1 Introduction

1.1 Law of persons

Law of persons determines:

1. which beings are legal subjects
2. how a legal subject originates and comes to an end
3. what legal status involves
4. what effect various factors have on a person's legal status

Confined to treatment of the natural person only: not juristic persons.
Deals virtually exclusively with the status of natural persons in the field of private law.

1.2 Different kinds of legal subjects

Legal personality is bestowed only on legal subjects.
In SA we have:

1. The natural person
2. The juristic person

1.2.1 Factors determining recognition as a legal subjects

Legal personality is conferred only to entities the law sees fit to recognize as legal subjects.

The following factors determine what is recognized as a legal entity within a country:

1. Legal norms and views of a particular community
2. The needs of commercial traffic
3. Historic and cultural background of a specific nation

Thus, as these factors change, what is recognized as a legal entity is subject to change.

1.2.2 Natural Person

All human beings, irrespective of age, mental capacity or intellectual capacity, are recognized as legal subjects: known as "natural persons"

Thus: every human can have rights, duties and capacities based on mental capacity & age.

1.2.2.1 Exceptions before modern law

Slavery was not abolished in the Cape until 1834: until then slaves in SA were legal objects who could not have rights, duties or capacities.

Monstra: babies born so deformed that they lacked the human form and human mind were not legal subjects under Roman & Roman Dutch law: today any abomination is regarded as a legal subject.

1.2.3 Juristic person

Legal personality is also bestowed on certain associations of natural persons.
The association itself is granted legal personality and is called a juristic person.

1.2.3.1 Characteristics of a juristic person

1. Enjoys a legal existence independent from its members or the people who created it
2. Must always act through its functionaries, i.e. directors of a company
3. When functionaries act on behalf of the juristic person, it juristic person acquires rights, duties and capacities, i.e. be bind itself to a contract, be owner of things, etc.

1.2.3.2 What is recognized as juristic persons?

1. **Associations incorporated** in terms of general enabling legislation, i.e. companies, banks, close corporations and co-operatives
2. **Associations especially created** and recognized as juristic persons in separate legislation, i.e. universities, semi-state organizations, public corporations (Eskom, SABC)
3. **Associations which comply with the common-law requirements** for the recognition of legal personality of a juristic person, i.e. churches, political parties, trade unions: known as *universitates*: Must meet following requirements:
    a. Association must have a continued existence irrespective of the fact that its members may vary
    b. Must have rights, duties and capacities
    c. Its object must not be the acquisition of gain

Trusts and partnerships are not recognized.

2 Beginning of legal personality

Legal personality begins at birth: *foetus* is not a legal subject.

Requirements for the beginning of legal personality:

1. Birth must be fully completed: complete separation between mother & *foetus*; umbilical cord does not have to be severed
2. Child must live after the separation: stillborn *foetus* does not acquire legal personality.

Viability (child can live independently of mother) is not a requirement for commencement of legal personality in South Africa due to viability being a vague concept that could lead to impossible problems of evidence (how to determine viability, length of life before viable, etc.).

2.1 Determining whether a child was alive

1. Purposes of criminal proceedings: Section 239(1) of the Criminal Procedure Act 51 of 1977: if the child has breathed, it was alive; child did not have to have independent circulation; child does not have to be entirely separated from its mother.
2. Courts: rely on medical evidence: normally whether child breathed or not; any other medical evidence by which life may be proved should be acceptable.

2.2 Registration of births

2.2.1 Births and Deaths Registration Act 51 of 1992

1. The Director General of Home Affairs must be notified of the birth of every child that was born alive within 30 days of the child's birth.
2. Duty rests on the parents to give notice: if neither can, notice must be given by:
    d. The person who has charge of the child
    e. The person the parents requests to do so
1. Anyone may apply to the Director General to assume a different surname
2. If a child's surname has changed, the birth register may be changed to reflect the change.

2.2.1.1 Naming of legitimate children under the act

1. Child must have a first name and a surname
2. Notice of legitimate child's birth: must be given under the surname of either parent or both surnames joined together: double-barrelled.
3. Children born as a consequence of artificial fertilisation of a woman who is a partner in a same-sex life partnership are also legitimate due to *J v Director General, Department of Home Affairs*: (2) thus counts for them too

2.2.1.2 Naming of extra-marital children under the act

1. An extramarital child is registered under surname of mother unless parents jointly request that the father's surname be used
2. If an extramarital child is registered under father's name, the father must acknowledge paternity in presence of person to whom the notice of birth is given and enter his particulars on the notice of birth
3. A father who wants to acknowledge paternity of an extramarital child and enter his particulars on the notice of birth after the birth has already been registered, may do so with the mother's consent
4. If the mother withholds consent, the father may apply to the high court for a declaratory order confirming his paternity and dispensing with the mother's consent
5. If an extramarital child is registered under her father's surname, the surname may only be changed with the father's written consent.
6. No provision is made in the act for double-barrelled surnames of extramarital children.
7. If the parents of an extramarital child marry after the birth has been registered, the register can be altered as if the parents were married at the time of birth.

2.2.1.3 Definition of extra-marital/legitimate

1. "Child born out of wedlock" (extra-marital) does not include children whose parents were married at the time of conception or at any time thereafter before the completion of the child's birth.
2. Concept of "marriage" has been expanded to include customary marriages and marriages concluded or solemnized according to the tenets of any religion: thus child = legitimate.
3. Religious marriages in (2) have not been afforded full recognition in our law, thus child is only considered legitimate for the purposes of registration of birth and not for all purposes.

3 Interests of the unborn child (nasciturus)

3.1 Nasciturus fiction

Law protects the potential interests of the *nasciturus* by employing the fiction that the *foetus* is regarded as having been born at the time of conception *when it is to his advantage*.

In such a case, the legal position is kept in abeyance (interests are kept aside) until birth of the child or until certainty has been reached that *foetus* will not become legal subject (abortion, miscarriage, etc.). If *foetus* does become a legal subject, he receives the rights that have been kept in abeyance for him.

Unborn *foetus* cannot have rights, duties or capacities.

3.1.1 Requirements when employing the fiction

1. Child must have been conceived at the time that the benefit would have accrued to him
2. Child must subsequently be born alive

3.1.2 Limitations of the fiction

1. A third person may benefit from the application of the fiction if such a benefit is a natural consequence of the application of the fiction in favour of the *nasciturus*, but the fiction may not be employed if **only** a third person will benefit, thus:
    f. If inheriting *nasciturus* dies shortly after birth, fiction will not be employed as only a third party benefits and not the child.
    g. If *nasciturus* inherits an estate large enough to support it, the parents will not be liable for its maintenance: thus parents and *nasciturus* benefit.
1. Fiction cannot be employed to the detriment of the *nasciturus*

3.2 Interests taken into account

In common law the *nasciturus* fiction was mainly employed in the field of succession. In SA, he fiction's application has been extended beyond the law of succession:

3.3 Patrimonial interests

3.3.1 Succession

3.3.1.1 Intestate succession (person dies without a will)

Nasciturus is employed: Distribution of assets is postponed until it is certain whether or not a live person has been born.

If child is alive: inherits as if already alive at time of deceased's death.

If child is not alive: does not obtain rights and is not considered when estate is divided.

3.3.1.2 Testate succession (testator leaves a valid will)

If testator's intentions regarding the unborn child is clear, testator's intention is carried out. If intentions are unclear, rules of the law of succession must be employed.

Examples:

1. If X leaves property specifically to A, B and C while D has already been conceived at the time of the testators death but has not yet been born, D gets nothing.
2. If X leaves property to his (grand)children who are "born or still to be born", any such (grand)children born after X's death will inherit regardless of whether or not they had already been conceived at the time of X's death.
3. If X does not appoint beneficiaries by name but as members of a class (i.e. "children of Y"), a child in that class who was already conceived at the time of X's death can inherit.

Ex Parte Boedel Steenkamp: X left stuff to "children who are alive at the time of my death": Judge decided conceived child should also inherit as the words "are alive" do not rebut the strong natural presumption that the testator intended to include the *nasciturus*.

Steenkamp demonstrates:

1. Court's unwillingness to act to the prejudice of the *nasciturus*
2. A testator who wishes a *nasciturus* not to inherit must express that intention very clearly.

3.3.1.2.1 Fideicommissum

Testator has ability to leave stuff to persons as yet unborn or unconceived: A leaves farm to B, proviso farm must devolve to B's eldest son, C, after B's death, and to D after C's death:

1. Institution know as *fideicommissum*
2. B is known as the fiduciary (*fiduciarus*)
3. C and D are known as the fideicommissaries (*fideicommissarii*)

3.3.1.2.2 Fideicommissum: protection of the interests of the unborn child

1. B may not alienate or mortgage the farm without the high court's permission
    h. If all fideicommissaries are majors and consent to alienation or mortgaging, there will be no problem in obtaining such an order
    i. If there is a minor or unborn fideicommissary, the court must give or withhold its consent as upper guardian of all minors
1. The court will only give its consent if the alienation or mortgaging will be to the advantage of all beneficiaries, including the unborn

3.3.1.2.3 Standard protection of the interests of the unborn child

1. **Immovable Property Act 94 of 1965** provides that the court has the power to remove or modify restrictions on immovable property which have been imposed by a will if it is to the advantage of the unborn or unconceived person.
2. **Administration of Estates Act 66 of 1965** provides that

   a. if an unborn child will after birth become entitled to money or movable property which is subject to somebody else's usufructuary of fiduciary rights, that person must give security to the master of the high court for the payment of the money or delivery of the property to the child after its birth.
   b. The master may consent to the subdivision of the land on behalf of the unborn heir if this is expedient and equitable
3. In legal proceedings involving property in which an unborn person may have an interest, a *curator ad litem* looks after the unborn child's interests.

3.4 Maintenance

In *Chisholm v ERPM* 1909 it was held that:

1. a child whose father is killed prior to her birth as a result of someone else's delict has a dependant's action for damages of support against that person.
2. damages are calculated on the basis of putting the child in the position it would have been in had the father not been killed

In *Shields v Shields* 1946 it was held that:

3. A mother or father cannot waive his or her unborn child's right to claim maintenance
4. An agreement to that effect would be *contra bonos mores*.

If a pregnant mother divorces the father of her unborn child, the court may provide for the child's maintenance in the divorce order in order to avoid the need for legal proceedings about maintenance after the child's birth.

This is not based on the *nasciturus* fiction, it is merely a common sense approach based on expedience.

3.5 Personality Interests

In *Pinchin v Santam Insurance* Co the *nasciturus* fiction was extended to the field of delict: the father claimed damages for the infringements of the child's personality rights.

The legal question was whether a person has an action for injury inflicted on him while still a *foetus* in his mother's womb.

Judge Hiemstra, after looking at various sources, decided our law was flexible enough to extend the *nasciturus* fiction to the field of delict. He accordingly held that a child does have an action to recover damages for pre-natal injuries. See Cases for full exposition.

3.5.1 Criticism against Hiemstra's judgement

The question which arose in *Pinchin* could have been solved without invoking the *nasciturus* fiction:

1. The ordinary principles of the law of delict would have given the child an action for pre-natal injuries anyway.
2. All the elements of a delict need not be present at the same time and that it therefore does not matter that the conduct and its consequences do not manifest themselves at the same time
3. Thus the requirements of conduct and damage are met even if the disability which the child suffers after birth was caused by the driver before birth

3.5.2 Arguments for Hiemstra's judgement

Nasciturus fiction has to be applied in order to give an action for pre-natal injury:

1. An unborn child has no legal personality and thus no rights that can be infringed by a delict
2. Thus in order to provide the child with an action, the child's legal personality must be pre-dated to before the birth so that the child has legal personality at the time of the conduct causing the injury

3.6 Guardianship and custody

Guardianship and custody are the 2 components of parental authority.

Guardianship: capacity a parent has to administer his child's estate and assist child in the performance of juristic acts.

Custody: controlling the person of the child.

If a woman is pregnant and gets divorced, the court may include an order regarding custody & guardianship in the divorce: done to obviate further legal proceedings once the child is born.

Same as maintenance: *nasciturus* not invoked; merely for convenience once child is born.

Parental authority does not arise until the child is actually born:

1. A pregnant woman cannot have parental authority over a part of her own body
2. A father cannot have parental authority over a part of the woman's body
3. The father cannot stop the mother from having an abortion, thus he cannot even have parental authority over the *foetus*
4. Question of how one would exercise parental authority, especially custody, over an unborn child arises

Friedman v Glicksman 1996:

Mother wants to enter into a contract for her unborn child.

Problems with this:

1. Legal personality only begins at birth, thus mother may not enter into a contract on behalf of a non-existent principle.
2. *Nasciturus* can also not be used: would mean that parental authority is conferred on parent before birth of child (not possible)

Solution to this:

1. Parent enters into a contract with a 3rd person
2. Parent (A) enters into a contract with somebody else (B) in terms of which B undertakes to keep open an offer of contract with the unborn child (C) after his birth
3. C is thus not party to the contract, only A and B, thus it does not matter that C does not yet exist

3.7 Termination of Pregnancy

Choice on Termination of Pregnancy Act 92 of 1996 regulates termination of pregnancies.

3.7.1 Circumstances under which pregnancy may be terminated

1. On the request of the woman during the first 12 weeks of the gestation period
2. From the 13th to the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman is of the opinion that:
    a. The continued pregnancy of the pregnancy would pose a risk of injury to the woman's physical or mental health
    b. There is a substantial risk that the *foetus* would suffer from severe physical or mental abnormality
    c. The pregnancy resulted from rape or incest
    d. The continued pregnancy would significantly affect the woman's social or economic circumstances
3. After the 20th week of the gestation period only after a medical practitioner in consultation with another medical practitioner or a registered midwife is of the opinion that the pregnancy would
    a. Endanger the woman's life
    b. Result in severe malformation of the *foetus*; or
    c. Pose a risk of injury to the *foetus*

Before the 12th week a termination may be performed by either a midwife or a medical practitioner.

After the 12th week only by a medical practitioner.

3.7.2 Consent by mentally able women

1. Termination may only take place with the informed consent of the pregnant woman.
2. No consent other than that of the woman is needed, unless the woman is incapable of giving consent
3. Minors must be advised to consult with their parents, guardians, family members or friends before termination but may not be denied if she prefers not to do so.

3.7.3 Consent by mentally disabled and unconscious women

3.7.3.1 Termination with consent of spouse/guardian/curator personae

1. If (1) the gestation period is less than 21 weeks and (2) the circumstances listed under point 2 of 3.7.1 are present the pregnancy may be terminated by a guardian or spouse if the woman:
    a. is mentally disabled to such an extent that she is incapable of understanding and appreciating the nature or consequences of terminating her pregnancy, or
    b. she is in a state of continued unconsciousness without a reasonable prospect of regaining consciousness in time to request and consent to the termination
2. The *curator personae* may consent if the woman's guardian or spouse cannot be found
3. Two medical practitioners or a medical practitioner and a registered midwife must also consent to the termination

3.7.3.2 Termination without consent of spouse/guardian/curator personae: prior to 21st week of gestation

1. Pregnancy may be terminated without consent of spouse/guardian/*curator personae* if two medical practitioners or a medical practitioner and a registered midwife are of the opinion that
    a. The continued pregnancy would pose a risk of injury to the woman's physical or mental health
    b. There is a substantial risk that the *foetus* would suffer from a severe physical or mental abnormality

3.7.3.3 Termination without consent of spouse/guardian/curator personae: from 21st week of gestation onwards

1. Pregnancy may be terminated without consent of spouse/guardian/*curator personae* if two medical practitioners or a medical practitioner and a registered midwife are of the opinion that the pregnancy would
    a. Endanger the woman's life
    b. Result in a sever malformation of the *foetus*
    c. Pose a risk of injury to the *foetus*

3.8 Sterilization

1. The Sterilization act 44 of 1998 permits the voluntary sterilization of anyone over the age of 18 years who is able of consenting.
2. Applies regardless whether or not the person is married
3. Person must give free and voluntary consent without inducement
4. Before consenting, the person must be
    a. given a clear explanation and adequate of the proposed plan of sterilization procedure
    b. told of the consequences, risks, reversible/irreversible nature of the procedure
    c. advised that consent may be withdrawn any time before the sterilization takes place
5. After (4), consent must be given on a particular prescribed form
6. Person under 18 will only be sterilized if failure to perform the sterilization would jeopardize his life or seriously impair his physical health

7. When sterilizing, the method posing the smallest amount of risk to the patient's health must be used.

3.8.1 Sterilizing mentally disabled people

1. For persons with severe mental disability, sterilization may be performed with the consent of person's parent, spouse, guardian or curator.
2. Desirability of sterilization must be evaluated by a panel consisting of a psychiatrist/medical doctor, psychologist/social worker and a nurse
3. The panel must take all relevant facts into account, including that the person has reached the age of 18 and that there is no other safe and effective method of contraception
4. If the person is incapable of consenting or incompetent due to severe mental disability, the sterilization may only be performed if the panel concurs that the sterilization may be performed and if the person is incapable of
    a. Making his own decision about contraception or sterilization
    b. Developing mentally to a sufficient degree to make an informed decision about contraception or sterilization
    c. Fulfilling the parental responsibilities associated with giving birth

3.9 Is the nasciturus a legal subject?

3.9.1 Nasciturus Rule

Van der Vyver, Joubert and Van der Merwe maintain that the protection afforded to the *foetus* is based on the *nasciturus* **rule** and not a fiction:

1. Whenever a situation arises where it would have been to the advantage of the *nasciturus* had he already been born, all rights conferred on people are also conferred on the *foetus*
2. Thus follows that the *foetus* is a legal subject from the date of conception whenever his interests are at issue
3. Thus legal personality sometimes begins at birth and sometimes at conception

3.9.2 Nasciturus Fiction

Cronje & Heaton and Jordaan & Davel favour the *nasciturus* fiction:

1. *Nasciturus* is regarded as having been born at the time of conception if a situation arises where it will be to the *foetus's* advantage had it already been born.
2. Not the protection of the "rights" of the *nasciturus* that is involved, but the protection of the rights of the child that will be born later
3. Thus the qualification that the *nasciturus* is regarded as having been born only if a living child is indeed born
4. If the child is not born alive, the protection falls away completely and it is as if there never was a nasciturus
5. Thus the interests of the as yet unborn child are kept open until he is actually born.
6. Accordingly, legal personality only begins at birth

4 The end of legal personality

Legal personality is terminated by death: thus dead people have no rights or obligations.
The dead person's assets are protected to protect the interests of creditors & heirs.
It is not clear what criteria are applied in determining when a person is legally dead:

1. Courts rely exclusively on medical evidence to establish
    a. whether someone is dead
    b. the moment of death
2. In the past: death = absence of natural heart and lung activity
3. Today: death = a process which sometimes extends over a period of time and involves cessation of natural heart, lung and brain activity
4. Medical experts suggest that brain death should be *legally* accepted as death

5. Human Tissue Act 65 of 1983 governs anatomical donations after death but does not specify criteria for determining when death takes place
    a. Provides that 2 doctors who have been in practice for at least 5 years must certify that the donor is dead
    b. 2 doctors may not be part of the transplant team
    c. Act thus places determination of death completely in the hands of the medical profession

4.1 Proof of death

Required for 2 reasons:

1. Once death is proved the deceased's estate can be administered and distributed
2. The surviving spouse can remarry

Death is proved by means of a death certificate signed by a medical practitioner or magistrate.

After death has been registered, Director-General of Home Affairs issues an official death certificate which is *prima facie* proof of the death of the person mentioned in the certificate.

4.2 Presumption of Death

4.2.1 Common Law procedure

If a person disappears and could be dead a presumption of death can be pronounced under the common law or, in some instances, in terms of statute.

4.2.1.1 Procedure to get a missing person pronounced dead

1. Any interested party can ask the high court where the person had his domicile to grant a presumption of death
2. Case is brought by way of an application
3. All relevant facts and circumstances must be brought to the attention of the court
4. Applicant must prove on a preponderance of probabilities that the missing person is dead

4.2.1.2 Factors and circumstances taken into account

1. Initially based on English law where presumption was granted after 7 years
2. Was later superseded by the rule that no fixed period of time is required (see Beaglehole)
3. Factors and circumstances taken into account to prove probability of death:
    a. Length of time person has been missing
    b. The age of the person when presumed dead
    c. The person's position in life
    d. The trade or occupation of the person
    e. The age of the person when the application is brought forward
    f. The person's state of health at the time of the disappearance
    g. Whether or not the person manifested suicidal inclinations

4.2.1.3 Procedure followed by our courts to issue presumption

1. After the hearing, the court sets a return date on which the final order will be made
2. Applicant must then
    a. give notice of rule *nisi* to interested parties indicated by the court
    b. publish the rule *nisi* in the Government Gazette
    c. publish the rule *nisi* in a newspaper in circulation in the area where the missing person used to live

4.2.2 Statutory procedure

There are 2 ways in which someone can be declared dead by statute:

4.2.2.1 Inquests Act 58 of 1959

Section 5(2) of the Inquests Act 58 of 1959 says that:

1. If a magistrate is of the opinion that a death was not of natural causes, he must make sure that an inquest into the circumstances and cause of the death is held by a judicial officer
2. If the corpse is available, the district surgeon must examine it to determine cause of death
3. If the body cannot be found or has been destroyed and all the evidence proves beyond a reasonable doubt that the person is dead, the judicial officer must record his findings in respect of:
    a. The deceased person's identity
    b. The cause or likely cause of death
    c. The date of death
    d. Whether the death was caused by an offence
4. If the judicial officer cannot find any of the above, the fact must be recorded
5. If a magistrate has recorded findings regarding the deceased person's identity and date of death, these must be submitted at the inquest for review by the high court having jurisdiction in the area where the inquest was held
6. If the high court confirms the findings the effect is the same as if it had made an order presuming the person's death

4.2.2.1.1 Remarks re the Act

In this act, the state takes the initiative because an unnatural death is suspected: thus not necessary for a private person to approach the court and ask for a presumption of death to be granted.

According to the act, the judicial officer must prove **beyond a reasonable doubt** that the person is dead: this differs from the common law presumption which only has to prove death on a balance of probabilities. Thus it is more difficult to prove a death due to the **heavier onus of proof** and it would be easier to have someone presumed dead under the common law.

4.2.2.2 Aviation Act 74 of 1962

Section 12(1) of the act says:

1. If an aircraft is involved in an accident in or above the Republic or its territorial waters, or any South African aircraft is involved in an accident anywhere, the Minister of Transport may appoint a board of enquiry to investigate the accident.
2. If there has been loss of life and a judicial officer is part of the board of enquiry
    a. the same procedure as followed under the Inquests Act must be followed
    b. the inquiry may be a joint inquiry by the board and an inquest under the Inquests Act
3. If it is not found beyond a reasonable doubt that someone died, interested parties may still approach the court for an order presuming the person's death.

4.3 The effect of an order of presumption of death

Order presuming death is binding on the whole world.

Only the high court of the area where the person was domiciled has jurisdiction to pronounce or set aside an order presuming death.

4.3.1 Rebuttable presumption

1. A presumption of death is a rebuttable presumption re the death of a person.
2. The order can be set aside if it turns out that the person might be/is alive
3. Application can be brought by any interested party or the person himself
4. If this happens, the formerly missing person may
    a. approach the court for an order that the estate not be further divided
    b. ask for an order setting aside the presumption of death
    c. get all their stuff back from people who have received benefits

d. sue people under the *condictio indebiti* if they don't want to give his stuff back

4.3.2 Estate

1. The estate of the person can be administered and divided amongst his heirs
2. Courts may require heirs to furnish security if the missing person should appear

4.3.3 Dissolution of marriage

1. Order presuming someone's death does not automatically dissolve marriage
2. Dissolution of Marriages on Presumption of Death Act 23 of 1979 regulates the position:
    a. If a person has been presumed dead, the court may make an order that the marriage is deemed dissolved by death on a date determined by the court.
    b. The court will not dissolve a marriage on its own initiative: the application must be brought by the spouse
    c. Result of the order is that the marriage is dissolved as if by death of one of the spouses
    d. If an inquest was held under the Inquests Act and a presumption of death was given, the marriage is automatically dissolved and no application needs to be brought by the spouse

4.3.4 Refusal by court to issue presumption of death

1. Court may refuse to order presumption of death, but may still divide person's belongings between his heirs provided they give security should the person come back.
2. Court may also refuse to order presumption of death but may appoint a *curator bonis* to administer his affairs.

4.4 Presumptions regarding sequence of death

If people die together (*commorientes*), the courts may need to determine who died first to see who inherited from whom

Law today is:

1. If the sequence cannot be proved on a balance of probabilities, no presumption of survival or simultaneous death will be made
2. Unless there is evidence to the contrary, however, court will find that all *commorientes* died together

4.5 Registrations of death

Births and Deaths Registration Act 51 of 1992 requires every death to be reported to the Director General of Home Affairs.

Applies to:

1. Deaths due to natural causes
2. Deaths due to unnatural causes
3. Stillbirths

4.5.1 Giving notice

1. If someone died of natural causes, anyone who was present at the death or became aware of it or the person in charge of the funeral must notify the Director General
2. Notice is given by means of a medical certificate issued by the medical practitioner who attended to the deceased or attended the corpse or by means of prescribed notice
3. If someone died of unnatural causes, a certificate may not be issued and the matter must be reported to the police whereupon an inquest will be held under the Inquests Act
4. For a stillbirth, the medical practitioner present at the birth or who examined the corpse must notify the Director General

5. If no doctor was present at the stillbirth, the duty falls on anyone who was present
6. As soon as the death has been registered, the Director General will issue an official death certificate

4.6 Duty to bury the deceased

1. No one may be buried or cremated before a burial order has been issued in terms of the Births and Deaths Registration Act: burial order is issued only once the prescribed notice of death/stillbirth has been given.
2. Written instructions by the deceased must be followed as far as possible.
3. In the case of verbal instructions, there must be clear proof of those instructions, especially if they contradict the written instructions.
4. If there are no instructions, the deceased's heirs have the right and duty to determine the corpse's fate.

5 Status

Status is derived from Latin *stare* (stand): thus status is concerned with a person's standing in the law.

Standing is determined by various attributes of a person or the condition in which he finds himself and to which the law attaches consequences, i.e.:

1. Domicile
2. Extra-marital birth
3. Youth
4. Physical illness or incapacity
5. Mental illness or incapacity
6. Intoxication
7. Prodigality
8. Insolvency

A legal subject has several **capacities** which flow directly from the law and are influenced by the factors previously listed:

1. Legal capacity
2. Capacity to act
3. Capacity to litigate (*locus standi in iudicio*)
4. Capacity to be held accountable for crimes and delicts

Only the high court is competent to give judgements regarding status.

5.1 Legal capacity

1. Legal capacity is the capacity to have rights and duties.
2. All humans have this capacity irrespective of personal qualities
3. All legal subjects have legal capacity, but legal capacity does not extend equally far for everyone, i.e. a child cannot marry
    a. Certain legal subjects cannot have certain rights or duties at all
    b. Certain legal subjects cannot have certain rights or duties at a specific time
    c. Thus legal capacity can be limited from person to person but no legal subject will ever be entirely without legal capacity
4. Something that can never have rights or duties is not a legal subject but a legal object

5.2 Capacity to act

1. Refers to the capacity to perform valid juristic acts.
2. Juristic act: an act to which the law attaches at least some of the consequences desired by the party performing the act
3. Children under 7 and mentally ill people have no capacity to act: law does not attach any validity to their expression of will

4. People between the ages of 7 and 21 have limited capacity to act: the law attached expression of will to certain acts but not to others

5.3 Capacity to litigate

Refers to the capacity to appear in court as party to a lawsuit

Usually a close correlation between capacity to act and capacity to litigate.

Some authors maintain that, because someone else can litigate on behalf of *infantes* and mentally ill people, these people do in fact have capacity to litigate: Cronje & Heaton do not support this.

5.3.1 Capacity to be held accountable for crimes and delicts

Refers to accountability: capacity to be held liable for crimes and delicts.

Often coincides with capacity to act and capacity to litigate.

To a large extent influenced by a person's age and mental condition because intent (*dolus*) or negligence (*culpa*) is a requirement for criminal and delictual liability: mentally ill people or people that are very young cannot have criminal capacity.

6 Domicile

Domicile is used to determine which legal system is applicable to specific people when determining their status.

6.1 Definition of domicile

Domicile is:

1. the place where a person is deemed to be constantly present
2. for the purpose of exercising his or her rights
3. and fulfilling his or her obligations
4. even in the event of his or her factual absence

To acquire domicile in the legal sense, one must have the intention of settling at a particular place for an indefinite period.

6.2 Importance of domicile

Domicile is important in many fields of private law.

Examples:

1. Whether or not a child is legitimate or extra-marital is determined by the law of the child's domicile of origin
2. Law of succession: if someone dies intestate, law of the country of domicile determines how movable property should devolve
3. Relevant when determining whether someone has the capacity to inherit
4. Determines what the matrimonial property regime of a marriage will be
5. Determines which division of the high court has jurisdiction in some matters: thus sometimes plays a role in law of procedure
6. A factor in determining international jurisdiction of a foreign court in order to recognise and enforce an order of such a court

6.3 General principled governing domicile

Principles are governed by the **Domicile Act 3 of 1992**.

Act is not retrospective: thus any right, capacity, obligation or liability which was acquired, accrued or incurred by virtue of the domicile a person had at any time prior to the date on which it came into operation, is not affected.

1. **Every person must have a domicile at all times** due to a person's status being largely dependent on his or her domicile in our law. The law therefore cannot allow a person to be without a domicile at any time.

2. **The changing of a person's domicile is never accepted without proof**. If it is proved that a person has established a domicile at a specific place, it is accepted that he retains that domicile until the contrary has been proved. The matter is determined on a balance of probabilities.
3. **No one can have a domicile in more than one place at the same time**. Some common law writers maintain that it is possible to have more than one domicile, but most modern authors submit that it is not possible.

6.4 Kinds of domicile

6.4.1 Domicile of origin

Refers to the domicile the law assigns to a person at birth.

Prior to the Domicile Act a person's domicile of origin revived if he abandoned his domicile of choice without assuming a new domicile.

Domicile Act, however, provides that no one loses their domicile until they acquire a new domicile and specifically provides that the domicile of origin does not revive.

Thus, because of the Domicile Act, domicile of origin has lost its significance: it is merely the first domicile assigned to a person by operation of law.

6.4.2 Domicile of choice

Section 1(1) of the Domicile Act provides that anyone

1. regardless of sex or marital status
2. over the age of 18 or under the age of 18 who legally has the status of a major
3. who does not lack mental capacity to make a rational choice

is competent to acquire a domicile of their choice

Prior to the act, a wife followed the domicile of her husband: was called domicile of dependence.

6.4.2.1 Requirements for acquiring a domicile of choice

To acquire a domicile of choice, the person concerned must:

1. Settle at the particular place (*factum* requirement)
2. have the intention of residing permanently at the place (*animus* requirement)

The 2 requirement must at some time or another exists simultaneously but need not come into being simultaneously.

6.4.2.1.1 Factum Requirement

1. Determining whether a person's residence meets the *factum* requirement is done objectively.
2. No specific period of physical residence is required, but the person must not just be visiting the place
3. Courts sometimes take into consideration the duration of the physical presence of a person when determining intention of remaining there.
4. Once domicile of choice has been established, the person's continued presence is not required.

Domicile Act recognizes only lawful presence for purposes of acquiring domicile of choice. Thus:

1. Illegal immigrants cannot acquire domicile
2. Deported people lose their domicile, because their return would be unlawful
3. Fugitives do not lose their domicile at the place from which they fled.
    a. Reason for this: preclude fugitive from relying on the fact that court does not have jurisdiction in area that he fled to

6.4.2.1.2 Animus Requirement

1. Determining whether person had intention (*Animus*) of staying somewhere is subjective.
2. Person acquires a domicile of choice at a particular place when they have the intention of staying there "for an indefinite period".
    a. Thus the requirement can still be satisfied even if the person envisages moving at an unknown future date
3. Person must be able to carry out the intention of settling at a particular place.
    a. Thus **previously** military staff, diplomats, public servants, employees of foreign governments or businesses and prisoners were thought to not be able to decide where they were going to stay due to employers deciding where they would stay.
    b. According to Cronje & Heaton the mere fact that a person has been posted to, stationed or imprisoned at a specific place does not mean they do not have *animus*.

6.4.2.1.3 Common law situation re military personnel, prisoners, etc

From *Baker v Baker* it has been decided that military personnel could acquire domicile at the place they are stationed.

From *Naville v Naville* it has been decided that diplomats, public servants and employees/officers of foreign governments or businesses could acquire domicile of choice in South Africa.

From *Nefler v Nefler* it has been decided that prisoners who are imprisoned for life automatically acquire a domicile of choice in prison.

6.4.3 Domicile by operation of law

Section 2(1) of the Domicile Act provides that:

Anyone that does not have the capacity to acquire a domicile of choice is domiciled at the place with which he is most closely connected

People who cannot acquire domicile of choice:

Children below 18 who have not attained majority status

People who do not have the mental capacity to make a rational choice

The law assigns a these people a place of domicile (the place with which they are most closely connected).

6.4.3.1 Domicile of a child

Section 2(1) applies.

Section 2(2) contains the rebuttable presumption that if a child stays with his parents, his domicile is his parental home.

Domicile is assigned only if person is under 18 and unmarried: when person reaches 18 or marries, he retains the domicile he had by operation of law until he establishes a new domicile.

Parents of the child include:

adoptive parents

parents who are not married to each other: thus law does not distinguish between children born in/out of wedlock

6.4.3.2 Domicile of a mentally incapacitated person

Section 2(1) applies.

Formerly:

mentally incapacitated people retained the domicile they had before becoming incapacitated

mentally capacitated people followed the domicile of their curator

7 Extra-marital birth

Legitimate child:

One who is born of parents

who were legally married to each other
at the time of the child's conception or
at any intervening time
Illegitimate child:
Parents were not married to each other at any of the above stages

7.1 Categories of illegitimate children

Natural Children (*spurii* or *liberi naturales*)
Children born of parents who were not married but could have validly married
Adulterine Children
One or both of the child's parents were married at the time of conception
Incestuous Children (*overwonnen kinderen* or *overwonnen bastaarden*)
Children born of parents who were too closely related to be able to marry

7.2 Artificial fertilisation

Children produced by artificial fertilisation of a woman with her husband's semen are legitimate, irrespective if the husband consented to his semen being used.

Children's Status Act 82 of 1987, section 5(1) states that:
A child born to spouses who consented to the use of another person's gametes for purposes of artificial fertilisation is deemed legitimate.
No right or obligations arise between the child and the gamete donor/donor's relations, unless
the donor is a woman who gave birth to the child, or
the donor is the woman's husband at the time of the artificial fertilisation
Section 5 does not apply to
married women who do not have their husband's consent
unmarried women, unless
she is a life-partner in a same sex relationship (*J v Director General, Department of Home Affairs*: see Cases)
Also extends to surrogate motherhood but is ill suited to deal with all the problems surrounding surrogacy.
Surrogacy will be addressed in the SA Law Commission's in its proposed Children's Bill.
Draft Children's Bill states that:

1. A child who is born to a surrogate mother who entered into a valid surrogate motherhood agreement, becomes the child of the commissioning parents for all purposes from the moment of birth.
2. The surrogate mother and her husband or life partner and their relatives have no rights in respect of the child, although the parties may agree that they have access to the child
3. The child has no rights of inheritance or maintenance against the surrogate mother, her husband or life partner, or their relatives
4. If the surrogate agreement is terminated before the child's birth, the child is the child of the surrogate mother and her husband or life partner as from the date of birth.
5. If the agreement is terminated after the date of birth, the child becomes the child of the surrogate mother and her husband or life partner and the commissioning parents lose all rights in respect of the child.

7.3 Proof of parentage

7.3.1 Presumption of Paternity

7.3.1.1 Married persons

If a child is born to a married woman it is presumed to be legitimate: thus it is rebuttably presumed that the woman's husband is the father.

Expressed in maxim: *pater est quem nuptiae demonstrant* (the marriage indicates who the father is)

Courts are hesitant to declare children extra-marital (*F v L, B v E*)

In cases where woman remarries soon after a divorce, the second husband is rebuttably presumed to be the father.

7.3.1.1.1 Rebutting the presumption of paternity

The presumption is rebuttable:

The fact that the husband is not the child's father must be proved on a balance of probabilities.

The right to rebut the presumption of paternity does not lapse in the course of time.

Any interested party can rebut the presumption, not just the child's mother or husband

Paramount considerations should be the child's interests

7.3.1.2 Unmarried persons

Section 1 of the Children's Status Act of 1987 says:

A man is presumed to be the father of an extra-marital child *only* if it is proved by way of judicial admission or otherwise that he had sexual intercourse with the child's mother at a time when the child could have been conceived.

Presumption is rebuttable.

Once the presumption operates, the onus is on the man to prove on a balance of probabilities that he cannot possibly be the father of the child: insufficient to prove that he probably isn't the father.

7.3.2 Corroboration of the mother's evidence

Formerly: courts did not accept mother's corroboration without evidence: rejected in *Mayer v Williams*.

In *Mayer v Williams* JA Trengove decided that:

The court should use the cautionary rule used in criminal proceedings when using the women's testimony with regard to the paternity of the child

Cautionary rule requires the court to recognize:

The danger of relying upon a complainant's evidence in respect of a sexual offence

The need for some safeguard reducing the risk of a wrong conviction

Safeguard may be found in:

Corroboration
the absence of contradictory evidence, or
the untruthfulness of the accused as a witness

Thus, court does not always require corroboration, but corroboration may serve as a safeguard

However, *Mayer v Williams*, will probably not be used due to the rejection of the cautionary rule in *S v J*.

7.3.3 Rebuttal of the presumption/allegation of paternity

7.3.3.1 Absence of sexual intercourse

If it can be proved that
the man did not have sexual intercourse with the child's mother
at any time when the child could have been conceived
the presumption/allegation is refuted

7.3.3.2 The gestation period

Roman & Dutch law accepted that a child born between 180 to 300 days after conclusion of a marriage was conceived during the marriage.

In our law there is no fixed gestation period: courts make a decision on an *ad hoc* basis.

Courts rely on:

Medical evidence as to when conception could possibly have taken place

The "normal" period of gestation:+- 270 to 280 days

7.3.3.3 Sterility

Allegation/presumption is refuted if it can be proved that the man is sterile.

7.3.3.4 The exceptio plurium concubentium

If a man has sex with a woman during the time that a child could have been conceived, but the woman also had sex with another man, the defence is called the *exceptio plurium concubentium*.

The problem arises as to who is the father of the child.

Solutions to the problem:

All the men involved could simply be absolved

- would be sexist, unfair, reflect a view not in keeping with modern-day notions of morality and not be in the best interest of the child

All the men could be held liable

- would be unfair to the men and open to abuse as it would be to the benefit of the woman to name as many men as possible in order for her to get maintenance from at least some of them

The man named by the mother can be held liable unless he can prove that he cannot be the father, i.e. due to sterility

- seems to be generally accepted in our law today, **thus the *exceptio plurium concubentium* is not in use today** as a rebuttal of the presumption of paternity and it would not help the man to prove that the woman had sexual relations with other men

Problems obviously arise with this approach as a man who is not the father could be named by the mother.

Cronje & Heaton allege that the mother's right to choose the father should be reconsidered due to:

Availability of sophisticated blood and tissue tests

Violation of the father's right to equality before the law and equal protection and benefit of the law due to the mother's right to choose

7.3.3.5 Physical features

He fact that the physical features of the child do or do not resemble those of the alleged father do not have much weight, but can be considered in conjunction with other factors which prove or disprove paternity.

7.3.3.6 Contraception

Proof that contraceptives were used during sexual intercourse does not refute the presumption of paternity.

7.3.3.7 Blood and tissue tests

I'm too tired to do this. Just study the cases.

May a court compel a child and an adult to undergo blood tests in order to determine paternity?

Case	**Child**			**Adult**		
	May	**May Not**	**Not Decided**	**May**	**May Not**	**Not Decided**
O v O	•				•	
Seetal v Pravitha	•					•
M v R	•			•		
S v L		•			•	
Nell v Nell			•		•	

8 The status and legitimation of extra-marital children

8.1 The status of the extra-marital child

8.1.1 Parental authority of the mother

1. If a child is extra-marital, only the mother has guardianship and custody.
2. If the unmarried mother is herself a minor, she has custody but guardianship is vested in the mother's guardian, unless a court directs otherwise
3. If the unmarried mother is a minor but has acquired the status of a major by marrying or by obtaining a declaration of majority, she has custody and guardianship
4. The unmarried mother becomes the guardian of the child when she turns 21.
5. If an extra-marital mother marries someone other than the child's father, she remains the child's only guardian
6. An extra-marital child is registered under his mother's surname, but the father may consent to his surname being used.
7. A child's domicile is determined by the place with which he is most closely connected and not by his mother/father's domicile.
8. Acts performed while the person thinks that they are the child's natural guardian may be ratified by the court if they were performed in the child's interest.

8.1.2 Parental authority of the father

1. The court has the power to award custody and guardianship of an extra-marital child to the father if it is the child's best interests.
2. The court would rather give guardianship of the child to the father than to another person due to his genetic relationship with the child.
3. Depending on whether it is in the child's best interests, custody can be given to the father and the child removed from the mother.

8.1.2.1 Natural Fathers of Children Born out of Wedlock Act 86 of 1997

Under the Act, the court has statutory power to award custody and/or guardianship to the father of an extra-marital child.

The Act does not automatically afford the father any right in respect of the child but provides that the court may, on application by the father, grant him custody and/or guardianship and/or access if it is in the best interest of the child.

The court takes the following into consideration when considering the father's application:

1. The relationship between the father and the child's mother, particularly whether either has a history of violence against or abuse of each other or the child
2. The child's relationship with both parents
3. The effect that separating the child from his mother, father, proposed adoptive parents or any other person is likely to have on the child
4. The child's attitude in relation to granting the application
5. The degree of commitment the father has shown towards the child, i.e. whether he paid for the birth, has paid maintenance from date of birth and has paid maintenance regularly.
6. Whether the child was born of a marriage concluded under a system of religious law
7. Any other fact that should, in the opinion of the court, be taken into account

The court may grant sole guardianship or custody of the child to either parent if, in the court's opinion, it is in the child's best interests.

The court may also order that, on the death of the parent to whom sole custody/guardianship was granted, a person other than the surviving parent will be the child's guardian or custodian.

Under Section 3 of the Act:

1. the family advocate must furnish the court with a report and recommendations regarding the welfare of the child before the court can consider the application

2. the court may cause any investigation it deems necessary and order anyone to appear before it
3. the court may appoint a legal representative to represent the child and may order the parties to pay the costs of any investigation, appearance or representation orders

8.1.2.2 Access

Most courts hold that the father does not automatically have the right of access to the child, even if he and the mother were living together at the time of the child's birth:

This is due to the fact that access is a component of parental authority and common law provides that the father does not have parental authority.

Paying maintenance for the child does not afford the father right of access (*B v S*)

If it is in the best interests of the child, access will be granted to the father(*B v S* & *B v P*)

In *Van Erk v Holmer* J Van Zyl went against *B v P* (full bench decision of the Transvaal Provincial Decision of the high court) and said that:

1. The old authorities were silent on the matter and that there was no precedent, legislation or custom
2. The child's interests demanded that no distinction be drawn between legitimate and extra-marital children
3. That expecting the father to pay maintenance but denying him access was grossly unfair
4. Access to a child should not be regarded as an incident of parental authority

Van Erk V Holmer was rejected by J Fleming in *S v S* and by JA Howie in *B v S*..

Re *Van Erk v Holmer* J Fleming said in *S v S* that:

1. J Van Zyl should have followed *B v P* due to *stare decisis*.
2. Opined that there were precedents upon which J Van Zyl should have based his decision
3. The fact that no old authorities gave a father right of access is a strong indication that no such right exists.
4. Public policy does not demand that an inherent right of access be granted to the father

Re *Van Erk v Holmer* JA Howie said in *B v S* that:

1. J Van Zyl's judgment was *obiter*
2. A father's right of access depends on paternal authority and as a father of an extra-marital child does not have that, there is no inherent right of access
3. If it is in the child's best interests, the father may be granted access
4. That if the court was to grant access, the father had to, *inter alia*, inform the court of the degree of commitment shown towards the child, the degree of attachment between him and the child and the reasons for applying for the order.

8.1.2.3 Adoption

Section 18(4)(d) of the Child Care Act 74 of 1983, which required only the consent of the mother for the adoption of an extra-marital child, was declared unconstitutional in *Fraser v Children's Court, Pretoria North* due to the fact that the section:

1. discriminated unfairly against fathers in some matrimonial unions
2. infringed the right to equality

The court also said that section 18(4)(d) discriminated unfairly on the ground of gender because the consent of a mother was always needed but the consent of a father of an extra-marital child was never needed.

8.1.2.3.1 Adoption Matters Amendment Act 56 of 1998

Parliament corrected the defect in the provision by enacting the Adoption Matters Amendment Act 56 of 1998 which amended Section 18(4)(d) of the Child Care Act to require:

1. The consent of both parents if paternity has been acknowledged by the father and the father's identity and whereabouts are known

2. If only 1 parent has consented to the adoption, a notice must be served on the other parent, giving the parent the opportunity to:
    a. also give or withhold consent
    b. advance reasons why his/her consent should not be dispensed with
    c. in the case of the father, apply for adoption of the child
3. The notice need not be served if the whereabouts of the parent is not known
4. The notice need only be server on the father of a child born out of wedlock if:
    a. He has acknowledged paternity in writing; has entered his particulars in the child's birth registration and has ensured that those particulars are correct at all times
    b. The child's mother at the time of consenting to the child's adoption confirms in writing that the child's father has acknowledged paternity and furnishes particulars regarding his identity and whereabouts
    c. A social worker, within 60 days of the mother having consented or at any stage before the adoption order is granted, submits a report confirming the father's identity and whereabouts

8.1.2.3.2 Child Care Amendment Act 96 of 1996

Section 27 of the Child Care Act did not deem certain types of marriages valid. Thus the father's consent was not needed for purposes of adoption. Section 10 of the Child Care Amendment Act 96 of 1996 repealed section 27 of the Child Care Act which discriminated against fathers in polygynous marriages.

Thus for the purposes of the Child Care Act, children born from marriages "concluded in accordance with a system of religious law subject to specific procedures" are not extra-marital.

8.1.2.3.3 Dispensing with parental consent

Section 19 of the Child Care Act stipulates when the consent of the father can be dispensed with when putting a child up for adoption:

1. The father has failed to acknowledge paternity
2. The child was conceived as a result of incest
3. The father was convicted of rape or assault on the child's mother
4. The father was, after an enquiry by the children's court following an allegation by the mother, found, on a balance of probabilities, to have raped or assaulted the child's mother.
5. The father failed to respond to a notice in terms of section 19A of the Child Care Act

Consent of either parent can be dispensed with if he or she, without good cause, failed to discharge his or her parental duties with regard to the child.

8.1.3 Maintenance

Both parent have a duty to support their extra-marital child.

The duty is apportioned between them in accordance with their respective means.

8.1.3.1 Parents' right to maintenance from extra-marital child

From common law it is clear that extra-marital child must support his mother and her relations.

Some authors maintain that the father may not claim maintenance from the extra-marital child due to the fact that the father is not related to the child. This is not so: the father does not have parental authority but is related.

8.1.3.2 Maintenance on the death of the parent(s)

If either parent dies, the parent's estate is responsible for the child's maintenance.

According to *Motan v Joosub*, if neither parent nor the parent's estate can support the child, the duty passes to the child's maternal grandparents.

This above case:

1. Is unfair, unacceptable and in conflict with common law and public policy.

2. Furthermore, the distinction between the duty of support in respect of legitimate and extra-marital children violates the extra-marital child's right to equality before the law and equal protection and benefit of the law.
3. Constitutes unfair discrimination on the ground of birth
4. Conflicts with the provision of the children's rights clause which makes the child's best interests paramount concern in all matters relating to the child.

In accordance with *Motan v Joosub* it is also argued that extra-marital children have a duty to support their maternal grandparents but not their paternal grandparents.

This is unconstitutional on the ground that it violates the right to equality before the law and equal protection and benefit of the law.

8.1.4 Right to Inherit

8.1.4.1 Intestate succession

In terms of section 1(2) of the Intestate Succession Act 81 of 1987 extra-marital birth does not affect the capacity of one blood relation to inherit the intestate estate of another.

Thus: extra-marital children can inherit from both parents and both parents can inherit from intestate from an extra-marital child.

Thus: no distinction drawn between legitimate and extra-marital children

8.1.4.2 Testate succession

People can benefit whoever they want in their wills: thus whoever a parent chooses (legitimate or extra-marital) can inherit testate.

The position of incestuous children is less clear but the authors submit that they should be able to inherit testate from both mother and father as children should not be punished for the sins of their parents.

According to **section 2D(1)(b) of the Wills Act 7 of 1953** extra-marital birth "shall be ignored" when determining a person's relationship to the testator, i.e. "my children" would exclude extra-marital children.

8.1.5 Extra Marital Birth and the Constitution

Regarding discrimination in access to the extra-marital child by the father, the appellate division concluded that the father is not unfairly discriminated against (*B v S* and *T v M*).

The question regarding access is always decided on the basis of what is in the best interests of the child.

If the mother refuses the father of an legitimate child access, he has to approach the court.

According to the Natural Fathers of Children Born out of Wedlock Act, a father may approach the court for an order granting him rights if it is in the best interests of the child.

The present legal position is open to criticism because:

1. The child's best interest are not necessarily served by separate rules in respect of parental authority over legitimate and extra-marital children.
2. If we were to comply with the "best interests" directive, the marital status of the child has to be irrelevant.
3. The differentiation between the child's parents amounts to unfair discrimination against the child on the ground of social origin and birth.
4. The law decided is advance that the child is not entitled to a legal relationship with both parents which infringes on the child's right to paternal (not just maternal) care.

From the view of the parents, thus, the position amounts to inequality before the law as well as unfair discrimination on the ground of marital status, sex and gender:

8.1.5.1 Discrimination

Some authors argue that mothers are the primary caretakers and that primary responsibility for child care justifies exclusion of the father's automatic rights as this conforms to the notion of substantive/real equality.

Problem with above statement is that:

1. Sends the message that fathers should not concern themselves with childcare as it isn't their job and/or they are incapable or unsuited to it
2. Does not give proper effect to the child's constitutional right to parental care and is not in the best interests of the child

The Children's Draft Bill will confer automatic parental responsibilities and rights on some categories of fathers of extra-marital children.

8.1.5.1.1 From the mother's viewpoint

There is discriminated:

1. On the ground of marital status: She has sole parental responsibility instead of shared responsibility.
2. On the ground of sex/gender: the law automatically imposes sole child care responsibilities on her.

8.1.5.1.2 From the father's viewpoint

There is discriminated:

1. On the ground of marital status: he has to approach the court to have rights in respect of the child, whereas a married man automatically has those rights.
2. On the ground of sex/gender: the law favours mothers instead of fathers because a mother automatically has parental authority and the father not.

8.2 The legitimation of extra-marital children

In terms of section 4 of the Children's Status Act 82 of 1987 a child is legitimized in all respects of his parents marry each other at any stage after his birth.

This applies even if the parents could not legally marry each other at the time of his birth.

Section 4 does not retroactively confer rights on the child after the marriage of his parents: thus he is only legitimated from the date of his parents' marriage.

The above is, however, in conflict with the Births and Deaths Registration Act 51 of 1992 which provides for the legitimation of children after birth by saying that "as if such a child's parents were legally married to each other at the time of birth."

An incestuous child can be legitimized if laws regarding forbidden degrees of relationship change, i.e. the Marriage Act 25 of 1961 made it possible for a widow to marry her dead husband brother, something which was previously prohibited.

8.2.1 Legitimation by an order of the authorities (*legitimatio per rescriptum principis*)

In common law the Sovereign could legitimate a child as a favour if one of the parents died before a marriage could be concluded.

In *Potgieter v Bellingan* it was held that the above method of legitimation was obsolete.

The court cannot declare an illegitimate child legitimate: it can only declare a child of a putative marriage legitimate, but then simply confirms an existing fact since the children born of a putative marriage are in any event legal.

8.2.2 Legitimation by adoption

A child can be legitimated by adoption . The child becomes the legitimate child of the adoptive parent, regardless of whether or not the parent is married. Thus if the father of an illegitimate child adopts it, it becomes legitimate.

9 Minority

Is one of the most important factors influencing a person's status.

Only persons with a reasonable understanding and judgment (**the ability to understand the nature, purport and consequences of one's acts**) have the capacity to act.

Youth has a major influence on a person's **power of judgement**: thus the law protects young people by limiting their capacity to participate in legal interaction.

From a legal viewpoint, a young person has neither the intellectual ability nor the experience to participate independently in legal and commercial dealings before the age of 21.

Because the object of the restrictions on minors' capacity is to protect them, the restrictions do not violate the constitutional right to equality, nor do they amount to discrimination on the ground of age.

9.1 Children's Rights

9.1.1 Section 28 of the Constitution

Children below the age of 18 are afforded special protection by section 28 of the Constitution.

The purpose of Section 28 is to protect children, not their parents.

Section 28 gives every child the right

1. To a name and nationality from birth
2. To family or paternal care, or appropriate alternative care when removed from the family environment
3. To basic nutrition, shelter, basic health care and social services
4. To be protected from maltreatment, neglect, abuse and degradation
5. To be protected from exploitative labour practices
6. Not to be required or permitted to perform work or provide services that are inappropriate for someone of his age, or place his well-being, education, physical or mental health, or spiritual, moral or social development at risk.
7. Not to be detained except as a measure of last resort. If detained, the child must be kept separate from people over the age of 18.
8. To have a legal practitioner assigned to him by the state in civil proceedings, at state expense, if substantial injustice would otherwise result
9. Not to be used directly in armed conflict, and to be protected in times of armed conflict

Section 28(2) prescribes:

1. A child's best interests are of paramount importance in every matter concerning the child.
2. Previously the criterion of the best interests of the child was limited to family law proceedings, but 28(2) indicates that the criterion must be applied in all fields of law.
3. Also submitted that: child's best interests must outweigh other constitutional rights unless the infringements on the child's best interests can be justified in terms of the general limitations clause in the Constitution

Our courts also hold that the child's rights to paternal or family care must be taken into account when sentencing a convicted parent and detaining a parent pending deportation from the country.

9.1.1.1 Subsection (b) and (c) of section 28(1)

Subsection (b) defines those responsible for giving care (mainly parents).

Subsection (c) lists "various aspects of the care entitlement", i.e. the state affording families access to land, housing, health care, food, water and social security.

Most of the cases dealing with section 28(1) deal with the rights contained in subsections (b) and (c). The constitutional court's attitude with regards to the rights contained in these subsections is as follows:

1. The duty they impose rests primarily on parents and family members
2. The duty passes to the state only if the child's parents or family members fail or are unable to provide care to the child
3. The state must, however, create the necessary environment for parents and family members to provide children with proper care.

According to *Government of the Republic of South Africa v Grootboom* subsection (b) and (c) need to be read together. The content of the child's right to receive care is therefore partly determined by the socio-economic rights mentioned in subsection (c).

Grootboom also mentions that the child's rights in terms of (c) must be ascertained in the context of the socio-economic rights in sections 25(5), 26 and 27 of the Constitution.

25(5), 26 and 27 oblige the state to make available adequate housing, healthcare services, food and water and social security.

There is thus an overlap between the child's rights as in 28(1)(c) and 25(5), 26 & 27: the court held that this overlap does not create separate and independent rights for children and does not entitle them to shelter on demand.

9.1.2 United Nations Convention on the Rights of the Child

Above has been ratified by South Africa and must thus comply with the obligation the convention imposes on the state.

1. The convention only confers special protection on children below 18 years
2. Convention *inter alia* stipulates that the best interests of the child should be "a primary" consideration in all actions concerning the child.
3. Children who are capable of forming their own views must be given the right to express those views freely in all matters that affect them.
4. Their views must be given due weight, taking their age and maturity into account
5. Convention obliges state parties to recognize the common responsibilities of parents for the upbringing and development of their children.

10 The legal status of an *infans*

An *infans* is a child below the age of 7.

A minor is a child between the age of 7 and 21, but also denotes someone below the age of 21.

10.1 Concepts

- There is an **agreement** (afspraak) if there is consensus between two or more people, and all are aware of having reached consensus (conscious consent).
- **A contract** (or obligatory agreement) is an agreement undertaken with the intention of creating an obligation or obligations.
- **Contractual liability** means that the party or parties to the contract can be held legally liable for the fulfilment of the provisions of the contract.
- **An obligation** is a juristic bond in terms of which the party or parties on the one side have a right to performance and the party or parties on the other side have a duty to render performance. **Contracts, delicts and various other causes (e.g. undue enrichment) give rise to obligations**.
- **Performance** is human conduct which may consist of a commission or an omission.
- **A civil obligation** is a legally enforceable obligation, while a **natural obligation** is unenforceable. These two concepts are explained in more detail in Cronje. & Heaton on 88. You should study this section.

- A **unilateral contract** is a contract in terms of which only one of the parties undertakes to render some performance. An example of such a contract would be a contract of donation. Only the donor undertakes to render some performance.
- A **multilateral contract** is a contract in terms of which more than one party undertakes to render a performance. An example of such a contract would be a contract of loan. The lender undertakes to lend the borrower a certain amount and the borrower undertakes to repay the amount.
- A **reciprocal contract** is a special type of multilateral contract. It is a multilateral contract in terms of which performance is promised on the one side in exchange for performance on the other side. An example of such a contract is a contract of sale. Suppose Peter sells his bicycle to Chris for R200. Both Peter and Chris undertake to render some performance, and both are simultaneously creditor and debtor. Peter is debtor as regards the delivery of the bicycle and creditor as regards the payment of R200. Chris is debtor as regards the payment of R200 and creditor as regards the delivery of the bicycle

10.2 Capacity to act

An *infans* cannot:

1. have any capacity to act and cannot conclude any juristic act.
2. enter into any agreement whatsoever, not even one that confers only rights and imposes no duties
3. act as somebody's agent because the law attaches no consequences to his/her expression of will
4. conclude a juristic act even with the assistance of his guardian: his guardian has to act on his behalf
5. accept a donation: the court, the master or the guardian must accept the donation on the *infans'* behalf, even if it is the *infans'* parent or guardian: the parent or guardian has to accept the donation on the *infans'* behalf and it must be made clear that the donation is being accepted on his behalf

Even if there is agreement between an *infans* and another person the law ignores it.

An *infans'* act can however constitute a juristic act, giving rise to legal consequences, i.e. destroying another's property

Once a guardian enters into an agreement on the *infans'* behalf it is on the *infans* that rights are conferred and duties imposed: the *infans* has legal capacity and can thus have rights, duties and capacities.

Certain transactions, i.e. an engagement or an insurance contract on his life, cannot be concluded by the guardian on the *infans'* behalf.

10.3 Capacity to litigate

An *infans* does not have *locus standi in iudicio* and cannot be a party to a lawsuit even if assisted by his guardian: the guardian must always litigate for and on behalf of him.

10.4 Delictual and Criminal Liability

Because an *infans* is completely unaccountable he can never be criminally or delictually liable where liability is based on fault.

He may, however, be liable for delicts not based on fault.

Thus an *infans* can:

1. be sued under *actio de pauperie* if he owns an animal and the animal causes damage
2. incur vicarious liability if his employee commits a delict in the execution of his/her duties
3. be held liable on the ground of undue enrichment or *negotiorum gestio* as these forms of liability are not based on capacity to act or capacity to incur delictual or criminal liability.

11 The legal status of a minor

Minors between the age of 7 and 21 have limited capacity to act.

11.1 Capacity to enter into a contract

The general rule is that a minor can only incur contractual liability if he is assisted by his guardian when a contract is made.

The minor can, however, enter into a contract without the assistance of his guardian if the contract improves his position without imposing any duties on him.

11.1.1 Entering into a contract without guardian's consent

11.1.1.1 Validity of the contract

1. If a minor enters a contract without his guardian's consent and the contract imposes duties on the minor, he is not liable in contract.
2. The obligation created upon the minor is unenforceable (*naturalis obligatio*).
3. The agreement is however not void, as the other party must honour his part of the agreement (obligation on him is a civil one (*civilis obligatio*) which is enforceable).
4. Thus the contract created is only partially valid. Such a contract can be ratified by the guardian or by the minor himself when he attains majority. Ratification converts the natural obligation to a civil one which is then enforceable.

11.1.1.2 Repudiation or honouring of the contract

1. It is up to the guardian (or the minor when attaining majority) to decide whether to honour or repudiate the contract: the other party must abide by this and still perform in terms of the contract.
2. Thus the other party cannot rely on the minor's minority or on *exceptio non adimpli contractus* to avoid his own contractual obligations.
3. Normally, when sued, the minor raises his minority as defence
4. The minor may also take out an order declaring him not contractually liable
5. The minor cannot sue the other party for performance, as he would need his guardian's consent to sue and such a consent would amount to ratification of the minor's contract.
6. If the minor has performed in terms of a contract and the contract is repudiated, he may recover what he has performed: property other than money is recovered by the *rei vindicatio* and money by a *condictio*.
7. As the contract cannot be enforced against the minor, he does not have to apply for *restitutio in integrum*.
8. *Restitutio in integrum* applies if the minor entered into a contract with assistance and the contract was to his detriment and he has performed in terms of the contract.

12 The minor's contractual capacity

12.1 Assistance by the guardian

The reason why a minor cannot enter into a contract without his guardian's consent is to protect the minor against his own immaturity of judgment. This falls away when a guardian gives his consent and the minor is then liable *ex contractu* as if he were a major.

The guardian's consent can take many forms:

1. The guardian can act on the minor's behalf
2. The minor can enter into the contract with his guardian's consent
3. The guardian can ratify the agreement after it has been concluded
4. The guardian's consent can be given expressly or tacitly:
    a. If the guardian raises no objection to a transaction, it can be accepted that tacit consent was given
    b. The guardian will also be taken to have ratified the contract if he allows the minor to sue the other party for performance in terms of the contract

5. Guardian's consent may apply to a single transaction or several, i.e. if the guardian allows their child to conduct their own business
6. The guardian need not have knowledge of each and every term of the contract, but must be aware of its nature and essential terms
7. Consent obtained through fraud or undue influence is worthless
8. The guardian is obliged to help the minor when entering into contracts that are to the minor's advantage:
    a. If the guardian is unwilling or unable to do this, the court may order the guardian to do so or itself give the required consent
    b. The court will also intervene if a guardian's own interests in a transaction conflict with the duty to further the minor's interests or where the guardian's consent is insufficient in itself
9. A guardian may not enter into a transaction on behalf of a minor that will come into operation only after the minor has attained majority.
10. A guardian may not conclude a contract on behalf of a minor in respect of agreements of a closely personal nature, i.e. antenuptial agreement.
11. A guardian who has consented to a transaction may withdraw consent prior to the transaction being concluded

12.2 Liability of the Guardian

A guardian does not incur personal liability in respect of the minor's contract, regardless of whether he assisted the minor or acted on the minor's behalf.

A guardian can be held liable:

1. if the minor acted as his agent
2. if he guaranteed the minor's performance and the minor does not perform
3. if he bound himself as surety for the minor's performance and the minor does not perform
4. on the basis of *negotiorum gestio* if he is the child's parent: the parent has a duty to maintain his children: if he does not perform his duty and it is performed by a third party, he can be held liable on the basis of *negotiorum gestio*. Here the guardian's liability arises not contractually but quasi-contractually.

12.3 Ratification

A guardian my expressly or tacitly ratify a contract the minor initially concluded without the guardian's consent.

Ratification validates the contract with retroactive effect.

A guardian cannot ratify a contract he did not initially have the power to conclude on behalf of a minor.

The minor may also ratify a contract when he comes of age: the contract then becomes fully enforceable.

Ratification by the minor can take place tacitly or expressly: when deciding if a minor tacitly ratified a contract, the court considers the minor's acts and conduct and deduces from this whether or not the minor had the intention of ratifying the contract.

If the above happens, and the minor does not know that he is acting as if he is tacitly approving a contract, the minor's ratification would be rebutted if his ignorance is reasonable and excusable.

See also *Edelstein v Edelstein*.

12.3.1 Statutory exceptions regarding a minor's capacity to act

There are some exception created by statute which allows a minor incur contractual liability:

1. A minor of 18 years may without consent enter into, vary or deal with a life insurance policy and pay premiums due under the policy. Any money payable under the policy must be paid to the minor who can do with it as he wishes.
2. A minor over the age of 16 may be a member of or a depositor with a mutual bank unless the articles of the mutual bank provide otherwise.

    a. The minor may without assistance have full dealings with the bank and deal with his deposit as he sees fit.
    b. He has all the privileges and obligations of a normal member, except that he cannot hold office in the bank.
3. Deposits in the Postbank and national savings certificates in the name of a minor of any age may be repaid to him

13 Minor's contractual capacity: Misrepresentation

If a minor misrepresented himself as a major, the general view is that the minor should be held liable.

There is, however, no consensus on what the basis for this liability should be. There are 2 possibilities:

1. The minor can be held liable on the basis that the contract he concluded is enforceable, i.e. the minor can be held **contractually liable**
2. The minor can be held liable on the basis of the delict (or rather wrongful act) he committed, namely misrepresentation, i.e. the minor can be held **delictually liable**

13.1 Contractual Liability

Those who advocate contractual liability advance the following as reasons why:

1. Roman-Dutch writers expressly denied the *restitutio ad integrum* to a minor who misrepresented himself as a major.
2. As *restitutio ad integrum* presupposes a binding contract it is implied that there is a binding underlying contract.

Cronje & Heaton do not support this:

1. *Restitutio ad integrum*'s proper application is for contracts the minor concluded with the necessary assistance and contracts the guardian concluded on the minor's behalf where the contract is binding.
2. Roman-Dutch practise, however, was also to apply for *restitutio ad integrum* in cases where a minor had entered into a contract **without** the necessary consent.
3. Cronje & Heaton maintain that in these circumstances the minor was not liable at all and that there was no need to resort to *restitutio ad integrum* as the minor could have simply recovered the performance already rendered in terms of the unenforceable contract.
4. Thus the invocation of *restitutio ad integrum* where it was not necessary does not mean that the minor is contractually liable for misrepresentation.

The second argument regarding why a minor should be held contractually liable for misrepresentation goes as follows:

1. The authors rely on estoppel
2. If the minor misrepresents himself as a major and another person enters into a contract on the basis of this misrepresentation, the minor cannot raise his minority as a defence.
3. Consequently the minor is held liable on the contract as if he was a major when the contact was concluded
4. The other party can then simply sue the minor and by means of estoppel frustrate any reliance of the minor on his minority as defence

Cronje & Heaton do not support this:

1. Holding the minor liable would defeat the object of limiting a minor's capacity to act
2. The fact that the minor acted fraudulently does not mean he has the necessary ability to judge and that the protection of the law is thus not needed.
3. In addition, holding the minor liable would mean that a minor could change their status and attain full capacity to act by committing a misrepresentation

See also *Louw v MJ & H Trust (Pty) Ltd*.

13.2 Delictual Liability

Minors can be held liable on a delictual basis for misrepresenting themselves as majors.

13.2.1 Claim of majority

If a minor openly claims to be a major, he is definitely misrepresenting himself.

The other contracting party does **not** need to enquire into the truth of the statement and he may accept the assertion unless he has good cause for believing that he is dealing with a minor.

13.2.2 Tacit claim of majority

Here the issue is whether the minor's conduct amounts to misrepresentation.

1. If the minor knows the other party thinks he is a major and does nothing to remove the misconception, he commits a misrepresentation.
2. For the minor to be held liable he must be old enough to be mistaken for a major.

13.3 Final word

The minor will be held liable only if:

1. He made a misrepresentation regarding his or her majority or capacity to act
2. The other party suffered a loss.
3. The misrepresentation was the cause that induced the other party to enter into a contract with the minor.

14 Minor's contractual capacity: Undue enrichment

Undue enrichment: Person A is unduly enriched at the at the cost of expense of person B if he or she (A) gains a patrimonial benefit at the expense of B without there being a recognised legal ground justifying the transfer of the benefit.

14.1 Calculation of enrichment

Must know well!

The enrichment claim is limited to the lesser of:

1. The amount by which the enriched person's estate remains enriched at the date of the institution of the action
2. The amount by which the other person's estate remains impoverished by that date.

Calculation:

1. The moment on which the calculation must be based is that moment when the other party institutes his or her claim.
2. The amount by which the minor's estate is increased owing to the performance of the other party must be calculated. Here we look only at price the actual value of the performance and ignore the contract price.
3. The amount by which the estate of the other party is decreased as a result of the performance must be calculated. Here again look only at the actual value of the performance and not at the contract price.
4. You can now determine two amounts. The minor is liable for the lesser of the two.
5. If the minor has lost the performance he or she received or its value has decreased, or if he or she has sold it, the following rules apply:
    a. If the minor has lost the performance he or she received (or it has been stolen), the other party is not entitled to anything.
    b. If the value of the performance has decreased, the minor is liable only for the decreased value.
    c. If the minor sold the performance before the action was instituted, he or she remains liable for the purchase price received, depending on how he or she applied the proceeds thereof.

d. If the proceeds are still in the minor's possession on the date of institution of the action, he or she is liable for as much of it as still remains at the time of institution of the action.
e. If the minor has used the proceeds for necessaries, he or she is still liable for the purchase price of these necessaries, even if nothing remains of them. Necessaries include food, clothing, accommodation and medical treatment. The reason for the minor's liability in this case is that he or she would have had to purchase the necessary items out of his or her own estate in any case. Therefore, by saving on these expenses, the minor is unduly enriched at the expense of the other party.
f. If the minor purchased luxury items with the proceeds, he or she is liable for the value of whatever still remains.

14.2 Benefit Theory

Benefit theory was introduced by *Nel v Divine, Hall & Co.* where it was held that if a contract as a whole is to a minor's benefit, the minor is contractually liable.

The courts applied this **incorrect** decision consistently until *Edelstein v Edelstein* authoritatively rejected it:

In *Edelstein v Edelstein* it was held that a minor is not contractually liable whenever a contract is in a vague and general way to his advantage, but that he may be held liable *ex lege* for the amount by which his estate was unduly enriched by the transaction.

Thus the benefit theory is no longer of application in today's law.

15 Minor's contractual capacity: Restitutio in integrum

Restitutio in integrum: is an extraordinary legal remedy whereby a minor can escape liability if

1. he contracted with the assistance of his guardian (or the guardian contracted on his behalf) and
2. the contract was prejudicial to the minor at the moment it was made.

The purpose of the restitution is to restore the *status quo ante*: complete restitution from both sides must take place, putting the parties in the position they would have been had they never entered into the contract.

Each party must:

1. Return everything received under the contract
2. The proceeds or any advantage derived from the contract
3. Compensate the other for any loss suffered as a result of the contract

Restitution not only affords a cause of action, but can also be used as a defence when a minor is sued for performance in terms of a prejudicial contract.

Restitution to a minor differs from other cases of restitution:

If does not release a person who has bound himself as surety for the minor from his obligations, i.e. a parent would still have to meet the obligations he/she stood surety for.

Restitutio in integrum prescribes at most three years after the date upon which the minor became a major, but cannot occur within the first year after the minor became a major.

15.1 When can *restitutio* be used?

Restitutio in integrum:

1. is only necessary if the minor is contractually liable.
2. is available even if the court consented to the minor's contract, as the court could have been misled or erred.
3. can be applied for whenever a minor has suffered prejudice, i.e. not only for contracts

15.2 When can *restitutio* not be used?

Restitutio in integrum can not:

1. be relied upon to set aside a marriage or escape delictual or criminal liability
2. be used by a minor who misrepresented himself as a major or in some other fraudulent manner persuaded the other party to enter into a contract
3. be used if the prejudice arose at a later date
4. be used if, after attaining majority, the minor ratifies the contract

15.3 Getting restitution

1. The minor may, with the assistance of his guardian, apply for restitution before attaining majority.
2. The guardian may also apply for restitution on the minor's part.
3. If the guardian fails to assist, a *curator ad litem* may be appointed to assist the minor
4. The minor can wait to attain majority and institute the action himself

16 Minor's capacity in terms of other juristic acts

16.1 Other agreements

The minor can enter into other agreements which benefit him without his guardian's assistance, i.e. the extinguishing of his debt to someone else, but may not enter into agreements that encumber him without his guardian's assistance.

If the minor performs without his guardian's assistance, the performance is invalid and he can recover whatever he performed.

If a minor entered into a contract with assistance, but performed without assistance, he may not recover his performance: as guardian consented to contract it is taken that he also consented to the minor's fulfilling the contract by rendering performance.

A real agreement by which a right is transferred to a minor is valid even if the minor acted without assistance. A minor cannot, however, transfer a real right to another person without the assistance of his guardian.

16.2 Minor's capacity to make and witness a will

Any person over may from the age of 16 make a will and dispose of his property as he pleases.

A witness to a will must be at least 14 years old.

16.3 Capacity to marry

Circumstances under which a minor may marry:

1. If both a legitimate minor's parents are alive , the must both consent even if the are divorced, unless
    a. the court orders otherwise, or
    b. sole guardianship has been granted to one of his parents
2. If one of the parents is deceased, the surviving parent's consent is sufficient
3. If the minor is extra-marital only the mother needs to consent, unless
    a. the father has obtained guardianship by a court order
4. An orphan for whom a guardian has been appointed must get the guardian's consent
5. For a boy under 18 and a girl under 15 the consent of the Minister of Home Affairs in needed: children below the age of puberty cannot marry at all, thus the Minister's power to consent is limited to girls between 12 and 15 and boys between 14 and 18.
6. If one or more of the minor's parents is absent or incompetent to consent, consent may be granted by the commissioner of child welfare.
    a. The commissioner must also determine whether it is in the minor's interest to enter into a prenuptial contract.
    b. If it is, the commissioner must ensure that this is done before consenting and assist the minor in its execution

    c. If the commissioner refuses his consent, the minor may approach the high court for consent.
7. The minor may also approach the high court if his parents / guardian refuses consent. The court may grant consent if:
    a. it is of the opinion that the parent or guardian's refusal is without adequate reason, and
    b. contrary to the interests of the minor
8. If the court consents, it may also order that a particular matrimonial property system must apply in the marriage. If an antenuptial agreement must be entered into, the court can appoint a curator to assist the minor in this regard.
9. A minor who has been married before or has been declared a major requires no consent

16.3.1 Effect of absence of consent to marry

16.3.1.1 Section 24 of the Matrimonial Property Act 88 of 1984

Section 24 of the Matrimonial Property Act 88 of 1984 governs the patrimonial consequences of a marriage entered into by a minor without consent.

Section 24(1) provides that if the marriage is dissolved due to lack of consent, the court may make any order regarding the matrimonial property as it sees fit.

Section 24(2) provides that if the marriage is **not** dissolved, the patrimonial consequences are

1. the same as if the minor was of age when the marriage was entered into, and
2. any antenuptial contract in terms of which the accrual system is included and which was executed with a view to the marriage, is deemed to be valid

16.3.1.2 Lack of consent of Minister of Home Affairs

1. If the consent of the Minister of Home Affairs was needed but was not obtained, the marriages is **null and void**
2. The Minister may, however, declare the marriage valid *ex post facto*.

16.3.1.3 Lack of consent of parent(s)

1. If the consent of the parent / guardian / commissioner of child welfare was needed but was not obtained, the marriage is **voidable**. It may be set aside by the court on application by:
    a. The parents or guardian before the minor attains majority and within six weeks from the date on which they became aware of the existence of the marriage, or
    b. The minor before attaining majority or within 3 months thereafter

16.4 Capacity to consent to medical treatment and operations

Over 14 years: minor may consent to any medical treatment of himself or his child.
Over 18 years: may consent to an operation, including sterilization
Pregnant of any age: may consent to termination of the pregnancy

16.5 Capacity to hold offices and perform functions

16.5.1 They Can't

Minor can **not** be a director of:

1. a company
2. a mutual bank
3. a trustee of an insolvent estate
4. executor of a deceased estate (submitted by Cronje & Heaton: not decided)

Emancipated minors can also **not** hold the above offices.

Minors can not be appointed as someone else's guardian (they are obviously the guardian of their own children)

16.5.2 They Can

Minors declared majors under the Majority Act or minors who attain majority through marriage, however, **can** hold the above offices.

A minor can act as someone else's **agent** without the consent of his guardian: an agent does not bind himself but the principle

16.6 Capacity to litigate

A minor has **limited capacity to litigate** (*locus standi in iudicio*) in most private-law lawsuits.

Thus: a minor himself can sue or be sued with his guardian's assistance, or his guardian can take up the case on his behalf.

If the minor does not have a guardian, he or she must be assisted by a *curator ad litem* who is appointed on application by the court.

Anyone who has an interest in this appointment, or a friend or a creditor of the minor, may make such an application. The minor himself or herself can make the application if old enough to be able to understand the procedure.

Exception for private law proceedings: If the court grants a minor *venia agendi* the minor:

1. Has full capacity to litigate
2. Does not require assistance at the proceedings

Exception does not apply to civil cases: minor requires the assistance of his guardian.

In criminal proceedings the guardian's assistance is not needed.

16.7 Capacity to incur delictual and criminal liability

To incur delictual or criminal liability, the minor must be accountable.

To be accountable, a person must have the mental ability to:

1. distinguish right from wrong
2. act in accordance with such an appreciation

Minors 7 - 14: **Rebuttably** presumed to be **not accountable** for their crimes and delicts

Minors 14 – 21: **Rebuttably** presumed to be **accountable** for their crimes and delicts

17 Termination of minority

17.1 Attainment of the prescribed age

Attainment of majority has been fixed by statute at the age of 21 years.

SA Law Commission recommends lowering it to 18.

Majority ensues at the beginning of the day of the person's 21st birthday, unless it is in the person's interest that it be extended to the exact moment of his birth.

17.2 Marriage

A minor who enters into a valid marriage before his 21st birthday becomes a major.

If the marriage is dissolved by death or divorce before the person's 21st birthday, minority does not revive.

A void marriage does not terminate minority and the annulment of a voidable marriage restores a minor's limited capacity with retrospective effect.

17.3 *Venia aetatis* and release from tutelage

It is submitted by Cronje & Heaton that the Age of Majority Act 57 of 1972's declaration of a minor to be a major under the Act has replaced *venia aetatis* and release from tutelage in practise.

Distinction between these two legal concepts lies in the authority which granted the concession. In the case of venia aetatis it was granted by the executive authority (sovereign), and in the case of release from tutelage it was granted by the judiciary (courts).

17.3.1 Venia aetatis

Venia aetatis: sovereign grants minor a concession to act as a major.

Effect: makes a minor a major in the eyes of the court with the exception that the minor cannot alienate immovable property or burden it with a mortgage unless this capacity was expressly conferred.

The Age of Majority Act 57 of 1972 repealed a Free State proclamation providing for *venia aetatis* but did not expressly revoke *venia aetatis* itself.

Our courts have not expressly decided whether *venia aetatis* is obsolete.

17.3.2 Release from tutelage

Refers to the authority the courts had, to confer full capacity to act, on a minor.

The Cape Province courts decided that they had the power to grant orders releasing minors from tutelage.

Even though release from tutelage had the same effect as *venia aetatis*, it was held that the court was merely emancipating the minor in its capacity as upper guardian of all minors.

17.4 Age of Majority Act 57 of 1972

Cases: *Botes, Akiki, Smith*

Anyone 18 years or older can apply to the high court to be declared a major.

Some authors submit that the requirement of necessity or desirability in the interest of the applicant should be what the court bases its decision upon.

Since the inception of the act, however, the court has not granted any orders and adopts a very strict approach that seem to require more than the requirements of necessity or desirability of the applicant.

17.4.1 The application

Application must be in the form of a notice and must be supported by an affidavit stating:

1. The applicant's **full names, ordinary place of residence and date of birth**
2. **Particulars** which allow the judge to decide whether the applicant is fit and proper to manage his own affairs
3. Whether the applicant lives with his **parents** and whether he intends to continue living with them
4. Whether the **parents or guardian supports** the application
5. Full particulars of any immovable **property** of which the applicant is the owner or will probably become the owner
6. Full particulars of any immovable **property** of which the applicant is the owner and which is **subject to *fideicommissum*, usufruct or similar right**, or which is subject to the control of the master, a tutor, *curator* or administrator
7. Any **other relevant information** which enables the court to judge whether it is necessary or desirable in the interests of the applicant to grant the application

17.4.2 Orders the court can make

After considering the application, the court may:

1. Grant the application
2. Refuse or postpone the application
3. Issue a rule *nisi* with directions as to its service
4. Order further evidence to be produced

5. Make whatever order it considers just in respect of costs

17.4.3 The effect of the application

If the court declares the applicant a major, he is deemed to have attained the age of majority for all purposes: thus the court can make no conditional order or withhold any of the normal incidents of majority.

It is submitted by the Cronje & Heaton that the Act should have allowed the court to make conditional orders.

18 Emancipation

Cases: *Dickens v Daly, Watson v Koen*

Emancipation: a minor is emancipated if his guardian grants him freedom independently to enter into contracts.

Can be compared to when a minor performs a valid juristic act with the assistance of his guardian: for this, the guardian consents to one act, for emancipation the guardian consents to a wide variety of acts.

Can only be effected by express or implied consent: carelessness does not result in emancipation.

The onus of proving emancipation rests on the person alleging that emancipation has taken place.

18.1 Emancipated minor's rights and capacity to act

If a minor is emancipated he incurs liability like a major.

Effect on his capacity to act has not authoritatively been decided: the issues is whether the minor's capacity to act extends beyond transactions in connection with the minor's trade.

Submitted by Cronje & Heaton that the degree of legal independence acquired depends on the circumstances of the case: if a parent gives the minor "complete freedom of action" the minor is emancipated for all intents and purposes; minor's capacity to act would be restricted if parent only emancipated him for the purpose of a particular business.

Even if a minor is emancipated he has available as a defence and action *restitutio in integrum*.

Unclear whether emancipated minor has *locus standi* but submitted by the C&H that it is wrong to assume that he has *locus standi* in all transactions relating to his emancipation. Courts seem to assume that an emancipated minor has *locus standi in iudicio.*

18.2 Tacit and express emancipation

Previously, in common law, a distinction was drawn between tacit & express.

This was later supplanted by *venia aetatis*.

Tacit: occurs where a minor lives apart from his parents and manages his own undertaking

Express: A declaration is drawn up before the court that the parent or guardian emancipates his child from parental authority.

At common law tacit emancipation was a means of terminating minority which is different from today: only consequence today is that minor can enter into contracts independently.

Submitted by C&H that Age of Majority Act 57 of 1972 has not repealed the institution of tacit emancipation as emancipation does not confer full majority status.

18.3 Who can emancipate a minor?

1. At common law the father could emancipate his child
2. At common law a mother could grant it if:
    a. The child was born out of wedlock
    b. She had sole guardianship
    c. Sole guardianship passed to her on the father's death

3. At common law, if the mother had custody and the father guardianship it was still the father who had to emancipate
4. According to **Guardianship Act 192 of 1993** it seems that now whoever has guardianship has the right to emancipate a child
5. Unclear whether minor is emancipated if one parent accedes and the other refuses
6. If the minor has no parents, his legal guardian can emancipate him
7. Also unclear whether when once granted the guardian can revoke emancipation: C&H of the opinion that it is possible, but in *Cohen v Sytner* it was deemed irrevocable.

19 Diverse factors which affect status

19.1 Mental Illness

19.1.1 Capacity of the mentally ill person

The fact that a person has been declared mentally ill or is detained in an institution does not directly affect his or her status. The question is whether the person is mentally ill for purposes of private law. If the person is indeed mentally ill for these purposes, he or she has no capacity to act or litigate whatsoever.

19.1.2 Definition of mental illness

According to the Supreme Court of Appeal (*Pheasant v Wayne* 1922 AD 481 and *Lange v Lange* 1945 AD 332), a person is mentally ill for purposes of private law if either

1. he or she cannot understand the nature and consequences of the transaction he or she is entering into, or
2. he or she does, in fact, understand the nature and consequences of the transaction, but is motivated or influenced by delusions caused by a mental illness

19.1.3 Proving mental illness

The absence or presence of mental illness is a question of fact which is usually determined in the light of medical evidence presented to the court.

19.1.4 Legal status of a mentally ill person

Mental illness affects a person's legal status because the law attaches no consequences whatever to the expressions of will of a mentally ill person. Thus a mentally ill person has absolutely no capacity to act or litigate, his curator must act completely on his behalf.

All juristic acts a mentally ill person enters into are invalid unless they were performed during a *lucidum intervallum*. The moment which is of importance in judging whether or not the juristic act is valid is that moment at which the juristic act is entered into.

19.1.4.1 Certification of mental illness

Whether or not a person has been declared mentally ill does not determine whether or not he has capacity to act: legal position is determined by whether person was actually mentally ill at the time which the transaction was entered into.

Thus, certification of mental illness merely shifts the burden of proof:

1. An uncertified person is deemed normal until the opposite is proved,
2. A certified person is deemed mentally ill until the opposite is proved.

19.1.4.2 Transactions of a mentally ill person

1. A mentally ill person cannot enter into any transactions even if he acquires only rights and the other party incurs only duties
2. Any transactions entered into are void and cannot be ratified

3. Transaction remains void even if person he was dealing with was unaware of the mental illness
4. Therefore a *bona fide* 3rd party can not insist on the transaction being completed

19.1.4.3 Liability of a mentally ill person

1. A mentally ill person can be held liable for an action based on undue enrichment
2. Can also be held liable on the basis of *negotiorum gestio*.

Above liabilities are possible because they are not based on contract and capacity to act.

As a mentally ill person cab have neither intention (*dolus*) nor negligence (*culpa*) he is not responsible for his crimes and delicts.

19.1.4.4 Marriage of a mentally ill person

1. A marriage is not automatically dissolved due to mental illness of one of the spouses, but according to the Divorce Act 70 of 1979 mental illness without reasonable prospect of cure is grounds for divorce.
2. In a marriage in community of property a judge may suspend the mentally ill spouse's power to deal with the estate to protect the other spouse's interest in the joint estate.
3. According to the Matrimonial Property Act 88 of 1984, if the sane spouse convinces the court that the insane one's actions is prejudicing or probably will prejudice his/her interest in the joint estate, the immediate division of the estate will be ordered.
4. Point (3) counts for marriages out of community, profit and loss subject to the accrual system as well, where the accrual will be immediately divided.

19.1.4.5 Parental authority of a mentally ill person

1. Mental illness does not automatically terminate parental authority
2. The court may however make an appropriate order in respect of custody and guardianship of the person's children or interfere in the exercise of parental authority if it is in the children's best interest.

19.1.4.6 General

The running of prescription against a person cannot be completed while he is mentally ill
There are numerous offices a mentally ill person cannot hold.

19.1.5 Appointment of a curator

Curator bonis: looks after the mentally ill person's estate and supplements his or her capacity to act.

Curator ad litem represents a mentally ill person's interests in legal proceedings.

Curator personae cares for the mentally ill person's person (body), either generally or for a specific purpose: entails a serious curtailment of a person's rights and freedoms and is not done lightly.

It is important to note that the mere fact that a person has been declared mentally ill, and that a curator has been appointed to administer his or her estate, does not mean he or she loses all capacity to act

19.1.5.1 Limitations of a curator

A curator can not:

1. perform acts that are considered of a too personal nature, i.e. institute an action of divorce on behalf of a mentally ill person
2. make a will
3. exercise paternal authority on behalf of a mentally ill person

19.1.6 Mental Health Act 18 of 1973

For the purposes of the Mental Health Act 18 of 1973, a "patient" means a person who is mentally ill to such a degree that it is necessary that he or she be detained, supervised,

controlled and treated, and includes a person who is suspected of being or is alleged to be mentally ill to such a degree.

In terms of the Act a person may be treated and admitted to an institution voluntarily or as a result of a reception order.

If someone suspects that a person is mentally ill, he or she may submit a written statement to a magistrate in which he or she indicates the reasons for the application, and his or her relationship to the person. In very urgent cases the application may be made to the superintendent of a mental health institution. The magistrate or superintendent will then consider the application and appoint two medical doctors to examine the patient. The magistrate may also order that the person be placed in an institution for a period of not more than 42days. This order does not affect a person's status, but only his or her freedom of movement.

The superintendent of the institution to which the patient is admitted must examine the patient and report to the official curator ad litem concerned, who has to forward the report to a judge of the high court. The judge considers this report. He or she may then make an order either for further detention, or for the discharge of the patient, or he or she may refer the matter for trial. A curator bonis may be appointed for the patient.

19.1.7 Mental Health Care Act 17 of 2002

Mental Health Care Act refers to "mental health care user" instead of "patient".

A mental health care user is

1. a person receiving care, treatment and rehabilitation services or
2. using a health service at a health establishment aimed at enhancing the person's mental health status.

Mental Health Care Act distinguishes between different categories of persons requiring mental health care on the ground of whether or not they submit to mental health care and admission voluntarily.

Involuntary care, treatment and rehabilitation services

1. may be provided only if the head of a health establishment approves a written application for the provision of such services.
2. The head of the health establishment must have the person examined by two mental health care practitioners.
3. He may only grant the application if both practitioners agree that involuntary services are needed.
4. The person is then referred for a 72-hour assessment period.
5. After the assessment the person must immediately be discharged unless the head of the establishment is of the opinion that his or her mental health status warrants involuntary commitment.
6. If the head is satisfied that involuntary commitment should occur, he or she must submit a written request to the Mental Health Review Board.
7. If the Mental Health Review Board grants the request, the matter must be referred to the high court.
8. If the Mental Health Review Board denies the request the person must be discharged.
9. After considering all the information, the high court may either order the person's immediate discharge or his or her further hospitalisation.
10. If necessary, an administrator (who is similar to the *curator bonis* which the common law and the Mental Health Act 18 of 1973 provide for) may be appointed to care for and administer the person's financial affairs.

19.1.7.1 Rights of mental health care users

The Mental Health Act 18 of 1973 was often criticised for failing to protect the rights of mentally ill persons. The Mental Health Care Act 17 of 2002, on the other hand, places a great deal of emphasis on the rights of mental health care users.

The Act, *inter alia*, contains a separate chapter setting out specific rights and duties in respect of mental health care users. These rights and duties operate over and above the rights other laws confer on mental health care users. Whenever these rights or duties are exercised or performed regard must be had to the mental health care user's best interests.

Rights can include:

1. Right to representation
2. Confidentiality
3. Having their person, human dignity and privacy respected
4. Being provided with care, treatment and rehabilitation services that improve their mental capacity to develop to full potential to facilitate their integration into community life

19.1.7.1.1 Care, treatment and rehabilitation

Care, treatment and rehabilitation services:

1. may not be used as punishment
2. may not be used for the convenience of other people
3. must be proportionate to the mental health care user's mental health status
4. may intrude only "as little as possible to give effect to the appropriate care, treatment and rehabilitation".

Except in urgent cases the patient must be informed of his rights prior to the administration of any care, treatment and rehabilitation services.

Everyone providing these services must take steps to ensure that mental health care users are protected from

1. exploitation
2. abuse
3. degrading treatment
4. forced labour

19.1.7.1.2 Discrimination in the Act

Act:

1. prohibits unfair discrimination on the ground of the person's mental health status
2. provides that any determination concerning a person's mental health status must be based solely on factors relevant to his mental health status and not
    a. socio-political status
    b. economic status
    c. cultural background
    d. religious background, or
    e. affinity

19.2 Inability to manage one's own affairs

Court can appoint a *curator bonis* for anyone who, owing to some or other physical or mental disability or incapacity, is not capable of managing his or her own affairs.

Applies to persons who are, for example, deaf and mute, blind, senile, paralysed or seriously ill.

The fact that a curator has been appointed for such a person does not result in the person losing his or her capacity to act altogether.

The circumstances have to be considered to decide whether the person was truly capable of managing his or her own affairs when he or she performed a certain juristic act. If, at the given moment, the person is physically and mentally capable of managing his or her own affairs, he or she can enter into a valid juristic act.

The curator need only assist such a person in so far as such assistance is necessary, that is if the person, while performing the juristic act, is not capable of managing his or her own affairs.

19.3 Influence of alcohol and drugs

Intoxication refers not only to the effect of intoxicating liquor, but also to the effect of any drug.

If a person has been influenced to the extent that he or she does not know what he or she is doing or what the consequences of his or her juristic acts are, then those acts are void (not voidable).

As regards the degree of intoxication, it is not sufficient that the person is influenced in such a way that it is merely easier to persuade this person to conclude the contract, or that this person is more willing to conclude the contract; the person must be influenced to such an extent that he or she does not have even the faintest notion of concluding a contract, or of the terms of the contract. The contract will then be void.

The person who alleges that someone is intoxicated must prove it. Intoxication affects a person's capacity to act only for as long as the intoxication lasts.

19.4 Prodigality

A prodigal is a person who has normal mental ability but is not capable of managing his or her own affairs, because he or she squanders his or her assets in an irresponsible and reckless way as a result of some defect in his or her power of judgment or character.

From the decisions of the courts it seems that prodigality normally goes hand in hand with alcoholism and/or gambling. To protect such people and their families against their prodigal tendencies, their status can be restricted by an order of the court. Any interested party, including the prodigal himself or herself, can apply to the court for an order declaring a person to be a prodigal and requesting a *curator bonis* to administer his or her assets.

19.4.1 Prodigal legal capacity

The prodigal is limited in terms of commercial dealings and handling finances, i.e. may not be a director of a company or be a trustee of an insolvent estate.

19.4.2 Prodigal capacity to act

The declaration of prodigality **must** be coupled by an order restraining the prodigal from administering his estate in order to deprive him of the ability to act.

The effect of the order is to make the legal status of the prodigal analogous to that of a minor, i.e. limited capacity to act and may not independently enter into juristic acts by which duties are imposed on him. The prodigal can thus enter into transactions with the assistance of his curator or the curator can act on his behalf.

The curator must honour transactions the prodigal validly concluded before being interdicted because up till then the prodigal had full capacity to act.

The prodigal may be charged with contempt of court if he enters into a transaction.

The prodigal retains parental authority over his children.

19.4.2.1 Validity of prodigal's transactions

Same as a minor:

1. Transactions are voidable at the instance of the curator, who may ratify or repudiate
    a. If ratified, it is binding
    b. If repudiated, the prodigal may recover from the other whatever has been paid or delivered to that party
2. Other party may also hold the prodigal liable on the basis of undue enrichment

19.4.2.2 Misrepresentation by prodigal

If the prodigal misrepresent himself as having full capacity to act, he cannot be held liable

19.4.2.3 Marriage

Roman Dutch authors disagree on whether a prodigal can get engaged or married, but modern authors hold that a prodigal can get married without the consent of his curator.

19.4.2.4 Making of a will

A curator cannot make a will for a prodigal or assist him with making one.

Whether the prodigal himself has the capacity to make a will is unclear: common law would have it that he can, but as the interdict precludes the prodigal from making any

disposition of his property whatsoever, it is probably safer to obtain permission from the state to make a will.

If the prodigal made a will before being declared as such, the will is valid.

19.4.3 Prodigal capacity to litigate

The prodigal may not embark on litigation without his curator's consent.

He may, however:

1. Sue unassisted for divorce
2. Apply for an order to have his curator dismissed or the curatorship set aside

19.4.4 Capacity to be held accountable for crimes and delicts

Prodigality does not affect a person's capacity to be held accountable for crimes and delicts he commits.

19.4.5 Constitutional implications of interdiction as a prodigal

C&H submit that the limitations placed on a prodigal are unconstitutional.

The interdict infringes on his right to dignity and privacy.

19.5 Insolvency

A person is insolvent if his or her liabilities exceed his or her assets (in other words when the person has more debts than assets). If the person's estate is sequestrated as a result of this state of affairs the sequestration affects his or her status.

19.5.1 Legal capacity of an insolvent person

There are certain offices an insolvent person cannot hold, i.e. he may not be the director of a company or mutual bank or a trustee.

19.5.2 Capacity to act of an insolvent person

When someone is declared insolvent and his or her estate is sequestrated, he or she is divested of his or her estate, which then vests in the master of the high court until such time as a trustee is appointed. When the trustee is appointed the insolvent estate vests in the trustee. Even though the trustee administers the insolvent estate this does not mean that the insolvent loses all capacity to act.

1. He may still enter into contracts provided he does not thereby purport to dispose of any property of the insolvent estate.
2. He must, however, get written consent from the trustee if he wants to enter into a contract that could adversely affect the insolvent estate.
3. He also needs the trustee's consent to carry on, be employed in or have any interest in the business of a trader who is a general dealer or manufacturer.

If the insolvent enters into a contract in breach of the above conditions, the contract is still valid so long

1. the property disposed of was acquired after sequestration
2. the disposition was for valuable consideration
3. the person with whom the insolvent transacted was unaware and had no reason to suspect that the estate was under sequestration

Other contracts in breach of the limitations are voidable at the instance of the trustee.

19.5.3 Capacity to litigate of an insolvent person

The insolvent does not lose all capacity to litigate when his or her estate is sequestrated. All civil proceedings by or against the insolvent are stayed (i.e. suspended) until the appointment of a trustee to act on behalf of the insolvent estate. For the rest, the insolvent retains capacity to litigate.

19.5.4 Capacity to be held accountable for crimes or delicts

Insolvency does not affect a person's capacity to be held accountable for crimes and delicts he commits.

If he commits a delict after sequestration, however, the compensation must be paid out of those assets the insolvent acquired after sequestration that fall outside the insolvent estate.