FAMILY LAW:

The engagement – is a contract between a man and woman to marry each other on a specific or determinable date. A valid engagement is not a prerequisite for a valid civil marriage. No special requirements are required for the conclusion of a engagement, which means that the contract can be concluded orally or in writing. Mistakes – error in persona – the woman or man for instance thinks he or she is marry x while she is actually marrying y. This means that there is a case of mistaken identity regarding the person to whom a party becomes engage to.

Erro in negotia – one of the parties could consider that promise as merely an informal agreement or a joke. These material mistakes results in the engagement being void and thus neither party can claim for damages on the basis of breach of promise.

Misrepresentation occurs when one of the parties to the contract makes a false representation to the other concerning facts which had the other known the truth, would have resulted in the contract not being concluded at all or else concluded on different terms.

Capacity to act – both parties to the engagement must have the capacity to act. A minor must obtain his or her parents (both parents unless courts has awarded sole guardianship to one parent)/legal guardian if both parents deceased permission to become engaged, ratification is also sufficient. Minor below 18 who has already been married and now divorced does not require parental consent. Emancipated minor has to obtain parental consent. Mentally ill person does not have the capacity to become engagement as long as the illness lasts.

Lawfulness – parties must be unmarried. A promise by a married person to marry after obtaining a divorce is void – contra bonos mores – against good morals.

Grounds for termination –
- couples marriage
- the death of either of the parties
- a mutual agreement to terminate the engagement
- withdrawal of parental consent where one person is a minor
- a unilateral and justified termination based on sound reason – justa causa – is best expressed as a fact or an occurrence which comes about after the engagement has been entered into and which according to human experience seriously jeopardizes the chances of a happy and lasting marriage. Examples are – becoming sterile, impotent, developing serious heredity disease, committing a serious crime, becoming mentally ill, becoming an alcoholic. Examples of circumstances that do not qualify as justa causa are – disagreements between parents and parties regarding wedding arrangements, one party no longer loves the other.
- breach of promise – the innocent party is allowed to withdraw from the engagement if the other party commits to breach of promise.
Damages for breach of promise – general rule is that damages for patrimonial loss are calculated on the basis of positive interest. This means that the innocent party is entitled to damages which would place him or her in the position he or she would have been in had the contract been fulfilled.

**PRESCRIBED CASE - SCHNAAR V JANSEN** – breach of promise to marry – justa causa. The plaintiff was engaged to the defendant. After they got engaged the defendant discovered that one of the plaintiff’s uncle had a black wife, that another had been hanged for his wife’s murder and that her brother had been convicted of housebreaking and theft. The defendant thereupon repudiated the engagement. The plaintiff sued him for breach of promise. The defendant admitted breach of promise but averred that the abovementioned circumstances rendered it impossible for him to comply with his promise to marry the plaintiff and that repudiation was justified. The plaintiff accepted to the defendant’s plea and the exception was allowed as was the claim. The court held that these circumstances did not justify unilateral repudiation of the engagement. Judge President Dove-Wilson said “if a man engages himself to a woman without having satisfied himself as to her relatives he takes the risk of their being unsatisfactory” Some authors accept this decision whilst some do not. Van Heerden suggests that this decision is incorrect as “an engagement to marry is a contract of utmost good faith and a party with a skeleton in his/her cupboard is obliged to disclose it”

**PRESCRIBED CASE - GUGGENHEIM V ROSENBAUM** – breach of promise to marry – damages – In 1943 the plaintiff was divorced at Reno in the American state of Nevada. At that stage she was domiciled in the state of New York. While she resided in New York she met the defendant, who was on a visit to the United State. The defendant domiciled in S.A. They fell in love and in New York the defendant asked the plaintiff to marry him. It was agreed that the marriage would take place in S.A. The plaintiff gave up her flat, sold her motor vehicle and some of her furniture had the rest of her furniture put into storage and gave up her employment. When she arrived in Cape Town the defendant met her and repeated his promise to marry her. The parties went to Johannesburg, where the defendant refused to marry the plaintiff. She sued him for damages for breach of promise. In reply he pleaded 2 special defenses:
   1. That the plaintiff’s divorce could not be recognized in terms of S.A law since she and her husband were divorced in a state in which they were not domiciled. The defendants promise to marry the plaintiff was therefore void as being contra bonos more on the ground that the plaintiff was still legally married.
   2. That the law of the state of New York had to be applied to the matter. New York did not allow the plaintiff to recover damages for breach of promise and the plaintiff’s claim for damages should therefore be rejected.
The defenses were rejected and the plaintiffs claim for damages was allowed.

Plaintiffs claim for damages was decided as follows:

- Loss on sale of motor vehicle – court rejected plaintiffs claim as she could not prove that the vehicle was sold below its market value.
- Cost of packing and storing belongings – plaintiff proved these expenses – R187
- Loss of earnings – court found that plaintiff was supported by defendant for a period of time and that she then found employment in JHB and plaintiff could not prove that this income was lower than her previous one. Her claim was therefore rejected.
- Loss of apartment – court rejected this claim as she could not prove that she would pay a higher rental for another apartment should she decided to return to New York
- Cost of returning to New York – rejected
- Prospective loss – the probability would have been that parties would have married and excluding the community of property and profit and loss. In the absence of proof to the contrary it must be assumed against the plaintiff that no marriage settlement would have been made on her in the anc. Taking into consideration that the defendant is a man of affluence and occupies a position of life that is superior to her own, she would have therefore derived material benefits from their marriage – R2000 was approved.
- Delictual damages – R500 awarded.

Return of the engagement gifts:

If parties mutually agree to terminate engagement or due to justa cuasa, all gifts including rings must be returned by both parties. Gifts already used up need not be. Breach of promise – the innocent party is entitled to the sponsalitiae and arrhae sponsalitiae (gifts made to show seriousness of the promise to marry – engagement ring) he or she gave to the guilty party. Small unconditional gifts may be retained by the guilty party. The innocent party may retain the arrhae sponsalitiae and the sponsalitiae largitas (small gifts made with view of marriage) he or she received. If the innocent party claims damages the value of the gifts retained must be set off against claim for damages.

ENGAGEMENT:

A valid engagement is not a prerequisite for a valid civil marriage. If one of the parties is under the impression that’s it’s a joke no engagement comes into place. If one of the parties has promised something like if he gets an increase in salary then he will marry the engagement is still valid. When a party to the engagement refuses to proceed with the marriage, the engagement ring that was given to this party must be returned.
BREACH OF PROMISE:
Examples are – when one of the parties terminates the engagement after he realizes he does not love the other. When one of the parties continuously refuses to agree to a wedding date, when one of the parties enters into a marriage with another.

Ex parte Dow – it was held that a marriage concluded in a garden is perfectly valid.

Putative marriages – ought to come into existence even if all the formalities were not complied with at the solemnisation of the marriage. A court cannot declare a putative marriage valid. The children born from a putative marriage are legitimate.

Davel v swanepoel – the defendant kept the plaintiff in s trying and secretly married a third party without first terminating the engagement.

Smit v Jacobs – the defendant secretly entered into a marriage with third party without terminating the engagement first.

Guggenheim v Rosenbaum – the defendant father having concluded an engagement denied all knowledge of its existence.

LEGAL REQUIREMENTS FOR THE CONCLUSION OF A VALID CIVIL MARRIAGE:

Marriage is traditionally defined as the legally recognized life long voluntary union between two parties to the exclusion of all others.

Capacity to act – mentally ill persons - if they enter into marriage the moment this occurs marriage is void. Infant (children below age of 7) do not have the capacity to act. Prodigals (a person with normal mental ability but who is unable of managing his or her own affairs because he or she squanders his or her assets in an irresponsible reckless way as a result of some defect in his or her power of judgment of character) may marry without consents.

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

Ex parte Dow – applicant applied for an order declaring this marriage null and void because the wedding had taken place, in conflict with section 29(2) of the marriage act, in front of a garden. Marriage was declared valid.

Consensus – forms the basis of and is fundamental requirement for entering into a marriage. Both parties must have the will to marry each other. Error in persona and error
in negotio are the only forms of material mistakes recognized in connection with marriage.

Misrepresentation – if one party misleads another prior to marriage by making false statements or creating a false impression by concealing information which should have been divulged and thereby persuades the other to enter into marriage, marriage is voidable if misrepresentation was of a serious nature.

Duress - if one spouse was forced to consent to the marriage by duress, the marriage is voidable. In smit v smit the woman was coerced to such an extent by her father and prospective husband that she appeared dazed and lacked the will of her own during the wedding. The court concluded that the duress rendered the marriage voidable and therefore set marriage aside. Undue influence also renders a marriage voidable; generally an unlawful marriage is void.

Persons within the prohibited degrees of relationship – our law prohibits marriage between persons within certain degrees of relationship. Marriages entered into in conflict with this prohibition are void.

**RELATIONSHIPS prohibited -**

- Consanguinity – relationship which is created by birth between persons. It is irrelevant if legitimate or illegitimate (blood relationship) – direct line – your parents, your children.
- Consanguinity (blood relationship)– collateral line – your brothers, sisters, nephews, nieces and cousins
- Affinity - relationship that comes into place by marriage and blood relations of spouses (relationship by marriage) – direct line – your parents in law, your step children
- Affinity (relationship by marriage) – collateral line – your sister in law, brother in law
- Ascendants – your grandparents, your parents
- Descendants – your children, your grandchildren

**BLOOD LINES:**

- Cousins may not marry each other
- A woman may not marry her deceased husband's father
- A man may not marry his sisters daughter
- A man can marry his deceased’s brother wife
- A stepchild is a relative by affinity in the direct line
- You and sister in law – affinity in the collateral line
Formalities preceding the marriage ceremony – section 12 of the marriage act provide that a marriage officer may not solemnize a marriage unless each party furnishes his or her identity document or prescribed affidavit. For marriage both parties must be present personally. No one can conclude a valid marriage through representation. Marriage officer who solemnizes a marriage, the parties thereto and 2 competent witnesses must sing marriage register immediately after marriage has been solemnized.

VOID, VOIDABLE AND PUTATIVE CIVIL MARRIAGES:

VOID MARRIAGE - a void marriage is one which has simply never come into existence. The position is thus exactly as it would have been had the “marriage” never been concluded

Ground for nullity –

- Marriage is solemnized by someone who is not a competent marriage officer
- No witnesses present at marriage
- One party is already married
- The parties are related to each other within the prohibited degrees of relationship
- One of the parties is below age of puberty
- One of the parties is mentally ill

A CONSEQUENCE OF A VOID MARRIAGE – a marriage is void ad initio – from the outset – does not have legal consequences of a valid marriage.

VOIDABLE MARRIAGE – is a marriage in which grounds are present either before or at the time of the wedding, on the basis of which the court can be requested to set the marriage aside.

Grounds for setting aside:

- Minority
- Stuprum – extra marital sexual intercourse with a third party before the marriage
- Material mistake
- Impotence
- Sterility

CONSEQUENCES OF A VOIDABLE MARRIAGE: A voidalbe marriage remains in force and has all the normal legal consequences of a valid marriage until it is set aside by a court order.
PUTATIVE MARRIAGE – exists when one of the parties to the marriage or both of them married unaware that there is a defect which renders the marriage void. At the time of entering into the marriage the particular party therefore believes in good faith that he or she is entering into a valid civil marriage (example parties did not know that they were related within the prohibited degrees of relationship). Both parties must be unaware of defect.

CONSEQUENCES OF A PUTATIVE MARRIAGE:
Is void ab initio, it has some of the legal consequences of a valid marriage for as long as at least one of the parties is bona fide, one of the parties on reasonable grounds was unaware of defect that renders the marriage void.

PRESCRIBED CASE – MOOLA V AULSEBROOK:
The applicant and her deceased husband had gone through a marriage ceremony in accordance with Islamic rites by a priest who was not a duly appointed marriage officer. Neither spouse was aware that they had to be married by a duly appointed marriage officer. The spouses lived together in monogamy from date of wedding until the husband’s death. They had seven children. When the husband died it was discovered that his will was invalid and his estate therefore had to devolve intestate. The applicant applied for an order declaring the children to be legitimate to enable them to inherit from their father. (At that time extra marital children could not inherit from their father in terms of the rules of intestate succession). The application was based on the argument that the marriage between the children’s parents was a putative marriage even though the statutory requirements for solemnization of a marriage had not been complied with. The application was granted. In this case the court had to decide whether or not a putative marriage can come into existence if the marriage was not duly solemnized.
At common law due solemnization was a prerequisite for a putative marriage. There are however many cases which are authority for he view that as long as the marriage was “contracted openly and in accordance with rituals and ceremonies not inconsistent with our law” it can be putative (ex parte anzar, ex parte l, ex parte soobiah, ex parte Reynolds)
**PRESCRIBED CASE - SOLOMONS V ABRAMS:** due solemnization as a requirement for a putative marriage.

The parties entered into a Muslim marriage. There was no evidence that they attempted or intended to comply with the requirements of the marriage act. Nor did they make any attempt to establish what those requirements were. They did not think that they had entered into a civil marriage. The priest did not hold himself out as being authorized to solemnize a civil marriage or as purporting to solemnize such a marriage. The applicant sought an order declaring that the union between the parties was putative civil marriage and that the children born thereof were legitimate. The application was dismissed. Parties did not think that the moulana was a marriage officer. Their evidence is not that they thought that they had become spouses in a civil marriage. There is no evidence of attempting or intending to comply with the requirements of the marriage act.

**THE INVARIABLE CONSEQUENCES OF A CIVIL MARRIAGE:**

Refers to personal consequences to marriage.

Status of spouses change – neither spouse may marry anyone else whilst marriage subsists, spouses are guardians of children born of marriage, relationship by affinity is created, spouses married in cop capacity to act is restricted, minor attains majority and retains it even if marriage dissolved.

Legal concept of consortium Omnis vitae is used in our law to determine when a marriage relationship is no longer normal. This concept includes material and immaterial things. By this we mean that this concept does not have a precise definition as virtually all the objects of all the rights emanating from marriage can be grouped together. In Grobblelaar vs Havenga – this concept was described an “an abstraction comprising the totality of a number of rights, duties and advantages accruing to the spouse of a marriage. This totality comprises inter alia “companionship, love, affection, comfort, mutual services, sexual intercourse. In Peter vs Minister of Law and order it was said that the concept is used “ as an umbrella word for all the legal rights of one spouse”

Spousal maintenance – from its beginning to its end marriage imposes a reciprocal duty of support between spouses, provided that the spouse whom claims maintenance is in need of it and the spouse from whom it is claimed is in a position to provide it. Duty of support arises at the beginning of the marriage, that is, as soon as the marriage has been solemnized. Requirements for the duty of support between spouses , there must be a valid marriage between the parties, the person claiming support must be in need of support ,the person from whom the support is claimed must be able to provide it.
**PREScribed CASE - EXCELL V DOUGLAS** – liability for household necessaries when there is no joint household.

The defendant and his wife are married in community of property. They agreed to apart. For the duration of the separation, the husband paid his wife an allowance. In 1923 a court ordered him to pay his wife 20 pounds per month. A number of years after their separation, the wife bought clothes on credit. When she refused to pay for the gods, the storekeeper demanded payment from the defendant. He denied liability on the ground that the spouses were living apart and that he was paying his wife a monthly allowance. The court a quo held that a husband is indeed liable for household necessaries his wife buys while they are living apart, owing to an agreement between them. The defendant appealed against this decision. The appeal was upheld.

The question as to when and how far a wife can bind her husband by her contracts is dealt with by a large number of roman Dutch law writers, and has often been discussed in our courts.

This case deals with the basis of one spouse’s liability for goods the other spouse purchased on credit while there was no common household between them. One spouse has the capacity to bind the other and, if the marriage is in cop, the joint estate, for household goods only if 3 requirements are met: there must be a valid marriage between the parties, the parties must share a joint household, the transaction in question must relate to household necessaries.

As was pointed in this case once the joint household comes to an end, one spouse can no longer bind the other spouse in contract for household necessaries – one of the requirements for contractual liability is absent, namely joint household.

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**PREScribed CASE - RELOOMEL V RAMSAY**: liability for household necessaries

Dr Ramsay and his wife were married out of cop. Dr Ramsay went to England and left his wife and children behind in Potchefstroom. There was no disagreement between the spouses and they were therefore not separated in the legal sense. Dr Ramsay gave his wife a very meager allowance of 15 pounds per month while he was away. During his absence his wife exceeded her allowance. On Dr Ramsay’s return, the plaintiff demanded payment for the debts Mrs Ramsay had incurred. Dr Ramsay refused to pay. He averred that the goods that the plaintiff had supplied to his wife were not household necessaries that his wife had had no right to pledge his credit, and that as their marriage was out of cop he was not liable for debts she incurred. The court a quo allowed the plaintiffs claim in respect of several items but refused to allow his claim for payment for silk and other fabric, as it did not consider them to be household necessaries. The plaintiff appealed against this decision. The appeal was upheld and Dr Ramsay was ordered to pay for the dress fabric as well.

In this case the court inter alia set out how one should determine whether a particular item is a household necessary. The court emphasized that factors such as the spouses standard of living, their means, the customs of the people in their area and so forth must be considered. The subjective approach was used in terms of which the matter is viewed from the prospective of the dealer. In terms of the subjective approach the court looks at
the facts of which the dealer was aware or should be reasonably aware. It held tat ,because the dealer did not even know that Dr Ramsay was away it was irrelevant that Dr Ramsay had given his wife money so that she did not have to buy on credit.

Court held that one spouse cannot limit regarding necessary household expenses others capacity to buy household necessaries on credit by making funds available to him or her with which household necessaries must be bought. The facts in this case were viewed from the third parties point. . Subjective approach test used ,the matter is viewed from the dealers point of view and considers only the facts of which the dealer was aware of which he or she could reasonably have been expected to be aware. Subjective approach affords better protection to third parties.

MAINTENANCE ACT – Expressly provides that it applies in respect of legal duty of any person to maintain any other parties irrespective of nature of the relationship between those persons giving rise to the duty.

Orders the court may make: If a maintenance order is not already in operation a maintenance court may make an order against the liable person for the payment of maintenance. An order for periodical payment of sums of money towards the maintenance creditor’s maintenance, a maintenance order can include any provision the court deems fit regarding payment of medical expenses iso the maintenance creditor, maintenance court substitute or discharge a maintenance order that is in place.

Enforcement of a maintenance order – the maintenance act provides for civil and criminal sanctions for failure to comply with a maintenance order. Civil sanctions if a maintenance debtor fails to make payment in accordance with a maintenance order within 10 days from the date on which payment becomes payable the maintenance creditor may apply for a warrant of execution against the maintenance debtors property, an order for attachment of emoluments (salary, wages, remuneration), an order for the attachment of any present or future debt owing or accruing to the maintenance debtor.

Matrimonial home – during the subsistence of the marriage both spouses are entitled to live in the matrimonial home and to use the household assets (such as furniture and appliances) irrespective of whether they are married in or out of cop and irrespective of which spouses owns or rents the matrimonial home. It is sui generic (that is unique) and invariable a consequence of marriage.

Parental authority – as a result of marriage both parents have equal guardianship over their children.

Donations between spouses- are allowed.
PRESCRIBED CASE - BANNATYNE V BANNATYNE – enforcement of a maintenance order.
When the parties were divorced in the Pretoria high court in 1999, a settlement order providing for the payment of maintenance to the wife and the children was incorporated into the decree of divorce. The husband also undertook to retain the children on his medical aid scheme and to pay their reasonable medical expenses. The husband did not pay maintenance regularly. Towards the end of 1999 he obtained a reduction of maintenance in the maintenance court. The order of the maintenance court replaced the order of the high court. The husband again fell into arrears. He further removed the children from his medical aid scheme and refused to pay their medical expenses. The wife repeatedly approached the maintenance court for enforcement of the maintenance order. Two writs of execution were even issued but failed to produce any money. The wife then approached the high court for an order committing the husband to prison for contempt of court for failing to comply with a maintenance order which had been made at the time of their divorce. The HC committed the husband for contempt of court but this was not a competent order as the order which had been made at the time of the parties divorce had ceased to be of force when the maintenance court order replaced it. The husband appealed to the supreme court of appeal, which held that the wife had not established factual and legal grounds for the granting of a contempt order. The CC granted the wife special appeal and also upheld her appeal against the order of the SC of appeal.

This decision indicates the serious light in which the CC views non compliance with maintenance orders and is most welcome. It is important to note that the CC held that the HC may only be approached for an order committing the maintenance defaulter for contempt of court if there is good and sufficient reason for doing so.

THE VARIABLE CONSEQUENCES OF A CIVIL MARRIAGE – IN COP

Marriages in cop are the primary matrimonial system in S.A.

COP excluded – existence of a valid anc wherein cop and loss excluded, domicilii of husband (so if husband is domiciled in England marriages automatically out), black marriages.

Assets – the moment they enter into a marriage in cop the spouses become co owners of everything that either of them owned prior to marriage. This transfer of ownership takes place automatically by operation of law – so no registration need take place.
Assets excluded are:
1. assets excluded in an anc
2. assets excluded by will or deed of donation
3. assets subject to a fideicommissum or usufruct
4. engagement gifts – jocalia
5. benefits under the friendly society act – section 17
6. non patrimonial damages – any damages claimed fro delict committed against him ,also disability payments
7. cost in matrimonial action
8. assets which replace separate assets

Attachment of separate assets – creditors can look at the assets of both spouses married in cop for recovery of debt. (du plessis v pienaar)

Liabilities – marriages in cop means the merger of liabilities of spouses as well.

**PRESCRIBED CASE - DE WET V JURGENS** – the nature if the spouses liability for their joint debts
The respondent was married in cop. Her husband committed adultery with Ms Shaw. Ms Shaw’s conduct affected the respondent to such an extent that she had to received ate claimed medical treatment. With her husbands consent (which was necessary), the respondent claimed for damages for personality infringement and medical expenses from Ms Shaw. The respondent’s husband was declared insolvent before the damages were paid to the respondent. When the amount was eventually paid, the trustee of the insolvent estate claimed it, as he contended that it fell into the insolvent estate. The trustee argued that the respondent was an insolvent because her husband was an insolvent and that the damages therefore fell into the insolvent estate. The court a quo held that the respondent was an insolvent but that the damages did not fall into the insolvent estate as the amount was excluded in terms of section 23(8) of the insolvency act. The trustee appealed against this decision and his appeal was dismissed.

The appellant division held that spouses who are married in cop are joint debtors in respect of joint debts. The same court had however also held that the spouses remain separate debtors even though the debt has to be paid out of the joint estate.
**NEDBANK V VAN ZYL** – a wife married in cop cannot stand surety for her husband’s debts

In September 1980 the respondent, Mrs Van Zyl, entered into a deed of suretyship with Nedbank Ltd in terms of which she bound herself as surety and co-principal debtor for the repayment on demand of all moneys her husband owed Nedbank on overdraft then and thereafter. At the time of execution of this agreement, Mr and Mrs Van Zyl were married in cop, but in 1982 they were divorced. During 1984 Mr Van Zyl defaulted on his obligations to Nedbank. All Nedbanks endeavors to recover the amount from him were fruitless. Nedbank then sued the respondent for payment of the outstanding amount together with interest and costs. Nedbank sought to hold the respondent liable solely on the ground of deed of suretyship. In the court a quo it was held that the agreement was a nullity and Nedbank’s claim was dismissed. Nedbanks appeal to the appellate division (now SC) was also dismissed.

Court held that spouses married in cop are joint debtors but One spouse that is married in cop cannot stand surety on the others debts because those debts are joint debts and in our law a person cannot stand surety for his or her own debts even if the spouse has assets falling outside the joint estate.

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**MARRIAGE IN COP – ADMINISTRATION OF JOINT ESTATE**

Principle of equal administration of the joint estate – replaced marital power. Wife and husband have same capacity to dispose of assets of the joint estate.

Acts that requires both Spouses consents:

1. prior written consent attested by 2 competent witnesses in respect of each transaction separately – transaction which requires registration at deeds office, transferring immovable property, registering a mortgage or servitude, granting any other real right over such property, suretyship
2. written consent attested by 2 competent witnesses in respect of each transaction separately – a contract to alienate or burden with a mortgage or servitude, receiving any credit, purchasing immovable property
3. only written consent – alienating ceding or pledging stock, shares, debetures, bonds insurance, policies, mortgage bonds, fixed deposits, withdrawing money
4. oral or tacit consent – alienating or pledging furniture, receiving money as remuneration, bonus, pension, gratuity, income from his or her separate property, inheritance, donation, bursary, interest or dividends from shares.
Protection of third parties – the matrimonial property act protects a 3rd party who enters into a transaction with a person married in cop if the third party does not, and cannot reasonably be expected to know that the persons spouses had to consent to the transaction or that necessary consent was not obtained. It such an instance that transaction is deemed to have been entered into with the required consent. The act does not prescribe how it must be established whether the 3rd party could reasonably have known that the required consent was not given. (Distillers corp. ltd v Modise)

Protection of the spouses inter partes – between the parties
- the statutory right to adjustment upon dissolution of the joint estate -
- dispensing with the other spouses consent – court may authorize the transaction in terms of section 16(1)
- suspension of a spouses powers iro of the joint estate
- immediate division of the joint estate
- the interdict
- the common law right of recourse upon dissolution of the joint estate
- the action paulina utilis –
- having the other spouse declared prodigal capacity to litigate – one spouse married in cop may not institute or defend legal proceedings without the other spouse’s approval.

Insolvency – section 17(4) of the matrimonial act provides that an application for the sequestration of a joint estate must be made by both spouses. Compliance with this requirement was preemptory and joiner of both spouses was therefore essential in such proceedings.

Suing for joint debts – act stipulates spouse should be sued when a debt is recoverable form the joint estate.

PRESCRIBED CASE - EX PARTE KROS – application in terms of section 21 (1) of the matrimonial property act.
The applicants applied in terms of section 21(1) of the matrimonial property act for permission to change their matrimonial property system from cop to separation of property with retroactive effect. They were married in 1982 and one child was born of marriage. The wife also had a child from a previous marriage. As reasons for the proposed change, the applicants indicated that they had been ignorant about the legal consequences of cop. Had they known what those consequences and implications were, they would have not married in cop. The wife intended to leave one third of her estate to her husband and the balance to her children. This she could not do if the matrimonial property system was not changed. Furthermore the husband intended to start his own business, which could jeopardize the assets the wife had brought into the joint estate, since they could be attached should the business fail. The application was granted. It should be borne in mind that it is no longer possible to introduce the accrual system by means of the registration of a notorial contract in terms of section 21(2) of the act.
EX PARTE OOSTHUIZEN – application in terms of section 21(1) of the matrimonial property act. The applicants were married in cop. They subsequently applied in terms of section 21(1) of the matrimonial property act for permission to change their matrimonial property system from cop to separation of property with the retroactive effect. The application was dismissed.

THE VARIABLE CONSEQUENCES OF A CIVIL MARRIAGE – OUT OF COP

ANC – narrow sense refers to the formal contract which is executed before a notary and registered in the deeds office. Wide sense it is an informal agreement between the parties which only binds them.

Formalities for the creation of a valid anc – must be attested by a notary and registered in the deeds office within 3 months of it execution or within such extended period as the court may allow.

Postnuptial – anc entered into before the marriage but never complied with formalities of notary and registering at deeds office a court may be approached to formalize contract if 3 requirements are met – parties must have definitely agreed upon terms of anc before marriage, goods reasons must be given by parties for their failure to properly execute and or register anc, must be done within reasonable time. Requirements for minors – minor must personally sign contract with consent of parents/guardians

Contents of anc –right of recourse iro household necessaries, succession (devolution of their assets in the event of death), and marriage settlements (donations etc),

Anc does not lapse on dissolution of marriage –any provisions for settlement must be carried out.

The accrual system – the fundamental idea is that one spouse contributes financially and otherwise to the growth of the other spouses estate and should therefore be entitled to share in that spouses estate on the dissolution of the marriage.

Calculating the accrual – accrual =net end value – net commencement value – asset which do not form part of accrual. the smaller estate – larger estate / 2 = accrual claim

Commencement value – usually state value in anc, deemed nil if liabilities are more than assets, if no value is declared it is deemed to be nil.

Assets which do not form part of accrual:
• non patrimonial damages a spouse received during marriage
• assets excluded in the anc, proceeds of such assets also excluded
• an inheritance, legacy or donation one spouse receives from a 3rd party
• donations inter vivos – between living spouses

ADVANTAGES OF THE ACCRUAL SYSTEM:
1. spouses share in the accrual of each others estate
2. whatever amassed prior to marriage is not shared
3. spouses are not liable for each others debts
4. spouses free to enter into contracts
5. administration of each others estate is uncomplicated
6. DISADVANTAGES – spouses have to enter into an anc to apply this system to their marriage, spouses do not share each others credit-worthiness, and accrual upon dissolution calculation is complicated.

ALTERATION OF MATRIMONIAL SYSTEM:

Court will only approve if – sound reasons are given, notice of change been given to all creditors and debtors, no other person will be prejudiced.

Procedural requirements:
1. notice – must be given to registrar of deeds
2. financial position of the spouses – sufficient information regarding assets and liabilities must be provided to enable court to judge whether or not sound reason for change
3. sound reasons
4. absence of prejudice – no other person must be prejudiced
5. domicile and residence – particulars of domicile and residence must be provided

EX PARTER BURGER - application in terms of section 21(1) of the matrimonial property act. The applicants were married out of cop in 1970. They later applied in terms of section 21(1) of the matrimonial property act for leave to introduce the accrual system as from the date of their marriage. The order was granted. The judge was satisfied that A proposed action. He was satisfied that sound reasons for the proposed change were given. The one applicants assets exceed his liabilities by 3.2 million whereas his spouses assets exceed her liabilities by 125 000. plainly therefore the parties desire to ensure that in the event of dissolution of the marriage the second applicant is accorded a fair share of the amount by which the first applicants estate has appreciated in value since they were married.
HONEY V HONEY – an informal alteration of the matrimonial property system is not permitted.
The parties married out of cop. Prior to their wedding they concluded an anc which inter alia provided that the marriage would be subject to the accrual system. A few years later they entered into a further contract, which was naturally executed but not registered in the deeds registry. Nor was the contract concluded with leave of the court in terms of section 21(1) of the matrimonial property act. The latter contract excluded the accrual system as from the date of the couples wedding. It further listed the party’s respective assets. The wife subsequently sued for divorce, the accrual in her estate was larger than in her husband’s estate.
Her husband maintained that the postnuptial contract was void ab initio, alternatively, that it was voidable and based his claim to share in his wife’s accrual on the anc. The court held that the postnuptial contract was void and unenforceable as between the parties inter se.

THE DISSOLUTION OF A CIVIL MARRIAGE – GENERAL

WAYS IN WHICH A MARRIAGE MAY DISSOLVE:
Death of one or both of the spouses, annulment of a voidable marriage, by divorce.

THE DISSOLUTION OF A CIVIL MARRIAGE – BY DEATH
Death dissolves both marriage and community of property.

THE DISSOLUTION OF A CIVIL MARRIAGE BY DIVORCE – THE GROUND FOR DIVORCE.

Divorce act now regulates divorce and its consequences. It provides for 3 no fault ground of divorce namely:
- irretrievable breakdown of the marriage – section 4
- the mental illness or the continuous unconsciousness – section 5

IRRETREIVABLE BREAKDOWN –
Section 4(1) 2 requirements – marriage relationship must no longer be normal; there must be no prospect of restoration of a normal marriage relationship between spouses.

SCHWARTZ V SCHWARTZ – irretrievable breakdown of marriage
The appellant and his wife were happily married until she became aware of his extra marital relationship with another woman (Miss Lintvelt). The appellant left the matrimonial home ,moved in with his mistress and sued for a divorce on the ground of irretrievable breakdown of marriage. The appellant’s wife admitted that the marriage had broken down, but denied that the breakdown was irretrievable and that there was no reasonable prospect of restoring a normal marital relationship. She testified that she still loved her husband and was prepared to take him back. The court a quo held that the appellant had not proved irretrievable break down and that a divorce could therefore not
be granted. He successfully appealed against this decision. in determining whether a marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between the parties it is important to have regard to what has happened in the past than is ,history of relationship up to date of trial and also to the present attitude of the parties to the marriage relationship as revealed by the evidence

**SWART V SWART** – irretrievable breakdown of a marriage

The plaintiff left his spouse's joint household after the defendant assaulted her. The parties had only been married for a short time. Both of them sued for divorce. They agreed that their marriage had broken down irretrievably but differed on the issue of whether the defendant had to pay maintenance to the plaintiff. As maintenance, the plaintiff claimed an amount for day to day expenses and payment of her medical expenses. The court granted a divorce order to the plaintiff and held that she was entitled only to payment of medical expenses. In order to assess the probability of a successful reconciliation being effected, the court also has to consider the reasons that prompted the plaintiff to sue for a divorce, and the parties conduct. Only when the court has determined that there is no reasonable prospect of reconciliation will it find that the marriage has broken down irretrievably and grant a decree of divorce. The court looks at the objective scantiness and surmounts ability of the reasons why a divorce was applied for to ascertain whether the marriage in question can still be saved. It was held that misconduct can be taken into account, but not at the expense of fairness. The court further held that only misconduct which has a bearing on the breakdown of the marriage is relevant. If the misconduct of one party was gross and especially if the other party was prepared to reconcile fault assumes greater relevance. In this case both the subjective and objective approach.

**SMIT V SMIT** – the relationship between sections 4 and 5 of the divorce act.

The appellant instituted divorce proceedings in terms of section 4 of the divorce act after his wife had been physically disabled for 6½ years and had been in an institution for infirm persons for approx. 5½ years. He did not allege that he no longer loved his wife. He argued that because of her condition, he enjoyed virtually no consortium privileges, no real marriage relationship existed between them and there was no prospect of restoration of a normal marital relationship. The appellant was unsuccessful in the court a quo. His appeal to the full bench was successful. If a person wants to divorce his or her unconscious or mentally ill spouse, the question arises whether the divorce claim action must be instituted in terms of section 5 of the divorce act or whether section 4 of the divorce act must be invoked. Conflicting judgments have been delivered on this issue. (Dickinson v Dickinson – section 4, krige v smit – section 5)

Hahlo 351 – whenever a spouse is mentally ill or continuously unconscious within the meaning of section 5 the likelihood is that the marriage will also have broken down irretrievably within the meaning of section 4. even when the breakdown of a marriage was due to mental illness or continues unconsiness, a decree of divorce can be granted on the grounds of irretrievable breakdown under section 4.
THE PATRIMONIAL CONSEQUENCES OF DIVORCE:

Settlement agreements – accepted practice to regulate division of assets, payment of maintenance etc. can be incorporated into decree of divorce.

CLEAN BREAK PRINCIPLE - the financial obligations between the spouses should terminate as soon as possible after divorce. A clean break can be achieved by making only redistribution order under section 7(3) of the divorce act and no maintenance order under section 7(2). The appellate division rightly indicated that the clean break principle is not foreign to our law and is something to be strived for if circumstances allow it.

REASONS FOR INSERTION OF SECTIONS 7(3) TO (6) – the accrual system was introduced into the matrimonial property law inter alia, because a spouse who married with complete separation of property had no right to share in the assets of the other spouse acquired during the subsistence of the marriage. As the accrual system was not imposed retroactively, the legislator inserted these sections into the divorce act to assist spouses who married with complete separation of property prior to the commencement of the matrimonial property act or marriage and matrimonial property law amendment act. These sections empower the court in limited circumstances to make an order that the assets or part of the assets of one spouse be transferred to the other if the court considers this to be just... these concepts introduces an entirely new concept, namely redistribution of assets upon divorce into our law. The purpose of this reformatory and remedial measure was to remedy the inequity which could flow from failure of the law to recognize a right of a spouse upon divorce to claim adjustment of a disparity between the respective assets of spouses which is incommensurate with their respective contributions during the subsistence of marriage to the maintenance or increase of the estate of one of the other.

REHABILITATIVE MAINTENANCE – will support the spouse to whom it is awarded for a certain temporary period of time. Kroon v Kroon – in order to determine whether r.m should be granted no notional earning capacity will be attributed to a spouse who does not have the necessary skills that will enable him/her to be trained and retrained for a job occupation or profession after divorce. The following factors be taken into account – spouses employability, his/her age, state of health, the duration of the marriage, the spouses standard of living during marriage, the length of the spouses absence from the labour market, whether he/she has any marketable skills and his/her commitment to the care of children.
Pension interest – not included in a spouses estate or the joint estate. Amendments to the pension fund act – came into operation on 13 September 2007 – non member spouse no longer has to wait until member retires before non members share of pension benefit accrues to her/him. Non member has 2 options – can request the pension fund to pay benefit in cash to them or request the benefit is transferred to an approved pension fund of their choice. Not clear if this is applicable to divorce orders before 13 September 2007.

Forfeiture of patrimonial benefits: forfeiture of benefits does not mean that a spouse loses his or her own assets. It merely entails that the spouse loses the claim he or she has to the other spouses assets.

Requirements for a forfeiture order – section 9(1) of the divorce act empowers the court to order total or partial forfeiture of benefits taking into account, the duration of marriage, circumstances which led to the breakdown of the marriage, any substantial misconduct on the part of wither spouse.

**PRESCRIBED CASE WIJKER V WIJKER** – forfeiture of patrimonial benefits

The parties were married in cop for some 35 years. During the subsistence of their marriage the wife started and ran a successful business, estate agency. Initially she held half of the shares in the estate agency and her husband the other half. Her husband subsequently transferred the shares to her so that she could obtain a tax benefit. The spouses agreed that he could have the shares back if and when he wanted. However when he asked for the shares back she refused to do so because she did not have high regard for his business sense and feared that he would use his the shares to further his own interests. As a result of his wife’s persistent refusal to return the shares, he sued for divorce. In a counterclaim she claimed a forfeiture order against him in respect of his shares in the estate agency and certain assets purchased from income derived from the business. In the court a quo a divorce order was granted against the wife and forfeiture order was made against the husband. The husband appealed against the forfeiture order, inter alia, on the ground that forfeiture should not have been decreed because the trial court had made no finding of substantial misconduct on his part. He also alleged that the trial court had misdirected itself in blaming him for the breakdown of the marriage in considering it unfair that he should share in his wife’s business. The appellate division (now SC of appeal) held that the forfeiture order should not have been made and accordingly upheld the husbands appeal.

This case at long last settled the dispute about whether the 3 factors that are set out in section 9(1) of the divorce act must all be present before a forfeiture order can be granted and particularly whether substantial misconduct is a prerequisite for the making of a forfeiture order.

Factors of partial or total forfeiture are the duration of the marriage, the circumstances which led to the breakdown of marriage, any substantial misconduct on the part of either spouse, these factors need not all be present and need not be viewed cumulatively. The court also held that no fault divorce did not do away with fault as a factor in respect of forfeiture orders. Further it is submitted that an order for forfeiture of benefits may only
be granted if the court is satisfied that in the absence of the order one spouse will be unduly benefited in relation to the other.

**PRESCRIBED CASE - WATT V WATT** – forfeiture of patrimonial benefits
The spouses were married out of cop. during the course of the marriage the husband donated a house to the wife. In a joint application the spouses applied for certain questions of law to be decided before evidence was led in their divorce action. They agreed that the husband alone had contributed the purchase price of the property as well as amounts expended on the improvements to the property that the value of the property had escalated since it was registered in the wife’s name. the court had to decide whether the house was a patrimonial benefit as contemplated in section 9(1) of the divorce act. If the answer was in the negative, the court had to rule on whether any contributions to the purchase price or improvements were patrimonial benefits which could be forfeited and whether the escalation in value was a patrimonial benefit which could be forfeited. The husband contended that the answers to these questions were in the affirmative while the wife contended they were negative. The court held that the house, the husband’s contributions and the escalation of price were not patrimonial benefits of the marriage. This case deals with the question of whether the patrimonial benefits of a marriage out of cop which may be forfeited are limited to benefits which are conferred in the spouse’s anc or whether benefits acquired during the subsistence of the marriage are also subject to forfeiture. The court was of the opinion that the patrimonial benefit of a marriage out of cop are fixed at marriage by the terms of the anc. These accords with the weight of RDL

**REDISTRIBUTION OF ASSETS:**
Requirements – spouses who seek redistribution must have contributed directly or indirectly to the maintenance or increase of the other spouse estate during the subsistence of the marriage, the court must be satisfied that by reason of such contribution, it would be equitable and just to make a redistribution order.

**BEAUMONT V BEAUMONT** – redistribution order in terms of section 7(3) of the divorce act.
The spouses were married in 1964. before their wedding they entered into an anc which excluded community of property, profit and loss. When they married, neither spouse had any assets. Twenty years later the husband sued the wife for a divorce. At that stage he had an estate valued at R450 000 and his wife had only R10 000. during the subsistence of the marriage his wife kept house for him and the children and fulfilled all the tasks of a wife and mother. She also assisted him in his business without receiving any remuneration. When he instituted divorce proceedings, his wife instituted a counterclaim for redistribution of assets in terms of section 7(3) of the divorce act. The court a quo granted her claim and awarded her R150 000 of his estate and maintenance. He unsuccessfully appealed against this order. This was the first decision by the SCA on redistribution of assets in terms of section 7(3) – 7(6) of the divorce act. The first important point the court made deal with whether one third of the spouse’s matrimonial property should be transferred to the spouse with the smaller estate if redistribution is ordered. The court a quo referred to the one third rule or guidelines of English law. The purpose of this section of the Divorce act to assist spouses
who married with complete separation of property prior to the commencement of the matrimonial property act or the marriage and matrimonial property law amendment act. These sections empowers the court to make an order that the assets or part of the assets of one spouse be transferred to the other spouse if the court considers this to be just. These provisions introduced an entirely novel concept (redistribution of assets upon divorce) into our law. Its purpose was to remedy the equity which could flow from failure of the law to recognize a right of a spouse upon divorce to claim an adjustment of a disparity between the respective assets of the spouse which is incommensurate with their respective contributions during the subsistence of the marriage. Beaumont v Beaumont – one third rule – appellate division held that our courts decision in terms of section 7(3) of the divorce act should not be restricted by the one third rule or any other starting points (such as the principle of an equal division). When the court considers a redistribution order the court has to make an assessment of what is just, having regard to the factors specifically mentioned in the act and whatever else the court deems relevant

**PREScribed CASE - KRITZINGER V KRITZINGER** – redistribution order in terms of section 7(3) of the divorce act. The spouses married out of cop in 1967. The wife was the managing director of clicks and the husband was a legal adviser to Mobil oil in Cape Town. At some point during the subsistence of the marriage the husband was offered a post at the head office of Mobil Oil in New York but he declined the offer because moving to New York would have been detrimental to his wife’s career. She earned twice as much as he did and contributed twice as much to the acquisition and maintenance of the party’s matrimonial home. Both parties contributed to their joint living expenses. In 1985 the wife sued the husband for divorce. At this stage her estate was worth approx. 690 000 and her husband was worth approx. R275 000. she inter alia claimed transfer of R109 000, which represented half of the net value of the spouses matrimonial home, which was registered in her husbands name. She based her claim on section 7 (3) of the divorce act and alleged that the amount represented her contribution towards the acquisition, improvement and maintenance of the matrimonial home and her contributions towards the payment of the bond installments. Her husband denied that it would be just and equitable to transfer any of his assets to his wife. He countersued for a divorce and alleged that the irretrievable breakdown of the marriage was due to his wife’s committing adultery with a certain Mr Green. He further claimed transfer of R200 000 of his wife’s assets to him. He alleged that he was entitled to the transfer as he had contributed indirectly to the maintenance of increase of her estate by not settling overseas and thus forfeiting promotion in order to further her career in which increased the value of her estate by approx.. R600 000. the court a quo dismissed the wife’s claim for transfer of assets and allowed the husbands counterclaim for transfer of R200 000. the wife successfully appealed this decision. The first important point the court made was that a claim for redistribution of assets should generally not be considered on a global approach. The 2 claims should be considered separately to ensure that each claim gets the attention it deserves. There might be cases were the facts relevant to both claims are interrelated. Secondly the court emphasized that although marriage is a partnership of a kind this does not mean that marriage has the same consequences of a partnership in the legal sense. The spouse who
avers that a partnership in the legal sense was formed between the spouses must prove this and the mere fact that both spouses contributed to the common household will not constitute sufficient proof. The third point which should be noted deals with the role that fault plays in relation to redistribution, in this case the appellate division (*now SCA) referred to Beaumont v Beaumont and accepted that fault could be considered in deciding whether a redistribution order should be granted. The facts of the case did not however indicate that there was a “conspicuous disparity of fault” between the spouses and therefore fault could not be regarded as a significant factor.

**PRESCRIBED CASE - KATZ v KATZ** – redistribution order in terms of section 7(3) of the divorce act.

The spouses married out of cop in 1964. In September 1986 the wife instituted a divorce action. She inter alia claimed the selling price of the spouse’s matrimonial home (R278000) which was registered in her name, maintenance, and half of her husband’s assets. As the time of the divorce, the husbands estate was valued at R7.5 million while apart from the house the wife had R750 000. the husband made a clean break settlement offer in which he undertook to pay his wife R750 000. she rejected his offer. In the court a quo the husband was ordered to pay the selling price of the house as well as R3.5 million to his wife. The husband appealed this decision. He did not object to the part of the order relating to the payment of the selling price of the home. He only objected to being ordered to transfer R3.5 million. The appeal was upheld.

section 7(4) covers the requirements for a redistribution order – spouse must have directly or indirectly contributed to the maintenance or increase of the others spouse’s estate during the subsistence of the marriage and the court must be satisfied that by reason of such contribution it would be equitable and just to make a redistribution order (discretionary). It further covers the performance of the “ordinary duties” of a wife in respect of looking after the home and caring for the family, for in performing these duties the wife renders services and saves expenses which necessarily contribute to the maintenance or increase of her husbands estate. A monetary value need not be placed on contribution.

**MAINTENANCE OF A SPOUSE AFTER DIVORCE:**

Factors the court must consider when making a maintenance order:

- the spouses existing or prospective means
- the spouses respective earning capacities
- the spouses financial needs and obligations
- each spouses age
- the duration of the marriage
- spouses standard of living during the marriage
- each spouses conduct in so far as it may be relevant to the breakdown of the marriage
- any redistribution orders granted
- any other factor which in the courts opinion should be taken into account.
PRESCRIBED CASE - KROON V KROON – maintenance for a spouse upon divorce.
The parties were married out of cop. They had 3 children of school going age, which attended private schools as day pupils and lived with their mother in the matrimonial home. The matrimonial home, which is worth R125 000 was registered in the wife’s name. The husband lived in a townhouse, which was worth approx. R70 000. The wife sued for divorce and inter alia claimed maintenance for herself at R1000 per month and for each child at R500 per month. She also wanted the maintenance to be increased annually in accordance with the inflation rate. She further claimed an order that the husband pay the children’s educational, medical and dental expenses and to pay maintenance, but asked the court to determine the amount. He further lodged a counterclaim in which he asked the wife to transfer an undivided half share of the matrimonial home to him or to sell the home and pay half share of the proceeds to him. The court rejected the counterclaim and ordered the husband to pay maintenance but at a lesser rate than the wife claimed. This case addresses a number of important points. Firstly it is important to note the courts emphasis on the fact that the parties conduct is irrelevant in respect of the granting of the divorce order but that it can be relevant for purposes of deciding on maintenance. Another important point is that the order was framed in such a way as to place strong pressure on the wife to sell the matrimonial home in order to acquire a means of income for herself. The court order was framed in such a way that the wife was obliged to sell the matrimonial home to increase her means. Permanent maintenance will not be awarded to a woman who can support herself or who can be trained and retrained to do so. The factors the court takes into account include the woman’s age, her state of health, the duration of the marriage, the parties standard of living during the marriage, the length of the woman’s absence from the labour market, whether she has any marketable skills, and her commitment to the care of the young children.

PRESCRIBED CASE - GRASSO V GRASSO – maintenance for a spouse upon divorce.
The party’s marriage had broken down irretrievably. The wife claimed a divorce, custody of the couples minor children and maintenance for herself and the children. In a counterclaim the husband inter alia claimed transfer of the party’s matrimonial home and the return of a motor vehicle. The main issue between the parties was whether the wife was entitled to maintenance. She was a primary school teacher by profession but did not work prior to the divorce. On the opening day of trial the husband made an offer of settlement in which he offered to pay maintenance for each child in the sum of R300 pm and maintenance for the wife in the sum of R600 pm until her death. Remarriage or 30 June 1986 whichever occurred first. The wife could retain the me, certain specified jewellery and she was to have first choice of furniture up to half their value. The common home was to be sold and each party was to receive R10 000 of the net proceeds in cash with the balance being held in trust for the children. The wife rejected this offer. The court granted a decree of divorce awarded custody to the wife and allowed her to retain the house and the car. The husband further ordered to pay
maintenance at the rate of R1500 pm for the wife and R450pm per child. factors a court must consider for a maintenance order are – the spouses existing or prospective means, the spouses respective earning capacities, the spouses financial needs and obligations, each spouses age, the duration of marriage, the spouses standard of living during the marriage, each spouses conduct in so far as it may be relevant to the breakdown of the marriage, any redistribution order in terms of section 7(3) of the divorce act, any other factor which in the courts opinion should be taken into account. Judge Berman held that no particular stress was laid on any one or more of these factors and they are not listed in any particular order of importance or of greater or lesser relevance. Only misconduct which has a bearing on the breakdown of the marriage is relevant. If the misconduct of one of the spouses was gross, and especially if the other party was prepared to attempt reconciliation, fault assumes greater relevance. The court also held that if the husband can afford to maintain tow homes at the same standard of living at which the common home was maintained and can afford to have his former wife stay at home she need not take up paid employment after the divorce and he must see to it that she can maintain her previous standard of living. The court additionally considered the high rate of inflation in as under the broad provision that the court may take any other factor into account.

POMMEREL V POMMEREL – maintenance for a spouse upon divorce.
When the spouses divorced the husband was ordered to pay maintenance for the wife in the sum of R750 pm and for each of the children in the sum of R325 pm. The wife applied for an increase in maintenance to R1120 pm for herself and R510 pm for each child. The magistrate increased the amount to R1000 pm for herself and R450pm for each child. The husband appealed against this order. His main argument was that the wife could work and contribute to her own and the children’s maintenance and that she could not escape this duty by declining to work. The court found no grounds for interfering with the magistrates order and dismissed the appeal. no maintenance will be awarded to a wife who is able to support herself, nor can a wife expect to enjoy after the divorce the same standard of living that she had as a married woman. However the mere fact that she is able to earn an income does not in itself disentitle her to maintenance. Secondly the court must balance up the needs of both parties and make an equitable distribution of the available income between them. Courts normally accept that spouses have to adopt a lower standard of living after divorce.
THE INTERESTS OF THE CHILDREN OF DIVORCING PARENTS:
Our common law and constitution prescribes that the Childs best interest must determine the outcome when a court has to make an order regarding a child. best interests of child are obviously a factual question.

Factors considered in Mccall v Mccall:
- love ,affection and other emotional ties between parent and child
- parents compatibility with the child
- parents abilities, character and temperature and impact thereof on child
- parents ability to communicate with child
- parents understanding, insight to childds feelings
- capacity and disposition to give guidance to child
- parents ability to provide the child with religious and educational well being and security
- parents ability to provide emotional ,psychological, cultural and environmental development
- parent’s mental and physical health and moral fitness.
- Stability/instability of child’s existing environment
- Desirability or otherwise of keeping siblings together
- The child’s preference
- The desirability or otherwise of applying the doctrine of same sex matching – placing sons with father and daughters with mum
- Any other relevant factor

PRESCRIBED CASE - MCCALL V MCCALL – factors to be considered in determining what is in the Childs best interests in the context of custody.
When the parties divorced, they entered into a settlement agreement which was made an order of court. In terms of this agreement custody of the couples 2 children was awarded to the mother. The agreement also provided for the appointment of a psychologist to provide counseling to all family members to monitor them on an ongoing basis to investigate the best interests of the children and to advise accordingly. The psychologist recommended that the son, Rowan, be placed in his father’s custody. The Childs mother did not agree with this recommendation , hence the application. The court upheld that Rowan should be placed in his father’s custody.
In terms of common law the criterion for determining any matter involving custody of or access to a child is the Childs best interests. Section 28(2) of the constitution confirms and entrenches this criterion as paramount in all matters regarding a child.
PRESCRIBED CASE - VAN VUUREN V VAN VUUREN – circumstances in which the family advocates ought to institute an investigation.

Upon their divorce, the parties entered into an agreement in terms of which their children would spend certain weekends and school holidays with their father. The court had difficulties with the agreement, inter alia because of the father’s alcohol problems and postponed the case for a day. The next day the plaintiff requested that the case be postponed indefinitely and that the family advocate be ordered to investigate the matter. The court postponed the case and ordered the family advocate to investigate the matters of custody and access.

This case is important because it contains guidelines on when a family advocate ought to investigate the arrangements regarding the children. De Villiers J indicated that a family advocate ought to apply for an order authorizing an enquiry if it is envisage that:

- custody of a young child will not be awarded to the child mother
- siblings will be separated
- custody will be awarded to a person other than the child’s parents
- an arrangement regarding custody or access will be made which is prima facie not in the child best interest.

PRESCRIBED CASE - KRUGEL V KRUGEL – joint custody.

The parties married in 1993 and divorced in 1996. They remarried in 1997 and again divorced in 1999. Two children were born of their first marriage. They were joint legal custodians of the children by virtue of settlement agreement which was made an order of court upon their second divorce, but the father was granted physical custody. While residing in Cape Town the father applied for sole custody. The parties had previously been involved in litigation with regard to custody and the father averred that in view of their history of custody claims and animosity between them, they could not work together and act in the best interest of the children. He also argued that the fact that he had moved to Cape Town made it impossible for them to exercise joint custody. The children’s mother opposed the application. She conceded that the children should continue residing with their father. She brought a counter-application in which she sought extended access to the children. She maintained that the father had moved to Cape Town without her consent and that the move was unlawful as the parties had joint custody. She further argued that the father had moved with the specific intention of frustrating her rights regarding her children and to minimize her influence over them. She contended that the father was attempting to sabotage joint custody in order to use the fact that joint custody was not working as a reason for changing the joint custody order. The court dismissed the father’s application and partly granted the mother’s counter application.

In deciding whether or not to order joint custody, the court has to consider whether input from both parents “even if that input is at times disharmonious”, is not preferable to an uninvolved parent.
PRESCRIBED CASE - GLIKSMAN V TALEKINSKY – the duty of a parent to support his or her major child.
The applicant was a widow who had 6 children ranging from the ages of 8 months to 11 years. She claimed 176 pounds pm as maintenance from her father (that is the respondent) who offered to pay 90 pounds. Her father was financially able to support her. During her marriage the applicant and her husband had a high standard of living, but their financial situation deteriorated to such an extent that her husband was declared insolvent. He died while still insolvent and the applicant was left without any means to support herself and her children. The court ordered the respondent to pay the applicant 90 pounds pm as a contribution towards her maintenance.
A parent’s duty to support his or her child continues for as long as the child is unable to support his or her self and the parent is able to pay maintenance. The duty does not necessarily come to an need when the child becomes a major.
A major child claiming maintenance bears the burden of proving the he or she is in need of maintenance.

PARENTAL AUTHORITY – defined as parental authority or parental power refers to the rights, powers, duties and responsibilities parents have in respect of their minor children and those children’s property.

GAURDIANSHIP AND CURATORSHIP:
In this context guardianship refers to the official supervised care of the person and estate or only the estate of a minor. The person who exercises this type of guardianship is called guardian or tutor

Types of guardians: testamentary guardian – appoint by a will, assumed tutor – a testamentary guardian appoints a guardian to assist him or her in exercising his guardianship, tutor dative – both HC and master of the HC as upper guardians of minors may appoint a guardian to a minor whose interest require this, supposed or putative tutor – mistaken for guardian

Requirements for appointment of guardian:

1. the person must be over the age of 18
2. the person must not be under curator ship
3. if the person is to be appointed as a testamentary tutor cannot have witnessed the will
4. the court must not have declared the person incapable of holding the office of guardian
5. the person must have provided the necessary financial security

rights and duties of guardians – must act bona fide at all times, must within 30 days of appointment make a detailed inventory of all property of minor under his or her control, the guardian must avoid conflicts of interest between his or her own.
Termination of guardianship – the minor dies, minor attains majority, the guardian dies, period of appointment lapses, completion of all guardianship tasks, guardian resigns or is disqualified, guardian removed by MOHC or HC.

Curatorship – refers to officially supervise care for the person and the estate or only the estate of someone who for some reason or another (minor, mentally ill, physically disabled, old age) is incapable of managing his or her own affairs. curator bonis – appointed to take care of the person’s estate, curator personae – appointed to take care of person’s person, curator ad litem – only for purposes of litigation.

Termination of curatorship – person who has been placed under curatorship dies, curator dies, curator’s appointment period lapses, curator resigns or is disqualified, and curator is removed by MOHC or HC.

COURTS CASES FOR REFERENCE:
1. Van der linder v van der linde – the court declared that mothers are not necessary able to be good parents on a day to day basis. The court stated that because of the physical demands made on court further held that ‘mothering’ refers to caring for a Childs physical and emotional well being and that it forms part not only of the mother’s role but also the fathers. The court emphasized that the quality of a parent’s role is not simply determined by gender. Consequently a father can be just as good a ‘mother’ as the Childs biological mother and conversely a mother can be just as good as a child’s biological father.

2. Levy v Levy – court does not have a discretion to refuse a divorce if one of the grounds for divorce is proven

3. Sempalele v sempalele – divorce act did not change the rule that a pension interest is not an asset in a spouse’s estate but only provides a mechanism for parties to divorce proceedings to have access to each others pension interest.

4. Amar v Amar – The court issued a divorce decree in terms of the divorce act but ordered the husband to pay maintenance to his wife(who has not otherwise entitled to maintenance)until such time as he cooperated in obtaining a Jewish religious divorce as well.

5. Coetzee v coetzee – in order to succeed in a divorce action based on irretrievable breakdown the plaintiff must prove that there has been a change in the pattern of the marriage from which breakdown can be deduced.

6. Maharaj v maharaj – pension interests are part of the assets of the parties of a divorce proceedings for purposes of the division of their assets.
7. Persad v persad, toho v diepmeadow city council & moremi v moremi – marriages in community of property held the right to occupy premises in terms of tenancy, a residential permit and statutory lease that was conferred on the spouse against whom the forfeiture order operated but iro which the other spouse had paid the rent could be forfeited – assets acquired during the subsistence of the marriage can also be forfeited.

8. Koza v koza – the court assumed without deciding the issue that in a marriage in cop the patrimonial benefits of the marriage are not restricted to those benefits which are conferred in the anc.

9. Madeihe v madeihe – court emphasized that custody is not a gender privilege or right but a responsibility and privilege that has to be earned. However the court further stated that because of the physical demands made on a mother in carrying the child and giving birth, the court may well, in case of doubt favour mother.

10. Ex parte critchfield – the court held that given the facts of the dynamics of pregnancy it would not amount to unfair discrimination if a court considered maternity in making custody award. The court however warned that it would be unconstitutional to place undue weight upon maternity when balancing it against the other relevant factors and that the court must astute to remind itself that maternity can never be will-nilly, the only consideration of any importance in determining the custody of young children.

11. Petersen v maintenance officer – court held that paternal grandparents are indeed liable for maintenance in respect of their son’s extramarital child (if the child’s parents are unable to support him/her)

12. Guggenheim v Guggenheim – compensating for part of her prospective loss and all expenditure incurred.

13. Martens v marten - is was held that simulated marriages or so called marriages of convenience are perfectly valid.
POSSIBLE MULTIPLE CHOICE QUESTIONS –

- Affinity in the collateral line exists between you and your Spouses sister.
- Putative marriage – a and b are married a discovered b was never divorced from previous marriage
- Donations between spouses are valid subject to the provisions of the matrimonial property act
- Rebuttable presumption if 2 persons entered into a civil marriage they are married in cop
- The patrimonial consequences of a marriage is determined by the law loci domicilii of the husband at the time of marriage
- Person married in cop that wants to sell asset from joint estate requires only a written consent from spouse to proceed
- Honey v honey – spouses cannot alter their matrimonial property system informally
- Marriages can be dissolved by death of any one or both spouses, by divorce
- Grounds for divorce are – continuous unconsciousness as contemplated in section of the divorce act, mental illness as contemplated in section 5, Irretrievable breakdown – section 4
- Beaumont v Beaumont – the court had to make an assessment of what is just
- Ryland v edros – contractual obligations flowing from de facto monogamous Muslim marriage can be recognized and enforced between parties despite the fact that the marriage is potentially polygamous
- Grounds for termination of engagement – couples marriage, death of either partner, mutual agreement to terminate, withdrawal of parental consent where one party is a minor, a unilateral and justified termination based on a sound reason, breach of promise
- Where a minor entered into a marriage without the necessary consent, his or her parents may apply for the setting aside of the marriage within six weeks after they become aware of the existence of the marriage and before the minor attains majority.
- Minors that marry and when marriage is not set aside authors of the text book are of the opinion that this marriage should be out of community of property with the application of the accrual system.
- Stuprum – extra marital sexual intercourse with a third party before the marriage
- Voidable marriage – example would be x and y married 2 months ago. It now appears that x is impotent. X was unaware of his impotence at the time of entering marriage
- Undue enrichment – example is when a dealer, such as makro provided food and clothing to a wife, whom has no income or any assets of her own, the dealer can hold husband liable on grounds of undue enrichment
- Bannatyne v bannatyne – constitutional court held that contempt proceedings in the high court to secure the enforcement of a maintenance debt are appropriate constitutional relief for the enforcement of a claim for the maintenance of children
• Void engagement – one of the parties is currently married but intends to get a divorce and therefore asks another (whom says yes) to marry him
• Guggenheim v Rosenbaum – court awarded innocent party upon breach of promise compensation for part of her prospective loss and part of her expenditure incurred
• Step children are collateral blood relatives
• High court can be approached when a minor wants to get married and parent refuses to consent
• Moola vs Bhabha – court decided that even though a marriage is not duly solemnized it can still be regarded as a putative marriage if it was “contracted openly and in accordance with rituals and ceremonies not inconsistent with our law
• Putative marriage – example – x and y are married at the time of marriage x was unaware that y and A’s divorce had not been finalized
• A wife that moves out of the matrimonial home because she is having an affair loses her right to claim maintenance from her husband
• Reloomel v ramsay – court viewed the question whether or not a particular item is a household necessary from the perspective of the dealer
• Application of ejection can be granted in a case where the husband beats children up when he consumes alcohol
• One third rule used to previously be practiced by SA law however it is no longer applied. This rule entails that one third of the spouses combined assets upon divorce is awarded to the spouse whom owns fewer assets. Unless there are factors which indicate that a different division should be made.
• Voidable marriage – one party aware she was sterile prior to marriage but concealed this from spouse and married him
• Putative marriage were bona fide at time of entering into the putative marriage – marriage without anc marriage is considered cop and loss
• Donation between spouses married out of cop are valid subject to the provisions of the insolvency act
• When 2 people marry rebuttable presumption arises that they are married in cop
• Married in cop and thereafter divorced – debtors can only claim debts from contract person
• Swart vs swart – an objective element taken into account only in order to determine whether the break down of the marriage was irretrievable
• Section 4(2) guidelines for irretrievable breakdown – a court has declared the defendant a habitual criminal and the defendant is undergoing imprisonment as a result of that sentence
• Recognition of customary marriage act. All customary marriages unregistered entered into before operation of the act is valid
• A marriage that is void – where a boy between 14 & 18 years of age or a girl between 12 & 18 years age marries without consent of the minister of home affairs – the minister of home affairs is entitled to ratify marriage
• Parental authority does not include a parents duty to support a child
Anc – spouses can agree on the devolution of their assets
Voidable marriage – if not set aside by a court is perfectly valid marriage
There is a prohibition on a civil marriage between a person and his or her relations by affinity in the collateral line
Father acquires parental authority if – child is born of a valid marriage, when he marries the mother of his extramarital child, when he adopts a child
Internationally the focus of the private law rules regarding the parent child relationship is increasingly shifting from the rights and powers of parents towards the rights and entitlement of children
The most important instrument for the recognition and protection of children’s rights in SA is the constitution of republic of SA
The constitution of the republic of SA prescribes that a child’s best interest are of paramount importance in every matter concerning children
Majority of a child terminates parental authority
Petersen v maintenance officer – court held that parental grandparents indeed liable for maintenance of sons extramarital child (parent unable to support child)
Martens v martens – court held that the so called marriages of convinience is perfectly valid
Marriages in cop – assets such as a house owned before marriage is part of joint estate, non patrimonial damages in a delictual action is an award not part of joint wedding ring not part of joint estate, house inherited from parents estate subject to a usufruct does not form part of joint estate, money inherited from an estate (will stipulates outside marriage of joint estate) capital does not form part of estate but if invested and earns interest, interest forms part of joint estate.
Consents required when married in cop – if joint property is being subdivided – prior written consents attested by 2 competent witness is required, creating a servitude on property – written consents of spouse is required attested by competent 2 witnesses in respect of each transaction, registration of actual servitude – prior written consent and attested by 2 competent witnesses for each transaction separately,
Requirements for a redistribution order – the spouse who seeks redistribution must have contributed directly or indirectly to the maintenance or increase of the other spouses estate during the subsistence of marriage, the court must be satisfied that, by means of such redistribution it would be equitable and just to make a redistribution order
Forfeiture order – section 9 factor that are considered are, the duration of marriage, the circumstances which led to the breakdown of the marriage, any substantial misconduct on the part of either spouse
Grasso v grasso – if the husband can afford to have ex wife not go out to work after divorce and where she did not work prior to divorce and particularly where his misconduct has caused breakdown of the marriage he should maintain her without it being necessary for her to take up employment.
- Pommerel v Pommerel – some of the factors which the court will take into account in order to decide whether a wife’s decision not to work after divorce is reasonable, are the wife’s age, her state of health, qualification, when she was last employed, the length of the marriage, the standard of living of the parties during marriage, her commitment to the care of young children.

- Kroon v Kroon – for the purposes of a decision on whether rehabilitative maintenance should be awarded to a spouse after divorce no notional earning capacity will be attributed to a spouse who does not have the necessary skills that will enable him or her to be trained or retrained for a job, occupation or profession after divorce.

- Havenga v Havenga – changed circumstances are not a prerequisite for the changing of a maintenance order after divorce.

- Hodges v Cobourough – a maintenance order made in terms of section 7(2) of the divorce act comes to an end upon the death of the party who has to pay maintenance.

- Unmarried fathers parental rights and responsibilities in terms of the children’s act – an unmarried father now obtains parental responsibilities and rights if he is the child’s biological father and is living with the child’s mother in a permanent life partnership at the time of the child’s birth. Regardless of whether he has lived or is living with the mother an unmarried father obtains parental responsibilities and rights if he consents to be identified or applies to be identified as the child’s father or pays damages in terms of customary law, contributes or has attempted in good faith to contribute to the child’s upbringing for a reasonable period, and contributed or has attempted to contribute in good faith to contribute towards the expenses in connection with the maintenance of the child for a reasonable period.

- Civil union act – came into operation in 30 November 2006 – applies to same sex and heterosexual couples. It inter alia allows same sex and heterosexual couples to enter into a marriage in terms of the act or a civil partnership in terms of the act. It uses the collective noun “civil union” for marriages and civil partnerships that are concluded in terms of the act. A civil union is defined as “the voluntary union of two persons who are both 18 years of age and older, which is solemnized and registered by way of either a marriage or a civil partnership, in accordance with procedures in this act to the exclusion while it lasts of all others” civil union partners can choose whether they want to call their union, marriage or a civil partnership. Regardless of the name the union has the same consequences as a marriage in terms of the marriage act.

- Requirements for a civil union are – both parties must be older than 18 years of age, neither party may be partner in more than one marriage or civil partnership at any given time – monogamous, neither party may be a spouse in a civil or customary marriage, apart from the fact that may be of same sex, there must be no other legal prohibition on their concluding a civil marriage (section 8(6))

- Gory v Kolver – in this case CC confirmed an order by HC declaring section 1(1) of the intestate succession act of 1987 unconstitutional insofar as it does not provide for a permanent same sex life partnership to inherit automatically.
as a spouse would, when the other partner dies without a will. The court further upheld the court reading in of the words “or partner in a permanent same sex life partnership in which the partners have undertaken reciprocal duties of support” after the word “spouse”, wherever it appears in the section. The court held that the order of constitutional invalidity should, in the main, operate retrospectively. It however imposed limitations aimed at reducing the risk of disruption in the administration of deceased estates and protecting the position of bona fida third parties.

- Age of majority act – now all reference to minors must be below 18 years of age in all references
- Illegitimate or extra marital – no longer use these phrases – now replaced by a child born of an unmarried parent.
- Children’s act requires all proceedings, actions and decisions in matters concerning children must – respect, protect, promote and fulfill the child’s rights set out in the bill of rights, respect the child’s inherent dignity, treat the child fairly and equitably, protect the child from unfair discrimination on any ground including the grounds of the health status or disability of the child or a family member of the child, recognize a child’s need for development and to engage in play and other recreational activities, recognize a child’s disability and create an enabling environment to respond to the special needs that the child has.
- Parental authority no longer use this term – now parental responsibilities and rights
- Accrual system automatically applies to all marriages that do not state without concluded on or after 1 November 1984 and for black marriages on or after 2 December 1988