of facts that the value of money depreciated since the time of the conclusion of the marriage it should be assumed, and the necessary calculations should be set out clearly.

- (3) Thirdly, you must subtract from the net end value all the assets which are excluded from the accrual by statute. The assets excluded from the accrual are listed under the heading “(c) **Assets which do not form part of the accrual**” on pages 102–103 of the textbook from (1)–(4). Regarding the assets in paragraph (1), namely, “Any non-patrimonial damages a spouse receives during the marriage”, you have to distinguish between patrimonial damages and non-patrimonial damages. Because students experience problems with this distinction we have decided to explain the meaning of each of these terms under the heading “**Problem area**” below.
- (4) Once the accrual of the spouses’ respective estates has been determined, you must establish which spouse’s estate has the smaller or no accrual, and determine his or her claim by
 - (a) firstly, subtracting the smaller accrual from the larger accrual in order to determine the difference between them
 - (b) secondly, dividing the difference by two in order to determine what half the difference is

ACTIVITY

Provide a summary of the steps to be taken to calculate the accrual of a spouse's estate as well as the steps needed to calculate the accrual claim.

FEEDBACK

The steps to be taken to calculate the **accrual** of a spouse's estate, can be summarised as follows:

Net value on dissolution (also called net end value) minus net commencement value (also called net initial value) minus assets which do not form part of the estate's accrual = ACCRUAL
--

The steps to be taken thereafter to calculate any **accrual claim**, can be summarised as follows:

Accrual claim = $\frac{1}{2}$ (larger accrual – smaller accrual)
--

You can now carefully study the example of an accrual calculation on page 103 of the textbook.

HINTS: When you are asked to do a calculation of accrual in the examination or in an assignment, you should always explain what you are doing. You therefore have to **SUBSTANTIATE** each step **CLEARLY**, as you obtain marks for this explanation in your assignment and in the examination. For example, you have to explain why you exclude or do not exclude a specific amount from the accrual. When doing an accrual calculation, you must keep in mind that we are not only interested in the calculations. We also want to see your explanation of why you follow certain steps. Please note that although you have to explain the different steps, you need not provide authority for it — you therefore need not refer to the relevant section of the Act at each step.

You may use the abbreviation CPI for the “consumer price index” in order to save time.

If you still do not know exactly what to do when calculating an accrual, study the feedback on the following activity.

ACTIVITY

Mr and Mrs X were married out of community of property on 1 January 1991. They did not expressly exclude the accrual system from their marriage. At the time of the conclusion of the marriage Mr X's liabilities exceeded his assets while Mrs X had R15 000 in cash. Mr X dies five years after entering into the marriage.

Mr X's net estate at the time of his death is worth R100 000 and consists of the following:

- R5 000 which he received as satisfaction for pain and suffering after being in a motor-vehicle accident
- R6 000 which he received as compensation for the loss of income he sustained while he was in hospital after the accident
- R14 000 which he received as compensation for the damages caused to his motor vehicle during the accident
- R25 000 which he received as a donation from his mother
- R50 000 which he earned on his own as an attorney

Mrs X's net estate at the time of Mr X's death is worth R90 000 and includes the following:

- a painting worth R5 000 which she excluded from the accrual in the antenuptial contract
- R10 000 which she inherited intestate from her father
- a ring to the value of R4 000 which Mr X gave to her on their first wedding anniversary
- R1 000 in cash which she received for a watch she had sold to her sister. Mrs X had inherited the watch from her grandmother a few years before

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

FEEDBACK

Before you started doing any calculations you should have indicated that the accrual system automatically applies to all marriages **out** of community of property and community of profit and loss, which are concluded **on** or **after** 1 November 1984 (or **on** or **after** 2 December 1988 in respect of civil marriages concluded by black persons). If the spouses do not want the accrual system to apply, they have to exclude it expressly.

The accrual in Mr X's estate is calculated as follows:

Net value on dissolution		R100 000	
Minus net commencement value (Liabilities exceed assets, therefore deemed to be zero)			- R 0
Minus assets excluded from the accrual: Satisfaction	R 5 000		
Donation from third party	<u>R25 000</u>		
	<u>R30 000</u>		- R 30 000
(Damages in the amount of R6 000 for loss of income and R14 000 for damages to motor vehicle NOT EXCLUDED because they are damages for patrimonial loss)			
Accrual			<u>R 70 000</u>

The accrual in Mrs X's estate is calculated as follows:

Net value on dissolution		R 90 000	
Minus net commencement value:	R15 000		
Adapt commencement value with CPI Accept that money was worth twice as much at the commencement of the marriage as at its dissolution: Thus R15 000 then adjusted to R30 000 now			- R 30 000
Minus assets excluded from accrual: Painting excluded in anc	R 5 000		
Inheritance	R10 000		
Donation between spouses	R 4 000		
Assets substituted for excluded assets	<u>R 1 000</u>		
	<u>R20 000</u>		- <u>R 20 000</u>
Accrual			<u>R 40 000</u>

Mrs X's estate has the smaller accrual and she can claim half the difference between the bigger and smaller accruals.

$$\begin{aligned}
 \text{Mrs X's accrual claim} &= \frac{1}{2} (\text{R}70\,000 - \text{R}40\,000) \\
 &= \frac{1}{2} (\text{R}30\,000) \\
 &= \text{R}15\,000
 \end{aligned}$$

Mrs X is therefore entitled to R15 000.

4 PROTECTION OF A SPOUSE'S RIGHT TO SHARE IN ACCRUAL

In this respect, you should firstly note the provisions of section 8 of the Matrimonial Property Act, which are explained in your textbook on pages 103–105. You should also note that the common-law remedies, namely the interdict and the *actio Pauliana utilis*, are available in certain circumstances to protect the spouses' interests in each other's accrual.

5 SATISFACTION OF THE ACCRUAL CLAIM

Here you have to note the provisions of section 10 of the Matrimonial Property Act which are discussed in your prescribed textbook on page 105.

Problem area

As already mentioned one type of asset which does not form part of the accrual is any non-patrimonial damages which a spouse received during the subsistence of the marriage. When you do a calculation of accrual all amounts received by a spouse for non-patrimonial loss during the subsistence of the marriage must therefore be subtracted from the net value of the spouse's estate on dissolution. However, students are not always clear on the difference between patrimonial loss and non-patrimonial loss.

Patrimonial loss

Patrimonial loss is loss which reduces a person's estate, for example, damage to a motor vehicle because of a road accident. Before the accident the vehicle had a value of say, R15 000, but immediately after the accident its value is only R10 000 because of the damage to it. The person's estate has therefore been reduced because of the damage. The compensation that the person who caused the damage has to pay to the aggrieved party for repairs to the motor vehicle is compensation for patrimonial loss. By paying the compensation, the person's estate is again increased and he or she is placed in the same position as he or she was in before the accident. This compensation is therefore **not** deducted from the net end value of the spouses' estates. Other examples of patrimonial loss are medical and hospital expenses, loss of income, etcetera.

Non-patrimonial loss

Non-patrimonial loss is loss which does not affect a person's estate but which affects his or her person or personality, for example pain and suffering, personality infringement as a result of slanderous comments towards a person, loss of amenities of life, etcetera. The person causing the pain and suffering, or making the slanderous comments, or causing the loss of amenities of life, pays compensation in order to compensate the aggrieved party for the pain or infringement or loss which he or she

suffered and/or still suffers, and not to place him or her in the same financial position he or she was in before the incident. This compensation is therefore **deducted** from the net end value of the spouses' estates.

The above explanation should help you to distinguish between compensation for patrimonial loss and compensation for non-patrimonial loss.

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **General**
 - (1) What was the reason for the enactment of chapter I of the Matrimonial Property Act 88 of 1984?
 - (2) Discuss the field of application of the accrual system.
- **The determination of the accrual system**
 - (3) What is the accrual of the estate of a spouse?
 - (4) X and Y intend entering into marriage. They ask you to explain the accrual system because they are considering applying this system to their marriage. Explain the basic principles of the accrual system to them.
 - (5) How can the commencement value of an estate be proved?
 - (6) List the assets which are excluded from the accrual by statute.
 - (7) List and discuss the steps you should take in determining the accrual in the spouses' respective estates and in calculating any claim for accrual.
- **Protection of a spouse's right to share in accrual**
 - (8) How is a spouse's right to share in the accrual of the estate of the other spouse protected *stante matrimonio*?
- **Satisfaction of accrual claim**
 - (9) Assume that a claim for the sharing of accrual becomes payable by a husband. What can the husband do if he and his wife cannot come to a mutually acceptable agreement regarding the satisfaction of the accrual claim against him?

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

On 14 January 1989 X and Y were married by antenuptial contract. They

did not exclude the accrual system. At the time of entering into marriage X had a study debt of R10 000 while Y owned a flat which was worth R40 000. During the existence of the marriage, X received R10 000 satisfaction in a libel suit. X's estate is now worth R200 000 and Y's estate is worth R100 000. How will the spouses' assets be divided upon dissolution of the marriage? Explain your answer by substantiating each step that you follow.

SUMMARY

In this study unit you learned

- when the accrual system applies
- what the accrual system entails
- how the accrual of a spouse's estate is calculated
- how a spouse's right to share in the accrual of the other spouse's estate is protected

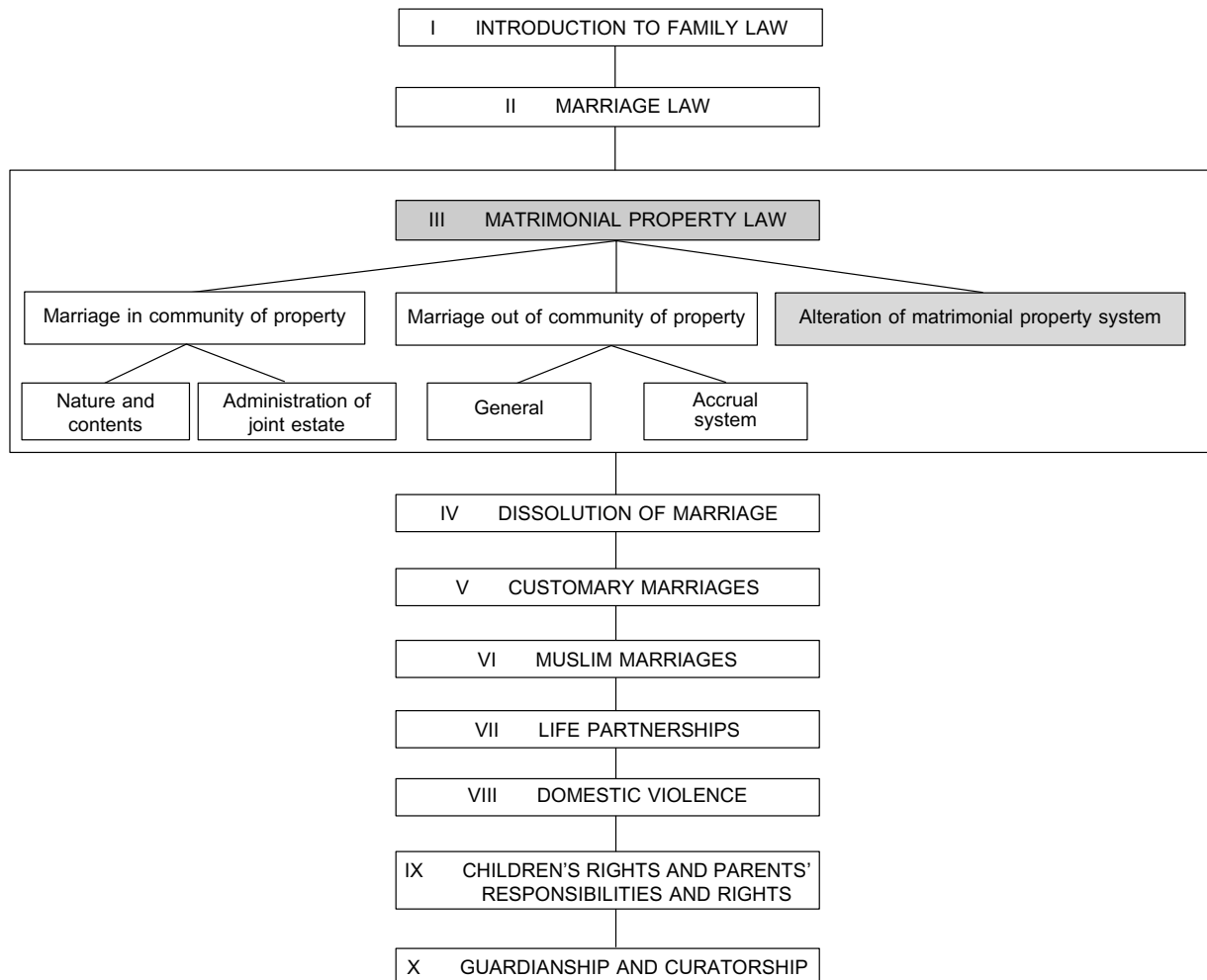
This study unit concludes the discussion on marriage out of community of property.

In the next study unit we shall look at the way in which and the circumstances under which the matrimonial property system selected by spouses, can be changed.

STUDY UNIT 13

Alteration of the matrimonial property system

MODULE MAP



PREFACE

In the previous study units of this section (section III) you learned about the different matrimonial property systems which are available to people who intend to marry. You also learned that if the prospective spouses do not enter into an antenuptial contract they are automatically married in community of property. But does this mean that the spouses have to remain married in community for the rest of their marriage? And what about spouses who chose to marry, for example, out of community without the accrual system? May they never change to the accrual system or to community of property? The present study unit explains that the matrimonial property system can be changed, but only in certain circumstances.

LEARNING OUTCOMES

After studying this study unit you should be able to

- (1) explain the principle of immutability in our matrimonial property law
 - (2) explain how the principle of immutability has been relaxed by the legislator
 - (3) explain how the matrimonial property system can be changed in terms of section 21(1) of the Matrimonial Property Act 88 of 1984
 - (4) explain whether section 21(1) authorises the courts to change the matrimonial property system with retroactive effect
 - (5) explain extra-judicial alteration of the matrimonial property system
-

PRESCRIBED MATTER

Read

- Prescribed textbook 110 “8.2.3 Procedural requirements”
- Prescribed textbook 111 “8.2.5 The effect that changing from community of property to separation of property has on jointly-owned property”

Study

- Prescribed textbook 107–110 up to before “8.2.3 Procedural requirements”
- Prescribed textbook 110–111 “8.2.4 Retroactive alteration of the matrimonial property system”
- Prescribed textbook 111–112 “8.3 Extra-judicial alteration of the matrimonial property system”
- *Ex parte Krös* in your prescribed casebook 165–168
- *Ex parte Oosthuizen* in your prescribed casebook 169–172
- *Ex parte Burger* in your prescribed casebook 172–174
- *Honey v Honey* in your prescribed casebook 175–179

CONTENT OF THIS STUDY UNIT

1 THE MEANING OF THE PRINCIPLE OF IMMUTABILITY

Meaning of “immutability”

First of all, you have to know that “immutability” means unchangeability or unalterability. In other words, it refers to the fact that something cannot be changed. In this case it is the matrimonial property system which cannot be changed.

ACTIVITY

Read the first paragraph under the heading “8.1 The principle of immutability in matrimonial property law” in your textbook on page 107 and explain in one sentence what the principle of immutability in matrimonial property law means.

FEEDBACK

The principle of immutability in matrimonial property law means that after the conclusion of marriage the matrimonial property system chosen by the spouses remains fixed, and cannot be changed during the subsistence of the marriage.

Relaxation of principle of immutability

Although the principle of immutability still applies in South African law it has been relaxed by the legislator by the creation of several mechanisms for effecting a postnuptial change of the matrimonial property system. These mechanisms are discussed on pages 107–108 of your prescribed textbook.

ACTIVITY

Explain the ways in which a postnuptial change of the matrimonial property system can be effected.

FEEDBACK

Firstly, for a limited period, **which has expired**, certain spouses were permitted to change their matrimonial property systems simply by way of a registered notarial contract. In terms of section 21(2) of the Matrimonial Property Act 88 of 1984, spouses who married before 1 November 1984 and whose marriage was out of community of property by virtue of an antenuptial contract could adopt the accrual system by executing and registering a notarial contract to that effect before **1 November 1988**. Blacks who married before 2 December 1988 and whose marriage was out of community of property by virtue of section 22(6) of the Black Administration Act 38 of 1927 could adopt the accrual system by executing and registering a notarial contract to that effect before **2 December 1990**.

Secondly, the court has the power to order the immediate division of the spouses’ matrimonial property and to change the couple’s matrimonial property system at the request of one of the spouses. Section 20 of the Matrimonial Property Act empowers the court to order the immediate division of the joint estate and to change the spouses’ matrimonial

property system if the conduct of one of them seriously prejudices, or will seriously prejudice, the interests of the other spouse in the joint estate (see study unit 10). Section 8 of the Matrimonial Property Act confers a similar power on the court in respect of immediate division of the accrual (see study unit 12).

Thirdly, spouses can bring a joint application in terms of section 21(1) of the Matrimonial Property Act for permission to change their matrimonial property system. The court will authorise the change only if the requirements set by the Act for such a change are met.

Fourthly, the high court has its common-law powers to rectify, amend or cancel an antenuptial contract which does not correctly reflect the terms of the parties' agreement, and to vary or cancel the antenuptial contract if there are sound reasons for doing so. Depending on the facts of the case, the rectification, amendment or cancellation can amount to changing the couple's matrimonial property system.

The above-mentioned mechanisms all achieve a change to the matrimonial property system that binds the spouses as well as third parties. In the last place there is an extra-judicial mechanism for effecting a change to the matrimonial property system which binds the spouses only.

2 COURT-SANCTIONED ALTERATION OF THE MATRIMONIAL PROPERTY SYSTEM IN TERMS OF SECTION 21(1) OF THE MATRIMONIAL PROPERTY ACT 88 OF 1984

Your textbook explains further on pages 108–110 that in terms of section 21(1) of the Matrimonial Property Act, a married couple may apply to the high court for permission to change their matrimonial property system from whatever it is to whatever they want it to be. Thus spouses who are married in community can, for example, change to complete separation of property or to the accrual system. Spouses who are married with the accrual system can, for instance, eradicate the accrual system from their marriage or change to community of property. Spouses who are married out of community without the accrual system can change to, for example, the accrual system or community of property.

Type of matrimonial property system which operates in marriage irrelevant

Date of marriage irrelevant

The application can be brought by any married couple regardless of when they married.

Note that section 21(1) cannot be used, as was erroneously done in both *Ex parte Saunders et Uxor* and *Ex parte Engelbrecht*, to bestow full validity on the matrimonial property system the spouses selected in an informal contract prior to the marriage.

Requirements The application for variation will not be granted by the court unless all the statutory requirements are met. They are that

- (1) there must be sound reasons for the proposed change
- (2) sufficient notice of the proposed change must be given to all the creditors of the spouses
- (3) no other person will be prejudiced by the proposed change

It is also important to note that one spouse cannot, on his or her own, apply for variation of the matrimonial property system — both spouses must apply together; in other words, they must apply jointly. They must also attach a draft notarial contract to their application in which they set out the proposed system.

After setting out the requirements for a successful application in terms of section 21(1), your textbook discusses one requirement, namely that of sound reasons, in detail on pages 109–110. You must study that discussion so that you can explain what the phrase “sound reasons” means and know in what circumstances the courts have found sound reasons to be present. From the cases that have come before our courts it appears that the courts readily find that the requirement of sound reasons has been met.

Procedural requirements Your textbook also discusses the procedure which must be followed in a section 21(1) application. This discussion appears under the heading “**8.2.3 Procedural requirements**” on page 110. You only have to read that discussion.

Retroactive change of matrimonial property system On pages 110–111 under the heading “**8.2.4 Retroactive alteration of the matrimonial property system**” of your textbook it is explained that it is not clear whether the court can authorise an alteration of the matrimonial property system with retroactive effect.

Meaning of “retroactive” If something is changed with retroactive effect it means that the change applies in respect of the past as well.

ACTIVITY

Explain very briefly what “retroactive” means in the case of an application in terms of section 21(1).

FEEDBACK

In the case of an application in terms of section 21(1), it means that the matrimonial property system is changed, not as from the date of the court order, but as from before that date — normally as from the date of the marriage.

With regard to the retroactive alteration of the matrimonial property system, you have to study the discussion of *Ex parte Krös*, *Ex parte Oosthuizen* and *Ex parte Burger* on pages 110–111 of your textbook. You also have to read these cases in your casebook. Take particular note of the note on the *Krös* case on pages 167–168 of your casebook.

Effect change has on joint property The effect that changing from community of property to separation of property has on jointly-owned property is explained on page 111 of your textbook. You only have to read that section.

3 EXTRA-JUDICIAL ALTERATION OF THE MATRIMONIAL PROPERTY SYSTEM

The question arises whether spouses can change their matrimonial property system without going to court with an application in terms of section 21(1), that is, extra-judicially. Can the spouses merely enter into a contract in terms of which they change their matrimonial property system? If they do enter into such a contract, what is its effect? This issue came before the court in *Honey v Honey*. You must study this decision as it appears on pages 111–112 of your textbook and on pages 175–179 of your casebook. You must also study the criticism against the case expressed in your textbook and your casebook.

ACTIVITY

Read the prescribed case *Honey v Honey* in your prescribed textbook on pages 111–112 and prescribed casebook on pages 175–179 and then answer the following questions:

- (1) What are the facts of this case?
- (2) What is the legal question in this case?
- (3) What did the court decide in this case?
- (4) Discuss the criticism against this case.

FEEDBACK

- (1) The parties in this case concluded an antenuptial contract prior to their marriage and duly registered it in the deeds registry. Apart from the normal clauses excluding community of property, this contract provided that the marriage would be subject to the accrual system. A few years after their marriage they entered into a further agreement which was notarially executed, but not registered in the deeds registry and not entered into with leave of the court as provided for in section 21(1) of the Matrimonial Property Act 88 of 1984. This contract purported to exclude the accrual system from the antenuptial contract

concluded before the marriage. Subsequently the wife sued her husband for divorce and, relying on the postnuptial contract, claimed an order that she was entitled to retain as her sole and absolute property the assets listed as hers in this contract. At the time of the divorce the accrual in her estate was larger than the accrual in her husband's (the defendant's) estate and consequently her husband maintained that the postnuptial contract was void *ab initio*, alternatively that it was voidable. He based his claim to share in his wife's accrual on the antenuptial contract.

- (2) The court had to decide whether the postnuptial contract was valid.
 - (3) The court held that the postnuptial contract was void and unenforceable as between the parties *inter se* as well as against third parties.
 - (4) The decision can be criticised on the following two points:
 - (a) **The postnuptial contract between the spouses is void, because of section 2 of the Matrimonial Property Act 88 of 1984.** According to Cronjé and Heaton (the authors of your prescribed books) this statement is incorrect since section 2 only deals with the position when the spouses are entering into an **antenuptial** contract. In terms of section 2 they may at that stage exclude the accrual system from their marriage by having an express clause to that effect included in their antenuptial contract. This section clearly does not deal with **postnuptial** exclusions of or alterations to the accrual system.
 - (b) **The rule “that the matrimonial property system is immutable [is] a substantive rule with a separate existence and not ... a mere application of the rule prohibiting donations between spouses” renders the postnuptial contract between the spouses void both as against third parties and as between the spouses.** This statement by the judge is also not supported by Cronjé and Heaton. Although it is clear that changes by the spouses *inter se* to the matrimonial property system cannot bind third parties, why should spouses who are married out of community of property not be permitted to enter into a contract which is binding only as between themselves, simply because that contract may have an effect on their matrimonial property system? Why, for example, should a spouse who is married out of community of property not be permitted to donate an amount to his or her spouse which is equal to the accrual benefit? Surely there is no reason thus to limit the principle of freedom to contract and the spouses' contractual capacity. If the contract is binding only as between the spouses no third party can be prejudiced by it, and thus the rule that the matrimonial property system is immutable, still applies in respect of third parties.
-

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **The principle of immutability**
 - (1) Explain briefly what the principle of immutability of the matrimonial property system means in matrimonial property law.
- **Application in terms of section 21(1) of the Matrimonial Property Act**
 - (2) In the past, South African matrimonial property law was governed by the principle of immutability. Thus spouses could never change the matrimonial property regime that applied to their marriage after entering into the marriage. Section 21(1) of the Matrimonial Property Act 88 of 1984 brought about an important change in this regard, and one that applies to all types of marriages. Discuss fully.
 - (3) Can spouses who are married in community of property apply, in terms of section 21(1) of the Matrimonial Property Act, for permission to change to the accrual system? Explain.
 - (4) List the requirements which must be met for a successful application in terms of section 21(1) of the Matrimonial Property Act.
 - (5) What does “sound reason” mean for purposes of section 21(1) of the Matrimonial Property Act?
 - (6) May the matrimonial property system chosen by spouses at the outset of marriage be changed retroactively? Discuss the relevant court cases.
- **Extra-judicial alteration of the matrimonial property system**
 - (7) Can spouses change their matrimonial property system by way of a contract without getting the court’s permission in terms of section 21(1) of the Matrimonial Property Act? Explain fully.
 - (8) Discuss the decision in *Honey v Honey*.

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

Mr and Mrs X were married in community of property on 10 December 1980. Mr X wants to start a new business, but realises that the venture may fail. Mr X does not want to jeopardise the joint estate. He, however, does not know what to do to improve the situation because at the time when he and Mrs X were married, his attorney told him that spouses could

not change their matrimonial property system during the subsistence of the marriage. Fully advise Mr X what the present legal position is. You do not have to discuss the procedure that has to be followed in these applications.

SUMMARY

In this study unit you learned what the principle of immutability in our matrimonial property law means and how it has been relaxed by the legislator. You also learned how spouses may change their matrimonial property system in terms of section 21(1) of the Matrimonial Property Act, but that it is still uncertain whether this may be done with retroactive effect. Finally you learned what extra-judicial alteration of the matrimonial property system entails.

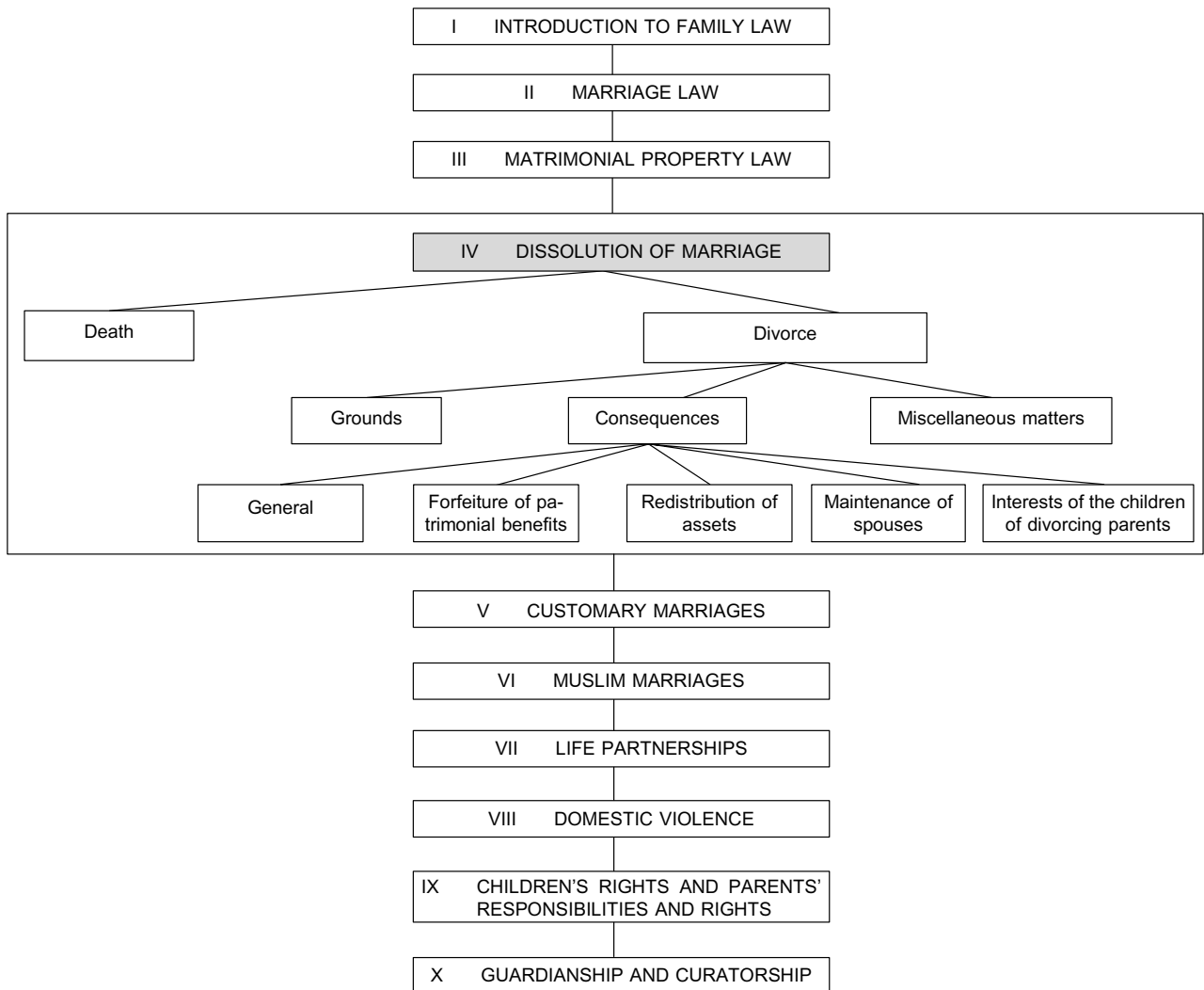
Dissolution of marriage

Section IV

SECTION IV

Dissolution of marriage

MODULE MAP



CONTENT

Overview

Study unit 14: Dissolution of marriage by death

Study unit 15: Grounds for divorce

Study unit 16: Consequences of divorce — general

Study unit 17: Forfeiture of patrimonial benefits

Study unit 18: Redistribution of assets

Study unit 19: Maintenance of the spouses

Study unit 20: Interests of the children of divorcing parents

Study unit 21: Miscellaneous matters in respect of divorce

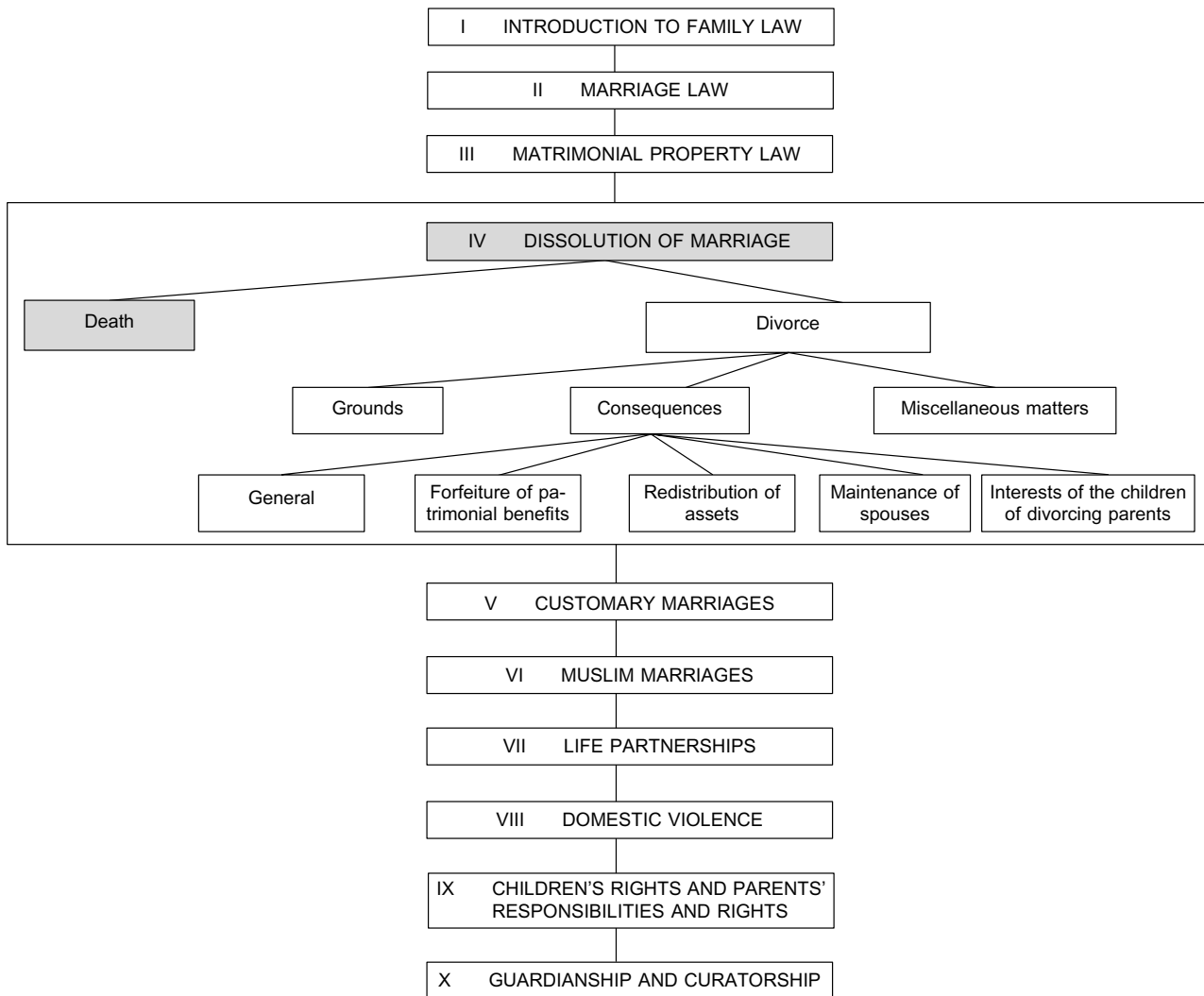
OVERVIEW

In the previous two sections (sections II and III) you learned how a marriage comes into existence and what its consequences are. In section IV you will learn how a marriage is dissolved and what the consequences of dissolution are. The first study unit in this section (study unit 14) sets out the ways in which a marriage is dissolved, and concentrates on one way in particular, namely death. Study units 15 to 21 deal with divorce as a method of terminating a marriage. In study unit 15 the grounds for divorce are explained. The consequences of divorce are discussed in study units 16 to 20, while miscellaneous matters relating to divorce, such as jurisdiction and procedure, are discussed in study unit 21.

STUDY UNIT 14

Dissolution of marriage by death

MODULE MAP



PREFACE

In the previous section you learned about the patrimonial consequences of marriage. We explained that a marriage can be in or out of community of property and discussed what each type of matrimonial property system entails. We also explained how the matrimonial property system can be changed during the subsistence of the marriage.

This study unit is the first in which the dissolution of marriage is discussed. It first briefly sets out the ways in which a marriage can be

dissolved, namely death of one or both spouses, nullification of a voidable marriage, and divorce. Then it concentrates on death as a means of dissolving a marriage.

LEARNING OUTCOMES

The purpose of this study unit is to enable you to

- (1) list the ways in which a marriage can be dissolved
 - (2) explain what judicial separation means and to know that orders for judicial separation can no longer be granted
 - (3) explain what extra-judicial separation means and how it works
 - (4) briefly explain the effect of death on a marriage in community of property
 - (5) discuss the provisions of the Maintenance of Surviving Spouses Act 27 of 1990
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PRESCRIBED MATTER

Read

- Prescribed textbook 115–116 up to before “10.3 Maintenance of Surviving Spouses Act 27 of 1970”

Study

- Prescribed textbook 113, 116 (from “10.3 Maintenance of Surviving Spouses Act 27 of 1970”) – 118

CONTENT OF THIS STUDY UNIT

1 GENERAL

Ways in which marriage can be dissolved

Page 113 of your prescribed textbook contains general information about the dissolution of marriage. First of all you have to note the three ways in which a marriage can be dissolved.

Judicial separation

Thereafter the textbook explains what judicial separation and extra-judicial separation mean. In respect of judicial separation you need only know what this concept means and that section 14 of the Divorce Act abolished the court’s power to make orders for judicial separation.

Extra-judicial
separation

In respect of extra-judicial separation you have to study the meaning of extra-judicial separation. You also have to know what the agreement is about, how long it lasts, and whether the court can be approached once the spouses have entered into an extra-judicial separation agreement. You have to note in particular that the agreement is effective only as between the parties (*inter partes*). These matters are discussed on page 113 of the textbook.

2 THE DISSOLUTION OF MARRIAGE BY THE DEATH OF ONE OR BOTH SPOUSES

2.1 Marriage in community of property

Predeceased spouse

The effect of death on a marriage in community is discussed at pages 115–116 of your textbook. You need only read that discussion. All you have to know is that when the marriage comes to an end because of the death of a spouse, the community of property between the spouses also comes to an end. The joint estate is then dealt with by the executor in terms of the Administration of Estates Act 66 of 1965. The executor pays all debts owed by the joint estate and claims all debts owed to the joint estate. He or she then gives half of the estate to the surviving spouse. The other half is given to the heirs of the predeceased spouse.

2.2 Marriage out of community of property

The discussion of the effect of death on a marriage out of community of property at page 116 of your textbook need also only be read.

2.3 Maintenance of Surviving Spouses Act 27 of 1990

On pages 116–118 of your prescribed textbook it is explained that a surviving spouse may, in certain circumstances, have a claim for maintenance against the estate of the deceased in terms of the Maintenance of Surviving Spouses Act. You have to study the discussion of the surviving spouse's claim for maintenance against the estate of the deceased spouse in detail. You also have to study the issue of whether a surviving customary or Muslim spouse has a claim in terms of the Act. Finally, you have to study the discussion on whether a surviving life partner has a claim in terms of the Act.

ACTIVITY

Mr and Mrs Sithole entered into a civil marriage in 1980 in community of property and a son, William, was born of their marriage in 1982. Mr Sithole died a week ago of a heart attack. At the time of his death, Mr and

Mrs Sithole's joint estate is worth R50 000. In terms of Mr Sithole's will, Mrs Sithole will inherit R5 000 and the balance of the estate will go to William. The will makes no further provision for Mrs Sithole. Since Mrs Sithole is, owing to a disability, unable to work and earn an income, she fears that she will be unable to maintain herself from the money she is entitled to according to the will and in terms of the matrimonial property system according to which she and Mr Sithole were married. Mrs Sithole wants to know from you whether she can claim maintenance from Mr Sithole's estate. Advise Mrs Sithole in this respect.

FEEDBACK

The Maintenance of Surviving Spouses Act 27 of 1990 determines that in certain circumstances the surviving spouse has a claim for maintenance against the estate of the deceased spouse. Section 2(1) of the Act determines that if a marriage is dissolved by death after the commencement of the Act, the surviving spouse has a claim against the estate of the deceased spouse for the provision of his or her reasonable maintenance needs until his or her death or remarriage in so far as he or she is unable to provide therefor from his or her own means or earnings.

The provisions of the Act apply in this case since the Act applies only to marriages which are dissolved by **death** and only where the dissolution of the marriage took place **after** the commencement date of the Act.

Mrs Sithole will have a claim against Mr Sithole's estate only in so far as she is unable to support herself from her own means or earnings. Since Mr and Mrs Sithole's joint estate was worth R50 000 on the dissolution of the marriage, Mrs Sithole is in terms of the matrimonial property system entitled to her half share of the joint estate, namely R25 000, and in terms of Mr Sithole's will to R5 000. The amount of R30 000 (R25 000 and R5 000) will probably not be enough to support her and therefore she will not be able to support herself from her own means and earnings, especially since she is unable to generate her own income.

This claim of the surviving spouse (Mrs Sithole) is, however, limited to the amount required to provide for her reasonable maintenance needs. The Act provides for specific factors which, in addition to any other factor which should be taken into consideration, must be considered by the court in the determination of the surviving spouse's reasonable maintenance needs. These factors are the following:

- (1) the amount in the deceased estate available for distribution amongst heirs and legatees
- (2) the existing and expected means, earning capacity, financial needs and obligations of the surviving spouse and the subsistence of the marriage

- (3) the standard of living of the surviving spouse during the subsistence of the marriage and his or her age on the death of the deceased spouse

Mrs Sithole's claim against Mr Sithole's estate takes the same order of precedence against Mr Sithole's estate as a claim for maintenance of a dependent child of Mr Sithole would have, should there have been such a claim. If William is dependent on Mr Sithole's estate for maintenance (in spite of the bequest), his claim for maintenance and Mrs Sithole's claim will take the same order of precedence. If Mrs Sithole's claim and that of a dependent child (had William been dependent on Mr Sithole's estate for maintenance) compete with each other, such claims shall if necessary be reduced proportionately.

If money or an asset from the estate has already been transferred to William in terms of the provisions of the Administration of Estates Act 66 of 1965 or pursuant to an instruction of the Master of the High Court, Mrs Sithole will have no right of recourse against William.

If Mrs Sithole's claim for maintenance is allowed, the executor of the deceased estate may settle the claim or part thereof by concluding an agreement with the surviving spouse and with those heirs and legatees who have an interest in the agreement. In order to settle Mrs Sithole's claim, the following can be done in terms of the agreement:

- a trust can be created; and/or
- assets of the deceased estate or a right to assets in the deceased estate may be transferred to Mrs Sithole or the trust; or
- an obligation may be imposed on an heir or legatee.

Mrs Sithole's claim against Mr Sithole's estate will terminate on her death or remarriage.

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **General**
 - (1) List the ways in which a marriage can be terminated.
 - (2) Can our courts still make orders for judicial separation? Give authority for your answer.
 - (3) What does extra-judicial separation mean?
 - (4) Who are bound by an extra-judicial separation agreement?
 - (5) For how long will an extra-judicial separation agreement be valid?

- (6) Can one spouse approach the court for a maintenance order if he or she has entered into an extra-judicial separation agreement with the other spouse?
- **The dissolution of marriage by the death of one or both spouses**
- (7) Briefly explain the effect of death on a marriage in community of property.
- (8) Does a surviving spouse have a claim for maintenance against the estate of his or her deceased spouse? Explain fully.

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

Mr and Mrs X were married out of community of property in 1960. Mr X died two weeks ago. At the time of his death, Mr X had an estate of R500 000 while Mrs X had an estate of R5 000. In terms of Mr X's will, Mrs X will inherit a sum of R15 000. No further provision has been made for Mrs X in Mr X's will. The spouse's house which was registered in Mr X's name, was bequeathed to his brother, Mr Y. Mr X has bequeathed the remainder of his estate to Z, his son from a previous marriage. Mrs X fears that she will be unable to maintain herself out of her estate and the money bequeathed to her by Mr X. In terms of the Maintenance of Surviving Spouses Act 27 of 1990 Mrs X claims maintenance from Mr X's estate. If this claim is granted, how will it be settled?

SUMMARY

This study unit is the first in which you learned about dissolution of marriage. It set out and discussed

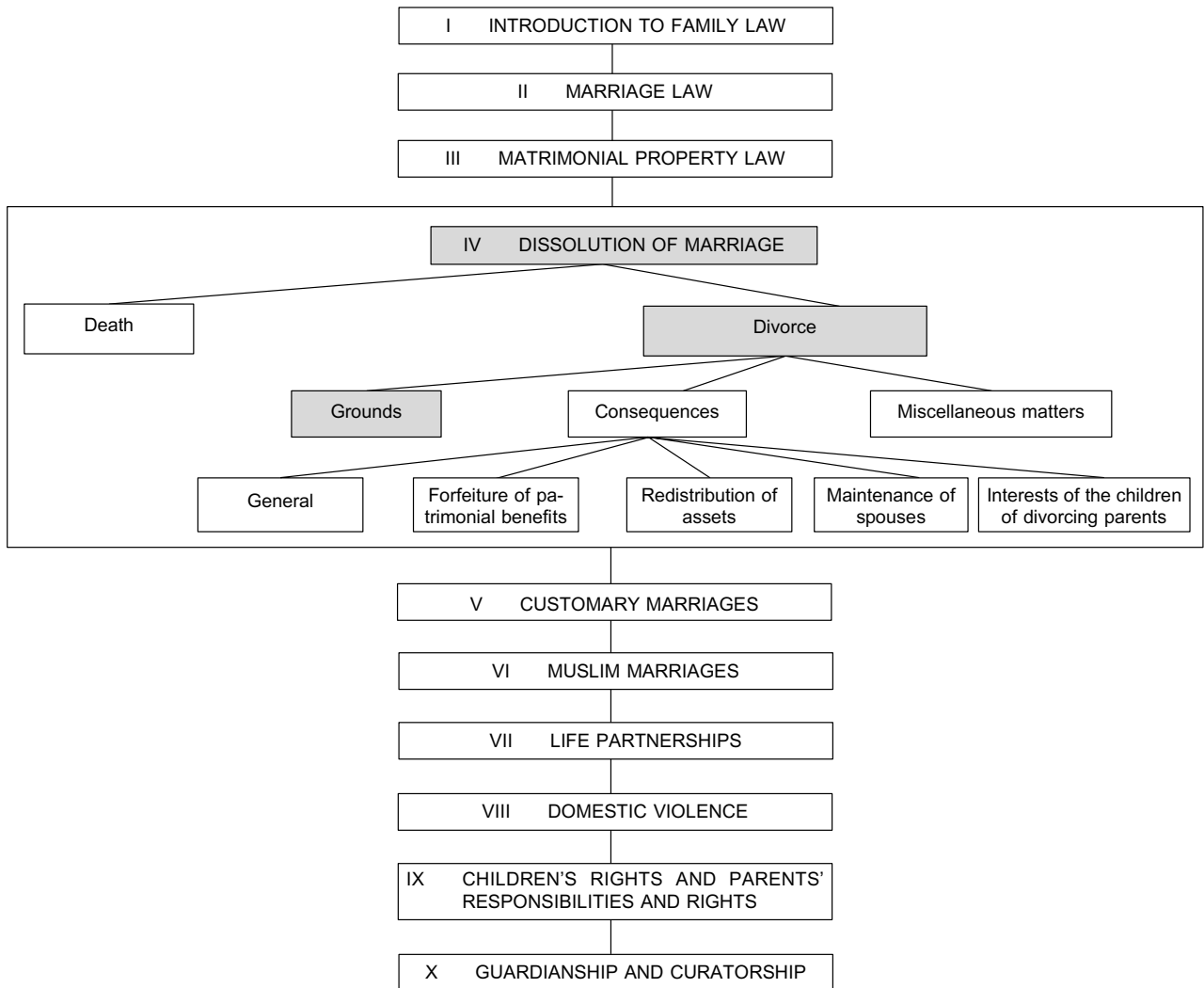
- the ways in which a marriage is dissolved
- judicial separation
- extra-judicial separation
- the effect of death on a marriage in community
- the claim of a surviving spouse in a civil or customary marriage for maintenance out of the estate of his or her deceased spouse
- the issue of whether a Muslim spouse has a claim for maintenance out of the estate of his or her deceased spouse
- the issue of whether a surviving life partner has a claim for maintenance out of the estate of his or her deceased life partner

In the next study unit you will start learning about divorce and, in particular, the grounds for divorce.

STUDY UNIT 15

Grounds for divorce

MODULE MAP



PREFACE

In the previous study unit we referred you to the three ways in which a marriage can be dissolved.

The first way, namely the death of one or both of the spouses, was discussed in the previous study unit.

The second way, namely the annulment of a marriage, was dealt with in study unit 7.

You must make sure that you know those study units before you proceed to study the present study unit, in which we start our discussion of the

third way in which a marriage can be dissolved, namely divorce. First we look at the grounds for divorce which presently exist in our law, namely the irretrievable breakdown of the marriage and the mental illness or continuous unconsciousness of a party to a marriage.

LEARNING OUTCOMES

The purpose of this study unit is to enable you to

- (1) know that the old divorce law was based on the fault principle
 - (2) list the grounds for divorce which currently exist in our law
 - (3) explain in detail when a marriage can be considered as having broken down irretrievably
 - (4) list the guidelines laid down in section 4(2) of the Divorce Act 70 of 1979
 - (5) discuss the first guideline in section 4(2) of the Divorce Act 70 of 1979 briefly
 - (6) list the criteria which are contained in section 5(1) and section 5(2), respectively
 - (7) briefly explain the special rules regarding divorce on the ground of mental illness or continuous unconsciousness
 - (8) discuss the connection between section 4 and section 5 of the Divorce Act 70 of 1979
 - (9) explain whether the court has a discretion to refuse a divorce if one of the grounds for divorce is proved
 - (10) discuss the content and implications of section 5A of the Divorce Act 70 of 1979
-

PRESCRIBED MATTER

Read

- Prescribed textbook 119 “11.1 Introduction”
- Prescribed textbook 121–122 “11.2.2 The guidelines in section 4(2)” and “11.2.3 Concluding remarks on section 4”
- Prescribed textbook 124 “11.4 Defences against an action for divorce”

Study

- Prescribed textbook 119–120 “11.2.1 The test for irretrievable breakdown”
- Prescribed textbook 122–124 “11.3 Incurable mental illness or continuous unconsciousness”

- Prescribed textbook 124–126 “11.5 The court’s discretion to refuse a decree of divorce”
- *Schwartz v Schwartz* in your prescribed casebook 183–186
- *Swart v Swart* in your prescribed casebook 187–191
- Prescribed casebook 196–197 (the note on *Smit v Smit*)

CONTENT OF THIS STUDY UNIT

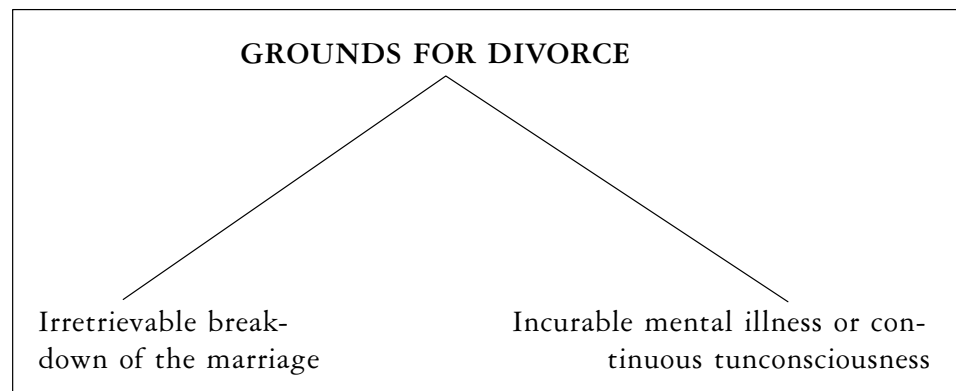
1 INTRODUCTION

Old divorce law You need only read the discussion on page 119 under the heading “11.1 Introduction” of your prescribed textbook. Please merely note that the old divorce law was based upon the **fault principle**.

2 THE GROUNDS FOR DIVORCE

Grounds You will see in your textbook on page 119 that a marriage may be dissolved by a court by a decree of divorce and that the only grounds on which such a decree may be granted are

- (1) the irretrievable breakdown of the marriage as envisaged in section 4
- (2) mental illness or continuous unconsciousness, as envisaged in section 5, of a party to the marriage



3 IRRETRIEVABLE BREAKDOWN OF THE MARRIAGE AS A GROUND FOR DIVORCE — SECTION 4

By far the majority of marriages dissolved by divorce are dissolved on the ground of the irretrievable breakdown of the marriage. Consequently, we have to deal with this ground in detail.

3.1 The problem of establishing a criterion for irretrievable breakdown

Crucial problem The crucial problem with regard to the principle of breakdown, is to establish when a marriage can be considered as having broken down irretrievably.

3.2 The requirements laid down in section 4

Two requirements In section 4(1) of the Divorce Act 70 of 1979 certain requirements according to which it must be determined whether a marriage has broken down irretrievably are laid down. When you study the provisions of section 4(1) in your textbook on page 119, you will see that it lays down two requirements, namely:

- (1) the marriage relationship between the spouses must no longer be normal
- (2) there must be no prospect of the restoration of a normal marriage relationship between the spouses

When is marital relationship no longer normal? Criteria for normal marital relationship Therefore, it must be determined when a marital relationship is no longer normal. You will see in your textbook on pages 119–120 that this is done by first establishing what a normal marital relationship is. Note that the legal definition of a normal marital relationship is sought in the concept of *consortium*. This concept was discussed in detail in study unit 8 (“**The invariable consequences of marriage**”). Make sure that you know what this concept entails. When one or both of the spouses behave in such a way that the *consortium* is terminated or seriously disrupted, one can say that a normal marital relationship no longer exists between the spouses.

Test to determine whether *consortium* has been terminated or violated The test or method used by the courts to determine whether the *consortium* has been terminated or seriously violated, involves subjective as well as objective elements. In this respect note the meaning of a purely subjective approach and a purely objective approach as explained in your textbook on page 120. It is also very important that you must know exactly how these approaches were applied in *Schwartz v Schwartz*, *Swart v Swart* and *Naidoo v Naidoo*. This matter is explained very well in the note on the *Swart* case in your prescribed casebook on pages 190–191. Also note the discussion on *Coetzee v Coetzee* in your textbook on page 130 and the second last paragraph of the note on the *Swart* case on page 191 of the casebook.

Application of test

- *Schwartz*
- *Swart*
- *Naidoo*
- *Coetzee*

ACTIVITY

Study those parts on page 120 in your textbook and pages 190–191 in your casebook that deal with the test or method used by the courts to determine whether the *consortium* has been terminated or violated and then answer the following questions:

- (1) What tests do the courts use to determine whether the *consortium* has been terminated or violated?

- (2) Provide a short explanation of what a purely subjective approach and what a purely objective approach involve.
- (3) Explain briefly how the courts applied the approaches under (2).
- (4) Which of the approaches under (3) is, according to Cronjé and Heaton, the correct approach which should be followed when it has to be determined whether the *consortium* has been terminated or violated?

FEEDBACK

- (1) The courts use the subjective and the objective test.
- (2) According to Cronjé and Heaton, a purely objective approach means that the court pays attention only to the facts and circumstances of the marriage in question, without taking into consideration the reasons why the plaintiff is suing for a divorce. Conversely, a purely subjective approach means that the court takes cognisance only of the fact that the plaintiff is applying for a divorce, without considering either the history of the marriage or the present state of the marriage concerned. The consequences of a purely subjective approach would be that the marriage would be regarded as having broken down irretrievably when the plaintiff applied for a divorce.
- (3) The courts do not have a consistent approach to the application of the two approaches. It would appear from what the judge had to say in *Schwartz v Schwartz*, that the subjective and objective elements were considered together in this case: “In determining whether a marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between the parties it is important to have regard to what has happened in the past, ie the history of the relationship up to the date of the trial, and also to the present attitude of the parties to the marriage relationship.”

In *Naidoo v Naidoo* the court expressly decided that the test that must be applied is both subjective and objective.

In *Swart v Swart* the subjective and objective approaches were applied somewhat differently than was done in the *Schwartz* and *Naidoo* cases. In the *Swart* case the subjective element was taken into account in determining whether the spouses' marriage had broken down. The judge contended that the breakdown of a marriage and the reasons for this cannot be measured objectively. The court took the objective element into account only in order to determine whether the breakdown was irretrievable. The judge said in this connection that objectively speaking the reasons on which the court had to base its decision upon divorce, were not serious enough to decide whether a specific marriage could still be saved. Thus, in this case the court first applied the subjective approach and afterwards the objective approach.

- (4) According to Cronjé and Heaton the correct approach is that applied in the *Schwartz* and *Naidoo* cases, namely that the objective as well as the subjective approach must be used to determine not only whether the marriage relationship has broken down, but also whether such breakdown is irretrievable.
-

3.3 The guidelines in section 4(2)

Three examples

In addition to the criteria contained in section 4(1) of the Divorce Act, section 4(2) of the Act provides three examples of situations which may indicate that a marriage has broken down irretrievably. These three examples are discussed on pages 121–122 of the textbook under the heading “11.2.2 The guidelines in section 4(2)”. You need not study the particulars given there. Only study the information given below on these three guidelines. They are

- (1) the fact that the spouses 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 fact that the defendant has committed adultery and that the plaintiff finds it irreconcilable with a continued marital relationship
- (3) the fact that the defendant has been declared an habitual criminal by a sentence of a court of law, and that he or she is serving a prison sentence as a result of this sentence

Please note that these examples are mere guidelines. Firstly, they are not the only proof of irretrievable breakdown of the marriage, and, secondly, they are not necessarily conclusive proof of irretrievable breakdown of the marriage.

Separation for at least one year

In respect of the first guideline, two important aspects must be noted, namely:

- (1) When a spouse relies on this guideline only, he or she will have to prove that there has been no cohabitation for an **uninterrupted** period of at least one year.
- (2) The separation refers to termination of *consortium* between the spouses and not to geographic separation. It is therefore not necessary to prove that the spouses are not living in the same house or even in the same room. Once the *consortium* between the spouses has been terminated for longer than one year, this guideline has been met.

4 DIVORCE ON THE GROUND OF MENTAL ILLNESS OR CONTINUOUS UNCONSCIOUSNESS — SECTION 5

Two further grounds for divorce, namely mental illness and continuous unconsciousness, are dealt with in section 5 of the Divorce Act 70 of 1979 and discussed on pages 122–124 of the textbook.

Criteria contained in subsections 5(1) and 5(2) of Act

The circumstances which the plaintiff must prove in order to obtain a divorce on the ground of the defendant's mental illness (s 5(1)) or continuous unconsciousness (s 5(2)) are clearly set out in your textbook on pages 122–123. You must know what these circumstances are.

5 THE CONNECTION BETWEEN SECTION 4 AND SECTION 5

This matter is discussed only briefly on page 123 of your textbook under the heading “11.3.2 Divorcing a mentally ill or unconscious spouse in terms of section 4 instead of section 5”. However, it is discussed in detail on pages 196–197 (the note on *Smit v Smit*) of your prescribed casebook. You must study this section of your casebook carefully. Make sure that you know what the issue is and how this issue was addressed in *Dickinson v Dickinson*, *Krige v Smit*, *Smit v Smit (a quo* and full bench decisions) and *Ott v Raubenheimer*. In this regard you must also know the points of view of Barnard and Hahlo.

ACTIVITY

Mr and Mrs Naidoo married five years ago. While on a mountain climbing expedition three years ago, Mrs Naidoo fell from a mountain ledge and hit her head against a rock. Mrs Naidoo has been unconscious since then. Mr Naidoo now wants to divorce Mrs Naidoo. Mr Naidoo asks you if he can apply for a divorce in terms of section 5(2) of the Divorce Act 70 of 1979, or whether he can also make use of section 4 of the Act. Advise Mr Naidoo about this. Substantiate your answer by referring to authority.

FEEDBACK

This matter deals with the connection between sections 4 and 5 of the Divorce Act 70 of 1979. There are many other circumstances which can lead to the irretrievable breakdown of a marriage, which are not provided for by section 5 of the Act. In the case of mental illness and continuous unconsciousness the legislature thought it fit to lay down certain rules. Consequently the question arises whether the requirements of section 5 always have to be complied with if one of the spouses is mentally ill or unconscious or whether the applicant has a choice of using section 4 or section 5.

This question has often been raised in the courts and conflicting decisions have been made. In *Dickinson v Dickinson* the plaintiff's wife had been committed as a mental patient for more than two years. The plaintiff had instituted an action for divorce in terms of section 4. The court decided that section 4 can indeed be applied.

In *Krige v Smit*, the plaintiff's husband had been in a semi-unconscious state for nearly two years. She sued him for divorce in terms of section 4 and alternatively in terms of section 5. The court granted a divorce order in terms of section 4 but tried to give section 5 its own place and function. The court found that section 5 facilitates the onus of proof which rests on the plaintiff by specifying all the elements which have to be proved. Section 5 also facilitates the task of the court when granting a divorce order since the court need only look for the presence or absence of the factors mentioned in the section. In these cases (where the spouse who is sued for divorce is mentally ill or unconscious) the court need not investigate the facts and the possibility of whether the spouses' marriage relationship can be restored.

The wide interpretation followed in *Dickinson v Dickinson* and *Krige v Smit*, was rejected by the court *a quo* in *Smit v Smit*. The court in the latter case decided that in cases where one of the spouses is mentally ill or unconscious, a divorce can only be granted in terms of section 5. On appeal to the full bench this decision was reversed.

In *Ott v Raubenheimer*, where the defendant against whom the divorce action was instituted was also mentally ill, the court once again granted the divorce order in terms of section 4.

It would appear from case law that a plaintiff (Mr Naidoo in this case) can indeed use section 4 in order to obtain a divorce order in cases where the defendant (Mrs Naidoo in this case) is mentally ill or, as in the case in question, unconscious. It is still uncertain whether he or she can rely only on section 4 if all the requirements for section 5 have not been complied with and if he or she has the choice of using section 4, even though the situation falls entirely within the scope of section 5.

Barnard apparently feels that the plaintiff cannot choose to use section 4 if all the elements of section 5 are present, but that he or she will have to make use of section 5. Hahlo's view is different. According to him the marriage relationship between spouses where one of the spouses is mentally ill or unconscious in terms of section 5, apparently has also broken down irretrievably in terms of section 4. According to Hahlo a divorce order can thus be granted in terms of section 4 even though the situation falls fully within the scope of section 5.

Special rules

You must also note the special rules which apply in respect of divorce on the ground of mental illness or continuous unconsciousness. These rules are discussed on pages 123–124 of your prescribed textbook.

6 DOES THE COURT HAVE A DISCRETION TO REFUSE A DECREE OF DIVORCE?

Court cases

This question is discussed in your textbook on pages 24–126. Your textbook points out that the use of the word “may” in sections 3, 4 and 5 of the Divorce Act 70 of 1979 creates the impression that the court can refuse to grant a divorce although one of the grounds for divorce has been proved. Make sure that you know what was decided on this issue in *Smit v Smit*, *Schwartz v Schwartz* and *Levy v Levy*. These cases are discussed on pages 124–125 of your textbook. Also note the discussion on *Schwartz v Schwartz* on pages 183–186 of the casebook. Note especially the second paragraph of the note on the *Schwartz* case on page 186 in the casebook.

Section 5A of the Divorce Act 70 of 1979

Regarding the court’s discretion, you should further note the provisions of section 5A of the Divorce Act 70 of 1979. The provisions and the aim of section 5A are set out on pages 125–126 of the textbook. Note that the court now has the discretion to refuse a decree of divorce if, as a result of religious prescriptions, one or both spouses will not be able to remarry once the court has granted a decree of divorce. In this manner the courts can now assist a Jewish woman whose husband refuses to grant her a divorce in terms of the Jewish faith. Also make sure that you know how the court forced the husband to grant his wife a Jewish religious divorce in *Amar v Amar*. (This case is briefly discussed on p 126 of the textbook.)

Further, you also have to take note of the argument that section 5A of the Divorce Act possibly violates the constitutional right to equality, and Cronjé and Heaton’s criticism against this argument. These aspects are discussed on page 126 of the textbook. Lastly, you should also know that section 5A of the Divorce Act may possibly infringe upon the right to freedom of religion, but that it is submitted that the limitation of the right to freedom of religion is justifiable as the purpose of the limitation is the achievement of real equality.

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **Introduction**

- (1) On which principle was the old divorce law based?

- **Grounds of divorce**
 - (2) List the two grounds for divorce created by section 3 of the Divorce Act 70 of 1979.
- **Irretrievable breakdown of the marriage as ground for divorce**
 - (3) List the two requirements laid down by section 4(1) of the Divorce Act 70 of 1979 for irretrievable breakdown of the marriage as a ground for divorce.
 - (4) When is a marital relationship no longer normal? Discuss with reference to relevant case law.
 - (5) List the guidelines laid down in section 4(2) of the Divorce Act 70 of 1979 which may indicate that a marriage has broken down irretrievably.
 - (6) Are these guidelines the only and conclusive proof of irretrievable breakdown of a marriage?
 - (7) For purposes of section 4(2) of the Divorce Act 70 of 1979, what would the position be if the spouses resumed cohabitation for any length of time during the year of separation in order to try to effect a reconciliation?
 - (8) What particular form should the separation take for purposes of section 4(2)(a) of the Divorce Act 70 of 1979? Discuss briefly.
- **Mental illness or continuous unconsciousness as ground for divorce**
 - (9) What must the plaintiff prove to obtain a divorce on the ground of the defendant's mental illness?
 - (10) Under what circumstances will the continuous unconsciousness of the defendant be a ground for divorce?
 - (11) May an order for forfeiture of patrimonial benefits of the marriage be made against a defendant if the marriage is dissolved on the ground of mental illness or continuous unconsciousness?
- **The connection between section 4 and section 5**
 - (12) Must a person who wants to divorce his or her mentally ill or continuously unconscious spouse institute the divorce action in terms of section 5 of the Divorce Act 70 of 1979 or can the action be instituted in terms of section 4? Refer to the relevant cases and to some authors' views on this matter.
- **The discretion of the court regarding the granting of a divorce order**
 - (13) Does the court have a discretion, or is the court compelled to grant a divorce order if the plaintiff proves that his or her marriage to the defendant has broken down irretrievably? Discuss with reference to the relevant court cases.
 - (14) Briefly set out the provisions and the aim of section 5A of the Divorce Act 70 of 1979.

- (15) How do the provisions of section 5A of the Divorce Act 70 of 1979 influence the matter of the court's discretion to refuse a divorce?
- (16) Would you say that section 5A of the Divorce Act 70 of 1979 violates the constitutional right to equality? Answer the question with reference to the opinion of the authors of your textbook on this issue.
- (17) What other constitutional right may possibly also be violated by the provisions of section 5A of the Divorce Act 70 of 1979?

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

Mr and Mrs X were married in 1980. Two months ago Mr X left Mrs X and moved in with Ms Y, who has been his mistress for the past three years. Mr X sues Mrs X for divorce. Mrs X, however, opposes the divorce action on the ground that she still loves Mr X and is willing to take him back should he return to the matrimonial home. Discuss in detail whether the court will issue an order for divorce in this case.

SUMMARY

In this study unit you learned

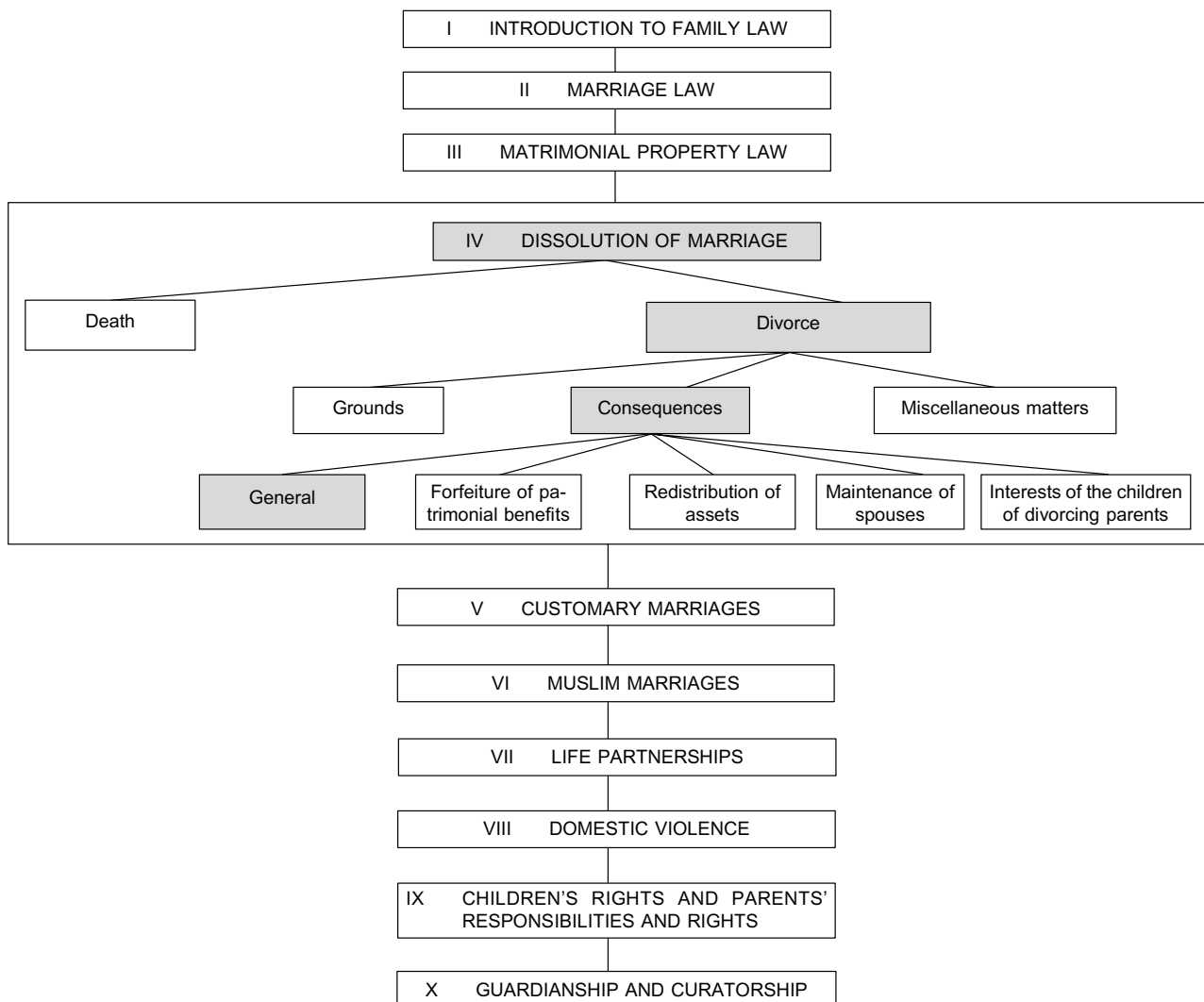
- which grounds for divorce are created by section 3 of the Divorce Act 70 of 1979
- what the requirements are for the granting of a divorce on each of the grounds for divorce
- what the connection between section 4 and section 5 is
- that the courts, except in so far as it concerns the provisions of section 5A of the Divorce Act 70 of 1979, do not have a discretion to refuse a divorce if it is proved that a marriage has broken down irretrievably or that the requirements of section 5 of the Act have been complied with

In the next study unit we shall start discussing the consequences of divorce. We shall look at these consequences in general.

STUDY UNIT 16

Consequences of divorce — general

MODULE MAP



PREFACE

In the previous study unit you learned about the grounds for divorce. We explained

- what the grounds for divorce are
- what each ground means and entails
- when each ground applies
- whether there is a link between the grounds for divorce
- that the court, except in so far as it concerns the provisions of section 5A of the Divorce Act, does not have a discretion to refuse a divorce

Now that you know what the grounds for divorce are we can proceed to study the consequences of divorce. In this (very short) study unit we shall look at some of the general consequences of divorce.

LEARNING OUTCOMES

The purpose of this study unit is to enable you to

- (1) explain what determines the effect a divorce will have on the division of the spouses' property
 - (2) explain when and how a spouse's pension interest is taken into account in determining the patrimonial consequences of divorce
-

PRESCRIBED MATTER

Read

- Prescribed textbook 127–128 “12.1 Introduction” and “12.2 Settlement agreements”

Study

- Prescribed textbook 128–131 “12.3 The patrimony of the spouses — general”

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

In the first paragraph on page 127 of the prescribed textbook you will read that the consequences of a divorce, like the grounds for divorce, are governed by the Divorce Act 70 of 1979.

2 SETTLEMENT AGREEMENTS

On pages 127–128 of the prescribed textbook settlement agreements and the incorporation thereof in divorce orders are discussed. You only need to read this discussion.

3 THE PATRIMONY OF THE SPOUSES — GENERAL

Factors which determine effect of divorce on division of property	The patrimony of the spouses has to do with their assets and liabilities and their finances. On pages 128–129 of your textbook it is pointed out that the effect of divorce on the division of the spouses' property depends on two things:
Matrimonial property system	(1) the matrimonial property system of the spouses (ie whether they were married in or out of community and whether the accrual system applies if they were married out of community)
Forfeiture order	(2) whether the court orders forfeiture of benefits (forfeiture of benefits is discussed in the next study unit)
Role of conduct	You must also know what role fault plays in determining the consequences of divorce. This aspect is discussed on page 129 of the prescribed textbook.

3.1 Pension interests

Part of assets upon divorce	When you study the discussion of pension interests on pages 129–131 in your prescribed textbook you will first see that, as opposed to the previous position, pension interests are now deemed to be part of a spouse's assets upon divorce. Make sure that you know why the decision in <i>Sempapalele v Sempapalele</i> is clearly wrong, and why <i>Mabaraj v Mabaraj</i> correctly reflects the present position. These cases are discussed on pages 129–130 in your prescribed textbook.
Calculation of pension interest	Section 1 of the Divorce Act determines how a spouse's pension interest must be calculated if the spouse is a member of a pension fund, or if the spouse is a member of a retirement-annuity fund. Also note that the amount of a spouse's pension interest must be reduced by any part of the pension interest to which another person is entitled by virtue of a previous divorce. Make sure that you know exactly how these calculations work. These calculations are explained on page 130 of the prescribed textbook.
Direct payment to non-member and endorsement	On pages 130–131 in the prescribed textbook it is explained that the court may order that the pension or retirement-annuity fund must pay any part of the pension interest which is due to the spouse of a member of the fund directly to that spouse. The court may also order that an endorsement to that effect must be recorded in the records of the fund. However, you do not have to know what section 11 of the Judicial Matters Second Amendment Act 55 of 2003 provides.
Shortcomings of the Act	You must also be able to explain the shortcomings of the Divorce Act with regard to the division of pension interests. These shortcomings are set out in the second paragraph on page 131.

Scope of provisions Lastly, you should take note that the provisions of the Divorce Act with regard to pension sharing are applicable only to marriages in community of property, marriages out of community of property with application of the accrual system and marriages subject to complete separation of property concluded **before** 1 November 1984. Therefore, on page 131 in the prescribed textbook it is stated that spouses' pension interests are not taken into account upon divorce if they married with complete separation of property **on or after** 1 November 1984.

ACTIVITY

What is a spouse's pension interest upon divorce if

- (1) the spouse is a member of a pension fund
- (2) the spouse is a member of a retirement annuity fund

FEEDBACK

- (1) You merely had to indicate that the spouse's pension interest in this case is the benefit to which the spouse would have been entitled had he or she terminated his or her membership of the fund on the date of the divorce.
 - (2) With regard to the second part of this question you merely had to indicate that the spouse's pension interest is equal to all the spouse's contributions to the retirement annuity fund up to the date of the divorce, together with annual simple interest on those contributions calculated at the prescribed interest rate.
-

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **The patrimony of the spouses — general**
 - (1) What determines the effect of divorce on the division of the spouses' property?
 - (2) Does fault still play a role as far as the consequences of divorce are concerned? Explain.
- **Pension interests**
 - (3) Does a spouse's pension interest automatically fall into his or her estate upon divorce? Give a full explanation, with reference to authority.

- (4) Explain how a spouse's pension interest must be determined upon divorce in terms of section 1 of the Divorce Act.
- (5) When and how does payment take place of any part of the pension interest of the member spouse to the spouse who is not a member of the particular fund?
- (6) Set out the shortcomings of the Divorce Act in respect of pension sharing.
- (7) Can a wife share in her husband's pension interest upon divorce if the spouses were married out of community and of profit and loss and without the accrual system in terms of an antenuptial contract on 1 December 1986?

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

Sam married Sarah on 2 February 1988. Their marriage is out of community of property and of profit and loss with the accrual system. At the beginning of the marriage neither spouse owned anything. During the subsistence of the marriage Sarah stayed at home and had no income of her own. She still owns nothing of value. During the entire subsistence of the marriage Sam worked for the same employer. He earned a small salary. From this salary he made contributions to a pension fund and he paid income tax and unemployment insurance. He spent the rest of his income on the maintenance of himself and Sarah. Like Sarah, he still owns nothing of value. Sam and Sarah are now planning to get divorced. Sarah is claiming a share of Sam's pension interest. Advise her whether she is entitled to such a share. Give authority for your advice.

SUMMARY

In this study unit you encountered some of the general consequences of divorce. You learned in particular

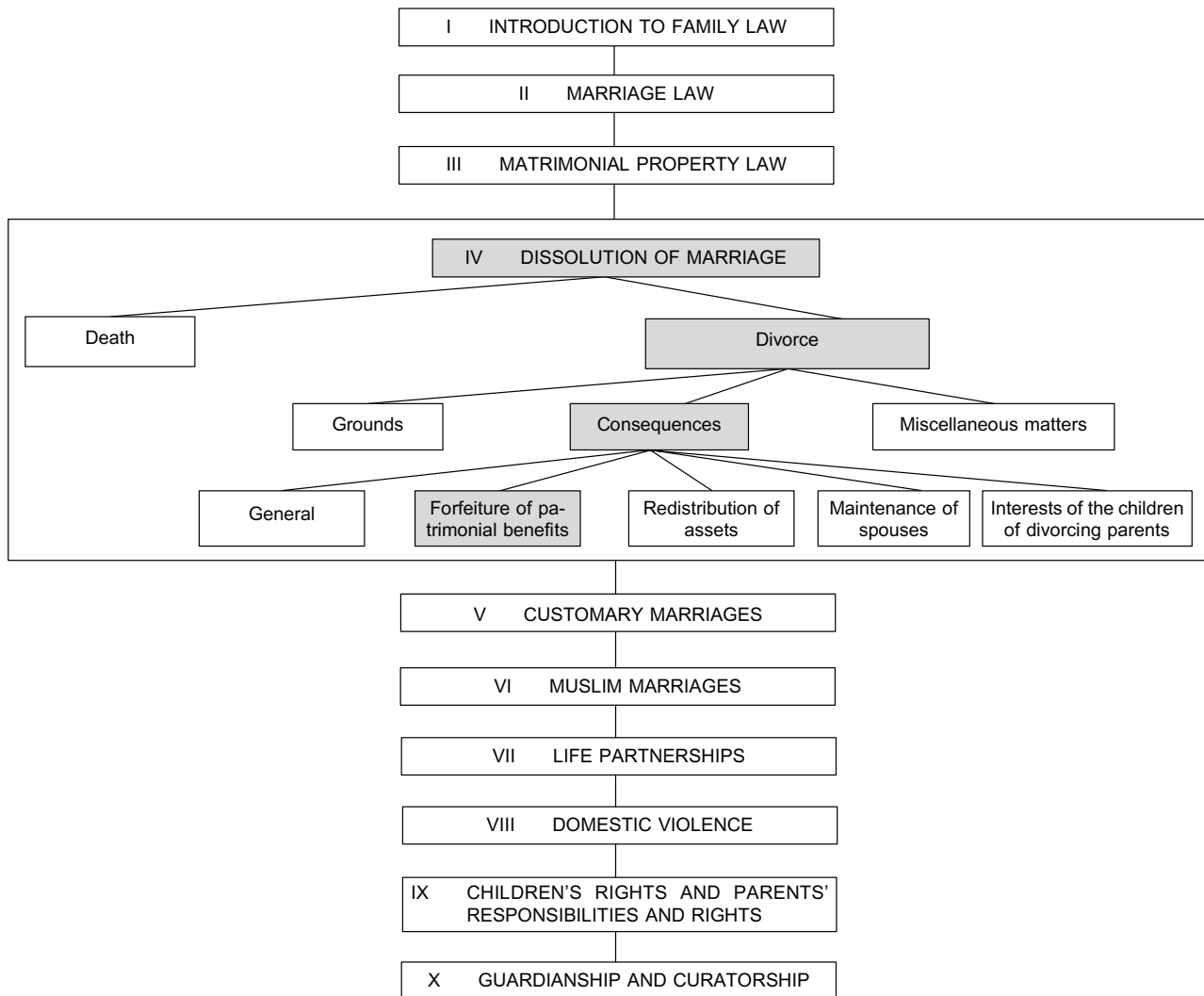
- what determines the effect of divorce on the division of the spouses' property
- when and how pension interests are taken into account on divorce

In the next study unit we study another consequence of divorce on the patrimony of the spouses, namely forfeiture of patrimonial benefits.

STUDY UNIT 17

Forfeiture of patrimonial benefits

MODULE MAP



PREFACE

In this study unit one of the patrimonial consequences of divorce is discussed, namely forfeiture of patrimonial benefits (or forfeiture of benefits or simply, forfeiture, as it is sometimes called). Forfeiture of patrimonial benefits means that, in certain circumstances, one of the parties can lose the patrimonial benefits which he or she acquired on the basis of his or her marriage to the other party.

Before you begin to study this study unit, you must ensure that you have first studied the previous study unit, which deals with general consequences of divorce.

LEARNING OUTCOMES

The purpose of this study unit is to enable you to

- (1) explain what forfeiture of benefits is
 - (2) explain what the requirements for forfeiture are
 - (3) explain whether the factors listed in section 9 of the Divorce Act are cumulative
 - (4) explain the role of misconduct in respect of forfeiture
 - (5) explain what the requirement of undue benefit means in respect of forfeiture and how it is proved
 - (6) explain whether, by using forfeiture of benefits, issues of fairness and justness can be employed to deviate from the consequences of the matrimonial property system selected by the parties
 - (7) set out the approach which the court of appeal must follow when hearing an appeal in respect of an order for forfeiture
 - (8) explain what can be forfeited
-

PRESCRIBED MATTER

Study

- Prescribed textbook 131–133 “12.4 Forfeiture of patrimonial benefits”
- *Wijker v Wijker* in your prescribed casebook 207–214
- *Watt v Watt* in your prescribed casebook 216–219

CONTENT OF THIS STUDY UNIT

1 THE REQUIREMENTS FOR A FORFEITURE ORDER

With regard to the requirements for a forfeiture order, you must firstly know that the court can order total or partial forfeiture. It will decide what order to make by taking into account the three factors listed in section 9 of the Divorce Act. The first question which arises in respect of the three factors is whether they are cumulative and whether they must all be present before a forfeiture order will be made. You must study the discussion of this issue at pages 131–132 of your textbook. In addition, you must study *Wijker v Wijker* in your casebook, especially the first five paragraphs of the note on pages 212–213 of your casebook. The second question in respect of the three factors is what role misconduct plays. This issue is also discussed on pages 131–132 of your textbook and in *Wijker v Wijker* (especially the fourth and sixth parts on p 213 of your casebook).

Three factors in section 9
Are they cumulative?

Role of misconduct

Undue benefit	Secondly, you must note that a forfeiture order will be granted only if one spouse will be unduly benefited in relation to the other spouse if such an order is not made. The middle paragraph on page 132 of your textbook explains what must be proved to satisfy the court that one spouse will be unduly benefited and what undue benefit means.
Justness and fairness no reason to deviate from matrimonial property system	The last paragraph on page 132 of your textbook explains that, although the court has a discretion whether or not to order forfeiture of benefits, it cannot use this discretion to deviate from the matrimonial property system selected by the parties merely because it may be just and fair to do so. This aspect is further discussed in the last three paragraphs of the note on <i>Wijker</i> on pages 213–214 in your casebook, where the decision that sight must not be lost of what the spouses' matrimonial property system entails, is explained.
Approach of court of appeal	Finally, you have to know what approach a court of appeal must follow when it hears an appeal against an order for forfeiture or against a refusal to grant an order for forfeiture. This matter is explained in <i>Wijker</i> . You should, in particular, study the fifth paragraph on page 213 of the casebook.

2 THE BENEFITS WHICH CAN BE FORFEITED

Does not lose own assets	Firstly, note that forfeiture never means that a person loses his or her own assets — it relates only to the claim he or she has to the assets of the other spouse. This is explained at the top of page 133 in your textbook.
Different views	Subsequently, on page 133 of the textbook examples are given of benefits which can be forfeited in the case of marriages in community of property and in the case of marriages out of community of property. With regard to the benefits which can be forfeited in the case of marriages out of community of property, you should also note the decision in <i>Watt v Watt</i> on pages 216–219 in your prescribed casebook. In the note on the case the different views on what are benefits which can be forfeited are explained. Also make sure that you know what was decided in <i>Persad v Persad</i> , <i>Toho v Diepmeadow City Council</i> , <i>Moremi v Moremi</i> and <i>Koza v Koza</i> and what the views of Hahlo and of Sinclair and Kaganas in this regard are.

ACTIVITY

Read the prescribed case of *Watt v Watt* on pages 216–219 of your prescribed casebook and then answer the following questions:

- (1) What are the facts of this case?
- (2) What is the legal question in this case?
- (3) What did the court decide in this case?
- (4) Discuss the negative and positive criticism on this case.

- (5) In what sense does the court's decision in this case differ from the decisions in *Persad v Persad*, *Tobo v Diepmeadow City Council*, *Moremi v Moremi* and *Koza v Koza*?

FEEDBACK

- (1) The plaintiff (husband) and the first defendant (his wife) were married out of community of property. During the existence of the marriage, the husband donated a house to his wife which he had bought with his own money. On their divorce, the husband claimed that the house was a patrimonial benefit of the marriage which had to be forfeited by her, while the wife claimed that the house was not a patrimonial benefit of the marriage.
- (2) The court had to decide whether, in terms of section 9(1) of the Divorce Act 70 of 1979, the house was a patrimonial benefit of the marriage and thus could be forfeited.
- (3) In agreement with the views of most of the Roman-Dutch writers, the court decided that the patrimonial benefits of a marriage out of community of property are stipulated on the conclusion of the marriage in the parties' antenuptial contract. The court further held that a donation made during the marriage arises from the relationship between the parties after the conclusion of the marriage and is not something that arises from the marriage itself. Since the donation of the house was made during the marriage and not on the conclusion of the parties' antenuptial contract, the court found that the house was not a patrimonial benefit of the marriage.
- (4) Hahlo is of the opinion that the case was decided incorrectly. He holds that the word "marriage" is ambiguous. It can refer to the ceremony itself, or the relationship it gives rise to. He argues that the phrase "benefits of the marriage" must be interpreted as benefits which are derived from the marriage as a continual relationship since this is more in line with the natural meaning of the words. This would mean that benefits that were acquired during the existence of the marriage (such as the house in the case under discussion) could also be forfeited. However, Sinclair and Kaganas are of the opinion that the case was decided correctly. They argue that in this connection the word "marriage" refers to the marital property regime. The implication is that only those benefits acquired in terms of the marital property regime can be forfeited.
- (5) The court's decision in this case differs from the decision in *Persad v Persad*, *Tobo v Diepmeadow City Council* and *Moremi v Moremi* in the sense that in these cases the court applied the view that the benefits in terms of a tenancy, a residential permit and a statutory lease, which were acquired in the course of the marriage, can be forfeited. Also in *Koza v Koza* the court assumed, without deciding the issue, that in a

marriage out of community of property the patrimonial benefits of the marriage are not restricted to those benefits which are conferred in the antenuptial contract.

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **Requirements for a forfeiture order**
 - (1) List the factors mentioned in section 9 of the Divorce Act.
 - (2) Must all three factors listed in section 9 of the Divorce Act be present before a forfeiture order can be made? Explain fully with reference to case law.
 - (3) What role does misconduct play in respect of forfeiture of benefits? Explain.
 - (4) What does undue benefit mean for purposes of an order for forfeiture?
 - (5) Can a court, when considering an application for forfeiture, use considerations of fairness and justness to deviate from the matrimonial property system selected by the spouses when they were married? Explain with reference to authority.
 - (6) Set out the approach which a court of appeal must follow when hearing an appeal in respect of an order for forfeiture.
 - (7) Discuss the decision of the Appellate Division in *Wijker v Wijker* in respect of forfeiture of benefits. (Please note again that the Appellate Division is now called the Supreme Court of Appeal).

- **What can be forfeited?**
 - (8) Can a spouse ever be ordered to forfeit his or her own assets?
 - (9) Give examples of benefits which can be forfeited
 - (a) in a marriage in community of property, and
 - (b) in a marriage out of community of property.

 - (10) Are the patrimonial benefits which can be forfeited in a marriage out of community of property limited to benefits conferred in the antenuptial contract? Explain with reference to case law and the views of authors.

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

Mr and Mrs Z are married out of community of property. During the course of the marriage, Mr Z donates a house, which he has bought with his own earnings to Mrs Z. Mr Z now sues Mrs Z for a divorce and brings an application that the house be regarded as a patrimonial benefit of the marriage that has to be forfeited by Mrs Z. Mrs Z, however, pleads firstly, that the house was not a patrimonial benefit of the marriage out of community of property and was therefore not subject to forfeiture and, secondly, that there had been no misconduct on her part. Fully discuss whether the court will order forfeiture of patrimonial benefits in terms of section 9 of the Divorce Act 70 of 1979.

SUMMARY

In this study unit you learned about forfeiture of patrimonial benefits. You learned in particular

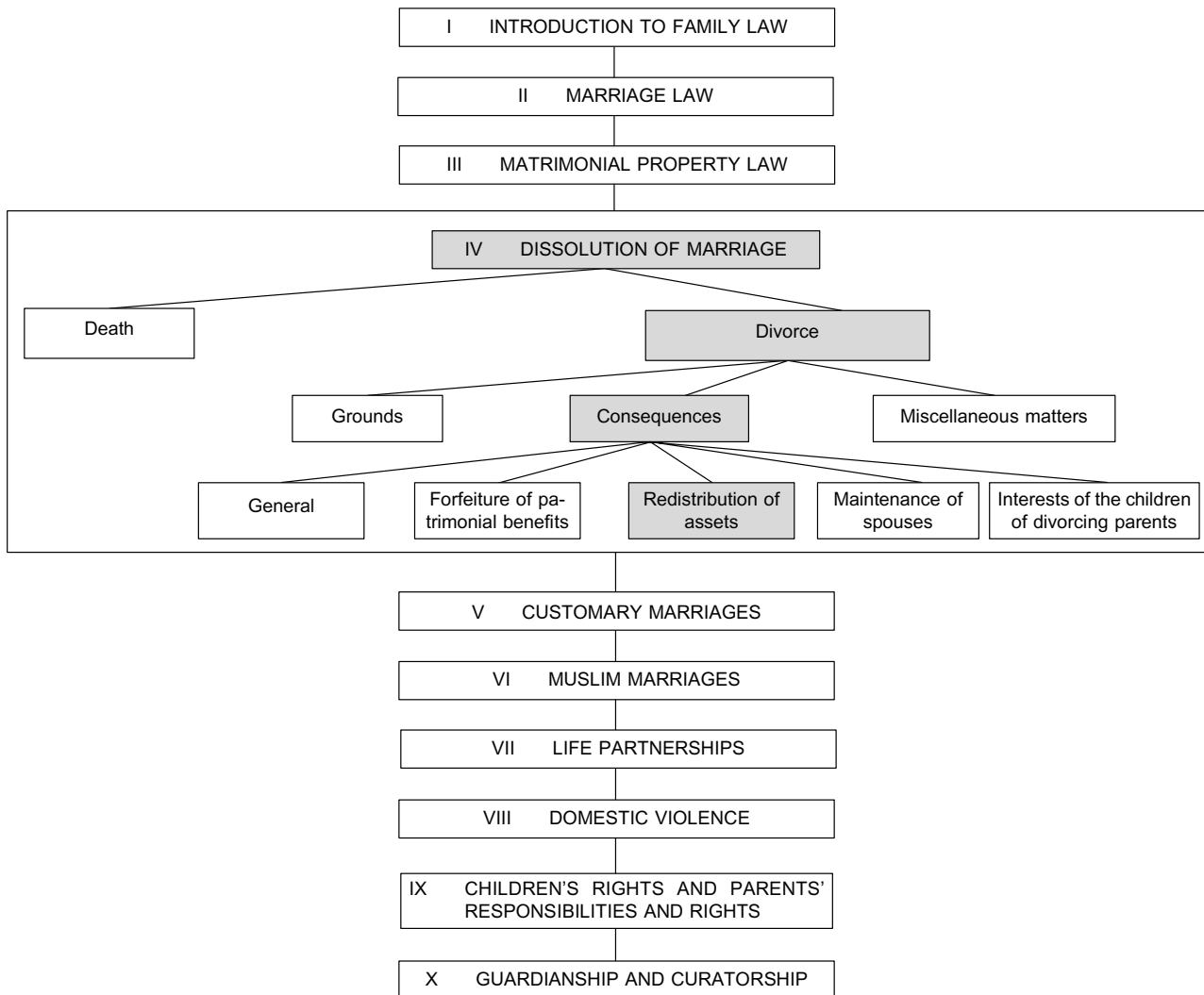
- what forfeiture means
- what the requirements for forfeiture are and how the court approaches them
- that fairness and justness cannot be used in an application for forfeiture, to deviate from the consequences of the spouses' matrimonial property system
- how a court of appeal approaches an appeal in respect of forfeiture
- what can be forfeited

In the next study unit we deal with another consequence of divorce on the patrimony of the spouses, namely redistribution of assets.

STUDY UNIT 18

Redistribution of assets

MODULE MAP



PREFACE

In the previous study unit we looked at one of the consequences of divorce, namely forfeiture of patrimonial benefits.

In this study unit we discuss redistribution of assets. This means that the court may order with regard to certain marriages under specific circumstances that one party must transfer some of his or her assets to the other party.

Because students often confuse forfeiture orders (discussed in the previous

study unit) with redistribution orders, it is vital that you study the content of the previous study unit carefully before you proceed to study this study unit.

LEARNING OUTCOMES

The purpose of this study unit is to enable you to

- (1) explain why the principle of redistribution of assets was introduced into our law
 - (2) explain what a redistribution order is
 - (3) list the **prerequisites** for the granting of a redistribution order
 - (4) list the **requirements** for the granting of a redistribution order and to discuss them briefly
 - (5) explain what the nature of the contribution to the maintenance or increase of the other spouse's estate has to be, and to discuss this aspect with reference to authority
 - (6) explain which other considerations the court can take into account in its decision whether or not to grant a redistribution order, and to explain
 - (a) how broad the interpretation by our courts of the last consideration, namely "any other factor which in the opinion of the court should be taken into account" is
 - (b) which factors have been taken into account by our courts in respect of the last consideration
 - (7) explain the interrelationship between section 7(2) and section 7(3)
 - (8) explain what the "clean break" principle is and how it can be applied in South African law
 - (9) discuss the criterion which should be applied to determine the amount to be awarded
 - (10) explain what form a redistribution order may take
-

PRESCRIBED MATTER

Read

- Prescribed textbook 134 (from the paragraph beginning with "Section 7(3) originally referred only to ...") – 136

Study

- Prescribed textbook 133–134 (up to just before the paragraph beginning with "Section 7(3) originally referred only to ...")
- Prescribed textbook 137–145

- *Beaumont v Beaumont* in your prescribed casebook 225–230
- *Kritzinger v Kritzinger* in your prescribed casebook 232–238
- *Katz v Katz* in your prescribed casebook 239–244

CONTENT OF THIS STUDY UNIT

1 THE INTRODUCTION OF REDISTRIBUTION AS A REFORMATIVE AND REMEDIAL MEASURE

As we mentioned above in study unit 12 (“The accrual system”), complete separation of property was often very prejudicial to the wife. In cases where she was occupied at home as a housewife and mother for most of her married life, and was therefore not able to accumulate an estate of her own, the financial position in which she was left on the eventual dissolution of the marriage could be most unfavourable. Although the accrual system has brought relief for spouses married after 1 November 1984, the objection still applies to marriages contracted out of community of property and excluding the accrual system, **prior** to the commencement of the Matrimonial Property Act and to marriages entered into in terms of section 22(6) of the Black Administration Act 38 of 1927 prior to the commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. You will note in your textbook on pages 133–134 that the legislature inserted sections 7(3) to 7(6) in the Divorce Act to bring a measure of relief and to counteract the injustice that could arise in these cases. In terms of these sections the court is empowered in specified circumstances to make an order that the assets or part of the assets of one spouse (usually the wealthier spouse) be transferred to the other (usually the poorer spouse).

2 THE PREREQUISITES FOR A REDISTRIBUTION ORDER

A spouse may apply for a redistribution order together with a decree of divorce only in specific circumstances. We refer to these circumstances as the prerequisites for the granting of a redistribution order. These prerequisites are set out on page 134 of your prescribed textbook. You must ensure that you know when a spouse who intends to divorce may apply to the court for a redistribution order.

Prerequisites

Prerequisite that spouses must have concluded anc prior to marriage

One of these prerequisites, namely that the spouses must have concluded an antenuptial contract (anc) prior to their marriage, is discussed in more detail on pages 134–136 of your textbook. You will note that this prerequisite has already featured in various cases where the parties entered into a marriage in terms of section 22(6) of the Black Administration Act

38 of 1927 or where they entered into a marriage abroad and complete separation of property was applicable to their marriage as a result of the operation of the law. You only need to read this discussion.

3 THE REQUIREMENTS FOR A REDISTRIBUTION ORDER

Once the prerequisites for the granting of a redistribution order have been met, the court will grant such an order only if the two requirements, which are mentioned and briefly discussed on page 137 of the textbook, have been met.

3.1 The nature of the contribution to the maintenance or increase of the other spouse's estate

Provisions of section 7(4)

Section 7(4) prescribes how the contribution to the maintenance or increase of the other spouse's estate may be made. You must ensure that you know the provisions of section 7(4) as set out on page 137 of your textbook.

“Ordinary” duties of housewife = contribution

Further you will see on page 137 of the textbook that in *Beaumont v Beaumont* the appellate division (now the supreme court of appeal) held that the wording of section 7(4) is wide enough to cover the performance of the “ordinary” duties of a housewife. You must also take note of the second-last paragraph of the note on the *Beaumont* case on page 230 in your casebook.

Contribution = positive act

The next case discussed in your textbook on pages 137–138 is *Kritzinger v Kritzinger*. In this case the appellate division stated that, normally, only a positive act constitutes a contribution. Merely to refrain from action therefore does not qualify as a contribution to the growth or maintenance of the other spouse's estate. Here you should also note the fourth paragraph of the note on the *Kritzinger* case on page 238 in your casebook.

Contribution need not be of monetary nature

Thirdly, in respect of the nature of the contribution, you must note the decision in *Katz v Katz* where the appellate division made it clear that the contribution need not be of such a nature that a monetary value can be placed upon it. You will further see in the note on the *Katz* case in your casebook on page 244 that it is not necessary for the person applying for the order to prove that his or her contribution entailed more than a contribution to his or her own maintenance.

Finally, note that the applicant need not have made a contribution to specific assets for those assets to be taken into accounts.

4 OTHER CONSIDERATIONS THE COURT TAKES INTO ACCOUNT

Considerations

The other considerations which the court takes into account, apart from the applicant's contributions, are set out in section 7(5) of the Divorce Act. These considerations are listed from (1) to (4) in your prescribed textbook on page 138. You must know what these considerations are and must not confuse them with the factors which the court must take into consideration in terms of section 7(2) of the Divorce Act in respect of the granting of a maintenance order. (The provisions of s 7(2) and maintenance orders are dealt with in the next study unit.)

Scope of "any other factor"

On page 138 of your textbook it is indicated that the last consideration that is mentioned in section 7(5), namely "any other factor which in the opinion of the court should be taken into account" is put extremely widely. You have to study the discussion of the case law on section 7(5)(d) on pages 138–139 of your textbook. You must know whether the courts will look at assets such as inheritances, legacies, donations and trust benefits which one spouse acquired when considering a redistribution order.

4.1 Misconduct

Can misconduct be taken into account?

It seems that our courts will, in terms of the last consideration ("any other factor"), also look at the spouses' conduct. In this regard you must study the section under the heading "(a) Misconduct" on pages 139–140 of the textbook. You must, however, note that in *Beaumont v Beaumont* the court held that a conservative approach to the matter of misconduct should be adopted. Only if the breakdown of the marriage resulted from the misconduct of one party only, is this a factor that has to be taken into account — especially if the misconduct is found to have been gross and prolonged. In this regard you must also note the note on *Beaumont v Beaumont* (third-last par on p 230) as well as the note on the *Kritzinger* case (p 238) in your casebook.

4.2 The interrelationship between sections 7(2) and 7(3), and the clean-break principle

Must fact that maintenance order will be issued, be considered?

It also appears from the *Beaumont* case (see the third par on p 230 of the casebook and p 140 of your textbook) that the court may not disregard the possibility of issuing a maintenance order when considering redistribution. The court must decide whether equity and justice would best be served if only a maintenance order, or only an order for redistribution, or both were issued. Therefore there is an interrelationship between a maintenance order and a redistribution order.

In *Katz v Katz* the interrelationship between the two subsections was also mentioned.

Clean-break principle You should also know what the “clean break” principle is. This principle is referred to on page 140 of your textbook and in the note on the *Beaumont* case in your casebook (the fourth par on p 230). You must ensure that you know what it means, and how and in which circumstances it can be applied in South African law.

In *Esterhuizen*’s case, which is discussed in detail on pages 141–142 of the textbook, the court even held that section 7(3) of the Divorce Act actually serves two distinct purposes, one being compensation of a spouse for past contributions rendered to the maintenance or increase of the other spouse’s estate, and another being provision for the applicant spouse’s maintenance needs. This case is, however, justly criticised by the authors of your textbook on pages 141–142. Make sure that you know what Cronjé and Heaton’s arguments against this decision are. This criticism also applies to the *Jordaan* decision (discussed above under “scope of any other factor”) in which the court solely took Mrs Jordaan’s **maintenance needs** into consideration when determining the amount of money Mr Jordaan had to pay her in terms of the **redistribution order**. In assessing the amount, the court looked only at how much money Mrs Jordaan would need for future **maintenance** whilst maintaining the same standard of living as during the marriage.

When you study the criticism against the *Esterhuizen* case (which, as mentioned above, also applies to the *Jordaan* case), you should firstly take note of the decision in *Zwiegelaar v Zwiegelaar* which is dealt with in paragraph 2.4 of the next study unit. Secondly, you should keep in mind that, should the supreme court of appeal later decide that it is acceptable to grant a lump-sum maintenance order in terms of section 7(2) of the Divorce Act, the criticism will fall away.

5 THE CRITERION FOR ESTABLISHING THE EXTENT OF THE REDISTRIBUTION

This matter is discussed in your prescribed textbook on pages 142–145 and in the note on the *Beaumont* case in your casebook (pp 229–230).

One-third “rule” You will see in your textbook on page 142 that the so-called one-third “rule” used to be accepted as a starting point in English law. You must ensure that you know what this “rule” entailed. Note in particular that in *Beaumont v Beaumont* the appellate division declined to accept the one-third starting point or, for that matter, any starting point. When a court has to decide what amount is to be transferred, the court — according to this decision of the appellate division — has to make an assessment of what is **just**, having regard to the factors mentioned specifically in the Act and whatever else the court deems relevant.

Principle of equal division Also note that currently the principle of an equal division applies in England. On pages 143–144 of your textbook and on pages 229–230 of the note on the *Beaumont* case you will notice that *Childs v Childs* and

Bezuidenhout v Bezuidenhout referred to this development in English law, and followed it. However, as the supreme court of appeal in the meantime rejected the *Bezuidenhout* decision in *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA), you need only read the discussion of this case on pages 143–144 of your textbook, and in the note on the *Beaumont* case in your casebook. Take note that the supreme court of appeal decided that though comparative legal study is of great value, English cases should be approached with circumspection. The court made it clear that our courts are not entitled as a matter of course to divide the joint net assets of the parties equally, regardless of the parties' respective unequal contributions. The *Beaumont* decision was confirmed, and it was decided that the courts' discretion to redistribute assets upon divorce should not be fettered by any guidelines. According to the court the greater role that Mr Bezuidenhout played in the success of the parties' business was an important factor that had to be taken into account. The court subsequently ordered a 60:40 division of the parties' joint assets. In a subsequent case, *Kirkland v Kirland* [2005] 3 All SA 353 (C), the court held that the principle of equality was however not rejected in the latter *Bezuidenhout* case, but that the supreme court of appeal merely found that this principle did not fit the facts of that particular case.

Equal distribution
between spouses not
necessary

In the textbook it is further explained that marriage is not normally a partnership in the legal sense of the word and that, consequently, it is unnecessary to divide the assets equally between the spouses when they divorce. In this regard you must also study the second paragraph of the note on *Kritzinger v Kritzinger* on page 238 in your casebook.

Distribution ≠
awarding of da-
mages

It is also explained in the textbook that a redistribution order should not be used in such a way that damages are awarded to a spouse. This aspect is also referred to in the last paragraph of the note on *Kritzinger v Kritzinger* on page 238 in your casebook.

6 THE FORM A REDISTRIBUTION ORDER MAY TAKE

The form that a redistribution order can take is discussed on page 145 of your textbook. You will see that the court has a wide discretion in this regard too, although the court may not make a redistribution order of its own accord. You should note that the court may impose such conditions as it deems just for the satisfaction of its order. Furthermore, the court is not bound to order the transfer of a specific asset or assets — it may order that a sum of money be transferred in lieu of the asset or assets.

ACTIVITY

You came across the case of *Beaumont v Beaumont* several times in this study unit. Read this prescribed case on pages 225–230 of your casebook and then once again go back and work through those sections of the study unit applicable to this case. Now summarise the five most important aspects of this decision.

In the first place, the court referred to the one-third rule in terms of which the court awards one-third of the total value of the spouses' assets to the spouse with the smallest estate on divorce. However, the court expressly rejected the suggestion that there should be guidelines like the one-third rule according to which the court should exercise its discretion in terms of section 7(3). According to this case, the court, in exercising this discretion, should make a judgment which is fair in the light of all the factors which are specifically mentioned and all the considerations which the court regards as relevant.

In the second place, it appears from the case that the court cannot disregard the possibility of making a maintenance order when considering a redistribution. The court must decide whether fairness and justice will best be served if only a maintenance order or only a redistribution order, or both are granted. Therefore, there is an interrelationship between a redistribution order and a maintenance order.

In the third place, the court referred to the "clean break" principle. According to this principle, there should be a "clean break" between the divorcing parties if one of them is wealthy enough to enable the court to make an order which will put the poorer spouse in the financial position to maintain himself or herself. The court rightly indicated that the "clean break" principle is not foreign to our law and that it is something to be strived for if the circumstances permit it.

In the fourth place, the court decided that conduct can be taken into account in determining the redistribution of assets on divorce. However, the court further held that the entire matter of conduct had to be approached very carefully. Only where the breakdown of the marriage was solely as a result of misbehaviour on the part of one of the parties could it be a consideration — especially if it were found that the conduct had been gross and prolonged.

In the fifth place, the court decided that section 7(4) can be interpreted in such a way that any contribution made by a spouse during the existence of the marriage is sufficient to be considered as a contribution in terms of the section. The ordinary duties of a housewife will therefore also qualify as a contribution.

ACTIVITY

Draw a distinction between forfeiture orders (which were discussed in the previous study unit) and redistribution orders (which are discussed in the present study unit). You should cover the following aspects when making the distinction:

- (1) the order's source of law
- (2) its area of application
- (3) the meaning of the order
- (4) the requirements for making the order

FEEDBACK

	FORFEITURE ORDERS	REDISTRIBUTION ORDERS
Source of law	Section 9 of the Divorce Act	Sections 7(3)–(6) of the Divorce Act
Area of application	Marriages in community of property as well as marriages out of community of property with or without the accrual system irrespective of when the marriage was concluded	Marriages out of community of property without the accrual system concluded before 1 November 1984 or before the coming into operation of the Marriage and Matrimonial Property Law Amendment Act (on 2 December 1988) and the spouses did not enter into an agreement concerning the division of their assets
Meaning	One spouse forfeits his or her claim against the other	One spouse has a claim against the other
Requirements	<ol style="list-style-type: none"> 1. Consideration of three factors in section 9 2. One party will be unduly benefited in relation to the other in the absence of an order. 	<ol style="list-style-type: none"> 1. Direct or indirect contribution to the growth or maintenance of the other spouse's estate. 2. It is equitable and just to make the order on the basis of the contribution.

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- Reason for the introduction of redistribution orders
 - (1) What was the reason for the insertion of sections 7(3) to (6) in the Divorce Act 70 of 1979?

- **Prerequisites for a redistribution order**
 - (2) When may the courts exercise their power to make an order that the assets, or part of the assets, of one spouse be transferred to the other?
- **Requirements for a redistribution order**
 - (3) Which two requirements must be met in terms of section 7(4) before the court may grant a redistribution order?
- **Nature of the contribution**
 - (4) How can a contribution be made for the purpose of a redistribution order?
 - (5) Is the wording of section 7(4) wide enough to cover the performance of the “ordinary” duties of a housewife? Refer to case law.
 - (6) Will a mere omission be sufficient to qualify as a contribution to the growth or maintenance of the other spouse’s estate? Refer to authority.
 - (7) Is it a requirement that the contribution must be of such a nature that a monetary value can be placed upon it? Refer to authority.
- **Other considerations the court takes into account**
 - (8) Which other considerations does the court take into account in terms of section 7(5)?
 - (9) Must an inheritance or donation which accrues to one spouse during the subsistence of the marriage be taken into consideration in terms of section 7(5)(d) for purposes of a redistribution order? Discuss with reference to authority.
 - (10) Will the court take the parties’ misconduct into account when considering a redistribution order? Refer to authority.
 - (11) Is there a relationship between section 7(2) and section 7(3) of the Divorce Act 70 of 1979? Explain with reference to the relevant court cases.
 - (12) What is the “clean break” principle?
 - (13) Under what circumstances will the “clean break” principle be applied in our law?
 - (14) Which order can the court make to achieve the “clean break” principle in our law?
 - (15) In *Esterhuizen v Esterhuizen* the court held that section 7(3) of the Divorce Act can serve two distinct purposes. Indicate which two purposes are referred to in this case. Also indicate why it is submitted that the decision in this case is wrong.
- **Criterion to establish what amount is to be transferred to the applicant**
 - (16) Do our courts use any guidelines to establish what amount is to be transferred to the applicant?
 - (17) Is it necessary to divide the assets equally between the spouses on divorce? Explain briefly.
 - (18) May a redistribution order be used to award damages to a spouse?

- **Form of a redistribution order**
 - (19) May the court make a redistribution order of its own accord?
 - (20) Which conditions may the court impose for satisfaction of its order?
 - (21) May the court order that a sum of money be transferred in lieu of an asset or assets?
 - (22) Can a claim and a counterclaim for the redistribution of assets be considered together? Give a brief reason for your answer.

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

Mr and Mrs X were married in 1970 with the old standard form antenuptial contract (ie out of community of property and of profit and loss). At the time of the wedding the spouses had no assets. Since they were married Mrs X has been working as a medical assistant to a doctor. She has always deposited her salary in Mr X's bank account. Mr X now wants to divorce Mrs X. Mrs X's estate is at present worth R10 000 while Mr X's estate is worth R500 000. Mr X offers Mrs X R30 000 in settlement of any claims she may possibly have against him. Mrs X asks you whether she should accept Mr X's offer. Advise her with reference to case law and sections 7(3)–(6) of the Divorce Act 70 of 1979.

SUMMARY

In this study unit you learned

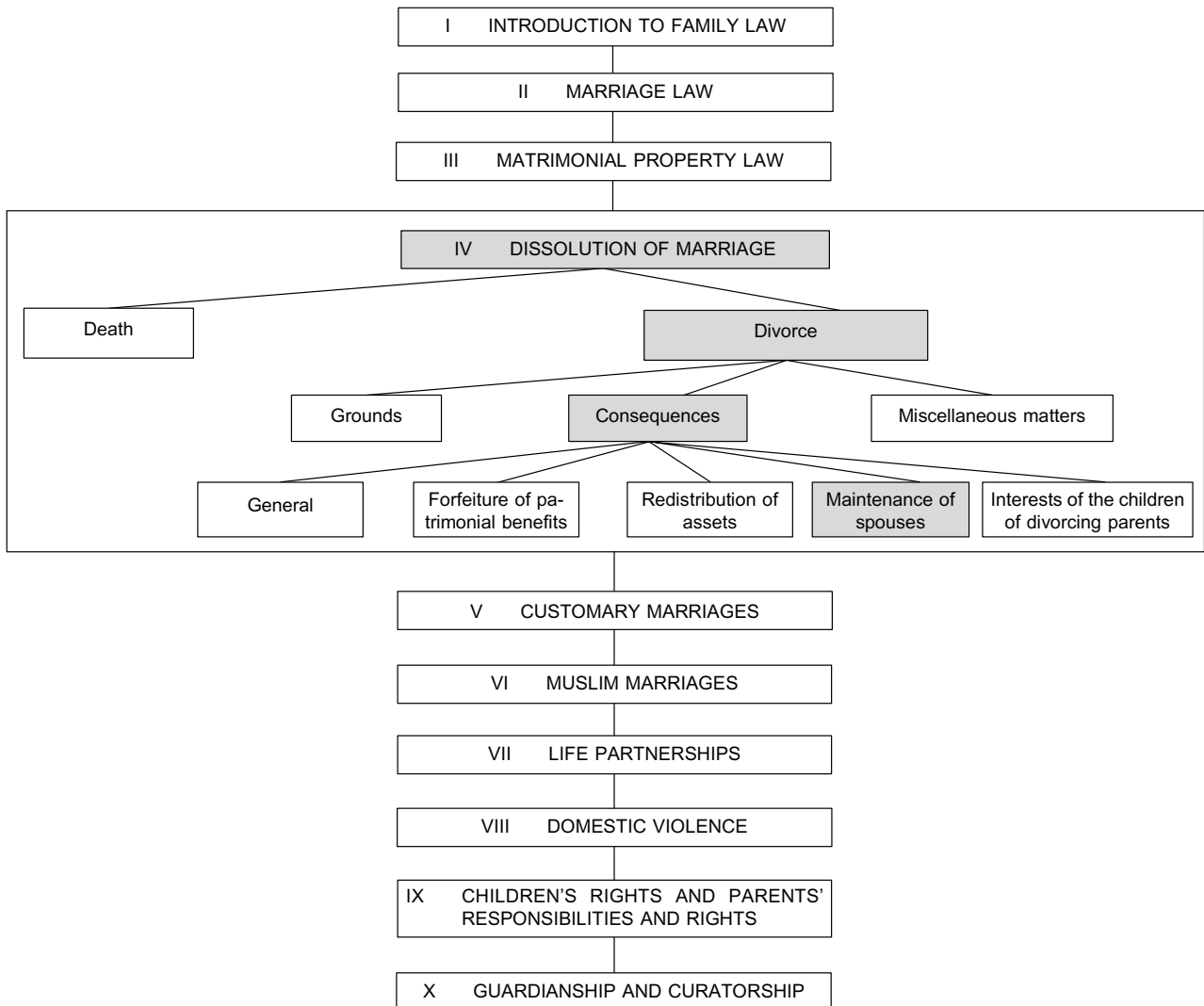
- why redistribution orders were introduced in our law
- what a redistribution order is
- under which circumstances a spouse can apply to court for a redistribution order
- when a redistribution order will be granted
- how a redistribution order can be granted
- which considerations the court takes into account when considering a redistribution order
- which criterion the court uses to establish what amount is to be transferred to the applicant
- what form a redistribution order can take

In the next study unit we shall look at the circumstances in which an order for maintenance between spouses should be granted at divorce.

STUDY UNIT 19

Maintenance of the spouses

MODULE MAP



PREFACE

In this study unit we discuss the maintenance of a spouse after divorce. In the previous study unit, which dealt with redistribution of assets, it was explained that there is an interrelationship between redistribution of assets and maintenance. It is therefore very important that you should know about and understand the redistribution of assets before proceeding to study the present study unit. In this study unit we now look at maintenance orders in terms of section 7(2) of the Divorce Act 70 of 1979, and the rescission, suspension or variation and termination of maintenance orders.

LEARNING OUTCOMES

The purpose of this study unit is to enable you to

- (1) distinguish between the rules applicable when spouses reach an agreement about post-divorce maintenance and the rules applicable when no such agreement is reached
- (2) explain whether a maintenance order can be made in favour of an ex-spouse after divorce
- (3) recognise that a maintenance order can be made in favour of a husband or a wife
- (4) list the factors which the court must take into consideration in terms of section 7(2) of the Divorce Act 70 of 1979 to arrive at a just maintenance order
- (5) explain whether some of the factors set out in section 7(2) carry more weight than others
- (6) discuss the issue whether the court must effect financial equality between the spouses in making its maintenance order
- (7) explain the role that the spouses' conduct plays in influencing the maintenance award
- (8) discuss whether, after divorce, spouses are entitled to expect the same standard of living which they enjoyed during the subsistence of the marriage
- (9) explain in detail whether maintenance will be awarded for life
- (10) explain what rehabilitative maintenance means
- (11) explain if maintenance may be awarded in the form of a lump sum
- (12) explain what nominal or token maintenance is and why it is sometimes awarded
- (13) explain that section 8 of the Divorce Act governs rescission, suspension and variation of maintenance orders in the High Court but that the maintenance court can also vary, rescind or suspend a maintenance order made upon divorce, irrespective of whether it was made in terms of section 7(1) or 7(2) of the Divorce Act
- (14) explain what would be "sufficient reason" for purposes of section 8 of the Divorce Act
- (15) explain whether it is necessary to prove a change in circumstances before a variation of a maintenance order can be obtained
- (16) explain whether financial inequality is a ground for varying a maintenance order
- (17) explain whether the court will vary a maintenance order on the ground of the applicant's voluntary undertaking of extra responsibilities
- (18) explain what a *dum casta* clause is
- (19) explain whether inflation on its own constitutes sufficient reason for variation of a maintenance order

(20) explain whether the fraudulent non-disclosure of information is sufficient reason for the variation, suspension or rescission of a maintenance order

(21) discuss the termination of maintenance orders

PRESCRIBED MATTER

Read

- Prescribed textbook 153–155 “13.3.2 Waiver of the right to claim rescission, suspension or variation of a maintenance order”

Study

- Prescribed textbook 147–153 (up to just before “13.3.2 Waiver of the right to claim rescission, suspension or variation of a maintenance order”), 155–156 “13.4 Termination of a maintenance order”
- *Kroon v Kroon* in your prescribed casebook 265–270
- *Grasso v Grasso* in your prescribed casebook 271–276
- *Pommerel v Pommerel* in your prescribed casebook 276–279

CONTENT OF THIS STUDY UNIT

1 GENERAL

The discussion of post-divorce maintenance starts with a distinction between the cases where the spouses reach an agreement about division of their assets and maintenance and those where the spouses reach no agreement. Your textbook explains on page 147 that section 7(1) of the Divorce Act governs those cases where the spouses reach an agreement. Section 7(2) of the Divorce Act regulates those cases where the spouses fail to reach an agreement about maintenance.

2 A MAINTENANCE ORDER IN TERMS OF SECTION 7(2) OF THE DIVORCE ACT 70 OF 1979

2.1 General

On page 147 of your textbook it is explained that section 7(2) of the Divorce Act empowers the court to make an order it finds just in respect of

the payment of maintenance to one of the spouses (husband or wife) for any period of time until the death or remarriage of that spouse. Also note that a maintenance order in favour of a spouse can be granted only upon divorce, and not at any later stage.

2.2 The factors the court must take into account

Factors The factors the court takes into account when considering a maintenance order are listed on pages 147–148 in your textbook, from (1)–(9). Carefully study this list of factors. The question whether some of the

Weight attached to factors factors in section 7(2) are more important than others is answered on page 148 of the textbook. Here, reference is made to the decisions in *Swart v Swart* and *Grasso v Grasso*. Note that from these cases it appears that one factor is not always more important than another — the circumstances and facts of each case will determine how much weight is to be attached to each factor.

Maintenance not intended to effect financial equality Section 7(2) of the Divorce Act provides that the court must make an order which it deems just. From *Reid v Reid* it appears that this does not mean that the court must effect financial equality between the parties on divorce. This aspect is also explained on page 148 of your textbook.

Role of fault Another aspect discussed in the middle of page 148 in your textbook is that of the effect of the spouses' conduct on the maintenance award. You will see that the decisions in *Swart v Swart* and *Grasso v Grasso* are also relevant here.

Same standard of living Another issue which arises in maintenance disputes on divorce is whether, after divorce, spouses can expect to maintain the same standard of living they maintained during their marriage. This question is discussed on pages 148–149 of your textbook and in the *Pommerehne* and *Grasso* cases in your casebook. Normally, the living standards of the poorer party (usually the wife) will decline after marriage but, if the wealthier spouse can afford to pay enough maintenance to maintain the standard of living the spouses enjoyed while they were still married, he or she may be compelled to do so — as happened in the *Grasso* case.

2.3 The move away from permanent maintenance

Maintenance for life and duty to work Note that your textbook refers to the allegation that women nowadays can no longer rely on marriage to provide them with maintenance for life. It is therefore expected of wives to go out to work after divorce and support themselves. This issue is very important and you must study the discussion of it on pages 149–150 of your textbook and your prescribed cases *Kroon v*

Rehabilitative main-
tenance *Kroon, Grasso v Grasso* and *Pommerel v Pommerel* in your casebook on pages 265–279 very carefully. The discussion also explains what rehabilitative maintenance is and when it will be awarded.

2.4 Lump-sum maintenance

On page 150 in your textbook you will see that in several cases it was decided that our courts cannot issue orders that maintenance be paid as a lump sum. Make sure that you know on which arguments these decisions were based, and why some of these arguments no longer apply today. Particularly note the discussion of *Zwiegelaar v Zwiegelaar* on pages 150–151 in your textbook and the possibility that maintenance may be paid as a single lump sum in the future.

2.5 Token maintenance

Since a maintenance order cannot be made in favour of a spouse after the marriage has been terminated by divorce, the courts sometimes award token maintenance to a spouse who does not really need maintenance at the time of the divorce, but who may need maintenance in the future. When that person later starts needing maintenance, the token maintenance can be increased to provide real maintenance. On page 151 your textbook explains this and also explains what token or nominal maintenance is.

ACTIVITY

Mr and Mrs Kahn got married in 1980, after qualifying as pharmacists. From the beginning of the marriage Mrs Kahn never worked outside the home, as she had to take care of the household and the children born of the marriage. Mr Kahn, who has been working as a pharmacist at a big hospital since the beginning of the marriage, recently discovered that he suffers from an incurable disease which in 10 years' time will render him unable to work. Mr and Mrs Kahn now wish to get divorced.

- (1) Mrs Kahn realises that because of her qualifications she will not be entitled to permanent maintenance. However, she wishes to know from you whether she will be entitled to any other form of maintenance. Fully advise her on this matter, with reference to authority.
- (2) Mr Kahn is concerned about the fact that he will not be able to work in 10 years' time and wishes to know from you whether he will be entitled to institute a claim for maintenance against Mrs Kahn in 10 years' time. Fully advise him on this matter.

- (1) Mrs Kahn will probably be entitled to rehabilitative maintenance.

In *Kroon v Kroon* it was held that our courts will consider a rehabilitative maintenance order if it is likely that a party can be trained or retrained for a job, occupation or profession and will be able to provide her own support. Such rehabilitative maintenance will support the party it was awarded to for a period of time, which will enable him or her to be trained or retrained.

In *Pommerel v Pommerel* it was held that the rule that maintenance will not be awarded to a wife who can support herself is not “a hard and fast principle of our law applicable to all cases”. The court must in each case consider the possibility that a spouse who is not currently working may be able to work — that is, the notional employability of the spouse must be considered.

In *V v V*, for example, a wife who was capable of earning her own living was awarded maintenance only for one year, as the court was of the view that that was long enough to enable her to establish herself in her career.

- (2) Mr Kahn will not be entitled to institute a claim for maintenance against Mrs Kahn in 10 years’ time because a maintenance order is coupled with a decree of divorce.

Because Mr Kahn will need maintenance only in 10 years’ time, he must request a token maintenance order against Mrs Kahn. An order for token maintenance is issued if, at the time of issuing the decree of divorce, there is no reason for the granting of maintenance, but it is anticipated that one of the spouses may in the future need maintenance. In terms of such an award, a small monthly amount of R1 or R5 is awarded. In 10 years’ time, Mr Kahn may then apply for the token maintenance to be changed to true maintenance. Relevant cases that could also be discussed (depending on the mark allocation of the question) are *Nel v Nel*, *Portinho v Portinho* and *Qoza v Qoza*.

Mr Kahn is entitled to request a maintenance order (a token maintenance order, in this case), as section 7(2) of the Divorce Act 70 of 1979 refers to “parties”, and not to a “husband and wife”.

3 THE RESCISSION, SUSPENSION OR VARIATION OF MAINTENANCE ORDERS

The discussion of rescission, suspension and variation of maintenance orders starts on page 151 of your textbook and runs to page 155. You, however, only need to read “13.3.2 Waiver of the right to claim rescission, suspension or variation of a maintenance order”.

Section 8 of Divorce Act — high court
Maintenance court

Firstly, make sure that you know that section 8 of the Divorce Act governs rescission, suspension and variation of maintenance orders by the high court. Note further that orders for maintenance which are made by the high court upon divorce can also be varied by a maintenance court, regardless of whether the maintenance order was issued in terms of section 7(1) or section 7(2) of the Divorce Act. However, there must be sufficient reason for the rescission, suspension or variation of the maintenance order.

3.1 The meaning of “sufficient reason”

Expression not definable

On page 152 of the textbook you will see that the term “sufficient reason” is not definable, and that the question whether sufficient reason is present will depend on the facts of each case.

Change in circumstances

A question which often arises, is whether there must be a substantial change in the parties’ circumstances before application can be made for rescission, variation or suspension of a maintenance order in terms of section 8 of the Divorce Act. On page 152 of your textbook it is explained that although, in terms of the decision in *Havenga v Havenga*, changed circumstances are not a prerequisite, there will normally be a change in circumstances. You must study the discussion of *Havenga* in your textbook.

Financial equality

In the third and fourth paragraphs on page 152 your textbook looks at the issue whether a maintenance order will be varied merely because one party is dissatisfied with it or because the order leads to financial inequality between the parties. First, reference is made to *Sparks v Sparks* very briefly and then *Reid v Reid* is discussed in detail. In the *Reid* case it was held that a maintenance order need not effect financial equality. Furthermore, it was held in *Reid* that if a party agrees to an unjust settlement in respect of maintenance on divorce, he or she cannot apply for variation purely on the ground of this inequity. Only in special circumstances will the court permit a person who applies for variation to question the justness of the existing maintenance order. It is pointed out that if an existing maintenance order has resulted in financial inequality between the parties, that inequality should continue. You must bear in mind, however, that if the party who is worse off proves that there is sufficient reason for a change, the maintenance order will be varied. However, the mere fact that there is financial inequality between the parties will not, in terms of the *Reid* case, be “sufficient reason”.

Voluntary undertaking of extra responsibilities

The courts normally refuse to allow variation of a maintenance order if the reason why a person needs more maintenance or wants to pay less maintenance is that he or she has voluntarily undertaken extra financial responsibilities, for example by purchasing an expensive item on credit or by remarrying. This rule is explained in the paragraph which runs from page 152 to page 153 of your textbook.

Also, on page 153 of the textbook you will see that the mere fact that the

<i>Dum casta</i> clause	party in whose favour the maintenance order operates lives with another person does not constitute sufficient reason for rescission of the maintenance order, except where a <i>dum casta</i> clause is included in the maintenance order. Make sure that you know what the tenor of such a clause is.
Inflation	Inflation and the accompanying depreciation of money is often relied on by a person who claims that he or she needs more maintenance. The courts are not consistent in their approach to whether inflation on its own constitutes sufficient reason for variation of a maintenance order. The weight of case law seems to favour the view that inflation is merely one of the factors to be considered and is not sufficient on its own. This point is explained in the first paragraph on page 152 of your textbook.
Fraudulent non-disclosure of information	Lastly, on page 153 of the textbook it is indicated under which circumstances the fraudulent non-disclosure of information will constitute sufficient reason for variation or rescission. Make sure that you understand this discussion.

3.2 Waiver of the right to claim rescission, suspension or variation of a maintenance order

You only have to read the discussion of this matter on pages 153–155 of the textbook. All you have to know is that one or both of the parties may waive the right to claim an increase or a decrease in maintenance, but that the court will not easily find that such a waiver has taken place.

4 TERMINATION OF A MAINTENANCE ORDER

The discussion of post-divorce maintenance ends with an explanation (on pp 155–156 of your textbook) of how maintenance orders come to an end. Here you have to distinguish between orders made in terms of section 7(1) of the Divorce Act, and those made in terms of section 7(2) of the Act.

4.1 An order in terms of section 7(1) of the Divorce Act 70 of 1979

If the maintenance order was made in terms of section 7(1) it comes to an end on the date or upon the occurrence of the event stipulated in the agreement between the spouses. Whether the duty to maintain continues after the death of the party who has to pay maintenance, will also depend on what is stipulated in the agreement. If the agreement is unclear the courts will presume that the spouses wanted the duty to continue after the death of the party who has to pay maintenance. Note also that the question whether the duty to maintain continues after the remarriage of the party who is entitled to maintenance has not yet been finally decided.

4.2 An order in terms of section 7(2) of the Divorce Act 70 of 1979.

Your textbook explains on pages 155–156 that an order made in terms of section 7(2) comes to an end

- on the date stipulated in the order, or
- on the death of the party entitled to maintenance, or
- on the remarriage of the party entitled to maintenance, or
- in terms of *Hodges v Coubrough*, on the death of the party who has to pay maintenance (note, however, also the conflicting decision in *Copelowitz v Copelowitz* which is in a sense confirmed by the decision of the supreme court of appeal in *Santam Bpk v Henery*), or
- on rescission of the order by the court

ACTIVITY

Complete the second column in the table below by filling in the correct case name for each legal principle.

PRINCIPLE	CASE NAME
(1) If the husband can afford to have his ex-wife not go out to work after divorce and where she did not work prior to divorce, and particularly where his misconduct has caused the breakdown of the marriage, he should maintain her without it being necessary for her to take up employment.	(1)
(2) For purposes of a decision on whether rehabilitative maintenance should be awarded to a spouse after divorce no notional earning capacity will be attributed to a spouse who does not have the necessary skills that will enable him or her to be trained or retrained for a job, occupation or profession after divorce.	(2)
(3) Some of the factors which the court will take into account in order to decide whether a wife's decision not to work after divorce is reasonable, are the wife's age, her state of health, qualification, when she was last employed, the length of the marriage, the standard of living of the parties during marriage, her commitment to the care of young children, and others.	(3)

PRINCIPLE	CASE NAME
(4) The approach which the court followed in this case in relation to the role the spouses' conduct played in the awarding of maintenance, was the following: the court had to decide which is fair in all the circumstances of the case whereby the conduct of the parties can be taken into account without reading into it any restriction at the expense of fairness.	(4)
(5) Changed circumstances are not a prerequisite for the changing of a maintenance order after divorce.	(5)
(6) A maintenance order made in terms of section 7(2) of the Divorce Act 70 of 1979 comes to an end upon the death of the party who has to pay maintenance.	(6)
(7) A maintenance order made in terms of section 7(2) of the Divorce Act 70 of 1979 can last until after the death of the party who has to pay maintenance.	(7)

FEEDBACK

The correct case names for each legal principle are the following:

- (1) *Grasso v Grasso*
 - (2) *Kroon v Kroon*
 - (3) *Pommerel v Pommerel*
 - (4) *Swart v Swart*
 - (5) *Havenga v Havenga*
 - (6) *Hodges v Coubrough*
 - (7) *Copelowitz v Copelowitz*
-

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **General**

- (1) When do sections 7(1) and 7(2) of the Divorce Act 70 of 1979 respectively apply?

- **Maintenance orders in terms of section 7(2)**
 - (2) Can a maintenance order be made in favour of an ex-spouse after divorce?
 - (3) Can a wife be ordered to pay maintenance for her husband after their divorce? Explain briefly.
 - (4) Which factors must be taken into consideration by the court in order to determine whether and for what amount an order for maintenance should be granted?
 - (5) Are some of the factors listed in section 7(2) of the Divorce Act 70 of 1979 more important than others? Explain fully.
 - (6) Must the court effect financial equality between the spouses by means of its order for maintenance? Explain.
 - (7) Does a spouse's misconduct play a role when the court decides whether to award maintenance to him or her, and how much to award? Explain fully. Refer to case law.
 - (8) Can spouses expect to maintain the standard of living after divorce which they maintained during marriage? Explain with reference to case law.
 - (9) Discuss the decision in *Grasso v Grasso*.
 - (10) Can a woman today rely merely on marriage to provide her with maintenance for life? Explain fully. Refer to case law.
 - (11) What did the court decide in *Pommerel v Pommerel* about a wife's duty to work after divorce?
 - (12) What does "rehabilitative maintenance" mean?
 - (13) What is the position regarding a court's power to make a lump-sum maintenance award upon divorce? Discuss fully with reference to authority.
 - (14) What is nominal or token maintenance?
- **Rescission, suspension and variation of maintenance orders**
 - (15) Can a maintenance court vary a maintenance order made by the High Court upon divorce?
 - (16) What does "sufficient reason" mean for purposes of section 8 of the Divorce Act?
 - (17) Must the circumstances prevailing at the time the maintenance order was granted have changed substantially before application can be made for rescission, variation or suspension of the order? Give authority for your answer.
 - (18) Is financial inequality on its own sufficient reason for varying a maintenance order? Explain.
 - (19) Is remarriage sufficient reason for variation of a maintenance order? Explain.
 - (20) What is a *dum casta* clause?
 - (21) Does inflation and the concomitant depreciation of money on its own constitute sufficient reason to justify an increase in maintenance? Discuss with reference to authority.
 - (22) Under which circumstances will the fraudulent non-disclosure of information constitute sufficient reason for variation or rescission?

- **Waiver of the right to claim rescission, suspension or variation of a maintenance order**
 - (23) May a spouse renounce his or her right to apply for an increase or a decrease in maintenance after divorce? Answer only “Yes” or “No”.
- **Termination of maintenance orders**
 - (24) What determines when a maintenance order made in terms of section 7(1) of the Divorce Act comes to an end?
 - (25) When do maintenance orders made in terms of section 7(2) of the Divorce Act come to an end?
 - (26) Does a maintenance obligation contained in an order made in terms of section 7(2) continue after the death of the party who has to pay maintenance? Explain briefly with reference to the conflicting court cases in this regard.

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

Mr and Mrs Khumalo married out of community without the accrual system in 1994. They now intend to get divorced. They want an amicable divorce and decide to arrange all the consequences of their divorce in an agreement. They agree, in writing, that Mr Khumalo will keep all his assets and Mrs Khumalo will keep all her assets and that Mr Khumalo will pay R500 maintenance per month for Mrs Khumalo until her death or remarriage. The spouses have no children. Does the court which grants the divorce have the power to incorporate the spouses’ agreement in its divorce order? Substantiate your answer.

SUMMARY

This study unit dealt with post-divorce maintenance between spouses and it

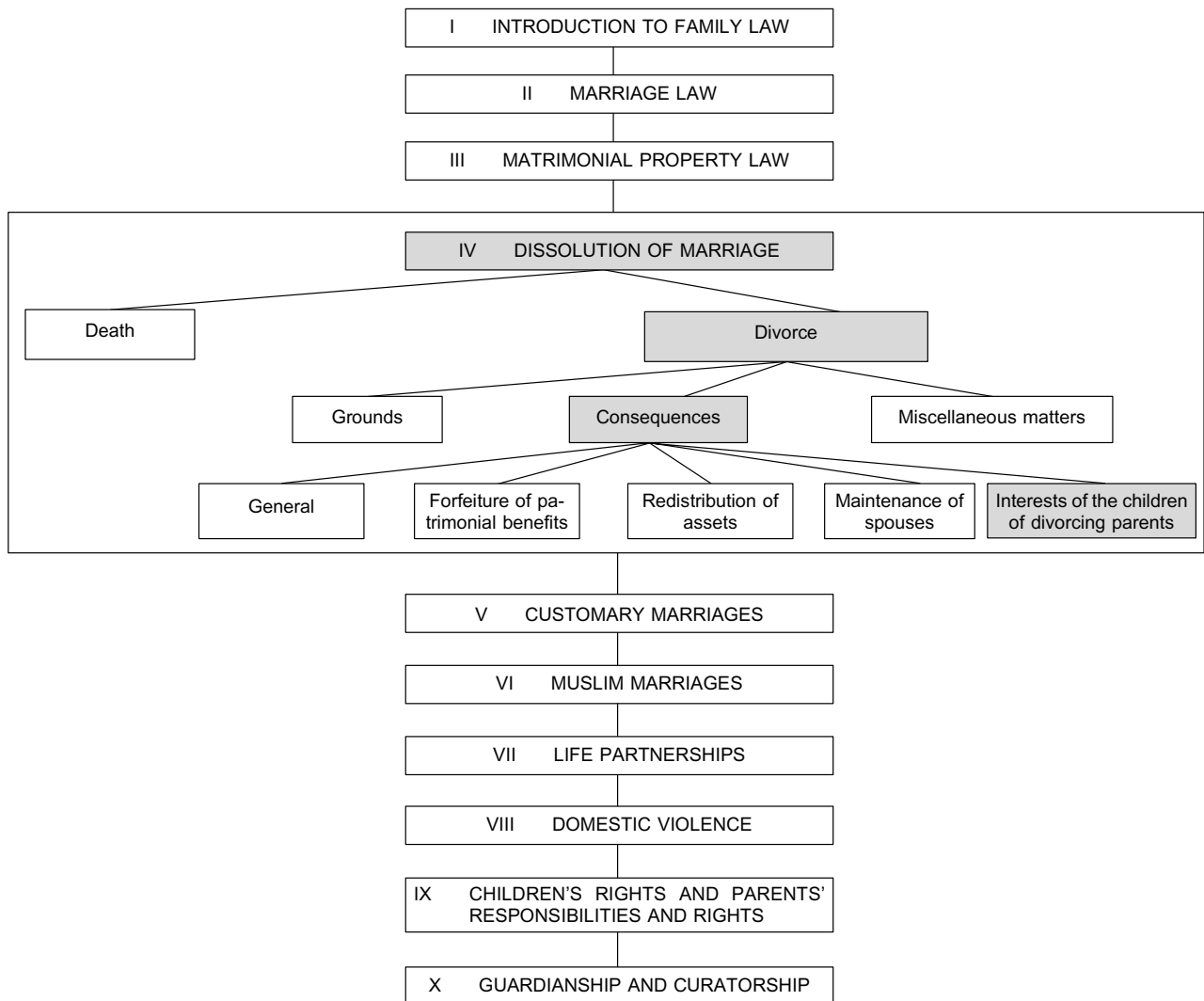
- explained the rules in respect of the granting of maintenance orders to spouses upon divorce
- explained variation, rescission and suspension of maintenance orders
- dealt with termination of maintenance orders made upon divorce

In the next study unit we shall discuss the protection of the interests of the children of a divorcing couple.

STUDY UNIT 20

Interests of the children of divorcing parents

MODULE MAP



PREFACE

In the three previous study units we looked at the consequences of divorce in respect of the **spouses**. You studied, respectively,

- forfeiture of patrimonial benefits (study unit 17)
- redistribution of assets (study unit 18)
- maintenance of the spouses (study unit 19)

In this study unit we look at the consequences of divorce in respect of the interests of the **children**.

LEARNING OUTCOMES

After studying this study unit you should be able to

- (1) explain what the criterion of “the best interests of the child” entails and how much value the courts attach to the criterion
 - (2) set out in which respects section 6 of the Divorce Act 70 of 1979 regulates the interests of children at divorce
 - (3) explain how the Mediation in Certain Divorce Matters Act 24 of 1987 protects the interests of the children in the event of a divorce
 - (4) explain what the different types of guardianship entail and to explain to whom guardianship of the children should be awarded upon divorce
 - (5) explain what the different types of custody entail and to explain which factors the court considers when deciding to whom custody of the children must be awarded upon divorce
 - (6) explain the non-custodial parent’s right of access and formulate the various forms that structured or defined access may take
 - (7) mention that after their divorce, both parents remain obliged to support their children in accordance with their respective means
-

PRESCRIBED MATTER

Read

- Prescribed textbook 170–180 “14.5.4 Maintenance”, “14.6 Enforcement of guardianship, custody and access” and “14.7 Rescission, suspension and variation of an order made upon divorce”

Study

- Prescribed textbook 157–169
- *McCall v McCall* in your prescribed casebook 317–319
- *Van Vuuren v Van Vuuren* in your prescribed casebook 320–322
- *Krugel v Krugel* in your prescribed casebook 343–346

CONTENT OF THIS STUDY UNIT

1 THE CRITERION OF “THE BEST INTERESTS OF THE CHILD”

When considering the consequences of divorce in respect of the children, the general principle applies, namely that the best interests of the children should be the paramount concern. This principle is clearly embodied in the Mediation in Certain Divorce Matters Act 24 of 1987 and section 6 of the Divorce Act 70 of 1979, which are discussed below. Note that this

principle is also included in section 28 of the Constitution as well as in the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child.

Factors

The criterion of the best interests of the child is discussed on pages 157–159 of your textbook. Note that in your prescribed case *McCall v McCall* the court provided a nearly complete list of factors which are to be considered in deciding what is in the best interests of a child as regards custody matters. Study these factors in conjunction with the note on *McCall* on page 319 of your prescribed casebook. You may ignore the information on the Children’s Bill 70 of 2003 on pages 158–159 of the textbook. You should however study the last paragraph before the heading “14.3 Divorce Act 70 of 1979”. It deals with the warning to courts not to rely on factors which infringe the constitutional rights of the child’s parents unless those factors go some way towards establishing what is, or what is not, in the child’s best interests.

2 STATUTORY PROTECTION OF THE CHILDREN’S INTERESTS

The two Acts which apply when the interests of the children of divorcing parents come up are the Mediation in Certain Divorce Matters Act and the Divorce Act 70 of 1979 (s 6).

2.1 The Divorce Act 70 of 1979

Section 6 of the Divorce Act regulates the interests of children in four respects. You must study the content of section 6 as set out in your textbook on pages 159–160 thoroughly.

2.2 The Mediation in Certain Divorce Matters Act 24 of 1987

Appointment of family advocates and family counsellors

The Mediation in Certain Divorce Matters Act provides for the appointment of family advocates (and family counsellors to assist the family advocate) to assist the court in determining what is in the best interests of a child whose parents are divorcing. The Act is aimed at providing the court with a report and recommendations by the family advocate in order to better enable the court to make decisions on matters concerning the welfare of children. The duties of the family advocate are set out on page 161 of the textbook. Note that your prescribed case, *Van Vuuren v Van Vuuren*, is also relevant here.

Duties

In the third paragraph on page 161 it is explained who may be appointed as family advocates and family counsellors.

ACTIVITY

Read your prescribed case, *Van Vuuren v Van Vuuren*, on pages 320–323 of your prescribed casebook and also the first two paragraphs on page 161 of your prescribed textbook, and list the circumstances in which a family advocate ought to apply for an order authorising an enquiry in terms of the Mediation in Certain Divorce Matters Act 24 of 1987.

FEEDBACK

The family advocate ought to apply for an order authorising an enquiry if it is envisaged that

- (1) custody of a young child will not be awarded to the child's mother
 - (2) siblings will be separated
 - (3) custody will be awarded to a person other than the child's parent
 - (4) an arrangement regarding custody or access will be made which is *prima facie* (ie, on the face of it) not in the child's interests
-

3 THE ASPECTS REGARDING THE POSITION OF THE CHILDREN THE COURT MAY REGULATE

3.1 Guardianship

Definition of guardianship
Awarding of guardianship

Firstly, you must note the definition of guardianship on page 162 of your textbook. You will further see that the court may make any order it deems fit regarding guardianship.

Guardianship to both parents

Because, in terms of section 1(1) of the Guardianship Act 192 of 1993, both parents have guardianship of their legitimate children during the subsistence of the marriage, guardianship should, as a general rule, be awarded to both of them upon divorce. If both parents are awarded guardianship upon divorce, both remain entitled to exercise any right or power, or carry out any duty arising from guardianship independently and without the other parent's consent. In your prescribed textbook on page 162 as well as on page 277 (where the contents of parental authority are set out) you are referred to the instances (exceptions) in which the consent of both parents is required and in which case they consequently cannot act independently.

Guardianship *simpliciter*

Where the circumstances warrant it the court may, however, award guardianship (ie, guardianship *simpliciter* or single guardianship) or sole guardianship to either parent. If sole guardianship is awarded to a parent upon divorce that parent becomes the child's only guardian, to the

Sole guardianship exclusion of the other parent. The consequences of such an award and an example of when sole guardianship is awarded are set out in the third and fourth paragraphs on page 162 of your textbook. Also note that sole guardianship is not readily awarded.

ACTIVITY

Explain the implications of granting sole guardianship to a parent upon divorce.

FEEDBACK

If sole guardianship is awarded to a parent upon divorce that parent becomes the child's only guardian, to the exclusion of the other parent. Sole guardianship means that, apart from the child being adopted, the sole guardian is the only parent whose consent needs to be obtained for those acts in respect of which both parents' consent is normally required in terms of the Guardianship Act 192 of 1993. In other words, only the parent with sole guardianship has to consent to the relevant child's marriage (if he or she is a minor), removal of the child from South Africa, an application for a passport for the minor if he or she is below the age of 18 years, and the alienation or encumbrance of the minor's immovable property.

The sole guardian also has the additional power to appoint his or her successor as sole guardian in a will. In terms of section 6(3) of the Divorce Act 70 of 1979, a court which awards sole guardianship to one of the parents upon divorce may also order that, on the predecease of that parent, someone other than the surviving parent will become the child's guardian — either jointly with, or to the exclusion of, the surviving parent.

The differences between the consequences of an award for guardianship *simpliciter* and an award of sole guardianship is discussed in the first paragraph on page 163 in your textbook. Ensure that you understand these differences.

3.2 Custody

Definition of custody First of all, you must note the definition of custody on page 163 of your textbook.

Custody to one parent You will also note that although the court may make any order regarding custody upon the parents' divorce it deems in the child's best interests custody is normally awarded to only one of the parents.

- Mother as custodial parent** Your textbook further explains on page 163 that in the past the custody of young or handicapped children and daughters of whatever age, was generally awarded to their mother. This trend is referred to as the maternal preference rule. You will, however, see in the textbook that this rule was rejected in *Van der Linde v Van der Linde* and *Madiebe (born Ratlhogo) v Madiebe*. Study the discussion of these two cases on page 163 of the textbook. You should also take note of the decision in *Ex parte Critchfield* and the third paragraph on page 164 where it is explained that the rejection of the maternal preference rule is undoubtedly in accordance with the equality clause in the Constitution.
- Limitations** In the third-last paragraph on page 164 of your textbook it is explained that the court may impose limitations on the custodial parent's right of custody, and also what these limitations entail. The rest of the discussion on pages 164–166 of your textbook deals with the different types of orders a court can make regarding custody. You will see that the court may award sole custody, deferred or postponed custody, split or divided custody, or joint custody. You have to know what each of these orders entail, and in what circumstances they are granted.
- Joint custody** With regard to joint custody you have to distinguish between joint legal custody and joint physical custody. You will find the meaning of these terms in the second paragraph on page 165 of the textbook. In your textbook it is also explained that the circumstances of each case will determine whether joint custody will be awarded, and what form it will take. The reasons why the courts in the past were hesitant to make joint custody awards are briefly mentioned on page 165. The advantages of such orders are also mentioned. You should also know what the court held in the most recent reported case on joint custody, namely *Krugel v Krugel*. This case is set out on pages 343–346 of your casebook, and is discussed on page 166 of your textbook. You also need to know the viewpoint of Cronjé and Heaton (the authors of your textbooks) on the granting of joint custody orders. You will find their viewpoint in the third-last paragraph on page 166 of your textbook.

ACTIVITY

Because Mr and Mrs Nel's conflicting personalities made it unbearable for them to stay married, Mrs Nel recently sued Mr Nel for divorce. During the subsistence of the parties' marriage they seldom agreed on matters and almost never made joint decisions without a dispute. Only one child, a two-year-old girl, Gerda, was born of their marriage. At this stage, the parties cannot agree on the various aspects of their divorce. Mrs Nel wants sole custody of Gerda, while Mr Nel wants joint legal custody. Mrs Nel informed Mr Nel that he could forget about an order for joint custody, because our courts are extremely reluctant to grant such orders, especially

where the parents cannot even agree on matters while they are married. Discuss fully, with reference to authority, whether Mrs Nel's statement is true.

FEEDBACK

It is true that our courts in the past were hesitant to make joint custody awards. The risk of parental conflict and disagreement is frequently used as an argument against joint custody. It is also argued that one parent should control the child's life, so that the child will know where he or she stands. Another objection to joint legal custody is that, as it does not involve sharing of day-to-day care of a child, it puts the care-taking parent in a position of responsibility without power, whilst giving the noncare-taker parent (usually the father) power without responsibility.

In the most recent reported decision on joint custody, namely *Krugel v Krugel*, the court rejected the arguments against joint custody on the ground that they do not serve the child's best interests. The court stated that a more liberal approach to granting joint custody might be appropriate in view of the changing roles and responsibilities of parents, and the concept of children's rights within the family. The court specifically rejected hostility between parents as a bar to joint custody. It was also held that, as long as both parents are fit and proper persons, they should have equal say in their child's upbringing, and that 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.

The court made the following important remark: [U]nless the disagreement is of such a nature that the child is put at risk either physically or emotionally, it still seems preferable for the child to learn to deal with the ups and downs of two involved parents, than to lose half of his or her rightful parental input.

The court concluded that joint custody promotes the rights of children, and also helps to establish sex equality by reshaping gender roles within parenthood.

Cronjé and Heaton support joint custody and submit that the court should, as a rule, not make an order for joint custody if one of the parents has committed, or threatens to commit, domestic violence against the other parent.

In light of the decision in *Krugel*, it however appears that the courts' initial unwillingness to grant joint custody orders is changing. Mrs Nel's statement can therefore not apply unconditionally.

- Custody to a third party In the second-last paragraph on page 166 it is mentioned that in exceptional cases the court may deprive both parents of custody, and award custody to a third party.
- Child's wishes Finally you have to know what role the child's wishes play when custody orders are made. This issue is explained at the bottom of page 166, and in the first paragraph on page 167 of your textbook.

3.3 Access

- Definition On page 167 of your textbook it is firstly explained what access entails. You should also know that even if the divorce order is silent on access the non-custodial parent of a legitimate child still has a right of access.
- Nature of access rights You also have to know judge Foxcroft's remarks in *V v V* regarding the nature of this right. Specifically take note of the quotation in the third paragraph under the heading "14.5.3 Access" on page 167 of your textbook.
- Agreement You also have to distinguish between the case where the parents agree on how the right of access should be exercised, and the case where the parents cannot agree on it, or where the court does not incorporate their agreement into the divorce order. With regard to the first case, the agreement may be in general terms, or the parents may agree on structured or defined access. With regard to the second case, the court may make whatever order it deems fit regarding access. The court may also order structured or defined access, or make an order in general terms. You should know what both structured or defined access and reasonable access entail.
- Cannot agree

ACTIVITY

Explain what is understood by the terms "structured or defined access" and "reasonable access".

FEEDBACK

Structured or defined access refers to the case where the access arrangements are very specific regarding the frequency of access and the times during which and the places where access may be exercised.

Reasonable access means that the non-custodial parent may have access to the child at reasonable times, places and intervals.

- Custodial parent has final say Also, you should know that the custodial parent has the final say in case of a dispute, but that he or she may not impose unreasonable restrictions or conditions negating access. This matter is discussed in the last paragraph on page 167 of your textbook.

- Conditions/restrictions** In the second paragraph on page 168 of your textbook it is mentioned that the court may impose any conditions and/or restrictions on access that it deems in the best interests of the child. The rest of the discussion deals with the various forms structured or defined access can take: If the siblings are not in the same parent's custody (split or divided custody) the court may order that access be exercised in such a way that the children spend their weekends together. Furthermore, the court may order phased-in access, postponed access, supervised access, and non-physical access. You have to know what each order entails, and in which circumstances they are granted.
- Access denied** In the third-last paragraph on page 168 of your textbook it is mentioned that the court also has the power to deny the non-custodian access altogether. It is also explained what circumstances justify such a serious invasion of this parent's right, and which circumstances will not justify such an order. In the second-last paragraph on page 168 of your textbook it is mentioned that if the court is convinced that this is in the child's best interests, it may award access to a third party who does not have an inherent right of access.
- Reasons for restrictions or access being denied** The rest of the discussion on pages 168–169 deals with how the court should formulate its judgment about the reasons why conditions are being imposed on access, or why access is being denied. The authors of your textbook submit that the court should be careful about how it formulates its judgment, and refers to *Van Rooyen v Van Rooyen* as an example of how it should not be done. The reasons why the court in this case restricted the non-custodial parent's right of access to her children raised a great deal of criticism. Ensure that you know the reasons for the court's judgment in *Van Rooyen v Van Rooyen*, and the criticism raised against it in *V v V* and in the sequel to the *Van Rooyen* decision.

ACTIVITY

After seven years of marriage, Mr Lewis informed his wife that he was homosexual and wished to get divorce. He also told her that as soon as their divorce was finalised, he intended to move in with his friend, with whom he had been having an intimate relationship for the past year. Mr and Mrs Lewis agreed that Mrs Lewis would get custody of their two minor children. Mrs Lewis also agreed that Mr Lewis could have access to his children on condition that they should not be exposed to their father's homosexual relationship. During the divorce proceedings, Mrs Lewis insists that Mr Lewis's access rights be restricted. She wishes the court to make it clear that when the children visit him or sleep over at his place, Mr Lewis's life partner should not be present.

In *Van Rooyen v Van Rooyen*, a decision full of judgmental remarks about the abnormality and unacceptability of homosexual orientation, the court

made a restrictive order similar to that requested by Mrs Lewis. Do you think that the court would, in Mr and Mrs Lewis's case, follow the same approach as in *Van Rooyen* and make a similar order? Substantiate your answer with reference to authority.

FEEDBACK

Although the court may impose any conditions and/or restrictions on access it deems in the best interests of the child the court should be careful about how it formulates its judgment about the reasons why conditions are being imposed on access.

Even though the decision in *Van Rooyen v Van Rooyen* (which was delivered before the Bill of Rights came into operation) was ostensibly based on the children's best interests, a similar order would today be declared unconstitutional.

After the coming into operation of the Constitution, the court in *V v V* criticised the court's remarks in *Van Rooyen v Van Rooyen* and held that, in the light of the equality clause in the Constitution, it is wrong in law to describe sexual orientation as abnormal. The court nevertheless held that, as the child's rights are paramount, "situations may well arise where the best interests of the child require that action is taken for the benefit of the child which effectively cuts across the parents' rights".

In the sequel to the *Van Rooyen* decision the court supported the remarks in *V v V*, namely that describing homosexuality as abnormal violated the equality clause. The court held that there is no justification for regarding a lesbian home as *per se* less suitable than one in which another sexual orientation prevails. The court also held that the order in the original *Van Rooyen* case was clearly constitutionally untenable as it prevents the applicant and her partner from living a normal life as partners, sharing a bedroom, displaying affection for one another and using whatever household and personal items they would normally do in their home in the presence of the children.

Should the court still wish to impose restrictions on Mr Lewis's access rights it will have to provide other reasons than those offered in the initial *Van Rooyen* case (namely, that homosexuality is legally wrong and abnormal). The court would most probably not restrict Mr Lewis's access rights at all, unless there are other grounds which justify such a restriction.

3.4 Maintenance of the children

The next issue which is discussed in your textbook on page 170, is the maintenance of the children following a divorce. You need only read that

Both parents still obliged to maintain discussion. All you need to know is that after the divorce, both parents remain obliged to maintain the children born of the marriage in proportion to their respective means.

Note once again that you need only read the sections under the headings “14.6 Enforcement of guardianship, custody and access” and “14.7 Rescission, suspension and variation of an order made upon divorce”.

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **Statutory protection of the children’s interests**
 - (1) Discuss, with reference to authority, the general principle that only the children’s best interests should be taken into account when considering the consequences of divorce in respect of the children.
 - (2) Which two Acts protect the children’s interests in the case of divorce?
 - (3) What are the duties of a family advocate?
 - (4) When should a family advocate apply to court to be appointed? Refer to the relevant court case.
- **Guardianship**
 - (5) What does the concept “guardianship” mean?
 - (6) What does the concept “sole guardianship” mean?
 - (7) To whom should guardianship of a minor child usually be awarded on divorce?
- **Custody**
 - (8) What does the concept “custody” mean?
 - (9) To whom was custody of young or handicapped children and girls generally awarded in the past? Refer to relevant case law and the opinion of the authors of your textbook in this regard.
 - (10) Name an example of a case where the court will award sole custody to one of the parents.
 - (11) What does the concept “deferred or postponed custody” mean?
 - (12) What does the concept “split or divided custody” mean?
 - (13) What does the concept “joint custody” mean?
 - (14) What did the court in *Krugel v Krugel* state with regard to the granting of joint custody orders?
 - (15) When will a court take a child’s wishes about whom should have custody into account?

- **Access**
 - (16) What does the concept “access” mean?
 - (17) Which remarks on the nature of access rights were made in *V v V*?
 - (18) Briefly explain what structured or defined access entails.
 - (19) Briefly explain what reasonable access entails.
 - (20) Explain which conditions and/or restrictions may be imposed by the court on access.
 - (21) Briefly discuss the judgment in *Van Rooyen v Van Rooyen* with specific reference to the manner in which the court described the non-custodian’s access rights and the criticism raised against this judgment in *V v V* and in the sequel to the *Van Rooyen* case.
- **Maintenance of the children**
 - (22) After divorce, who usually has to maintain the children born of the marriage?

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

Mr and Mrs Molefe have been married for fifteen years. Their marriage has broken down irretrievably and they have decided to get divorced. They have a son aged fourteen and a daughter aged nine. Mr and Mrs Molefe cannot agree on which of them should have custody of the children. They are adamant that they do not want joint custody of the children. Mr Molefe wants to have custody of the son, while Mrs Molefe wants to have custody of both children. Mrs Molefe asks you what the legal position on custody of children after the divorce of their parents is. Explain the position in detail with reference to case law and legislation.

SUMMARY

In this study unit we looked at

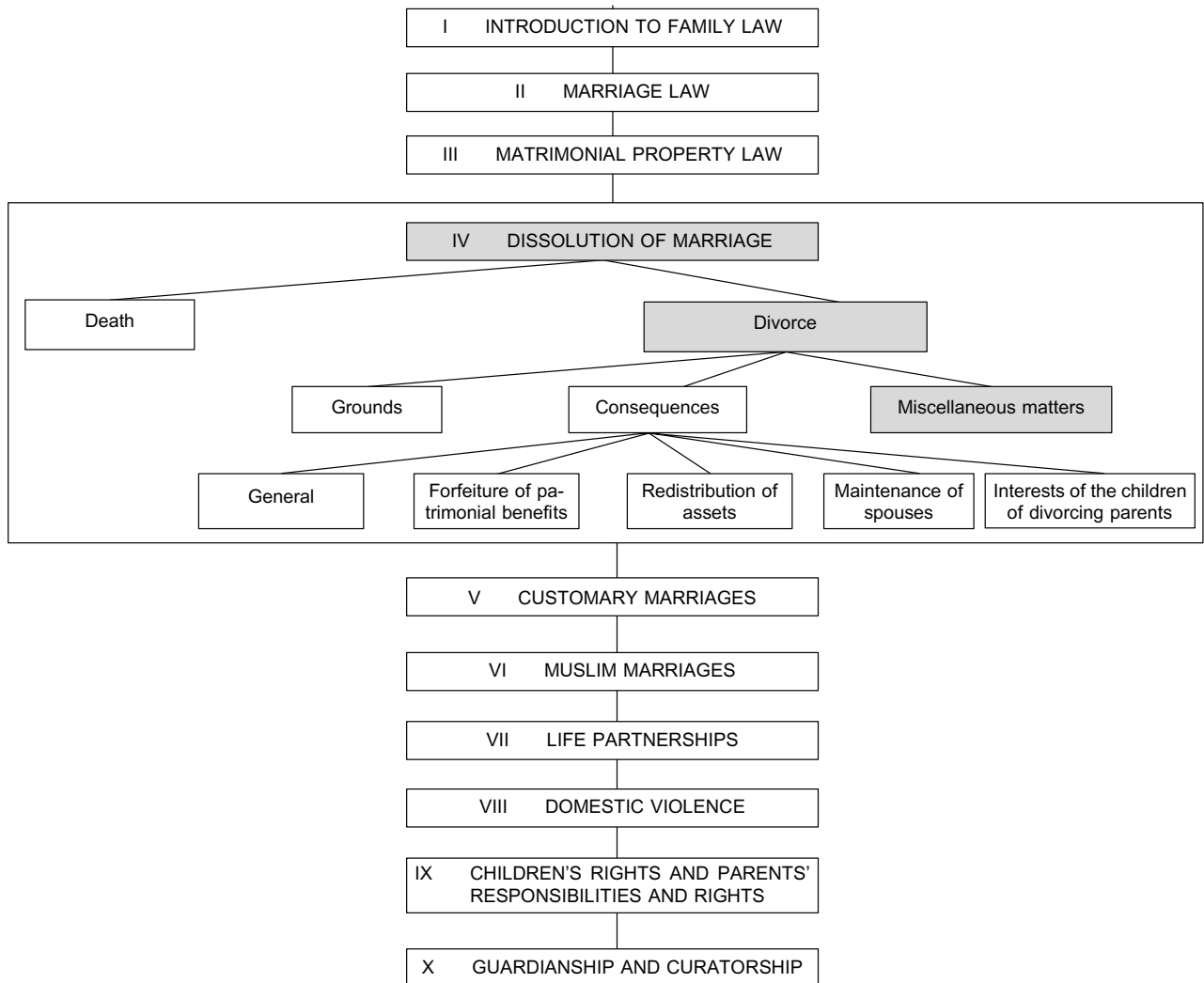
- the criterion of “the best interests of the child” which is used when considering the consequences of divorce in respect of the children
- the two Acts which protect the interests of the children in the event of a divorce
- the definition of guardianship and the awarding thereof in the event of divorce
- the definition of custody and the awarding thereof in the event of divorce
- the non-custodial parent’s right of reasonable access
- maintenance of the children after divorce

In the next study unit we shall discuss miscellaneous matters in connection with divorce.

STUDY UNIT 21

Miscellaneous matters in respect of divorce

MODULE MAP



PREFACE

In the previous study units of this section you learned how a marriage is terminated and what the consequences of termination are. The majority of the study units dealt with the consequences of divorce. The present study unit is the last to deal with divorce-related issues.

LEARNING OUTCOMES

The purpose of this study unit is to enable you to

- (1) discuss the effect of divorce on a will in which one spouse benefited the other before divorce
 - (2) define a “divorce action”
 - (3) explain when a court has jurisdiction in a divorce action
 - (4) explain what “court” means for purposes of jurisdiction in a divorce action
 - (5) explain when rule 43 of the Uniform Rules of Court applies
 - (6) explain the position in respect of publication of particulars of divorce actions
-

PRESCRIBED MATTER

Read

- Prescribed textbook 182 (from the last par beginning with “The Hoexter Commission proposed the ...”) – 185 (up to before “15.3 Relief *pendente lite*”)
- Prescribed textbook 185 (the last two paragraphs) – 186 “15.4 A final order for costs”
- Prescribed textbook 187 “15.6 The abolition of orders for judicial separation”

Study

- Prescribed textbook 181–182 (up to before the par on the Hoexter Commission)
- Prescribed textbook 185 (the first par under the heading “15.3 Relief *pendente lite*”)
- Prescribed textbook 186–187 “15.5 The limitation on publication of particulars of a divorce”

CONTENT OF THIS STUDY UNIT

1 THE EFFECT OF DIVORCE ON A WILL

The effect of divorce on a will, in which a former spouse is nominated as a beneficiary, is discussed on page 181 of the textbook. You will see that the

Section 2B of Wills Act position is regulated by section 2B of the Wills Act 7 of 1953. Ensure that you know the provisions of this section and that you understand how it should be applied to a set of facts.

2 DIVORCE PROCEEDINGS

2.1 The meaning of the concept “divorce action”

Under this heading you only need to know what “divorce action” means for purposes of the Divorce Act. Note that an application for substituted service must be brought where the defendant is untraceable and that an application for edictial citation must be brought where the defendant lives outside South Africa.

2.2 Jurisdiction in a divorce action

Section 2(1)
“Court”

In this regard you must first study section 2(1) of the Divorce Act as set out in your textbook on page 182. You also have to know what the term “court” means. The rest of the information under this heading you need only read.

2.3 Instituting a divorce

You need only read the section under this heading on page 183 of the textbook. Just note that divorce must be instituted by way of an action.

2.4 Divorce procedure

You need only read the section under this heading on pages 183–185 of the textbook. Just note that the existing accusatorial procedure in divorce proceedings is being questioned more and more, and that an inquisitorial procedure and alternative dispute resolution, especially mediation, are recommended.

3 RELIEF *PENDENTE LITE*

Make sure that you know when rule 43 of the Uniform Rules of Court, which deals with interim applications for relief, applies — this is set out on page 185 of the textbook.

4 A FINAL ORDER FOR COSTS

You need only read the section under this heading on page 196 of the textbook.

5 THE LIMITATION ON PUBLICATION OF PARTICULARS OF A DIVORCE

Limitation on publication

Your textbook explains on pages 186–187 that, in terms of section 12 of the Divorce Act, only certain particulars regarding a divorce action may be published for public knowledge. You must know which particulars may be published. You must also study the exceptions to the limitation on publication of particulars regarding a divorce action. In other words, you must know when additional particulars may be published.

Exceptions

Constitutionality of provision

Lastly, you must be able to explain why the limitation on the publication of particulars of a divorce is probably unconstitutional.

ACTIVITY

Indicate whether the following statements are correct. If a particular statement is incorrect, please rectify it.

- (1) A divorce action is only an action for a decree of divorce, and other relief in connection with a divorce.
- (2) A court will have jurisdiction in a divorce action if the wife is domiciled in the court's area of jurisdiction.
- (3) Divorces can also be heard in the magistrates' court.
- (4) Rule 43 of the Uniform Rules of Court applies to applications after the granting of a divorce order.
- (5) The limitation contained in section 12 of the Divorce Act 70 of 1979 can easily be achieved by less restrictive means.

FEEDBACK

- (1) False. A divorce action also includes:
 - an application *pendente lite* for an interdict, interim custody of, or access to, a minor child of the marriage, or the payment of maintenance
 - an application for a contribution towards the costs of a divorce action
 - an application to institute the action or make the application *in forma pauperis*
 - an application for substituted service of process in the action or application, and
 - an application for edictal citation of a party to the action or application

- (2) Correct.
 - (3) False. Divorces can be heard only in the high court or a divorce court established under section 10 of the Administration Amendment Act 9 of 1929.
 - (4) False. Rule 43 of the Uniform Rules of Court applies to applications which are instituted while a divorce is pending.
 - (5) Correct.
-

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **The effect of divorce on a will**
 - (1) Explain, with reference to legislation, the effect of divorce on a will.
- **Divorce proceedings**
 - (2) How does the Divorce Act define a “divorce action”?
 - (3) When does a court have jurisdiction in a divorce action?
 - (4) What does “court” mean for purposes of the Divorce Act?
- **Relief *pendente lite***
 - (5) When does Rule 43 of the Uniform Rules of Court apply?
- **Limitation on the publication of particulars of divorce actions**
 - (6) What does the limitation on publication of particulars of divorce actions entail? Explain fully.
 - (7) When may particulars or information regarding a divorce be published?
 - (8) Why is the limitation on the publication of particulars of a divorce probably unconstitutional?

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

Mr and Mrs Williams were married in 1990. In 1992 Mr Williams made a will in which he bequeathed all his property to Mrs Williams. In March 1995 Mr and Mrs Williams divorced. Mr Williams dies in December 1995 without having changed his will. Will Mrs Williams inherit from Mr Williams? Explain fully.

SUMMARY

In this study unit you learned about

- the effect of divorce on a will in which one spouse nominated the other as a beneficiary
- divorce proceedings
- relief *pendente lite* in divorce proceedings
- the limitation on the publication of particulars of divorce actions

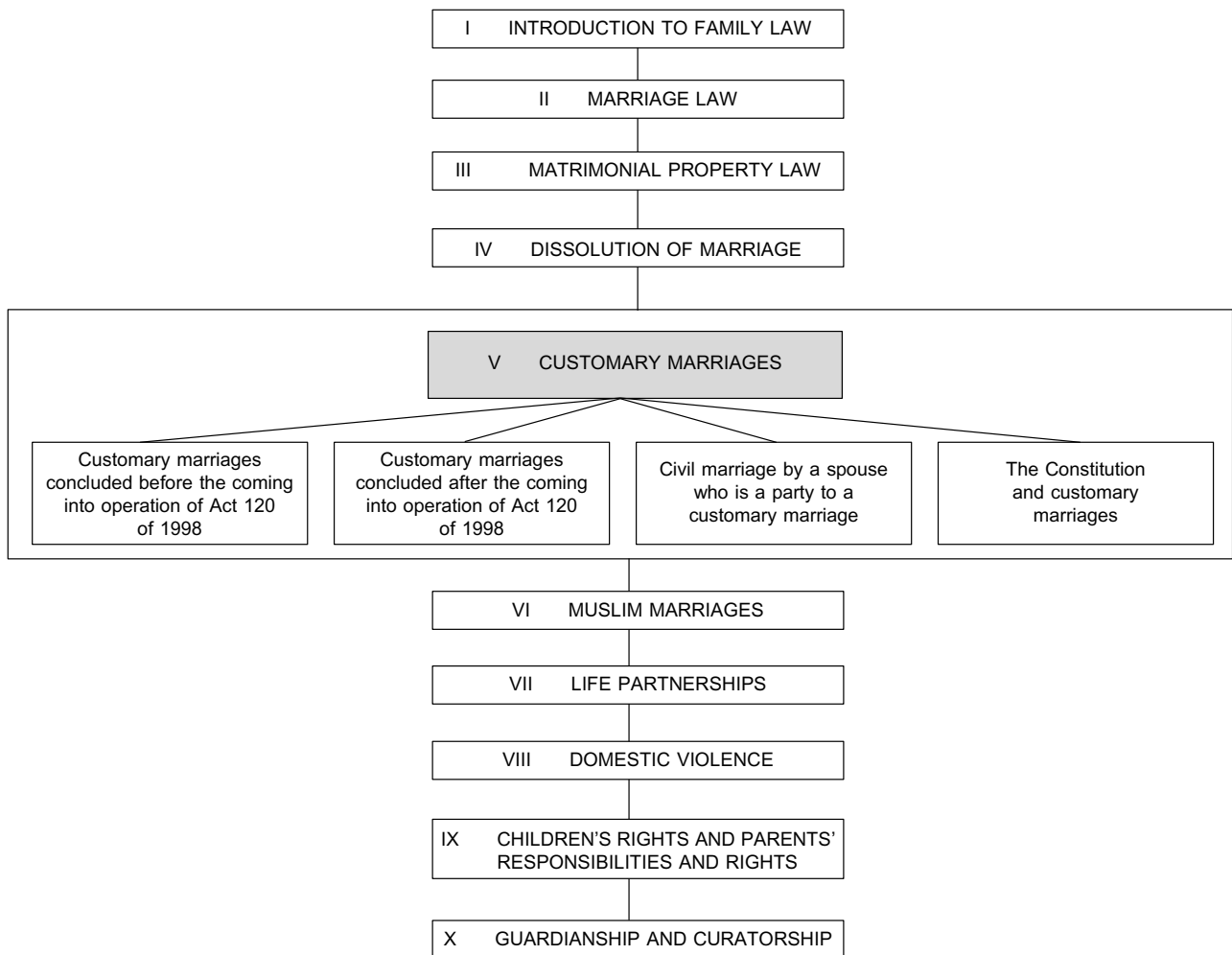
Customary marriages

Section V

SECTION V

Customary marriages

MODULE MAP



CONTENT

Overview

Study unit 22: Customary marriages

OVERVIEW

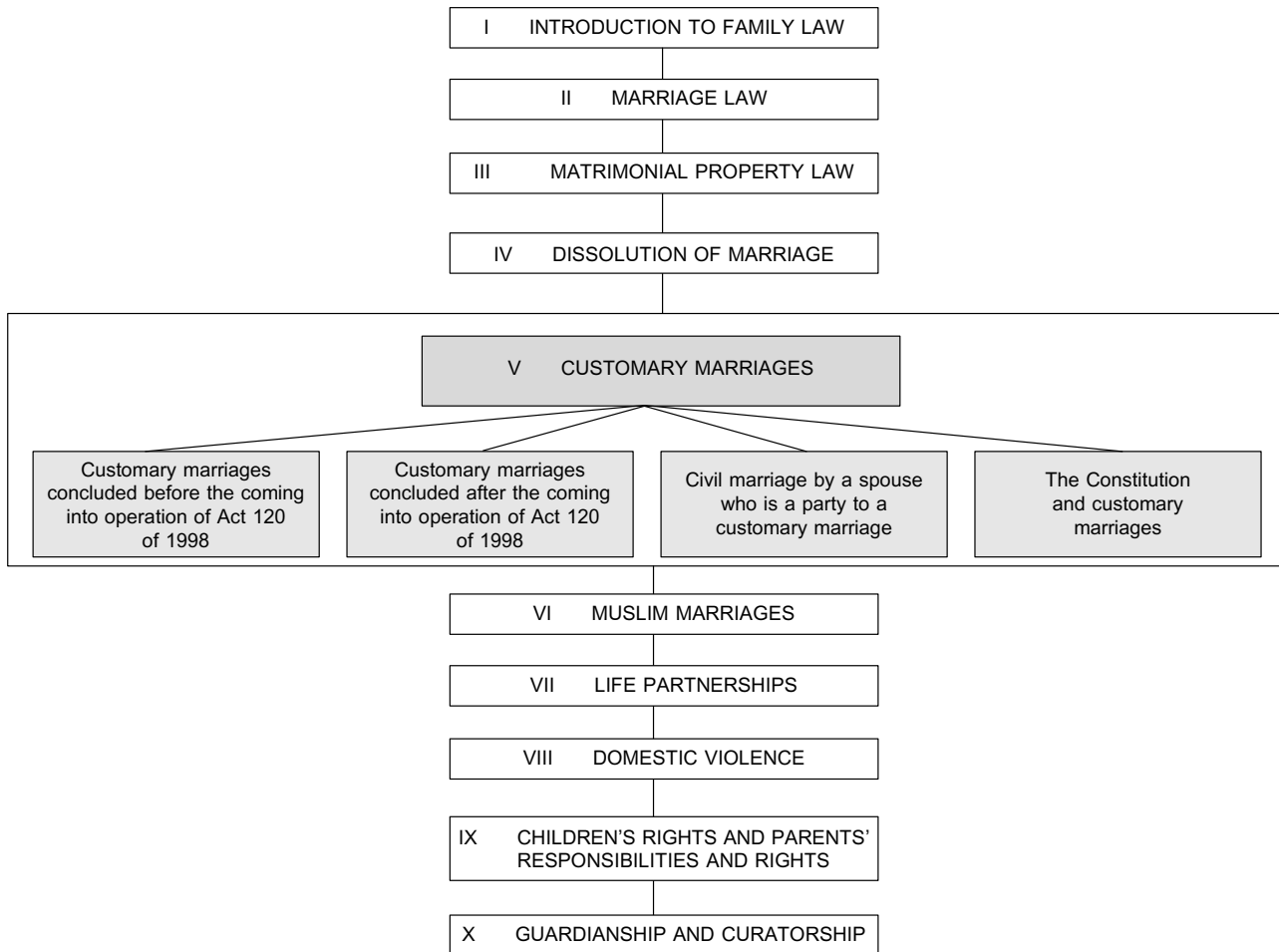
Section V is a short but very interesting and dynamic section of family law. In this section the rules which regulate customary marriages are set out briefly.

This section consists of only one study unit. In study unit 22 the rules concerning customary marriages are set out. The study unit also contains a short discussion of the Constitution and customary marriages.

STUDY UNIT 22

Customary marriages

MODULE MAP



PREFACE

This study unit deals with the rules which apply to customary marriages entered into before and after the coming into operation of the Recognition of Customary Marriages Act 120 of 1998, the rules which apply in the case where a civil marriage is concluded by a spouse who is also a party to a customary marriage and, lastly, with the Constitution and customary marriages.

LEARNING OUTCOMES

The purpose of this study unit is to enable you to

- (1) explain why customary marriages were invalid at common law

- (2) give a synopsis of the legal requirements which respectively apply to the conclusion of customary marriages before and after the coming into operation of the Recognition of Customary Marriages Act
 - (3) briefly discuss the requirement of registration of customary marriages
 - (4) distinguish between the proprietary consequences of customary marriages entered into before and after the coming into operation of the Recognition of Customary Marriages Act
 - (5) explain what status the wife occupies in a customary marriage
 - (6) briefly discuss the dissolution of customary marriages
 - (7) explain the rules which apply if a civil marriage is concluded by a spouse who is also a party to a customary marriage
 - (8) discuss the constitutional arguments for and against the recognition of customary marriages
-

PRESCRIBED MATTER

Read

- Prescribed textbook 191–194 (from “16.2.1 The legal requirements for a valid customary marriage” to before “16.2.4 The wife’s status”)
- Prescribed textbook 195 (from the second par – ie the par which begins with the words “The court’s power ...”) – 196 (to before the last par – ie, the par which begins with the words “In the case of the dissolution ...”)
- Prescribed textbook 197 (to before “ The interests of the children of the divorcing parents”)
- Prescribed textbook 200 “16.3.2 Registration of the marriage”
- Prescribed textbook 201–202 “(ii) *The patrimonial consequences if the marriage is not set aside*”
- Prescribed textbook 204 (from the par which begins with the words “Another question is whether ...”) – 206 (to before “16.3.4 The wife’s status”)

Study

- Prescribed textbook 191 “16.1 Introduction”
- Prescribed textbook 194 (from “16.2.4 The wife’s status”) to the end of the first paragraph on 195
- Prescribed textbook 196 (only the last par)
- Prescribed textbook 197 (from “The interests of the children of divorcing parents”) – 200 (to before “16.3.2 Registration of the marriage”)
- Prescribed textbook 200–201 “(i) *The patrimonial consequences if the marriage is set aside*”

- Prescribed textbook 203–204 (to before the par which begins with the words “Another question is whether ...”)
- Prescribed textbook 206–211 (from “16.3.4 The wife’s status”)

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Invalid ito common law
Valid ito Act

Note that customary marriages were invalid in terms of common law, but that they received full legal recognition when the Recognition of Customary Marriages Act 120 of 1998 came into operation on 15 November 2000. On page 191 it is explained why these marriages were invalid in terms of common law.

Limited statutory recognition

On page 191 of the textbook it is indicated that the legislator, already gave limited recognition to customary marriages before the Recognition of Customary Marriages Act came into operation.

ACTIVITY

Indicate whether the following statement is true or false. Also give a reason for your answer.

The Recognition of Customary Marriages Act does not recognise all customary marriages which existed before the Act came into operation.

FEEDBACK

False. The Act afforded legal recognition to all customary marriages regardless of when they were concluded.

Distinction between customary marriages concluded before and after the coming into operation of the Act

In certain respects the Recognition of Customary Marriages Act makes a distinction between customary marriages entered into before the coming into operation of the Act and those entered into after the coming into operation of the Act. For this reason the rules on customary marriages entered into before and after the Act are discussed under separate main headings in your textbook. For the sake of simplification we, however, decided to discuss the different rules together. Whenever different rules apply, a distinction is made between the position before and after the coming into operation of the Act on 15 November 2000.

2 THE LEGAL REQUIREMENTS FOR A VALID CUSTOMARY MARRIAGE

Position before commencement of the Act All you need to know about the legal requirements for a customary marriage which was concluded before the coming into operation of the Recognition of Customary Marriages Act is that the validity of these customary marriages is determined in accordance with customary law.

Position after commencement of the Act On pages 199–200 of the textbook you will see that customary marriages entered into after the coming into operation of the Act have to comply with the following requirements:

- both spouses must be above the age of 18 (a minor below the age of 18 years can only enter into a customary marriage if the Minister of Home Affairs or his or her designate grants written permission.)
- both spouses must consent to the marriage
- if either spouse is a minor, his or her parents or legal guardian must consent to the marriage (If the parents' or legal guardian's consent cannot be obtained, the provisions of s 25 of the Marriage Act 25 of 1961 apply. If minors marry without the necessary consent, the provisions of s 24A of the Marriage Act apply. These provisions are discussed in study unit 6 above.)
- the spouses must not be within the prohibited degrees of relationship (Note that the forbidden degrees of relationship are determined in accordance with customary law.)
- the marriage must be negotiated and entered into or celebrated in accordance with customary law
- *lobolo* is also customarily delivered

This is all you have to know about the legal requirements for a customary marriage entered into after the coming into operation of the Act.

3 REGISTRATION OF THE MARRIAGE

Position before commencement of the Act All you have to know about registration of the marriage is that customary marriages entered into before the coming into operation of the Act had to be registered before 15 November 2002. Any spouse or person who has a sufficient interest in the matter may apply for the registration of the marriage. Non-registration does not affect the validity of the marriage.

Position after commencement of the Act Customary marriages entered into after the coming into operation of the Act must be registered within three months of the date of the wedding. Again, non-registration does not affect the validity of the marriage.

This is all you have to know about the registration of the marriage. You need therefore only read the discussion in your textbook.

ACTIVITY

Indicate whether the following statement is true or false. Also give a reason for your answer.

A customary marriage entered into before the coming into operation of the Act which was not registered by 15 November 2002 is not considered a valid marriage in terms of the Act.

FEEDBACK

False. In terms of the Act the validity of a customary marriage is not affected by non-registration.

4 THE PROPRIETARY CONSEQUENCES OF THE MARRIAGE AND CONTROL OF THE MATRIMONIAL PROPERTY

Position before commencement of the Act	You need only read the discussion on the proprietary consequences of customary marriages entered into before the coming into operation of the Act on pages 193–194 of the textbook. All you have to know is that these consequences are determined according to customary law.
Position after commencement of the Act	Regarding the proprietary consequences of customary marriages entered into after the coming into operation of the Act, your textbook distinguishes between customary marriages minors concluded without the necessary consent and other customary marriages.
Customary marriages of minors without the necessary consent	On pages 200–201 of the textbook you will see that the Recognition of Customary Marriages Act provides that section 24(1) of the Matrimonial Property Act 88 of 1984 applies if the court dissolves a minor's marriage for lack of consent. Note, however, that the Recognition of Customary Marriages Act does not provide that section 24(2) of the Matrimonial Property Act applies if the court does not dissolve the marriage. You do not have to study the discussion on pages 201–202 of the textbook on which matrimonial property system should apply in these cases. You need only know that the authors of your textbook suggest that in these cases the proprietary consequences of the minor's customary marriage should be determined by the court as upper guardian of all minors. Where the minor has already reached the age of majority, the court is of course no longer the upper guardian, and the problem can consequently not be solved in this manner.
Other customary marriages	Further, on page 203 of the textbook, you will see that the proprietary consequences of other customary marriages entered into after the coming

Only marriage

Additional custom-
ary marriage

into operation of the Recognition of Customary Marriages Act depend on whether or not the marriage which the husband wants to enter into is his only marriage. If it is his only marriage, the matrimonial property system is determined by the same rules which apply to civil marriages. On pages 203–204 of the textbook, you will further see that if the husband, however, wants to enter into another customary marriage, he first has to apply to the court for approval of a written contract which will regulate the future matrimonial property system of his marriages. Ensure that you know what happens if the husband’s existing marriage is in community of property or subject to the accrual system, and if the husband’s existing marriage is out of community of property without the accrual system. Note also that in all applications the court must ensure that the property is distributed equitably and that all the relevant circumstances of the family groups that would be affected if the application were to be granted, are taken into account. Note the consequences of failure to obtain a court-approved contract.

The rest of the discussion need only be read. In other words, you need only read the section from the paragraph which begins with “Another question is whether ...” to the end of the paragraph before the heading “16.3.4 The wife’s status” on page 206.

ACTIVITY

Briefly explain the distinction between customary marriages entered into before the commencement of the Act and those entered into after the commencement of the Act, with regard to their proprietary consequences.

FEEDBACK

The proprietary consequences of customary marriages entered into before the commencement of the Act remain unchanged and continue to be governed by customary law. The proprietary consequences of customary marriages entered into after the commencement of the Act, however, depend on whether or not the marriage is monogamous. If the marriage is monogamous, the same rules which apply to civil marriages determine the matrimonial property system. If the marriage is polygynous, the husband must obtain a court-approved contract regulating the proprietary consequences of the marriage.

5 THE WIFE’S STATUS

On pages 194 and 206 of the textbook you will see that the Recognition of Customary Marriages Act abolishes the wife’s status of perpetual minority

and her husband's guardianship over her. Further ensure that you know what section 6 of the Act provides in respect of the wife's status. Lastly also note that it is uncertain whether section 6 alters the status of multiple wives of one man as against each other.

6 DISSOLUTION OF THE MARRIAGE

- Ground for divorce** With regard to the dissolution of a customary marriage you should firstly note that there is only one ground for divorce, namely the irretrievable breakdown of the marriage. This is explained in the last paragraph on page 194, which you must study.
- Patrimonial consequences of divorce** The second aspect you must study is the patrimonial consequences of divorce. You need to study only the first paragraph on page 195 and the last paragraph on page 196. You should firstly note that section 8(4)(a) of the Recognition of Customary Marriages Act empowers the court to incorporate a settlement agreement into the divorce order, make an order regarding spousal maintenance, redistribute assets, order forfeiture of benefits, and make an order regarding costs. The section also empowers the court to rescind, vary or suspend a maintenance order or an order regarding the spouses' children. Furthermore, the parties' pension interests are deemed to form part of their assets upon divorce. In the case of the dissolution of a marriage of a man who is a spouse in a polygynous customary marriage section 8(4)(b) of the Act further requires the court to take all relevant factors into consideration and to make an equitable order. The section specifically lists a postnuptial alteration of the spouses' matrimonial property system as a factor the court must take into account. If the husband entered into another customary marriage after the coming into operation of the Act the court must also take the existing order regarding the matrimonial property system of the polygynous marriage into account.
- Interests of children** With regard to the interests of the couple's children you must study the information under the heading "**The interests of the children of divorcing parents**" on page 197 of the textbook. There you will see that the court may make an order regarding the children's guardianship and custody, and that section 6 of the Divorce Act 70 of 1979 and the Mediation in Certain Divorce Matters Act 24 of 1987 apply to the divorce.
- Maintenance** Maintenance is discussed at the bottom of page 197. Note that the court must take into account any provision or arrangement that has been made in accordance with customary law.
- Joinder** On page 198 it is explained that the court may order the joinder of anyone who has a sufficient interest in the divorce proceedings. Examples of persons who may have a sufficient interest are also given.

Jurisdiction In the paragraph under the heading “(iv) *Jurisdiction*” on page 198 you will see that a divorce order in respect of a customary marriage must be obtained from the high court, family court, or divorce court. The Act however preserves the role of customary mediators.

Interim relief The last aspect regarding the dissolution of a customary marriage which you have to study is *interim* relief. On page 198 you will see that, pending their divorce, either spouse may invoke Rule 43 of the Uniform Rules of Court.

Dissolution by a spouse’s death On page 198, your textbook further explains that the Recognition of Customary Marriages Act does not regulate the dissolution of customary marriages by a spouse’s death. You will see that the reason for this can probably be found in the fact that, as a result of the sororate and levirate customs, customary unions are not necessarily dissolved by a spouse’s death.

ACTIVITY

What does the Recognition of Customary Marriages Act provide about the dissolution of a customary marriage by death? What would you say is the reason for this?

FEEDBACK

The Act is silent on the dissolution of a customary marriage by death. The reason for this may be the fact that as a result of sororate and levirate customs, customary marriages are not necessarily dissolved by death.

7 A CIVIL MARRIAGE BY A SPOUSE WHO IS A PARTY TO A CUSTOMARY MARRIAGE

On pages 206–207 of the textbook you will see that all civil marriages remain monogamous as a result of the provisions of section 10(4) of the Recognition of Customary Marriages Act. You also need to be able to discuss the position where the parties to a customary marriage wish to enter into another marriage. This matter and the provisions of section 10(2) of the Act are discussed on pages 207–208 of the textbook. You must study the provisions of section 10(2) thoroughly. Also note the shortcoming of this subsection, namely that it does not properly regulate the consequences of the interface between the couple’s customary and civil marriage. Lastly also note the conclusion of the authors of your textbook on page 208 that customary law should apply in respect of the proprietary

consequences as from the date of the marriage, and that the provisions of section 10(2) should apply as from the date of the conclusion of the civil marriage.

ACTIVITY

In terms of the Recognition of Customary Marriages Act not all customary marriages can be changed into civil marriages. Explain.

FEEDBACK

In terms of the Act, a couple in a monogamous customary marriage can change their marriage to a civil one. However, this is not possible for couples in a polygamous customary marriage.

8 THE CONSTITUTION AND CUSTOMARY MARRIAGES

The constitutional arguments for and against the recognition of customary marriages are discussed on pages 208–211 of the textbook. You will see that the constitutional values of culture and gender equality are relevant in this regard.

Customary law part of culture Regarding the value of culture, you must note the provisions of sections 9(3), 9(4), 30 and 31(1) of the Constitution. Customary law is clearly part of culture.

Customary marriages also part of tradition You will further see that customary marriages are also part of tradition, to which recognition is given by of section 15(3) of the Constitution. Note, however, that the provisions of section 15(3) are also subject to the qualification that legislation which might recognise traditional marriages or systems of traditional law of persons and family law, may not be inconsistent with the other provisions of the Constitution.

Problem: elements of culture discriminate against women The problem is, however, that some aspects of customary culture and tradition, namely polygyny and the payment of *lobolo*, allegedly violate the right to equality and women's right to dignity. The possible inequality and lack of dignity inherent in these aspects are consecutively discussed in your textbook on pages 209–210. If it is concluded that these two aspects indeed infringe upon gender equality and the right to dignity it could be argued that customary marriages should not be recognised. Also, some customary wives still have an inferior legal status, which clearly violates the right to equality and the right to dignity.

Can discriminatory elements be justified into the limitation clause?

The last matter to consider is whether the infringement of gender equality and the right to dignity by the above-mentioned two elements of customary marriages is justifiable in terms of the limitation clause (s 36) of the Constitution. This issue is discussed on pages 210–211 of your prescribed textbook.

ACTIVITY

Draw a distinction between the constitutional arguments for and against the recognition of customary marriages.

FEEDBACK

Arguments for the recognition of customary marriages	Arguments against the recognition of customary marriages
<p>(1) Customary law is part of culture. Sections 30 and 31(1) of the Constitution protect the right to culture and section 9(3) and (4) of the Constitution enshrines the right not to be unfairly discriminated against on the ground of culture.</p> <p>(2) Customary marriages are part of tradition, and section 15(3) provides for the recognition of marriages concluded under any tradition.</p>	<p>(1) Some elements of customary culture infringe the right to sex and gender equality, and infringe on women's right to dignity.</p> <p>(2) Some of the traditional practices regarding customary marriages infringe sex and gender equality and violate the right to dignity.</p>

QUESTIONS

NB: Make sure you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **Introduction**
 - (1) Why were customary marriages invalid in terms of our common law? Briefly explain your answer.
 - (2) To which extent did the Recognition of Customary Marriages Act 120 of 1998 change the common-law position?
 - (3) When did the Recognition of Customary Marriages Act come into operation?
- **The legal requirements for a valid customary marriage**
 - (4) Briefly set out the legal requirements for a customary marriage which is entered into after the coming into operation of the Recognition of Customary Marriages Act.

- **Registration of the marriage**
 - (5) When must a customary marriage entered into before the coming into operation of the Recognition of Customary Marriages Act be registered?
 - (6) When must a customary marriage entered into after the coming into operation of the Recognition of Customary Marriages Act be registered?
 - (7) Does non-registration affect the validity of a customary marriage?
- **The proprietary consequences of the marriage and control of the matrimonial property**
 - (8) What determines the proprietary consequences of customary marriages entered into before the coming into operation of the Recognition of Customary Marriages Act?
 - (9) What are the proprietary consequences of a customary marriage a minor entered into without the necessary consent after the coming into operation of the Act? Distinguish between the case where the marriage is dissolved and the case where the marriage is not dissolved.
 - (10) On what do the proprietary consequences of other customary marriages entered into after the coming into operation of the Act depend?
 - (11) What is the position if the customary marriage which a man wants to enter into after the coming into operation of the Act, is his only marriage?
 - (12) What is the position if a man wants to enter into another customary marriage after the coming into operation of the Act?
- **The wife's status**
 - (13) To which extent has the Recognition of Customary Marriages Act changed the wife's status in a customary marriage?
 - (14) Briefly discuss the provisions of section 6 of the Recognition of Customary Marriages Act.
- **Dissolution of the marriage**
 - (15) On which grounds can a divorce order in respect of a customary marriage be granted?
 - (16) Which powers does a court which grants a divorce order in respect of a customary marriage have with regard to the consequences of the divorce?
 - (17) From which court can a divorce order in respect of a customary marriage be obtained?
 - (18) Why do you think the Recognition of Customary Marriages Act is silent on the dissolution of customary marriages by the death of a spouse?

- **A civil marriage by a spouse who is a party to a customary marriage**
 - (19) What does section 10(2) of the Recognition of Customary Marriages Act provide, and what is the result of this provision?
- **The Constitution and customary marriages**
 - (20) Which constitutional values are relevant with regard to the issue of the recognition of customary marriages?
 - (21) Briefly discuss the constitutional arguments for the recognition of customary marriages.
 - (22) Briefly discuss the constitutional arguments against the recognition of customary marriages.

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

Temba has two customary wives, Thembi and Lindi. He married Thembi in 1990 and Lindi in 1996. He now wants to divorce Thembi and marry Thandi. Advise Temba on

- (1) the grounds for divorcing Thembi
- (2) the patrimonial consequences of the divorce (Temba and Thembi have no children.)
- (3) the requirements which must be met for his marriage to Thandi to be valid
- (4) the patrimonial consequences of his marriage to Thandi
- (5) Thandi's status as a customary wife
- (6) Lindi's status as a customary wife

SUMMARY

In this study unit you learned

- that customary marriages were invalid in terms of common law
- that customary marriages became valid for all purposes when the Recognition of Customary Marriages Act came into operation
- what the legal requirements for a valid customary marriage are
- that customary marriages must be registered
- what the proprietary consequences are of customary marriages entered into before the coming into operation of the Recognition of Customary Marriages Act, and what the proprietary consequences are of customary marriages entered into after the coming into operation of the Act
- how the Recognition of Customary Marriages Act changed the status of a wife in a customary marriage

- how a customary marriage can be dissolved
- which requirements must be complied with before a spouse who is a party to a customary marriage can also conclude a civil marriage
- what the consequences are of a civil marriage entered into by spouses who are already married to each other according to customary law
- what the constitutional arguments for and against the recognition of customary marriages are

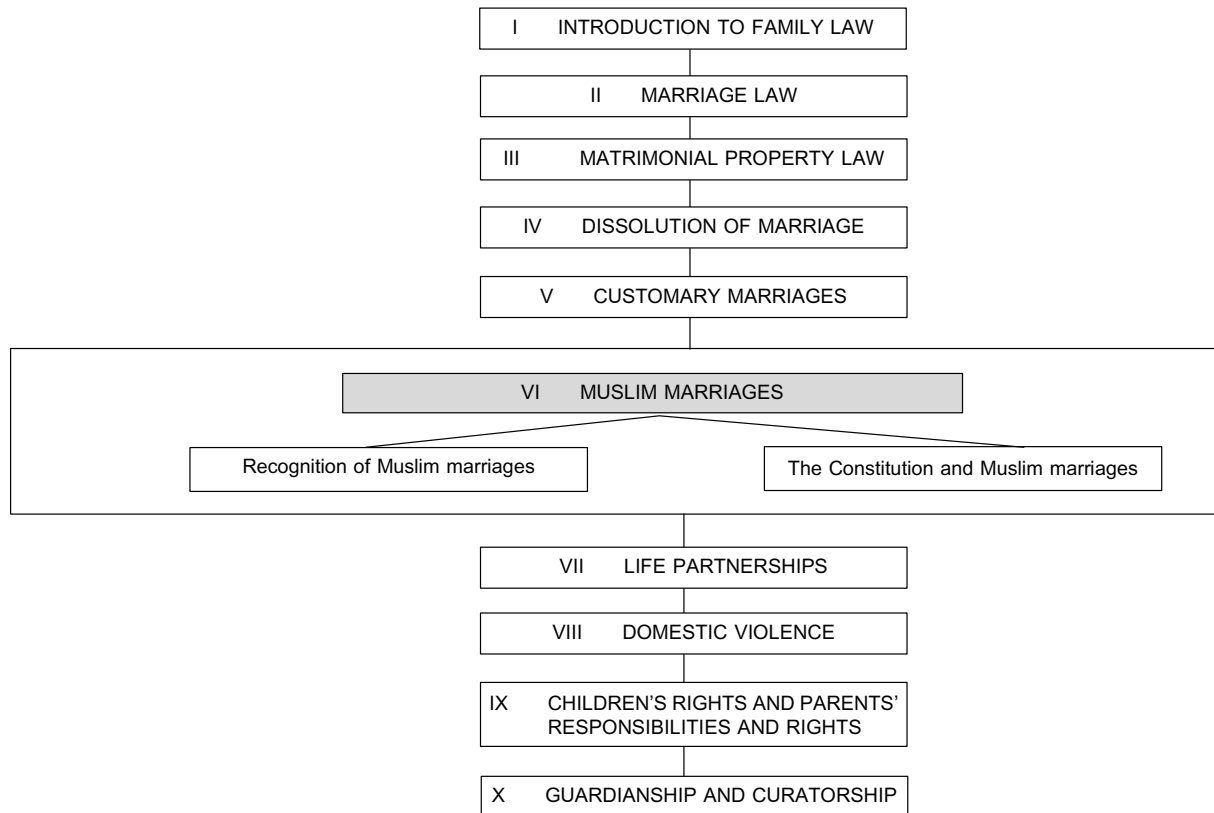
Muslim marriages

Section VI

SECTION VI

Muslim marriages

MODULE MAP



CONTENT

Overview

Study unit 23: Muslim marriages

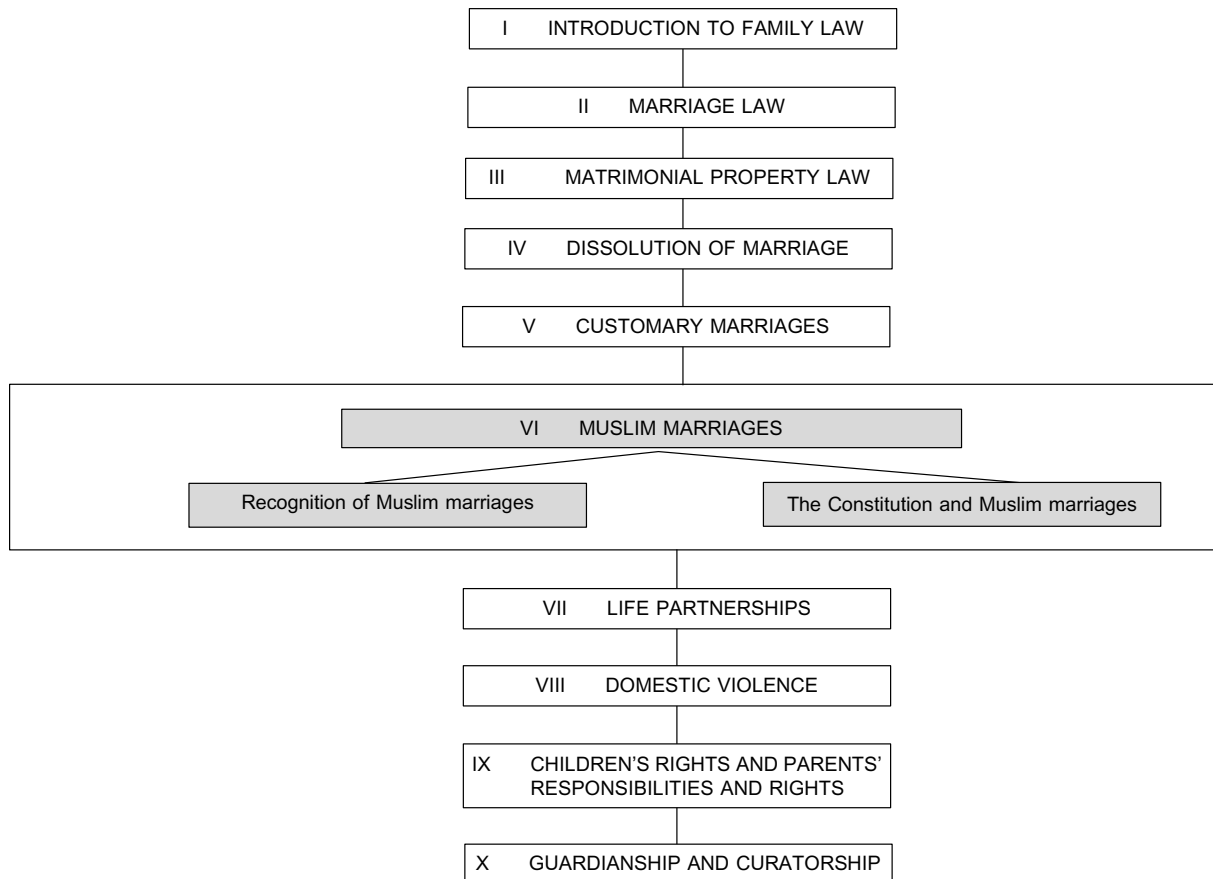
OVERVIEW

Section VI is a very short section. It consists of only one study unit. The study unit deals with the recognition which has thus far been extended to Muslim marriages, and the issue of whether the limited recognition of Muslim marriages violates the Constitution.

STUDY UNIT 23

Muslim marriages

MODULE MAP



PREFACE

Muslim marriages are not yet fully recognised by our law. However, the legislature and courts have extended some recognition to these marriages. In this study unit you will learn why Muslim marriages are not recognised. You will also learn about the limited legislative and judicial recognition of Muslim marriages. Finally, you will investigate the issue of the constitutionality of the non-recognition of Muslim marriages.

LEARNING OUTCOMES

Once you have studied this study unit you should be able to

- (1) explain why Muslim marriages are not recognised

- (2) set out the legislative recognition that has been afforded to Muslim marriages
 - (3) discuss the recognition the courts have extended to Muslim marriages
 - (4) explain whether the limited recognition of Muslim marriages is unconstitutional
-

PRESCRIBED MATTER

Study

- Prescribed textbook 215–217, 222–223 (you may ignore 218–221)

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

In the previous study unit we indicated that the reasons why customary marriages were not fully recognised prior to the coming into operation of the Recognition of Customary Marriages Act 120 of 1998 were that they permit polygyny and are not solemnised in terms of the Marriage Act 25 of 1961. On page 215 of the prescribed textbook you will see that these are also the reasons why Muslim marriages are not yet fully recognised. This is the only information under the heading “17.1 Introduction” on page 215 of the textbook that you have to know.

ACTIVITY

Why are Muslim marriages not yet fully recognised? Give a very brief answer.

FEEDBACK

Above in this study unit you learned that there are two reasons why Muslim marriages are not fully recognised. They are that Muslim marriages permit polygyny and are not solemnised in terms of the Marriage Act.

2 RECOGNITION OF MUSLIM MARRIAGES

2.1 Statutory recognition

On pages 215–216 of your prescribed textbook you will see that several Acts afford recognition to Muslim marriages. You will note that many of the Acts apply to religious marriages, regardless of whether they are *de facto* monogamous or polygynous. On page 216 of the textbook you will also learn that in *Daniels v Campbell* the constitutional court held that a surviving spouse in a monogamous Muslim marriage qualifies as a “spouse” and “survivor” in terms of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990, even though those Acts do not expressly provide that Muslim marriages fall within their ambit. You must be able to discuss the Constitutional Court’s decision in *Daniels v Campbell*.

ACTIVITY

Mr and Mrs Omar are married by Muslim rites. Neither of them has ever concluded a civil marriage. Indicate whether the following statements are true or false. You do not have to explain your answer.

- (1) Because Muslim marriages are not fully recognised Mrs Omar cannot be compelled to testify against Mr Omar, even in circumstances where a wife who is a party to a civil marriage could be compelled to testify against her husband.
- (2) Because Muslim marriages are not fully recognised property Mrs Omar inherits from Mr Omar is not exempt from transfer duty.
- (3) If the Omars’s marriage is terminated by Mr Omar’s death, Mrs Omar can institute a claim for maintenance against Mr Omar’s estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990 in so far as she is unable to provide for her reasonable maintenance needs from her own means and earnings.

FEEDBACK

- (1) False. (On p 215 of the textbook you will see that s 10A of the Civil Proceedings Evidence Act 25 of 1965 and s 195(2) of the Criminal Procedure Act 51 of 1977 recognise religious marriages for the purposes of compelling a spouse as a witness.)
- (2) False. (On pp 215–216 of the textbook you will see that s 9(1)(f) read with s 1 of the Transfer Duty Act 40 of 1949 exempt property which one spouse in a religious marriage inherits from the other spouse from transfer duty.)
- (3) True. (In *Daniels v Campbell* the Constitutional Court held that a

surviving spouse in a monogamous Muslim marriage qualifies as a “spouse” and “survivor” in terms of the Maintenance of Surviving Spouses Act: see p 216 of the textbook.)

2.2 Judicial recognition

On pages 216–217 of the textbook several decisions in which Muslim marriages were recognised for specific purposes are set out. You must be able to discuss each of these decisions, and to indicate the purposes for which Muslim marriages were recognised in each case. You must also be able to indicate that, thus far, the courts have restricted recognition to Muslim marriages that are *de facto* monogamous.

ACTIVITY

Seven years ago, Sara and Petrus entered into a Muslim marriage. Two years ago, Petrus indicated to Sara that he was considering taking a second wife, as Sara had not yet borne him children and he wished to be a father. Sara was very upset and convinced Petrus not to take a second wife. Two weeks ago, Petrus was killed in an accident on the farm where he worked as a labourer. The accident was caused by the farmer’s negligence. Sara wishes to sue the farmer for loss of support. Can she institute such a claim? Give authority for your answer.

FEEDBACK

This activity deals with the question of whether the surviving spouse in a monogamous Muslim marriage has an action for loss of support. This question was answered in the affirmative in *Amod (Born Peer) v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)*. To be able to give an answer regarding Sara’s situation you have to discuss the supreme court of appeal’s decision in *Amod*. The case is discussed on page 217 of the textbook. You specifically have to point out that the court held that the decisive issue is not whether the surviving spouse was lawfully married to the deceased, but whether the deceased was legally obliged to support the surviving spouse in a relationship which was worthy of recognition and protection in terms of the common law. The court concluded that in view of the ethos of tolerance, pluralism and religious freedom which evidenced itself even before the adoption of the interim Constitution the *boni mores* of our society require that the contractual duty of support which flows from a Muslim marriage should be recognised and be legally enforceable at common law. Because of the decision in *Amod* Sara can therefore sue the farmer for loss of support.

3 THE CONSTITUTION AND MUSLIM MARRIAGES

The final aspect regarding Muslim marriages that you must study is made up of the constitutional arguments about the recognition of such marriages. These arguments are set out on pages 222–223 of the textbook.

ACTIVITY

Explain whether the limited recognition of Muslim marriages is unconstitutional.

FEEDBACK

The constitutional arguments about the recognition of Muslim marriages are discussed on pages 222–223 of the textbook. For this activity you simply have to set out those arguments. You have to explain that the advocates of the recognition of Muslim marriages argue that non-recognition of Muslim marriages violates the right to be free from unfair discrimination on the ground of religion, conscience or belief and the right to freedom of conscience, religion, thought, belief and opinion. They also rely on section 15(3)(a) of the Constitution, which permits legislation recognising religious marriages or systems of religious personal and family law. However, any such legislation must comply with section 15(3)(b) of the Constitution, which provides that the legislation must be consistent with the rights contained in section 15(3) and the other provisions of the Constitution.

You also have to explain that from a sex and gender-equality perspective it could be argued that Muslim marriages should not be recognised in their present form, because elements of these marriages violate the right to sex and gender equality. The offending elements include polygyny and the patriarchy which is inherent in Muslim marriage law and includes the rule that the husband has “leadership” of the family and that the wife must obey him. In decisions such as *Ryland v Edros* and *Amod (Born Peer) v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* limited recognition was given to *de facto* monogamous Muslim marriages. On the ground of these decisions it is arguable that polygyny is the only obstacle to the recognition of Muslim marriages.

The final aspect you have to discuss is the application of the limitation clause of the Constitution in the context of Muslim marriages. The limitation clause would come into play only if it were to be concluded that Muslim marriages violate sex and gender equality and the right to dignity. The court may be reluctant to hold that violation of the key founding values of equality and dignity is reasonable and justifiable. However, non-recognition of Muslim marriages probably results in greater inequality and indignity for Muslim women. Also, the different treatment of customary

and Muslim marriages constitutes inequality before the law and unequal protection and benefit of the law. It seems unlikely that a court would consider the latter infringement justifiable.

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **Introduction**

- (1) Why are Muslim marriages not yet fully recognised by South African law?

- **Recognition of Muslim marriages**

- (2) Give five examples of Acts or sections of Acts which recognise Muslim marriages.
- (3) Does a surviving Muslim spouse qualify as a “spouse” and “survivor” in terms of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990? Explain your answer with reference to authority.
- (4) Can a claim emanating from a Muslim marriage contract be enforced in South African law? Explain your answer with reference to authority.
- (5) Does the surviving spouse in a monogamous Muslim marriage have a claim for loss of support if his or her spouse is killed through the negligent conduct of a third party? Explain your answer with reference to authority.

- **The Constitution and Muslim marriages**

- (6) Which constitutional values are relevant with regard to the issue of the recognition of Muslim marriages?
- (7) Discuss the constitutional arguments for and against the recognition of Muslim marriages.

PLEASE NOTE THAT YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENTS OF THIS STUDY UNIT.

SUMMARY

In this study unit you learned

- why Muslim marriages are not yet fully recognised by South African law
- that some Acts recognise Muslim marriages

- what the Constitutional Court decided in *Daniels v Campbell*
- in which circumstances the courts have extended recognition to Muslim marriages
- what the constitutional arguments for and against the recognition of Muslim marriages are

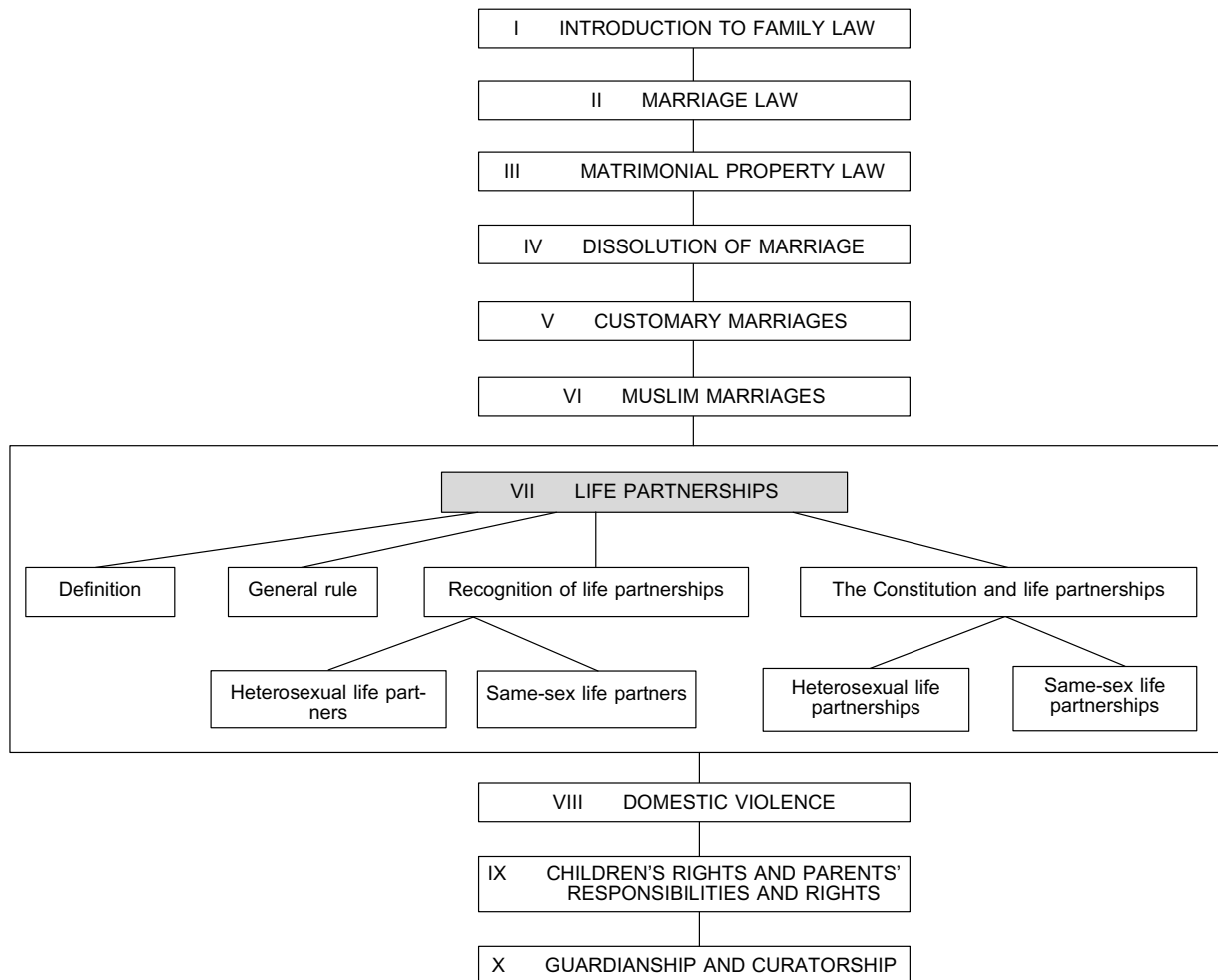
Life partnerships

Section VII

SECTION VI

Life partnerships

MODULE MAP



CONTENT

Overview

Study unit 24: Life partnerships

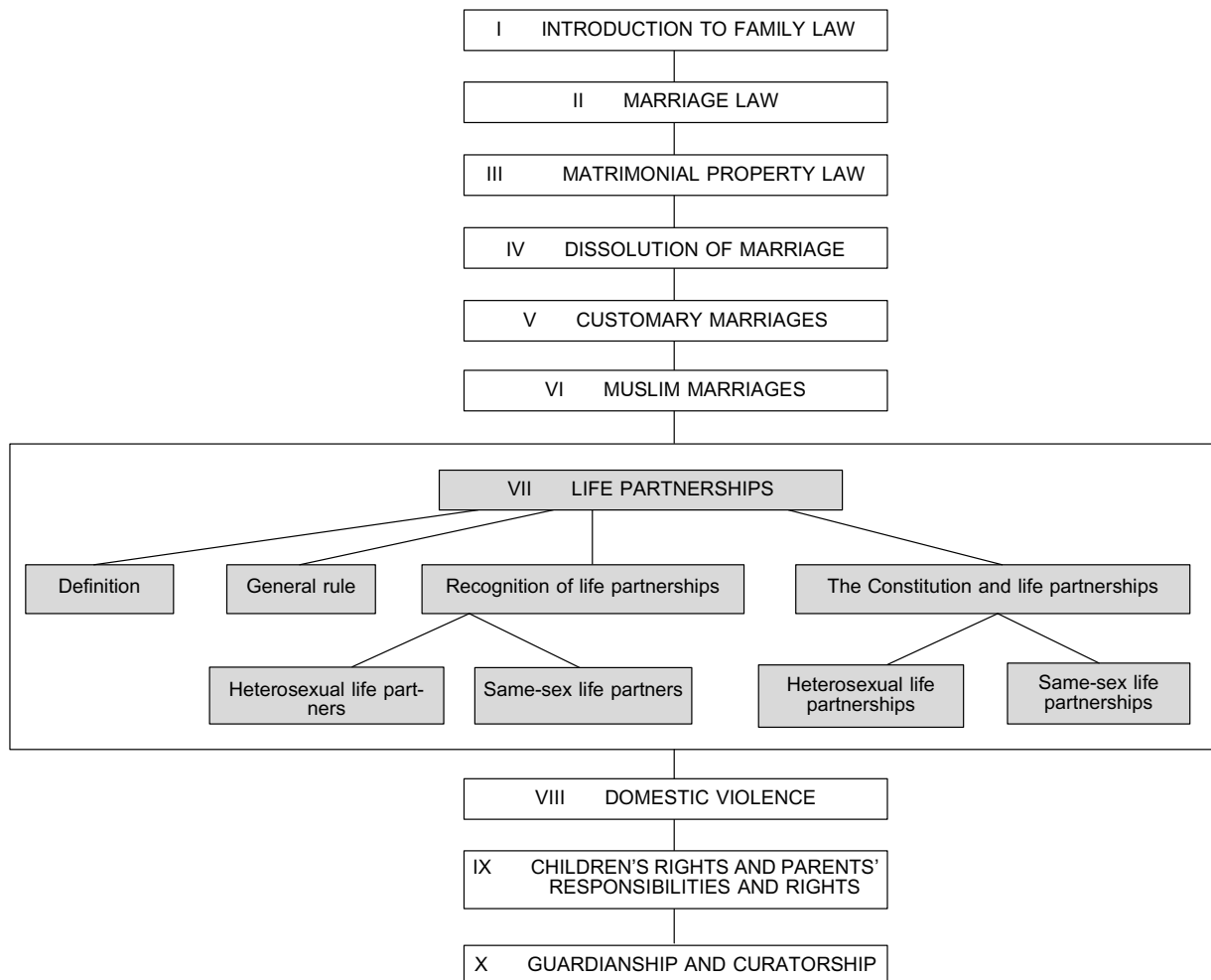
OVERVIEW

Like the previous section, section VII is also a short section. It consists of only one study unit. The study unit deals with marriage-like relationships. It includes life partnerships of heterosexual and same-sex couples to which various Acts and court cases have increasingly given recognition. The question whether the limited recognition of life partnerships is unconstitutional is also examined.

STUDY UNIT 24

Life partnerships

MODULE MAP



PREFACE

Although the life partnerships of couples who live together in marriage-like relationships without getting married have none of the *ex lege* consequences of marriage various Acts and court decisions have started to give piecemeal recognition and protection to these relationships. In this study unit we look at the recognition extended to, respectively, heterosexual and same-sex life partnerships up to now. We also deal with the issue of the constitutionality of the law's refusal to treat heterosexual and same-sex life partners, respectively, like spouses.

LEARNING OUTCOMES

Once you have studied this study unit you should be able to

- (1) define a life partnership
 - (2) explain the general rule with regard to the legal consequences of cohabitation outside marriage
 - (3) know which statutory recognition has hitherto been extended to, respectively, heterosexual and same-sex life partnerships
 - (4) explain how court decisions have increasingly extended recognition to same-sex life partnerships
 - (5) explain whether the law's refusal to treat heterosexual life partners like spouses is unconstitutional
 - (6) explain whether the law's refusal to treat same-sex life partners like spouses is unconstitutional
-

PRESCRIBED MATTER

Read

- Prescribed textbook 227 “18.1 Definition” (from the second sentence)
- Prescribed textbook 227–229 “18.2 General” (from the last par on 227)
- Prescribed textbook 234–237 “18.5 Protection by means of the ordinary rules of the law which apply as between third parties”

Study

- Prescribed textbook 227 (only the first sentence under “18.1 Definition” and the first par under “18.2 General”)
- Prescribed textbook 229–234 “18.3 Recognition of heterosexual life partnerships” and “18.4 Recognition of same-sex life partnerships”
- Prescribed textbook 237–240 “18.6 The Constitution and life partnerships”

CONTENT OF THIS STUDY UNIT

1 DEFINITION

In the first place, you must be able to explain what a life partnership is. The first sentence on page 227 of your prescribed textbook contains a definition of this term.

2 GENERAL

The general rule of our law is that none of the *ex lege* consequences of marriage automatically ensue if a couple lives together without getting married. This is the case regardless of whether or not the life partners are legally permitted to marry each other. This rule is set out and explained with examples in the first part of the first paragraph under this heading on page 227 of the textbook. In the second part of that paragraph it is stated that legislation and court decisions have, however, extended some of the consequences of marriage to life partnerships. This aspect is further elucidated under the next two headings.

3 RECOGNITION OF HETEROSEXUAL LIFE PARTNERSHIPS

Firstly, you must know that various Acts, such as the Insolvency Act 24 of 1936, the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the Estate Duty Act 45 of 1955, the Pension Funds Act 24 of 1956, the Income Tax Act 58 of 1962, the Maintenance Act 99 of 1998, the Domestic Violence Act 116 of 1998 and the Rental Housing Act 50 of 1999 treat heterosexual life partners and spouses alike. All these Acts are discussed on pages 229 to 230 of the textbook. You need not study the detail and numbers or dates of these Acts. Just note that most of these Acts extend the same protection to heterosexual and same-sex life partners.

Ignore the discussion of *Robinson v Volks* in your textbook on page 230, and only read the following section on this case:

In this case, the Cape provincial division of the high court initially declared section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 unconstitutional to the extent that it fails to include permanent life partners within the ambit of the Act. The decision of the Cape provincial division of the high court was, however, overturned by the constitutional court in *Volks v Robinson* 2005 (5) BCLR 446 (CC). The majority of the judges of the constitutional court found that differentiating between a spouse and a heterosexual life partner by excluding the life partner from a maintenance claim against the estate of his or her deceased life partner in circumstances where a spouse would have had such a claim in terms of the Maintenance of Surviving Spouses Act 27 of 1990 does not constitute unfair discrimination. Nor does it violate the surviving life partner's right to dignity. The majority pointed out that although the Bill of Rights does not contain the right to marry and to found a family, section 15(3)(a)(i) recognises marriage as an institution. Also, the constitutional court has recognised that marriage and family are important social institutions in our society: *Dawood v Minister of Home Affairs*; *Sbalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (8) BCLR 837 (CC), 2000 (3) SA 936 (CC) pars [30] and [31]; *Du Toit v Minister for Welfare and*

Population Development 2002 (10) BCLR 1006 (CC), 2003 (2) SA 198 (CC) par [19]. Marriage is also recognised internationally. Therefore it follows that the law may distinguish between married and unmarried people, and may accord benefits to married people which it does not accord to unmarried people. The majority concluded that, in the present case, the distinction between married and unmarried people could not be said to be unfair when it is considered in the larger context of the rights and obligations which are uniquely attached to marriage. In the case of heterosexual life partnerships, the law does not impose an automatic duty of support upon the life partners during the subsistence of the life partnership. In the case of marriage, on the other hand, a reciprocal duty of support automatically exists between the spouses. The majority held that the Constitution does not require the imposition of an obligation on the estate of a deceased person in circumstances where the law attaches no such obligation during the deceased's lifetime, and that there is no intention on the part of the deceased to undertake such an obligation. It accordingly held that it is not unfair to distinguish between surviving spouses and surviving heterosexual life partners. In respect of the alleged violation of the surviving life partner's right to dignity the majority held that the life partner's dignity is not impaired by

“simply [being] told that there is a fundamental difference between her relationship and a marriage relationship in relation to maintenance”(par [61]).

The court accordingly concluded that, in the circumstances, it was not appropriate posthumously to impose an obligation that did not exist before death.

Lastly, you must note that nowadays a heterosexual life partner enjoys the same medical scheme and job-related benefits as a spouse, but that a surviving heterosexual life partner does not yet have a claim for damages for loss of support against a third party who unlawfully kills his or her life partner. These aspects are explained in the last two paragraphs on page 230 of the textbook.

4 RECOGNITION OF SAME-SEX LIFE PARTNERSHIPS

Note that same-sex life partners enjoy more or less the same statutory recognition as heterosexual life partners, but that they indeed enjoy broader judicial recognition. In *Du Plessis v Road Accident Fund* the supreme court of appeal, for example, extended the common-law action for damages for loss of support to same-sex life partnerships where a contractual duty to maintain had been undertaken. Likewise, in *Satchwell v President of the Republic of South Africa*, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, *J v Director General, Department of Home Affairs* and *Du Toit v Minister for Welfare and Population Development*,

respectively, certain job-related benefits, immigration permits, parental protection and rights in respect of adoption were afforded to same-sex life partners which have not been extended to heterosexual life partners as yet. The relevant legislation and court decisions are discussed on pages 231–234 in your textbook. You must know the gist of these discussions as set out above.

5 PROTECTION BY MEANS OF THE ORDINARY RULES OF THE LAW WHICH APPLY AS BETWEEN THIRD PARTIES

You need only read the sections under this heading on pages 234–237 of the textbook.

6 THE CONSTITUTION AND LIFE PARTNERSHIPS

6.1 Heterosexual life partnerships

Make sure that you know why claims of unconstitutionality will probably be rejected where heterosexual partners are either free to marry each other, or prohibited to do so. Study the relevant arguments in this regard on page 237 of the textbook.

6.2 Same-sex life partnerships

In respect of the constitutionality of the present position regarding same-sex life partnerships it is argued that the non-recognition of such life partnerships and the prohibition on same-sex marriage violate the right to equality of gay and lesbian persons, their right to dignity and their right to privacy. You must study the relevant constitutional arguments in this regard on pages 238–240 in the textbook. In addition you should note the supreme court of appeal's decision in *Fourie v Minister of Home Affairs* 2005 (3) BCLR 241 (SCA), which was delivered after publication of your textbook. In this case, a lesbian couple attacked the common-law prohibition on same-sex marriages. The supreme court of appeal held that the common-law definition of "marriage" was unconstitutional to the extent that it restricted marriage to persons of the opposite sex. The court developed the definition to open up marriage up to persons of the same sex. The court expressly added that same-sex couples must meet the requirements set by the Marriage Act 25 of 1961 for a valid marriage. As the prescribed marriage formula in the Marriage Act refers to "husband" and "wife" same-sex couples can still not be married by a marriage officer who uses that marriage formula. The Marriage Act however allows marriage officers who are ministers of religion or who hold a responsible position in a religious denomination or organisation to follow the marriage formula which is usually observed by that denomination or organisation if the particular formula has been approved by the Minister of Home Affairs.

In the past, the Minister of Home Affairs refused to approve marriage formulae that referred to same-sex couples. Once a religious denomination or organisation has acquired the Minister's approval of its marriage formula it will be able to marry same-sex couples. No religious denomination or organisation will however be compelled to marry same-sex couples. Until the Marriage Act is amended same-sex couples who do not wish to have a religious marriage ceremony will not be able to get married. (The supreme court of appeal did not consider the constitutionality of the marriage formula in the Marriage Act, as the parties did not dispute the constitutionality of the Act.) This state of affairs clearly amounts to inequality before the law and unequal protection and benefit of the law, which violates section 9 of the Constitution. However, the position may soon change, as the Minister of Home Affairs has lodged an appeal against the supreme court of appeal's decision.

ACTIVITY

John and William have been living together as life partners for 10 years and wish to get married now. They want to know from you if they can conclude a valid marriage. Advise them on this matter.

FEEDBACK

Since the decision in *Fourie v Minister of Home Affairs* dealt only with the common-law definition of marriage and not with the marriage formula in the Marriage Act which refers to "husband" and "wife", John and William can still not conclude a valid marriage. The Marriage Act however allows marriage officers who are ministers of religion or who hold a responsible position in a religious denomination or organisation to follow the marriage formula which is usually observed by that denomination or organisation if the particular formula has been approved by the Minister of Home Affairs. Therefore, if a religious denomination or organisation obtains the Minister's approval of a marriage formula which makes provision for same-sex couples John and William will indeed be able to conclude a valid marriage. A constitutional attack on the Marriage Act's prohibition on same-sex marriage would probably also be successful, as such prohibition clearly violates gay and lesbian persons' rights to equality, dignity and privacy.

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **Definition**
 - (1) What is a life partnership?
- **General**
 - (2) What is the general rule with regard to the legal consequences of cohabitation outside marriage?
- **Recognition of heterosexual life partnerships**
 - (3) List the legislative recognition extended to heterosexual life partnerships thus far.
- **Recognition of same-sex life partnerships**
 - (4) Briefly discuss the legislative and judicial recognition extended to same-sex life partnerships thus far.
- **The Constitution and life partnerships**
 - (5) Explain whether the law's refusal to treat heterosexual life partners like spouses is constitutional or not.
 - (6) Explain whether the law's refusal to treat same-sex life partners like spouses is constitutional or not.
 - (7) Briefly discuss the effect of the decision in *Fourie v Minister of Home Affairs*.

NOTE THAT YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENTS OF THIS STUDY UNIT.

SUMMARY

In this study unit you learned

- what a life partnership is
- what the general rule is with regard to the legal consequences of cohabitation outside marriage
- that mainly legislation has extended limited recognition to heterosexual life partnerships thus far
- that legislation and court decisions have increasingly extended recognition to same-sex life partnerships
- that the law's refusal to treat heterosexual life partners like spouses is probably constitutional
- that the law's refusal to treat same-sex life partners like spouses is probably unconstitutional

The next section deals with domestic violence. All persons who are, or who have been, in a domestic relationship (including life partnerships) qualify for protection in terms of the Domestic Violence Act 116 of 1998.

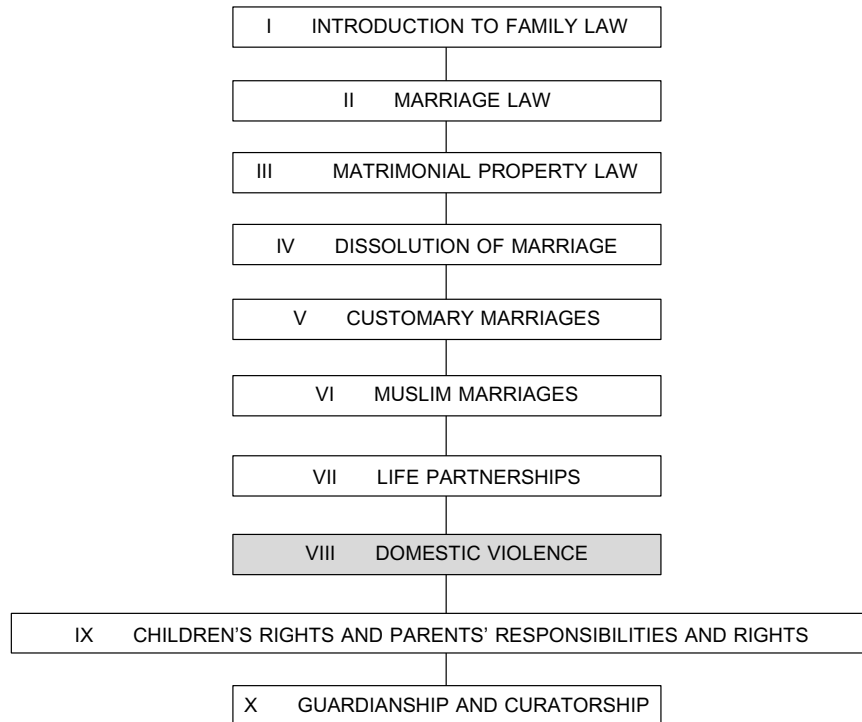
Domestic violence

Section VIII

SECTION VIII

Domestic violence

MODULE MAP



CONTENT

Overview

Study unit 25: Domestic violence

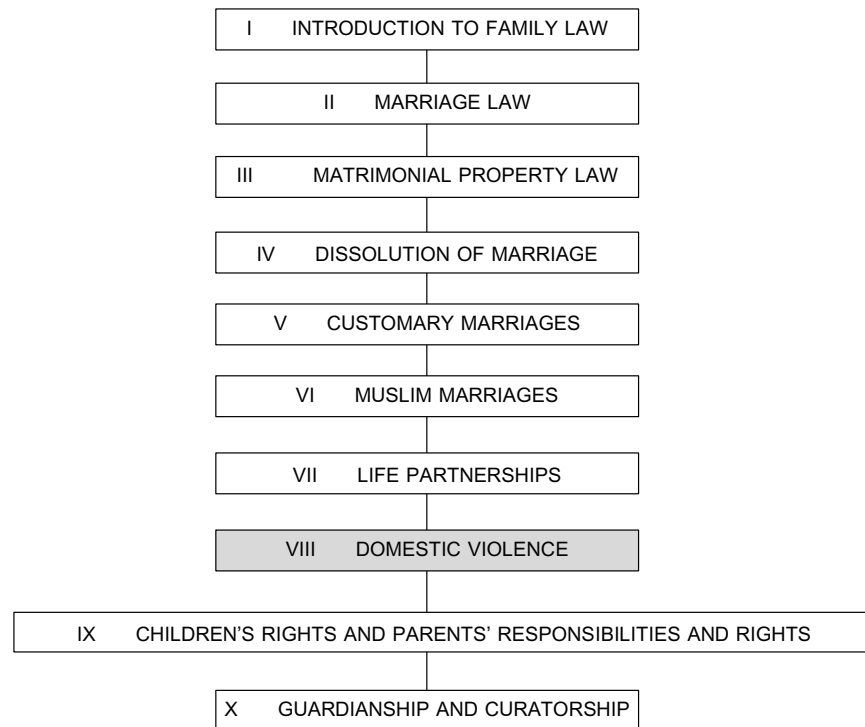
OVERVIEW

Section VIII deals with domestic violence and is the shortest section since chapter 7 of your textbook which covers this topic, need only be read. This section consists of only one study unit, namely study unit 25.

STUDY UNIT 25

Domestic violence

MODULE MAP



PREFACE

Domestic violence is an all too common occurrence in South Africa. To combat this problem, the Domestic Violence Act 116 of 1998 makes provision for protection orders with which persons who are in a domestic relationship can protect themselves from domestic violence.

LEARNING OUTCOMES

After studying the content of this study unit you should be able to

- (1) indicate which remedy is created by the Domestic Violence Act 116 of 1998
- (2) indicate that the Domestic Violence Act also applies to spouses in customary and Muslim marriages, and to parties to a cohabitation relationship, including same-sex life partners

- (3) indicate that in terms of the Domestic Violence Act a court which issues a protection order against a spouse may prohibit that spouse from entering the shared residence, or any part of such a residence
 - (4) indicate that in terms of the Domestic Violence Act a court which issues a protection order against the perpetrator of domestic violence may refuse him or her contact with any child
-

PRESCRIBED MATTER

Read

- Prescribed textbook 243–254

Study

- Only the content of the study unit

CONTENT OF THIS STUDY UNIT

1 THE DOMESTIC VIOLENCE ACT 116 OF 1998

- Protection orders** The Domestic Violence Act makes provision for the granting of protection orders with which any person who is, or who has been, in a domestic relationship, and who is, or who has been, subjected or allegedly subjected to domestic violence, can protect him or herself. The terms “domestic relationship” and “domestic violence” are defined in broad terms in the Act so as to cover as many cases of domestic violence as possible.
- Field of application** The Act affords protection to any person who is, or who has been, in a domestic relationship with the perpetrator. Take note that it includes, *inter alia*, persons who are, or who were, married to each other, and that for the purposes of the Act “marriage” refers to a marriage according to any law, custom or religion. Thus, for example, Muslim spouses and spouses in a customary marriage also enjoy protection in terms of the Act. Further, note that it also includes persons who live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other. This is the case even if they are unable to marry each other, and regardless of whether they are of the same or the opposite sex.
- Prohibitions** In terms of the protection order the perpetrator is, *inter alia*, prohibited from committing certain acts (which are broadly defined in the Act). Except from prohibiting the perpetrator from committing any act of

domestic violence he or she can also be prohibited from entering the shared residence or any part of such residence. Therefore, instead of using the common-law application for ejectment from the matrimonial home, a spouse who is subjected to, or is threatened with, domestic violence can invoke the provisions of the Domestic Violence Act to prevent the other spouse from entering the matrimonial home or part of it (see study unit 8). Also, if the court is satisfied that it is in the best interests of any child, it may refuse the perpetrator contact with any child in the care of the victim of domestic violence, or impose conditions in respect of his or her contact with the child (see study unit 26).

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **Domestic Violence Act 116 of 1998**
 - (1) Which remedy is created by the Domestic Violence Act 116 of 1998?
 - (2) Does the Act apply to spouses in customary and Muslim marriages?
 - (3) Does the Act apply to same-sex life partners?
 - (4) Can a spouse be prohibited from entering the shared residence or any part of such a residence in terms of the Act?
 - (5) Can the perpetrator of domestic violence be refused to have contact with a child in the care of the victim of domestic violence in terms of the Act?

PLEASE NOTE: YOU NEED NOT BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

SUMMARY

In this study unit you learned

- that the Domestic Violence Act makes provision for the issuing of protection orders
- that the Act also applies to spouses in customary and Muslim marriages and parties to a cohabitation relationship, which includes same-sex life partners
- that a spouse can be prohibited from entering the shared residence or any part of such a residence
- that the perpetrator of domestic violence can be refused to have contact with any child in the care of the victim of domestic violence.

In the next section we deal with children's rights and parents' responsibilities and rights in respect of their children.

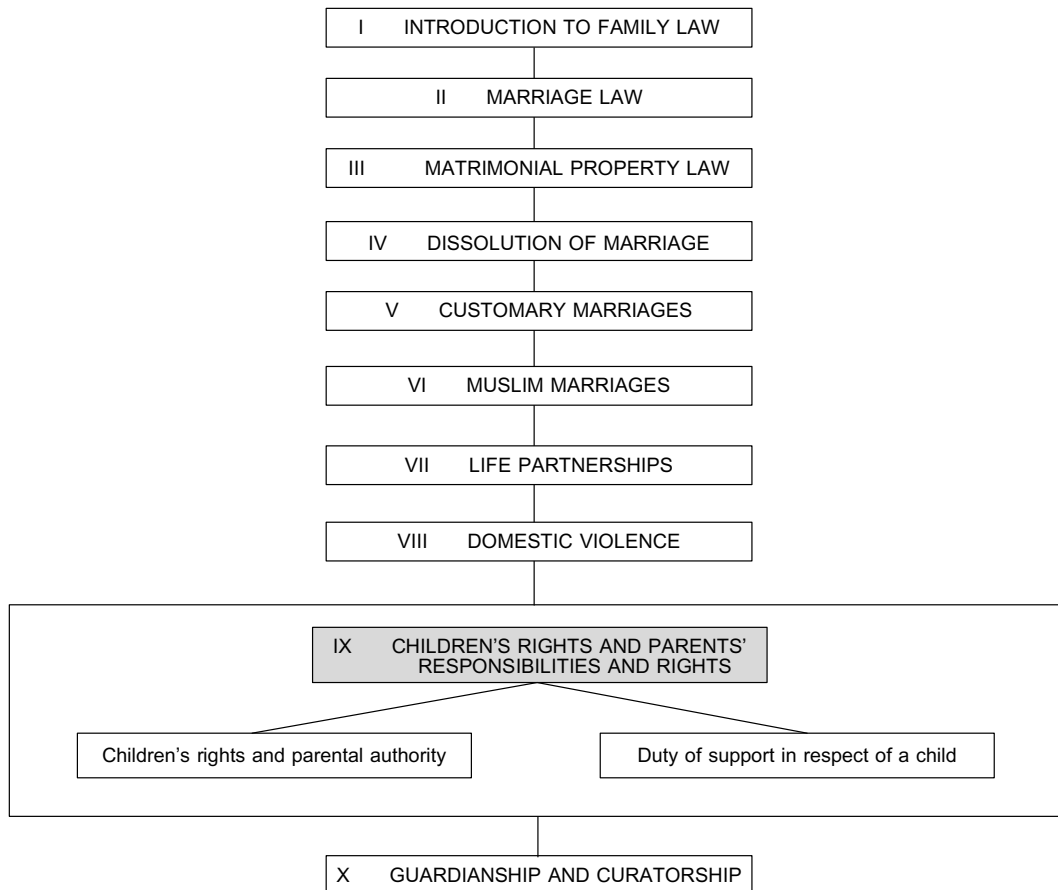
Children's rights and parents' responsibilities and rights

Section IX

SECTION IX

Children's rights and parents' responsibilities and rights

MODULE MAP



CONTENT

Overview

Study unit 26: Children's rights and parental authority

Study unit 27: Duty of support in respect of a child

OVERVIEW

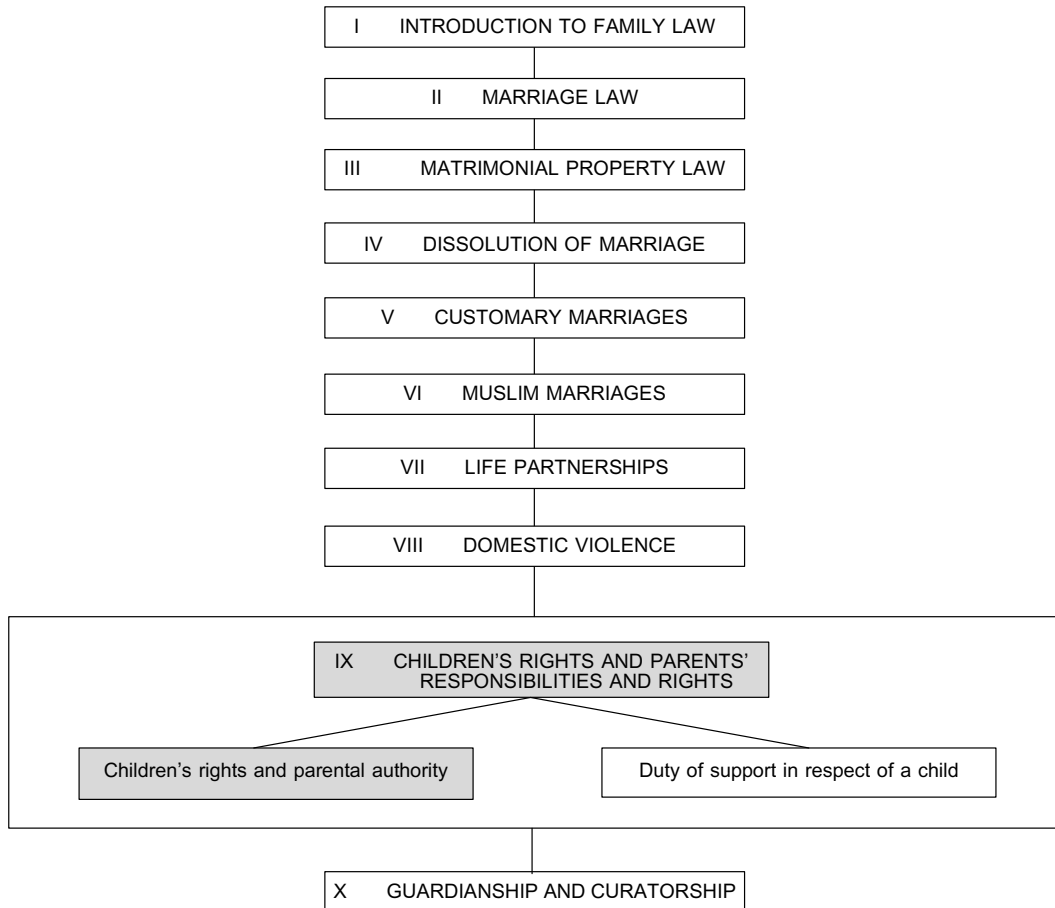
Section IX deals with children's rights and parents' responsibilities and rights and is divided into two study units:

- Study unit 26 deals in the first place with the special rights afforded to children in terms of section 28(1) of the Constitution. In the second place, it deals with all the aspects of parental power.
- Study unit 27 explains the basic principles with regard to the duty of support in respect of a child.

STUDY UNIT 26

Children's rights and parental authority

MODULE MAP



PREFACE

This study unit deals with children's rights and parental authority. Parental authority is the legal power which parents have over their children.

LEARNING OUTCOMES

After studying this study unit you should be able to

- (1) name the rights afforded to children in terms of the children's rights clause in the Constitution

- (2) define parental authority
 - (3) list the ways in which a father, a mother and same-sex life partners acquire parental authority
 - (4) explain what adoption is and what the requirements for and the effects of adoption are
 - (5) explain the contents of parental authority
 - (6) explain what a parent's having guardianship entails
 - (7) explain what a parent's having custody entails
 - (8) explain what a parent's having access entails
 - (9) explain when and how the court can interfere with parental authority
 - (10) list the ways in which parental authority is terminated
-

PRESCRIBED MATTER

Read

- Prescribed textbook 258 (from “(b) **The right to a name**”) – 264; 267–268 “(a) **The Children’s Bill 70 of 2003**”; 273 (from “(d) **Rescission of an adoption order**”) – 277 (up to just before “21.3 **The contents of parental authority**”); 285–287 “(iv) *The Children’s Bill 70 of 2003*”; 289 “21.5 **Enforcement of parental authority**”

Study

- Prescribed textbook 257–258 (up to just before “(b) **The right to a name**”); 265–267 (up to just before “(a) **The Children’s Bill 70 of 2003**”); 268 (from “21.2.4 **Adoption**”) – 273 (up to just before “(d) **Rescission of an adoption order**”); 277 (from “21.3 **The contents of parental authority**”) – 285 (up to just before “(iv) *The Children’s Bill 70 of 2003*”); 287 (from “(e) **Guardianship Act 192 of 1993**”) – 289 (excluding only “21.5 **Enforcement of parental authority**”)

CONTENT OF THIS STUDY UNIT

1 CHILDREN’S RIGHTS

All you need to study in respect of children’s rights is the content of pages 257–258 up to just before “(b) **The right to a name**”. The rest of the discussion on pages 258–264 in your textbook need only be read. In the first place, you need to know that the focus of the private-law rules

regulating the parent-child relationship is increasingly shifting from the rights and powers of parents towards the rights and entitlements of children. In the second place, you should know that apart from having all the rights the Constitution confers on everyone, children below the age of 18 years are afforded special protection by section 28 of the Constitution (the children's rights clause). In the third place, you have to know which rights are entrenched in section 28(1) of the Constitution. These rights are set out in the paragraph under the heading "(a) General" on pages 257–258 in your textbook. Finally, you have to take note that section 28(2) of the Constitution, which prescribes that a child's best interests are of paramount importance in every matter concerning the child, creates an independent right that goes beyond the scope of the rights enumerated in section 28(1).

2 PARENTAL AUTHORITY

2.1 The nature of parental authority

Parental authority is defined in your textbook on page 265. You have to study this definition.

2.2 The acquisition of parental authority

The explanation in your textbook of the acquisition of parental authority starts on page 265 and ends on page 277. You only have to know that which is discussed hereunder and those sections of the textbook to which you are specifically referred.

Ways to obtain
authority

You should be able to list the ways in which a mother, a father and same-sex life partners acquire parental authority. They appear under the heading "21.2 Acquiring parental authority" on page 265 in the textbook.

ACTIVITY

List the ways in which a mother, a father and same-sex life partners acquire parental authority.

FEEDBACK

A father acquires parental authority by

- (1) the birth of a legitimate child
- (2) marrying the mother of his extra-marital child

- (3) obtaining an order in terms of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 conferring parental authority on him
- (4) adopting a child

A mother acquires parental authority by

- (1) giving birth
- (2) adopting a child

Same-sex life partners acquire parental authority by

- (1) adopting a child
- (2) a woman acquires parental authority if her same-sex life partner gives birth to a child as a result of artificial fertilisation

Extra-marital child	Although the father of an extra-marital child has no inherent right of guardianship over, custody of and access to his extra-marital child, he can apply to the high court for these rights in terms of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997. The provisions of this Act are discussed on pages 266–267 of your textbook. You have to study these provisions thoroughly. You must know under which circumstances the court will grant such an application, and which factors the court will take into account when considering the application. Also, you will see that the family advocate can also be involved in the proceedings.
Adoption	In respect of adoption, you have to study only the definition of adoption on page 268, everything under “(b) The requirements for adoption ” on pages 268–273 and everything under “(c) The effects of adoption ” on page 273.
Definition	Firstly, make sure that you know the definition of adoption on page 268 of the textbook. Secondly, you have to know who is competent to adopt a child and what requirements such a person has to meet. These aspects are set out in your textbook on pages 268–269. In the third place, you must know that only a child below the age of 18 years can be adopted. Fourthly, you must be able to explain the provisions regarding the child’s interests (see pp 269–270). You must also know whose consent has to be obtained for adoption, when one parent’s consent can be dispensed with, and what the procedure is when one parent is unavailable to give consent. These aspects are discussed on pages 270–272 of the textbook. You further have to be able to indicate that an adoption order may not be made unless the children’s court has considered the prescribed report by a social worker. In the last place you also have to know what the effects of adoption are. They are discussed on page 273 of the textbook.
Who is competent to adopt a child?	
Whose consent is necessary?	
Effects of adoption	

2.3 The contents of parental authority

2.3.1 Guardianship

Wide and narrow meaning Guardianship is the first element of parental authority. Guardianship has a wide and a narrow meaning. In its wide meaning guardianship includes custody as well as guardianship in the narrow sense. At page 277 your textbook explains what guardianship in the narrow sense is. You will see that this explanation corresponds with the explanation of guardianship which we dealt with in study unit 20 above in respect of the consequences of divorce for the children of a divorcing couple. In study unit 28 you will again encounter guardianship, but then it will be the guardianship which comes in lieu of parental power.

After explaining what guardianship is, your textbook deals with guardianship of legitimate children and guardianship of extra-marital children respectively.

Guardianship of legitimate children Take note that the Guardianship Act 192 of 1993 contains important provisions with regard to guardianship over legitimate children. The Act (s 1) provides that both parents of legitimate children have guardianship over their children. They can exercise this power independently and without each other's consent. There are, however, exceptions to this rule where both parents must consent. These exceptions are set out on page 277 of your textbook. You must study them. Take note that guardianship consists of three elements and that the Guardianship Act (s 1) covers all three of them.

Administration of child's estate The first element of guardianship is the administration of the child's estate. You must study the discussion of the administration of the child's estate carefully on page 278. You must know

- what this administration includes
- that a person who donates or bequeathes property to a child can exclude the property from the parent's control
- that the child and not the parent is the owner of the property in the child's estate
- that the parent is not entitled to compensation for administration of the child's estate
- that the parent must act as a prudent and reasonable person would in administering the child's estate

Assistance in performance of juristic acts The second element of guardianship deals with the assistance that a parent has to give a child in the performance of juristic acts.

- Appointment of testamentary guardian** On page 278 your textbook refers to the third element of guardianship, namely that a parent can appoint a testamentary guardian for his or her child only if he or she is the child's only parent or if he or she has been appointed sole guardian of the child.
- Guardianship of extra-marital children** With regard to guardianship of extra-marital children you have to distinguish between the position of the mother on the one hand and that of the father on the other hand.
- Mother of the child** Regarding the mother's position, you should take note of the provisions of section 3 of the Children's Status Act set out on pages 277–278 of your textbook. You need to know what the position is if the mother is still a minor and the case where she is a major or attains the status of a major.
- Father of the child** With regard to the father of an extra-marital child, you should know that he has no automatic right of guardianship over his child. In this regard you should once again take note of the provisions of the Natural Fathers of Children Born out of Wedlock Act in terms of which the father may apply for guardianship. This is discussed on pages 266–267 of our textbook.

2.3.2 Custody

- Definition** Custody is the second element of parental authority. On pages 278–280 your textbook explains what custody means and entails. The explanation corresponds with what was said in study unit 20 above in respect of custody of children of divorcing couples. In respect of the discussion of custody in the present study unit, you must note in particular that the right to discipline the child forms part of custody.

You should also note that the custodial parent enjoys a broad discretion in respect of the exercise of the responsibilities and rights encompassed by custody, in which the court is reluctant to interfere. Regarding this issue, take note of the decision in *Martin v Mason* set out on page 280 of your textbook.

- Extra-marital child** Although it is not mentioned in your textbook you need to know, once again, that only the mother has custody of an extra-marital child, but that the father can apply for custody in terms of the Natural Fathers of Children Born out of Wedlock Act. The provisions of this Act, as set out on pages 266–267 of your textbook, are therefore also of importance in this regard.

2.3.3 Access

- Definition** The third element of parental authority is access. On page 280 of your textbook it is explained what access entails. Note once again that,
- Extra-marital child** although not mentioned in your textbook, the father of an extra-marital child has no inherent right of access to his child, but that he can apply for

it in terms of the Natural Fathers of Children Born Out of Wedlock Act. You should therefore once again take note of the provisions of this Act, as they appear on pages 266–267 of your textbook.

2.4 Judicial interference with parental authority

Meaning of judicial interference	The issue of judicial interference with parental authority is discussed in detail on pages 280–289 of your textbook. First of all, you must know what judicial interference with parental authority means. It means simply that the court may interfere with the authority exercised by a parent over his or her child or even terminate it. There are two main powers by virtue of which the court can interfere with parental power:
Two powers	(1) the high court’s inherent common-law power as upper guardian of all minors (2) the court’s statutory power embodied in various Acts
Upper guardian	At pages 280–282 of your textbook the court’s power as upper guardian is explained. You must study that explanation. After that you must look at the statutory powers of the court. You do not, however, have to study the explanation in your textbook on pages 282–289 in detail. You need only have a superficial knowledge of what the court can do in terms of each Act. You may, furthermore just read the discussion on the Children’s Bill on pages 285–287.
Matrimonial Affairs Act	In respect of the Matrimonial Affairs Act 37 of 1953, you need only know that the court can, in terms of section 5, make an order in respect of guardianship, custody and/or access on application of a parent of a legitimate child. The court will make an order which serves the best interests of the child. In particular, it can award sole guardianship or sole custody to a parent.
Marriage Act	In respect of the Marriage Act, you must once again look at what was said in study unit 6 above about the court’s power to replace the parental consent required for the marriage of a minor.
Divorce Act	In respect of the Divorce Act 70 of 1979, you must once again look at what was said in study unit 20 above about the interests of children of divorcing parents.
Child Care Act	In respect of the Child Care Act, you need know the following only: A child who apparently has no parent or guardian or whose safety and welfare require it, can be taken to a place of safety and then must be brought before a children’s court. The children’s court holds an enquiry to determine whether the child is in need of care. At its enquiry, the court has the power to make any of the orders provided for in section 15(1) of the Act. These orders are set out on page 284 of your textbook. You must study them. Finally, you must know what effect removal of a child from

the custody of his or her parents has on the parental power of those parents. This is explained on page 284 of your textbook: The parent loses his or her right to custody of the child, but retains the power to administer the child's property to consent to an operation or medical treatment involving a serious danger to the child's life, and to consent to the child's marriage.

Guardianship Act Next you have to be able to explain that, in terms of the Guardianship Act 192 of 1993, the court may dispense with a parent's consent to a juristic act that is listed in section 1(2). You have to know that the best interests of the child are the determining factor when the court decides whether to dispense with a parent's consent. You must study the discussion of *Jackson v Jackson* on page 288 in your textbook in this regard. You must also be able to indicate which factors the courts have taken into account in respect of dispensing with a parent's consent for his or her child's removal from South Africa.

Natural Fathers of Children Born out of Wedlock Act You should further bear in mind that the rights of the mother of an extra-marital child may be limited or taken away completely if the court issues an order in terms of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997. You have already been referred to the provisions of this Act above.

Domestic Violence Act Lastly, you should note that the court may issue an order in terms of the Domestic Violence Act 116 of 1998 that a person against whom a protection order applies (called the respondent), may have no contact with a specific child or specific children or that his or her contact with that child or those children be limited. This may, for example, happen if the respondent has abused the child or if the child lives with somebody who has been abused by the respondent. The court will only make such an order which excludes or limits the respondent's contact if it is in the best interests of the child.

2.5 Termination of parental authority

On page 289 of your textbook the ways in which parental power is terminated are listed. You must study that list.

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **Children's rights**

(1) Has there been a change in the focus of the legal rules governing the parent-child relationship? Briefly explain your answer.

- (2) Which special rights are given to children in terms of section 28(1) of the Constitution?
- **The definition of parental authority**

(3) Define parental authority.
 - **The acquisition of parental authority**

(4) List the ways in which parental authority is acquired by a mother, a father, and same-sex life partners respectively.

(5) How can an illegitimate or extra-marital child be legitimated?

(6) What is adoption?

(7) Who can adopt a child?

(8) Which requirements must a person meet before he or she can adopt a child?

(9) Whose consent to an adoption has to be obtained in terms of the Child Care Act 74 of 1983?

(10) Under which circumstances can consent to an adoption be dispensed with in terms of section 19 of the Child Care Act 74 of 1983?

(11) Which procedure must be followed in terms of section 19A of the Child Care Act 74 of 1983 where one parent is unavailable to give consent to an adoption?

(12) What are the consequences or effects of an adoption?
 - **The contents of parental power**

(13) Explain what guardianship entails.

(14) Who has guardianship over legitimate children in terms of the Guardianship Act 192 of 1993?

(15) In respect of which juristic transactions does a child need both parents' consent?

(16) Can a person who donates property to a minor exclude the property from the control of the child's parent?

(17) Who is the owner of the property in the child's estate?

(18) Is a parent entitled to compensation for administration of the child's estate?

(19) Which test or criterion is used to determine whether a parent has properly administered the child's estate?

(20) Can a parent validly assist his or her child in respect of a transaction with that parent? Explain briefly.

(21) When can the parent of a child appoint a testamentary guardian for the child?

(22) Who is the guardian of an extra-marital child whose mother is still a minor? Refer to the relevant legislation.

(23) How does a father obtain guardianship of his extra-marital child? Refer to the relevant legislation.

(24) Explain what custody entails.

(25) Explain whether the court would easily interfere with the

custodial parent's discretion in respect of the exercise of responsibilities and rights encompassed by custody. Refer to case law.

(26) Explain what access entails.

(27) How does the father of an extra-marital child obtain access to his child? Refer to the relevant legislation.

- **Judicial interference with parental power**

(28) What does it mean if we say that the high court is the upper guardian of all minors?

(29) In terms of which statutory provisions does the court have the power to interfere with parental authority or even to terminate it?

(30) Can a court award sole guardianship to a parent in terms of the Matrimonial Affairs Act 37 of 1953?

(31) Very briefly explain the provisions of the Child Care Act 74 of 1983 in respect of a child who has no parent or guardian.

(32) Which orders can the children's court make in terms of section 15 of the Child Care Act?

(33) What effect does removal of a child from the custody of his or her parents in terms of the Child Care Act 74 of 1983 have on the parental power of the parents?

(34) Can a court which issues a protection order in terms of the Domestic Violence Act 116 of 1998, exclude a person's contact with a child? Briefly explain your answer.

- **Termination of parental authority**

(35) List the ways in which parental authority is terminated.

PLEASE NOTE: YOU SHOULD ALSO BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

Mr X has an extra-marital son, Z, who is currently three years old. Although Mr X wishes to have a relationship with his son, he is prohibited by Z's mother from taking part in Z's upbringing and having any contact with him. Mr X wishes to know from you whether he has parental authority over Z, and if not, how it can be obtained. Advise him on this matter with reference to legislation.

SUMMARY

This study unit very briefly dealt with children's rights and all aspects of parental power. It explained

- which special rights are afforded to children in terms of the Constitution

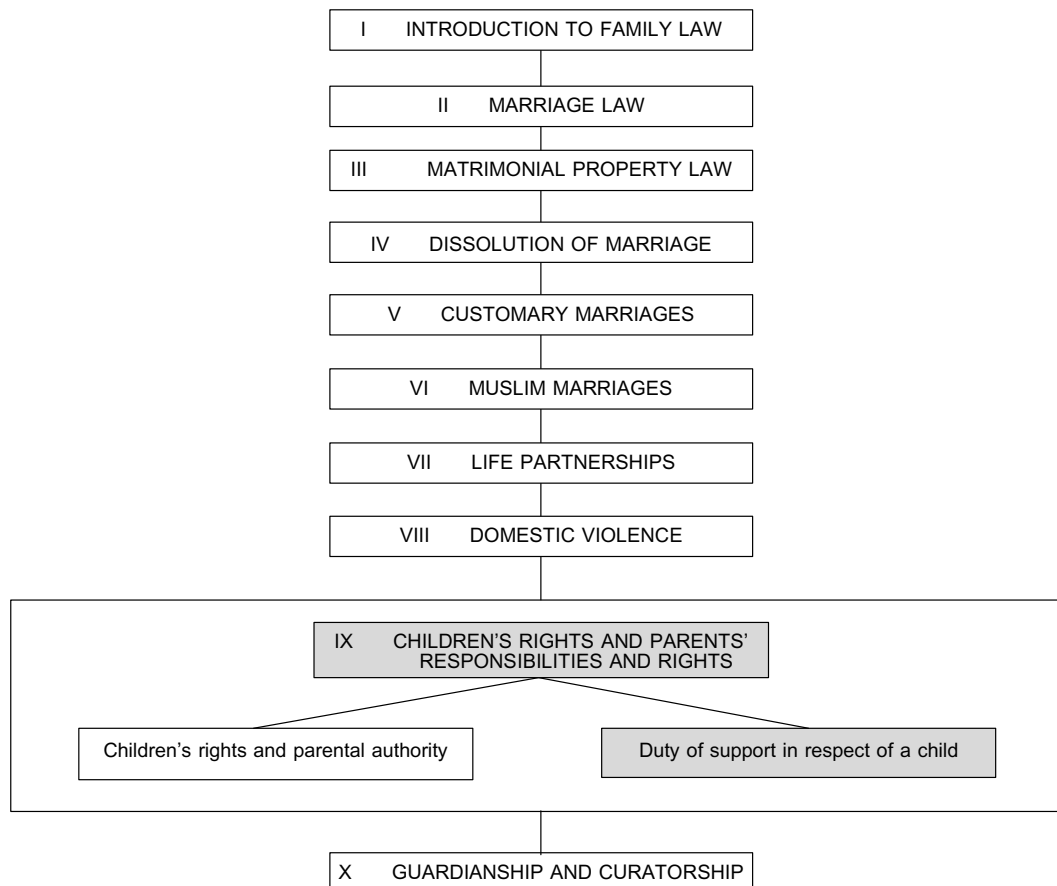
- what parental power is
- how it is acquired
- what its elements are
- how it can be interfered with
- how it is terminated

The next study unit deals with the duty of support in respect of a child.

STUDY UNIT 27

Duty of support in respect of a child

MODULE MAP



PREFACE

In the previous study unit we looked at the special rights afforded to children in terms of the Constitution, and we discussed the nature, acquisition, content and termination of parental authority. You also briefly studied judicial interference with parental authority.

In this study unit we shall discuss the duty of support in respect of a child. The reason why this topic is dealt with in a separate chapter in your textbook and a separate study unit in the study guide is that the duty of support in respect of a child is not regarded as a component of parental authority.

In this study unit we shall look at the people who are responsible for a child's support, the scope of the duty of support and the enforcement and termination of the duty of support. Finally, we shall discuss the reciprocity of the duty of support.

LEARNING OUTCOMES

After you have studied this study unit you should be able to

- (1) explain that a parent, grandparent, and siblings have a duty to support a child, but that it is unclear whether a stepparent has a duty to support his or her stepchild
 - (2) explain the scope of the duty of support
 - (3) briefly indicate how the duty of support is enforced
 - (4) indicate when the duty of support ends
 - (5) explain that the duty of support is reciprocal
-

PRESCRIBED MATTER

Study

- Prescribed textbook 291–296
- *Gliksman v Talekinsky* in your prescribed casebook 453–456

CONTENT OF THIS STUDY UNIT

1 PERSONS WHO HAVE A DUTY OF SUPPORT IN RESPECT OF A CHILD

On pages 291–294 of your textbook it is explained who has a duty of support in respect of a child. Ensure that you study this discussion thoroughly.

Parents

With regard to a parent's duty of support you should know, in the first place, that a parent's duty to support his or her children exists by operation of law (ie, *ex lege*), and as already mentioned above, that it is not a component of parental authority. It is therefore not terminated when parental authority comes to an end. In this regard you must study *Gliksman v Talekinsky* on pages 453–456 of your casebook. Secondly, you have to know when the parental duty is terminated, how the duty is apportioned between the parents, and that one parent can recover from the

other parent any amounts he or she spent in excess of his or her *pro rata* share. You also have to know the bases on which the parents can be held liable by third parties for debts incurred in respect of a child's support.

Grandparents

With regard to grandparents' duty of support in respect of their grandchild you should know, in the first place, that the duty of support passes to them only if neither parent can support the child. Secondly, you should know that the duty of support passes to both the child's maternal and paternal grandparents. Further, take note of the important decision in *Petersen v Maintenance Officer* on page 292 of your textbook. In that case the Cape provincial division of the high court declared unconstitutional the rule (laid down in *Motan v Joosub*) that paternal grandparents were not liable for the maintenance in respect of their son's extra-marital child.

ACTIVITY

Mr and Mrs Nel, very well-off farmers in the Cape, have a 21-year-old son, Dewald, who is currently earning no income because he is a full-time Unisa student. Dewald and his girlfriend, Britney, have an extra-marital son, Tim.

- (1) Mr and Mrs Nel are not sure whether they are still legally obliged to support Dewald now that he has reached majority. Advise them in this regard, with reference to case law.
- (2) Since Dewald and Britney earn no income, they cannot support their child. Mr and Mrs Nel are of the view that they are not responsible for Tim's maintenance. Explain to them, with reference to case law, how our law has been reformed in this respect.

FEEDBACK

- (1) The fact that Dewald has reached the age of majority is irrelevant. In *Gliksman v Talekinsky* the court made it clear that a parent's duty to support his or her child continues for as long as that child is unable to support itself and the parent is able to pay the maintenance and does not necessarily come to an end when the child reaches the age of majority.

In the light of the aforementioned Mr and Mrs Nel will in all probability be legally obliged to maintain Dewald.

- (2) If neither parent can support their child, the duty of support passes to the child's maternal and paternal grandparents. In the past, the law distinguished between legitimate and extra-marital children in this regard. In terms of the 1930 decision of the appellate division (now the supreme court of appeal) in *Motan v Joosub*, paternal grandparents were not liable for maintenance in respect of their son's extra-marital child.

In *Petersen v Maintenance Officer* the Cape provincial division of the high court declared this rule unconstitutional on the ground that it unjustifiably violated the extra-marital child's right not be unfairly discriminated against on the ground of birth and his or her right to dignity, and failed to afford paramountcy to the child's best interests.

In the light of the aforementioned, Mr and Mrs Nel will (together with Britney's parents) be liable for Tim's maintenance.

Siblings If neither the child's parents nor his or her grandparents are in a position to support the child, the duty of support passes to the child's siblings according to their respective means, provided that the sibling who claims maintenance is indigent.

Stepparents Note that, at common law, a stepparent is not obliged to maintain his or her stepchild, as the duty to support rests on blood relationship, and not affinity. However, in *Heystek v Heystek* the court held that a stepparent does have a duty of support in respect of his or her stepchild. The decision is wrong in so far as the court held that marriage in community of property, the existence of a common household and *consortium omnis vitae* with the child's mother render the stepfather liable for his stepchild's support. In this regard you must see the criticism of *Heystek v Heystek* on pages 293–294 of your textbook. There it is pointed out that the only part of the decision in *Heystek v Heystek* which may provide a valid basis for conferring a duty of support on a stepparent is the court's view that the child's right to parental care gives the child a right to claim maintenance from his or her stepparent. If this part of the decision is correct, it means that the Constitution has created a duty of support between stepparent and stepchild. Thus, for the latter reason, it may be that a stepparent is now obliged to support his or her stepchild. Time will tell whether other courts will be prepared to accept the view that there is a duty of support between stepparent and stepchild.

2 THE SCOPE OF THE DUTY OF SUPPORT

Next you have to study the rules on the scope of the duty to support a child. These rules are set out on pages 294–295 of the textbook.

3 ENFORCEMENT OF THE DUTY OF SUPPORT

In study unit 8 above we very briefly and superficially dealt with enforcement of maintenance. That discussion dealt specifically with enforcement of maintenance between spouses. On page 295 of the textbook you will see that the same principles which govern enforcement

of maintenance obligations between spouses also govern enforcement of maintenance obligations between parent and child. But, in addition, section 50(2) of the Child Act 74 of 1983 provides that anyone who is legally liable to maintain a child and who fails to do so while able to do so, is guilty of a crime (a crime is also called an offence).

4 TERMINATION OF THE DUTY OF SUPPORT

Further, you have to know when the duty of support ends. This issue is discussed on page 295 of the textbook.

5 THE RECIPROCITY OF THE DUTY OF SUPPORT

In study unit 8 above we briefly explained that the duty of support between husband and wife is reciprocal, and we also explained what this means. On pages 295–296 of the textbook you will see that the same principle of reciprocity applies in respect of the duty of support between parent and child. Thus, a child must support his or her parents as the parents must support the child. Similarly, a grandchild must support his or her grandparents as the grandparents must support the grandchild. Also take note of the distinction that is drawn between legitimate and extra-marital children and the fact that it is unclear whether an extra-marital child is obliged to support his or her father and paternal grandparents. Next, the requirements for the existence of a child's duty to support his or her parents and grandparents and the scope of the duty are explained. Ensure that you understand the discussion.

QUESTIONS

NB Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **Persons who have a duty of support in respect of a child**
 - (1) By virtue of what ground does the duty of support exist between parent and child?
 - (2) Is the duty of support part of parental power? Explain.
 - (3) Is the parental duty of support terminated by the death of the parent?
 - (4) Which parent is liable against third parties for debts incurred in respect of a child's support? Discuss briefly.
 - (5) Explain with reference to case law whether the paternal grandparents of an extra-marital child has a duty to support the child.
 - (6) When are a child's siblings obliged to support him or her?

- (7) Does a stepparent have a duty to support his or her stepchild?
Explain with reference to authority.
- **The scope of the duty of support**
(8) Which factors does the court take into account to calculate the amount of maintenance?
 - **Enforcement of the duty of support**
(9) Which crime was created by section 50(2) of the Child Care Act 74 of 1983?
 - **Termination of the duty of support**
(10) Does a maintenance order that has been made in respect of a child lapse automatically when the child becomes self-supporting?
 - **The reciprocity of the duty of support**
(11) Is an extra-marital child obliged to support his or her father?
Explain.

PLEASE NOTE: YOU SHOULD BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

Below follows an example of a problem-type question:

Mrs and Mr X were married in community of property on 5 January 1991. They have one child, Anne, who is five months old. Mrs X has two minor children, Bob and Charles, from her previous marriage to Mr Y. Mrs X also has an extra-marital child, Dianne, of whom Mr Z is the father. Mr X refuses to pay maintenance for all these children. Explain who is liable for the maintenance of each child. Substantiate your answer.

SUMMARY

This study unit dealt with the basic aspects of the duty of support in respect of a child. In it it was explained

- that a parent, grandparent, and siblings have a duty to support a child, but that it is unclear whether a stepparent is obliged to support his or her stepchild
- what the scope of the duty of support is
- how the duty of support is enforced
- when the duty of support ends
- that the duty of support is reciprocal

In the next section we look at the guardianship which replaces parental authority, as well as at curatorship.

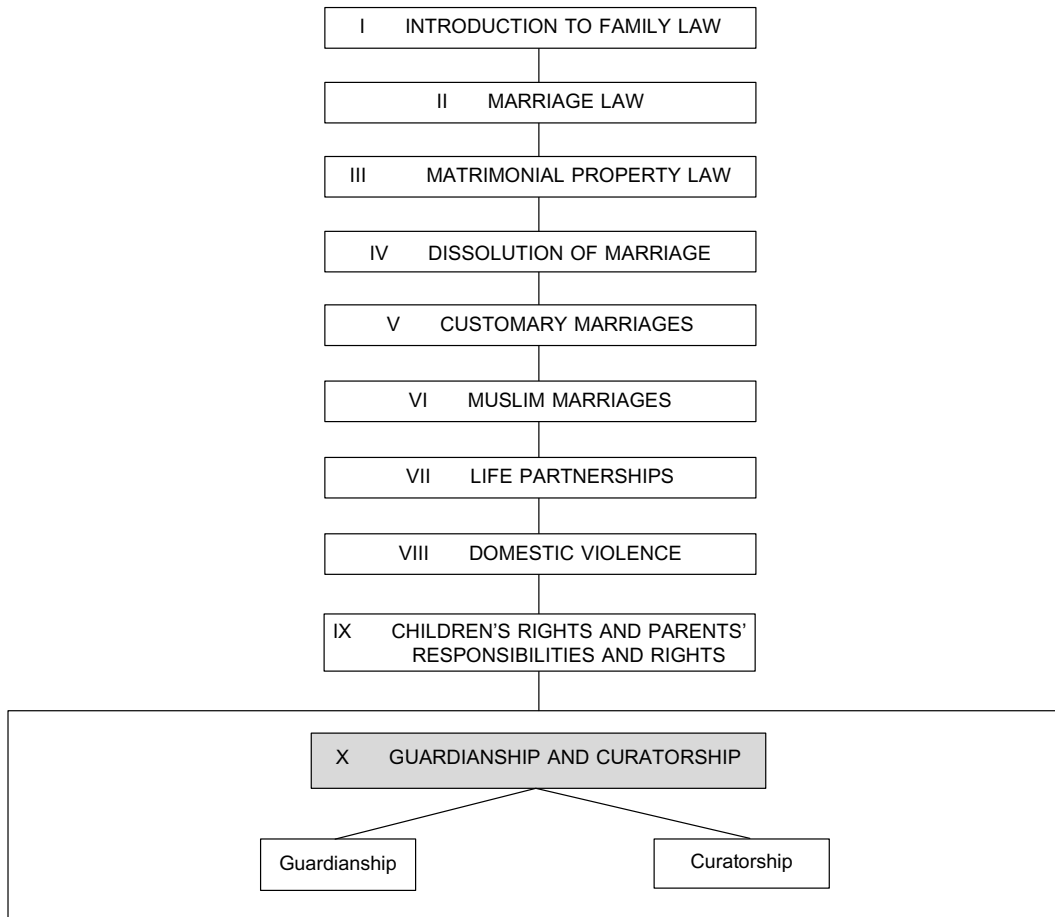
Guardianship and curatorship

Section X

SECTION X

Guardianship and curatorship

MODULE MAP



CONTENT

Overview

Study unit 28: Guardianship and curatorship

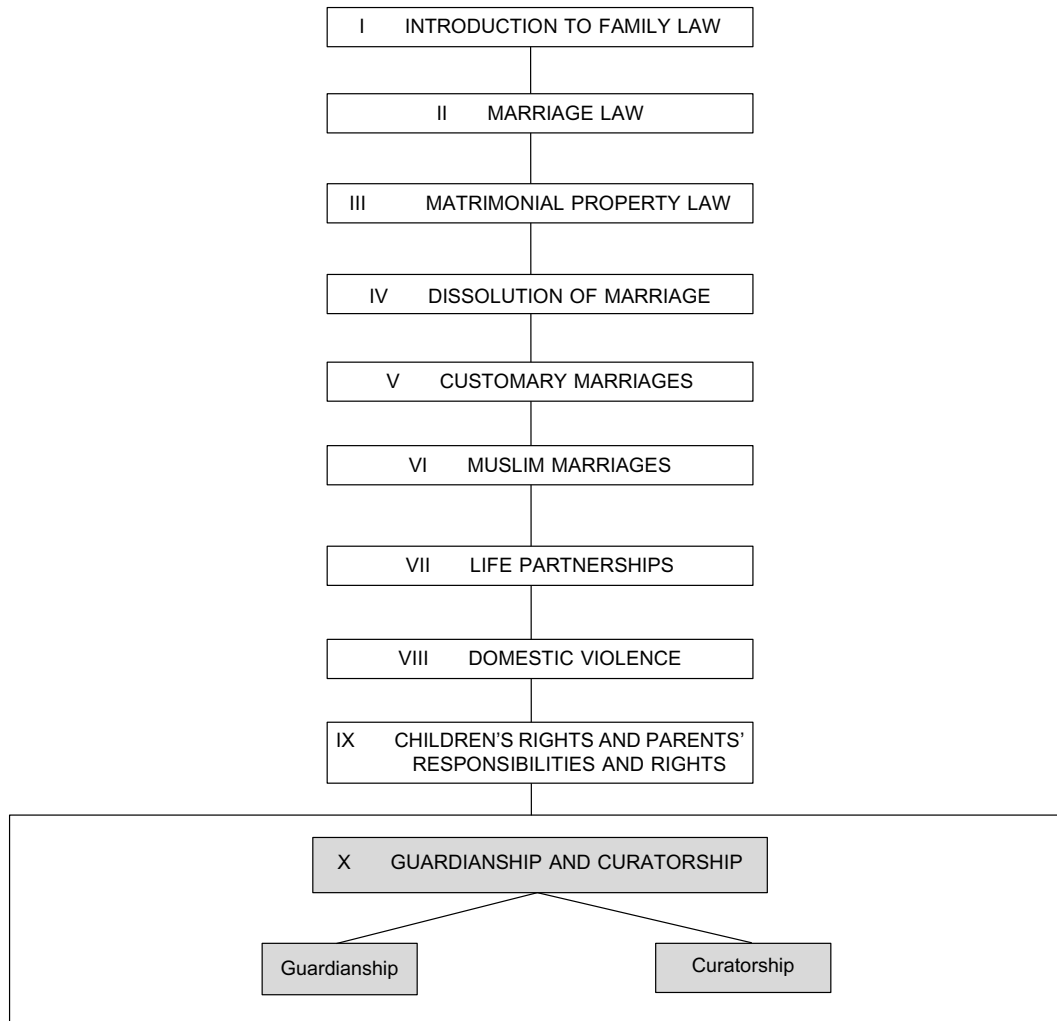
OVERVIEW

Section X is the last section of Family Law. Perhaps because it is the last section and is a short one, it is often left out by students when they study for the examination. Do not leave it out. We often set short, direct questions on this section of the work.

STUDY UNIT 28

Guardianship and curatorship

MODULE MAP



PREFACE

In the previous study unit we discussed parental authority and children's rights. You, inter alia, saw that both parents have equal guardianship over the children born of their marriage. In this study unit, where we discuss the **guardianship which replaces parental authority**, you will notice that it is not only a parent (or parents) who may act as the guardian (or guardians) of a child. Our law provides that a guardian may be appointed over the person and estate (or only over the estate) of a minor who does not have parents.

You will further note in this study unit that our law also provides that a person who is incapable of managing his or her own affairs may be placed under **curatorship**, and that a curator may be appointed over his or her person and estate (or only over his or her estate). A curator may also be appointed to assist him or her in litigation.

LEARNING OUTCOMES

The purpose of this study unit is to enable you to

- (1) explain what is entailed by the guardianship which arises when parental authority is terminated
 - (2) list the different kinds of guardians and to describe each of these offices briefly
 - (3) set out the requirements for the appointment as a guardian
 - (4) list the rights and duties of a guardian
 - (5) list the ways in which guardianship is terminated
 - (6) define the concepts “curatorship” and “curator”
 - (7) list the different kinds of curators our law provides for and to describe each of these offices briefly
 - (8) set out the requirements for the appointment as a curator
 - (9) list the rights and duties of a curator
 - (10) list the ways in which curatorship is terminated
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PRESCRIBED MATTER

Study

- Prescribed textbook 299–304

CONTENTS OF THIS STUDY UNIT

1 GUARDIANSHIP

On page 299 your textbook defines the kind of guardianship which is at issue in this study unit, and distinguishes between this and the guardianship which a parent has over his or her child (see study unit 26). Ensure that you know the definition and understand the distinction.

1.1 The types of guardians (tutors)

The different types of guardians (or tutors) for which South African law

Definitions

provides, are set out on pages 299–300 of the textbook. Ensure that you can give a proper definition of each type of guardian (ie a testamentary tutor, an assumed tutor, a tutor dative and a supposed or putative tutor). Also note the different ways in which these different types of guardians are appointed.

ACTIVITY

Briefly explain the meaning of the following terms:

- (1) testamentary guardian
- (2) assumed tutor
- (3) tutor dative
- (4) supposed or putative tutor

FEEDBACK

- (1) A testamentary guardian is the guardian appointed by a minor's natural guardian in his or her will to act as the minor's guardian after the natural guardian's death. The testamentary guardian may not act as the minor's guardian until his or her appointment has been confirmed by the master of the high court.
 - (2) An assumed tutor is a guardian who is appointed by a testamentary guardian to assist him or her in exercising guardianship, or even to take his or her place as guardian. An assumed guardian may be appointed only if the testator expressly conferred the power of assumption on the testamentary guardian. The appointment of the assumed tutor must also be confirmed by the master of the high court.
 - (3) A tutor dative is the guardian appointed to a minor by the high court or the master of the high court where a minor's interests require this. A tutor dative will be appointed if, for example, property accrues to a minor while he or she is neither under parental authority nor under guardianship or curatorship.
 - (4) A supposed or putative tutor is a person who acts as a minor's guardian while under the mistaken impression that he or she is the minor's guardian while this is not the case. This may happen, for example, where the father of an extramarital child institutes an action on behalf of his child while under the impression that he is the child's guardian. If the supposed or putative tutor's conduct is in the minor's interests, the high court may ratify such conduct.
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1.2 The requirements for appointment as a guardian (tutor)

You must know what the requirements for the appointment as a guardian are. They are listed in your textbook on page 300 from (1) to (5).

1.3 The rights and duties of a guardian (tutor)

You must know what the rights and duties of a guardian generally include. They are listed on pages 300–301 of the textbook.

1.4 Termination of guardianship

Note that guardianship is terminated at the commencement of certain events. These events are listed on page 301 of your textbook from (1) to (7). You must be able to list them.

2 CURATORSHIP

Under this heading in your textbook on page 301 the concept curatorship is defined. Thereafter it is explained that a curator can be appointed for different purposes. Ensure in this regard that you know what a *curatrix bonis*, a *curatrix personae* and a *curatrix ad litem* is.

2.1 The types of curators

The different types of curators for which South African law provides, are set out on pages 302–303 of the textbook. Ensure that you can give a proper definition of each type of curator (ie a curator nominate, an assumed curator, a curator dative and a *curator ad litem*).

Definitions

ACTIVITY

Briefly explain the meaning of the following terms:

- (1) curator nominate
- (2) assumed curator
- (3) curator dative
- (4) *curator/curatrix ad litem*

FEEDBACK

- (1) A curator nominate is someone who is appointed by a testator or donor who bequeaths or donates property to a person who lacks capacity to act, such as a minor or a mentally ill person, to administer

the property for the duration of the person's incapacity. The appointment of a curator nominate must be confirmed by the master of the high court.

- (2) An assumed curator is the curator appointed by a curator nominate to assist him or her, or even to take his or her place as curator. An assumed curator may be appointed only if the testator or donor conferred the power of assumption on the curator nominate. The appointment of the assumed curator must also be confirmed by the master of the high court.
 - (3) A curator dative is a curator appointed by the high court or the master of the high court in terms of common law or legislation. The high court may, for example, appoint a curator dative to take care of the estate (and person) of a mentally ill person or someone who is unable to manage his or her own affairs (eg, because of old age, a serious illness or a handicap). The master of the high court may, *inter alia*, appoint a curator dative over property which belongs to someone whose place of residence is unknown, or who is permanently absent from South Africa without having a legal representative to administer the property here.
 - (4) A *curator* or *curatrix ad litem* is someone who assists a person in litigation because the person does not have capacity to litigate. Such a curator is appointed for, for example, unborn children, mentally ill persons, and minors who are involved in litigation against their parents.
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2.2 The requirements for appointment as a curator

You must know what the requirements for the appointment as a curator are. These requirements, which are basically the same as the requirements for the appointment as a guardian, are listed in your textbook on page 303 from (1) to (5).

2.3 The rights and duties of a curator

You must know what the rights and duties of a curator generally are. They are listed on pages 303–304 of the textbook. Note, once again, that these rights and duties are very similar to the rights and duties of a guardian.

2.4 Termination of curatorship

Note that curatorship is terminated at the commencement of certain events. These events are listed on page 304 of your textbook from (1) to (7). You must be able to list them.

QUESTIONS

NB: Make sure that you can answer these questions properly. They are designed to test your knowledge of the study material in this study unit.

- **Guardianship**

- (1) To what does the guardianship which replaces parental authority refer?
- (2) Give a short definition of each of the four types of guardians for which South African law provides.
- (3) List the requirements for the appointment as a guardian.
- (4) What are the rights and duties of a guardian generally?
- (5) List the ways in which guardianship is terminated.

- **Curatorship**

- (6) What does the concept “curatorship” mean?
- (7) List and give short definitions of the different kinds of curators for which South African law provides.
- (8) List the requirements for the appointment as a curator.
- (9) What are the rights and duties of a curator generally?
- (10) List the ways in which curatorship is terminated.

PLEASE NOTE: YOU NEED *NOT* BE ABLE TO ANSWER PROBLEM-TYPE QUESTIONS ON THE CONTENT OF THIS STUDY UNIT.

SUMMARY

In this study unit you saw

- that it is not only a parent who can act as the guardian of a child
- that our law makes provision for different types of guardians, which may be appointed for a child who has no parents
- that guardians must comply with certain requirements before they can be appointed as guardians
- that guardians must exercise their rights and carry out their duties in the best interests of the children
- when guardianship which replaces parental authority is terminated

You also learned

- what curatorship is
- that our law provides for different types of curators which can be appointed for persons who, due to some or other handicap
 - cannot look after their property
 - and/or their persons
 - or cannot take part in litigation on their own

- that curators must also comply with certain requirements before they can be appointed as curators
- that curators must exercise their rights and carry out their duties in the best interest of persons placed under their curatorship
- when curatorship is terminated