

# UNIT 2 – INVARIABLE CONSEQUENCES OF MARRIAGE

- Cronjé & Heaton Chapter 5
- Van der Westhuizen v Wan der Westhuizen 1996 (2) SA 850 (C)
- Wise v Moolman [2008] JOL 22230 (T)

# OUTCOMES

- List and explain how the status of a person changes when entering into a marriage
- Discuss what is meant by the *consortium omnis vitae* and how it can be enforced (both against the other spouse as well as against outsiders)
- Explain the significance of the Matrimonial Home
- In regards to the duty of support, explain:
  - What it entails
  - The extent of the duty
  - How it can be enforced
  - Relevance in regards to household necessities
- Discuss the significance of the husband as the head of the household

# INVARIABLE CONSEQUENCES OF MARRIAGE

- **When entering into a civil marriage (into the Marriage Act) there are both variable and invariable consequences.**
- Variable consequences = can be changed by the parties
- Invariable consequences = cannot be changed by the parties through contract  
(Relate mostly to the issue of status)

# Change of STATUS to “being married”

- Prohibition of concurrent marriages;
- Prohibition of future marriages
- Change of names
- Right to intestate succession
- Majority of minors
- Marital power (important in the past)
- Children are, become children born of married parents (“legitimate”) => joint parental powers
- Spouses become competent but not compellable witnesses
- Depending on the spouses matrimonial regime, their capacity to act can be restricted
- Changes in the PAST
  - Pre 1992 a wife followed the domicile of her husband, even when they no longer lived together. Changed by the Domicile Act.
  - Pre 1949 a married woman automatically assumed her husband’s nationality
  - Pre 1966 – 1991, a wife for the purposes of the Group Areas Act assumed the racial classification of her husband

# THE *CONSORTIUM OMNIS VITAE*

- In Roman-Dutch law the doctrine of unipersonality does not exist (i.e. marriage does not make husband and wife one in law)
- **Formal definition** of *consortium omnis vitae* (p. 422 Sinclair): “an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage ... These embrace intangibles, such as loyalty and sympathetic care and affection, concern ... as well as the more material needs of life, such as physical care, financial support, the rendering of services in the running of the common household or in support-generating business...”

# THE *CONSORTIUM OMNIS VITAE*

- **Grovelaar v Havenga** => abstraction comprising the totality of a number of collective rights, duties & advantages
- Both immaterial and material things fall under consortium:
  - Physical, social and emotional aspects
  - duty of fidelity
  - duty to cohabit

# THE *CONSORTIUM OMNIS VITAE*

- HOW can one enforce the *consortium*?
- Against the other spouse:
  - Not directly enforceable against spouse (i.e. Cannot get an interdict)
  - Only enforceable indirectly => ground for divorce
  - Divorce is based on an irretrievable breakdown with no reasonable prospect of restoration (consortium will indicate whether there is an irretrievable breakdown)
- Against 3<sup>rd</sup> parties:
  - *Actio legis Aquiliae*
  - C/L: *Actio iniuriam*: a marriage partner can claim damages against a 3<sup>rd</sup> party for infringing on the *consortium*:
    - Adultery
    - Enticement / alienation of affection
    - Harboursing
  - Case law: *Van der Westhuizen* and *Wise v Moolman*

# THE *CONSORTIUM OMNIS VITAE*

Van der Westhuizen

## Facts :

- Wife sues a 3<sup>rd</sup> party (woman) for committing adultery, alienation of affection and loss of *consortium* with her husband.

## Court:

- Here: disintegration of her marriage, the hostility of her husband and the hurt & humiliation
- Conscious and deliberate desecration of the marriage relationship.
- R 20 000 awarded for adultery, alienation of affection and loss of *consortium*
- Additional note: Factors aggravating 3<sup>rd</sup> party's misconduct:
  - Being aware of the marriage relationship
  - 3<sup>rd</sup> party knew that the marriage was successful, before she interfered
  - The flaunting of the adulterous relationship
  - Continuation of the affair, despite the plaintiffs request to stop
  - 3<sup>rd</sup> party responsible for plaintiff losing job & violence against her from husband
  - 3<sup>rd</sup> party moves into the common home
  - acting with complete insensitivity & without concern



# THE *CONSORTIUM OMNIS VITAE*

Wise v Moolman (post Constitution) 2008 Judgement

## Facts:

- Claim for damages against the person who had committed adultery with the spouse
- Defendant argued that the action is no longer part of our law.

## Court:

- The action does NOT violate the 3<sup>rd</sup> parties and the adulterous spouse's Constitutional rights to freedom of conscience and belief and freedom of association.
- It is necessary to protect marriages.

# THE MATRIMONIAL HOME

- Provision of accommodation & household assets forms part of the duty of support.
- During marriage => both spouses to contribute to the upkeep of the matrimonial home.
- Both spouses are entitled to live in the matrimonial home & use the household assets
- No eviction of a spouse, except ito the Domestic Violence Act 116 of 1998
- Remedy: *mandament van spolie*
- Right of occupation of the non-owning or non-renting spouse not against 3<sup>rd</sup> parties; partly remedied through the Matrimonial Property Act 1984
- Also, no protection where a bank repossess the matrimonial home.

# DUTY OF SUPPORT

- Each spouse is responsible to support the other and the joint household, according to his / her **means** & depending on whether the other spouse is in **need**.
- Maintenance refers to all necessary expenditure
- Remedy: One spouses can sue other spouse OR 3<sup>rd</sup> party can sue other spouse
- Duty of support ends at
  - Divorce. The court can make an order.
  - Death
  - Separation, but parties are still married but live apart

# DUTY OF SUPPORT – Household Necessaries

- Household necessities: often overlap with maintenance, but not always.
- Also note: household necessities differ depending on the situation:  
eg. *Reloomel v Ramsay*
- Joint & several liability for household necessities re all marriages.
- i.e. One spouse can purchase household necessities & bind the other spouse to the contract as well.
- **“Joint & several liability”**
- Liability for household necessities only arises where 4 requirements are met

# DUTY OF SUPPORT – Maintenance Order

- Getting a maintenance order (Maintenance Act 99 of 1998)

1st step: Complaint to be made

2nd step: maintenance officer to investigate whether there is a legitimate complaint.

3rd step: maintenance officer to decide whether to institute a enquiry in the Maintenance Crt

4th step: Court can make an order (different options)

- Enforcing a maintenance order:

Civil sanctions

Criminal sanctions

# HUSBAND AS HEAD OF FAMILY

- C/L: the husband is the head of the family who can decide where & in what style the couple are to live
- Husband must act **reasonably**
- C/L rule was statutory reinforced in the Matrimonial Property Act 88 of 1984, but removed again in 1993
- No-fault divorce has diluted the significance of the husband's power as head of family.
- Further, a husband may also no longer interfere with his wife's personal life
- No real significance today

# THE FAMILY NAME

- PG 61 – 62 TB
- Woman may or may not take the husband's surname;
- man cannot take the woman's surname without going through an extensive procedure;
- Arguably unconstitutional!
- Children can have either or a double-barrel surname

# OUTCOMES REVISITED

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