

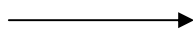
## SECTION 1- MARRIAGE LAW

### ENGAGEMENT

- ❖ Q&A Define the concept engagement?
  - Is a contract between a man and a woman who agree to marry each other on a specific or determinable date
  - Is a contract but not a normal contract
- Engagement is not a prerequisite to carry out a valid marriage
- ❖ May an engagement be concluded subject to conditions?
  - Can be subject to conditions. Impossible or unlawful conditions do not void it.
- ❖ List the requirements for valid engagement
  - Legal req for valid engagement: Acronym- CCLP (consent, capacity, lawful, possible)
    - Parties must agree (must be consensus) about the marriage
    - parties must have capacity to act (minor needs permission or mentally ill is incapable)
    - engagement must be lawful (parties are unmarried and able to marry)
    - engagement must be judicially and factually possible
- material mistake and material misrepresentation excludes consensus
  - material mistake = engagement is void
  - material misrepresentation = engagement is voidable by party who was misled
  - Does not matter if mistake was deliberate or made innocently
  - Misrepresentation occurs when there is a false representation of the truth or failing to correct a misconception or omitting to disclose certain facts where there is a duty to speak
- ❖ Distinguish between error in persona and error in negotio?
- ❖ A married person promises to marry another person after obtaining a divorce from current spouse. Is the promise valid?
- ❖ Q&A- What is the effect of a material mistake and of a material misrepresentation respectively?
  - 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 by party who was misled
- ✚ CASE- Schnaar v Jansen (concept of the duty to speak)
  - Consensus was the legal requirement in issue in this case.
  - Facts of case: Man terminated engagement after finding out things about the woman's family. She sued him for breach of contract.
  - Legal question: Court had to decide if those circumstances (non disclosure of certain facts) justified the man's termination of the engagement.
  - Van den Heever thinks decision is wrong because a party is obliged to disclose things of this nature in good faith as an engagement is a contract to marry

Note- age of majority is 18 not 21

When a minor wants to conclude contract of an engagement- following consent is needed



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

- Impossible or unlawful conditions do not render the engagement void, but are merely held to be *pro non scripto* (not to have been written). Such conditions are not taken into account at all.

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

❖ Q&A- When can an engagement be terminated. List the different ways?

- Marriage
- Death of either person
- Mutual agreement
- Withdrawal of parental consent when the party is a minor
- Unilateral and justified termination based on sound reasons (*justa causa*)  
*Justa causa* is a fact or occurrence which comes about after the engagement has been entered into which will seriously jeopardise the chances of a happy and lasting marriage. The realisation by one party that s/he is no longer in love is not *justa causa* as it will not seriously jeopardise the chances of a happy marriage. A termination of engagement for this reason will constitute breach of promise. Rule can be criticised because not loving the other party should be the most valid reason for terminating an engagement. Possibility of having a happy marriage is jeopardised if a party is not in love with the other.
- Breach of promise (is the unlawful termination of the engagement) (innocent party can claim damages for breach of contract or satisfaction for personality infringement based on the delict *iniuria*)

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

- ✚ CASE- *Guggenheim v Rosenbaum*- Authority: Courts calculate damages on the basis of positive and negative interest. Decided that a clear distinction must be drawn between an action for damages and an action for satisfaction which may be brought in the same action.
- Damages awarded for breach of contract of engagement are *sui generis* (of its own kind). They are awarded differently to other contracts. When ordinary contracts are breached, damages are worked out on the basis of positive interest. With breach of engagement, damages calculated on the basis of positive and negative interest.  
 Positive interest (innocent party entitled to damages that will place them in the financial position they would have been in had the contract been performed)  
 In *Guggenheim*, both prospective loss and actual loss was awarded. This also allows for expenses incurred to be awarded as and the person will be placed in the same financial position if the contract had not been entered into (negative interest)
- For action for satisfaction based on *iniuria* (infringement of personality), plaintiff must prove infringement as well as the intention to infringe to succeed with claim.
- ❖ Q&A- name 3 examples where courts granted satisfaction for personality infringement based on breach of promise.

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- different rules apply according to the reasons for termination (whether parties agree to terminate engagement or if its terminated for a *justa causa* or if a party has committed a breach of promise)
- ❖ Q&A- List rules which apply in respect of the return of engagement gifts where a party has committed breach of promise
  - Innocent party can claim *sponsalitia largitas* (gifts made with a view to the marriage) and the *arrahae sponsalitia* (gifts to show the seriousness of promise to marry) which he or she gave (small or unconditional gifts not included here)
  - Innocent party may retain *arrahae sponsalitia* and *sponsalitia largitas* they received
  - If innocent party claims damages, the value of the gifts retained must be taken into account. (unsure if same applies when satisfaction is claimed)
- Satisfaction and damages on the grounds of seduction.
  - This includes 2 separate claims : one for seduction and one for defloration and the concomitant minimising of womans chances of making a suitable and successful marriage) and the claim for damages
- ❖ Define seduction – induced into sexual activity outside marriage

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## LEGAL REQUIRMENTS FOR THE CONCLUSION OF A VALID CIVILMARRIAGE

Note- minor children are children between 7-18 not 7-21

- ❖ Q&A- define marriage?  
Marriage is traditionally defined as the legally recognised life long voluntary union between one man and one woman to the exclusion of all other persons.
- It is not a contract
- Requirements for a valid marriage: (Acronym- CCLF, capacity, consensus, lawful, formalities)
  - *Capacity to act*
  - *Consensus*
  - *Must be lawful*
  - *Prescribed formalities must be complied with*
- If the requirements are not met, the marriage is not valid

## CAPACITY TO ACT

- infants (children under 7) and mentally ill have no capacity to act. They cannot understand the nature and consequences of their actions. Minors (7-18) or prodigal (prodigal is incapable of managing his own affairs or squanders her assets) are people who need consent to marry.

## CONSENSUS

- ❖ Q&A- What are the factors affecting consensus? (possible essay question)  
Mistake- only material mistake excludes consensus. Mistake concerning identity of other person (error in personam) and mistake concerning 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 that occurs in practice. Unsure if the mistake renders it void or voidable. Heaton suggests should be void because consent is absent but in the interests of society it should be voidable at request of party who was mistaken.  
Simulated marriages (marriages of convenience) are valid as the parties had intention to validly marry.  
Mistake in not material where a party is mistaken about facts concerning marriage or personal attributes of other party unless the misunderstanding was caused by misrepresentation. A non-material mistake is irrelevant to the marriage and is therefore not a ground for its dissolution.
- Misrepresentation- Only serious misrepresentation will affect the validity of marriage. eg. where woman is already Pregnant by another man at time of entering marriage and fraudulently conceals this. Husband can have marriage set aside.
- ✚ Duress- Duress (force) renders a marriage voidable. Eg. Spouse is forced to consent to marry.eg Smith v Smith where bride was threatened by father and groom that she went ahead in a daze. Court set aside upon her request.
- Undue influence- Undue influence should affect validity. There is no express authority on this. It should be a ground for setting aside a marriage.
- ❖ Q&A- Distinguish between error in negotio and error in personam?

## LAWFULNESS

- Marriage must be lawful for the parties to marry to be valid  
Who is prohibited from marrying?
  - A man or woman already married cannot take a second spouse while marriage still exists.
  - A child cannot marry the person who adopted them
  - People too closely related
  - Guardian and his ward (minor under guardianship) unless High Court consents
- Mixed marriages before Mixed Marriages Act 55 of 1949 was repealed were not automatically validated

## PRESCRIBED FORMALITIES MUST BE COMPLIED WITH

- Marriage by proxy not permitted. Parties must be personally present
- ✚ Ex Parte Dow – Prescribed formalities should be complied with were at issue. Applicant applied for order declaring his marriage 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.  
29(2) provides that a marriage should be solemnised in a church or other building used for religious services or in a public place or private dwelling house with open doors and in the presence of the parties themselves and at least 2 competent witnesses. Purpose is to avoid clandestine marriages. Decision is to be welcomed since only a material defect ought to render a marriage void ab initio.
- Registration- Marriage register must be signed by parties to the marriage, two witnesses and marriage officer but if not done, marriage is still valid.
- Prohibited degrees of relationship- certain people may not marry each other because they are too closely related.  
Related by blood (cosanguinity) or Related by marriage (affinity)
- Relationship can be in the direct line or collateral.
- Blood relatives in collateral line are not ascendants or descendants but have a common ancestor
- Relatives in direct line are Ascendants (forebears or ancestors: parents, grandparents, great-grandparents and so on)  
Descendants (born of you: children, their children and so on)
- Affinity in the direct line- exists between a spouse and all the blood relatives in the direct line of the other spouse
- Affinity in the collateral line- exists between a spouse and the blood relatives in the collateral line of the other spouse

## PROHIBITIONS- who may not marry

Rule 1- Blood relatives in the direct line (can never marry your ascendants or descendants)

Rule 2- Blood relatives in the collateral line may not marry if either of them is related to their common ancestor within the first degree or generation (cannot marry your brother, sister, their children, their grandchildren because you have the common ancestor). You can marry your cousin because although you are blood relatives in the collateral line, neither is related to a common ancestor

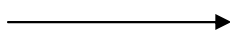
Rule 3- Persons related to each other by affinity in the direct line may not marry (cannot marry ex-spouses relatives in direct line.)

Rule 4- Persons related to each other by affinity in the collateral line are allowed to marry (eg, ex spouses brother, sister, brother in law, sister in law, cousin, niece, nephew)

## THE CIVIL MARRIAGE OF A MINOR

Note- minor children are children between 7-18 not 7-21

- Minors have limited capacity to act and must obtain necessary consent to enter into marriage



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 <b>presiding officer of childrens court</b> 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

## ABSENCE OF REQUIRED CONSENT

### Validity

- 24A Marriage Act 25 of 1961 provides that a minors marriage is not void if consent is not obtained. However a competent court may dissolve it on grounds of lack of consent on application by parents or guardian or minor themselves within certain periods

### Patrimonial consequences

- Must distinguish between cases where marriage is dissolved on ground of lack of consent and those where the marriage is not dissolved. Where marriage is dissolved on the ground of lack of consent, the court can make an order regarding the division of matrimonial property as it deems just. Where the marriage is not dissolved, the Act provides:
  - If the parties have not entered into an antenuptial contract, community of property applies
  - If the parties entered in to ANC where accrual was not excluded, the ANC is valid
  - It does not provide for if the ANC is excluded. The question arises whether the contract is valid or void.
- ❖ Q&A- Summarise the consequences of a minor concluding a marriage without the necessary consent as per section 24 of marriage Act.?

Know section 24(2) Marriage Act **Distribution of matrimonial property upon dissolution of marriage for want of consent of parents or guardian.**

(2) If such a marriage is not dissolved, the patrimonial consequences of the marriage are the same as if the minor were of age when the marriage was entered into and any antenuptial contract in terms of which the accrual system is included and which has been executed with a view to such a marriage is deemed to have been validly executed.

## VOID CIVIL, VOIDABLE CIVIL AND PUTATIVE CIVIL MARRIAGES

- Two grounds for nullity of a marriage
  - 1> Non -compliance with formal requirements for a valid marriage
  - 2> Non -compliance with the material requirements for a valid marriage
- Consequences of a void marriage- A void marriage does not have the legal consequences of a valid marriage therefore a court order declaring the marriage void is not essential.
- 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.

Grounds for setting aside a voidable marriage :

1. Minority
2. stuprum
3. material mistake
4. impotence
5. sterility
6. undue influence
7. duress

### DIMSSUM

Minority- marriage of a minor can be set aside if entered into without consent at request of parents, guardians or minor

Stuprum- (extramarital sexual intercourse with a 3<sup>rd</sup> party before the marriage)

- ❖ Q&A: When can a man apply for the annulment of his marriage on the ground of stuprum? A man can apply for annulment where his wife was pregnant with another mans child as the time of entering into the marriage

Material mistake- Mistake concerning identity of other person (error in personam)

and mistake concerning 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 that occurs in practice.

Impotence- one spouse has to prove that the other was already impotent before entering the marriage. Either spouse may apply for annulment provided that she was unaware of the impotence.

- ❖ Q&A- Define impotence? The inability to have sexual intercourse
- ❖ Q&A- When is a marriage voidable on the ground of impotence? When one spouse proves that the other was already impotent before entering the marriage and is still impotent and that the first mentioned spouse was unaware of the impotence at the time of entering the marriage
- ❖ Q&A- When will an applicant fail with his application for the annulment of marriage on the ground of impotence?
  - If applicant was aware of the impotence
  - If applicant condoned or excused the impotence
  - If impotence was temporary or probably curable

Sterility- When a person is able to have sexual intercourse but cannot procreate children and is thus infertile

- ❖ Q&A- Distinguish between impotence and sterility

- ✚ Van Niekerk v Van Niekerk- held that the mere fact of sterility renders the marriage voidable. On the other hand, held in Venter v Venter that not the presence of sterility which renders it voidable but the fraudulent concealment thereof Heaton prefers Venter case decision  
Constitutional Court case lends support to Heaton's view- National Coalition for Gay & Lesbian Equality v Minister of Home Affairs

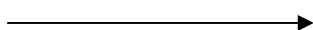
- Consequences of a voidable civil marriage- remains in force until set aside by a court order

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	Avoidable 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.	

- Putative Marriages- a void marriage can also be a putative marriage. This happens when at the time of entering, one or both parties were unaware of the defects that rendered their marriage void and believed in good faith that they were lawfully married.
- ❖ Q&A- How do the consequences of a marriage which is void only differ from those of a void marriage which is putative as well? Unlike a marriage which is merely void, the putative marriage has some of the legal consequences of a valid marriage.
- Children born of these marriages are legitimate
- Patrimonial consequences will depend on whether one or both parties were bona fide

#### THE INVARIABLE CONSEQUENCES OF A CIVIL MARRIAGE

Distinguish between variable and invariable consequences of marriage



INVARIABLE CONSEQUENCES OF MARRIAGE	VARIABLE CONSEQUENCES OF MARRIAGE
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	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
These consequences mainly concern the person of the spouses	These consequences mainly affect the estates of the spouses and the control they have in this regard

- ✚ Grobbelaar v Havenga describes the concept of consortium omnis vitae as 'an abstraction comprising the totality of a number of rights, duties and advantages accruing to the spouses of a marriage'  
This concept is also described in Peter v Minister of Law and Order

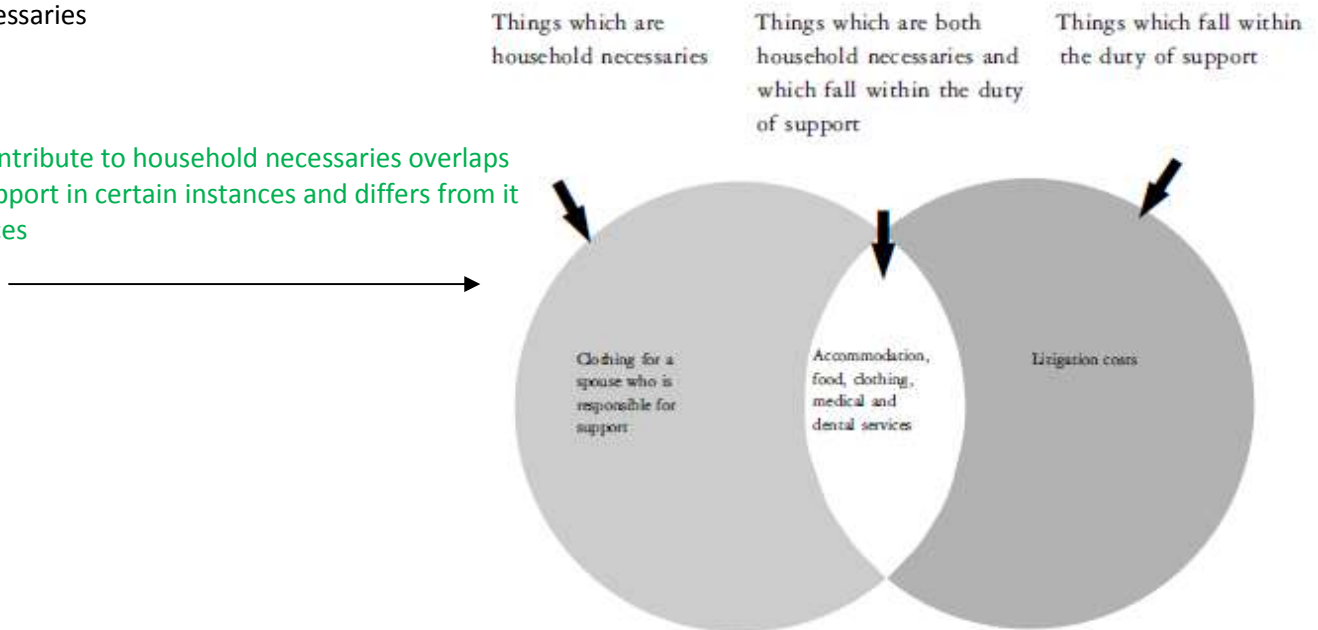
#### Spousal maintenance

- support and maintenance in the same thing
- reciprocal duty on spouses to maintain each other
- duty arises at start of marriage as soon as it has been solemnised and lasts until termination (death or divorce)
- Requirements for duty of support between spouses:
  - must be a valid marriage between parties

- person claiming support must be in need of support
- person from whom support is claimed must be able to provide it
- Recovery of debts for support- where debts incurred for maintenance can be recovered in the case of a marriage COP. First from the joint estate. If marriage is out of community, the spouse who incurred the debt is liable unless the debt was in respect of household necessities in which case both will be jointly liable.
- In terms of Divorce Act- Duty to support lasts till end of marriage but court can grant order for maintenance after divorce. In matters of death, in terms of Maintenance of surviving spouse Act, the surviving spouse can be maintained out of the estate of the deceased. Where marriage still exists, the duty may be terminated only if the spouses no longer live together and if the spouse who is claiming is the one who caused the separation.

### Household necessities

How duty to contribute to household necessities overlaps with duty of support in certain instances and differs from it in other instances



Termination of joint household- where joint household no longer exists one spouse can no longer bind the other in contract to buy household necessities. When household terminates, one of the requirements for the capacity to buy household good necessities is no longer met and the capacity no longer exists. This does not mean that a spouse cannot still bind the other on the basis of the duty to support.

- ✚ **Reloomel v Ramsay-** court set out how one should determine whether a particular item is a household necessary or not. Emphasised factors such as spouses standard of living, their means, customs of the people in the area etc to be considered.

Court used subjective approach in terms of which the perspective of a trader is considered. Looks at facts that the trader was or should have been aware of.

Alternatively, court can use objective approach- traders knowledge of the spouses circumstances is ignored. Applied in Voortrekkerwinkels. Court decided that husband would not be liable if he could show that there was already an adequate supply of the specific commodity in the house

- If court revokes a spouses power to buy household necessities, the other spouse will not be liable for it.
- A spouse cannot unilaterally revoke the capacity of the other spouse. The duty arises ex lege and is an incident of marriage.

### The Maintenance Act 99 of 1998

- Applies in respect of the legal duty of any person to maintain another irrespective of the relationship giving rise to the duty. Therefore it applies also to contractual duties between people not related by blood or marriage.
- Maintenance court can make order for payment of maintenance by lump sum and periodical payments
- An order of the maintenance order has the effect of an order made in a civil action and can be enforced in the ordinary courts.
- Provides new mechanisms to enforce the maintenance order. Provisions of Act can be invoked before debtor is convicted of an offence of failing to pay as per the order. If he fails to pay within 10 days from the date it is payable, the creditor can apply for:
  1. Authorisation of a warrant of execution against the maintenance debtors property
  2. Order for the attachment of emoluments due to the maintenance debtor (ie. Attachment of wages, allowance etc whether in money or not)
  3. Order for attachment of any present or future debt owing to or accruing to him

### The Matrimonial Home

- As a result of marriage, both spouses have the right to occupy the matrimonial home irrespective of how they are married and of who rents or owns it.

### Parental responsibility and rights

- Both parents have parental responsibilities and rights in respect of their children born of the marriage.

### Donations between spouses

- If married in community of property, you are prohibited from making donations to each other unless she donates one of her separate assets to the spouse with the condition that it must be excluded from the joint estate.
- ❖ Q&A- What is the reason why the abolition of the prohibition on donations does not apply between spouses married in community of property? Spouses who are married COP share everything equally. If one spouse makes a donation from his half of the joint estate to the other spouse, the item will simply come out the joint estate and fall back into it. Thus the donation will have no effect.

### The family Name

- A wife need not assume her husbands surname on marriage
- A woman can keep her own surname or create a double barrel surname
- A husband must apply to the director general if he wishes to assume his wifes surname or add it to his.
- This state of affairs may be unconstitutional.
- At common law, the husband is the head of the family

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## **SECTION 2- MATRIMONIAL PROPERTY LAW**

- Consists of legal rules which determine patrimonial consequences of marriage (consequences regarding assets and liabilities)
- Parties can determine their patrimonial consequences by selecting the specific matrimonial property system available- these are variable consequences

### Marriage in Community of property

- Each property system determines the patrimonial consequences of marriage in a particular way.
- Universal COP is the primary matrimonial property system in SA. There is a rebuttable presumption in law that when 2 people get married they are married COP. This can be rebutted by proving the existence of certain circumstances.
- Universal Community of property entails that spouses 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 their marriage. When they marry, their separate estates automatically merge into one joint estate. Upon dissolution, liabilities are settled from joint estate and balance is distributed equally between spouses. Confirmed in Estate Sayle v Commissioner for Inland Revenue & De Wet v Jurgens
- Joint estate consists of joint assets and joint liabilities
- Assets are the assets which the spouses owned prior to marriage as well as what they obtain after marriage
- Ownership takes place automatically by law and transfer and delivery or registration of immovable property is not required
- Assets which do not form part of the joint estate and remain separate assets:
  1. Assets excluded in antenuptial contract
  2. Assets excluded by will or deed of donation
  3. Assets subject to a fideicommissum or usufruct
  4. Jocalia (engagement gifts)
  5. Benefits under Friendly Societies Act
  6. Non patrimonial damages (affects person or personality)
  7. Costs in matrimonial action
  8. Assets which replace separate assets
  9. Assets as a result of personal injury inflicted by other spouse
  10. Proceeds excluded by the court in terms of prevention of organised crime Act

Note- fruits of the inheritance can be stipulated to be excluded as well



- In the case of a fideicommissum, the testator leaves property to a person (fiduciary) subject to the duty of handing it over in full ownership to another person (fideicommissary) at a certain time or upon the fulfilment of a certain condition.
- In the case of a usufruct, 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 to eventually return the property to the owner with the preservation of the substance thereof.
- ✚ Du Plessis v Pienaar- held that creditors of spouses married COP can look to the estates of both spouses for recovery of a joint debt. Therefore even separate estates can be attached for joint debts.
- ✚ All antenuptial debts and liabilities as well as debts and liabilities incurred stante matrimonio (during existence of marriage) form part of joint estate therefore spouses are co-debtors for the debts as in Nedbank v Van Zyl. Authority for the fact that spouses in COP are co-debtors.  
Mr & Mrs Van Zyl were married COP. Mrs entered into a written contract of suretyship with the bank binding herself as surety for the repayment of money owed by husband on overdraft. After a divorce, Mr defaulted on his payments to the bank. The bank was unable to recover the debt from Mr, so they sued Mrs on basis of the suretyship. Court had to decide on nature of liability between spouses for joint debts. Court held that spouses married in COP are co-debtors and were jointly responsible for liabilities that bind the joint estate. Declared the deed of suretyship unenforceable. SCA upheld decision.
- Antenuptial debts- include all contractual and delictual debts of spouses including maintenance liabilities (eg, from previous marriage or for children from previous marriage)
- Contractual debts, Delictual debts and other separate debts  
A contractual debt- can be recovered from the joint estate if the spouse who incurred the debt had capacity to incur such debt.  
Delictual debt- Spouses married COP cannot hold each other liable for damages in delict (ie. for compensation for patrimonial loss, eg, damage to a motor vehicle, medical expenses, loss of income etc), however one can sue the other for satisfaction (bodily injuries caused by a spouse- satisfaction is compensation for non-patrimonial loss like damage which affects your person and not your patrimony like pain and suffering, personality infringement)  
Other separate debts- Section 19 of Matrimonial Property Act should be extended to cover criminal fines and a spouses maintenance obligations towards his/her parents, siblings, children born of unmarried parents, and children from a previous marriage.
- 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 it, he has no right of recourse against the other spouse.

**Section 19 Matrimonial Property Act. Liability for delicts committed by spouses.**—When a spouse is liable for the payment of damages, including damages for non-patrimonial loss, by reason of a delict committed by him or when a contribution is recoverable from a spouse under the Apportionment of Damages Act, 1956 (Act No. 34 of 1956), such damages or contribution and any costs awarded against him are recoverable from the separate property, if any, of that spouse, and only in so far as he has no separate property, from the joint estate: Provided that in so far as such damages, contribution or costs have been recovered from the joint estate, an adjustment shall, upon the division of the joint estate, be effected in favour of the other spouse or his estate, as the case may be.

#### Administration of the joint estate

- Section 14 Matrimonial Property Act - Marital power is replaced by equal concurrent management in COP marriages. Spouses have equal powers to manage estate. Principle of equal management in section 14 of Matrimonial Property Act. Any spouse may perform any juristic act with regard to the joint estate without consent of the other spouse except such acts which are excluded by the Act.
- Different forms of consent needed from a spouse to perform certain actions:
  - Prior written consent, attested by two competent witnesses iro each transaction separately
    - Req To register a servitude
    - To conclude contract standing surety
  - Written consent attested by two competent witnesses iro each transaction separately
    - Req to take a bond
  - Written consent without any further requirements
    - Req To institute legal proceedings like apply for an interdict
  - Oral or tacit consent
    - Req To sell household goods
    - To receive money regarding spouses business

No consent required to buy securities on stock exchange

No consent needed when spouse acts in ordinary course of business

Protective measures in the Matrimonial Property Act iro the administration of the joint estate

- When one spouse concludes a transaction with a 3<sup>rd</sup> party without necessary consent
- When one spouses consent cannot be obtained or is unreasonably withheld
- When one spouse prejudices the interests of the other in the joint estate

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>

Remedies and the requirements which a spouse may use against the other when married in COP

1. Can apply for an adjustment upon division of the joint estate

- Requirement: a) spouse who concludes a transaction with a 3<sup>rd</sup> party ought to know or ought to have known that 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. Apply for authorisation of the transaction by court when required consent cannot be obtained or is withheld

- Requirement: a) Court must be satisfied that a good reason exists for dispensing with the other spouses consent

3. Apply for suspension by high court of any power which a spouse may have over joint estate in terms of Act for a definite or indefinite period

- Requirement: a) court must be satisfied that it is necessary for the protection of the other spouses interests in the joint estate
- b) court can only suspend the power on application by the prejudiced spouse

4. Apply for immediate division of joint estate

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

5. Apply for common law interdict to prevent other spouse from proceeding with a transaction which affects the joint estate

- Requirement: a) One spouse must threaten to alienate an asset from the joint estate-alienation must not have happened yet
- b) spouse who intends to alienate an asset of the 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 should be available

6. Apply for the common law right of recourse.

- Requirement: a) assets of joint estate should already have been alienated by the guilty spouse
- b) 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. Institution of the *action Pauliana utilis* in terms of which an asset of the joint estate that was alienated in a fraudulent manner may be recovered

- Requirement: a) assets of joint estate should already have been alienated by guilty spouse
- b) spouse who alienated assets should have done so with intention of defrauding other spouse
- c) in terms of the *Laws* case it is further required that it must also be proved that the 3<sup>rd</sup> party when

entering into the transaction, was aware that the disposal of the assets was in fraud of the other spouses rights. According to 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- action can be instituted only after dissolution of marriage

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

heaton- in favour of Reyneke decision

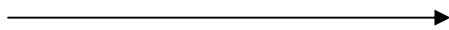
8. Apply for the declaration of one spouse as a prodigal

Requirement: a) person must squander their assets in an irresponsible and reckless manner

b) squandering must be due to defect in the persons power of judgment or character

- Capacity to litigate- is the capacity to act as a party in a court case
- Application for sequestration of the joint estate must be brought against both spouses however if brought against only one spouse, it will not be dismissed if teh applicant satisfies the court that despite reasonable steps he was unable if the debtor was married COP or get the name and address of the debtors spouse
- Application for the surrender of joint estate must be made by both spouses

A distinction must be made between debts incurred for necessities for the joint household, other debts which bind the joint estate & debts in connection with the separate property of a spouse



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

## MARRIAGE OUT OF COMMUNITY OF PROPERTY

- Purpose of 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
  - Ante (means before) nuptial (means marriage)- must be entered into before the marriage
  - Requirements: if not properly executed by a notary and registered at Deeds office, it is not valid as against 3<sup>rd</sup> parties (Deeds Registries Act)- (it will be as if married in COP). Such unregistered anc is known as informal ANC and is valid only between spouses.
  - Postnuptial registration is possible (governed by deeds Registries Act). Need consent of the High court. Section 88 of Deeds Registries Act governs this and court will grant consent if these 3 req are met: (Application can be made by one or both parties or a beneficiary under a will)
    - Parties must definitely have agreed on the terms of the anc before contracting the marriage
    - Parties must provide good reasons for their failure to properly execute or register the anc
    - And the application must be made within a reasonable time after it has been discovered that the agreement has not been properly registered.
  - Any provision not contrary to the law, good morals or the nature of marriage can be included in anc.
  - Main purpose of anc is to deviate from the automatic matrimonial property consequences of marriage namely COP
  - Various matrimonial property systems can be agreed upon in anc:
    - complete separation of property
    - marriage out of community of property with retention of community of profit and loss
    - accrual system
  - anc can contain provisions regarding a spouses right of recourse in respect of liability for household necessities, however in COP marriages, the Matrimonial property Act governs this liability.
  - Succession clauses can be added
  - Marriage settlement is sometimes included (a donation which one spouse makes to the other)
- ❖ Q&A- Is it possible to have an anc if you are married in COP? Yes. Spouses married in COP can exclude certain assets from their joint estate

Note- can use abbreviation anc in exam, not ANC

## THE ACCRUAL SYSTEM

NB- Accrual applies automatically to marriages out of COP and community of profit and loss after **1 November 1984** and does not apply to marriages out of COP concluded before the Matrimonial Property Act

- Accrual system regarded as the secondary matrimonial property system in SA
- Defined as a type of postponed community of profit (accrual system is based on the idea that both spouses should upon the dissolution of 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)
- Although spouses each have own estate during marriage, the spouse whose estate shows the smallest or no accrual at the dissolution of the marriage may legally share in the accrual of the other spouses estate.
- Does not apply to parties married before the Act out of COP and of profit and loss, however parties so married were given a limited period to make the accrual system applicable by execution and registration of a notarial contract in terms of the Act.
- Accrual system applies to:
  1. Marriages concluded out of COP and community of profit & loss after 1 Nov 1984 where parties did not expressly exclude accrual in the anc
  2. Marriages where the spouses introduced the accrual by execution and registration of a notarial contract
  3. Marriages where spouses introduced accrual into a court order under section 21(1) of Act
- During the subsistence of the marriage- everything the spouses acquire falls into their own separate estates. They retain and control their own estate.
- On dissolution of marriage spouses share equally in the accrual. The spouse whose estate shows no accrual or lower accrual has a claim against the spouse with the larger accrual. The claim is for an amount equal to half the difference between the accrual of the respective estates.
- Right to accrual cannot be transferred during marriage, it is not liable to attachment during marriage and does not form part of the insolvent estate of a spouse.
  - ✚ Reeder v Softline case- court recognised the difference between the claim and the right. Authority for fact that the accrual and accrual claim relate to the value of an estate and not the assets in that estate

### Calculation of accrual

- Accrual is the growth of a spouses estate during marriage. It is the amount by which the value at the dissolution exceeds the value at the commencement. (difference between the net end value and net commencement value)
- It is calculated with reference to the net value of the estates at the commencement and dissolution. This means after all debts have been paid and includes all amounts owing. It excludes all assets which should be excluded.
- Net end value on dissolution – net commencement value – assets which do not form part of estates accrual = accrual  
Accrual claim =  $\frac{1}{2}$  (larger accrual – smaller accrual)
- Can use abbreviation CPI for consumer price index in exam
- Protection of spouses right to share in accrual by common law remedies : interdict and the actio Pauliana utilis
- What amount to patrimonial loss? Loss which reduces a person estate eg.damage to vehicle, compensation for damage to pay to aggrieved party for repairs to vehicle, medical and hospital expenses, loss of income etc
- What is non-patrimonial loss? Loss which does not affect a persons estate but affects he person or personality eg. Compensation for pain, suffering, personality infringement, loss of amenities of life, satisfaction etc. The compensation for non patrimonial loss must be deducted from accrual. This compensation will not place him in the same position he was in before the incident.

Know these definitions of marital property systems:

**Complete separation of property-** each spouse retains the estate s/he had before marriage or at time of marriage as well as everything s/he acquires during the marriage

**Marriage out of community of property with retention of community of profit and loss-** each spouse retains the estate s/he had before marriage but because community of profit and loss is retained, all profit and loss arising during the marriage become joint profit and loss and constitute a joint estate of which each spouse owns an undivided half share

**Accrual system-** each spouse retains the estate s/he had before the marriage. Upon dissolution of marriage the spouses share equally in the accrual/growth/profit their estates have shown during the subsistence of the marriage

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### Alteration of matrimonial property system

- Immutability means unchangeability or unalterability
- The principle of immutability 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
- The principle applies in SA law but is relaxed by legislator effecting a postnuptial change.
- For a limited period certain spouses were permitted to change the matrimonial property system by way of registered notarial contract. In terms of Matrimonial Property Act 88 of 1984, spouses who married before **1 November 1984**

and whose marriage was out of COP by virtue of an anc could adopt the accrual system by executing and registering a notarial contract before 1 Nov 1988. Black married before 2 Dec 1988 out of COP by Black Admin Act 38 of 1927 could adopt accrual system by executing and registering a notarial contract to that effect before 2 December 1990.

- A court has the power to order immediate division of estates and to change the matrimonial property system at the request of one of the spouses. Section 20 empowers court to order immediate division and to change system if the conduct of a spouse seriously prejudices or will prejudice the interests of the other spouse in the joint estate.
- Spouses can bring a joint application to change system. Requirements must be met.
- High court has common law powers to rectify, amend or cancel and ANC which does not correctly reflect the terms of the parties agreement
- These changes bind the spouses and 3<sup>rd</sup> parties.
- There is an extra-judicial mechanism for effecting a change to bind the spouses only

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#### COURT SANCTIONED ALTERATION OF A PROPERTY SYSTEM

- Act provides for spouses to apply to high court for permission to change their matrimonial property system.
  - Application can be brought by any married couple regardless of when they were married.
  - Requirements that must be met before a High court will make an order for the separation of the spouses matrimonial property system as per section **21(1) Matrimonial Property Act 88 of 1984**
    - (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
  - One spouse cannot apply on his own, both must apply jointly
  - Must also attach a draft notarial contract to application setting out the proposed system
  - In the case of an application in terms of section 21(1) it means that the matrimonial property system is changed not from the date of the court order but as from before that date normally the start of the marriage.
- It is not clear whether a court can authorise an alteration of the system with retroactive effect.

✚ Honey v Honey- 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 spouses merely enter a contract changing it, what will the effect be?

In this case parties concluded an anc with accrual prior to marriage and registered it in deeds registry. They later entered a further agreement which was notarially executed but not registered in deeds registry and not with leave of the court as required as per Act. This contract excluded accrual from the and. Later wife sued husband for divorce and relied on postnuptial contract. Claimed that she was entitled to retain her sole property as per the contract. At time of divorce, her accrual was larger. The husband maintained that the contract was void and that he had a claim to his wife's accrual. Court had to decide if contract was valid. Held that it was void and unenforceable between spouses and 3<sup>rd</sup> parties.

- 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 Heaton 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 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 COP 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.
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### STUDY UNIT 3- DISSOLUTION OF MARRIAGE

- 3 ways which a marriage can be dissolved
  1. Dissolution by death
  2. By divorce
  3. Annulment of marriage
- Judicial separation abolished by section 14 of Divorce Act
- Marriage in COP- marriage ends at death of a spouse. COP also ends. Joint estate dealt with by executor in terms of Administrations of Estate Act. Executor pays all debts from joint estate and claims all debts owed to estate. He then gives half of estate to surviving spouse. Other half is given to heirs of deceased.
- A surviving spouse can claim maintenance from deceased estate as per Maintenance of surviving spouse Act.
  - ✚ Feldman v Oshry- decision was overruled by SCA in Oshry & Oshry v Feldman. Found that maintenance could be awarded in a lump sum in terms of Maintenance of surviving spouse Act
- Act provides that a surviving spouse can claim maintenance from the deceased estate for the provision of her reasonable maintenance needs until her death or remarriage in so far as she is unable to provide from her own means.
- Act only applies to marriages dissolved by death and where dissolution took place after commencement of Act.
- The claim is limited to the amount required to provide for her reasonable maintenance needs, Flg factors must be considered:
  1. Amount in deceased's estate available for distribution amongst heirs or 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 marriage and her age on death of spouse

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#### GROUND FOR DIVORCE

- Marriage may be dissolved by a court or by decree of divorce.
- Divorce can only be granted if:
  - a) Irretrievable breakdown of marriage
  - b) Mental illness or continuous unconsciousness
- When is a marriage irretrievably broken down?
 

Requirements from section 4: a) marriage relationship must no longer be normal  
b) there must be no prospect of restoration of a normal marriage relationship

Therefore it must be determined when a marital relationship is no longer normal.
- Legal definition of a normal marital relationship lies in the concept *consortium*. When one or both spouses behaves in a way that the consortium is terminated or seriously disrupted one can say that a normal marital relationship no longer exists between spouses.
- Section 4(2) of Divorce Act provides 3 eg of situation of irretrievable breakdown (only guidelines)
  - (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 because of it
- Court can refuse to grant divorce order even though a ground for divorce has been proved. Court can refuse if as a result of religious prescriptions or one or both spouses will not be able to remarry after divorce.

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#### CONSEQUENCES OF DIVORCE

- Patrimony of spouses deals with assets and liabilities and finances. The effect of divorce on the division of the spouses property depends on :
    1. Matrimonial property system (in COP or out or with/without accrual)
    2. Whether court order forfeiture of benefits
  - Pension interests- is deemed to be part of the assets upon divorce (pension fund, retirement annuity fund)
 

Court can order endorsement on fund (funds to be paid directly to spouse)

Not applicable to marriages to marriages with complete separation from 1 Nov 1984

The spouses pension interest will be equal to all the spouses contributions to the RA up to the date of divorce together with annual simple interest on those contributions at prescribed interest rate.
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## FORFEITURE OF PATRIMONIAL BENEFITS

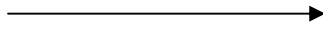
- In certain circumstances one of the parties can lose their patrimonial benefits which they acquired on basis of their marriage.
- Forfeiture order will be granted only if one spouse will be unduly benefited in relation to the other spouse if such an order is not made.
- Court cannot use its discretion to order forfeiture of benefits to deviate from the matrimonial property system because it may be just and fair to do so.
- Forfeiture does not mean that spouse will lose his assets, it means that he will lose his claim that he has to the assets of the other spouse.
  - ✚ Watt v Watt- couple married COP. Husband donated house to wife which he bought with his own money. On divorce, husband claimed house was a patrimonial benefit which she must forfeit. Wife claimed it was not a patrimonial benefit. Court had to decide if it was a patrimonial benefit or not. Court held that patrimonial benefits of marriage out of COP are stipulated in ANC. Held that donation made during marriage arises from relationship and not from marriage itself. Since donation was made during marriage and not on conclusion of marriage, the house was not a patrimonial benefit. Hahlo thinks this is incorrect. Feels the word marriage can relate to the ceremony or relationship also. Benefits must be interpreted as benefits derived from marriage as continual relationship meaning that benefits acquired during marriage could also be forfeited. Sinclair & Kaganas opinion that it was correct. Argued that marriage refers to the marital property regime. Implication is that only those benefits acquired in terms of marital property regime can be forfeited.
  - ✚ Persad v Persad- different decision. Court applied view that the benefits in terms of a tenancy, residential permit and statutory lease acquired during marriage can be forfeited
  - ✚ Koza v Koza- court assumed that marriage out of COP, the patrimonial benefits are not restricted to benefits conferred in anc.

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## REDISTRIBUTION OF ASSETS

- A court may order with regard to certain marriages under specific circumstances that one party must transfer some of his assets to the other party
- Court may take following into consideration”
  - Misconduct- look at the spouses conduct
    - ✚ Beaumont v Beaumont- could held that conservative approach to matter of misconduct should be adopted. Only if breakdown of marriage resulted from misconduct of one party only should be taken into account especially if conduct was gross and prolonged. Court may not disregard possibility of issuing a maintenance order when considering redistribution. Court must decide whether equity and justice would be served if only a maintenance order or redistribution order or both were issued. Therefore there is interrelationship between the two. Court refused to accept one-third starting point or any starting point. Held that clean break principle should be strived for. Held that duties of housewife qualify as a contribution. Held that misconduct must be considered
- Clean break principle- there should be a clean break betw divorcing parties if one of them is wealthy enough to enable court to make order which will put the poorer spouse in the financial position to maintain himself. This principle is not foreign to our law.
- Divorce Act serves two purposes- compensation of a spouses for past contributions rendered to the maintenance or increase of the other spouses estate and provision for the applicants spouse maintenance needs
- One-third rule- used to be accepted as a staring point in English law. Court awards one-third of the total value of the spouses estate to the spouse who has the smallest estate on divorce. Court held that it should make an order that is fair in light of all the factors.( Beaumont v Beaumont case)
- Court may not make a redistribution order on its own accord

Important- know comparisons



	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"> <li>1. Consideration of three factors in section 9</li> <li>2. One party will be unduly benefited in relation to the other in the absence of an order.</li> </ol>	<ol style="list-style-type: none"> <li>1. Direct or indirect contribution to the growth or maintenance of the other spouse's estate.</li> <li>2. It is equitable and just to make the order on the basis of the contribution.</li> </ol>

## MAINTENANCE OF THE SPOUSES

- Divorce Act empowers court to make order for maintenance it finds just to a spouse for any period of time until death. Order can only be granted upon divorce and not at later stage.
- Spouse can be compelled to pay enough to poorer spouse to maintain his or her standard of living
- Maintenance can be paid in a single lump sum
- Token maintenance awarded to spouse who does not really need maintenance at time of divorce but who may need it the future (this is awarded at time of divorce because an award cannot be made after). It can be increased later to provide real maintenance
- Section 8 covers rescission, suspension and variation of maintenance orders by high court.
- Orders made by high court can also be varied by maintenance court regardless of what the order was
- There must be sufficient reason for the rescission, suspension and variation
  - ✚ Reid v Reid- held that maintenance order need not effect financial equality. If party agrees to an unjust settlement in respect of maintenance, he cannot apply for variation purely on this ground. If existing maintenance order has resulted in financial inequality betw parties, the inequality must continue. However if a party proves that there is sufficient reason for a change then the order will be varied but the mere fact that there is financial inequality will not in the Reid case be sufficient reason.
- If party has voluntarily taken on more financial responsibilities, could will not vary order
- If party who wins order lives with another person is not reason for rescission of order except where a *dum casta* clause is included in order.
- Maintenance order comes to an end on date or occurrence of event stipulated in agreement. Whether duty to maintain continues after death depends on stipulation in order. If it is not clear, it can carry on after spouse death.
- An order made in terms of section 7(2) (division of assets and maintenance of parties) ends:
  - on date stipulated in order
  - on death of party entitled
  - on remarriage of party entitled
  - in terms of *Hodges v Coubrough* on death of party who has to pay, confirmed by SCA in *Kruger v Gos*
  - on rescission of order by court
- factors the court takes into account when determining a maintenance order are:
  1. the amount in the estate of the deceased spouse available for distribution to heirs and legatees
  2. the existing and expected means , earning capacity , financial needs and obligations of the survivor and the subsistence of the marriage
  3. the standard of living of the survivor during the subsistence of marriage and his/her age at death of the deceased spouse
- ❖ Q&A What are the req for the duty of support to exist betw spouses married in terms of Marriage Act
  - There must be a valid marriage between spouses
  - Person claiming support must be in need of support
  - Person from whom support is claimed must be able to provide it



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## INTERESTS OF THE CHILDREN OF DIVORCING PARENTS

- 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
- Section 6 of Divorce Act regulates the interests of children in four respects
  - ✚ Van Vuuren- 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

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## GUARDIANSHIP

- Court may make any order it deems fit
- In terms of Childrens Act, both parents have guardianship of legitimate children during marriage therefore guardianship should be awarded to both upon divorce so both can exercise any right, power, carry out any duty arising from guardianship independently without other parents consent

## CARE (custody)

- Care is normally awarded to one person
  - ✚ Maternal preference rule- young or handicapped children and daughters of any age generally awarded to their mother. This rule was rejected in Van der Linde.
- Courts were hesitant to make joint care awards. Risk of parental conflict and disagreement is an argument against joint custody. Also, one parent should control the child's life so the child knows where they stand. 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 non-caretaker parent (usually the father) power without responsibility
  - ✚ Krugel v Krugel- court rejected argument against joint custody on ground that they do not serve the child's best interest. Held that a more liberal approach to granting joint custody is appropriate in view of changing roles of parents. Court rejected hostility betw parents as ground to bar joint custody. Held as long as both were fit and proper persons, both should have equal say in their child's upbringing even if it is at times disharmonious. Unless the disagreement is of such a nature that the child is put at risk physically or emotionally. Held that joint custody helps establish sex equality by reshaping gender roles in parenthood. Due to Krugel case, seems as if courts reluctance to award joint custody is changing. Heaton felt in favour of joint custody and it should only be denied if one was violent or threatened violence

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## CONTACT (access)

- If divorce order is silent on contact, non caregiving parent will still have a right of contact
- Parents can agree on how right of contact should be exercised or court can make ruling in divorce order. Order can be structured and defined or reasonable access. 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 in disputes but cannot be unreasonable regarding contact.
- Court may impose any conditions / restrictions on contact in best interests to the child
  - ✚ Van Rooyen- Husbands rights were restricted because he was homosexual. this order was made before BOR. It may be deemed unconstitutional now. V v V criticises this decision in light of equality clause. It is wrong to describe sexual orientation or homosexuality as abnormal.
- Upon divorce, both parents are still obliged to maintain the children born of the marriage in proportion to their respective means
- Parental responsibilities and duties
  - Must care for the child
  - Maintain contact with child
  - Act as a guardian of child
  - Contribute to the maintenance of child
  -

### Section 18 (3)(c) of Childrens Act

(3) Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must—

- (a) administer and safeguard the child's property and property interests;
- (b) assist or represent the child in administrative, contractual and other legal matters; or
- (c) give or refuse any consent required by law in respect of the child, including-
  - (i) consent to the child's marriage;
  - (ii) consent to the child's adoption;
  - (iii) consent to the child's departure or removal from the Republic;
  - (iv) consent to the child's application for a passport; and
  - (v) consent to the alienation or encumbrance of any immovable property of the child.

## **STUDY UNIT 4- CUSTOMARY MARRIAGES**

- Were invalid in terms of common law (permit polygyny)but received full legal recognition when Recognition of Customary Marriages Act came into operation on 15 Nov 2000. The Act afforded legal recognition to all customary marriages regardless of when they were concluded (even before the Act)
- Not recognised because it permits polygyny and are not solemnised in terms of the Marriage Act
- Legal req for marriages before Act (before 15 Nov 2000):
  - 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.
  - 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

### Registration:

- 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.
- 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.

### Proprietary consequences:

- Proprietary consequences of monogamous customary marriages entered into during or before Act are same as in Civil marriages.
- Proprietary consequences of polygynous customary marriages entered into during or before Act are determined by traditional customary law
- Proprietary consequences of polygynous customary marriages entered into after the Act are regulated by the Act
- If a husband wishes to enter into another customary marriage, he must apply to court for approval of a written contract which will regulate all future matrimonial property systems

### Wifes status

Recognition of customary marriages Act abolishes wifes status of perpetual minority and her husbands guardianship over her

### Dissolution of marriage

- Only one ground for divorce- irretrievable breakdown
- Act empowers court to incorporate a settlement agreement into divorce order, make an order regarding spousal maintenance, redistribute assets, order forfeiture of benefits, make order regarding costs.
- Court can rescind, vary or suspend maintenance order or order regarding children.
- Parties pension interest forms part of assets upon divorce
- If man is spouse in a polygynous marriage, court must take all relevant factors into consideration and make an equitable order.
- Court may make an order regarding childrens guardianship and care

- Maintenance- court must take into consideration any provision or arrangement that has been made in accordance with customary law
- Court may order joinder of anyone with sufficient interest in the divorce proceedings
- Divorce order in respect of jurisdiction must be obtained from high court, family court or divorce court. Act preserves the role of customary mediators
- Act does not regulate dissolution of marriages by a spouse's death because of sororate and levirate customs, customary unions are not dissolved by a spouse's death. The Act is silent on the dissolution of marriage by death

Civil marriage by a spouse who is party to a customary marriage

- All civil marriages remain monogamous
- Couples in a polygamous customary marriage cannot change their marriage to a civil one

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#### **STUDY UNIT 4 HINDU & MUSLIM MARRIAGES**

- Not yet fully recognised by our law but have some recognition
- Polygyny is very rare under Hindu & Muslim marriage today
- Not recognised because it permits polygyny and are not solemnised in terms of the Marriage Act
- Several Acts afford recognition to the Hindu & Muslim marriage regardless of whether mono or polygynous
  - ✚ Daniels v Campbell- constitutional court held that a surviving spouse in a monogamous Hindu & Muslim marriage qualifies as a spouse and survivor in terms of Intestate Succession Act and Maintenance of Surviving spouse Act
- In terms of Civil Proceedings Evidence Act and Criminal proceedings Act- recognise religious marriages for the purposes of compelling a spouse as a witness
- Property which one spouse inherits in a religious marriage from the other spouse is exempt from transfer duty
- If a marriage is terminated by death, a spouse can institute a claim for maintenance against the deceased's estate in terms of Maintenance of Surviving Spouses Act in so far as she is unable to provide for her reasonable maintenance needs from her own means and earnings. (Daniels v Campbell)
  - ✚ Amod- surviving spouse has an action for loss of support. SCA decision. Court held that the decisive issue is not whether surviving spouse was lawfully married to deceased by whether deceased was legally obliged to support surviving spouse in a relationship which was worthy of protection and recognition in terms of the common law. Should be legally enforceable at common law.
- Advocates of the recognition of Hindu & Muslim marriages argue that non-recognition of Hindu & 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 Hindu & 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 Hindu & Muslim marriage law and includes the rule that the husband has "leadership" of the family and that the wife must obey him. 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 Hindu & Muslim marriages. The limitation clause would come into play only if it were to be concluded that Hindu & 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, nonrecognition of Hindu & Muslim marriages probably results in greater inequality and indignity for Hindu & Muslim women. Also, the different treatment of customary and Hindu & 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.

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#### **STUDY UNIT 5- LIFE PARTNERSHIP**

- Couples who live together in marriage like relationships without getting married have none of the ex lege consequences of marriage. This is the case regardless of whether or not the life partners are legally permitted to marry each other.
- Legislation and court decisions have extended some of the consequences of marriage to life partnerships
- Same-sex life partnerships enjoy more or less the same statutory recognition as heterosexual life partners but they enjoy broader judicial recognition
  - ✚ Du Plessis v Road Accident Fund- SCA extended common law action for damages for loss of support to same sex life partnerships where a contractual duty to maintain had been undertaken.

## STUDY UNIT 6- DOMESTIC VIOLENCE

- Children have a right to a name
- Children under 18 are afforded special protection by s 28 of Constitution (childrens rights clause) in addition to having all the rights the Const confers on everyone
- A parents duty to support his child exists by law and is not a component of parental authority Duty of support passes to grandparents only if neither parent can support the child
- Duty passes to both the childs maternal and paternal grandparents
  - ✚ Persen v Maintenance Officer- 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 sons extra-marital child
- If neither the childs parents nor grandparents are in a position to support the child, the duty passes to the childs siblings
- At common law a step parent is not obliged to maintain his stepchild. The duty of support rests on the blood relationship and not affinity.
  - ✚ Heystek v Heystek- court held that step parent does have a duty of support in respect of stepchild. The decision is wrong in so far as the court held that marriage in COP the existence of a common law household and consortium onnis vitae with the childs mother render the stepfather liable for his stepchilds support. Note- consortium onnis vitae- comprises the rights, duties, advantages accruing to a spouse in a marriage. It comprises companionship, love , affection and comfort. The term is used as an umbrella term for all the legal rights of one spouse to the other in a marriage.
- Same principles that govern enforcement of maintenance also governs enforcement of maintenance obligations between parent and child. Childrens Act provides that anyone who is legally able to maintain the child and who fails to do so while able is guilty of a crime
- Reciprocal duty applied- child must also support parents
  - 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