

Department of Private Law



Family Law

Only study guide for PVL2601

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Revised edition 2011

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

PVL2601/1/2012-2015

98758411

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The study guide reflects the law as at 1 August 2011.

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Learning outcomes and assessment criteria

In this module we cover the basic principles of family law. Owing to the fact that the module is pitched at second-year level, it has been structured to suit the unique educational needs of students still new to this field.

The learning outcomes and assessment criteria for this module are the following:

Outcome 1:

To gain the knowledge, skills, attitudes and competencies needed to analyse and critically evaluate legal material (the Constitution, legislation, case law and academic opinion) relating to family law

Assessment criteria:

- Legal problems and issues relating to family law should be identified in real-life situations or simulated scenarios.
- Terms, rules, concepts, established principles and theories related to family law should be understood.
- You should be able to demonstrate an awareness of how family law relates to areas such as the law of persons, the law of succession, property law and the law of contract.
- Legal material related to family law should be critically analysed and synthesised.

Outcome 2:

To formulate legal arguments and apply your knowledge to practical family-law problems

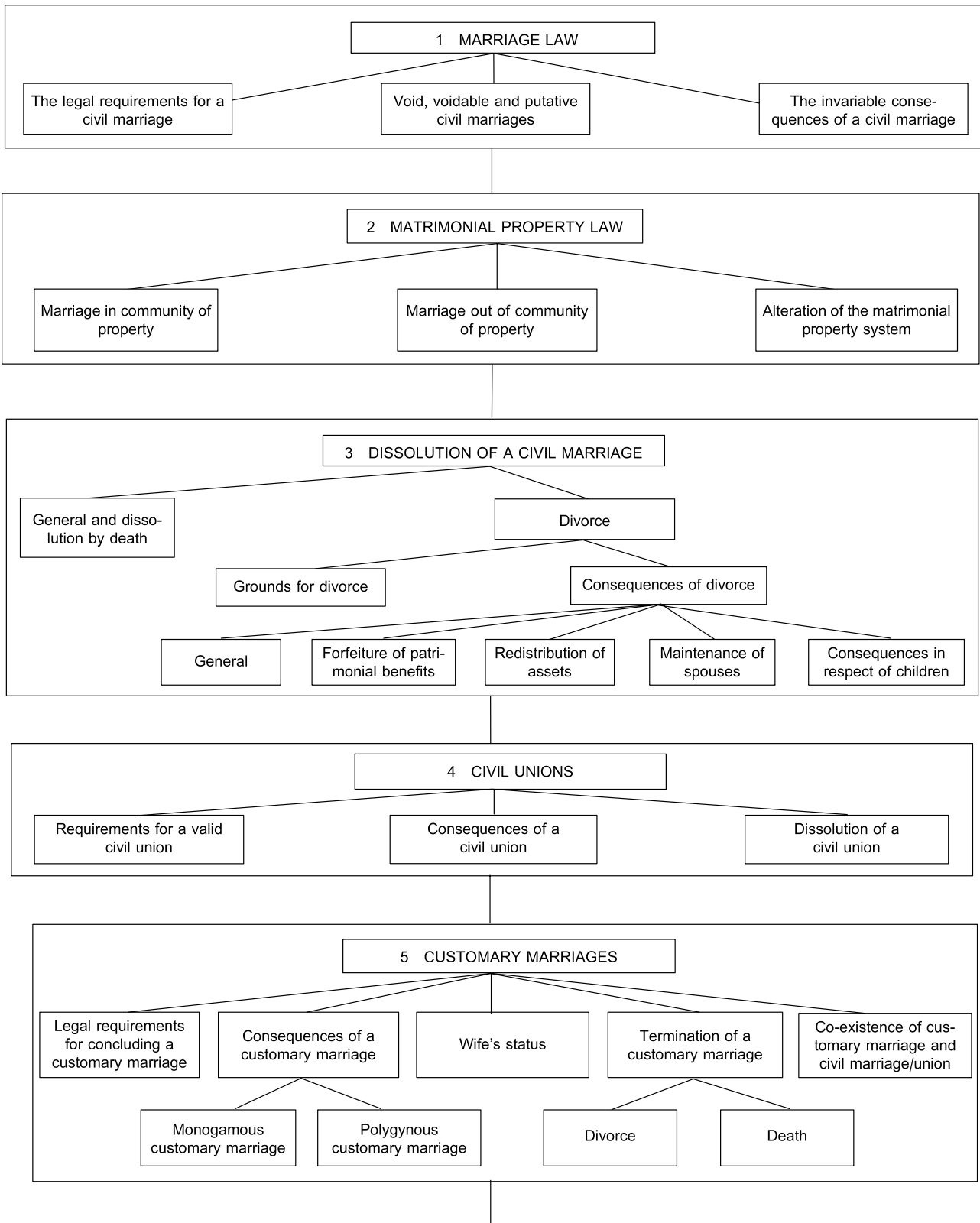
Assessment criteria:

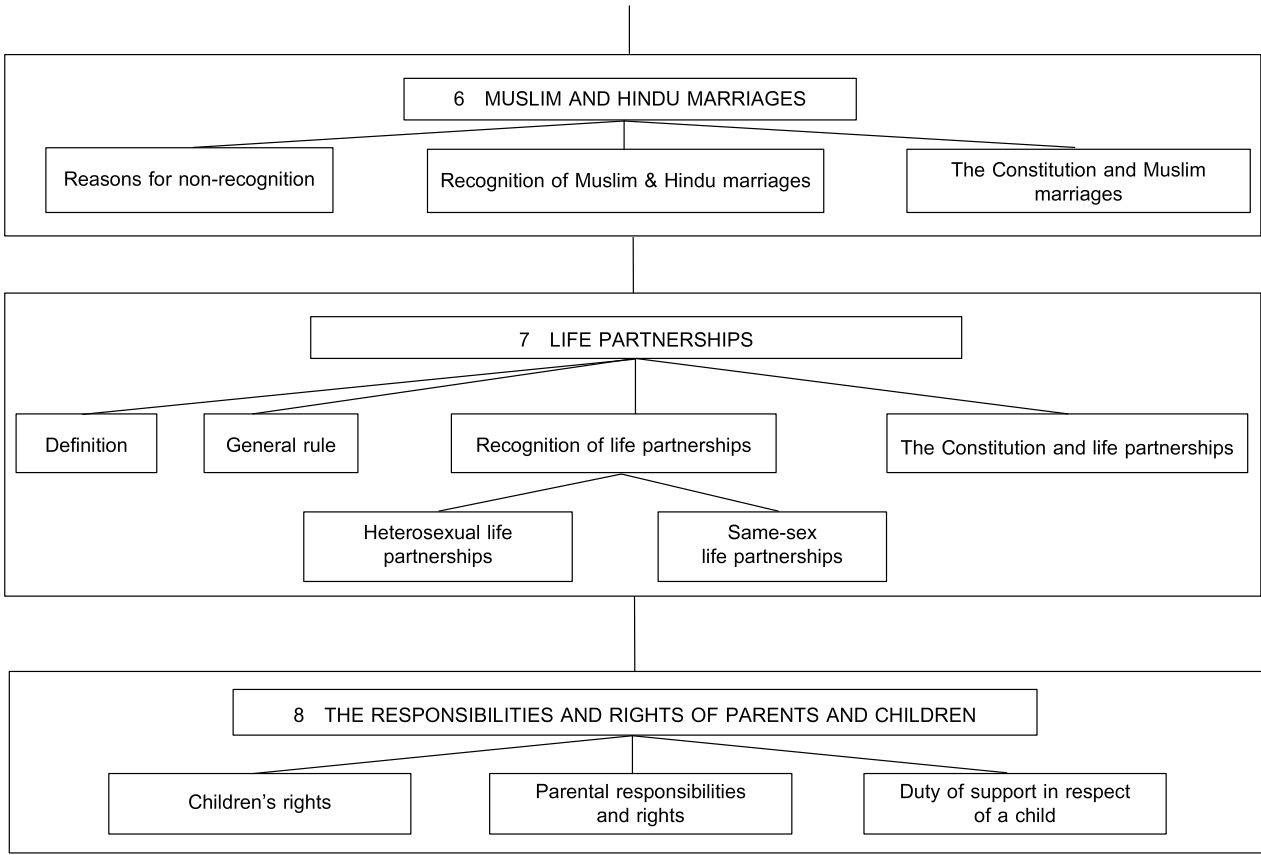
- Well-defined problems relating to family law should be solved using correct procedures and appropriate evidence.
- Information should be presented and communicated reliably and coherently in professionally accepted formats using basic information technology.
- Legal texts should be used skilfully to substantiate arguments and support solutions for specific family law issues.

Overview of content of module and module map

In this module the following topics are dealt with in detail: marriage law (the conclusion of a civil marriage and the invariable consequences of a civil marriage), matrimonial property law (the operation of the different matrimonial property systems and the alteration of the matrimonial property system), the dissolution of a civil marriage by death and divorce, the consequences of divorce (for the spouses and the children), civil unions, customary marriages, Muslim and Hindu marriages, life partnerships and the responsibilities and rights of parents and children.

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





Bibliography

Heaton J *South African Family Law* 3 ed (2010) LexisNexis Durban

Heaton J *Casebook on South African Family Law* 3 ed (2010) LexisNexis
Durban

Key to study guide

It is very important for you to 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 guide and help you through your tutorial matter. Because the study guide is no more than a guide or a 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 that you should use to study the prescribed tutorial matter.

Note 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 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. Please do not underestimate the scope of this module.

You will see that the study guide is divided into **eight sections**. You will further notice that each study unit defines its **purpose** 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.

In each study unit you will be told what to **study** under the heading “PRESCRIBED LEARNING MATERIAL”. The main part of each study unit then consists of a discussion of the **content of the study unit**. This is a step-by-step guideline for studying the particular section of the work. The idea is to guide you through the tutorial matter systematically.

You will also notice that all study units 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 the assignment questions but merely serve to assist you in acquiring the skills you need to pass this module. You will not be asked to do “activities” in the examination; you will be required to answer questions. Any difficulties you experience with the activities should be resolved by the **feedback** which is provided after every activity. The feedback is usually not a model answer; it merely serves to indicate what you were required to do in the activity and shows how you could have done this.

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

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 were to try and tackle the work without the assistance given by this study guide.

Family Law



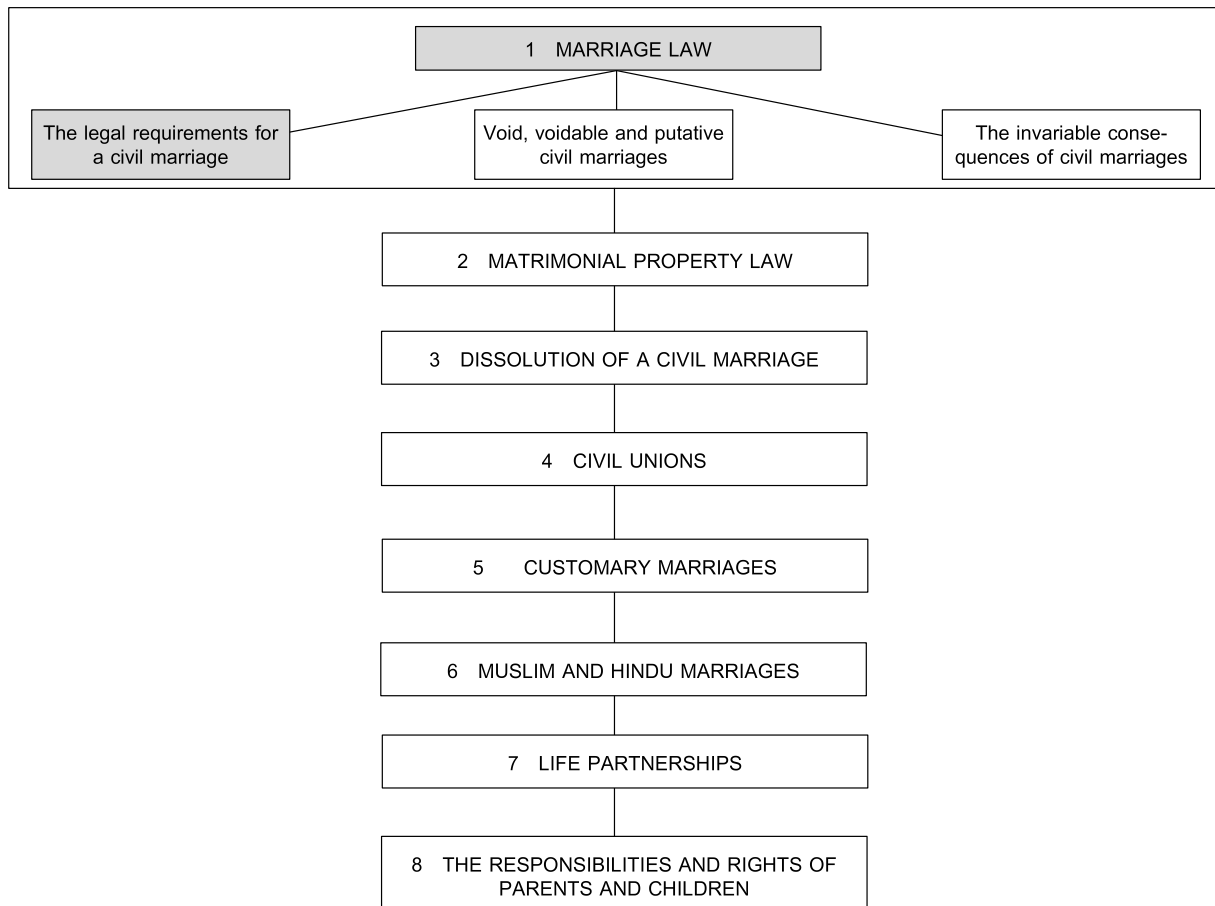
Marriage Law

Section 1

STUDY UNIT 1

The legal requirements for a civil marriage

MODULE MAP



OVERVIEW

Civil marriages are dealt with in sections 1 to 3 of your study guide. Civil marriages are monogamous and may only be entered into by persons of the opposite sex. Civil marriages are governed by the common law and various Acts and were, until about a decade ago, the only marital relationships fully recognised by South African law.

Although a civil marriage is often preceded by an engagement, an engagement is not a legal requirement for a civil marriage. The requirements for, the content and consequences and the termination of an engagement are discussed in chapter 2 of your prescribed textbook. You may read this chapter for interest's sake. There will, however, be no questions on the engagement in the assignments or the examination.

For the purposes of study unit 1, you have to know that a civil marriage is valid only if certain legal requirements are met. This study unit explains what these requirements are.

PURPOSE OF THIS STUDY UNIT

The purpose of this study unit is to enable you to

- define the term “civil marriage”
- identify the legal requirements for a civil marriage
- know the factors that have an influence on each of the requirements for a civil marriage
- explain how each factor influences the requirements for a civil marriage

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 15 to 18 (up to just before “(b) Consent which is required for the civil marriage of a minor”)
- Prescribed textbook pages 25 (from “3.3 Agreement”) to 31 (up to just before “3.5.1 Marriage officers”)
- Prescribed textbook pages 32 (from “3.5.3 Formalities during the marriage ceremony”) to 34

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

You should be able to give the traditional definition of a civil marriage as well as the more modern version of this definition, as set out on page 15 of your prescribed textbook. Note further that it is undesirable to describe a civil marriage as a type of contract.

2 REQUIREMENTS FOR A CIVIL MARRIAGE

You should be able to ascertain whether the legal requirements for a civil marriage are met in different scenarios. In a nutshell these requirements are the following:

- (1) The parties must have capacity to act.
- (2) There must be agreement between the parties to enter into a civil marriage with each other.
- (3) The marriage between the parties must be lawful.
- (4) The prescribed formalities must be complied with.

2.1 Capacity to act

Note that some persons have no capacity to act, while others only have limited capacity to act.

For the purposes of the present study unit, all you need to know in respect of the capacity to act on pages 15 to 18 of the textbook is the effect of prodigality, mental illness, placement under curatorship due to a disability or chronic illness, and minority on a person's capacity to enter into a civil marriage. You, therefore, do not have to memorise the names of and the discussions on the court cases referred to in this section.

ACTIVITY

Draw a table to indicate the effect of prodigality, mental illness, placement under curatorship due to a disability or chronic illness, and minority on a person's capacity to enter into a civil marriage.

FEEDBACK

Categories of person	Effect on capacity to enter into a civil marriage
Declared prodigals	Can enter into a civil marriage without curator's consent
Mentally ill persons	Can only enter into a civil marriage during a <i>lucidum intervallum</i>
Persons under curatorship due to a disability or chronic illness	Can enter into a civil marriage without curator's consent
Minors	Can only enter into a civil marriage with the consent of their parents/legal guardians (in the next study unit you will see that the presiding officer of the children's court may also consent to the civil marriage of a minor)

2.2 Agreement

With regard to the second requirement for a civil marriage you should note that various factors can have an effect on the agreement between the parties to enter into a civil marriage with each other. These factors are all discussed in your textbook on pages 25 to 27.

ACTIVITY

Draw a diagram to indicate which factors can have an effect on agreement and what the effect of each factor on the validity of a civil marriage is.

FEEDBACK

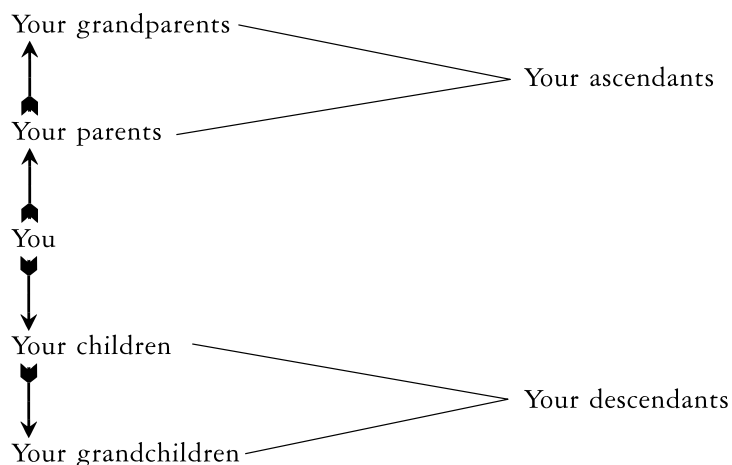
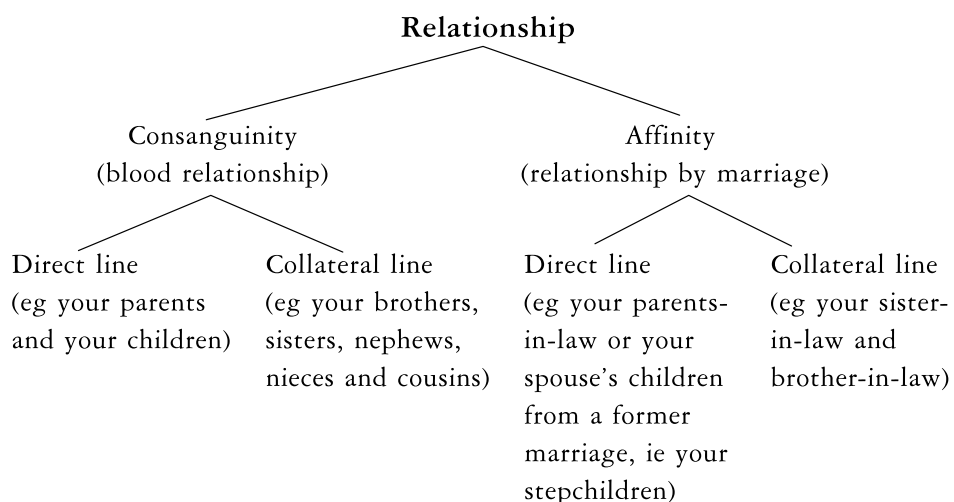
I FACTORS WHICH CAN HAVE AN EFFECT ON CONSENSUS			
Mistake	Misrepresentation	Duress	Undue influence
<p>Mistake concerning the identity of the other party (<i>error in personam</i>) or a mistake concerning the nature of the juristic act (<i>error in negotio</i>) are the only forms of material mistake in respect of a civil marriage</p> <p>Only a material mistake excludes agreement</p> <p>Distinguish from simulated civil marriages or civil marriages of convenience</p>	<p>Where one of the parties misleads the other prior to the civil marriage by making untruthful statements, or gives a false impression to the other party by concealing information which should have been made known and thereby persuades the other to enter into marriage</p> <p>Only a serious misrepresentation excludes agreement</p> <p>Eg of a serious misrepresentation: where a woman is already pregnant by another man at the time of entering into the marriage and fraudulently conceals this (= prenuptial <i>stuprum</i>)</p>	<p>Where one of the spouses has been forced to consent to the civil marriage</p> <p>Eg <i>Smith v Smith</i></p>	<p>Where one of the parties to a civil marriage has been influenced in his or her choice and has been persuaded to enter into the marriage as a result of the influence</p>
II EFFECT ON THE VALIDITY OF A CIVIL MARRAIGE			
Mistake	Misrepresentation	Duress	Undue influence
Unclear whether void or voidable	Voidable	Voidable	Voidable
<p>Some authors: voidable</p> <p>Heaton: strictly speaking void, but in terms of the interests of society it ought not to be void, but voidable</p> <p>Simulated civil marriage: valid because parties had the intention to conclude a civil marriage (<i>Martens v Martens</i>)</p>	<p>Only a serious misrepresentation can lead to the civil marriage being set aside</p>	<p>(<i>Smith v Smith</i>)</p>	<p>No direct authority</p> <p>Ought to have an effect on the validity of a civil marriage</p>

2.3 Lawfulness

Make sure that you know all the instances in which a specific civil marriage or a civil marriage between specific persons would be unlawful. You have to study pages 27 to 31 of your textbook in this regard.

As students often find it difficult to understand the section on the degrees of relationship which make a marriage unlawful, we would like to explain this section in a bit more detail.

To understand the different categories of relationship, you may find the diagrams below helpful:



You should further note that there are four basic rules that have to be considered when determining whether persons are within the prohibited degrees of relationship. Although you should know that these can be found in the Marriage Act, Political Ordinance and the Immorality and Prohibition of Mixed Marriages Amendment Act, you do not have to know the specific sections of the legislation itself. You therefore need not refer to authority should you get a question in the assignments or the examination dealing with the prohibited degrees of relationship. The four rules are as follows:

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.

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, who are exactly 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 who are exactly the same people) within the first degree. You and your cousin are related to the common ancestor(s) within the second degree.

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.

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.

You should also 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 first diagram on page 29 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, to B in the fourth degree, to C in the fifth degree, and so on.

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, the first thing you should do is to draw a diagram of relationship as part of your answer. In the next activity you can practise drawing such a diagram and applying it to a set of questions.

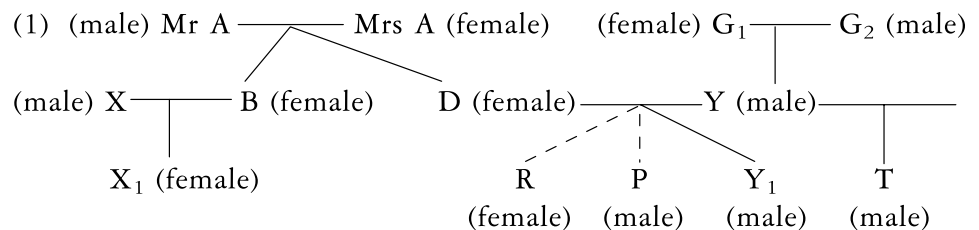
ACTIVITY

Short scenario: Two girls, B and D, are born of the marriage of Mr and Mrs A. B later marries one of her old boyfriends, X, and a girl X₁, is born of their marriage. D marries her gym instructor, Y, who has a daughter, T, from a previous marriage. T stays with her grandmother, G₁, and grandfather, G₂, (Y's parents) during the holidays. A boy, Y₁, 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.

What you have to do:

- (1) Draw a diagram.
- (2) Thereafter indicate whether the following persons may enter into a civil marriage with each other. In each case, give a reason for your answer.
 - (a) If Mr A dies, Mrs A and Y₁?
 - (b) If B and Y die, X and D?
 - (c) If B and Mr A die, X and Mrs A?
 - (d) If X dies, B and Y₁?
 - (e) T and Y₁?
 - (f) If Y dies, D and P?
 - (g) P and R?
 - (h) X₁ and Y₁?
 - (i) If Y and G₁ die, D and G₂?

FEEDBACK



- (2)
 - (a) No, because Mrs A and Y₁ are blood relations of one another in the direct line.
 - (b) Yes, because X and D are related by affinity in the collateral line.
 - (c) No, because X and Mrs A are related by affinity in the direct line.
 - (d) 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.
 - (e) 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.
 - (f) No, because an adoptive parent may not marry his or her adopted child.
 - (g) Yes, because P and R are not related by either blood or affinity.
 - (h) 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.

- (i) No, because D and G₂ are relations of one another by affinity in the direct line.
-

2.4 The prescribed formalities

With regard to the final requirement for a civil marriage to be valid, namely that the prescribed formalities must have been complied with, you only need to study the formalities during the marriage ceremony and the registration of the civil marriage on pages 32 to 34 of the textbook.

ACTIVITY

Short scenario: Mr X and Miss Y plan to enter into a civil marriage with each other on 9 December. They would like the marriage to be celebrated on the beach at Muizenberg.

What you have to do: Advise them on whether or not this is possible.

FEEDBACK

Detailed guidelines for your answer: In your answer you first have to identify the problem; that is, whether the parties may celebrate their marriage on the beach at Muizenberg. You should state that we are here dealing with one of the requirements for a civil marriage, namely that the prescribed formalities must be complied with.

Secondly, you have to discuss the relevant law applicable to the problem with reference to authority. You have to refer to section 29(2) of the Marriage Act, the imperative provisions of this section, and the decision and the reasons for the court's decision in *Ex parte Dow*.

Lastly, you should apply the law to the facts of the activity. You should come to the conclusion that despite the provisions of section 29(2) of the Marriage Act, the parties will probably be able to celebrate their marriage on the beach at Muizenberg in the light of the decision in *Ex parte Dow*.

SUMMARY

In this study unit you learnt about all the legal requirements for a civil marriage.

Do you now know what these requirements are?

To refresh your memory and to contribute to your understanding, write a few notes on the following:

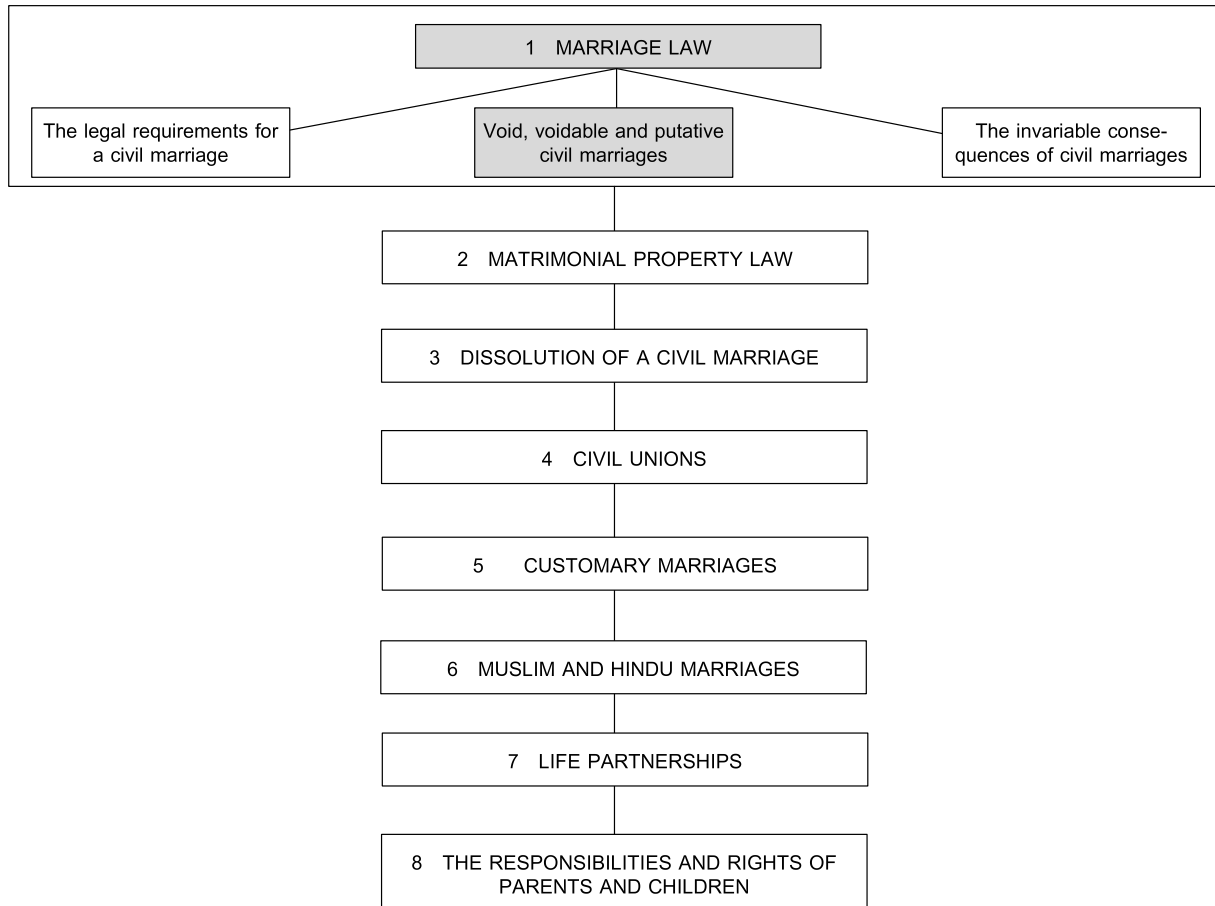
- the definition of a civil marriage
- the four legal requirements for a civil marriage
- the factors that can have an influence on each of the requirements
- the influence of these factors on the requirements for a civil marriage

You further learnt that civil marriages that do not comply with these requirements are generally void or voidable. In the next study unit we investigate in more detail void and voidable marriages, as well as putative marriages, which are a certain type of void marriage.

STUDY UNIT 2

Void, voidable and putative civil marriages

MODULE MAP



OVERVIEW

In this study unit we look at void, voidable and putative civil marriages. This study unit is closely connected with the previous study unit in which the legal requirements for a civil marriage were discussed. In that study unit 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 should first have studied the previous study unit properly.

PURPOSE OF THIS STUDY UNIT

The purpose of this study unit is to enable you to

- distinguish between void and voidable civil marriages

- know the grounds for nullity of marriage and identify the cases that resort under each ground
- discuss the consequences of a void civil marriage
- know and explain the grounds for setting aside a voidable civil marriage
- discuss the consequences of a voidable civil marriage
- understand the nature of a putative marriage
- know what the requirements for a putative marriage are
- discuss the consequences of a putative marriage

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 35 to 41
- The note on *Moola v Aulsebrook* in your prescribed casebook on page 55
- *Zulu v Zulu* in your prescribed casebook on pages 58 to 60

CONTENT OF THIS STUDY

1 VOID CIVIL MARRIAGES

1.1 The definition of a void marriage

Study the definition of a void civil marriage as set out on page 35 of your prescribed textbook.

1.2 The grounds for nullity

There are two grounds for the nullity of a civil marriage, which are discussed in your textbook on page 35. The two grounds are:

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

Examples of each of the above are given on page 35 of your textbook. You should make sure that you know, and are able to identify, all the cases that resort under each of these grounds.

1.3 The consequences of a void marriage

The consequences of a void marriage are explained on page 36 of your textbook. Remember, a void marriage means that legally no marriage has been concluded. In a nutshell, the effect of a void marriage is the following:

- A void marriage does not affect the status of the parties as a void marriage does not confer any of the consequences of marriage on the parties or their children.
- No matrimonial property system is operative between the parties.
- There is no reciprocal duty of support between the parties.
- The parties may not inherit intestate from each other.

- The parties' children are children born of unmarried parents.
- Both the parties are free to enter into another marriage, civil union or customary marriage.

2 VOIDABLE CIVIL MARRIAGES

2.1 The definition of a voidable marriage

It is important that you know the definition of a voidable marriage on page 36 of your textbook so that you can identify a voidable marriage in a set of facts.

2.2 The grounds for setting aside a voidable civil marriage

You should know and be able to discuss the following seven grounds for voidability of a marriage (they are discussed on pp 36–39 of the textbook):

(a) Minority

Note that minors need consent from their parent(s), legal guardian(s) or the presiding officer of the Children's Court to marry.

(b) Material mistake

Two forms of material mistake, namely mistake about the identity of the other party and the nature of the juristic act, exclude agreement, which should render the marriage voidable. See also the second activity and the feedback in the previous study unit.

(c) Duress

Duress renders a civil marriage voidable. See also the second activity and the feedback in the previous study unit.

(d) Undue influence

Note that it is submitted that undue influence should render a civil marriage voidable. See also the second activity and the feedback in the previous study unit.

(e) Stuprum

You should know the definition of *stuprum* as it is explained in your textbook on page 37. Note that it can only render a marriage voidable if the wife was pregnant with another man's child at the time of the wedding and her husband was unaware of this fact.

(f) Impotence

The definition of impotence is given on page 38 of your textbook. Make sure that you know the definition of impotence and when it can render a marriage voidable.

(g) Sterility

You should be able to give a definition of sterility and distinguish it from impotence. Note also the conflicting court cases that deal with this aspect.

ACTIVITY

Distinguish between *stuprum*, impotence and sterility and the effect each has on the validity of a marriage.

FEEDBACK

<i>STUPRUM</i>	STERILITY	IMPOTENCE
Extramarital sexual intercourse with a third party before the marriage.	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.
Normally it does not affect the validity of a civil marriage. The exception is where a woman is pregnant with another man's child at the time of the wedding. If her husband was unaware of the pregnancy, the marriage is voidable and he may request annulment of the marriage.	If one of the parties fraudulently concealed his or her sterility, the marriage is voidable and the other party may have the marriage annulled. <i>Venter v Venter.</i> <i>Van Niekerk v Van Niekerk.</i>	A civil marriage is voidable if one of the spouses was unaware of the impotence at the time of the wedding. The exceptions are where the plaintiff was aware of the impotence, condoned it, or the impotence is temporary or probably curable.

ACTIVITY

Place each of the following sets of facts in 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) H and W's marriage was solemnised by O who is not a competent marriage officer.
- (4) 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.
- (5) H and W, both 17 years of age, conclude a marriage against the wishes of both their parents, and consequently without their parents' consent.
- (6) After entering into marriage with H, W finds out that H is impotent and was already impotent before contracting the marriage.
- (7) O, a competent marriage officer, solemnises the marriage between H and W. O, H and W are the only persons present at the solemnisation.

- (8) H, whose wife is dying, concludes a marriage with W.
 (9) 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

VOIDABLE MARRIAGE	VOID MARRIAGE
(1); (4); (5); (6) and (9)	(2); (3); (7) and (8)

2.3 The consequences of a voidable civil marriage

Remember that a voidable marriage remains in force and has all the legal consequences of a valid civil marriage until it is set aside by a court order. Study the consequences of a voidable civil marriage as discussed on page 39 of your textbook.

ACTIVITY

It is a good idea to compile a table to indicate the distinction between void and voidable marriages, as this will help you to understand the difference between these two concepts better.

FEEDBACK

VOID MARRIAGE	VOIDABLE MARRIAGE
<p>A void civil marriage never comes into existence (it is void <i>ab initio</i>).</p> <p>Subject to certain statutory and common-law qualifications,* a void civil marriage does not have the legal consequences of a valid civil marriage. This entails, <i>inter alia</i>, the following:</p> <ul style="list-style-type: none"> ● status of the parties: unmarried ● children born/conceived during the marriage: children born of unmarried parents <p>For purposes of legal certainty a void civil marriage should be declared void by the court. The order is merely declaratory.</p>	<p>A voidable civil marriage remains in force until it is dissolved by a court order.</p> <p>A voidable civil marriage has all the normal consequences of a valid civil marriage. This entails, <i>inter alia</i>, the following:</p> <ul style="list-style-type: none"> ● status of parties: married ● children born/conceived during the marriage: children born of married parents <p>A voidable marriage must be annulled by a court order. The decree is compulsory.</p>

* Statutory qualifications: sections 6 and 26(1) of the Marriage Act 25 of 1961. See the discussion of these sections on page 36 in your textbook.

3 PUTATIVE MARRIAGES

3.1 The definition of a putative marriage

A void civil marriage can, under certain circumstances, also be a putative marriage. This is the case when, at the time of the conclusion of the marriage, there is a defect which renders it void, but one or both of the spouses were unaware of this defect.

3.2 The requirements for a putative marriage

The two requirements for the existence of a putative marriage are discussed on page 40 of the textbook. There are four court decisions which deal with this aspect, namely, *Bam v Bhabha*, *Ngubane v Ngubane*, *Moola v Aulsebrook* and *Solomons v Abrams*. The latter three cases are discussed in the note on the *Moola* case in your prescribed casebook on page 55, which is prescribed learning material for this study unit. The first case is mentioned on page 40 of your textbook and in the note on *Moola v Aulsebrook* in the casebook. Make sure that you know whether due solemnisation is still a requirement today for the existence of a putative marriage.

3.3 The consequences of a putative marriage

(a) General

Note that although a putative marriage is void, it has some of the legal consequences of a valid marriage. Note also that the court cannot declare a putative marriage valid.

(b) Children born of a putative marriage

Note that the children born of a putative marriage are regarded as children born of married parents. The procedure that is usually followed in such a case is explained in your textbook on pages 40 and 41.

(c) The patrimonial consequences of a putative marriage

In respect of the patrimonial consequences of a putative marriage, you should clearly distinguish between the case where both parties are *bona fide* (acting in good faith), and the case where only one party is *bona fide*. In addition, you have to study *Zulu v Zulu* in your prescribed casebook on pages 58 to 60, especially the note on page 60. In this decision the case where one party is already a spouse in another valid civil marriage in community of property is distinguished from the case where neither party is already a spouse in another valid civil marriage in community of property.

ACTIVITY

Short scenario: Charles and Mary enter into marriage without an antenuptial contract. Neither the parties nor the priest who solemnised the marriage is aware of the fact that Charles and Mary are related to each other within the prohibited degrees of consanguinity. Charles and Mary have no children.

What you have to do: Fully discuss the nature and the patrimonial consequences of the marriage.

FEEDBACK

Some guidelines before you start writing anything: In the first place, you have to investigate whether the requirements for a putative marriage have been met before you can comment on the nature of the marriage that Charles and Mary entered into. Remember to also discuss the relevant case law. Secondly, you have to discuss the position regarding the patrimonial consequences of a putative marriage. Remember to discuss *Zulu v Zulu*.

SUMMARY

In this study unit you learnt about a number of aspects pertaining to void, voidable and putative civil marriages.

Do you know what these marriages entail?

To refresh your memory and to contribute to your understanding, write a few notes on the following:

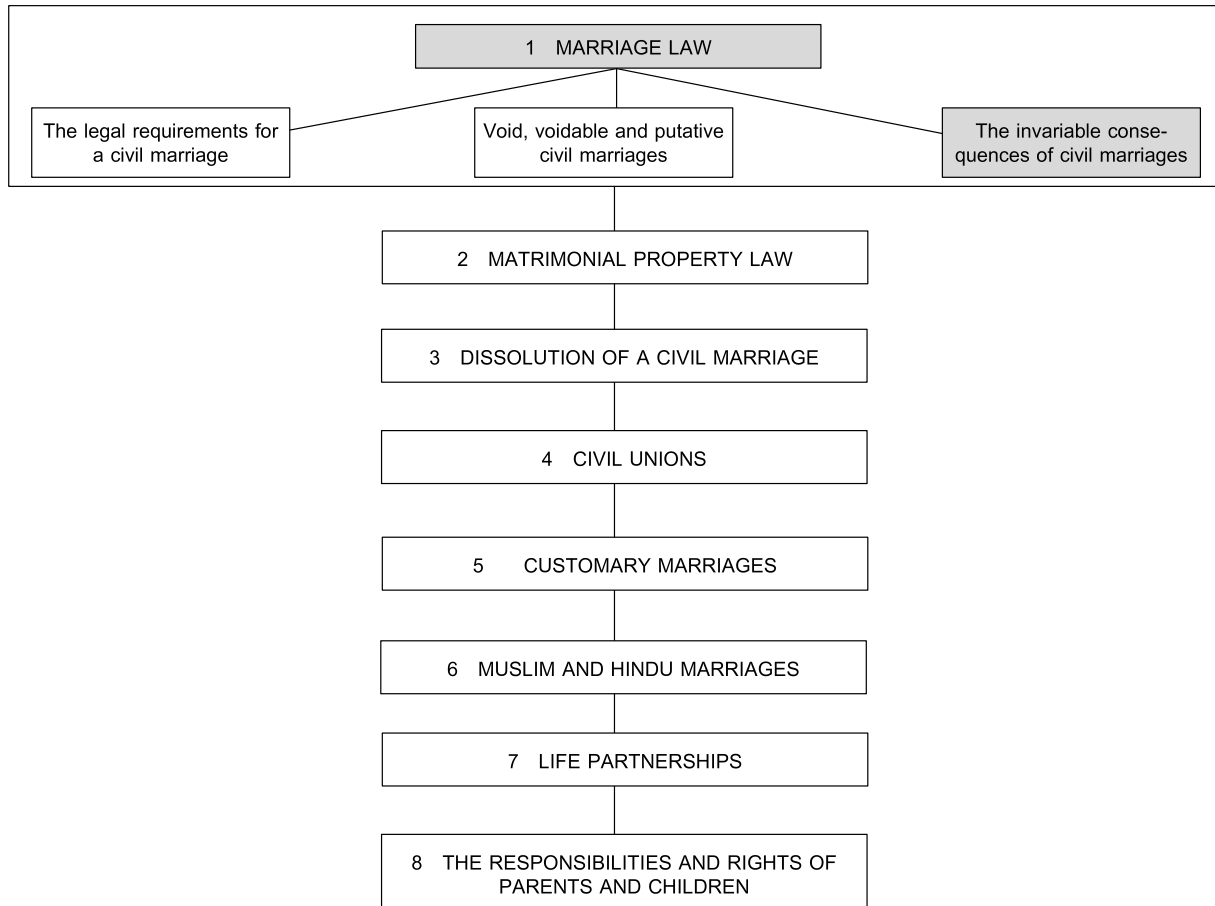
- the distinction between a void and a voidable civil marriage
- the grounds for nullity of a civil marriage
- the grounds for the voidability of a civil marriage
- the consequences of a void marriage
- the consequences of a voidable civil marriage
- what a putative marriage is
- what the consequences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

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

STUDY UNIT 3

The invariable consequences of civil marriage

MODULE MAP



OVERVIEW

In the first two study units of this section, you learnt how a civil marriage comes into existence and you learnt that a marriage may be void, voidable or putative if the prescribed requirements are not met. Before attempting the present study unit you should make sure that you know how a valid civil marriage comes into existence.

The present study unit and the whole of the next section on matrimonial property law (Section 2) deal with the invariable and the variable consequences of a civil marriage respectively.

The variable consequences deal mainly with the matrimonial property system which applies to a civil marriage. The consequences in respect of the matrimonial property system are variable because the spouses can choose which matrimonial property system should apply to their marriage.

The present study unit deals with those consequences of a civil marriage that cannot be changed by the spouses. These consequences are therefore known as the invariable consequences of a civil marriage. 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.

PURPOSE OF THIS STUDY UNIT

The purpose of this study unit is to enable you to

- distinguish between the variable and invariable consequences of a civil marriage
- list the invariable consequences of a civil marriage
- explain what each invariable consequence means
- explain how a civil marriage affects the status of the spouses
- explain the meaning and content of *consortium omnis vitae*
- explain the reciprocal duty of maintenance between the spouses
- explain the capacity to buy household necessities
- explain the relevance of the Maintenance Act 99 of 1998 with regard to maintenance orders
- explain what the spouses’ right to occupy the matrimonial home entails
- indicate that, as a result of marriage, both parents acquire parental responsibilities and rights in respect of children born from the marriage
- explain the rules in respect of the abolition of the prohibition on donations between spouses
- explain the rules about a common family name
- explain whether the rule that the husband is the head of the family still forms part of our law today

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 43 and 44 (up to the end of the first paragraph under “5.3.1 The content and protection of *consortium omnis vitae*”)
- Prescribed textbook pages 46 (from “5.4 Spousal maintenance”) to 63
- The note on *Excell v Douglas* in your prescribed casebook on page 76
- The note on *Reloomel v Ramsay* in your prescribed casebook on page 81
- *Bannatyne v Bannatyne* in your prescribed casebook on pages 88 to 95

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

On page 43 of your prescribed textbook and in the preface to this study unit a distinction is drawn between the variable and the invariable consequences of a civil marriage. You have to distinguish between these consequences as parties are able to change the variable consequences in an antenuptial contract but unable to change the invariable consequences.

2 THE STATUS OF THE SPOUSES

A civil marriage changes the status of the spouses from being unmarried to being married. There are certain things they qualify for as married persons and there are certain things they are not allowed to do because they are married. On page 43 in your textbook seven such examples of how marriage affects the status of spouses are listed. Memorise these examples.

3 *CONSORTIUM OMNIS VITAE*

Pages 44 to 45 of your textbook set out the exact meaning of *consortium omnis vitae*. You need only study the first paragraph on page 44 of the textbook. You have to be able to explain what *consortium* is. This concept is important as you need to know what a normal marriage relationship consists of before you can determine whether a marriage has irretrievably broken down if the spouses want a divorce. You also need to know the cases, *Wiese v Moolman*, *Grobbelaar v Havenga* and *Peter v Minister of Law and Order*, which explain what the concept *consortium omnis vitae* means.

4 SPOUSAL MAINTENANCE

4.1 The reciprocal duty of support between spouses

First of all you should note that “support” and “maintenance” are the same thing. The two words can be used interchangeably.

Your textbook contains a detailed discussion of the reciprocal duty of support between spouses on pages 46 to 48. The duty is reciprocal in that the spouses must maintain or support each other. The same position applies to both spouses. The rules for the husband are the same as those for the wife and vice versa. Make sure you know what the requirements for the existence of a reciprocal duty of support are. When all the requirements are present the one spouse can enforce the right to maintenance against the other spouse. A spouse can further be liable to third parties if a third supplies goods or services required for the maintenance of the other

spouse. Make sure you know when spouses are liable to third parties for maintenance debts. From this it follows that you will have to be able to determine when the duty terminates.

You do not need to study *Reyneke v Reyneke* on page 47 of the textbook.

ACTIVITY

Read the first paragraph under “(a) General” on pages 46 and 47 of your textbook and compile a list of the three requirements for the duty of support between spouses in a civil marriage.

FEEDBACK

You should have identified the following three requirements:

- (1) a valid civil 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
-

4.2 Household necessities

In order to run a household there are certain necessities that need to be purchased such as food and clothes. There are also expenses which are regarded as household necessities such as doctor’s fees. The question that arises is who is responsible for these expenses and can third parties claim unpaid expenses from any one of the spouses?

The duty to contribute to the purchase of household necessities is discussed on pages 48 to 51 of the textbook. Study this section. Note that a distinction is made between the duty of support and the liability for household necessities. Make sure that you know the modern-day relevance of the rules regarding liability for household necessities and the requirements for the capacity to incur debts for household necessities. You also have to know how a spouse’s capacity to purchase household necessities can be revoked and whether the capacity can be limited. In addition to what is said in your textbook, you have to study the notes on *Excell v Douglas* and *Reloomel v Ramsay* on pages 76 and 81 respectively of your prescribed casebook.

ACTIVITY

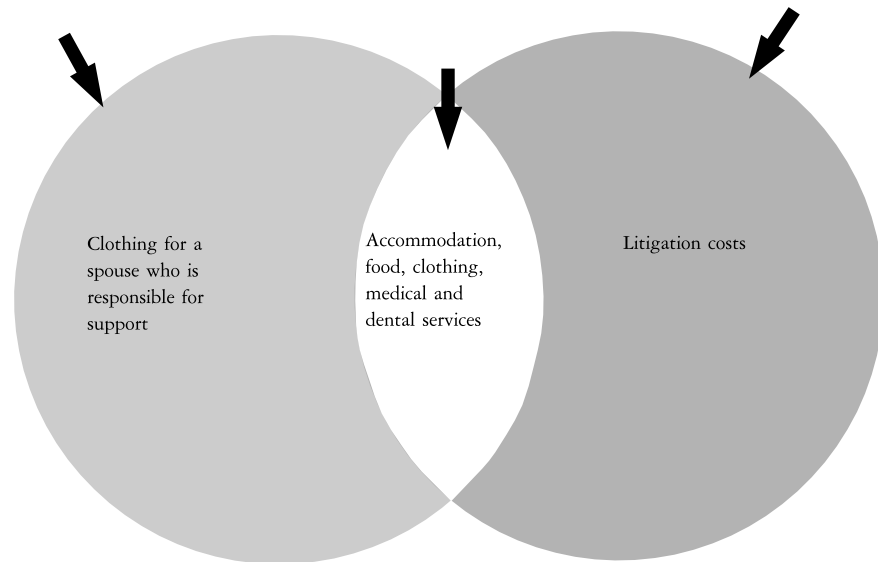
Draw a diagram with circles which indicates how the duty to contribute to household necessities overlaps with the duty of support in certain instances and differs from it in other instances.

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



ACTIVITY

Briefly state what the subjective and objective tests (or approaches) used by the courts to determine whether something is a household necessary entail.

FEEDBACK

In answering the question you have to refer to *Reloomel v Ramsay* in which the subjective approach was used. You then have to explain what the subjective approach entails. Thereafter you have to refer to *Voortrekkerwinkels (Ko-operatief) Bpk v Pretorius* in which the objective approach was used and explain what the approach entails.

The tests are discussed on page 50 of your textbook and in the note on *Reloomel v Ramsay* on page 81 of your casebook.

4.3 The Maintenance Act 99 of 1998

As many of you might one day become maintenance officers in the Maintenance Court, the discussion on the Maintenance Act on pages 51 to 60 of the textbook is of great importance in providing you with the necessary “tools of trade”.

(a) General

The Maintenance Act not only covers maintenance between spouses but also incorporates any situation where a person might be entitled to maintenance. This would, for example, also include persons in a life partnership who agreed to maintain one another.

(b) The maintenance complaint and maintenance enquiry

Note the duties of a maintenance officer and a maintenance investigator as set out on page 52 of the textbook.

(c) The orders the court may make

With regard to the discussion under this heading on pages 53 and 54 of your textbook, you only need to study the first paragraph and the first line of the second paragraph on page 53 and the second to fourth paragraphs on page 54.

(d) Appeals

Note that an appeal to the High Court does not normally suspend the maintenance order at issue.

(e) Enforcement of a maintenance order

Make sure that you know all the civil and criminal sanctions for failure to comply with a maintenance order as set out on pages 55 to 60 of the textbook. Note also that your prescribed case for this study unit, *Bannatyne v Bannatyne*, is important with regard to both civil and criminal sanctions. Remember to also study this case in your casebook on pages 88 to 95. Also study *Fose v Minister of Safety and Security* in your textbook on page 57. You do not, however, have to study all the other cases discussed or mentioned on pages 57 and 58 of the textbook.

5 THE MATRIMONIAL HOME

Spouses usually share a home – the matrimonial home. Both spouses have a right to occupy the home and use the household assets such as furniture and appliances. What are the implications of this when the parties no longer want to be married? Can one spouse chase the other spouse out of their home? What if one of the spouses pays the rent, would she then be able to evict her husband if he were a good-for-nothing drunk? What if one of the spouses becomes violent? You have to know what the spouses' right to occupy the matrimonial home entails. This is discussed on pages 60 and 61.

6 PARENTAL RESPONSIBILITIES AND RIGHTS

Note that both parents have parental responsibilities and rights in respect of the children born of the marriage. These responsibilities and rights are dealt with in detail in study unit 19.

7 DONATIONS BETWEEN SPOUSES

Donations between spouses married out of community of property have been allowed since the commencement of the Matrimonial Property Act on 1 November 1984.

ACTIVITY

Short scenario: Mr and Mrs Brink were married out of community of property in 1975. During December 1982, Mr Brink made a donation to Mrs Brink. Is the donation, made during 1982, valid today? Substantiate your answer with reference to authority.

What you have to do: Indicate whether the donation made by Mr Brink during 1982 is valid and refer to the relevant authority.

FEEDBACK

Before you start writing anything: Keep in mind that the Matrimonial Property Act came into operation on 1 November 1984.

Although donations between spouses married out of community of property were not allowed in 1982, the donation made by Mr Brink to Mrs Brink is valid. This is because section 22 of the Matrimonial Property Act determines that no transaction effected before or after the commencement of this Act is void or voidable merely because it amounts to a donation between spouses.

8 THE FAMILY NAME

On marriage, a woman has the right to choose whether she wants to use her husband's surname. The question that may be asked is why does the husband not have a right to use his wife's surname? You need to know the different rules with regard to the use of a common family name and the constitutionality thereof as discussed on pages 61 and 62 of the textbook.

9 HEADSHIP OF THE FAMILY

Is the husband still regarded as the head of the family? You have to be able to discuss this question. Study pages 62 and 63 of the textbook in this regard.

SUMMARY

In this study unit you learnt about a number of aspects relating to the invariable consequences of marriage.

Do you know by now what the invariable consequences of marriage are?

To refresh your memory and to contribute to your understanding, write a few notes on the following:

- the distinction between the variable and invariable consequences of a civil marriage
- the invariable consequences of a civil marriage
- each invariable consequence

In the next study unit you will start with the patrimonial consequences of a civil marriage which can be determined by the parties themselves and which are subsequently known as the variable consequences of a civil marriage.

Family Law



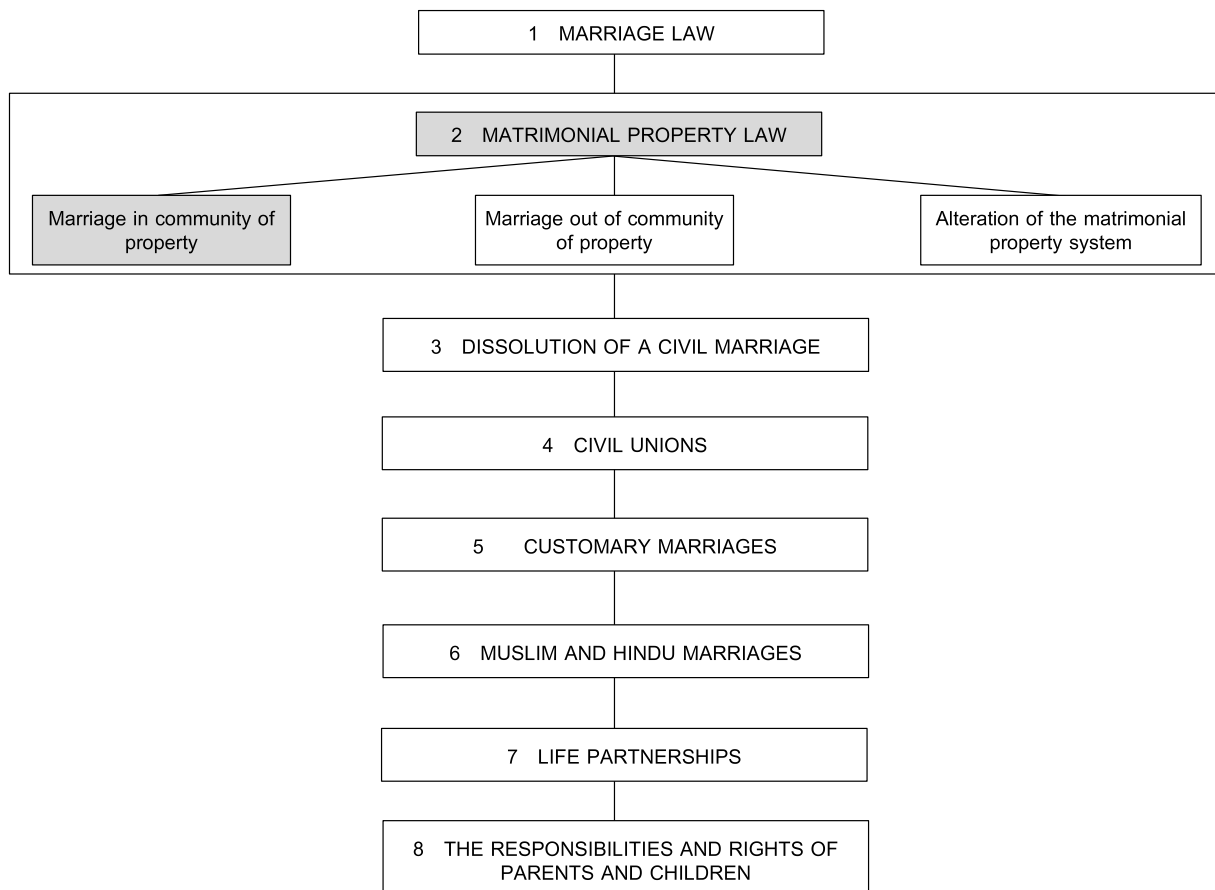
Matrimonial Property Law

Section 2

STUDY UNIT 4

The variable consequences of civil marriage – marriage in community of property

MODULE MAP



OVERVIEW

In the previous section you learnt about the legal requirements for the conclusion of a valid civil marriage. We explained that in order for a civil marriage to be valid the parties must have capacity to act, there must be agreement between the parties, the marriage must be lawful and the prescribed formalities have to be complied with. In the previous section you also learnt when a marriage is void or voidable and what the difference between void and voidable marriages is. We also explained what a putative marriage is, when a marriage is putative and what the consequences of such a marriage are. Finally you learnt that when one enters into a civil marriage it has certain far-reaching consequences in respect of the spouses and their property. The consequences that come into being automatically by operation of the law are called invariable consequences and cannot be excluded by the spouses.

In section 2 we are going to 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 **themselves** determine the patrimonial consequences of their marriage by selecting the specific matrimonial property system applicable to their marriage. For this reason, these consequences are known as the **variable consequences** of 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 would 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.

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. Note that the patrimonial consequences of marriage relate to the estates of the spouses.

In this study unit we shall look at the patrimonial consequences of a marriage where the spouses have decided to marry in community of property.

PURPOSE OF THIS STUDY UNIT

The purpose of this study unit is to enable you to

- explain when a marriage is in community of property and when not
- discuss what universal community of property entails (ie the nature of universal community of property)
- briefly 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)
- set out how joint debts may be recovered
- explain the principle of equal management of the joint estate
- identify the different forms of consent and the acts that resort under each form
- briefly 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

- identify and discuss the remedies one spouse has against the other in the following instances:
 - if the latter concludes transactions with third parties without the required consent
 - if the latter withholds his or her consent unreasonably
 - if the latter prejudices the interests of the other spouse in the joint estate
- discuss the capacity to litigate of spouses married in community of property

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 65 to 84
- The note on *De Wet v Jurgens* in your prescribed casebook on page 106
- *Nedbank v Van Zyl* in your prescribed casebook on pages 107 to 111

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

You do not need to have an in-depth knowledge of the discussion under this heading on page 65 of the textbook, but take note of the changes which were brought about to South African matrimonial property law by the Matrimonial Property Act 88 of 1984. The Matrimonial Property Act introduced two important changes to the existing South African matrimonial property law:

- It abolished the marital power.
- In addition to the two existing matrimonial property systems (ie marriage in and out of community of property), it also introduced a variation of marriage out of community of property, namely the accrual system.

2 CASES IN WHICH COMMUNITY OF PROPERTY DOES NOT ARISE

In your textbook on page 65 you will see that the primary matrimonial property system in South Africa is the system of universal community of property. This means that the conclusion of a marriage in South Africa results in community of property. 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 textbook that this presumption can be rebutted by proving the existence of certain circumstances, namely:

- the existence of a valid antenuptial contract, excluding community of property, profit and loss

- a valid postnuptial contract in which community of property and community of profit and loss are excluded
- the husband was domiciled in a country where separation of property automatically applies to marriages
- the spouses are black persons who entered into a civil marriage which is governed by section 22(6) of the Black Administration Act

Note the discussion of these circumstances on pages 65 and 66 of the textbook.

3 THE NATURE OF UNIVERSAL COMMUNITY OF PROPERTY

You have to know that spouses become tied co-owners in undivided and indivisible half shares of all assets and liabilities they acquire during marriage. This means that no asset can physically be divided and no spouse has an exclusive right in respect of any right belonging to the joint estate during the marriage. You also have to know the names of the cases in which the nature of community of property was confirmed (*Estate Sayle v Commissioner for Inland Revenue*, *De Wet v Jurgens* and *Mazibuko v National Director of Public Prosecutions*). This aspect is dealt with on pages 66 and 67 of your textbook.

4 THE CONTENT OF UNIVERSAL COMMUNITY OF PROPERTY

4.1 Assets

(a) General

Note that all assets acquired by either spouse prior to marriage, as well as those accumulated after marriage, become part of the joint estate. This rule is subject to a few exceptions, which will be dealt with below under separate headings.

Make sure that you know exactly what an asset is and that transfer of ownership takes place automatically by operation of law when parties enter into a marriage in community of property.

ACTIVITY

Short scenario: Themba and Stella married in community of property on 10 October 2010.

What you have to do: Indicate which of the following statements are true:

- (1) Upon their marriage Themba became co-owner of everything Stella owned prior to their marriage.

- (2) Stella will only become co-owner of Themba's Ferrari (ie a movable asset) when the Ferrari is transferred by way of delivery to Stella.
- (3) Themba will only become co-owner of Stella's house (ie an immovable asset) when the property is registered in both their names in the deeds office.

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.

(b) Separate assets

As indicated above, there are, however, assets that do not form part of the joint estate and which remain the separate assets of the spouses.

ACTIVITY

Some of the assets that do not form part of the joint estate are given below, but you have to fill in the missing ones yourself:

- (1) assets excluded in an antenuptial contract
- (2) _____
- (3) assets subject to a *fideicommissum* or usufruct
- (4) _____
- (5) benefits under the Friendly Societies Act 25 of 1956
- (6) _____
- (7) damages as a result of personal injury inflicted by the other spouse
- (8) _____
- (9) proceeds excluded by the court in terms of the Prevention of Organised Crime Act 121 of 1998

FEEDBACK

Each of these assets is discussed briefly and clearly in your textbook on pages 67 to 70. Make sure that you know which assets fall outside the joint estate and why they do not form part of the joint estate.

(c) Attachment of separate assets

You have to know the decision in *Du Plessis v Pienaar* as it is discussed in your textbook on pages 70 and 71. When you study the discussion of this case you will see that marriage in community of property can have a negative effect on the joint estate in the case of insolvency of one of the

spouses. Note that not even an asset that has been excluded from the joint estate is protected in the case of insolvency, since all the property of both spouses falls into the insolvent estate when one spouse is sequestrated.

4.2 Liabilities

(a) General

All debts and liabilities incurred before, as well as during, a marriage in community of property form part of the joint estate. In *Nedbank v Van Zyl* it was confirmed that spouses are co-debtors for debts incurred. Study page 71 of your textbook and pages 107 to 111 of your casebook in this regard.

(b) Antenuptial debts

Antenuptial debts are debts incurred by either of the spouses before their marriage. Note that all antenuptial contractual debts of the husband and the wife, as well as any antenuptial maintenance liabilities, become joint debts on conclusion of a marriage in community of property. Make sure that you also understand why it is no longer clear whether antenuptial delictual debts become joint debts on conclusion of a marriage in community of property. This aspect is discussed on pages 71 and 72 of your textbook.

(c) Debts incurred during the subsistence of the marriage

Since different rules apply in each of the following cases, you must be able to differentiate between contractual debts, delictual debts and other separate debts as set out on pages 72 and 73 of your textbook.

(i) Contractual debts

With regard to contractual debts, it is important that you understand in which cases the debt can be recovered from the joint estate and in which cases it can be recovered from the separate estate of the spouse who incurred the debt. A spouse can only bind the joint estate if he or she had the capacity to bind the joint estate. This, in turn, centres on the question of whether the other spouse's consent was obtained, if required. The different forms of consent will be explained below.

(ii) Delictual debts

With regard to delictual debts, you must note very carefully the provisions of section 19 of the Matrimonial Property Act, which are explained in your textbook on page 72. You will see that this section is applicable when one of the spouses commits a delict against a third party, as well as when one of the spouses commits a delict against the other spouse.

(iii) Other separate debts

You do not have to have an in-depth knowledge of the discussion in your textbook on pages 72 and 73 under this heading. All you have to know is that the legal position regarding criminal fines and other separate debts is currently uncertain and that the author of your textbook submits that section 19 of the Matrimonial Property Act should also apply in respect of these debts.

(d) Debts which are outstanding at the dissolution of the joint estate

Once again you have to differentiate between contractual debts and delictual and other separate debts of the former spouses.

(i) Contractual debts

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 the marriage. In respect of the discussion in your textbook on page 73, you only have to know how and from whom contractual debts incurred during the subsistence of the marriage can be claimed.

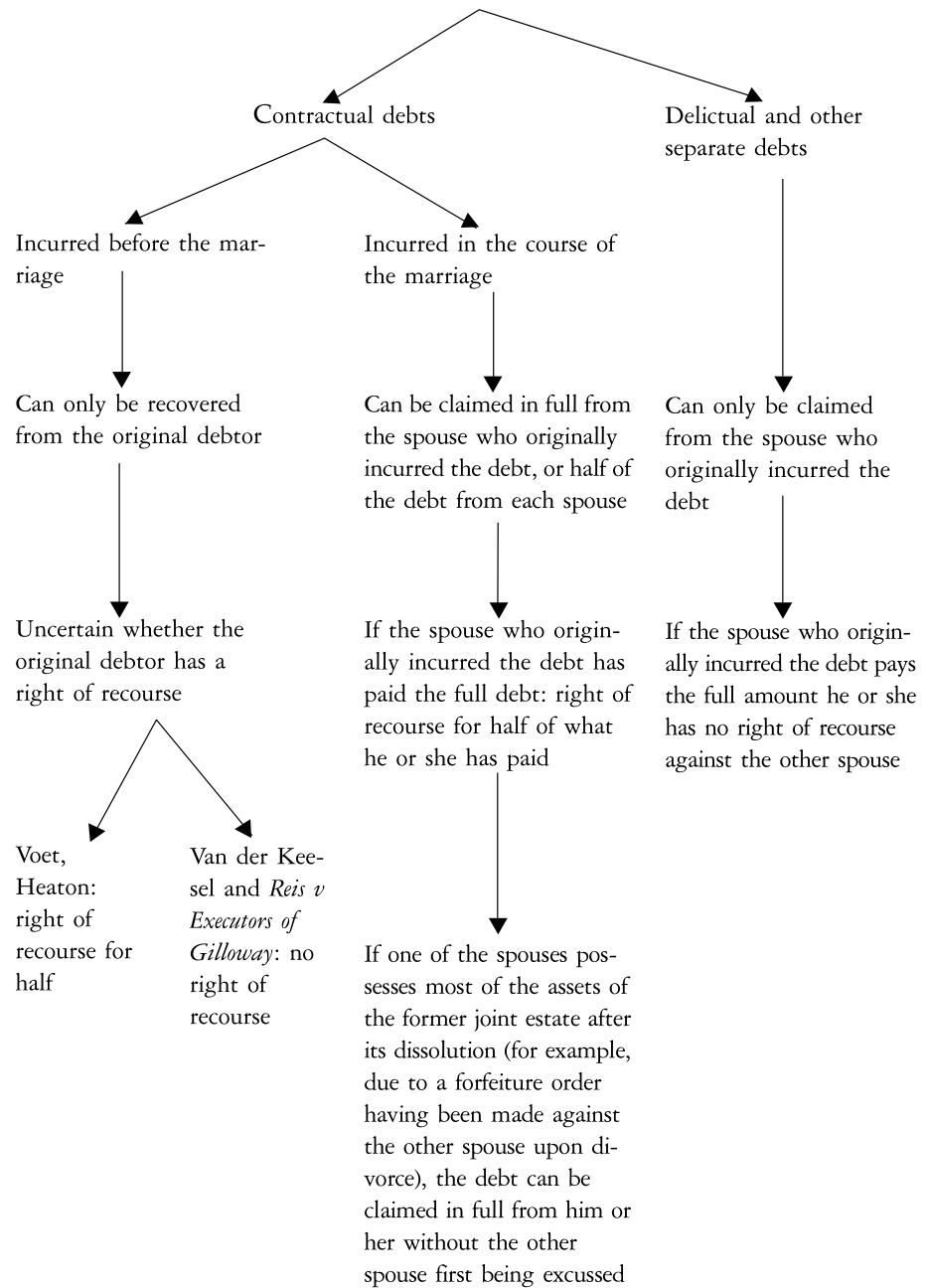
(ii) Delictual and other separate debts

You will see that only the original debtor is responsible for delictual and other separate debts which are outstanding on dissolution of the marriage.

ACTIVITY

The diagram below will help you to understand the rules that apply in respect of debts outstanding on dissolution of the joint estate:

DEBTS OUTSTANDING UPON THE DISSOLUTION OF THE JOINT ESTATE



5 ADMINISTRATION OF THE JOINT ESTATE

5.1 Abolition of the marital power

You do not have to have an in-depth knowledge of the discussion under this heading in your textbook on pages 74 and 75. All you have to know is that section 11 of the Matrimonial Property Act abolished the marital power whereby the husband had exclusive control over the joint estate and replaced it with a system of equal administration of the joint estate.

5.2 The principle of equal administration of the joint estate

On page 75 of the textbook you will see that the effect of section 14 of the Matrimonial Property Act is that both spouses are now on an equal footing regarding the administration of the joint estate. This means that both spouses have the same capacity to perform juristic acts that bind the joint estate, provided that the necessary consent is obtained.

5.3 Acts for which the consent of both spouses is required

The different forms of consent that sections 15(2), 15(3) and 17(1) of the Matrimonial Property Act provide for are listed in your prescribed textbook in paragraphs (b) to (e) on pages 75 to 77. They are:

- prior written consent, attested by two competent witnesses, in respect of each transaction separately
- written consent, attested by two competent witnesses, in respect of each transaction separately
- written consent without any further requirement
- oral or tacit consent

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.

5.4 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 77 and 78. With regard to 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.

5.5 Protective measures in respect of the administration of the joint estate

(a) 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 78 to 80 of your prescribed textbook. You will see that a distinction is drawn between *bona fide* third parties (ie 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) and *mala fide* third parties (ie 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). In this regard you also have to study all the cases as they are discussed in your textbook.

Study the table given below, as it will help you understand 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 Passassiersdienste</i> ; <i>Bopape v Moloto</i> ; <i>Visser v Hull</i> .

(b) Protection of the spouses between themselves

(i) Statutory remedies

ACTIVITY

Read pages 80 to 82 of the textbook and fill in the different statutory remedies that one spouse may use against the other when

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

Some of the remedies have been listed below; you are only required to fill in the missing remedies.

- (1) The statutory right to adjustment upon dissolution of the joint estate
- (2)
- (3) Suspension of a spouse's powers in respect of the joint estate
- (4)

FEEDBACK

The different statutory remedies are listed in your textbook on pages 80 to 82.

(ii) Common-law remedies

Make sure that you know the following summary of the requirements for the application for and granting of the different common-law remedies:

Requirements for **the interdict**:

- (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 in terms of s 15(9)(b) of the Matrimonial Property Act) should be available.

Requirements for **the common-law right of recourse upon dissolution of the joint estate**:

- (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.

Requirements for **the *actio Pauliana utilis***:

- (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 must also be proved that the third party, when entering into the transaction, was aware that the disposal of the assets was fraudulent with regard to the other spouse's 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. Note in particular the *Nel* and the *Reyneke* case.

Requirements for **having the other spouse declared a prodigal**:

Note that on page 83 doubts are expressed as to whether this remedy would be constitutional today.

5.6 Capacity to litigate

(a) General

Capacity to litigate is the capacity to act as a party in a court case. You will note that section 17(1) of the Matrimonial Property Act places a restriction on the capacity of spouses who are married in community of property to litigate, subject to the following exceptions:

- proceedings relating to the spouse's separate property
- proceedings relating to the recovery of non-patrimonial damages for a delict that was committed against the spouse
- proceedings with regard to the spouse's profession, trade or business

Make sure that you know what the consequences of non-compliance with the provisions of this section are.

(b) Insolvency

On page 84 of the textbook you will see that section 17(4) regulates the position of spouses who are married in community of property in the case of insolvency. Note that an application for the sequestration of a joint estate has to be made against both spouses and an application to surrender the joint estate has to be made by both spouses.

(c) Suing for joint debts

Finally, you should note the provisions of section 17(5), which stipulates which spouse should be sued if a debt is recoverable from the joint estate.

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 spouses' 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

SUMMARY

In this study unit, you learnt about many aspects of a marriage in community of property. Do you know what a marriage in community of property entails?

To refresh your memory write a few notes on the following:

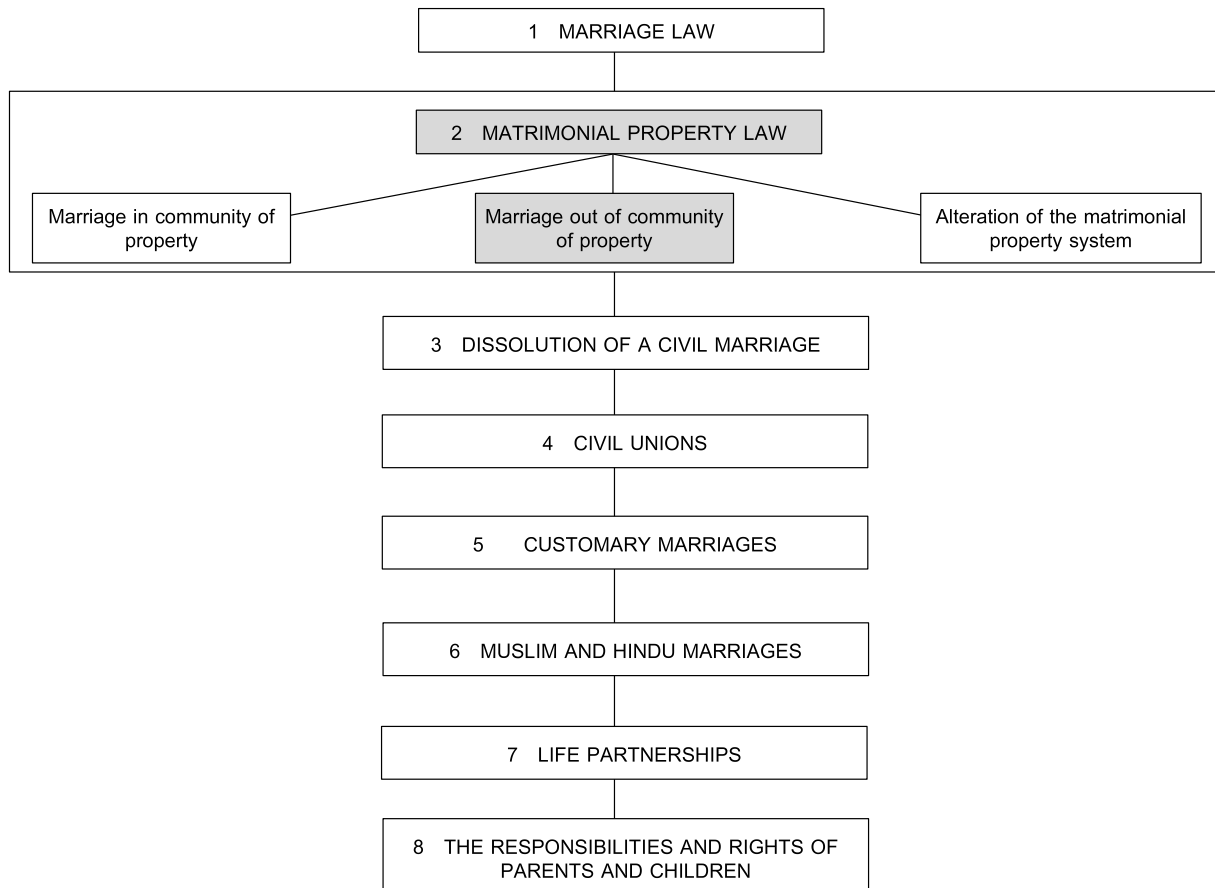
- when a marriage is in community of property
- what universal community of property means
- what the joint estate of the spouses consists of
- the separate property that does not form part of the joint estate
- how debts must be recovered from spouses who are/were married in community of property
- the principle of equal management
- the protective measures in respect of the administration of the joint estate as contained in the Matrimonial Property Act and according to common law
- the capacity to litigate of spouses married in community of property

In the next study unit we shall discuss the marriage out of community of property.

STUDY UNIT 5

The variable consequences of civil marriage – marriage out of community of property

MODULE MAP



OVERVIEW

In the previous study unit you studied marriage **in** community of property. You learnt

- 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 we deal with marriage **out** of community of property. First we discuss in general what an antenuptial contract is, as well as the different types of provision usually found in such a contract. We then deal with the three variations of marriage out of community of property that

are most commonly encountered in antenuptial contracts, namely marriage with complete separation of property, marriage out of community of property with retention of community of profit and loss and the accrual system. The latter type of marriage out of community, which applies to all marriages out of community of property and community of profit and loss entered into after the commencement of the Matrimonial Property Act 88 of 1984 unless it is expressly excluded in the antenuptial contract, is discussed in detail.

PURPOSE OF THIS STUDY UNIT

After studying this study unit you should be able to

- explain what the purpose of an antenuptial contract is
- explain that an informal antenuptial contract is valid only between the spouses
- discuss the postnuptial registration of an antenuptial contract
- discuss the minor's antenuptial contract
- discuss the contents of an antenuptial contract
- explain the effect of marriages with complete separation of property on the estates of the spouses
- explain the effect of marriages out of community of property with retention of community of profit and loss on the estates of the spouses
- explain why the legislature has accepted the accrual system
- explain when the accrual system applies
- explain what the accrual system entails
- calculate the accrual of the spouses' estates and determine the value of the accrual claim of the spouse with the smaller accrual against the spouse with the larger accrual
- explain how one spouse's right to share in the accrual of the other spouse's estate is protected by the Matrimonial Property Act
- set out the arrangements that can be made for satisfaction of an accrual claim

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 85 to 90 (up to just before “7.1.5 Interpretation of an antenuptial contract”)
- Prescribed textbook pages 92 to 95 (up to just before “(b) Renouncing the accrual claim”)
- Prescribed textbook pages 95 (from “7.4.4 Calculating the accrual”) to 100 (up to just before “7.5 Advantages and disadvantages of the main matrimonial property systems”)

CONTENT OF THIS STUDY UNIT

1 THE ANTENUPTIAL CONTRACT

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.

1.1 The purpose of an antenuptial contract

You do not have to have an in-depth knowledge of the discussion in your textbook on pages 85 and 86 under this heading. 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.

1.2 The formalities for the creation of a valid antenuptial contract

(a) General

In respect of the discussion in your textbook under this heading, 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 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 only valid between the spouses (or *inter partes*, ie between the parties).

(b) Postnuptial execution and registration of an antenuptial contract

There are, however, circumstances in which the postnuptial execution and registration of an antenuptial contract is permitted. Make sure that you know the provisions of section 88 of the Deeds Registries Act which govern the execution and registration of an antenuptial contract after the marriage, as set out on pages 86 and 87 of the textbook.

ACTIVITY

Short scenario: Mr and Mrs Edwards were engaged on 31 December 2010 and were married three months afterwards. 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 against third parties, what that means and what they can do in order to make their antenuptial contract binding against third parties.

What you have to do: Advise Mr and Mrs Edwards with reference to the relevant legislation whether their informal antenuptial contract has any effect against third parties and whether there is something that they can do about their predicament.

FEEDBACK

Some guidelines before you start writing anything: You must first refer to the Deeds Registries Act which provides that an antenuptial contract must comply with the formalities of notarial execution **and** registration to be valid against third parties. You must further indicate what the consequences of non-fulfilment of these formal requirements are.

You must then refer to provisions of section 88 of the Deeds Registries Act which provide for execution and registration of the antenuptial contract **after** the marriage, with the consent of the High Court. Do not forget to set out the three requirements that must be met before the court will grant consent and to mention that the application can be made by either one or both spouses or even by a beneficiary under a will.

1.3 Additional requirements which apply to the antenuptial contract of a minor

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 87 and 88 of your textbook.

1.4 The contents of the antenuptial contract

(a) General

Can an antenuptial contract contain provisions to the effect that the parties need not be faithful to each other, that they need not live together or that they will only be married for two years? The answer to this question is set out on page 88 of the textbook. Make sure that you know which provisions may, in general, be included in an antenuptial contract.

(b) The matrimonial property system

Under this heading in your textbook you will see that the main purpose of an antenuptial contract is usually to deviate from the automatic matrimonial property consequences of marriage, namely that marriage is in community of property (see study unit 4).

(c) A right of recourse in respect of household necessities

Note that an antenuptial contract can also 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 on pages 88 and 89 of your textbook.

(d) Succession

What is a *pactum successorium* and may it be included in an antenuptial contract? Study the answers to these questions on page 89 of the textbook.

(e) Marriage settlements

Make sure that you know what a marriage settlement is, whether a reversion clause may be included in respect of a marriage settlement and why spouses would today still be prompted to make marriage settlements. All these aspects are discussed on pages 89 and 90 of the textbook.

2 MARRIAGE OUT OF COMMUNITY OF PROPERTY AND COMMUNITY OF PROFIT AND LOSS WITHOUT THE ACCRUAL SYSTEM

You have to know what the effect of this matrimonial property system, also known as complete separation of property or the old standard-form antenuptial contract, is on the spouses' estates upon marriage. Study page 92 of the textbook in this regard.

3 MARRIAGE OUT OF COMMUNITY OF PROPERTY WITH RETENTION OF COMMUNITY OF PROFIT AND LOSS

Here, too, you have to know what the effect of this fairly uncommon matrimonial property system is on the spouses' estates upon marriage. Study pages 92 and 93 of the textbook in this regard.

4 THE ACCRUAL SYSTEM

4.1 Introduction

Make sure that you know why it was necessary for the legislature to introduce the accrual system. Study the short discussion on page 93 of the textbook in this regard.

4.2 Marriages to which the accrual system applies

The discussion in your textbook under this heading deals with the field of application of the accrual system.

ACTIVITY

Read page 93 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 **as from** 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
 - (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.)
-

4.3 When and how accrual sharing takes place

(a) General

On page 94 of your textbook, you will see that the accrual system can be described as a type of postponed community of profit. This means that 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. During the subsistence of the marriage it is therefore out of community of property and of profit and loss and 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. However, on the dissolution of the marriage the spouses share equally in the accrual.

You will further see 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 also see 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 a spouse's insolvent estate.

Lastly, make sure 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 that a spouse has during the subsistence of the marriage to share in the accrual of the other spouse's estate. Make sure that you understand the remarks made by the court in *Reeder v Softline* in this regard. Note further that 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.

4.4 Calculating the accrual

You have to study the calculation of accrual claims carefully as discussed and explained on pages 94 to 99 of the textbook.

On page 95 of your prescribed textbook, under the heading “(a) **General**”, 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. The net value means the value after all outstanding debts have been paid, and it includes all amounts that are still owing to the estate.

The steps that 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 prescribe a number of methods for proving the initial value of an estate. These methods are discussed on page 96 of the textbook under the heading “(b) **The commence-**

ment value (or the initial value)”. You should further note that the net commencement values must be adapted according to the weighted average of the consumer price index (CPI) 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 on 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 CPI, R2 20 years ago is now worth only R1. The initial value of the estate, as adapted by the CPI, is therefore R20 000. Many students make the mistake of calculating the initial value as adapted by the CPI as R5 000 because the R2 of 20 years ago is now worth only R1. 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 CPI. 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 assignments or the examination) we usually indicate the extent to which 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 at the time of the conclusion of the marriage is now worth R1, 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 has depreciated since the time the marriage was concluded, it should be assumed and the necessary calculations should be set out clearly.

- (3) Thirdly, you must subtract all the assets which are excluded from the accrual in terms of sections 4 and 5 of the Matrimonial Property Act from the net end value. This means that the value of these assets is not taken into account in the calculation of the accrual. The assets excluded from the accrual are listed under the heading “(c) **The assets which do not form part of the accrual**” on pages 97 and 98 of the textbook from (1) to (4). Regarding the assets in paragraph (1), you have to distinguish clearly between patrimonial damages and non-patrimonial damages. As students are not always clear on this distinction, we would like to explain it to you in more detail:

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. Take note that this compensation must **not** be deducted from the net end value of the spouses' estates. Other examples of patrimonial loss are medical and hospital expenses, loss of income, and so forth.

Non-patrimonial loss, on the other hand, 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, and so forth. 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. Remember that this compensation must be **deducted** from the net end value of the spouses' estates.

- (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 study carefully the example of an accrual calculation on pages 98 and 99 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 them – 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 2000. 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; she 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 CPI, R2 has the same value as R1 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><u>R 70 000</u></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><u>R 40 000</u></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.

4.5 Protection of a spouse's right to share in the 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 99 and 100. 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.

4.6 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 100.

SUMMARY

In this study unit you learnt about marriages out of community of property.

To refresh your memory and to contribute to your understanding, write a few notes on the following:

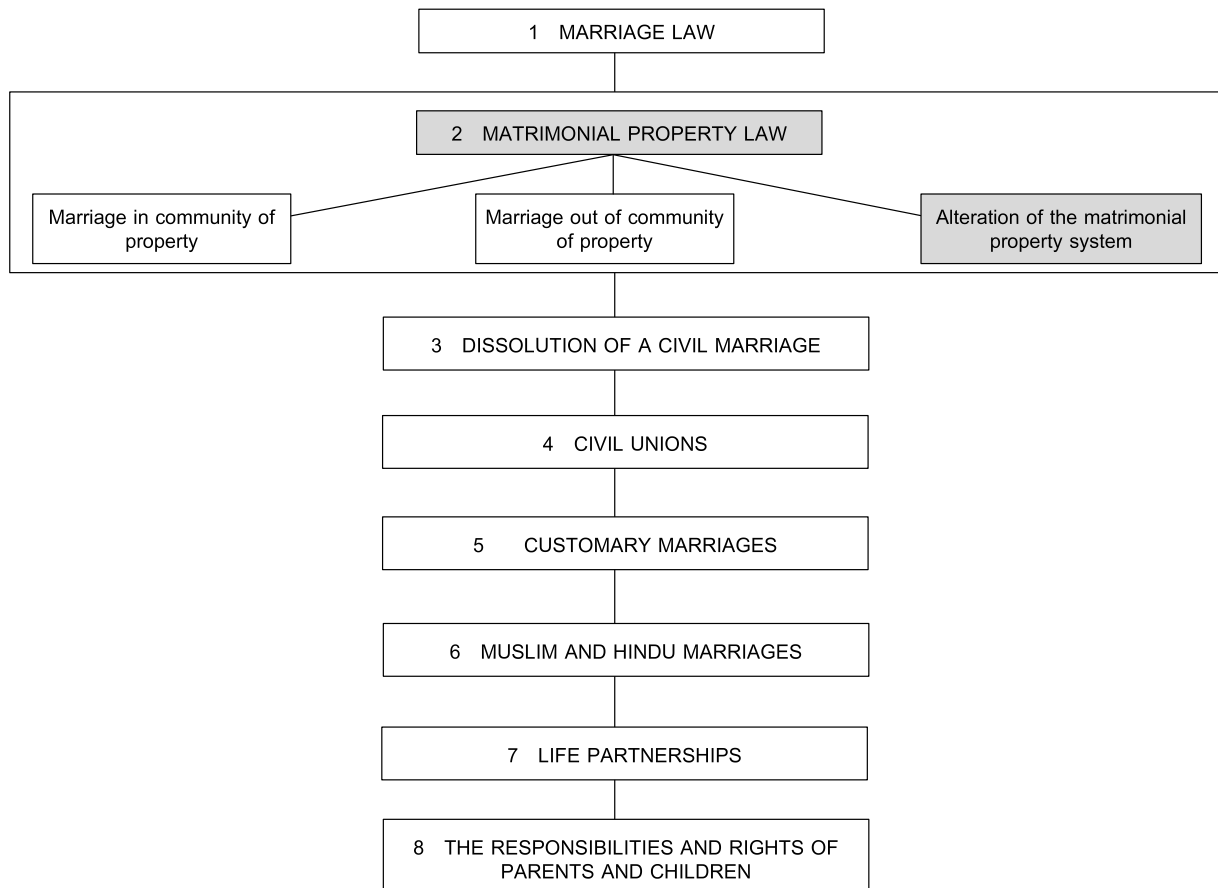
- the purpose of antenuptial contracts
- the operation of marriages out of community of property and community of profit and loss without the accrual system
- the operation of marriages out of community of property with retention of community of profit and loss
- the operation of the accrual system

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

STUDY UNIT 6

Alteration of the matrimonial property system

MODULE MAP



OVERVIEW

In the previous study units of this section (section 2), you learnt about the different matrimonial property systems that are available to people who intend to marry. You also learnt 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 out of community, for example, without the accrual system? May they never change to the accrual system or to community of property? This study unit explains that the matrimonial property system can be changed, but only in certain circumstances.

PURPOSE OF THIS STUDY UNIT

The purpose of this study unit is to enable you to

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

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 103 to 105 (up to just before “8.2.3 Procedural requirements”)
- Prescribed textbook pages 106 and 107 (only “8.2.4 Retroactive alteration of the matrimonial property system”)
- Prescribed textbook page 107 (“8.3 Extra-judicial alteration of the matrimonial property system”)
- *Ex parte Krös* in your prescribed casebook on pages 143 to 145
- *Ex parte Oosthuizen* in your prescribed casebook on pages 146 to 149
- *Ex parte Burger* in your prescribed casebook on pages 150 to 152
- *Honey v Honey* in your prescribed casebook on pages 152 to 156

CONTENT OF THIS STUDY UNIT

1 THE PRINCIPLE OF IMMUTABILITY IN MATRIMONIAL PROPERTY LAW

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.

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 page 103 of your prescribed textbook. For the purposes of this module you only have to know that 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.

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

2.1 General

Your textbook explains on page 104 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.

As you will see further down on page 104, a section 21(1) change to spouses' matrimonial property regime is often confused with a postnuptial registration of spouses' matrimonial property regime in terms of section 88 of the Deeds Registries Act (which is discussed in the previous study unit). Make sure that you know what the difference is between these two remedies. Note also the discussion of the *Sanders* and the *Engelbrecht* case in this regard.

2.2 Statutory requirements

The requirements that need to be considered by the court before a section 21(1) application for variation will be granted are discussed on pages 104 and 105 in your textbook. 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 jointly.

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 page 105. 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.

2.3 Procedural requirements

Remember that you do not have to study the discussion under this heading on pages 105 and 106.

2.4 Retroactive alteration

On pages 106 and 107 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. Retroactive alteration means that something is changed in respect of the past as well. Retroactive alteration of the matrimonial property system means that if spouses were married in community of property and apply for alteration of their matrimonial property system in terms of section 21(1) to being married out of community of property and the court grants the application, they are deemed to be married out of community of property since the conclusion of their marriage. In addition to the discussion of *Ex parte Krös*, *Ex parte Oosthuizen* and *Ex parte Burger* in your textbook, you also have to read these cases in your casebook. Take particular note of the note on the *Krös* case on page 145 of your casebook.

ACTIVITY

Short scenario: Mr and Mrs Smith were married in community of property on 10 December 1980. Mr Smith wants to start a new business, but realises that the venture may fail and he does not want to jeopardise the joint estate. However, he does not know what to do to improve the situation because, at the time when he and Mrs Smith were married, his attorney told him that spouses could not change their matrimonial property system during the subsistence of the marriage.

What you have to do: Give Mr Smith detailed advice on what the present legal position is with regard to the alteration of spouses' matrimonial property system during the subsistence of their marriage.

FEEDBACK

Some guidelines before you start writing anything: This question relates to the principle of immutability which still applies in South African law, but which has been relaxed by the legislator by means of section 21(1) of the Matrimonial Property Act.

You therefore have to set out the requirements for a section 21(1) application for the alteration of the Smiths' matrimonial property system and in particular indicate whether sound reasons exist for such a change. Remember to refer to case law in this regard. For the sake of completeness you can also indicate with reference to case law whether the change will be granted retroactively or not.

3 EXTRA-JUDICIAL ALTERATION OF THE MATRIMONIAL PROPERTY SYSTEM

Can spouses change their matrimonial property system extra-judicially (ie without going to court with an application in terms of section 21(1))? 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? These questions are answered in your prescribed case *Honey v Honey*. You have to study this decision as it appears on page 107 of your textbook and on pages 152 to 156 of your casebook. You must also study the criticism against the case expressed in your textbook and the note on this case in your casebook.

ACTIVITY

Read the prescribed case *Honey v Honey* in your textbook on page 107 and the casebook on pages 152 to 156 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 the leave of the court, as provided for in section 21(1) of the Matrimonial Property Act. 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, 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 between the parties themselves, 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.**

According to Heaton (the author 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 against third parties and between the spouses.** This statement by the judge is also not supported by Heaton. Although it is clear that changes by the spouses between themselves 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 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 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.
-

SUMMARY

In this study unit you learnt about a number of aspects regarding the alteration of the matrimonial property system.

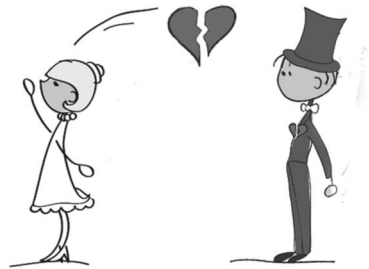
Do you know what this issue entails?

To refresh your memory and to contribute to your understanding, write a few notes on the following:

- the principle of immutability in our matrimonial property law
- the alteration of spouses’ matrimonial property system in terms of section 21(1) of the Matrimonial Property Act
- whether spouses may change their matrimonial property system with retroactive effect
- extra-judicial alteration of the matrimonial property system

In the next section we shall explain the different ways in which a marriage can be dissolved.

Family Law



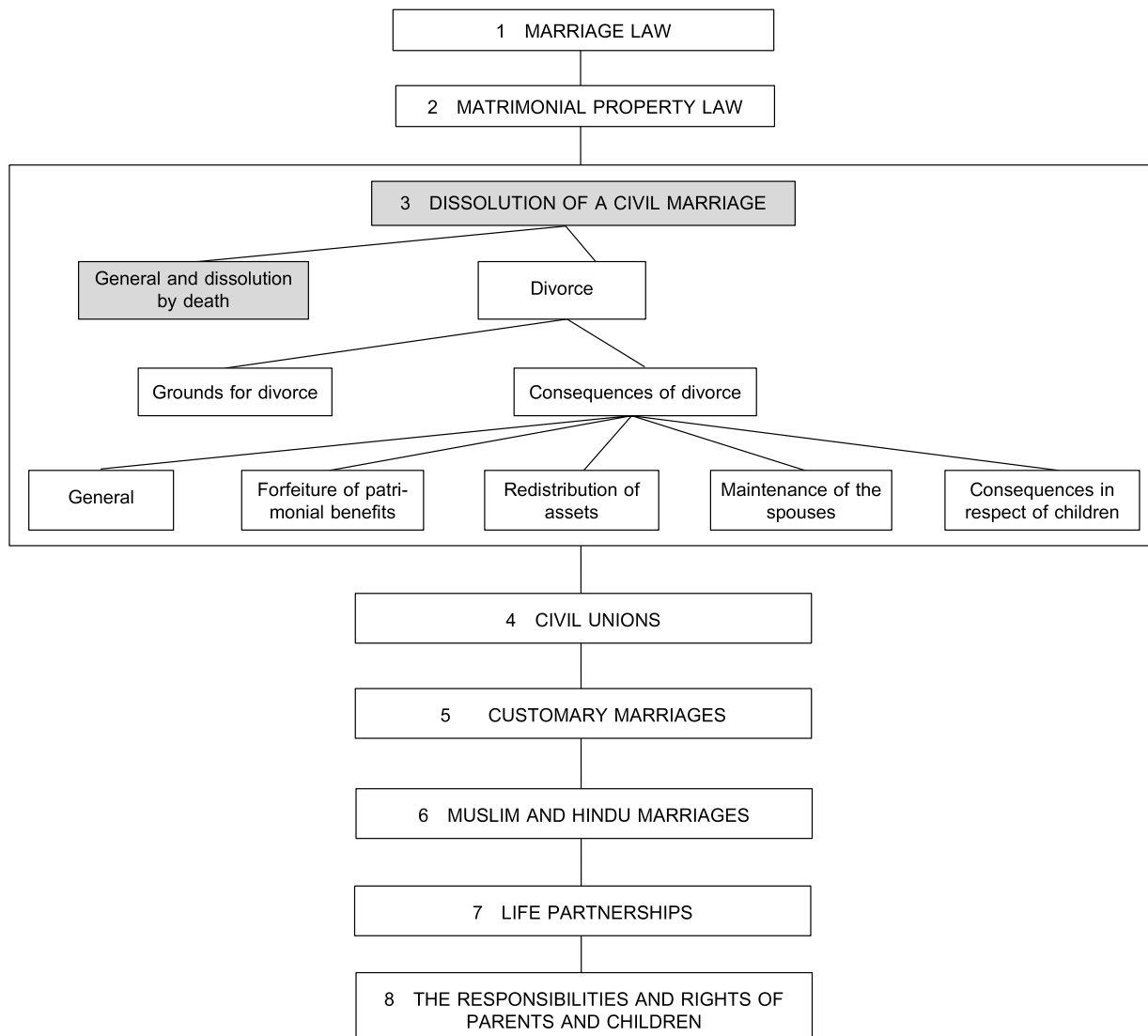
Dissolution of a civil marriage

Section 3

STUDY UNIT 7

Dissolution of a civil marriage – general and dissolution by death

MODULE MAP



OVERVIEW

In the previous section you learnt 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 further 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 by the death of one or both of the spouses, the nullification of a voidable marriage, and divorce. Then it concentrates on death as a means of dissolving a marriage.

PURPOSE OF THIS STUDY UNIT

The purpose of this study unit is to enable you to

- identify the ways in which a marriage can be dissolved
- explain what judicial separation means and to know that orders for judicial separation can no longer be granted
- explain what extra-judicial separation means and how it works
- briefly explain the effect of death on a marriage in community of property
- briefly explain the effect of death on a marriage out of community of property
- discuss the provisions of the Maintenance of Surviving Spouses Act 27 of 1990

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 109, 111 to 114

CONTENT OF THIS STUDY UNIT

1 THE WAYS IN WHICH A MARRIAGE IS DISSOLVED

Note the three ways in which a marriage can be dissolved (as set out on page 109 of the textbook and in the overview at the beginning of this study unit).

2 JUDICIAL SEPARATION

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.

3 EXTRA-JUDICIAL SEPARATION

Note that extra-judicial separation may still be agreed upon by parties. Make sure that you 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 between the parties. These matters are discussed on page 109 of the textbook.

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

4.1 Marriage in community of property

All you have to know of the discussion on pages 111 and 112 of your textbook under this heading 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.

4.2 Marriage out of community of property

The effect of death on a marriage out of community of property is discussed on page 112 of the textbook. Note, firstly, that antenuptial contracts are not terminated by the death of either spouse and, secondly, that the surviving spouse may lodge certain claims against the executor of the deceased spouse's estate.

4.3 Maintenance of Surviving Spouses Act 27 of 1990

4.3.1 *General*

Note that the surviving spouses in **all kinds of matrimonial property systems** whose marriages were dissolved by death **after 1 July 1990** may have a claim against their deceased spouses' estates in terms of the Maintenance of Surviving Spouses Act for their reasonable maintenance needs until their death or remarriage. The surviving spouses must, however, not be able to provide for their reasonable maintenance needs from their own means and earnings. Make sure that you know what is included under the means of a surviving spouse. Study the discussion on page 112 in the textbook in this regard.

4.3.2 *Reasonable maintenance needs*

You must know the factors which are taken into account in determining a surviving spouse's reasonable maintenance needs. They are listed from (1) to (6) on page 113 of the textbook. You do not, however, have to study the discussion of *Feldman v Osbry* on page 113.

4.3.3 *Disposal of the maintenance claim*

Make sure that you know how a surviving spouse's maintenance claim must be disposed of and how it can be settled by the executor of the deceased estate. These aspects are discussed on pages 113 and 114 of the textbook.

As regards the discussion of *Feldman v Osbry* on page 114 in your textbook, note that this case was recently overruled by the Supreme Court of Appeal in *Osby NNO v Feldman* 2010 (6) SA 19 (SCA). The Supreme Court of Appeal found that maintenance in a lump sum could indeed be awarded by the court in terms of the Maintenance of Surviving Spouses Act as nothing in this Act prevents such an award. The court said the following:

The difficulties with estimating an appropriate lump sum award by reference to certain assumptions that might later prove to be unfounded do not present insurmountable difficulties. In delictual claims, for example, damages in relation to loss of support are estimated with regard to the life expectancy of a claimant and on the basis of other assumptions. There too, total accuracy can never be assured. Courts do the best they can. This does not mean that a court assessing a claim for maintenance should not take these factors into account in the totality of the presented circumstances in deciding an appropriate award.

4.3.4 *The order of preference*

Note the order of preference of a surviving spouse's maintenance claim in respect of other claims against the deceased's estate as set out on page 114.

ACTIVITY

Short scenario: Mr and Mrs Sithole entered into a civil marriage in 1989 in community of property and a son, William, was born of their marriage in 2000. 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.

What you have to do: Mrs Sithole wants to know from you whether she can claim maintenance from Mr Sithole's estate. Advise Mrs Sithole on this matter.

FEEDBACK

Detailed guidelines for your answer: You should first state that the provisions of the Maintenance of Surviving Spouses 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.

You should then state that, in terms of this Act, Mrs Sithole has a claim against the late Mr Sithole's estate for the provision of her reasonable maintenance needs until her death or remarriage in so far as she is unable to provide for them from her own means or earnings. In this regard, you should have dealt with the fact that Mrs Sithole is unable to work and earn an income as a result of a disability and with the fact that she is entitled to her half share of the joint estate, namely R25 000 and the inheritance of R5 000 in terms of Mr Sithole's will. A likely conclusion is that 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.

You should further indicate that Mrs Sithole's claim is, however, limited to the amount required to provide for her reasonable maintenance needs. You should refer to the five factors which, in addition to any other factor which must be taken into account, must be considered by the court in the determination of a surviving spouse's reasonable maintenance needs.

After discussing the relevant factors you would probably conclude that Mrs Sithole can definitely lodge a maintenance claim with the executor of Mr Sithole's estate.

Lastly, you could perhaps also say that Mrs Sithole's claim 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.

ACTIVITY

Short scenario: Mr and Mrs X were married out of community of property in 1980. 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 spouses' 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.

What you have to do: Explain how her maintenance claim could be settled if it is granted.

Model answer: If Mrs X'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, namely Mr Y and Z. In order to settle Mrs X's claim, the following can perhaps be done in terms of the agreement:

- Mr Y can agree to grant Mrs X a usufruct over the former matrimonial home to allow her to stay on in the house.
- Z can agree to transfer a lump sum of money or other assets that he inherited from Mr X to Mrs X or to a trust of which Mrs X is the beneficiary.

If the parties are unable to reach agreement on the way in which Mrs X's claim is to be settled, **the court may be approached for an order**. According to the ruling of the Supreme Court of Appeal in *Osbyr NNO v Feldman*, the court may also make an order for lump-sum maintenance in terms of the Maintenance of Surviving Spouses Act.

SUMMARY

This study unit is the first in which you learnt about dissolution of marriage.

To refresh your memory and to contribute to your understanding, write a few notes on the following:

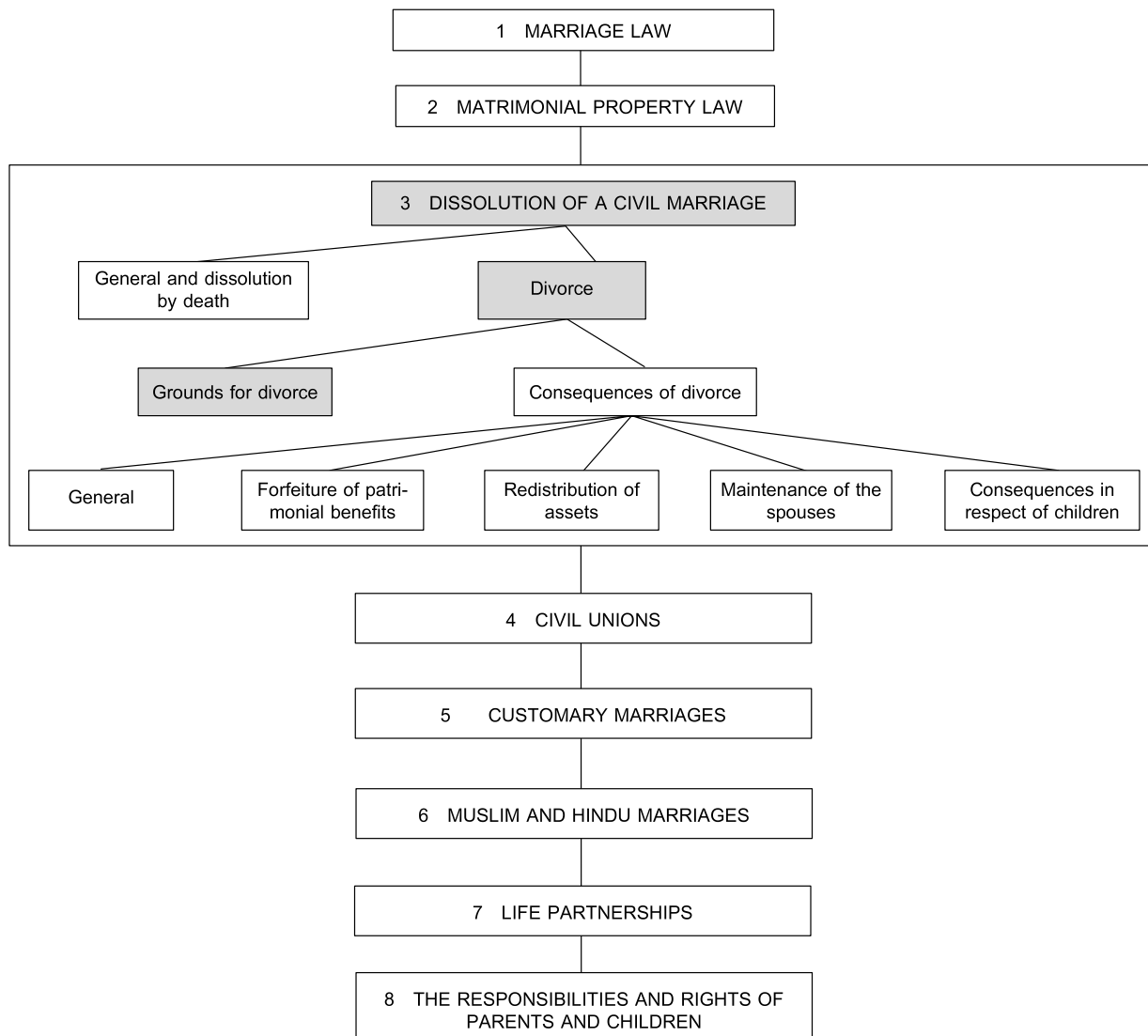
- the ways in which a marriage is dissolved
- judicial separation
- extra-judicial separation
- the effect of death on a marriage in community
- the effect of death on a marriage out community
- the claim of a surviving spouse in a civil marriage for maintenance out of the estate of his or her deceased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

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

STUDY UNIT 8

The grounds for divorce

MODULE MAP



OVERVIEW

You have learnt that there are 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 2.

In this study unit 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 that currently exist in our law, namely the irretrievable breakdown of the marriage and the mental illness or continuous unconsciousness of a party to a marriage.

PURPOSE OF THIS STUDY UNIT

The purpose of this study unit is to enable you to

- list the grounds for divorce which currently exist in our law
- list the guidelines laid down in section 4(2) of the Divorce Act 70 of 1979
- list the criteria which are contained in section 5(1) and section 5(2), respectively
- explain whether the court has the discretion to refuse a divorce if one of the grounds for divorce has been proven
- discuss the content and implications of section 5A of the Divorce Act

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 115 and 116
- Prescribed textbook pages 118 (from “11.3.2 Incurable mental illness or continuous unconsciousness”) and 119 (up to just before “11.3.3 Divorcing a mentally ill or unconscious spouse in terms of section 4 instead of section 5”)
- Prescribed textbook pages 120 to 122 (only “11.5 The court’s discretion to refuse a decree of divorce”)

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

You do not have to have an in-depth knowledge of the discussion under this heading on page 115 of the textbook. You only have to be able to list the grounds for divorce that currently exist in our law. They are irretrievable breakdown of the marriage, mental illness of a party and the continuous unconsciousness of a party.

2 IRRETRIEVABLE BREAKDOWN OF THE MARRIAGE

2.1 The test for irretrievable breakdown

When you study the provisions of section 4(1) on page 115 of your textbook, 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

Therefore, it has to be determined when a marital relationship is no longer normal. You will see on pages 115 and 116 of your textbook 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 study unit 3. 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 and the court may grant a divorce order.

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 116. You do not, however, have to study the discussion of the three cases that follows on page 116. It is enough for you to know that the objective and subjective tests have to be applied together.

2.2 The guidelines in section 4(2)

Although you do not have to study the discussion under this heading in your textbook on pages 117 and 118, you must be able to list the guidelines for irretrievable breakdown laid down by section 4(2) of the Divorce Act. These guidelines are the following:

- The parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of divorce proceedings.
- The defendant has committed adultery and the plaintiff finds it irreconcilable with a continued marriage relationship.
- A court has declared the defendant a habitual criminal and the defendant has been imprisoned as a result of the sentence.

Note that these are only guidelines with regard to whether a normal marriage relationship no longer exists and that parties may also prove irretrievable breakdown in another way.

3 INCURABLE MENTAL ILLNESS OR CONTINUOUS UNCONSCIOUSNESS

Two further grounds for divorce, namely mental illness and continuous unconsciousness, are discussed in your textbook on pages 118 and 119.

ACTIVITY

What must the plaintiff prove in order to obtain a divorce on the ground of the defendant's mental illness?

FEEDBACK

The criteria are listed in section 5(1) of the Divorce Act and on page 118 of your textbook.

ACTIVITY

Under what circumstances will the continuous unconsciousness of the defendant be a ground for divorce?

FEEDBACK

The circumstances are listed in section 5(2) of the Divorce Act. You will also find them on pages 118 and 119 of your textbook.

4 DEFENCES AGAINST AN ACTION FOR DIVORCE

Note that you do not have to study the discussion under this heading on page 120 of the textbook.

5 THE COURT'S DISCRETION TO REFUSE A DECREE OF DIVORCE

On page 120 your textbook points out that the use of the word “may” in sections 3, 4 and 5 of the Divorce Act creates the impression that the court can refuse to grant a divorce although one of the grounds for divorce has been proven. Make sure that you know what was decided on this issue in *Smit v Smit*, *Schwartz v Schwartz* and *Levy v Levy*.

Next your textbook deals with the provisions contained in section 5A of the Divorce Act. You have to study this section thoroughly, since these provisions pertain to marriages that, in addition to having been concluded in a civil ceremony, have also been concluded in accordance with the precepts of a particular religion. The provisions and the aim of section 5A are set out on pages 120 to 122 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, for example, 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 pages 121 and 122 of the textbook.

Lastly, you have to take note of the arguments that section 5A of the Divorce Act possibly violates the constitutional rights to equality and freedom of religion and Heaton's criticism and comments on these arguments on page 122 of the textbook.

ACTIVITY

Short scenario: Mr and Mrs Mnisi were married in 1980. Two months ago Mr Mnisi left Mrs Mnisi and moved in with Ms Sibanyoni, who has been his mistress for the past three years. Mr Mnisi sues Mrs Mnisi for divorce. However, Mrs Mnisi still loves her husband and requests the court to refuse the divorce order.

What you have to do: Briefly discuss whether the court has the discretion to refuse a divorce order in this case.

FEEDBACK

Some guidelines before you start writing anything: In answering this problem-type question, you first have to establish whether the marriage between Mr and Mrs Mnisi has broken down irretrievably. You therefore have to refer to the test for irretrievable breakdown. You will probably come to the conclusion that there is no longer a normal marital relationship between the Mnisis and that there is no prospect of restoring a normal marriage relationship between them.

You then have to deal with the court's discretion to refuse a decree of divorce. You have to refer to the impression that sections 3, 4 and 5 of the Divorce Act create and the courts' decisions in this regard.

SUMMARY

In this study unit you learnt about a number of aspects regarding the grounds for divorce.

Do you know by now what these grounds are?

To refresh your memory and to contribute to your understanding, write a few notes on the following:

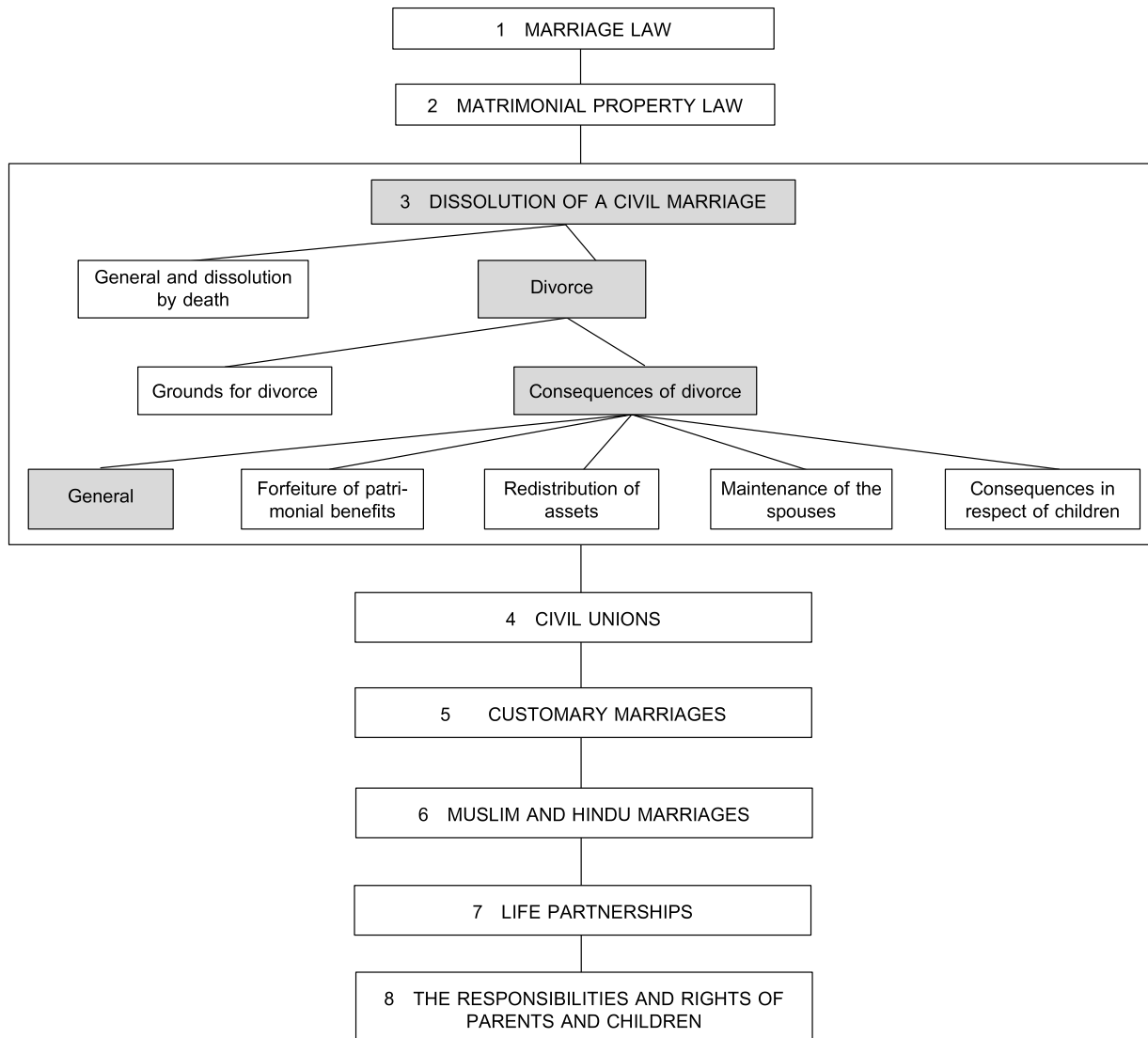
- the grounds for divorce that currently exist in our law
- whether the court has the discretion to refuse a divorce if one of the grounds is proven
- the content and implications of section 5A of the Divorce Act

In the next study unit we shall start discussing the consequences of divorce.

STUDY UNIT 9

Patrimonial consequences of divorce – general

MODULE MAP



OVERVIEW

In the previous study unit you learnt about the grounds for divorce. We explained

- what the grounds for divorce are
- what each ground means and entails
- 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 on the patrimony of the spouses. In this study unit we shall look at some of the general patrimonial consequences of divorce.

PURPOSE OF THIS STUDY UNIT

The purpose of this study unit is to enable you to

- realise how important settlement agreements are upon divorce and know which provisions may be included in these agreements
- explain what determines the effect a divorce will have on the division of the spouses' property
- explain when and how a spouse's pension interest is taken into account in determining the patrimonial consequences of divorce

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 123 to 130 (up to just before "12.4 Forfeiture of patrimonial benefits")

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Note that the patrimonial consequences of divorce deals with the division of the spouses' assets and other financial issues upon divorce.

2 SETTLEMENT AGREEMENTS

As most divorce cases in South Africa are uncontested, settlement agreements play a vital role in regulating the patrimonial and other consequences of divorce for spouses and minor children. It is consequently of great importance that you know exactly which provisions may be included in a settlement agreement, what the status of a settlement agreement is and whether and how a settlement agreement can be amended, rescinded or suspended. All these matters are discussed on pages 123 to 125 of the textbook.

3 THE PATRIMONY OF THE SPOUSES

3.1 General

Note that the patrimony of the spouses has to do with their assets and liabilities and their finances.

On pages 125 and 126 of your textbook it is pointed out that there are two factors that determine the effect of divorce on the division of the spouses' assets, namely:

- (1) the matrimonial property system applicable to the spouses' marriages

- (ie whether they were married in or out of community of property and whether the accrual system applies if they were married out of community of property)
- (2) whether the court orders forfeiture of benefits and/or a redistribution of the spouses' assets (the forfeiture of patrimonial benefits and the redistribution of assets are discussed respectively in the following two study units)

Note also the role that fault still plays in determining the consequences of divorce on page 126 of the textbook.

3.2 Pension interests

(a) General

Note that a spouse's pension interest is now deemed to be part of his or her assets upon divorce. This means that the value of a spouse's pension interest upon divorce must be added to the assets of that spouse or to the joint estate of the spouses when the division of the spouses' assets is considered. Make sure that you know why the decision in *Sempapalele v Sempapalele* is clearly wrong, and why *Maharaj v Maharaj* correctly reflects the present position. These cases are discussed on pages 126 and 127 of your textbook.

(b) Meaning and calculation of "pension interest"

Make sure that you know how and in terms of which legislation and/or court case a spouse's pension interest must be calculated if he or she is a member of

- (1) a pension fund
- (2) a retirement annuity fund
- (3) a pension preservation fund or provident preservation 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. All these aspects are explained on page 127 of the textbook.

(c) The difference between a pension interest and a pension benefit

All you have to know about the discussion under this heading on pages 127 and 128 of the textbook is that the provisions of the Divorce Act 70 of 1979 regarding pension sharing relate only to a pension interest which is an interest that has not yet accrued by the time of the divorce, and not also to a pension benefit that is money that has already been paid out during the subsistence of the marriage.

(d) Payment or transfer of the non-member spouse's portion of the pension interest

On pages 128 and 129 of the textbook the provisions of section 7(8) of the Divorce Act and section 37D(4) of the Pension Funds Act 24 of 1956 are discussed. You must know the content of these provisions and specifically why it was necessary to also enact section 37D(4) of the Pension Funds Act, even though section 7(8) of the Divorce Act already makes provision for pension sharing upon divorce. Note also the shortcomings of these provisions as set out in the last two paragraphs under this heading in the textbook.

(e) Excluded marriages

Note that pension sharing may take place in all kinds of marriages except in marriages concluded on or after 1 November 1984 with complete separation of property.

ACTIVITY

Short scenario: Mr and Mrs Maluleke were married in community of property in 2006. They are currently involved in contested divorce litigation. Apart from Mr Maluleke's pension interest in Unisa's pension fund, the parties have no other significant assets.

What you have to do:

- (a) Mrs Maluleke would like to be awarded half of Mr Maluleke's pension interest upon divorce. However, Mr Maluleke does not want to give Mrs Maluleke half of his pension interest as she did not expressly claim half of this interest in the divorce summons. Advise the parties on whether or not Mr Maluleke's pension interest automatically falls into the joint estate. Refer to the conflicting court cases in this regard as well as to the relevant legislation.
- (b) How would the value of Mr Maluleke's pension interest be calculated upon divorce if it indeed falls into the parties' joint estate? Refer to the relevant legislation.
- (c) If the court finds that Mrs Maluleke is entitled to half of Mr Maluleke's pension interest, when and how will she be able to get the pension interest?

FEEDBACK

Detailed guidelines for your answer:

- (a) In order to answer this question you first have to refer to section 7(7)(a) of the Divorce Act, which determines that a spouse's pension interest is deemed to be part of his or her assets upon divorce. You then have to discuss the conflicting decisions in *Sempampalele* and *Maharaj* and indicate that the latter case is clearly the correct decision. Lastly, you have to advise the parties that it is not necessary for

spouses who are married in community of property to deal expressly with their pension interests upon divorce as they automatically falls into the joint estate.

- (b) As Mr Maluleke is a member of a pension fund, section of the Act has to be applied to calculate the value of his pension interest. In terms of this section his pension benefits will be calculated by determining the benefit to which Mr Maluleke would have been entitled had he terminated his membership of the Unisa pension fund on the date of the divorce.
- (c) Make sure that you answer both questions of this last part of the activity, namely, **when** Mrs Maluleke will be able to get her half share of Mr Maluleke's pension interest and **how** she will be able to get it. Note that you are not asked here to refer to authority for your answer. With regard to the “**when**” part of the question, you have to point out that she no longer has to wait until Mr Maluleke retires before her half share of Mr Maluleke's pension interests accrues to her, but that she will be able to get her share within three to four months after the date of the divorce. With regard to the “**how**” part of the question, you have to indicate that Mrs Maluleke can request the pension fund either to pay the interest to her in cash, or to transfer the interest to an approved pension fund of her choice.
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SUMMARY

In this study unit you learnt more about settlement agreements and encountered some of the general patrimonial consequences of divorce.

To refresh your memory and to contribute to your understanding, write a few notes on the following:

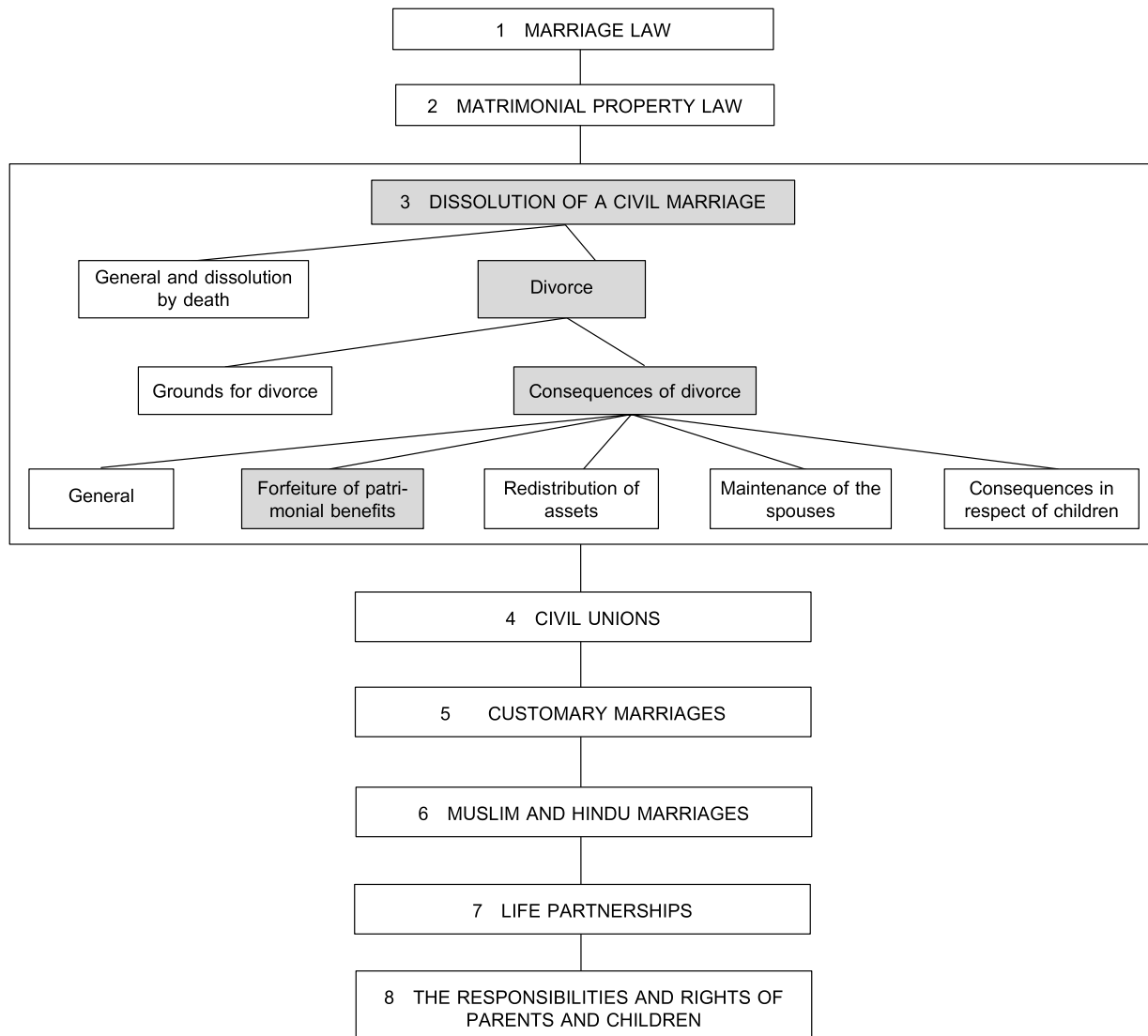
- the importance of settlement agreements
- the two factors that determine the effect of divorce on the division of the spouses' assets
- pension sharing upon divorce

In the next study unit you will learn more about another consequence of divorce on the patrimony of the spouses, namely the forfeiture of patrimonial benefits.

STUDY UNIT 10

Forfeiture of patrimonial benefits

MODULE MAP



OVERVIEW

In this study unit, one of the patrimonial consequences of divorce is discussed, namely the forfeiture of patrimonial benefits (or forfeiture of benefits or simply, forfeiture, as it is sometimes called). In terms of section 9(1) of the Divorce Act 70 of 1979, on divorce a party to a marriage may lose a benefit accrued to him or her as a result of the marriage under certain circumstances. For example, Jelani and Ruta were married in community of property. Their total assets (ie the joint estate) are R800 000. Jelani brought R500 000 into the marriage and Ruta R300 000. If no forfeiture order is requested upon divorce each party

will get R400 000 (ie half of the joint estate). However, if Jelani requests a forfeiture order against Ruta and the court grants such an order in total, Ruta will only get R300 000, and not the other R100 000 of her half share of the joint estate to which she would have been entitled owing to the marriage being in community of property. This example may not be clear now, but revisit it after you have worked through this study unit.

Before you begin to study this study unit, you must ensure that you have first studied the previous study unit, which deals with the general patrimonial consequences of divorce. In that study unit we explained what determines the effect a divorce will have on the division of the spouses' property and how a spouse's pension interest is taken into account in determining the patrimonial consequences of divorce.

PURPOSE OF THE STUDY UNIT

The purpose of this study unit is to enable you to

- explain what forfeiture of benefits is
- explain what the requirements for forfeiture are
- explain whether the factors listed in section 9 of the Divorce Act are cumulative
- explain the role of misconduct in respect of forfeiture
- explain what the requirement of undue benefit means in respect of forfeiture and how it is proved
- 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
- explain what (which assets) can be forfeited

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 130 to 132 (“12.4 Forfeiture of patrimonial benefits”)
- The note on *Wijker v Wijker* in your prescribed casebook on pages 194 to 196
- *Watt v Watt* in your prescribed casebook on pages 198 to 201

CONTENT OF THIS STUDY UNIT

1 THE REQUIREMENTS FOR A FORFEITURE ORDER

As explained above in the overview, forfeiture of patrimonial benefits means that, in certain circumstances, upon divorce 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.

The requirements that need to be considered by the court in determining whether a forfeiture order can be granted are discussed on pages 130 and 131 of your textbook. They are the duration of the marriage, the circumstances which led to the breakdown of the marriage and any substantial misconduct on the part of either spouse. You have to know these factors and be able to answer the question of whether these factors are cumulative, in other words whether all the factors need to be present before a forfeiture order will be made. In addition, you have to study the first six paragraphs of the note on *Wijker v Wijker* on pages 194 and 195 in your casebook. In this case the dispute about whether all three factors must be present before forfeiture can be granted was finally settled.

The second question in respect of the three factors is what role misconduct plays in determining the granting of a forfeiture order. Can misconduct only be considered under “substantial misconduct” as a factor or can it be considered under “circumstances which led to the breakdown of the marriage”? This issue is discussed on page 130 of your textbook and in the last paragraph on page 195 of your casebook (the note on *Wijker v Wijker*).

Furthermore, it is important to note that a forfeiture order will be granted only if one spouse will be unduly benefitted in relation to the other spouse if such an order is not made. The last paragraph on page 130 running over onto page 131 of the textbook explains what must be proved to satisfy the court that one spouse will be unduly benefitted and what undue benefit means. This boils down to the following: Before granting a forfeiture order the court will have to determine whether the party against whom the order is sought has benefitted. This is a factual question. If the party has benefitted then the court will have to determine whether such a benefit is undue. This involves a value judgement based on the factors in section 9(1) of the Divorce Act.

Next it must be established if the court can use its discretion whether or not to order forfeiture of benefits to deviate from the matrimonial property system if it is just and fair to do so. The answer to this question is found on page 131 of your textbook. This aspect is further discussed in the note on *Wijker* on page 196 of your casebook. Note also the decision of the Supreme Court of Appeal in *Botha v Botha* in this regard.

Note that you do not have to study the issue on the approach that 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, as set out in the second-last paragraph on page 195 of the casebook.

2 THE BENEFITS WHICH CAN BE FORFEITED

On page 131 of the textbook the benefits that can be forfeited are discussed. It is important to note that forfeiture never means that a person loses his or her own assets. Subsequently, on page 132 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. Note that there are different views on whether the patrimonial benefits of a marriage out of community of property that may be forfeited are limited to benefits which are conferred in the spouses' antenuptial contract, or whether benefits acquired during the subsistence of the marriage are also subject to forfeiture. This aspect is further discussed in the note on *Watt v Watt* on pages 200 and 201 in your casebook. Make sure that you know the views of Hahlo and of Sinclair and Kaganas.

ACTIVITY

Short scenario: Mr and Mrs Wilson are married out of community of property. During the course of the marriage, Mr Wilson donates a house to Mrs Wilson, which he has bought with his own earnings. Mr Wilson is now suing Mrs Wilson for a divorce and requests the court that the house be regarded as a patrimonial benefit of the marriage that has to be forfeited by Mrs Wilson. Mrs Wilson, however, pleads that the house was not a patrimonial benefit of the marriage out of community of property and was therefore not subject to forfeiture.

What you have to do: Discuss in detail whether the court will order forfeiture of patrimonial benefits in terms of section 9 of the Divorce Act 70 of 1979.

FEEDBACK

Some guidelines before you start writing anything: The question relates to the forfeiture of patrimonial benefits of a marriage out of community of property. You will have to investigate what can be forfeited in a marriage out of community of property.

In answering the question you will therefore have to refer to the decision in *Watt v Watt* and the opposing views of Hahlo and of Sinclair and Kaganas on this case. You will then have to come to a conclusion indicating which view you support and provide a reason for your opinion.

SUMMARY

In this study unit you learnt about a number of aspects of the issue we refer to as the forfeiture of patrimonial benefits.

Do you know by now what this issue entails?

To refresh your memory and to contribute to your understanding, write a few notes on the following:

- the meaning of forfeiture of patrimonial benefits

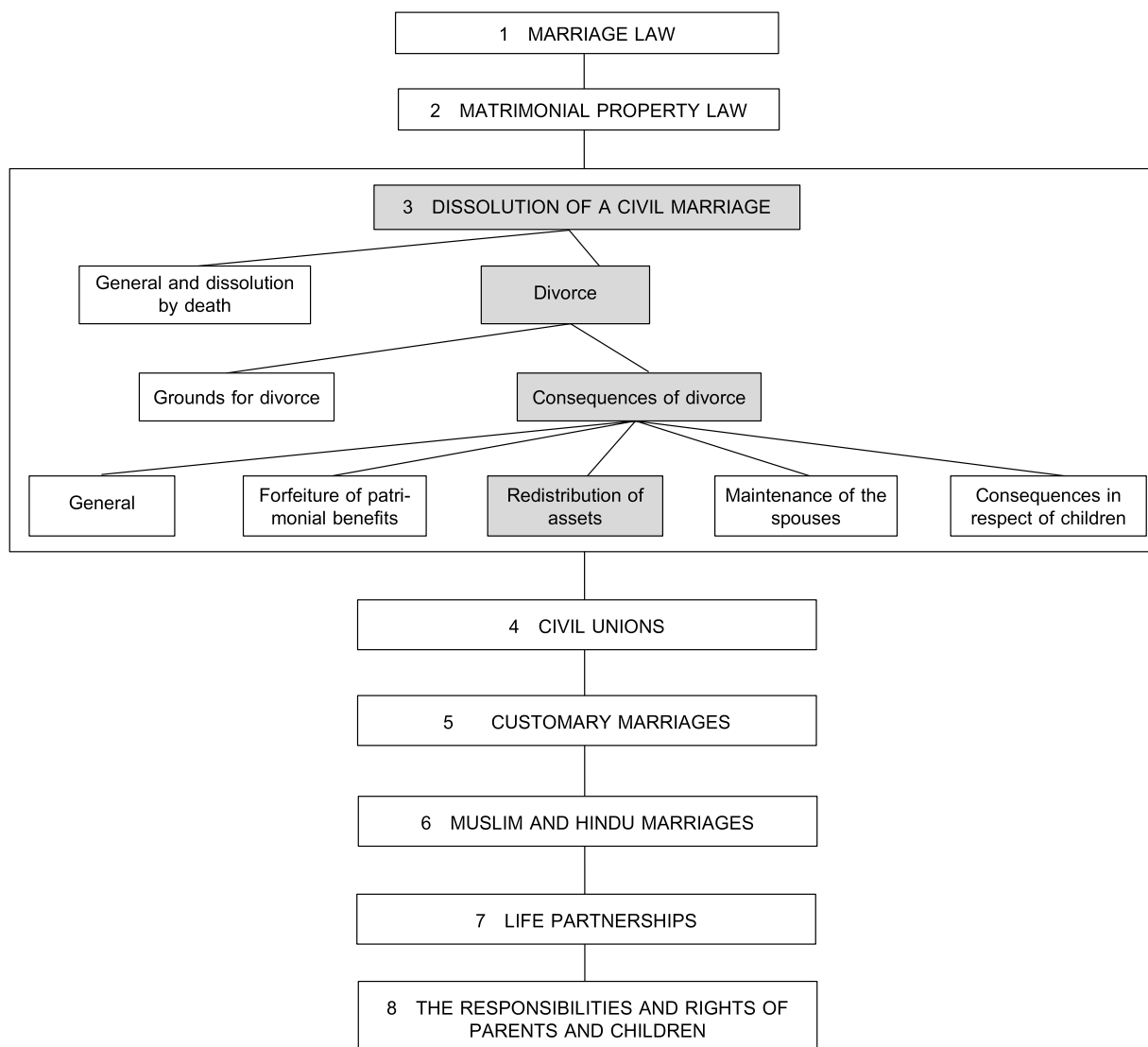
- the requirements for forfeiture and the court's approach to the requirements
- the principle that fairness and justness cannot be used in an application for forfeiture to deviate from the consequences of the spouses' matrimonial property system
- what can be forfeited in marriages in community of property and in marriages out of community of property

In the next study unit we deal with another consequence of divorce on the patrimony of the spouses, namely the redistribution of assets.

STUDY UNIT 11

Redistribution of assets

MODULE MAP



OVERVIEW

In the previous study unit we looked at one of the patrimonial consequences of divorce, namely the forfeiture of benefits.

In this study unit we discuss the redistribution of assets. A redistribution of assets occurs when, with regard to certain marriages under specific circumstances, the court orders 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.

PURPOSE OF THIS STUDY UNIT

The purpose of this study unit is to enable you to

- explain why the principle of redistribution of assets was introduced into our law
- explain what a redistribution order is
- list the **prerequisites** for the granting of a redistribution order and discuss their constitutionality
- list the **requirements** for the granting of a redistribution order and discuss them briefly
- explain what the nature of the contribution to the maintenance or increase of the other spouse's estate has to be, and discuss this aspect with reference to authority
- explain the other considerations the court can take into account in its decision whether or not to grant a redistribution order, and explain
 - whether misconduct can be taken into account
 - whether there is an interrelationship between sections 7(2) and 7(3) of the Divorce Act 70 of 1979
 - what the clean-break principle entails
 - which other factors have been taken into account by our courts in respect of section 7(5)(d)
- discuss the criterion which should be applied when determining the amount to be awarded
- explain what form a redistribution order may take

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 132 (from “12.5 Redistribution of assets”) and 133 (up to just before “(b) Marriages that are subject to complete separation of property by operation of the law”)
- Prescribed textbook pages 136 (from “(c) The constitutionality of the prerequisites in section 7(3)”) to 141
- Prescribed textbook pages 143 (from “(d) Various other factors the courts have taken into account”) to 148 (up to just before “12.5.8 Consideration of a claim and a counter-claim for redistribution”)
- *Beaumont v Beaumont* in your prescribed casebook on pages 207 to 213

CONTENT OF THIS STUDY UNIT

1 THE INTRODUCTION OF REDISTRIBUTION AS A REFORMATIVE AND REMEDIAL MEASURE

As we mentioned in study unit 5 (“The variable consequences of civil marriage – marriage out of community of property”), 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 88 of 1984 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 132 and 133 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 (the wealthier spouse) be transferred to the other (the poorer spouse).

2 THE PREREQUISITES FOR A REDISTRIBUTION ORDER

2.1 General

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. You must know these prerequisites, which are set out on page 133 of your prescribed textbook.

2.2 The constitutionality of the prerequisites in section 7(3)

You may ask why, for instance, a woman who got married with complete separation of property on 31 October 1984 may under certain circumstances have a claim for the redistribution of assets against her husband upon divorce, while a woman who got married in the same way on 2 November 1984 has no such claim. You may also like to know why all spouses who marry in terms of the Recognition of Customary Marriages Act 120 of 1998 may institute claims for the redistribution of assets upon divorce, while only a limited number of spouses who married in terms of the Marriage Act 25 of 1961 may institute such claims upon divorce. The constitutionality of this differential treatment of spouses is discussed on pages 136 and 137 of your textbook. Make sure that you understand the constitutional arguments in favour of and against the differential treatment of spouses.

3 THE REQUIREMENTS FOR A REDISTRIBUTION ORDER

3.1 General

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 pages 137 and 138 of the textbook, have been met.

3.2 The nature of the contribution to the maintenance or increase of the other spouse's estate

Section 7(4) of the Divorce Act prescribes the way in which the contribution to the maintenance or increase of the other spouse's estate may be made. You should ensure that you know the provisions of section 7(4) as set out on page 138 of your textbook.

With regard to the question as to what constitutes a contribution, you also have to study your prescribed case for this study unit, namely *Beaumont v Beaumont* on page 207 in your textbook and pages 207 to 213 in your casebook and *Kritzinger v Kritzinger* on pages 138 and 139 in your textbook. Note also Heaton's criticism of the *Kritzinger* case concerning career sacrifices.

4 OTHER CONSIDERATIONS THE COURT TAKES INTO ACCOUNT

4.1 General

The other considerations which the court must take 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 pages 139 and 140. You have to 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.)

4.2 Misconduct

The question is whether misconduct can be taken into account despite the fact that divorce is no longer fault-based and the fact that misconduct is not expressly mentioned in section 7(5) of the Divorce Act. It seems that our courts will, in terms of section 7(5)(d) ("any other factor"), also look at the spouses' conduct. Make sure that you know exactly under what circumstances misconduct will be taken into account. The decisions in *Beaumont v Beaumont* and *Buttner v Buttner* are relevant in this regard. Study these decisions as set out on pages 140 and 141 in your textbook. Remember to also study the *Beaumont* case in your casebook on pages 207 to 213.

4.3 The interrelationship between sections 7(2) and 7(3) and the clean-break principle

Here the question is whether the fact that a maintenance order will be issued must also be considered. The answer to this question is found in *Beaumont v Beaumont*, your prescribed case for this study unit. Study the discussion of this case on page 141 of the textbook and on pages 207 to 213 of the casebook.

Under this heading, you should also know what the “clean-break” principle is and under what circumstances it can be applied in South African law. This principle is referred to on page 141 of your textbook and in the note on the *Beaumont* case in your casebook on pages 212 and 213. Make sure that you also know what was said about the clean-break principle in *Katz v Katz*, as set out in your casebook.

Note that you do not have to study the long discussion on the *Esterhuizen* case on pages 142 and 143 of your textbook.

4.4 Various other factors the courts have taken into account

On page 143 of your textbook all the other factors that our courts have considered under section 7(5)(d) (“any other factor”) are set out. Make sure that you know what these other factors are.

5 ASSETS WHICH CAN BE CONSIDERED FOR PURPOSES OF A REDISTRIBUTION ORDER

Under this heading in your textbook on pages 143 to 145 you have to know the facts of and decisions made in various important cases, namely *Kirkland v Kirkland*, *Badenhorst v Badenhorst*, *Brunette v Brunette* and *Beira v Beira*.

Note that the assets that a court will consider for purposes of a redistribution order also include inheritances, donations, the capitalised value of a spouse’s interest in a retirement annuity from which the spouse derives a monthly income and trust assets if a spouse has *de facto* control of the trust.

6 THE CRITERION FOR ESTABLISHING THE EXTENT OF THE REDISTRIBUTION

ACTIVITY

Read the discussion on all the cases on pages 143 to 145 of your textbook carefully and then complete the second column of the table below to indicate which one of the following awards with regard to the division of the spouses’ assets was made in each case:

- A $\frac{1}{3} : \frac{2}{3}$ division
- A 40:60 division
- An equal division

<i>Beaumont v Beaumont</i>	A/An division
<i>Childs v Childs</i>	A/An division
<i>Bezuidenbout v Bezuidenbout</i>	A/An division
<i>Kirkland v Kirkland</i>	A/An division
<i>Joubert v Joubert</i>	A/An division
<i>Badenhorst v Badenhorst</i>	A/An division
<i>Buttner v Buttner</i>	A/An division

FEEDBACK

<i>Beaumont v Beaumont</i>	A/An $\frac{1}{3} : \frac{2}{3}$ division
<i>Childs v Childs</i>	A/An <i>equal</i> division
<i>Bezuidenbout v Bezuidenbout</i>	A/An division
<i>Kirkland v Kirkland</i>	A/An division
<i>Joubert v Joubert</i>	A/An division
<i>Badenhorst v Badenhorst</i>	A/An $\frac{1}{3} : \frac{2}{3}$ division
<i>Buttner v Buttner</i>	A/An division

7 THE FORM A REDISTRIBUTION ORDER MAY TAKE

The form that a redistribution order can take is discussed on pages 147 and 148 of your textbook. Note that the court also has a wide discretion in this regard. Note also that the court may impose such conditions as it deems just for the satisfaction of its order.

ACTIVITY

Short scenario: Mr and Mrs Abrahams were married out of community of property and of profit and loss in 1980. At the time of the wedding the spouses had no assets. Since their marriage, Mrs Abrahams has been working as a medical assistant to a doctor and has always deposited her salary in Mr Abrahams's bank account. Mr Abrahams now wants to divorce Mrs Abrahams. Mrs Abrahams's estate is currently worth R10 000 while Mr Abrahams's estate is worth R500 000. Mr Abrahams offers Mrs Abrahams R30 000 in settlement of any claims she may possibly have against him.

What you have to do: With reference to case law and sections 7(3) to (6) of the Divorce Act 70 of 1979, advise Mrs Abrahams whether she should accept Mr Abrahams's offer.

FEEDBACK

Detailed guidelines for your answer: To answer this question, you must first indicate that, in terms of section 7(3) of the Divorce Act, Mrs Abrahams will be entitled to claim a redistribution order because the prerequisites for such an order have been met – they were married before 1 November 1984 out of community of property and of profit and loss and they did not enter into an agreement concerning the division of their assets.

Secondly, you must indicate that Mrs Abrahams also meets the requirements for a redistribution order – she contributed directly to the increase of Mr Abrahams' estate by depositing her salary into his bank account. It also seems to be equitable and just to make a redistribution order under the circumstances.

Thirdly, you should mention that the only other relevant consideration that the court will take into account in this case is the existing means and obligations of the parties – Mr Abrahams's estate is worth R500 000, while Mrs Abrahams's estate is only worth R30 000. (As no mention is made in the set of facts of any donations, any forfeiture orders, any misconduct on the part of one of the parties or any maintenance orders between the parties, you need not discuss any of the other considerations that the court takes into account when considering a redistribution order.)

Lastly, you should discuss the criterion for establishing the extent of a redistribution order by referring to cases like *Beaumont v Beaumont*, *Childs v Childs*, *Bezuidenbout v Bezuidenbout*, *Kirkland v Kirkland*, *Joubert v Joubert*, *Badenhorst v Badenhorst* and *Buttner v Buttner*. If, under the circumstances, the court orders a $\frac{1}{3} : \frac{2}{3}$ division of the spouses' total assets, Mrs Abrahams should be entitled to R170 000 and, if the court orders an equal division, she should be entitled to R255 000. You should therefore conclude that the R30 000, which Mr Abrahams offers Mrs Abrahams, is totally inadequate and that she should not accept this offer.

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:

- the order's source of law
- its area of application

- the meaning of the order
- the requirements for making the order

FEEDBACK

	FORFEITURE ORDERS	REDISTRIBUTION ORDERS
Source of law	Section 9 of the Divorce Act	Sections 7(3) to (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

SUMMARY

Do you know by now what the redistribution of assets entails?

To refresh your memory and to contribute to your understanding, write a few notes on the following:

- the reason why redistribution orders were introduced in our law
- the meaning of a redistribution order
- the circumstances under which a spouse can apply to court for a redistribution order
- the requirements for a redistribution order
- the considerations the court takes into account when considering a redistribution order
- the assets which can be considered for purposes of a redistribution order

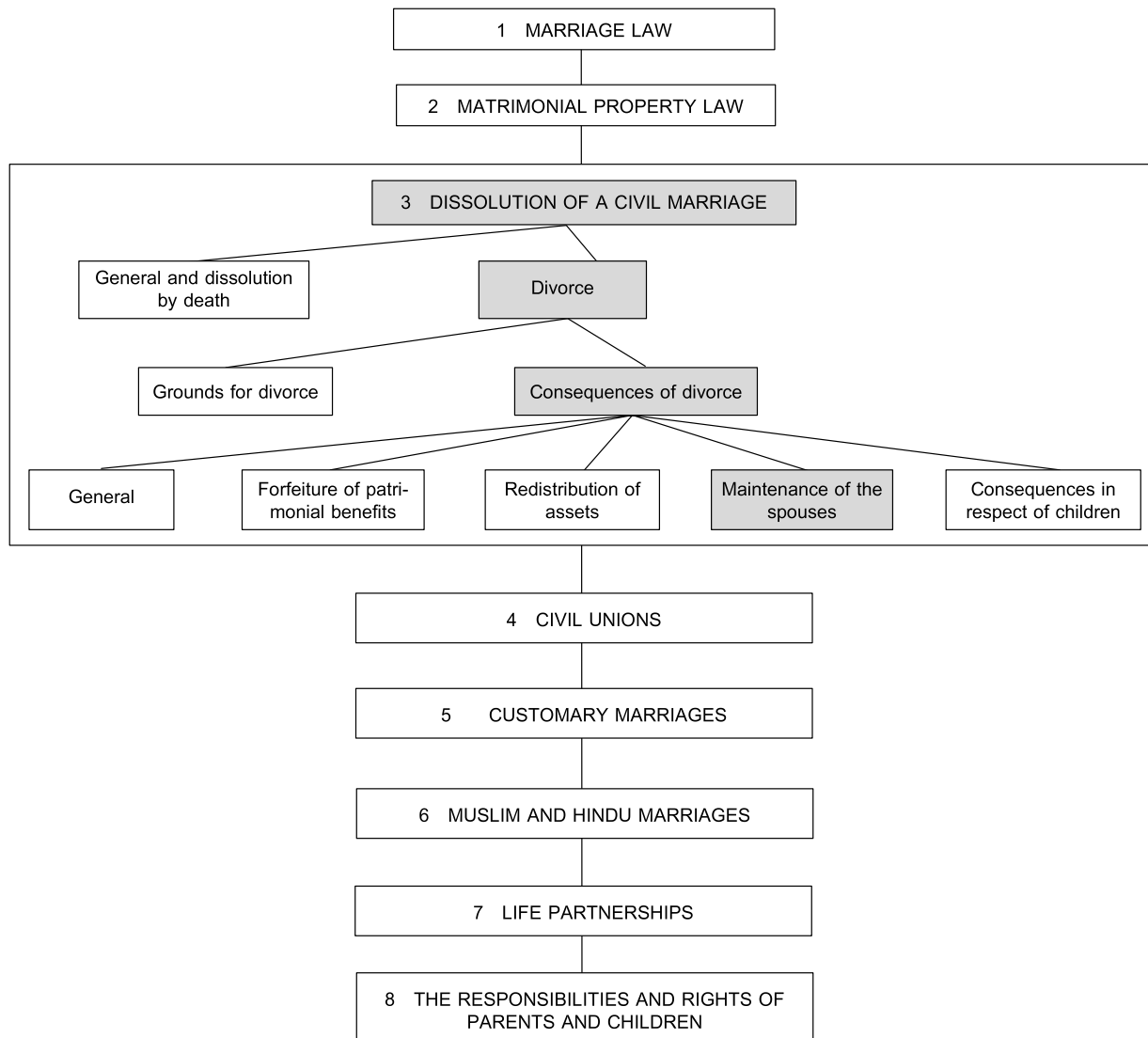
- the criterion which the court uses to establish what amount is to be transferred to the applicant
- the form that a redistribution order can take

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 12

Maintenance of a spouse after divorce

MODULE MAP



OVERVIEW

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 the 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 this 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 the termination of maintenance orders.

PURPOSE OF THIS STUDY UNIT

The purpose of this study unit is to enable you to

- distinguish between the rules that apply when spouses reach an agreement about post-divorce maintenance and the rules that apply when no such agreement is reached
- explain whether a maintenance order can be made in favour of an ex-spouse after divorce
- list the factors that the court must take into consideration in terms of section 7(2) of the Divorce Act in order to arrive at a just maintenance order
- discuss whether, after divorce, spouses are entitled to expect the same standard of living which they enjoyed during the subsistence of the marriage
- list the other factors that the courts have taken into account in respect of spousal maintenance upon divorce
- explain in detail whether maintenance will be awarded for life
- distinguish between the different maintenance orders, namely permanent maintenance, rehabilitative maintenance, lump-sum maintenance and token or nominal maintenance
- explain that maintenance orders may be rescinded, suspended or varied in the High Court in terms of section 8 of the Divorce Act or in the Maintenance Court in terms of the Maintenance Act 99 of 1998
- explain what “sufficient reason” would be for the purposes of section 8(1) of the Divorce Act
- discuss what circumstances would usually constitute sufficient reason for the variation of a maintenance order and what circumstances would usually not constitute sufficient reason for such variation
- discuss the termination of maintenance orders

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 151 to 158 (up to just before “13.3.3 Waiver of the right to claim rescission, suspension or variation of a maintenance order”)
- Prescribed textbook pages 160 to 162 (“13.4 Termination of a maintenance order”)
- The note on *Kroon v Kroon* in your prescribed casebook on page 250
- *Kooverjee v Kooverjee* in your prescribed casebook on pages 254 to 259

CONTENT OF THIS STUDY UNIT

1 GENERAL

The discussion on post-divorce maintenance starts with a distinction being made between cases where the spouses reach an agreement about the division of their assets and maintenance and those where the spouses reach no agreement. On page 151, your textbook explains that section 7(1) of

the Divorce Act governs those cases where spouses reach an agreement and that section 7(2) of the Divorce Act regulates those cases where spouses fail to reach an agreement about maintenance.

2 MAINTENANCE ORDERS IN TERMS OF SECTION 7(2) OF THE DIVORCE ACT 70 OF 1979

2.1 General

On page 151 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. It is also explained that a maintenance order in favour of a spouse can be granted only upon divorce, and not at any later stage.

Note further the kind of discretion that the court has in granting maintenance orders upon divorce, as is explained on pages 151 and 152 of the textbook.

2.2 Factors the court must take into account

Section 7(2) provides a list of nine factors that a court must take into account in order to make a just maintenance order. These factors will be considered by the court in order to determine whether a maintenance order should be made and for what amount.

ACTIVITY

Some of the factors that the court must take into account when making a maintenance order are given below, but you have to fill in the factors that have been omitted in the spaces provided:

- (1) The spouse's existing or prospective means
- (2)
- (3) The spouse's financial needs and obligations
- (4)
- (5) The duration of the marriage
- (6)
- (7)
- (8) Any redistribution order in terms of section 7(3) of the Divorce Act
- (9)

FEEDBACK

The factors to be taken into account when making a maintenance order are listed on page 152 of your textbook.

A few other issues which arise in maintenance disputes upon divorce are discussed in your textbook on pages 152 and 153. One of these issues pertains to the question of whether parties can expect to maintain the same standard of living after divorce. You will note that the reality of divorce is that both spouses will have to adopt a lower standard of living after divorce. It is further explained in your textbook on page 153 and in the note on *Kroon v Kroon* on page 250 of your casebook that a spouse's misconduct may be taken into account by the court when making a maintenance order. Also make sure that you know which other factors have been considered by our courts when making maintenance orders in favour of a spouse upon divorce.

2.3 The movement towards rehabilitative maintenance or no maintenance at all

Note that women nowadays can no longer rely on marriage to provide them with maintenance for life. Nowadays orders for permanent maintenance are seldomly made. Women who are in paid employment are expected to maintain themselves and women who are not engaged in paid employment or who are engaged in only limited paid employment are expected to take up paid employment or to increase their participation in such employment after divorce. The first category of women is usually awarded no maintenance, while the latter two categories of women are usually granted only rehabilitative maintenance. Make sure that you know what rehabilitative maintenance is and what our courts have said about it in *Kroon v Kroon*, *Botha v Botha* and *Kooverjee v Kooverjee*, your prescribed case for this study unit. You therefore have to study pages 153 to 155 in your textbook, page 250 in your casebook (the note on *Kroon v Kroon*) and pages 254 to 259 in your casebook (*Kooverjee v Kooverjee*) very carefully. Also make sure that you know that the so-called clean-break principle is all too frequently applied in a way that ignores or underplays the long-term consequences of the domestic and child-care responsibilities women bear both during the subsistence of the marriage and after its dissolution and the career sacrifices many of them make.

2.4 Lump-sum maintenance

On page 155 of the textbook you will see that, in the past, it was argued that our courts cannot issue orders that maintenance be paid in a lump sum. Make sure, however, that you know why lump-sum maintenance awards may be permissible in future. Note also the decision in *Zwiegelaar v Zwiegelaar* on pages 155 and 156 of your textbook in this regard.

Also note the decision of the Supreme Court of Appeal in *Osbry NNO v Feldman* 2010 (6) SA 19 (SCA) with regard to lump-sum maintenance. In this case, it was held that lump-sum maintenance can be awarded by the court in terms of the Maintenance of Surviving Spouses Act. Although the facts of the decision limit the judgment to lump-sum maintenance for a surviving spouse, some of the *dicta* are framed in broad terms and are

equally applicable to lump-sum maintenance after divorce. The Supreme Court of Appeal held that the earlier cases in which it had been held that maintenance excludes a lump-sum amount were no longer applicable as they were either based on the 1963 Maintenance Act, which expressly restricted maintenance to periodical amounts, or failed to take into account that the definition of “maintenance order” in the 1963 Act was no longer in operation. In terms of section 1 of the 1998 Maintenance Act, which replaced the 1963 Act, a maintenance order is defined as “any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic”. The 1998 Act therefore does not exclude the payment of maintenance by way of a lump sum. Although the facts of *Osbray* relate to lump-sum maintenance in terms of the Maintenance of Surviving Spouses Act the scope of the court’s dictum regarding the change brought about by the 1998 Act extends beyond the Maintenance of Surviving Spouses Act and makes it clear that lump-sum maintenance awards are competent in terms of section 7(2) of the Divorce Act too.

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. This was done by some courts in the past more or less as a matter of course. On page 156 of your textbook it is explained that this type of maintenance award may, however, only be made if application of the factors in section 7(2) of the Divorce Act to the facts and circumstances of a particular case indicates that such an award is just.

ACTIVITY

Short scenario: Mr and Mrs Kahn were 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 is suffering from an incurable disease which, in 10 years’ time, will render him unable to work. Mr and Mrs Kahn now wish to get divorced. Mrs Kahn realises that because of her qualifications she will not be entitled to permanent maintenance, but she is concerned that she will not be able to be self-sufficient for quite a while. Mr Kahn is also concerned about the fact that he will not be able to work in 10 years’ time.

What you have to do: Advise both parties with reference to authority whether they will be entitled to any maintenance orders in their favour.

Some guidelines before you start writing: With regard to Mrs Kahn, you will have to refer to the following: the fact that she is well qualified, the movement towards rehabilitative maintenance and cases like *Kroon v Kroon*, *Botha v Botha* and *Kooverjee v Kooverjee*. With regard to Mr Kahn, you will have to refer to the following: the fact that a maintenance order can only be awarded upon divorce, token or nominal maintenance, and cases like *Qoza v Qoza* and *Buttner v Buttner*. With regard to both spouses, you will also have to refer to the factors that must be taken into account in terms of section 7(2) of the Divorce Act.

3 RESCISSION, SUSPENSION OR VARIATION OF MAINTENANCE ORDERS

3.1 General

Firstly, make sure that you know that section 8 of the Divorce Act governs rescission (ie the setting aside of an order), suspension and variation of maintenance orders made by the High Court upon divorce. Note further that such maintenance orders can also be varied by the Maintenance Court in terms of the Maintenance Act (which is dealt with in study unit 3). Note also what was said in *Cohen v Cohen* with regard to a Maintenance Court order that varies only some aspects of a High Court order. All these aspects are set out on pages 156 and 157 of the textbook.

3.2 The meaning of “sufficient reason” for purposes of section 8(1) of the Divorce Act 70 of 1979

On page 157 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. You will also see that although sufficient reason usually involves changed circumstances, such circumstances are not a statutory requirement in terms of section 8(1).

Note further the reason why courts are generally unwilling to vary maintenance which was agreed upon in a settlement agreement or a maintenance order with which one party is dissatisfied or which a party alleges is unjust. Also make sure that you know which circumstances will usually constitute sufficient reason for variation (eg a fraudulent non-disclosure of information) and which circumstances will usually not constitute sufficient reason (eg the voluntary undertaking of extra responsibilities by a party, the fact that the maintenance recipient starts living with another person and the mere fact of inflation). All these aspects are set out on pages 157 and 158 of the textbook.

4 TERMINATION OF A MAINTENANCE ORDER

4.1 General

The discussion of post-divorce maintenance ends with an explanation (on pp 160–161 of the textbook) of how maintenance orders come to an end. Here you have to distinguish between orders made in terms of section 7(1) and those made in terms of section 7(2) of the Divorce Act.

4.2 An order in terms of section 7(1) of the Divorce Act 70 of 1979

You do not need to have an in-depth knowledge of the discussion under this heading in your textbook. You only have to know that 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 settlement agreement between the spouses.

4.3 An order in terms of section 7(2) of the Divorce Act 70 of 1979

Your textbook explains on pages 161 and 162 that a maintenance 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 maintenance recipient, or
- on the remarriage of the maintenance recipient, or
- according to the decision of the Supreme Court of Appeal in *Kruger v Goss* on the death of the maintenance debtor

SUMMARY

This study unit dealt with post-divorce maintenance between spouses.

To refresh your memory and to contribute to your understanding, write a few notes on the following:

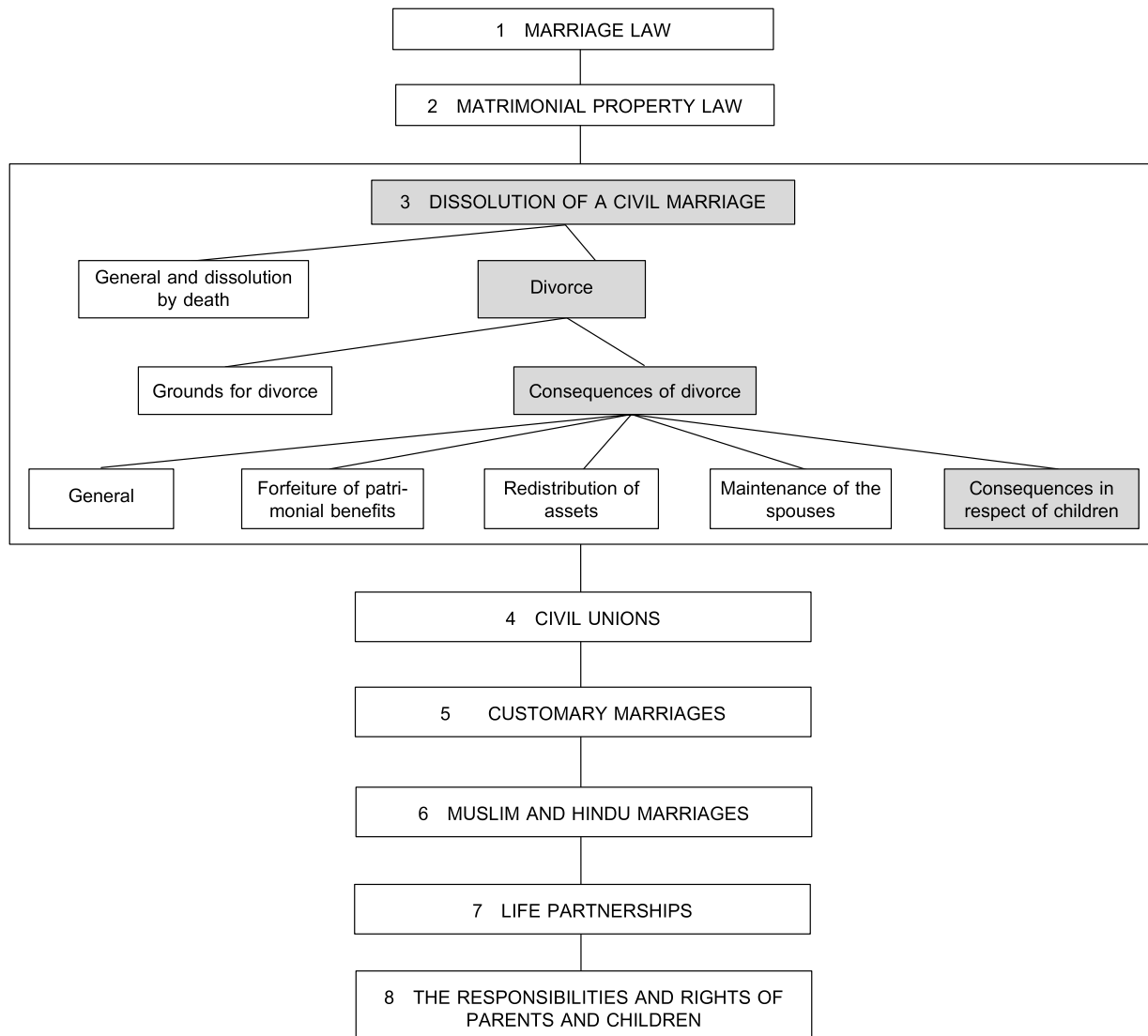
- the factors which must be taken into account when the court makes a maintenance order
- rehabilitative maintenance
- lump-sum maintenance
- token or nominal maintenance
- the rescission, suspension and variation of maintenance orders
- the termination of maintenance orders made upon divorce

In the next study unit we shall discuss the protection of the interests of the children of a divorcing couple.

STUDY UNIT 13

The interests of the children of divorcing parents

MODULE MAP



OVERVIEW

In the three previous study units we looked at the consequences of divorce in respect of the **spouses**. You studied

- the forfeiture of patrimonial benefits (study unit 10)
- the redistribution of assets (study unit 11)
- the maintenance of the spouses (study unit 12)

In this study unit we look at the consequences of divorce in respect of the interests of the **children**.

PURPOSE OF THIS STUDY UNIT

After studying this study unit you should be able to

- know that a child's best interests are of paramount importance in every matter concerning the child in terms of legislation and other legal instruments
- know the factors which must be taken into consideration when determining the best interests of a child upon divorce
- explain how the Mediation in Certain Divorce Matters Act 24 of 1987 protects the interests of the children in the event of a divorce
- set out in which respects section 6(1) to (4) of the Divorce Act 70 of 1979 regulates the interests of children at divorce
- explain what the different types of guardianship entail and to whom guardianship of a child should be awarded upon divorce
- explain the different kinds of care orders the court may make
- explain the non-care-giving parent's right of contact and formulate the various forms that structured or defined contact may take
- know that after their divorce, both parents remain obliged to support their children in accordance with their respective means

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 163 (from "14.2 The best interests of the child") to 179 (up to just before "14.6 Enforcement of guardianship, care and contact")
- *Krugel v Krugel* in your prescribed on pages 301 to 305

CONTENT OF THIS STUDY UNIT

1 THE BEST INTERESTS OF THE CHILD

When considering the consequences of divorce in respect of children, the general principle applies, namely, that the best interests of the children should be the paramount concern. As you will see on page 163 of the textbook, the principle of the best interests of the child is clearly embodied in section 28(2) of the Constitution of the Republic of South Africa, 1996, sections 6, 7 and 9 of the Children's Act 38 of 2005, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

Furthermore, note the list of factors set out in section 7(1) of the Children's Act that must be taken into consideration in determining a child's best interests on pages 164 and 165 of the textbook. Note also the objection to this list of factors and the warning to courts not to rely on factors which infringe the constitutional rights of the child's parents on page 165 of the textbook.

2 THE MEDIATION IN CERTAIN DIVORCE MATTERS ACT 24 OF 1987

Note when and on whose request an enquiry in terms of the Mediation in Certain Divorce Matters Act must be instituted by the office of the Family Advocate. The case of *Van Vuuren v Van Vuuren* is relevant in this regard. Note also the purpose of an enquiry and the duties of the Family Advocate and family counsellors in terms of the Act. All these aspects are discussed on pages 166 and 167 of the textbook.

3 THE DIVORCE ACT 70 OF 1979

Under this heading in your textbook on pages 167 to 169 make sure that you know the content of section 6(1) to (4) of the Divorce Act. In addition, note the provisions of section 10 of the Children's Act concerning a child's views in divorce matters and specifically the ways in which a child's views can be ascertained.

ACTIVITY

List the ways in which a child's voice can be heard during divorce proceedings.

FEEDBACK

- (1) The child can appear in court in person (although this is very rare).
 - (2) The Family Advocate can ascertain the child's views at an enquiry in terms of the Act.
 - (3) A child can be interviewed by an expert in terms section of the Act.
 - (4) A legal representative can be appointed for the child in terms of section of the Act or in terms of section of the
-

4 ASPECTS THE COURT MAY REGULATE

4.1 General

All you need to know about the discussion under this heading in your textbook on pages 169 to 170 is the following:

In terms of section 6(3) of the Divorce Act, a court may make any order it deems fit in respect of the maintenance of a dependent child (which may include major children of the parties), or the custody or guardianship of, or access to, a minor child (which only includes minor children of the parties).

Although section 6(3) still refers to the common-law concepts of “custody” and “access”, the Children’s Act introduced new, broader concepts, namely “care” and “contact”. Although various terms are currently used in practice, you should try to use the broader terms of the Children’s Act, namely “care” and “contact” rather than “custody” and “access”. In your textbook, the term “care-giving parent” is used to describe the parent who is awarded the care of minor children upon divorce and the term “non-care-giving parent” is used to describe the parent who is awarded contact with the children after the divorce.

4.2 Guardianship

(a) The meaning of “guardianship”

Note the wide and the narrow meaning of guardianship at common law, as well as the narrow meaning of this concept in terms of section 18(3) of the Children’s Act, as set out on page 170 of the textbook.

(b) The order the court may make in respect of guardianship

Make sure that you know what equal, concurrent guardianship (joint guardianship), guardianship *simpliciter* (single guardianship) and sole guardianship entail and in what circumstances each of these forms of guardianship may be awarded. All these aspects are discussed on page 171 of the textbook.

4.3 Care

(a) The meaning of “care”

Note the broad meaning of care in terms of section 1(1) of the Children’s Act on page 172 of the textbook.

(b) The order the court may make in respect of care

You may ask if it is still a rule today that the care of minor children is awarded to their mother upon divorce. On pages 172 and 173 of the textbook you will see that this question is clearly answered in the negative in *Van der Linde v Van der Linde*, section 28(1)(b) of the Constitution and several other international legal instruments. Make sure that you understand the reasons why the maternal preference rule has been rejected.

Next, pages 173 to 175 of the textbook deal with joint care awards, which are increasingly being awarded upon divorce. In this regard you need to distinguish between joint legal care and joint physical care. Note also the reasons why the courts in the past were hesitant to make joint care awards and the advantages of such awards. Your prescribed case for this study unit, namely *Krugel v Krugel*, deals with joint care awards. Study this case

in your textbook, as well as on pages 301 to 305 of your casebook, carefully. You also need to know the viewpoint of Heaton (the author of your textbooks) on the granting of joint care awards.

The rest of the discussion on page 175 of your textbook deals with the limitations that a court may impose on a parent's right of care/residency and other types of order a court can make regarding care. You will see that the court may also award deferred or postponed care/residency, split or divided care/residency or sole care. You have to know what each of these orders entails, and in what circumstances they are granted.

ACTIVITY

Short scenario: 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 care of Gerda, while Mr Nel wants joint legal care. Mrs Nel has informed Mr Nel that he can forget about an order for joint care, because our courts are extremely reluctant to grant such orders, especially where the parents could not agree on matters even while they were married.

What you have to do: Discuss fully, with reference to authority, whether Mrs Nel's statement is true.

FEEDBACK

Some guidelines before you start writing anything: On the one hand you will have to consider the reasons why our courts were hesitant in the past to make joint care awards. On the other hand, you will also have to consider the advantages of joint care and your prescribed case for this module, namely *Krugel v Krugel*.

4.4 Contact

(a) The meaning of "contact"

In our global community contact no longer needs to be physical in nature, but may also be virtual. See the explanation in this regard on pages 175 and 176 of the textbook.

(b) The order the court may make in respect of contact

You first need to distinguish between the terms "reasonable contact" and "structured or defined contact".

You also need to know that the care-giving parent has the final say in the case of a dispute, but that he or she may not impose unreasonable restrictions or conditions negating contact of the other parent. Examples of such unreasonable restrictions or conditions are set out on page 176 of the textbook.

Note further the conditions and/or restrictions on contact that the court may impose on the non-care-giving parent as set out on pages 176 and 177 of the textbook. Such conditions and/or restrictions may include phased-in contact, postponed contact, suspended contact, supervised contact, and non-physical contact. You have to know what each of these forms of contact entails, and under which circumstances they will be granted by the court.

In the second full paragraph on page 177 of your textbook it is mentioned that the court also has the power to deny the non-care-giving parent contact altogether. It is also explained what circumstances justify such a serious invasion of this parent's right, and what circumstances will not justify such an order. Note also that the court may award contact to a third party.

The rest of the discussion on pages 177 and 178 deals with how the court should formulate its judgment about the reasons why conditions are being imposed on contact, or why contact is being denied. The author of your textbook submits 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-care-giving parent's right of contact with her children raised a great deal of criticism. Make sure 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.

4.5 Maintenance

(a) The meaning of "maintenance"

Note the common-law meaning of maintenance as set out on page 178 of the textbook.

(b) The order the court may make in respect of maintenance

All you need to know of the discussion under this heading on pages 178 and 179 of your textbook is that, after the divorce, both parents remain obliged to maintain the children born of the marriage in proportion to their respective means.

SUMMARY

In this study unit we looked at the interests of children upon their parents' divorce.

Do you know by now that children's best interests must determine all decisions that concern them upon their parents' divorce?

To refresh your memory and to contribute to your understanding, write a few notes on the following:

- the criterion of "the best interests of the child" which is used when considering the consequences of divorce in respect of the children
- the enquiry by the Family Advocate in terms of the Mediation in Certain Divorce Matters Act
- the provisions of section 6(1) to (4) of the Divorce Act
- the meaning of guardianship and the awarding thereof in the event of divorce
- the ways in which a child's wishes can be ascertained upon divorce
- the meaning of care and the awarding thereof in the event of divorce
- the meaning of contact and the awarding thereof in the event of divorce
- parents' duty to maintain their children after divorce

Family Law



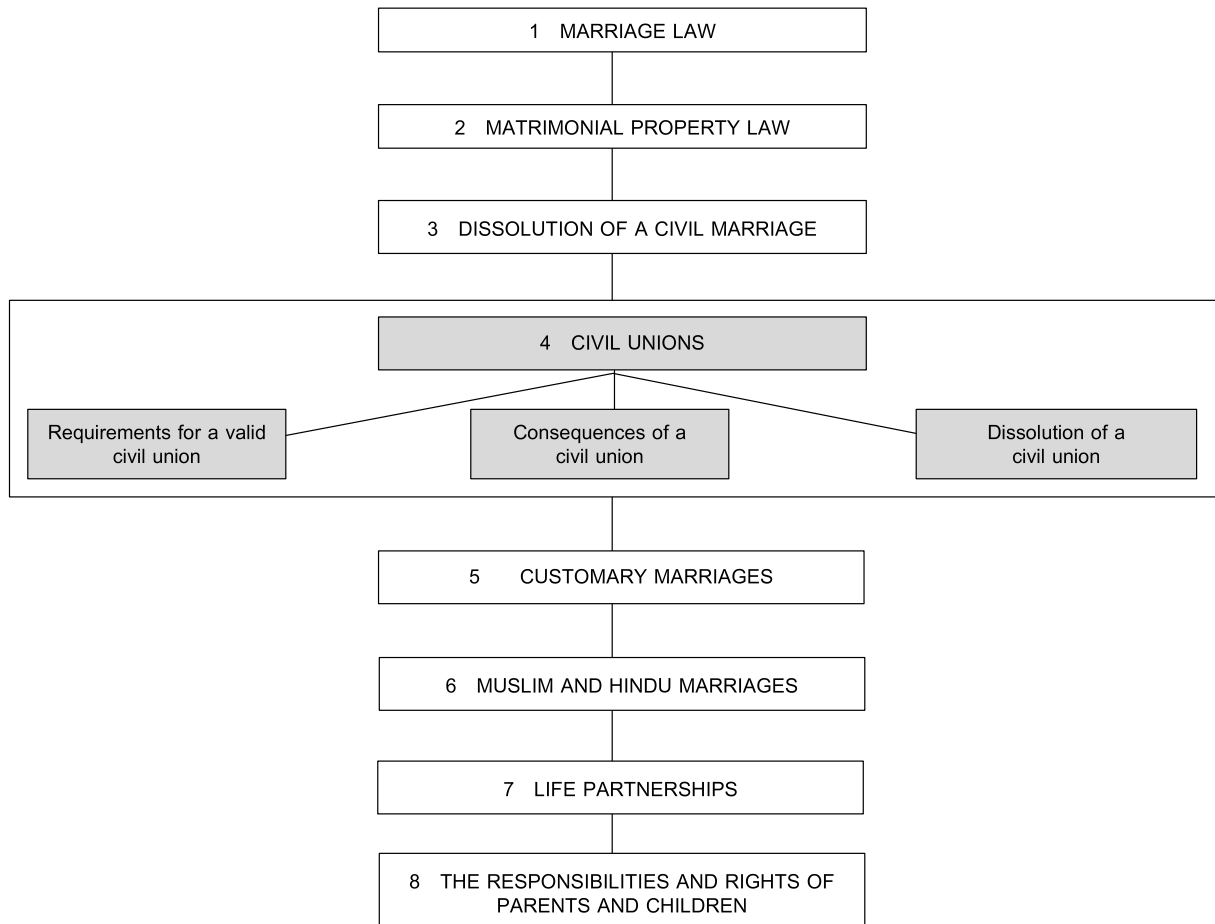
Civil unions

Section 4

STUDY UNIT 14

Civil unions

MODULE MAP



OVERVIEW

A civil union is a marriage or civil partnership concluded in terms of the Civil Union Act 17 of 2006. A civil union can be concluded by partners of the opposite sex or by same-sex partners. In this module the requirements for a valid civil union, its consequences and dissolution thereof are discussed.

PURPOSE OF THIS STUDY UNIT

The purpose of this study unit is to enable you to

- define a civil union
- realise that the requirements and consequences of a civil union are more or less the same as that of a civil marriage

- discuss the variable and invariable consequences of a civil union
- discuss how a civil union is dissolved

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 193 (from “16.1 Introduction”) to 196 (up to just before the second paragraph starting with “The prohibited degrees of relationship ...”)
- Prescribed textbook page 199 (“16.3.1 General”)
- Prescribed textbook page 201 (only “16.4 The dissolution of a civil union”)

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

A civil union is defined on page 193 of your prescribed textbook. Note that parties can choose whether they want to call their civil union a “civil partnership” or a “marriage”, although the consequences are the same.

ACTIVITY

Short scenario: Daniel and Solomon want to enter into a marriage. They are both majors and of the same sex. Can they conclude a marriage?

What you have to do: Indicate whether Daniel and Solomon can marry in terms of the Civil Union Act.

FEEDBACK

Some guidelines before you start writing anything: You will have to consider who has the capacity to enter into a civil union in terms of the Civil Union Act. Also consider what a union in terms of the Act can be called.

You will be able to answer the question after you have studied page 193 of your prescribed textbook carefully.

2 THE LEGAL REQUIREMENTS FOR A CIVIL UNION

The legal requirements for a valid civil union are discussed on pages 194 to 199 of your textbook, but you only need to study the discussion on pages 194 to 196. Note that the requirements are similar to those for a civil marriage, with the exception that minors cannot conclude a civil union and same-sex couples are allowed to enter into a civil union. It is important to know the requirements of a valid civil union, as only parties to a valid civil union will acquire the benefits of a marriage.

3 CONSEQUENCES OF A CIVIL UNION

The variable and invariable consequences applicable to civil marriages apply to civil unions, subject to the changes required by the context. Can you still recall what the variable and the invariable consequences of a civil marriage are? If not, refer back to study units 3 to 6, where the variable and the invariable consequences of a civil marriage are discussed.

4 THE DISSOLUTION OF A CIVIL UNION

The same rules that apply to the dissolution of civil marriages apply to the dissolution of civil unions. Refer back to section 3, where the ways in which a marriage is dissolved and the consequences thereof are discussed. Note that the redistribution of assets (discussed in study unit 11 under section 3) are not available to parties divorcing in a civil union, as redistribution is only available to parties married before 1 November 1984 and 2 December 1988, whereas the Civil Union Act only came into operation on 30 November 2006.

Note: You will have to refer back to the relevant study units mentioned above dealing with the requirements, consequences and dissolution of civil marriages and remember that the principles are also applicable to civil unions.

ACTIVITY

Short scenario: Glenda and Elliot are married in terms of the Civil Union Act. However, they have realised that they cannot stand each other anymore. They want a divorce and want to know from you what the accepted grounds for divorce are.

What you have to do: Indicate what the grounds for divorce for a civil union are.

FEEDBACK

Some guidelines before you start writing anything: The same principles that apply to divorce in civil marriages are applicable to a civil union. You will therefore have to refer back to study unit 8 to determine the grounds for divorce.

SUMMARY

In this study unit you learnt about a number of aspects regarding civil unions.

Do you know what civil unions entail?

To refresh your memory and to contribute to your understanding, write a few notes on the following:

- the definition of a civil union
- the requirements of a civil union
- the variable and invariable consequences of a civil union
- dissolution of a civil union

Family Law



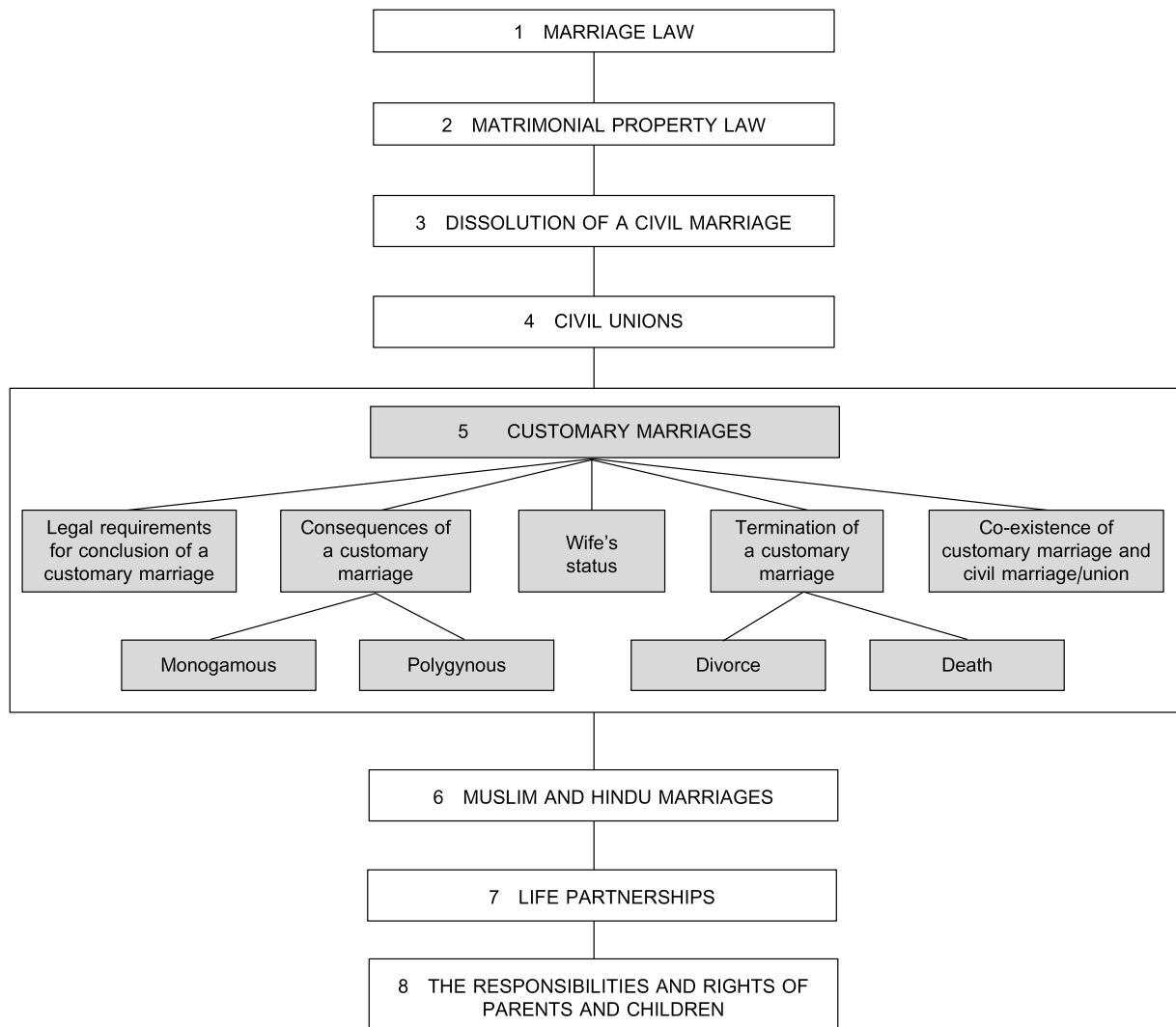
Customary marriages

Section 5

STUDY UNIT 15

Customary marriages

MODULE MAP



OVERVIEW

Customary marriages are marriages concluded in terms of the Recognition of Customary Marriages Act 120 of 1998. The Act provides for marriages contracted under customary law, which is defined as “the customs and usages traditionally observed among the indigenous African peoples of South Africa which form part of the culture of those peoples”. The principles in regard to the conclusion and dissolution of customary marriages are discussed. The possible coexistence of customary marriages with civil marriages and civil unions is also dealt with.

PURPOSE OF THIS STUDY UNIT

The purpose of this study unit is to enable you to

- give a synopsis of the legal requirements which apply to the conclusion of customary marriages before and after the coming into operation of the Recognition of Customary Marriages Act
- briefly discuss the requirement for customary marriages to be registered
- discuss the proprietary consequences of monogamous and polygynous customary marriages
- explain what status the wife occupies in a customary marriage
- briefly discuss the termination of customary marriages by divorce
- briefly discuss the termination of customary marriages by death
- discuss the coexistence of a customary marriage and a civil marriage or civil union

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook page 205 (“17.1 Introduction”)
- Prescribed textbook page 207 and the first paragraph on page 208.
- Prescribed textbook pages 209 (from “17.4.2 Monogamous customary marriages”) and 210 (up to the end of the first paragraph under “(a) Marriages entered into before the coming into operation of the Act”)
- Prescribed textbook pages 211 (from “(b) Marriages entered into after the coming into operation of the Act”) and 212 (up to just before “(ii) *The matrimonial property system(s) the contract can provide for*”)
- Prescribed textbook pages 217 (from “17.5 The wife’s status”) and 218 (up to just before “(ii) *Redistribution of assets*”)
- Prescribed textbook pages 219 (from “Redistribution in terms of section 8(4)(b)”) and 220 (up to just before “(iii) *Pension interests*”)
- Prescribed textbook pages 221 (from “(b) The interests of the children of divorcing parents”) to 227
- *Gumede v The President of the Republic of South Africa* in your prescribed casebook on pages 309 to 317

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Customary marriages enjoy full recognition as valid marriages in South Africa. This means that the normal consequences of a marriage are applicable to parties in a customary marriage. Make sure that you know what a “customary marriage” is. This is discussed on page 205 of your textbook.

ACTIVITY

Short scenario: Xolani and Lungile were married prior to the implementation of the Recognition of Customary Marriages Act. Is their customary marriage valid?

What you have to do: Discuss whether the Recognition of Customary Marriages Act recognises customary marriages concluded before the Act came into operation.

FEEDBACK

Some guidelines before you start writing anything: You will have to determine whether the Recognition of Customary Marriages Act is retrospective in nature.

You will find the answer on page 205 of your prescribed textbook.

2 THE LEGAL REQUIREMENTS FOR A CUSTOMARY MARRIAGE

With regard to the legal requirements of a customary marriage, the Recognition of Customary Marriages Act differentiates between customary marriages concluded before and after the Act came into operation on 15 November 2000. All you need to know about the legal requirements for a customary marriage which was concluded before 15 November 2000 is that the validity of such customary marriages is determined in accordance with customary law. The requirements for valid customary marriages concluded after 15 November 2000 are determined by the Recognition of Customary Marriages Act. These requirements are discussed on page 207 of your textbook. Note that there are additional requirements in respect of a minor's customary marriage.

ACTIVITY

Make a list of the legal requirements for a valid customary marriage concluded after 15 November 2000.

FEEDBACK

You will find the requirements on page 207 of your prescribed textbook.

Note: Make a list of the requirements for a valid customary marriage as this will make it easier to remember them.

3 REGISTRATION OF THE MARRIAGE

Customary marriages have to be registered. However, even if a customary marriage is not registered it is still a valid marriage. Registration is merely required to provide *prima facie* proof that the parties are in a customary marriage. You have to study the first paragraph on page 208 of your prescribed textbook in this regard.

4 THE PATRIMONIAL CONSEQUENCES OF THE MARRIAGE AND CONTROL OF THE MATRIMONIAL PROPERTY

With regard to the patrimonial consequences of customary marriages you will need to differentiate between monogamous and polygynous customary marriages. Polygynous marriages are marriages where the husband has more than one wife. The **patrimonial consequences of monogamous customary marriages** are the same irrespective of whether the marriage was concluded before or after 15 November 2000. *Gumede v The President of the Republic of South Africa* removed the differentiation between the patrimonial consequences of monogamous customary marriages entered into before and after the Act. This case is discussed on pages 309 to 317 of your casebook. The patrimonial consequences of a monogamous customary marriage are discussed on pages 209 and 210 of your textbook. You have to study the relevant pages in both the casebook and the textbook. You will see that the patrimonial consequences of a customary marriage are in effect similar to those of a civil marriage.

There is a difference in the **patrimonial consequences of polygynous customary marriages** concluded before and after 15 November 2000. Polygynous customary marriages entered into before 15 November 2000 are governed by traditional customary law. This is discussed on page 210 of your textbook in the first paragraph under “(a) **Marriages entered into before the coming into operation of the Act**”.

The Recognition of Customary Marriages Act regulates the patrimonial consequences of polygynous customary marriages entered into after 15 November 2000. The Act requires that the husband enter into a court-approved contract which regulates the future matrimonial property system of the marriages before a polygynous customary marriage can be concluded. You have to study “(i) *A court-approved contract*” on pages 211 and 212 of your textbook in this regard. The purpose of the contract is to ensure equitable distribution of the property between family members.

ACTIVITY

Short scenario: Themba and Thandi concluded a customary marriage without an antenuptial contract. What would their matrimonial property system be under the following situations?

(a) Themba and Thandi married on 15 April 1999.

- (b) Themba and Thandi married on 15 April 2005.
- (c) Themba was already married to Lindi when he married Thandi on 15 April 1999.

What you have to do: Determine the matrimonial property system applicable to Themba and Thandi under situations (a), (b) and (c).

FEEDBACK

Some guidelines before you start writing anything: Remember that the matrimonial property system for monogamous customary marriages is the same irrespective of when the parties were married. However, with regard to polygynous marriages, it is important to determine when the parties were married.

You will find the answer on pages 209 to 212 of your prescribed textbook. Your answer to (a) and (b) will be the same, but it will differ from your answer to (c).

5 THE WIFE'S STATUS

The Recognition of Customary Marriages Act provides the wife with equal status to her husband. She acquires full legal status and capacity and can no longer be regarded as a perpetual minor. She therefore has the power to acquire and dispose of assets, enter into contracts and litigate. It is, however, unclear whether the wives in a polygynous marriage are equal to each other. You have to study pages 217 and 218 of your textbook under this heading.

6 TERMINATION OF THE MARRIAGE BY DIVORCE

6.1 Ground for divorce

The Recognition of Customary Marriages Act provides only for one ground of divorce – the irretrievable breakdown of the marriage.

6.2 The consequences of divorce

The patrimonial consequences of divorce are discussed under “(i) *General*” on page 218. Broadly speaking, the financial consequences are similar to those of a civil marriage or a civil union.

Furthermore, note that the court is empowered by section 8(4)(b) to make a redistribution order when a polygynous customary marriage is terminated by divorce. This is discussed under “**Redistribution in terms**”

of section 8(4)(b)” on pages 219 to 220 of your textbook. Further in this regard, see the second paragraph of the note on *Gumede v The President of the Republic of South Africa* on page 316 of your casebook. In this case, the court confirmed that section 8(4)(b) is applicable to all customary marriages upon divorce.

The interests of the children of divorcing parents and maintenance are discussed on page 221. The court can make any order it deems fit regarding guardianship, care, contact and maintenance.

You also have to study pages 221 and 222 with regard to the procedural aspects of the termination of customary marriages by divorce. On these pages you will see who may be joined to divorce proceedings, which court has jurisdiction over the dissolution of customary marriages through divorce, what the nature of the divorce procedure is and who can apply for interim relief.

7 TERMINATION OF THE MARRIAGE BY DEATH

7.1 Death as a ground for termination

The Recognition of Customary Marriages Act remains silent on the termination of customary marriages by death. Death does not traditionally terminate a house created by marriage or end the marriage. Death terminates marriages in KwaZulu-Natal in terms of section 36(1) of the Zulu Codes. However, no such provision exists for the rest of South Africa. It can, therefore, be assumed that death does not necessarily terminate a customary marriage outside KwaZulu-Natal. This aspect is discussed on pages 222 and 223 of your textbook.

7.2 Maintenance of the surviving spouse(s)

In order for a spouse to be able to institute a claim for maintenance against the estate of his or her deceased spouse, the Maintenance of Surviving Spouses Act has to be applicable. The question which then arises is whether the Act is applicable to customary marriages. You have to be able to give reasons why the Act will apply to polygynous customary marriages. This is discussed on page 223 of your textbook under this heading.

8 THE COEXISTENCE OF A CUSTOMARY MARRIAGE AND A CIVIL MARRIAGE OR CIVIL UNION

A person in a civil marriage or civil union is not allowed to enter into a customary marriage as well. Similarly, a person in a customary marriage cannot enter into a civil marriage or civil union with another person. Note that spouses in a customary marriage may, however, enter into a civil

marriage with each other, but not into a civil union. See the discussion in this regard on pages 224 to 226 of your textbook. You will also have to study the consequences where a customary marriage is converted into a civil marriage on pages 226 and 227.

SUMMARY

In this study unit you learnt about a number of aspects regarding customary marriages.

Do you know by now what customary marriages entail?

To refresh your memory and to contribute to your understanding, write a few notes on the following:

- the legal requirements for a valid customary marriage
- the registration of customary marriages
- the proprietary consequences of monogamous and polygynous customary marriages
- how the Recognition of Customary Marriages Act changed the status of a wife in a customary marriage
- the termination of a customary marriage through divorce and death
- the requirements that must be complied with before a spouse who is a party to a customary marriage can also conclude a civil marriage
- the consequences of a civil marriage entered into by spouses who are already married to each other according to customary law

Family Law



Muslim and Hindu marriages

Section 6

STUDY UNIT 16

Muslim and Hindu marriages

MODULE MAP



OVERVIEW

Muslim and Hindu marriages are not yet fully recognised by our law. However, the legislature and the courts have extended some recognition to these marriages. In this study unit you will learn why Muslim and Hindu marriages are not recognised. You will also learn about the limited legislative and judicial recognition of Muslim and Hindu marriages. Finally, you will investigate the issue of the constitutionality of the non-recognition of Muslim and Hindu marriages. The recognition provided for Muslim and Hindu marriages and the arguments for recognition are similar and therefore both forms of marriage are dealt with in the same study unit, although they are discussed in two separate chapters in your textbook.

PURPOSE OF THIS STUDY UNIT

The purpose of this study unit is to enable you to

- explain why Muslim and Hindu marriages are not recognised
- set out the legislative recognition that has been afforded to Muslim and Hindu marriages
- discuss the recognition the courts have extended to Muslim and Hindu marriages
- explain whether the limited recognition of Muslim and Hindu marriages is unconstitutional

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 231 to 239

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

On pages 231 and 237 of the textbook you will see why Muslim and Hindu marriages are currently only provided with limited legal recognition. Parties to a Muslim or a Hindu marriage are therefore not entitled to all the benefits of married people. Limited recognition implies that the consequences of these marriages are only recognised for specific purposes. This recognition is provided by specific statutes and the extended application of statutes afforded by certain court decisions.

2 RECOGNITION OF MUSLIM AND HINDU MARRIAGES

Some of the Acts explicitly provide that they apply to religious marriages, including Muslim and Hindu marriages. You have to know which these Acts are. The Acts that are applicable to Muslim and Hindu marriages are listed on page 232 of your textbook. You do not have to study the details or the numbers or dates of these Acts; you merely have to know how each Act extends recognition to Muslim and Hindu marriages.

The courts have also interpreted certain statutes in such a way that their application is extended to Muslim and Hindu marriages. These decisions are discussed on pages 232 to 235 with regard to Muslim marriages and on pages 237 to 239 with regard to Hindu marriages.

ACTIVITY

What you have to do: Draw a table with two columns. In the first column write the cases discussed on pages 232 to 235 and 237 to 239. In the second column indicate the recognition provided to Muslim and Hindu marriages by each specific case.

Your first column should include the following cases: *Daniels v Campbell*; *Hassam v Jacobs*; *Ryland v Edros*; *Amod v Multilateral Motor Vehicle Accidents Fund*; *Khan v Khan*; *AM v RM*; *Hoosein v Dangor*; *Ismail v Ismail*; *Govender v Ragavayab*; *Singh v Ramparsad*.

Note: This summary will assist you in studying the relevant cases in this section.

3 THE CONSTITUTION AND MUSLIM AND HINDU MARRIAGES

There are people who argue for the recognition of Muslim and Hindu marriages. They argue that non-recognition discriminates on the grounds of religion, conscience, belief or culture, the right to dignity, the right to freedom of conscience, religion, thought, belief and opinion, the right to culture and the right to choose to participate in a particular culture. On the other hand, there are those who argue against the recognition of Muslim and Hindu marriages. They argue that such marriages discriminate on the grounds of sex and gender. These arguments are discussed on pages 235 and 236 of your textbook. Although the arguments are discussed in relation to Muslim marriages they are also applicable to Hindu marriages. After working through this section you will have to be able to argue for or against the recognition of Muslim and Hindu marriages.

SUMMARY

In this study unit you learnt about a number of aspects regarding Muslim and Hindu marriages.

Do you know what these marriages entail?

To refresh your memory and to contribute to your understanding, write a few notes on the following:

- the reasons why Muslim and Hindu marriages are not fully recognised by South African law
- the legislative recognition of Muslim and Hindu marriages
- the extended recognition to Muslim and Hindu marriages by the courts
- the constitutional arguments for and against the recognition of Muslim and Hindu marriages

Family Law



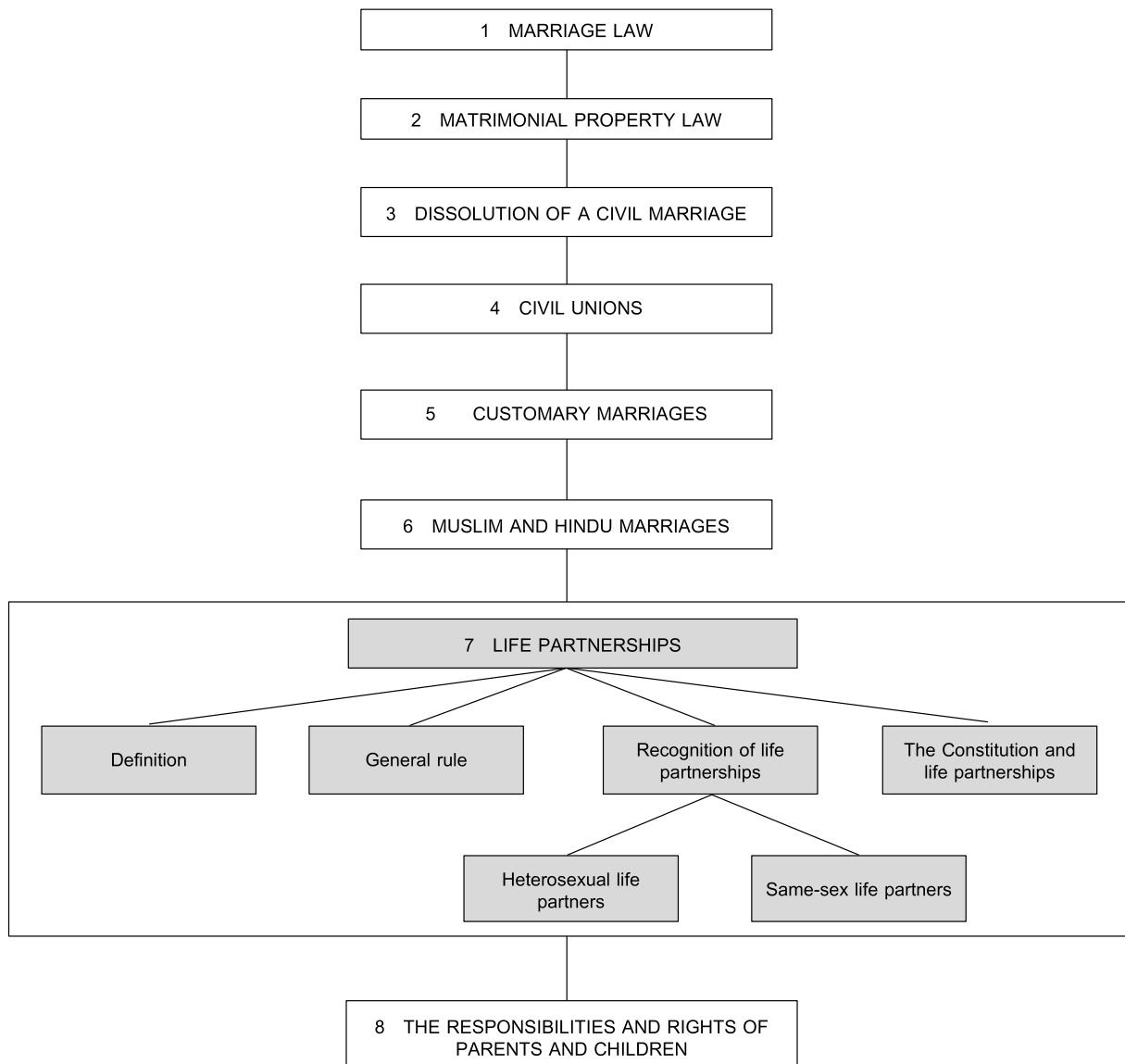
Life partnerships

Section 7

STUDY UNIT 17

Life partnerships

MODULE MAP



OVERVIEW

The relationship between couples who live together without entering into a legally recognised marriage is known as a “life partnership”. Although life partnerships generally have none of the normal consequences of a 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 heterosexual and same-sex life partnerships up to now. We also discuss the constitutionality of the law’s differentiation between same-sex and heterosexual life partnerships.

PURPOSE OF THIS STUDY UNIT

The purpose of this study unit is to enable you to

- define a life partnership
- explain the general rule with regard to the legal consequences of cohabitation outside marriage
- know which statutory recognition has hitherto been extended to heterosexual and same-sex life partnerships respectively
- explain how court decisions have increasingly extended recognition to same-sex life partnerships
- explain that the law's refusal to treat heterosexual life partners and same-sex life partners in the same way is probably unconstitutional

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook page 243 (the first two paragraphs only)
- Prescribed textbook pages 247 (from “20.3 Legislative and judicial recognition of life partnerships”) to 252 (up to just before “20.3.3 Determining whether a life partnership has come into existence”)
- Prescribed textbook pages 253 (from “20.4 The Constitution and life partnerships”) and 254
- *Volks v Robinson* in your prescribed casebook pages 351 to 357

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

In the first place, you must be able to explain what a life partnership is. The first paragraph on page 243 of your prescribed textbook contains a definition of this term. Note that when a couple lives together without entering into a marriage their relationship does not automatically acquire the normal consequences of a marriage. There are, however, exceptions to the general rule which you will find on page 243 of your prescribed textbook. The exceptions are Acts that apply certain consequences of marriage to life partnerships, Acts which were extended by courts to apply such consequences to life partnerships and ordinary legal rules and remedies that can be used to apply the consequences of a marriage to life partnerships. We will, however, not deal with the protection of life partnership by means of the ordinary legal rules in this module. It is sufficient to know that life partners can achieve a measure of protection by means of ordinary legal rules by, for example, entering into a contract or drawing up a will.

2 LEGISLATIVE AND JUDICIAL RECOGNITION OF LIFE PARTNERSHIPS

Certain Acts treat life partners as spouses for specific purposes. You have to know these Acts which are discussed on pages 247 and 248 of your

prescribed textbook. You do not have to study the detail or the numbers or dates of these Acts. You merely have to know the Acts that provide legislative recognition to life partnerships. Note that most of the Acts treat partners in both heterosexual and same-sex life partnerships as spouses.

Medical scheme benefits and job-related benefits are examples of benefits which are usually only conferred on heterosexual life partnerships. The application of such benefits is determined by the rules of each individual fund or scheme. This is discussed on page 248 in the third paragraph starting with “Other examples of benefits ...” and page 249 under “20.3.2 Same-sex life partnerships”.

Note that the courts have refused to extend spousal benefits to heterosexual life partners. You have to study *Volks v Robinson* in this regard on pages 248 and 249 of your prescribed textbook and pages 351 to 357 of your prescribed casebook.

The courts have, however, extended spousal benefits to same-sex life partners. The relevant cases in this regard are discussed on pages 249 to 252 of your prescribed textbook.

ACTIVITY

What you have to do: Draw a table with two columns. In the first column write the cases discussed in your textbook on pages 249 to 252 that extended spousal benefits to same-sex life partners. In the second column indicate the recognition provided to same-sex life partners by each specific case.

FEEDBACK

Ensure that your first column contains the following cases: *Langemaat v Minister of Safety and Security*; *Satchwell v President of the Republic of South Africa*; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*; *Du Plessis v Road Accident Fund*; *Farr v Mutual & Federal Insurance Co Ltd*; *J v Director General, Department of Home Affairs*; *Du Toit v Minister for Welfare and Population Development*; *Gory v Kolver*.

Note: Such a table will assist you in studying this section. You will have to study these cases in such a manner that you will be able to discuss the cases separately. You need only study the cases as they are discussed in your prescribed textbook.

3 THE CONSTITUTION AND LIFE PARTNERSHIPS

Note that most of the decisions regarding the extension of spousal benefits to life partners were delivered before the coming into operation of the Civil Union Act, which recognises same-sex and heterosexual civil unions (see

study unit 14). The courts extended spousal benefits to same-sex life partners and not heterosexual partners because, at that stage, same-sex partners did not have the option to marry before the implementation of the Civil Union Act. In terms of this Act, they are now allowed to enter into a civil union. The result of these cases is that same-sex life partners have more rights than heterosexual life partners. This is discussed on pages 253 and 254 of your prescribed textbook under the heading “20.4 The Constitution and life partnerships”. The question is, however, whether it is acceptable under the Constitution to treat same-sex and heterosexual life partners differently? You should be able to answer this question after studying pages 253 and 254 of your prescribed textbook.

SUMMARY

In this study unit you learnt about a number of aspects regarding life partnerships.

Do you know what life partnerships entail?

To refresh your memory and to contribute to your understanding, write a few notes on the following:

- the description of a life partnership
- the general rule with regard to the legal consequences of cohabitation outside marriage
- the limited legislative extension of recognition to heterosexual life partnerships thus far
- the extension of the recognition to same-sex life partnerships by legislation and the courts
- the constitutionality of the law’s refusal to treat heterosexual life partners and same-sex life partners in the same way

Family Law



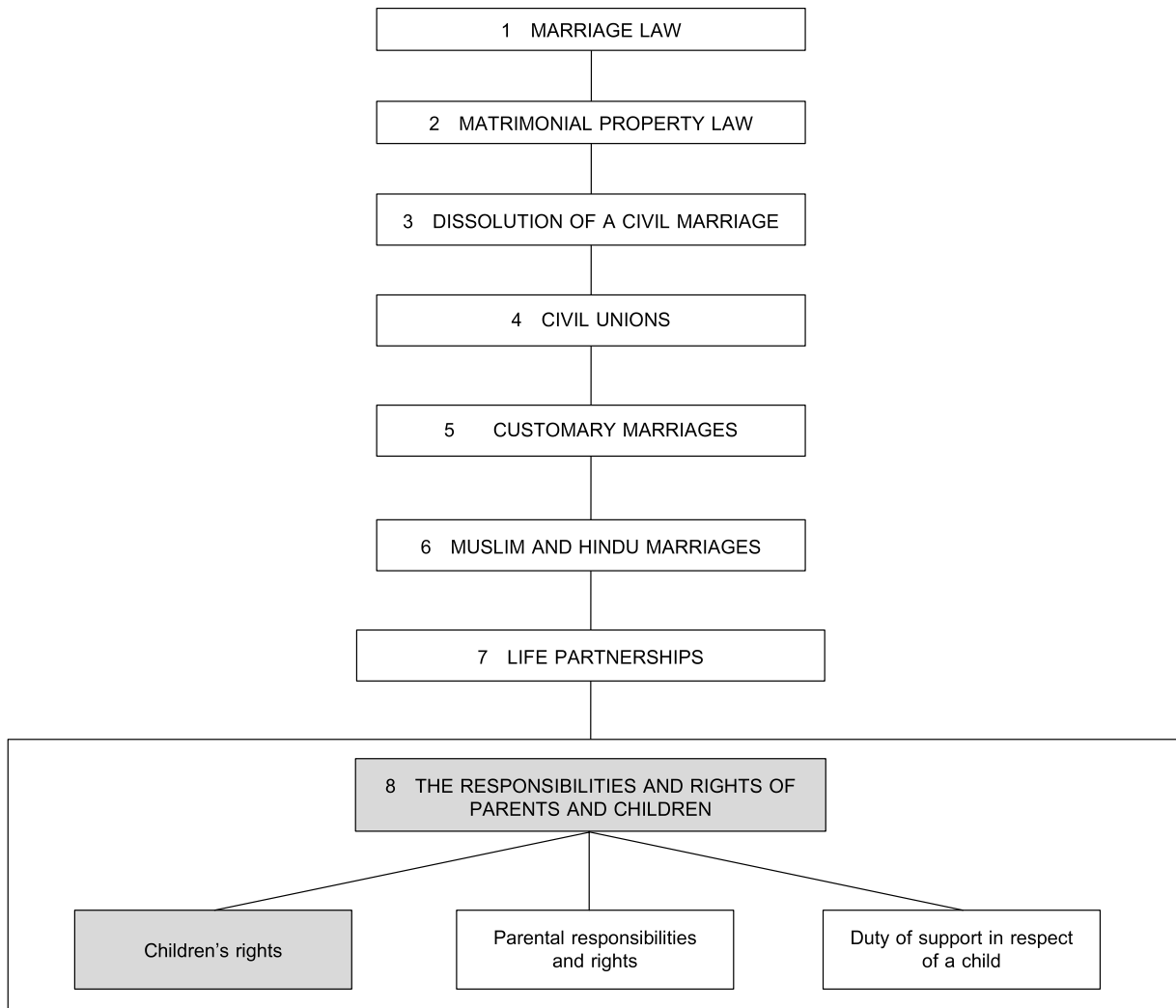
The responsibilities and rights of parents and children

Section 8

STUDY UNIT 18

Children's rights

MODULE MAP



OVERVIEW

In this very short study unit you will learn more about the special rights afforded to children in terms of section 28 of the Constitution of the Republic of South Africa, 1996 and the Children's Act 38 of 2005. You will encounter some of the concepts that you already learnt about in study unit 13 (dealing with the interests of the children of divorcing parents), such as the principle of the best interests of the child. In the next study unit (study unit 19) you will look in more detail at parental responsibilities and rights.

PURPOSE OF THIS STUDY UNIT

After studying this study unit you should be able to

- point out the shift in the focus of the private-law rules regulating the parent-child relationship
- name the rights afforded to children in terms of the children's rights clause in the Constitution
- briefly discuss the paramountcy of the child's best interests in our law
- be aware of the supplementary rights a child has in terms of the Children's Act

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 271 and 272 (up to just before "22.2 The right to a name")
- Prescribed textbook pages 276 (from "22.2.6 The paramountcy of the child's best interests") and 277
- Prescribed textbook pages 280 to 282

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Note the important shift in the focus of the private-law rules regulating the parent-child relationship.

2 SECTION 28 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

ACTIVITY

List the rights afforded to children in terms of section 28(1) of the Constitution.

FEEDBACK

These rights are set out on page 272 in your textbook (they are listed from (a)–(i)).

3 THE PARAMOUNTCY OF THE CHILD'S BEST INTERESTS

Note that, according to section 28(2) of the Constitution, a child's best interests must be central in all fields of law – not only in family law.

Ensure that you know what the paramountcy principle entails and whether it can be limited in any way. These aspects are discussed in your textbook on pages 276 and 277.

4 THE CHILDREN'S ACT 38 OF 2005

You do not have to know all the details of the discussion of the Children's Act on pages 280 to 282 of the textbook. However, you have to be aware of the ways in which the Children's Act gives effect to a child's constitutional rights and his or her rights in terms of international instruments.

SUMMARY

This study unit very briefly dealt with children's rights.

To refresh your memory and to contribute to your understanding, write a few notes on the following:

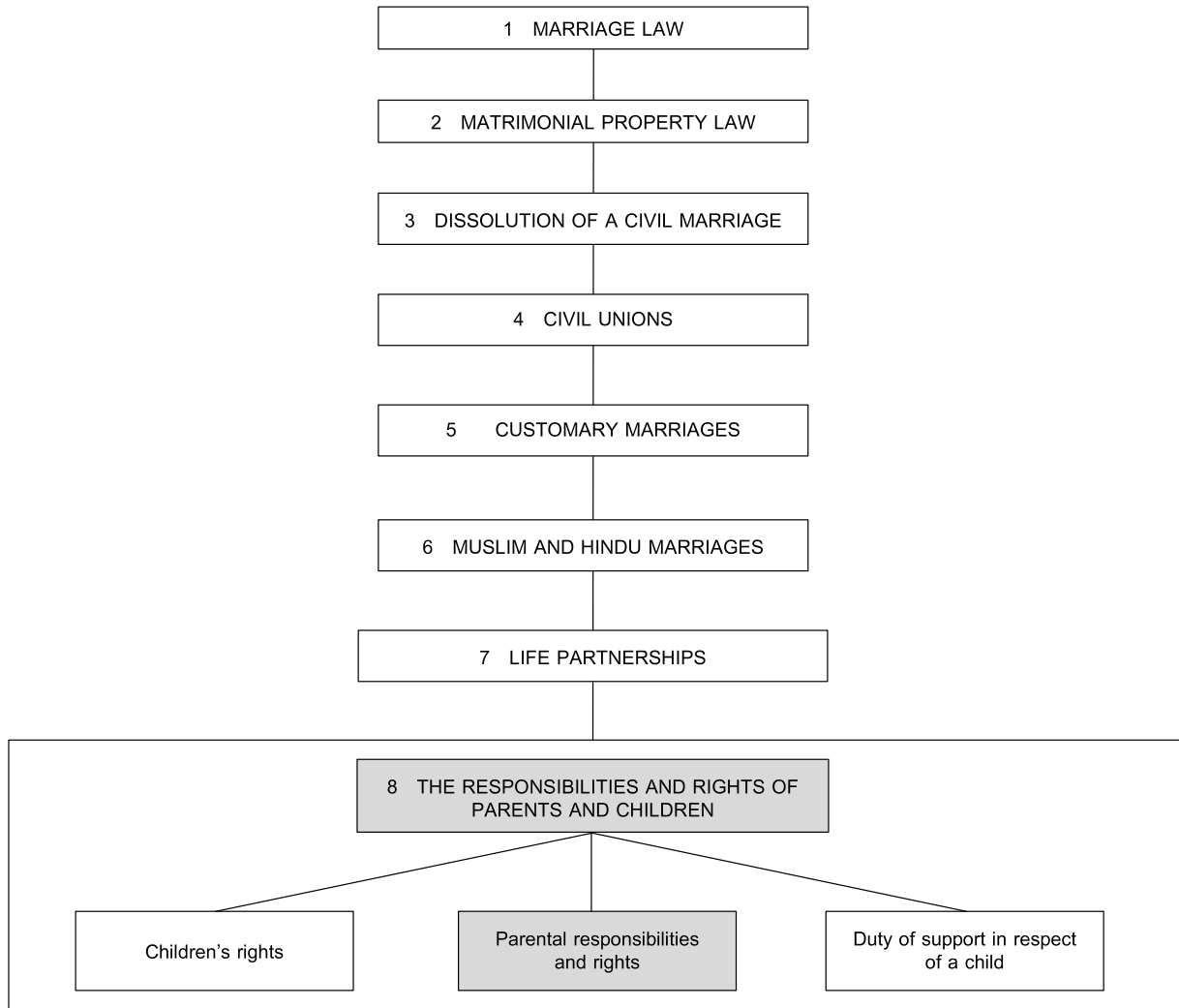
- the children's rights clause (s 28(1) and (2)) in the Constitution
- the supplementary rights afforded to children in terms of the Children's Act

The next study unit deals with parental responsibilities and rights in respect of a child.

STUDY UNIT 19

Parental responsibilities and rights

MODULE MAP



OVERVIEW

In this study unit you will learn more about parents' responsibilities and rights towards their children. You will encounter some of the concepts that you have already learnt about in study unit 13 (dealing with the interests of the children of divorcing parents), such as guardianship, care and contact.

PURPOSE OF THIS STUDY UNIT

After studying this study unit you should be able to

- explain the contents of parental responsibilities and rights

- explain what a parent having guardianship entails
- explain what a parent having care entails
- explain what a parent having contact entails
- discuss the ways in which a person can acquire parental responsibilities and rights in respect of a child
- discuss the limitations on co-holders of parental responsibilities and rights to exercise these responsibilities and rights independently
- list the ways in which parental responsibilities and rights are terminated

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 283 to 292 (up to just before “(d) Consent”)
- Prescribed textbook pages 298 (from “23.3 The position when more than one person has parental responsibilities and rights in respect of a child”) to 301
- Prescribed textbook page 319 (“23.6 Termination of parental responsibilities and rights”)

CONTENT OF THIS STUDY UNIT

1 THE CONTENTS OF PARENTAL RESPONSIBILITIES AND RIGHTS

1.1 General

On page 283 of the textbook you will see that the common-law term “parental authority” has been replaced with a new term “parental responsibilities and rights”. Make sure that you know what these responsibilities and rights consist of. Note that they include contributing to a child’s maintenance. This aspect of parental responsibilities and rights will be discussed in the next study unit (study unit 20). Other aspects of parental responsibilities and rights will be discussed below in paragraphs 1.2 to 1.3.

1.2 Guardianship

As all children have one or more guardians, you may ask what it is that a guardian must do for a child. You will find the answer to this question on page 283 of the textbook under this heading. You should also note the statutory provision in terms of which guardianship is defined (and subparagraph (a) under paragraph 3.2 of study unit 13).

1.3 Care

Note the definition of care as set out in section 1(1) of the Children’s Act, as well as the broad decision-making powers and discretion that the care-

giving parent has in respect of the day-to-day life of the child. These aspects are set out on pages 284 and 285 of the textbook. (Note also subparagraph (a) under paragraph 3.3 of study unit 13.)

1.4 Contact

Note the meaning of contact and how it can take place, which are discussed on page 285 of the textbook. (See also subparagraph (a) under paragraph 3.4 of study unit 13 in this regard.) An interesting aspect to take note of here is the fact that, while a person exercises his or her right of contact, he or she can temporarily exercise certain responsibilities and rights that resort under care. Note the court's decision in *Allsop v McCann* in this regard.

2 WAYS OF ACQUIRING PARENTAL RESPONSIBILITIES AND RIGHTS

2.1 General

As you will see below, there are many ways in which a person can acquire parental responsibilities and rights in respect of a child.

2.2 Birth

Make sure that you know when a biological mother, a biological mother's guardian, a birth mother, a surrogate mother and/or her spouse, a civil union partner or partner in a permanent relationship and (a) commissioning parent(s) obtain(s) parental responsibilities and rights in respect of a child. This is explained on page 286 of the textbook.

2.3 A marriage or civil union with the child's mother at the time of the child's conception or birth or at any intervening time

On pages 286 and 287 of the textbook you will see that it is not only a man, but also a woman, who can obtain parental responsibilities and rights in this way. Note also the wide definition of marriage in terms of the Children's Act.

2.4 A marriage or civil union between the child's parents after the child's birth

All you have to know of the discussion under this heading on page 287 of the textbook is that the father of a child born of unmarried parents obtains full parental responsibilities and rights in respect of the child if he marries (in terms of the Marriage Act or the Recognition of Customary Marriages Act or according to the tenets of their religion) or enters into a civil union (in terms of the Civil Union Act) with the mother after the child's birth.

2.5 A permanent life partnership between the parents at the time of the child's birth

In the last paragraph on page 287 you will see that an unmarried biological father automatically acquires full parental responsibilities and rights in respect of his child if at the time of the child's birth he lived with the child's mother in a permanent life partnership that falls outside the scope of the Civil Union Act.

2.6 Acknowledging paternity and contributing to the child's upbringing and maintenance

As you will see on page 288 of the textbook this is another way in which an unmarried biological father can acquire full parental responsibilities and rights in respect of his child.

2.7 A parental responsibilities and rights agreement

Note that an unmarried biological father or any other person who has an interest in the child's care, wellbeing and development can obtain parental responsibilities and rights in this way. Note also pages 288 and 289 of the textbook, where the requirements for a parental responsibilities and rights agreement to become enforceable are discussed, and page 289, where the way in which an enforceable parental responsibilities and rights agreement can be terminated or amended is discussed.

2.8 Assignment by an order of court

Make sure that you know the three ways in which a person who does not have parental responsibilities and rights in respect of a child can acquire them by means of a court order. These are explained on pages 289 and 290 of the textbook.

2.9 Appointment in a will

Note the content of the three statutory provisions in terms of which a person who has sole guardianship or sole care of a child can appoint another person to act as his or her successor after his or her death in a will, as set out on pages 290 and 291 of the textbook.

2.10 Adoption

(a) General

Adoption is the last way in which a person can acquire full parental responsibilities and rights in respect of a child.

(b) An adoptable child

Make sure that you know what an adoptable child is, as set out on page 291 of the textbook.

(c) The adoptive parent(s)

Make sure that you know who can adopt a child, as set out on pages 291 and 292 of the textbook.

ACTIVITY

Answer the following questions on the acquisition of parental responsibilities and rights:

- (1) Name six ways in which an unmarried biological father can acquire parental responsibilities and rights in respect of his child.
- (2) Name four ways in which a woman can obtain parental responsibilities and rights in respect of her lesbian partner's child.
- (3) Name four ways in which a grandparent can acquire parental responsibilities and rights in respect of his or her grandchild.

FEEDBACK

- (1) See paragraphs 2.4, 2.5, 2.6, 2.7, 2.8 and 2.10 above for the answer to this question.
- (2) See paragraphs 2.3, 2.7, 2.8, and 2.10 above for the answer to this question.
- (3) See paragraphs 2.2, 2.7, 2.8 and 2.10 above for the answer to this question.

Note that paragraph 2.9 above might also be relevant for the persons mentioned in questions (1) to (3) of this activity.

3 THE POSITION WHEN MORE THAN ONE PERSON HAS PARENTAL RESPONSIBILITIES AND RIGHTS IN RESPECT OF A CHILD

3.1 General

Note that the co-holders of parental responsibilities and rights may exercise their responsibilities and rights independently. As you will see below, however, there are instances where they will have to obtain each other's consent, consult each other or agree or seek to agree on certain things.

3.2 Guardianship

After memorising the juristic acts for which all guardians of a child must give their consent, you may ask what would happen if one parent wants to emigrate with his or her child despite the other parent's objection. You will find the answer to this question on pages 299 and 300 of the textbook. Make sure that you know how the courts have dealt with this relevant and vexing problem to date. The decisions of the Supreme Court of Appeal in *Jackson v Jackson* and *F v F* are very important in this regard. Also note all the factors which will play a role when the courts have to make a judgment in this regard.

ACTIVITY

Short scenario: Mrs Botha, the care-giving parent of Sean and Nellie, wants to emigrate to Sidney, Australia with the children, because her new husband has been offered a fantastic job there. As she knows that her ex-husband, Mr Botha, who is actively involved in the day-to-day lives of Sean and Nellie, will not give his consent for the children to emigrate to Australia, she approaches the High Court for an order authorising her to emigrate with the children. Mr Botha vehemently opposes this application as he feels that Sean and Nellie, who are now 16 and 17 years old respectively, must finish their schooling in South Africa. He also does not want to have less contact with the children. Sean would like to stay in South Africa because he is a keen provincial soccer player, while Nellie is uncertain whether she would like to stay or emigrate with her mother and stepfather.

What you have to do: Which factors do you think will determine the court's decision in this scenario?

FEEDBACK

Some guidelines before you start writing anything: Note that the answer to the above question will not come solely from this study unit, but also from study unit 13 dealing with the interests of the children of divorcing parents. You will have to focus on the factors that are listed in section 7(1) of the Children's Act, the reasonableness of Mrs Botha's decision to emigrate, the practical and other considerations on which the decision is based, the extent to which she has engaged with and properly thought through the real advantages and disadvantages of the proposed emigration for Sean and Nellie, Sean and Nellie's best interests and their wishes. You will also have to discuss the Supreme Court of Appeal's decisions in *Jackson v Jackson* and *F v F*.

3.3 Due consideration of the views and wishes of other co-holders

Note the extent of this limitation on a co-holder's decision-making powers as set out on page 300 of the textbook.

3.4 Surrender or transfer of parental responsibilities and rights is prohibited

All you have to know of the discussion under this heading on pages 300 and 301 of the textbook is that co-holders may agree that one of them and nobody else will exercise any or all of the responsibilities and rights on behalf of the other co-holder(s).

3.5 Parenting plan

As you will see on page 301 of the textbook, co-holders who experience difficulties in exercising their parental responsibilities and rights must first seek to agree on a parenting plan by attending mediation or consulting a Family Advocate, social worker or psychologist before they will be allowed to approach the court for the resolution of their disputes. Make sure that you know what may be included in parenting plans and what formalities must be complied with for these plans to be registered with a Family Advocate or made an order of court. Lastly, note the ways in which such parenting plans may subsequently be amended or terminated.

4 TERMINATION OF PARENTAL RESPONSIBILITIES AND RIGHTS

The ways in which parental responsibilities and rights are terminated are listed on page 319 of your textbook. You have to study that list.

SUMMARY

This study unit dealt with various aspects of parental responsibilities and rights.

To refresh your memory and to contribute to your understanding, write a few notes on the following:

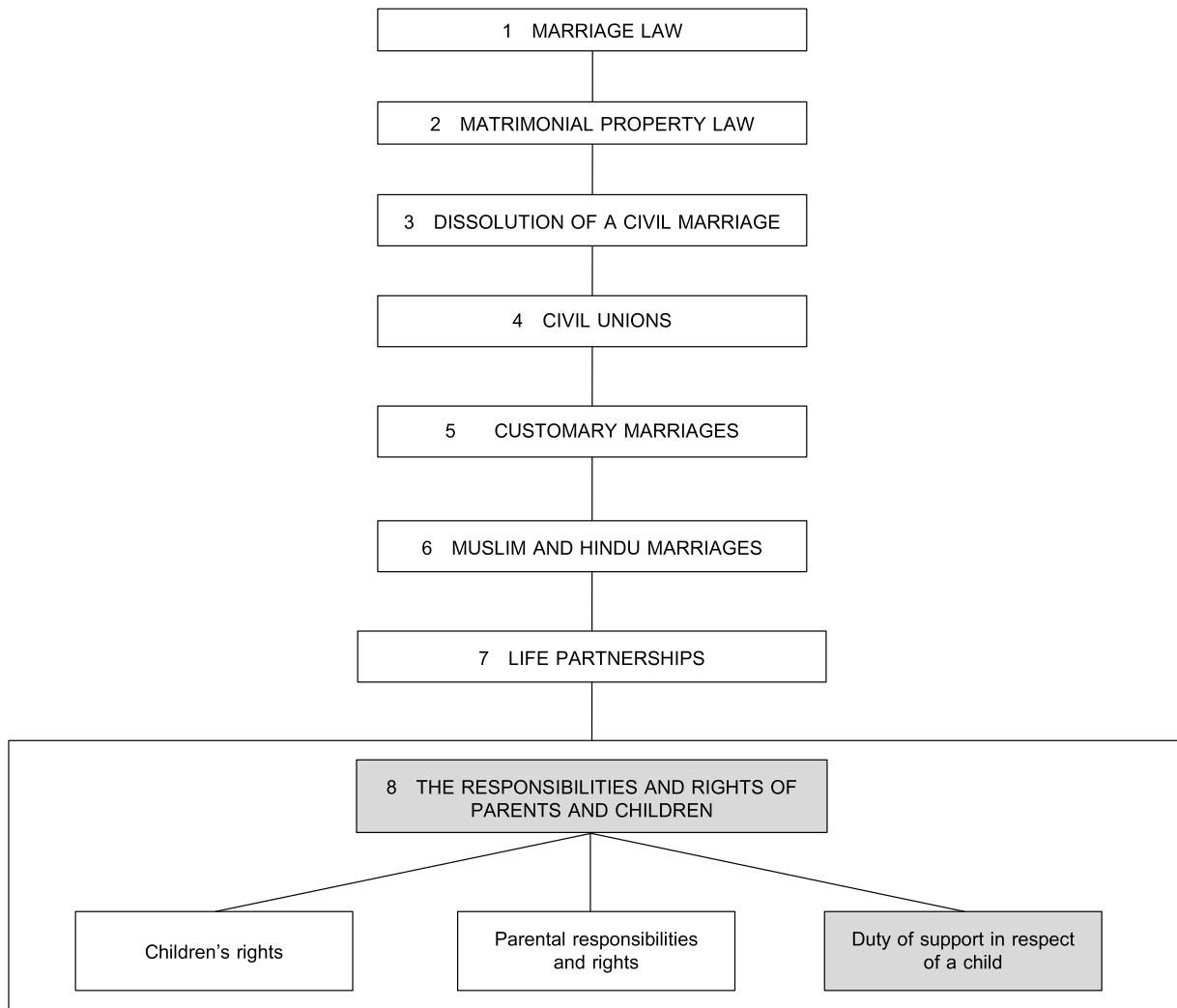
- the contents of parental responsibilities and rights
- the meaning of guardianship
- the meaning of care
- the meaning of contact
- how parental responsibilities and rights are acquired
- the limitations on co-holders to exercise parental responsibilities and rights independently
- the termination of parental responsibilities and rights

The next and final study unit deals with the duty of support in respect of a child.

STUDY UNIT 20

The duty of support in respect of a child

MODULE MAP



OVERVIEW

In the previous study unit we looked at the content of parental responsibilities and rights, the acquisition thereof, the position where more than one person have parental responsibilities and rights in respect of a child and the termination of parental responsibilities and rights.

In this study unit we shall discuss the duty of support in respect of a child, which is another aspect of parental responsibilities and rights. We shall look at the people who are responsible for a child's support and the scope, the enforcement, the termination and the reciprocity of the duty of support.

PURPOSE OF THIS STUDY UNIT

The purpose of this study unit is to enable you to

- explain that parents, grandparents, 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
- explain the scope of the duty of support
- briefly indicate how the duty of support is enforced
- indicate when the duty of support ends
- explain that the duty of support is reciprocal

PRESCRIBED LEARNING MATERIAL

- Prescribed textbook pages 322 (from “24.2 The persons who are obliged to support a child”) to 329

CONTENT OF THIS STUDY UNIT

1 INTRODUCTION

Note that you do not have to study this paragraph.

2 THE PERSONS WHO ARE OBLIGED TO SUPPORT A CHILD

On pages 322 and 323 of your textbook it is explained who has a duty of support in respect of a child. They are

- the child’s parents – their duty of support exists *ex lege* (by operation of the law)
- the child’s grandparents – the duty of support passes to them if neither parent can support the child
- the child’s siblings – the duty of support passes to the child’s siblings if neither the parents nor the grandparents are in a position to support the child
- a person who is not the child’s parent, grandparent or sibling, but has care of the child in terms of a court order, a parental responsibilities and rights agreement which has taken effect, or an appointment by a parent who had sole care of the child while the parent was still alive
- a step-parent – at common law, a step-parent is not obliged to maintain his or her stepchild, as the duty to support rests on blood relationship, and not affinity. However, note the decision in *Heystek v Heystek* in which the opposite view was expressed – namely that a step-parent is obliged to maintain his or stepchild because the Constitution obliges a step-parent to provide his or her stepchild with parental care.

3 THE SCOPE OF THE DUTY OF SUPPORT

Next, you have to take note of all the circumstances that may have an effect on the scope of maintenance payable and the standard at which maintenance must be provided in respect of a child. These circumstances are explained on pages 324 and 325 of the prescribed textbook.

4 ENFORCEMENT OF THE DUTY OF SUPPORT

On page 325 of the textbook, you will see that, in terms of section 305(4) of the Children's Act, a person who is legally liable for maintaining a child and who fails to provide maintenance to the child while able to do so is guilty of an offence.

5 RECOVERY OF EXPENSES RELATING TO SUPPORT

You do not need to have an in-depth knowledge of the discussion under this heading. You only have to know that a person who has supplied maintenance to a child does not have right of recourse against the child. However, one parent can recover any amount he or she spent in excess of his or her *pro rata* share from the other parent.

6 TERMINATION OF SUPPORT

When you study pages 326 to 328 of the textbook you will see that the duty of support ends in the following cases:

- the death of the child, but not the death of the parent
- the child's adoption
- when the child becomes self-supporting
- if the child enters into a marriage or a civil union (note that then the child can still claim maintenance from his or her parent, grandparent, brother or sister)

Note further that there might be a difference between the termination of a maintenance order and termination of the duty of support in respect of a child, as is explained under the heading "24.6.2 Termination of an order regarding a child's maintenance" on page 328 of the textbook.

7 THE RECIPROCITY OF THE DUTY OF SUPPORT

On pages 328 and 329 of the textbook you will see that the principle of reciprocity applies in respect of the duty of support between parent and child. This means that a child must support his or her parents in the same way as the parents must support the child. Similarly, a grandchild must

support his or her grandparents in the same way as the grandparents must support the grandchild. Study the requirements for the existence of this duty of support as they are set out in your textbook.

ACTIVITY

Short scenario: Mr and Mrs Nel, who are wealthy farmers in the Cape, have a 19-year-old son, John. John and his girlfriend, Sarah, have a son, Timothy. Since John and Sarah are both full-time students, they earn no income. Mr and Mrs Nel are of the opinion that they are not responsible for Timothy's maintenance. Discuss, with reference to case law, the way in which our law has been reformed in this respect.

What you have to do: Fully discuss whether paternal grandparents have a duty of support in respect of their grandchildren born of unmarried parents.

FEEDBACK

Some guidelines before you start writing: The question relates to persons who are obliged to support a child. You will have to investigate whether grandparents, in particular paternal grandparents, are obliged to support their grandchild born of unmarried parents. Remember to refer to case law in your answer. Finally write a conclusion based on your arguments.

SUMMARY

In this study unit you learnt about the duty of support in respect of a child.

To refresh your memory and to contribute to your understanding, write a few notes on the following:

- the duty of support of parents, grandparents and siblings in respect of a child
- whether all people who have care of a child are obliged to support the child
- whether a step-parent is obliged to support his or her stepchild
- the scope of the duty of support
- the enforcement of the duty of support
- the termination of the duty of support
- the reciprocity of the duty of support