

Department of Private Law

Law of Persons



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Only study guide for
PVL1501

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PREFACE



Dear Student

Welcome to this module on the Law of Persons (PVL1501). The study guide for Law of Persons consists of three parts. Each part is divided into a number of learning units which cover different aspects of the law relating to the various topics.

Enjoy the learning experience, and we wish you all the best in your studies.

Your lecturers

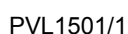
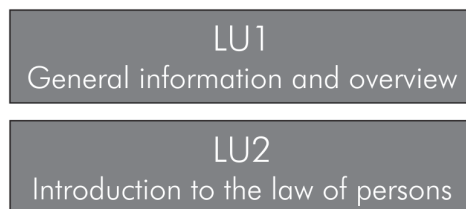
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INTRODUCTION TO THE LAW OF PERSONS



LEARNING UNIT 1

General information and overview

Module map 1

LU1 General information and overview
LU2 Introduction to the law of persons
LU3–5 The beginning and end of legal personality
LU6–20 Factors which determine status

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PRESCRIBED MATERIAL TO STUDY

- Tutorial Letter 101

1.1 INTRODUCTION

Welcome to this module on the law of persons. This learning unit provides important general information and an overview of the module. It does not cover any module content and, for that reason, also does not contain activities or feedback. The module content is covered in Learning units 2 to 20.

First of all, we set out the module objectives and specific outcomes of the module. Secondly, we give you important information on the study material for this module, including information on how to use your study guide. Thirdly, we give you an overview of the contents of the module.

1.2 MODULE OBJECTIVES AND SPECIFIC OUTCOMES

In this module we cover the basic principles of the law of persons. Owing to the fact that the module is pitched at first-year level, it has been structured to suit the unique educational needs of students still new to this field. The purpose of this module is to teach you the basic principles of the law of persons and to equip you with the knowledge, skills and attitudes needed to analyse and solve well-defined problems relating to the law of persons. The module incorporates aspects of transformative constitutionalism, Ubuntu, social responsibility, graduateness and humanisation within the context of the law of persons.

If you follow the study guide (which contains instructions on how to study the module) properly, work through all the activities in the study material, and answer all the questions at the end of each learning unit, you ought to have all the skills (set out below in the learning outcomes) that we require of you.

The specific outcomes for this module are the following abilities:

- **To analyse the legal principles of the South African law of persons**

After you have mastered this module, you should be able to identify legal problems and issues relating to the law of persons in real or simulated fact scenarios. This requires an understanding of the terms, rules, concepts, established principles and theories related to the law of persons. You should be able to demonstrate an awareness of the value of the law of persons in the field of private law. In addition, you should be able to critically analyse legal material related to the law of persons.

- **To describe the beginning and end of legal personality and factors that affect a person's status**

In the second place, you should have a clear understanding of the principles of the law of persons. You should be able to describe the beginning and end of legal personality and factors that affect a person's status. In this regard, you should be able to present and communicate information reliably and coherently in professionally accepted formats using basic information technology. Your interpretations should be consistent with the understanding of the legal principles of the South African law of persons.

- **To formulate legal arguments and apply their knowledge to practical, well-defined problems relating to the law of persons**

In the third place, mastering this module should enable you to solve well-defined problems relating to the law of persons using correct procedures and appropriate evidence. Furthermore, you should be able to use legal text skilfully to substantiate arguments and support solutions for specific law of persons issues.

1.3

STUDY MATERIAL

1.3.1

Study guide

A law student's first module in private law is very important. It may be your first encounter with legal studies, or the module in which you study a specific branch of law in detail for the first time. Be that as it may, we treat the law of persons module as an introductory module.

In an introductory module we feel that we must guide our students, whether they are **senior** or **junior students**, to a great extent. We shall only gradually come to expect you to study independently. Therefore, we shall be giving you (even if you are a more mature student) a good deal of guidance in the study guide. The law is a science in which you will first have to master basic concepts and basic principles. To be able to do this you will have to do a good deal of thinking as you go along, and, as it were, argue with yourself (or, better still, with some of your fellow students or with your lecturer). A jurist who cannot argue is not a jurist in the true sense of the word. For

instance, it is not the “smart” advocate or lawyer of popular fiction or television that we think of when we speak of being able to argue. Such a person, who has a snappy and easy answer to every argument, should exist only in cheap fiction. What we mean is that you must know and understand the legal principles so well that you are able to use them easily and correctly in a discussion about the law and when you deal with legal problems. First, you have to understand the basic principles, then the more detailed rules – although it is obvious that the detail is also of great importance. The most dangerous jurist is perhaps the one who thinks that he or she can rely on principles when he or she knows too little about the details to grasp the real meaning of the principles.

It is of vital importance that you understand how to use this study guide, since its aim is to guide you through the contents of the module, as contained in the tutorial material.

The study guide for this module consists of **three parts**: Part 1 consists of general information and an overview of this module as well as the introduction to the law of persons, part 2 deals with the beginning and end of legal personality, and part 3 deals with factors which determine status. Each part is divided into a number of learning units which cover different aspects of the law relating to the various topics. At the end of the study guide, we include a glossary to provide you with an easy reference guide to look up Latin and technical terms.

The study guide is designed in such a way that it leads you through the study material one step at a time. Thus, we recommend most strongly that you use it in this manner. Plan your own study programme (you can use the scheduling tool provided on myUnisa) according to the subdivision of the study guide and, in this way, work through the study material systematically. The study guide is primarily a guide, not a textbook – it guides you through the study material, but contains little study material itself. It contains an explanation by means of which you can explore and understand the study material yourself. **The study guide is not meant to replace or summarise what is contained in the prescribed book.** The study guide should, in fact, take the place of a lecturer who guides you through the module systematically, and you should use it in this way in your studies. As you work on this module, you should always have this study guide lying open next to you – guiding you through the study material. The study guide is there to tell you what to study, what to look out for and how you should understand and interpret your study material.

In order to fulfil this function, the study guide is divided into learning units, roughly in the same way that lectures at a residential university are arranged. Each learning unit leads you through a part of the module content. **Learning units vary in length and in degree of difficulty. Some of them demand more time, study and understanding than others.**

It is and remains your own responsibility to organise your study programme yourself according to these units. There are 20 learning units, which you should normally be able to work through at the rate of two per week. In a normal academic semester of approximately 15 weeks, this should still leave you sufficient time for completing the assignments and examination preparation. If you wish to approach the module in a different way, you will have to adapt the way you study the various learning units accordingly, for instance by studying three learning units per week rather than just two. The content of the learning units is not always equally long or equally difficult, but you should nevertheless be able to deal with two learning units per week.

At the beginning of each learning unit we shall point out by way of a **module map** where the particular unit fits into the module as a whole. Then the **prescribed material** for the learning unit in question is set out. The prescribed material consists of the relevant sections from the prescribed textbook, as explained above. We indicate which sections of the work you have to study, and which sections you can merely read.

- **STUDY** implies that you should work through the prescribed material in question thoroughly and intensively, and that you should **know** (i.e. remember) and understand it in detail as indicated in the study guide. You will find that this material focuses on specific matters in far greater detail, and that the study guide will indicate what you should be paying special attention to.
- **READ** means that the information contained in that section does not have to be studied, but consists of background information of which you can take note. However, you need not study it for examination purposes.

The **prescribed cases** that you must study are also indicated at the beginning of each learning unit. Copies of the prescribed cases are contained in the Prescribed Reader (titled *Casebook for Law of Persons*) that you received with your study material. **You are expected to make summaries of the prescribed cases. For information on how to summarise a judgment, see Learning unit 4. Remember that you also have to know the other cases that are mentioned in your study material. You need not read or study these cases yourself, but you have to know what is said about such cases in the study material.**

Each learning unit defines its **outcomes** in such a way that it indicates in broad terms what you should be able to do when you have completed that particular unit. This summary is therefore an important guideline on how to study the study material.

The main part of each learning unit consists of a step-by-step guideline on how to study that section of the work and the study material that deals with it. The idea is to guide you through the study material systematically, while you follow the order indicated in the study guide as closely as possible. Used in this way, the study guide will also indicate what you should look out for,

what the most important elements or problems are in each case, how you should integrate and demarcate the different topics discussed, and so forth. Problem areas are highlighted individually and discussed to draw your attention to them and help you master them.

Activities and **feedback** are incorporated into Learning units 2 to 20. (As explained in 1.1 above, Learning unit 1 consists of general information and an overview of the module, hence the absence of activities and feedback in this learning unit.) The activities are based on the material which has just been covered. Thus, you should first study the relevant preceding section of the material before you attempt to do the activities. Try not to look at the feedback while doing the activities. The activities are a very important part of the study material and you are encouraged to do them. After you have completed the activities, compare your answers with the feedback given in the study guide. The feedback is not necessarily complete and may simply refer you to the paragraph(s) in the prescribed book where you may find the relevant information.

The activities are not on the same level as examination questions, but are generally slightly easier than the questions which you will encounter in the examination. The activities nevertheless have the following important objectives:

- to encourage you to work through the material again
- to help you to learn and understand the relevant concepts
- to give you practise towards attaining the objectives of the learning unit (and ultimately the learning outcomes of the module)
- to highlight any difficult areas in the work
- to help you to keep a constant check on your progress through the work

A number of “test yourself” **questions** follow the discussion in Learning units 2 to 20. **These are not the only questions that may be asked, but they may correspond with possible assignment and examination questions.** If you are able to answer them, you have reached the outcomes set out at the beginning of the learning unit and you are well on your way to being prepared for the examination. We want to encourage you to do the questions under examination conditions, that is, without referring to the study material, before you tackle the next learning unit.

After the self-assessment questions, a **conclusion** is given in which the content of the learning unit is placed in context, making it easier to progress to the next learning unit.

You will see that there is a broad **margin** down the left-hand side of the pages in the study guide. You will sometimes find keywords in this margin. These keywords highlight or explain certain important words or concepts. The margin also gives you a blank space in which you can write your own keywords or make notes.

1.3.2 Tutorial letters

Tutorial letters always contain compulsory reading matter and actually complement the study guide. You should therefore study these tutorial letters very carefully and integrate the information they contain with that in your study guide.

1.3.3 Prescribed book

In Tutorial Letter 101 you will find information of your prescribed book for this module. We expect you to purchase this book. You may order it from the publishers or purchase it from the recommended booksellers.

The prescribed book is

- Heaton J *The South African law of persons* 5th ed (2017) LexisNexis Durban

References to “Heaton” indicate your prescribed book, *The South African law of persons* 5th ed (2017) LexisNexis by Heaton.

Please note that all references (e.g. Heaton 1) are to **pages** and not to **paragraphs**.

1.3.4 myUnisa

On the myUnisa page for this module you will find all the prescribed study material for the module. You can also submit your assignments via the myUnisa page. In addition, we will use the myUnisa site to send out important announcements to you during the course of the semester. Please consult Tutorial Letter 101 for information on how to access and use the myUnisa page.

1.4 CONTENTS OF MODULE

The goal of this introduction is to indicate in broad terms the different subjects which, together, make up this module, and especially the connection between these subjects and how they relate to each other. At the end, we give you a module map that graphically depicts the contents of the whole module.

Law of persons We start with the subject for which you actually enrolled this semester, namely, the **law of persons**, in Learning unit 2. We explain the distinction the law makes between persons as “natural persons” and “juristic persons”.

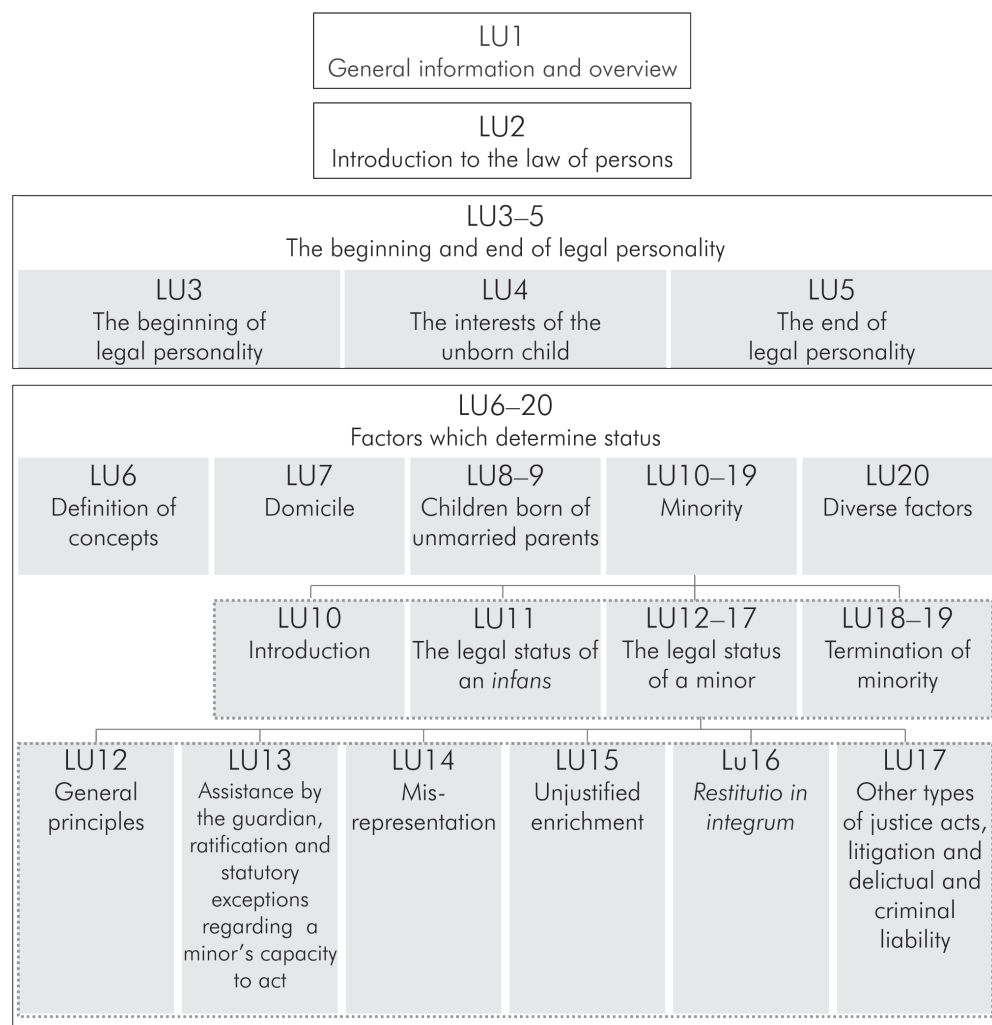
Nasciturus fiction It is also important to know the point at which a person’s legal personality begins, namely at birth, and the special rules that are applicable should the interests of an unborn child be affected.

Presumption of death	We then discuss the end of legal personality, namely at death, and explain the special rules of presumption of death that are applicable when a person disappears and it is uncertain whether he or she is still alive.
Status	As the law of persons is that area of private law that determines the legal status of a legal subject, it is important to know what is understood by status, that is, a person's standing in law. A person's legal capacity, capacity to act, capacity to litigate and capacity to be held accountable for crimes and delicts are important competencies in this respect.
Domicile	An aspect of law that influences a person's status is domicile. Domicile is the place where, for the purpose of the exercise of his or her rights and the fulfilment of his or her obligations, a person is legally deemed to be constantly present, even in the event of his or her factual absence. We explain the importance of domicile, the general principles governing domicile, and the kinds of domicile that are distinguished in our law.
Birth to unmarried parents	As the birth of a child to married or unmarried parents can have consequences pertaining to the status of the child, we discuss the status of children born of unmarried parents. We discuss the classification of children born as a result of artificial fertilisation. We also explain how proof of parentage works and how a man can prove that he is not the father of a child. Furthermore, we discuss the relationship of the child born of unmarried parents with his or her mother and father as far as parental responsibilities and rights are concerned. Lastly, we discuss the ways in which the status of a child born of unmarried parents may be changed to that of a child born of married parents.
Minority	Minority is one of the most important factors influencing a person's status. We first deal with introductory issues of the effect of minority on status and we discuss children's rights. Then we discuss the status of an <i>infans</i> and a minor. As far as the minor's capacity to enter into a contract is concerned, we discuss the general principles regarding this capacity and the remedies that are available to the major who has entered into a contract with an unassisted minor. We set out the legal principles applicable to cases where the minor acts with assistance, or where the minor's agreement is ratified. That includes assistance by the guardian and ratification. We also look at the statutory exceptions regarding the minor's capacity to act. Next, we discuss misrepresentation and unjustified enrichment. We also deal with <i>restitutio in integrum</i> . Furthermore, we discuss other agreements the minor may enter into, the capacity to make a will, to marry, to consent to medical treatment and operations, and to hold certain offices and perform certain functions. Finally, we discuss a minor's capacity to litigate and to incur delictual and criminal liability.
Termination of minority	Because minority has a great deal of influence on a person's status, it is important to know when and how minority is terminated. Here we discuss

attainment of the prescribed age, marriage or civil union, *venia aetatis*, release from tutelage, and emancipation.

Diverse factors Lastly we consider some diverse factors that may influence a person's status, namely, mental illness, inability to manage one's own affairs, the influence of alcohol and drugs, prodigality and insolvency.

This introductory outline should give you some idea of the material we shall cover in this module. You will find it helpful to keep in mind the contents of the module as a whole and the way it is structured as you work through each of its three parts. This will give you the background you need to understand each part in its proper context and to read, select and interpret the tutorial material in order to structure your preparation for the examination.



1.5 CONCLUSION

In this learning unit we explained the module objectives and specific outcomes of this module. We gave you important information on the prescribed material for this module, including information on how to use

the study guide. We also gave you an overview of the contents of the module.

The next learning unit will be an introduction to the law of persons. We will explain what the law of persons is, and which different kinds of legal subjects there are.

LEARNING UNIT 2

Introduction to the law of persons

Module map 2

LU1

General information and overview

LU2

Introduction to the law of persons

LU3–5

The beginning and end of legal personality

LU6–20

Factors which determine status

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2.5	LAW OF PERSONS AND CUSTOMARY LAW	17

PRESCRIBED MATERIAL TO STUDY

- Heaton pages 1, 3–6

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) explain what the law of persons is, and why you start the study of law with the law of persons
- (2) explain what the different kinds of legal subjects are
- (3) explain the concept “transformative constitutionalism”, with reference to examples
- (4) explain the concept “customary law”, indicate the characteristics of customary law, and distinguish between “living” and “official” customary law

2.1

What is the law of persons?

INTRODUCTION

The law of persons is a subsection of private law and, after what we said in Learning unit 1, you may understand why we start with a section of private law, and why a module in private law is the first area in which you become acquainted with our legal system. Private law is a person’s “first law”, as it were, being that sphere of the law which governs his or her relationships with fellow human beings. In private law we encounter concepts and institutions which are basic to all other branches of the study of law. Their significance for private law must be grasped before their significance for constitutional law, criminal law and other branches of public law can be understood.

Law governs relations between legal subjects

It is equally understandable why the law of persons, as a particular subsection of private law, takes pride of place. We stressed that the law governs the relations between people in a community. The members of the community, we said, are legal subjects to whom the law applies and for whose benefit the law exists. This also means that they are the hub of the law, since it is the relations between them that are governed by the law. A legal order without subjects is as unthinkable as a sport without participants who must obey the rules, and who are, therefore, subject to the rules.

Who is a legal subject?

One cannot continue with a study of law without knowing about the very being who is the legal subject. **The fact that the legal subject is the centre of the legal world means that he or she is the bearer of rights, duties and capacities.** The legal subject can be the owner of a farm, enter into contracts, inherit or marry, must pay taxes, may not commit a crime, *et cetera*. Such a being is a legal subject, a *persona iuris*, in brief, a **person** in the eyes of the law.

2.2 DEFINITION OF LAW OF PERSONS

Study Heaton page 1 in this regard. In the law of persons we study the legal subject. We ask who he or she is, how he or she comes into being, what his or her legal position is, and how he or she comes to an end in the eyes of the law. To put it another way, the law of persons determines

- the different kinds of legal subjects
- how a legal subject originates and comes to an end
- what legal status involves
- what effects various factors have on a person's legal status

2.3 DIFFERENT KINDS OF LEGAL SUBJECTS

Study Heaton pages 3 to 4. In this section, the author explains the two categories of legal subjects, namely natural persons and juristic persons. She indicates which entities are recognised as juristic persons, and which not, with reference to examples.

ACTIVITY 2.1

- (1) Name the two classes of legal subjects recognised in South African law.
- (2) Is a *monstrum* regarded as a legal subject in our law today?
- (3) Name the entities that are recognised as juristic persons in our law.
- (4) Is a partnership regarded as a juristic person in our law?

FEEDBACK

- (1) The two classes of legal subjects are natural persons and juristic persons (Heaton p 3).
- (2) Yes, any form of human life is today regarded as a legal subject (Heaton p 3).
- (3) Our law recognises the following entities as juristic persons:
 - (a) Associations incorporated in terms of general enabling legislation; banks, for example, are juristic persons.
 - (b) Associations especially created and recognised as juristic persons in separate legislation; universities, for example, are juristic persons.
 - (c) Associations which comply with the common-law requirements for the recognition of the legal personality of a juristic person. The common-law requirements are that the association must have a continuous existence irrespective of the fact that its members may vary; it must have rights, duties and capacities or be able to have rights, duties and capacities; and its object must not be the acquisition of gain (Heaton p 4). The Society for the Prevention of Cruelty to Animals (SPCA) and the

Treatment Action Campaign (TAC) are examples of associations like these.

- (4) No, a partnership is not regarded as a juristic person (Heaton p 4).

2.4

LAW OF PERSONS, THE CONSTITUTION, AND TRANSFORMATIVE CONSTITUTIONALISM

Study Heaton pages 5 to 6 in this regard. In this section, the author indicates the areas of the law of persons where the Constitution of the Republic of South Africa, 1996 (the supreme law of the country) has been the foundation of legal development of several aspects of the law of persons. An example is the revision of the legal position of unmarried fathers by the Children's Act 38 of 2005 (s 21).

On page 6, Heaton indicates that the Constitution should not be used only in a formalistic manner, but also in a **transformative** manner, in other words as an instrument to achieve transformation in society. This approach to the role of the Constitution is called "**transformative constitutionalism**". The objective of transformative constitutionalism is to achieve a society based on true equality. **In addition to Heaton, you have to study the discussion below.**

There is no single definition for the concept of transformative constitutionalism. According to the late former Chief Justice Pius Langa,¹ transformative constitutionalism comprises the following two basic ideas:

- social and economic transformation
- transformation of the legal culture

Let us look at some examples of **social and economic transformation**:

- Firstly, this form of transformation involves the fulfilment of socio-economic rights. An example of a socio-economic right is the right to social security, which is protected in section 27(1)(c) of the Constitution. The provision of social grants, such as the child support grant, is an example of a programme aimed at social and economic transformation. In March 2017, child support grants were paid out to more than 12 million children younger than 18.² The value of the child support grant was R410 when this study guide was written.³ This programme assists in achieving socio-economic upliftment of the poor. In addition to the child support grant, there are other grants aimed at achieving socio-economic upliftment of the elderly (the older person's grant) and persons with disability (the disability grant). Another socio-economic right is the right to have access to health care services, which is protected in section 27(1)(a) of the Constitution. A programme aimed at fulfilling this right is the

1. Langa "Transformative constitutionalism" 2006 *Stellenbosch LR* 351–360.

2. The child support grant is one of the grants payable in terms of the Social Assistance Act 13 of 2004.

3. Jamieson, Berry & Lake *South African Child Gauge* 2017 207.

Department of Health's ARV Treatment Programme, which provides free antiretroviral treatment to approximately four million South Africans living with HIV/Aids.⁴

- Secondly, apart from the fulfilment of socio-economic rights, this form of transformation is aimed at providing better access to education and other opportunities through a variety of programmes, for example affirmative action and black economic empowerment.

One of the ways in which **transformation of the legal culture** can be achieved is through transformation of legal education.⁵ Under a transformative Constitution, legal rules can no longer be analysed and interpreted only in a formal, technical manner. Students should be taught a new form of legal reasoning that emphasises values and policy.

2.5 LAW OF PERSONS AND CUSTOMARY LAW

For this section, you have to study the discussion below. The Constitution recognises customary law as a legal system in section 211(3). This section provides that the courts must apply customary law when it is applicable. This application of customary law is subject to the Constitution and any legislation that deals with customary law.

Customary law is also indirectly recognised in sections 30 and 31 of the Constitution. Section 30 protects the right to participate in the cultural life of one's choice, but this may not be done in a manner that is inconsistent with the Bill of Rights. Section 31 provides that persons who belong to a cultural community may not be denied the right to enjoy their culture and to form cultural associations. This right is also subject to the Bill of Rights. In this regard, the interpretation section in the Bill of Rights (s 39) is also of importance. In terms of section 39(2), every court must promote the spirit, purport and objectives of the Bill of Rights when developing the common law or **customary law**. Section 39(3) confirms that the Bill of Rights does not deny the existence of any other rights or freedoms recognised or conferred by common law, **customary law** or legislation, to the extent that they are consistent with the Bill of Rights.

Customary law can be defined as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples".⁶

You should take note of the following characteristics of customary law:⁷

4. <http://www.unaids.org/en/regionscountries/countries/southafrica>.

5. Quinot "Transformative legal education" 2012 *SALJ* 411–433.

6. Recognition of Customary Marriages Act 120 of 1998 s 1.

7. Heaton "An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context" 2009 *Journal for Juridical Science* 14.

- Customary laws are largely unwritten. An exception is KwaZulu-Natal, where customary law has been partly codified.⁸
- Customary law continually changes and develops.
- There are many tribal differences within each culture and religion.

Despite these differences, there are some underlying legal principles and values that are applicable across cultural legal systems.⁹

A distinction is made between “**living**” and “**official**” customary law:

- **Living** customary law is “the customs, traditions, beliefs and values by which people govern themselves”.¹⁰
- **Official** customary law is the laws and rules applied by the courts in the Western legal tradition. This version of customary law is sometimes criticised for being an incorrect representation of customary law.¹¹

In this study guide, we will sometimes refer you to relevant principles of customary law. You should study these principles, where applicable. Please keep this general discussion in mind when you study these sections.

TEST YOURSELF

- (1) Give a definition of the law of persons.
- (2) Define the term “natural person”.
- (3) Define the term “juristic person”.
- (4) List the entities that are recognised as juristic persons in our law, and refer to an example of each.
- (5) Explain what is meant by “transformative constitutionalism”, with reference to examples.
- (6) What do you understand by “customary law”?
- (7) List three characteristics of customary law.
- (8) Distinguish between “living” and “official” customary law.

CONCLUSION

After studying this learning unit, you should be able to give a definition of the law of persons, and explain the two classes of legal subjects that are distinguished in our law, namely the natural person and the juristic person. You should also be able to explain the concept “transformative constitutionalism” with reference to examples. Finally, you should be able to explain the concept “customary law”, refer to the characteristics of customary law, and distinguish between “living” and “official” customary law.

In the next learning unit we discuss the beginning of legal personality.

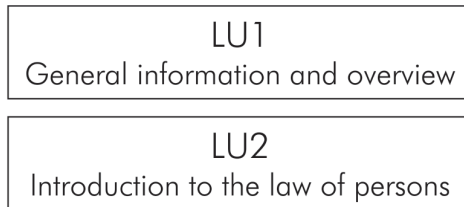
8. See the KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proclamation R151 *Government Gazette* 10966 of 9 October 1987.

9. Bekker “Children and young persons in indigenous law” in Robinson (ed) *The law of children and young persons in South Africa* (1997) 185.

10. Moyo “Reconceptualising the ‘paramountcy principle’: Beyond the individualistic construction of the best interests of the child” 2012 *African Human Rights Law Journal* 151. See also *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) para [56].

11. Bennett “The best interests of the child in an African context” 1999 *Obiter* 149.

THE BEGINNING AND END OF LEGAL PERSONALITY

PVL1501/1 19

LEARNING UNIT 3

The beginning of legal personality

Module map 3

LU1 General information and overview		
LU2 Introduction to the law of persons		
LU3–5 The beginning and end of legal personality		
LU3 The beginning of legal personality	LU4 The interests of the unborn child	LU5 The end of legal personality
LU6–20 Factors which determine status		

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3.2	THE BEGINNING OF LEGAL PERSONALITY	21
3.3	REGISTRATION OF BIRTHS	22

PRESCRIBED MATERIAL TO STUDY

- Heaton pages 7 to 12

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) explain the legal requirements for the beginning of legal personality
- (2) explain the provisions of the Births and Deaths Registration Act 51 of 1992 that deal with the registration of births
- (3) apply these principles to a given set of facts

3.1 INTRODUCTION

In this learning unit you will learn when legal personality begins. You will also learn about the provisions of the Births and Deaths Registration Act, as well as the regulations made under this Act.

3.2 THE BEGINNING OF LEGAL PERSONALITY

It is important to know that a person's legal personality only begins at birth. A person is not regarded as a legal subject before he or she is born alive. On page 7 Heaton explains the legal requirements for the beginning of legal personality. You have to know these requirements.

ACTIVITY 3.1

- (1) At what moment does a person's legal personality commence?
- (2) Name the two legal requirements for the beginning of legal personality.
- (3) Is the following statement true or false? Substantiate your answer.

For birth to be completed it is necessary that the umbilical cord be severed.

FEEDBACK

- (1) Legal personality commences at birth (Heaton p 7).
- (2) The two legal requirements for the beginning of legal personality are the following: (a) the birth must be fully completed, although it is not required that the umbilical cord be severed; (b) the child must live after the separation (see Heaton p 7). Please take note that the preponderance of authority shows that the third requirement mentioned in Heaton page 7 (viability) does not apply in our law.
- (3) The first requirement for the beginning of legal personality is that the birth must be fully completed. For birth to be complete it is not necessary that the umbilical cord be severed. The statement is thus false (Heaton p 7).

ACTIVITY 3.2

- (1) Explain how it is determined whether a child lived after birth.
- (2) Fill in the two missing words in the following sentence:
Under viability is understood that the child must have reached such a stage of development that she can of her mother's body.
- (3) Heaton is of the opinion that, in South African law, viability is not a requirement for the beginning of legal personality. What objection does she have to this requirement?

FEEDBACK

- (1) In our law it has not yet been authoritatively decided how life must be proved after birth. Any medical evidence by which life may be proved should be admissible when the issue of whether a child was born alive is to be decided for purposes of determining whether the child obtained legal personality (Heaton p 7).
 - (2) The two missing words are: **exist independently** (Heaton p 7).
 - (3) The author's objection to the requirement of viability is that it is a vague concept that could lead to impossible problems in evidence (Heaton p 7).
-

3.3

REGISTRATION OF BIRTHS

The Director-General of Home Affairs must be notified of the birth of every child who was born alive. Take note of the documents that should accompany the registration of the birth of a child, as well as who should register the birth of a child.

Where possible, both the father and the mother should register the birth of their child. However, there are many cases where the biological father is unknown or may not be available to register the birth of a child. In such cases, the mother will be responsible for giving notification of the birth of the child. A particular procedure should be followed to register the birth of an abandoned child.

On pages 8 to 12 Heaton explains the procedure applicable to the registration of the birth of children born of married parents and of children born of unmarried parents. The author also describes the procedure that should be followed in the case of an abandoned child.

ACTIVITY 3.3

- (1) The Births and Deaths Registration Act 51 of 1992 contains certain prescriptions for the registration of the births of children born of married parents and of children born of unmarried parents. Make a short summary of the most important sections of this Act. (Use only Heaton pp 8–12 and the discussion above as sources.)
- (2) The regulations made under the Act prescribe that the notice of birth must also be accompanied by certain documents. List these documents.

■ FEEDBACK

- (1) In your summary you should have mentioned which births have to be registered and by whom. You should also have explained under whose name a child born of married parents and a child born of unmarried parents must be registered, and under what circumstances the registration of the birth of a child born of unmarried parents may be changed.
 - (2) In your answer you should have drawn a distinction between the different periods when notice of birth is given: (a) when notice of birth is given within 30 days of the birth; (b) when notice of birth is given after 30 days from the date of birth of the child, and (c) when the child is older than one year when notice of the birth is given. You should also explain what procedure should be followed in the case of an abandoned child.
-

TEST YOURSELF

- (1) Discuss the legal requirements for the commencement of legal personality.
- (2) Discuss the provisions of the Births and Deaths Registration Act 51 of 1992 that deal with the registration of births.
- (3) Explain the procedure that a mother, whose surname is different from that of her child, has to follow to change her child's surname to correspond with hers. Distinguish between the position of a child born of unmarried parents and a child born of married parents.

CONCLUSION

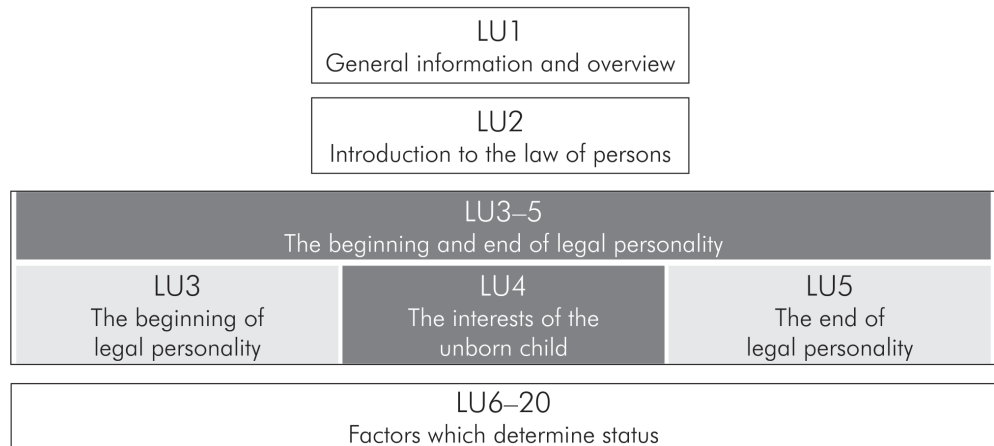
In this learning unit we discussed the two requirements for the beginning of legal personality. We saw what test is used to determine whether a child lived after birth. Furthermore, you got to know the concept of “viability”, and considered the question of whether viability is a requirement for the beginning of legal personality. We also paid attention to the provisions of the Births and Deaths Registration Act 51 of 1992 and the regulations made under the Act.

In the next learning unit we discuss the interests of the unborn child (*nasciturus*).

LEARNING UNIT 4

The interests of the unborn child (*nasciturus*)

Module map 4



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PRESCRIBED MATERIAL TO STUDY

- Heaton pages 12 to 27
- *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA) (Case [1] in the Prescribed Reader)

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) define the *nasciturus* fiction
- (2) state the requirements that are necessary for this fiction to come into operation
- (3) identify those interests in respect of which the fiction has been applied in our law, and explain how the fiction is applied with each interest
- (4) consider the question of whether the *nasciturus* is a legal subject, and distinguish between the *nasciturus* fiction and the *nasciturus* rule
- (5) apply the aforementioned principles to a given sets of facts, with reference to authority
- (6) briefly summarise the Choice on Termination of Pregnancy Act 92 of 1996 that deals with the termination of pregnancy

4.1 INTRODUCTION

In the previous learning unit you learned that legal personality begins at birth and that a foetus cannot have any rights, duties and capacities. In this learning unit it will be pointed out that, in certain circumstances, the law protects the potential interests of the unborn child by employing the *nasciturus* fiction. You will now learn what the requirements for the application of this fiction are and when it is employed.

4.2 DEFINITION AND REQUIREMENTS

Definition:
nasciturus

On pages 12 and 13 Heaton pays attention to the meaning of the *nasciturus* fiction and the requirements for its application. A *nasciturus* is a conceived but unborn child. If you want to, you may also use the term “foetus” instead of “unborn child”.

What is a
fiction?

Please take note that a fiction is something that is imaginary, a presumption or an assumption that is not based on fact. For example, when applying the *nasciturus* fiction, the unborn child is regarded as a living person, although it has not yet been born.

What is the
meaning of “in
abeyance”?

Heaton also explains what it means when one says that the legal position is held in abeyance. If it appears in a specific case that, had the *nasciturus* already been born, he or she would have had certain claims or rights, the legal position is kept in abeyance until the *nasciturus* does in fact become a person, or until it becomes certain that no person has developed from the *nasciturus*. This only means that the interests are kept aside until the child is born, and at birth the child receives the interests. Should the interest that the *nasciturus* receives be a testamentary benefit, for instance, the division of the estate is remanded until the *nasciturus* is born.

Nasciturus
must benefit

Please take note that for the application of the *nasciturus* fiction there is a condition that it must be to the unborn child’s advantage. This condition will be complied with should the child and a third person, for example a parent, benefit together. The benefit must not, however, exist only to the advantage of a third person. On page 13, Heaton refers to examples of cases where the *nasciturus* and a third person will benefit together and where only a third person will benefit.

ACTIVITY 4.1

(1) Fill in the missing words:

Whenever a situation arises where it would be to the advantage of the *nasciturus* if he or she had already been born, the law protects his or her (two words) by the implementation of the fiction that the *nasciturus* is regarded as having been born at the time of his or her whenever it is to his or her advantage. If it appears in a specific case that, had the *nasciturus* already been born, he or she would have had certain claims or rights, the legal position is kept in until the unborn child does in fact become a person or until it becomes certain that no person has developed from the *nasciturus*.

- (2) List the two requirements for the application of the fiction.
- (3) Write down an example of a situation where the application of the *nasciturus* fiction will be to the advantage of only third persons.
- (4) Write down an example of a situation where the application of the *nasciturus* fiction will be to the advantage of both third persons and the *nasciturus*.

FEEDBACK

- (1) The missing words are **potential interests**, **conception** and **abeyance** (Heaton p 12).
- (2) The two requirements for the application of the fiction are that the child must have been conceived at the time when the benefit would have accrued to him or her, and must subsequently be born alive (Heaton p 12).
- (3) On page 13, Heaton discusses examples of the situations mentioned above. Of course, you could also have mentioned your own examples. An example of a situation where the application of the *nasciturus* fiction will be to the advantage of only third persons is where the unborn child would have been entitled to an inheritance had he or she been born when the testator died. If the child dies shortly after birth, the *nasciturus* fiction will not come into operation because the only person to benefit from its application would be the child's intestate heirs and not the child himself or herself.
- (4) A parent is responsible for maintaining his or her child, provided he or she is able to do so and the child is incapable of supporting himself or herself. If an unborn child is born alive and then inherits an estate large enough to support himself or herself, the parents will not be liable for his or her maintenance. In this way they will also benefit from the application of the *nasciturus* fiction. In such circumstances the fiction will indeed be applied, since the benefit which the parents derive flows from the application of the fiction in favour of the *nasciturus*.

4.3

Any conceivable interest protected

THE INTERESTS TAKEN INTO ACCOUNT

Please note that, although the *nasciturus* fiction had only limited use in the common law, its application in modern South African law has been extended. Our law proceeds from a general principle and protects any conceivable interest.

4.3.1

Patrimonial interests

4.3.1.1

Succession

On pages 13 to 15, Heaton discusses the operation of the *nasciturus* fiction in the field of intestate and testate succession. She points out how important it is to distinguish between testate and intestate succession.

ACTIVITY 4.2

- (1) In a sentence or two, distinguish between testate and intestate succession.
- (2) Below follows a table containing clauses from testators' wills. Indicate in each instance whether C, who was already conceived at the time of the death of the testator, but was only born alive after his death, may inherit. Indicate your choices by selecting "yes" or "no" in the appropriate block.

(a)	“I bequeath my estate to my children A and B, and any other child(ren) that my wife expects at the time of my death.” At the time of his death, the testator had two children, A and B, and his wife was expecting a third child, C.	Yes/No
(b)	“I bequeath my estate to my children.” At the time of his death, the testator had two children, A and B, and his wife was expecting a third child, C.	Yes/No
(c)	“I bequeath my estate to my children, A and B.” At the time of his death, the testator had two children, A and B, and his wife was expecting a third child, C.	Yes/No
(d)	“I bequeath my estate to my children who are alive at the time of my death.” At the time of his death, the testator had two children, A and B, and his wife was expecting a third child, C.	Yes/No

FEEDBACK

- (1) Intestate succession refers to situations where the testator has died without leaving a will, while testate succession refers to situations where the testator has died and left a valid will (Heaton p 13).
- (2) With reference to clause (a), C will be able to inherit because the testator’s intention is clear that unborn children must inherit (Heaton pp 13–14).

Should a testator not mention the beneficiaries by their names, but as members of a class (i.e. “my children” as in clause (b)), the conceived child born after the death of the testator will be able to inherit (Heaton p 14). With reference to clause (b), C will thus also be able to inherit.

With reference to clause (c), C will not be able to inherit, because only beneficiaries who have specifically been mentioned (A and B) will be able to inherit (Heaton p 14).

With reference to clause (d), C will be able to inherit. (Heaton pp 13–14.)

4.3.1.2

Maintenance after birth

Take note of the interesting case of *Shields v Shields* 1946 CPD 242, where the parents of an unborn child agreed that the father of the child would not be held responsible for paying maintenance for the child after his or her birth. The court held that a mother could not enter into such an agreement on behalf of her child and that the agreement was contrary to the public interest. The court thus refused to sanction the agreement. Heaton deals with this case on pages 15 and 16. She indicates that if a pregnant woman divorces the father of her unborn child the court may provide for the child’s maintenance in the divorce order. She explains that this rule is not based on the *nasciturus* fiction, but is merely a common-sense approach based on expediency. (“Expediency” refers to something that is advantageous or convenient.)

Furthermore, take note of Heaton's discussion with regard to the statutory inclusion of maintenance as a parental responsibility and right in section 18 (2)(d) of the Children's Act.

Lastly, Heaton explains why acceptance that a parent cannot have parental responsibilities and rights over his or her unborn child does not affect the application of the *nasciturus* fiction in the field of succession.

4.3.1.3

A dependant's action for loss of support

In *Chisholm v East Rand Proprietary Mines Ltd* 1909 TH 297, the court held that a child whose father was killed before he or she was born has a claim for loss of support against the person who committed the delict. For example, if the father was killed in a motor vehicle accident due to the negligence of another driver, the child will have a claim against the driver who caused the accident. Although this case is not prescribed, you have to study this decision as discussed in Heaton on pages 16 to 17 and understand the criticism against it.

ACTIVITY 4.3

- (1) In our law there is a rule that a child whose father was killed prior to the child's birth as a result of another person's delict, may institute a claim for damages, owing to loss of maintenance after his or her birth against the person who caused the death of his or her father.
 - (a) In what case was this rule laid down?
 - (b) On what basis will the damages be calculated in such an instance?
- (2) May the parents of an unborn child validly agree that the father will not be held responsible for the maintenance of the child after his or her birth? Give authority for your answer.

FEEDBACK

- (1) The case in which this principle was laid down is *Chisholm v ERPM* 1909 TH 297 (see the discussion under "A dependant's action for loss of support" above). The damages are calculated on the basis that the child is placed, as far as maintenance is concerned, in the position he or she would have been in had the father not been killed (Heaton pp 16–17).
- (2) No. In *Shields v Shields* 1946 CPD 242 it was held that such an agreement is invalid, because it is contrary to good morals or the legal convictions of the community (see the discussion under "Maintenance after birth" above).

4.3.2

Prenatal injury

Law of delict

Here we deal with the law of delict. A delict (or unlawful deed) is an unlawful (i.e. against the norms of the law) and culpable deed causing another person to suffer a loss. When a person's unlawful and culpable act violates the physical integrity of another (for instance by negligently hitting the person with a motor vehicle), the "guilty" person commits a delict; the "victim" (injured person) then has the right to claim damages from the

former for his or her injuries on the ground of the delict committed against him or her. Heaton pages 17 to 18 investigates the question of whether this principle also applies if the “victim” is an unborn child, who is later born with physical defects or brain damage.

As will be noticed from Heaton pages 17 to 18, the extension of the *nasciturus* fiction to claims for prenatal injuries was criticised by several authors. This dilemma has now been resolved in *Road Accident Fund v Mtati* 2005 (6) SA 125 (SCA) (one of your prescribed cases). As a result of this Supreme Court of Appeal case, all future claims for prenatal injuries will have to be based on the ordinary principles of the law of delict, and not on the *nasciturus* fiction. The *nasciturus* fiction will, however, still apply to other areas of the law.

ACTIVITY 4.4

- (1) Until recently, authors have not been able to agree on whether it was necessary to invoke the *nasciturus* fiction to institute an action for prenatal injuries, or whether the ordinary principles of the law of delict could be employed. Recently this question came before our courts, and has now been resolved.
 - (a) In which case was this debate laid to rest?
 - (b) Briefly discuss the case in question and explain why we say that the debate has been resolved.
- (2) By now you should know what a court decision looks like, how you may summarise a judgment, and what four components your summary must consist of. Now do the following activity:
 - (a) Write down the four components that a summary of a court judgment must consist of.
 - (b) Read the judgment in *Road Accident Fund v Mtati* and make a summary of it. Your summary must contain the four components written down for (a) above and must be more or less one page long. Do not worry if at first your summary is longer than one page. Try again, until you can summarise the judgment in more-or-less one page.

FEEDBACK

- (1) The case in question is *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA) (Case [1] in the Prescribed Reader).
- (2) (a) A summary of a court judgment should consist of the following four components:
 - the facts
 - the legal question
 - the judgment (or rather the court’s answer to the legal question)
 - the reasons for the court’s judgment (or *rationes decidendi*)
- (b) Your summary should look more or less like this:

The facts of the Road Accident Fund case were briefly as follows: A pregnant woman was knocked down and seriously injured by the negligent driver of a motor vehicle. The woman’s child, Z, was subsequently born with brain injuries and was mentally disabled. The father of the child, as the natural guardian, then instituted a

claim against the Road Accident Fund on behalf of the child, alleging that the child's injuries had been caused by the accident. The Road Accident Fund raised a special plea. It contended, firstly, that an unborn child is not a person and is therefore not entitled to compensation and, secondly, that because an unborn child is not a person, a driver does not owe a duty of care to an unborn child. The special plea was dismissed by the court *a quo*. The Fund then appealed to the Supreme Court of Appeal.

The **legal question** consisted of two parts, namely:

- Does Z have a claim against the Road Accident Fund for the damages resulting from her disabilities?
- Should such an action be allowed by using the *nasciturus* fiction, or by using the ordinary principles of delict?

The Supreme Court of Appeal **decided** that it would be intolerable if our law did not grant an action for prenatal injuries, and that such an action should be based on the law of delict. The appeal was thus unsuccessful.

The **reasoning** for the judgment was as follows:

The court held that, according to the ordinary principles of the law of delict, unlawfulness and damage are separate elements for delictual liability, and that the child's delictual right of action becomes complete when he or she is born alive. The assertion that the driver of the vehicle did not owe Z a legal duty because she had not yet been born must be rejected.

As a result of this judgment, all future claims for prenatal injuries will have to be based on the ordinary principles of the law of delict, and not on the *nasciturus* fiction. The *nasciturus* fiction will still apply to other areas of the law.

4.3.3 Guardianship and care

Study Heaton pages 19 and 20 in this regard.

Section 18 of the Children's Act 38 of 2005 replaces the common-law concept of "parental power" with a new concept, namely, "parental responsibilities and rights". The Act also replaces the concept of "custody" with the concept of "care". The common-law concept of "guardianship" is retained.

You will see that Heaton first explains that guardianship and care (formerly "custody") are the two components of parental responsibilities and rights. She also explains what is meant by guardianship and care. She then indicates that if a woman is pregnant when getting divorced, the court may include an order regarding guardianship and care in the divorce order.

As in the case of maintenance for a child who is still to be born (see 4.3.1.2 above), the rule is based on expediency and not on an application of the *nasciturus* fiction. On pages 19 and 20, Heaton explains why parental responsibilities and rights cannot arise before a child is actually born. Because a parent does not have parental responsibilities and rights in respect of his or her unborn child, a parent who wanted to negotiate a benefit for his or her unborn child would have to use a contract for the benefit of a

third party. On pages 19 and 20 Heaton explains how a contract for the benefit of a third party works and how it can be used to obtain a benefit for an unborn child.

4.3.4 Termination of pregnancy

4.3.4.1 General

Heaton indicates on page 20 that termination of pregnancy is not an instance where the foetus's interests are protected by the *nasciturus* fiction. The *nasciturus* fiction can obviously not be used because an aborted foetus will never be born alive.

4.3.4.2 Circumstances in which a pregnancy may be terminated

Abortion is now regulated by the Choice on Termination of Pregnancy Act 92 of 1996, which legalised abortion. On pages 20 and 21 Heaton discusses the rules regulating the termination of pregnancy during the following periods:

- during the first 12 weeks of the gestation period
- from the 13th up to the 20th week of the gestation period
- after the 20th week of the gestation period

4.3.4.3 Consent

On pages 21 to 23 Heaton discusses the provisions of the Choice on Termination of Pregnancy Act dealing with consent to abortion. She distinguishes between mentally able women and mentally disabled and unconscious women. If a pregnant woman is mentally disabled to such an extent that she does not understand and appreciate the consequences of the proposed abortion, and she is less than 21 weeks pregnant, her guardian, spouse or civil union partner may consent to the termination of the pregnancy. The same applies to a pregnant woman where there is no prospect that she will regain consciousness. Take note that the same criteria as set out in the Act for the different stages of the pregnancy must be present.

Christian Lawyers' Association v Minister of Health 2005 (1) SA 509 (T) deals with this issue. The plaintiff argued that certain sections of the Choice on Termination of Pregnancy Act were unconstitutional because they permitted a woman under the age of 18 years to choose to have her pregnancy terminated without parental consent or control. The court, however, held that the legislature had not left the termination of a minor's pregnancy unregulated, but that the cornerstone of this concept was "informed consent".

4.3.4.4 The foetus's right to life and other constitutional arguments surrounding termination of pregnancy

On pages 23 to 25, Heaton indicates that before the introduction of a Bill of Rights into our law, our courts held that a foetus is not a legal subject and does not have a right to life that can be enforced on its behalf. In *Christian Lawyers Association of South Africa v The Minister of Health* 1998 (4) SA 1113 (I), the Choice on Termination of Pregnancy Act was challenged on the ground that it contravenes section 11 of the Constitution of the Republic of South Africa, 1996, which guarantees the right to life. The court rejected this argument. You must study this decision as it is discussed in Heaton on pages 23 to 24.

On pages 24 and 25, Heaton indicates that there is no conflict between the unborn child's constitutional rights and those of the pregnant woman, simply because the unborn child does not have any rights prior to birth. She further explains why any constitutional challenge by the father of the provision in the Choice on Termination of Pregnancy Act, which grants the woman the sole right to decide on the matter by requiring only her consent to the termination, would fail.

4.3.5 Sterilisation

You have to study the provisions in the Sterilisation Act 44 of 1998 as discussed in Heaton on pages 25 to 26. Distinguish between the different provisions that apply to majors, minors and persons who are incapable of giving consent.

ACTIVITY 4.5

- (1) Fill in the missing words:

In terms of the Sterilisation Act 44 of 1998, the (two words) of anyone who has reached the age of years is permitted to consent to sterilisation of him or her (Heaton p 25).

- (2) Explain under which circumstances a minor may be sterilised (Heaton p 25).

FEEDBACK

- (1) The missing words are: **voluntary sterilisation** and **18**.
 (2) A minor may be sterilised only if his or her life would be jeopardised or seriously impaired if the sterilisation were not performed.

4.4 DOES THE PROTECTION OF THE INTERESTS OF THE NASCITURUS IMPLY THAT AN UNBORN CHILD IS SOMETIMES A LEGAL SUBJECT?

Rule v fiction

Certain authors (such as Van der Merwe and Van der Vyver & Joubert) are of the opinion that the protection we give to the unborn child is based on the *nasciturus* rule and not on the fiction. They argue that if a situation arises where it would have been to the advantage of the unborn child had he or

she already been born, all the rights that a normal person would have had must also be afforded the unborn child. The unborn child is thus a legal subject as from the date of his or her conception whenever his or her interests are at issue. He or she must also subsequently be born alive.

Other authors (such as Heaton; Boezaart; and Kruger & Robinson) argue that, should a situation arise before an unborn child's birth where it would have been to his or her advantage had he or she already been born, we should apply the *nasciturus* fiction (as explained above) to protect his or her interests. The unborn child is thus not regarded as a legal subject (Heaton pp 26–27).

ACTIVITY 4.6

- (1) Complete the table by filling in your answer to each question in the relevant block.

	Fiction	Rule
(a) At what moment does legal personality begin, according to the supporters of the <i>nasciturus</i> fiction and the <i>nasciturus</i> rule respectively?		
(b) Which writers support the application of the <i>nasciturus</i> fiction and the <i>nasciturus</i> rule respectively?		

FEEDBACK

The supporters of the *nasciturus* fiction accept that legal personality begins only at birth, while, according to the supporters of the *nasciturus* rule, the *nasciturus* is a legal subject from the moment of conception. You should therefore have written the word “birth” in the first block and the word “conception” in the second block.

The supporters of the application of the *nasciturus* fiction are Heaton, Boezaart, and Kruger & Robinson. The supporters of the application of the *nasciturus* rule are Van der Merwe, and Van der Vyver & Joubert (Heaton pp 26–27).

TEST YOURSELF

- (1) The will of A, a millionaire, contains the following clause:
 “My daughter B inherits R60 000 and her children who are alive at the date of my death, each inherits R20 000.” A dies on 10 September 2018. B's second child, X, is born on 10 October 2018. B has one other child, Y. Who is entitled to inherit from A's estate? Discuss with reference to authority.
- (2) The dependants of a breadwinner institute an action on the ground that his or her death was caused unlawfully and culpably. With reference to case law, discuss the possibility that their action may include an action on behalf of a foetus.
- (3) Mary and John are married. Mary is expecting the couple's first child. Mary's father is setting up a family business. He wants Mary, John and their child to be co-owners of the business. Can John or Mary accept co-ownership of the business on behalf of their unborn child?

- (4) Discuss the possibility of the protection of the right of the *nasciturus* to its physical integrity, with reference to decided cases and the views of authors in this regard.
- (5) Discuss the Choice on Termination of Pregnancy Act 92 of 1996. In your answer you have to indicate during which stages a pregnant woman may have her pregnancy terminated and the circumstances in which a pregnancy may be terminated.
- (6) Explain whether a woman's right to have her pregnancy terminated infringes her unborn child's right to life.

Nota Bene: You will notice that we have included an essay and a problem-type question here. Essay-type questions are direct questions which must be answered in essay form, and problem-type questions are questions where we give you a set of facts and base either short questions or an essay question on these facts. For those of you who are unsure how to answer an essay or problem-type question, we include some guidelines on how to answer these types of question. As with problem-type questions, the answering of essay-type questions is a skill, just like any other skill that improves with practise. We would like to help you to learn how to answer essay-type questions and problem-type questions through practise, and with a little guidance on our side.

Essay-type questions (e.g. question 4 above)

Essay-type questions = direct questions which must be answered in essay form

- (1) Give an **introduction**. This includes identifying the problem and defining what you have identified.
- (2) **Discuss** the relevant legal principles and their applications, with reference to authority. Authority can include case law, statutory law, opinions of legal writers, et cetera.
- (3) Give a **conclusion**. Here you must refer back to the question and give an answer. If you don't agree with the legal position you may give your own opinion here.

Example

We will now illustrate how to answer an essay-type question by using question 4 above as an example. You should discuss the following in your answer:

- *Introduction:* Here we are dealing with the protection of the interests of the unborn child. You had to explain what the *nasciturus* fiction means, how it operates and what its requirements are (Heaton pp 12–13).

You also had to mention that any possible potential interest of the *nasciturus* is protected, that there is no *numerus clausus* (final list) of interests, and that one of these interests is the right to physical integrity.
- *Discussion:* You will find this section of the work in Heaton pages 17 to 18. You had to explain that everyone has certain personality rights, one of which is the right to physical integrity. When one person injures another as a result of a culpable and unlawful act, he or she is violating the physical integrity of the other person. The injured person then has the right to claim damages and reparation from the person who injured him or her. Somebody's action may also cause injuries to the *nasciturus* before birth. In the *Mtati* case, the question that arose was whether the rights of the unborn child can be protected in cases like these.

- *Conclusion:* Conclude by explaining why the different views on whether the *nasciturus* fiction should have been applied in these circumstances are no longer relevant, and what the law currently states.

Problem-type questions (e.g. question 1 above)

Problem-type questions = problematic sets of facts on which questions are based

As part of assessment questions, we sometimes ask problem-type questions. As we explained above, the answering of essay-type questions, just like the answering of problem-type questions, is a skill which, like any other skill, improves with practise. Below are the steps you must follow when answering such a question:

- (1) **Identify the problem** that the question deals with.
- (2) **Define or describe** what you identified in (1).
- (3) **Discuss** all the relevant legal principles, with reference to authority.

Authority can include statutory law, case law, opinions of legal writers, and so on.

- (4) Give a **conclusion**. In other words, you will have to apply what you have discussed to the facts.

Also see the tutorial letter that deals with the answering of examination and assignment questions, in which we give you a few examples to illustrate these principles.

EXAMPLE

Now try to answer question 1 above by following the steps we have just discussed. Your answer should be about two written pages long.

- *Identification of problem:* Here we are dealing with the protection of one of the interests of the unborn child, namely, that the unborn child may inherit testate.
- *Relevant definitions and descriptions:* As we deal here with, *inter alia*, the question of whether the *nasciturus* fiction must be applied or not, you must describe the fiction, and mention the requirements for its application (Heaton pp 12–13).
- *Discussion of relevant legal principles and authority:* You should have discussed, with reference to case law, the question of whether the unborn child may inherit testate by using the *nasciturus* fiction (Heaton pp 13–15). You should have pointed out that if a deceased leaves property, and the *nasciturus* would have come into consideration as an heir had he or she already been born at the time of the deceased's death, he or she becomes entitled to the inheritance on eventual birth – as if already born at the moment of conception.

You should have pointed out that it is important to distinguish between intestate and testate succession. Intestate succession means that the deceased died without making a will, and testate succession means that the deceased died leaving behind a valid will. In this question we deal with testate succession.

You should have explained that, when a testator leaves a valid will, effect must be given to the provisions of the will. The intention of the testator is therefore important. This intention must be determined on the basis of the wording of the will. If it is obvious that the testator intended that a *nasciturus* should not inherit, this intention should be carried out. If the will is silent about that *nasciturus*, the *nasciturus*, once he or she is born, should inherit as if he or she was already alive when the testator died.

The next step would have been to discuss the *Ex parte Boedel Steenkamp* case, where the facts were similar to those in the question under discussion. The court held that the unborn child was entitled to inherit, along with the daughter and her other children. The court also held that it was not absolutely clear that it was the testator's intention to exclude the *nasciturus*. You should have discussed the criticism in Heaton on page 14 in this regard.

CONCLUSION

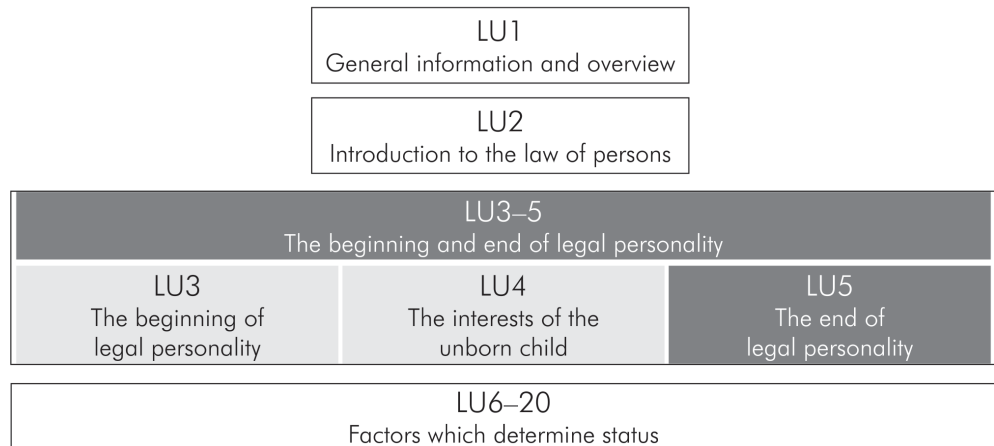
This learning unit dealt with the *nasciturus* fiction. We paid particular attention to the meaning of the fiction, the requirements for its application, and the different fields where the fiction may possibly be used. We also looked at the question of whether the *nasciturus* is a legal subject. The provisions of the Choice on Termination of Pregnancy Act, as well as the Sterilisation Act, were also discussed in this learning unit.

In the next learning unit, we discuss the end of legal personality.

LEARNING UNIT 5

The end of legal personality

Module map 5



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PRESCRIBED MATERIAL TO STUDY

- Heaton pages 27 to 33

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) explain how the moment of death is determined and proved
- (2) discuss the legal principles with regard to the statutory and common-law presumption of death orders
- (3) explain the effect of a presumption of death order
- (4) apply these principles to given sets of facts, with reference to authority
- (5) discuss the presumptions regarding sequence of death
- (6) explain the procedure with regard to the registration of deaths
- (7) briefly explain the duty to bury the deceased

5.1 INTRODUCTION

In this learning unit you will learn that a person's legal personality is ended by death. The National Health Act 61 of 2003 gives a legal definition of "death". Before this Act was enacted, no definition of "death" existed. You will also learn which procedures should be followed when a person dies of unnatural causes.

5.2 THE END OF LEGAL PERSONALITY

In Heaton pages 27 and 28 you will see that the legal personality of a person comes to an end at his or her death.

ACTIVITY 5.1

What criteria are applied in our law to determine when a person is legally dead?

FEEDBACK

Prior to the coming into operation of section 1 of the National Health Act 61 of 2003, South Africa lacked a legal definition of “death”. When the legislature enacted this Act, it adopted the criterion of brain death as the legal standard in so far as the provision of health services, donation of corpses or specified tissue in corpses, post-mortem examinations, and the removal of tissue at post-mortem examinations are concerned. This is in keeping with the prevailing views in modern medical practice on when death occurs. However, keep in mind that the definition of “death” in the National Health Act applies only to the specific matters governed by the Act. If the Act does not apply, the courts may, as in the past, rely on medical evidence (Heaton pp 27–28).

5.3

Legal position where person disappears and it is uncertain whether he or she is alive

PROOF OF DEATH

In Heaton page 28 you will see that when it has been established, on the grounds of medical evidence, that a person has died, his or her estate can be administered, insurance moneys paid out and, if he or she was married, the marriage will be dissolved. However, a problematic situation arises when a person disappears and it is not certain whether he or she is still alive. In such cases, the presumption of death is used to settle this unsatisfactory state of affairs.

Here we distinguish between two different procedures for obtaining a presumption of death order.

Should any interested party apply to the High Court of South Africa to have a presumption of death expressed, we refer to it as a common-law application, because the application is brought in terms of the common law. There are certain statutory provisions that govern the expression of the presumption of death order. In terms of the statutory procedure, the state takes the initiative when an unnatural death is suspected. The consequences of an order of presumption of death also differ with regard to the two kinds of presumption of death orders, especially in respect of the dissolution of any existing marriage of the person.

ACTIVITY 5.2

Name the two different procedures in terms of which presumption of death orders may be granted.

■ FEEDBACK

Presumption of death orders may be expressed in terms of the common law and in terms of a statutory procedure (Heaton pp 28–29).

We shall now discuss these procedures separately.

5.4 PRESUMPTION OF DEATH

5.4.1 Common-law procedure

In this section you will learn what the requirements for a common law presumption of death are. Study Heaton pages 28 to 29 and answer the questions below. See the table below for examples.

ACTIVITY 5.3

- (1) Who can apply to the High Court of South Africa to have a presumption of death expressed?
- (2) Name the things that must be brought to the attention of the court in a common-law application for a presumption of death.
- (3) What procedure will the court follow after hearing the application? Explain in a few short sentences.

■ FEEDBACK

- (1) In Heaton page 28, you will see that any interested person (e.g. spouse, child or creditor of the missing person) can apply to the High Court to have a presumption of death expressed in regard to the missing person.
 - (2) In this kind of application, all the relevant facts and circumstances must be brought to the attention of the court. The relevant facts and circumstances are the following:
 - (a) the age of the person at the time he or she went missing
 - (b) how long the missing person has been away from home
 - (c) whether the missing person was engaged in a trade or occupation that endangered life(See Heaton p 29 for a discussion).
 - (3) After the application has been heard, a return date is usually set on which the final order will be made. It is then ordered by the court that all interested parties (as determined by the court) should be given notice of the rule nisi and that it must also be published in the local press and the Government Gazette. In so doing it is ensured that ample opportunity is given to any interested parties to bring any further relevant facts or possible objections to the notice of the court before the order is finalised (Heaton p 29).
-

ACTIVITY 5.4

Mr Jonas has been missing for 20 years since the aeroplane in which he was travelling disappeared without a trace off the Durban coast.

- (1) May Mrs Jonas bring an application to the court for a presumption of death order?
- (2) In English law, such a presumption is usually expressed after an absence of seven years. What is the position in South Africa? Briefly explain.

- (3) What factors will the court consider? Discuss in a few paragraphs, with reference to authority.

■ FEEDBACK

- (1) Yes, any interested person may apply (Heaton p 28).
- (2) The length of a person's absence can be taken into account and can even be decisive, but it is not the only factor that the court will consider (Heaton explains p 29).
- (3) Whether or not a presumption of death will be expressed in a specific case depends wholly on the particular circumstances of the case. In *Ex parte Estate Russell* 1926 WLD 118 the following factors which may also play a role in determining whether a presumption of death order should be granted, are given, namely:
 - the age of the missing person
 - the length of his or her absence
 - whether the missing person was engaged in a dangerous trade or occupation

(Also see Heaton's discussion, on page 29, of the *Ex parte Estate Russell* case).

It will depend on the circumstances of each case whether a presumption order will be granted (Heaton p 29).

5.4.2

Inquests Act

Statutory procedure

Apart from the procedure set out above, certain statutory provisions govern the expression of a presumption of death in certain cases. The Inquests Act 58 of 1959 provides that, if it is suspected that a person died of unnatural causes, the magistrate can hold an inquest. Section 18 of the Act provides that if the corpse of the person concerned has not been found, or if it has been destroyed, the magistrate's findings in regard to the case concerned may be ratified by a judge of the High Court and that this order will have the same effect as an order presuming the death of the person concerned made by that judge (Heaton pp 29–30).

5.5

THE EFFECT OF AN ORDER OF PRESUMPTION OF DEATH

On pages 30 to 32, Heaton explains what the effect of an order of presumption of death is. Note that it is only a rebuttable presumption and does not mean that the missing person is dead. The presumption can be set aside. This is explained on page 32 in Heaton. It is important that you know what effect an order of presumption of death will have on the administration of the missing person's estate, as well as his or her marriage or civil union. See the table below.

ACTIVITY 5.5

Mrs Jonas has successfully applied for a presumption of death order with regard to her husband, who has been missing for six months.

- (1) Can the estate now be administered?

- (2) What will the situation be if it becomes clear that the missing person did not die? Explain the position in a few sentences.

■ FEEDBACK

- (1) Yes, the presumption results in the estate of the person regarding whom the presumption of death has been expressed being administered in the normal way, as if there were proof of his or her death (Heaton p 31).
 - (2) Because the presumption is rebuttable, the court which expressed the presumption can set aside its original order if, on the basis of further evidence, it becomes clear that the missing person did not in fact die. This can be done on the application of any interested person or the missing person himself or herself. In such a case, he or she may bring an action for enrichment against those who have been enriched at his or her expense as a result of the presumption of his or her death (Heaton p 32).
-

ACTIVITY 5.6

Mrs Jonas has successfully applied for a presumption of death order with regard to her husband, who has been missing for six years. She now wishes to marry Mr Sibanyone.

- (1) Name the Act in terms of which she may apply to the court to dissolve her marriage.
- (2) Must she bring a separate application for the marriage to be dissolved?
- (3) What is the effect of such an order dissolving her marriage?

■ FEEDBACK

- (1) Section 1 of the Dissolution of Marriages on Presumption of Death Act 23 of 1979 stipulates that the court which expresses a presumption of death may, at the request of the remaining spouse, make an order dissolving the marriage (or civil union) as from a date determined by the court.
- (2) Yes. An order can be made at the same time as the presumption is made, or at any time thereafter, by means of a separate application.
- (3) If an order is made, the marriage (or civil union) is deemed to be dissolved by death for all purposes – the legal consequences are therefore the same as in a case where the marriage (or civil union) has actually been dissolved by death.

Note that such an application can be made only by the remaining spouse and that, in accordance with the wording of the Act, the court is not bound to grant the application, but has a discretion to refuse it.

However, it is difficult to think of a situation where the court would be prepared to express a presumption of death but refuses to dissolve the marriage (or civil union) of the missing person (Heaton p 31).

ACTIVITY 5.7

A presumption of death order was expressed in terms of the Inquests Act 58 of 1959. Is a separate application necessary to dissolve the marriage? Explain in a few sentences with reference to authority.

■ FEEDBACK

Section 2 of the Dissolution of Marriages on Presumption of Death Act provides that a presumption of death that is expressed in terms of the Inquests Act, and confirmed by the High Court, automatically dissolves the existing marriage or civil union of the person concerned. In this case, no special application for the dissolution of the marriage or civil union needs to be made. The marriage or civil union is then also deemed to have been dissolved by death as from the date recorded in the court's finding as the date on which the person died (Heaton p 31).

ACTIVITY 5.8

Mrs Jonas's application for a presumption of death order with regard to her husband who has been missing for 20 years was not successful. May the court order that the estate of the missing person nonetheless be divided among his heirs? Explain in a few sentences.

■ FEEDBACK

If the court refuses to express a presumption of death, it may nonetheless order that the missing person's property be divided among his or her heirs. On occasion, the courts have ordered that the heirs must provide sufficient security for return of the property should the missing person reappear (Heaton p 31).

5.6

SUMMARY OF THE DIFFERENCES BETWEEN THE COMMON-LAW AND STATUTORY PRESUMPTION OF DEATH PROCUDURES

The distinction between a common-law presumption of death and a statutory presumption of death order

NB: Take note that the procedures and effect of the two presumptions of death differ.

	Common law presumption of death	Statutory presumption of death
When?	When a person is missing and there is no certainty as to whether he or she is dead or still alive.	A person's death was not due to natural causes.
Who can apply?	Any interested party, such as a creditor, heir, surviving spouse or civil union partner of the missing person.	The State, namely a judicial officer, takes the initiative (Inquests Act).
Burden of proof	The applicant must prove, on a preponderance of probabilities, that the missing person is dead.	The judicial officer must be certain beyond reasonable doubt that the person is dead.

	Common law presumption of death	Statutory presumption of death
Court	The High Court in whose jurisdiction the missing person was domiciled.	A police official must investigate the circumstances of the death and report the matter to the magistrate of the district concerned.
Applicable law	Common law	Inquests Act 58 of 1959
Effect on marriage	The marriage of the missing person is not automatically dissolved, but the surviving spouse must bring a separate application in terms of the Dissolution of Marriages on Presumption of Death Act 23 of 1979 in order to dissolve his or her marriage or civil union.	If an inquest was held in terms of the Inquests Act and the finding was confirmed by the High Court, the person's marriage or civil union is automatically dissolved. The surviving spouse does not need to make a separate application for the dissolution of the marriage or civil union.

5.7 PRESUMPTIONS REGARDING SEQUENCE OF DEATH

When a few people die in the same disaster (*commorientes*) it is important for purposes of inheritance to determine who died first. Study Heaton page 32.

5.8 REGISTRATION OF DEATHS

In terms of the Births and Deaths Registration Act every death, whether as a result of natural or unnatural causes, has to be reported to the Director-General of Home Affairs. In this regard study Heaton pages 32 to 33.

5.9 DUTY TO BURY THE DECEASED

In this section you will learn more about the requirement that a burial order must be issued before someone may be cremated or buried. You will also learn what procedure should be followed when a person gave instructions regarding his or her funeral and/or burial place or cremation. In this regard you should study Heaton page 33.

ACTIVITY 5.9

Thomas died yesterday. On his deathbed he told his girlfriend that he wanted to be cremated and that he wished his ashes to be scattered on the farm where he was born. However, two years before he died, he included a clause in his will that he should be buried next to his father in the family graveyard. In his will he appointed his mother as his sole heir. Thomas's girlfriend insists that he must be cremated,

while Thomas's mother wants him to be buried next to his father. Will Thomas be cremated or buried?

■ FEEDBACK

In terms of our law, the deceased's instructions on his or her cremation or burial must be given effect to, as far as is possible and permissible. In the case of verbal instructions, there must be clear proof of those instructions, particularly if they contradict written instructions the deceased gave at a different time. In the present case, Thomas's oral instructions to his girlfriend contradict his earlier written instructions. Only if Thomas's girlfriend can provide clear proof that he said that he wanted to be cremated will his body be cremated and his ashes scattered on the farm where he was born. If she cannot provide such proof Thomas's corpse will be buried in accordance with the written instructions in his will (Heaton p 33).

TEST YOURSELF

- (1) Discuss in detail the procedure that has to be followed in an application for a presumption of death order in terms of the common law.

Question 2 is an example of a problem-type question:

- (2) Mrs Smith's husband has been missing for ten years since his yacht disappeared without trace off the Namibian coast.
 - (a) Mrs Smith wishes to finalise her husband's estate. What can she do to effect this? Explain in detail.
 - (b) Mrs Smith meets Mr Jones and wishes to marry him. Can she do so? What would you advise her to do? Discuss with reference to authority.

Questions 3 to 6 are examples of essay-type questions:

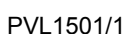
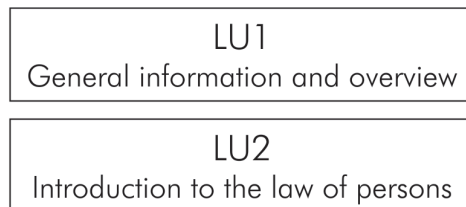
- (3) Discuss in detail the procedure that a person has to follow in an application for the dissolution of his or her marriage after a presumption of death regarding his or her spouse has been expressed in terms of the common law. What is the effect of the order dissolving the marriage?
- (4) If, in any particular case, a court is not prepared to grant a presumption of death order, is there any alternative relief which may be granted? Discuss.
- (5) Briefly discuss the statutory provisions that govern the expression of presumption of death in certain cases. In your answer, refer to the Inquests Act 58 of 1959.
- (6) Discuss in detail the consequences of a presumption of death order expressed in terms of the common law.
- (7) What is the effect of a presumption of death, expressed in terms of section 18 of the Inquests Act 58 of 1959, on the marriage of the particular person?
- (8) Mr and Mrs Jones, their two children and their only grandchild are all killed in a motor vehicle accident. Which of them will be presumed to have died first?
- (9) Which Act currently regulates the registration of deaths?

CONCLUSION

In this learning unit we discussed the legal principles applicable to presumption of death orders.

In the next learning unit, you will learn what is understood by a person's status.

FACTORS WHICH DETERMINE STATUS



LEARNING UNIT 6

Status – definition of concepts

Module map 6

LU1 General information and overview				
LU2 Introduction to the law of persons				
LU3–5 The beginning and end of legal personality				
LU6–20 Factors which determine status				
LU6 Definition of concepts	LU7 Domicile	LU8–9 Children born of unmarried parents	LU10–19 Minority	LU20 Diverse factors

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6.4	CAPACITY TO LITIGATE	50
6.5	CAPACITY TO BE HELD ACCOUNTABLE FOR CRIMES AND DELICTS	50

PRESCRIBED MATERIAL TO STUDY

- Heaton pages 35 to 37

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) show that you understand what is meant by the term “status”
- (2) explain the meaning of “legal capacity”
- (3) show that you understand what is meant by “capacity to act”
- (4) explain the meaning of “capacity to litigate”
- (5) explain “capacity to be held accountable for crimes and delicts”

6.1

Definition:
status

INTRODUCTION

Because the law of persons is the part of private law that, *inter alia*, determines the legal status of a legal subject, it is very important to understand the meaning of the term “status”.

The word “status” is derived from the Latin word *stare* which means “to stand”. We are therefore concerned with a person’s “standing” in the law. A person’s standing in the law is determined by all those attributes a person has to which the law attaches consequences. In private law, examples of such attributes are youth and mental illness. Study Heaton page 35 in this regard.

CUSTOMARY LAW

A system of patriarchy is followed in some communities in customary law,¹² in terms of which certain special rights and privileges are afforded to senior men, while women and junior men have fewer rights and privileges.¹³ As a result of this, certain factors (such as sex) influence a person’s status in customary law. However, you should note that the concept of “status” in customary law refers to a person’s social standing, and not to a person’s standing in law or to legal status. A first wife in a polygynous marriage, for example, holds a higher social standing than the subsequent wives.¹⁴ However, this will not influence her “status” in law.

12. Note that the Balobedu community follows a matriarchal system.

13. Bennett *Customary Law in South Africa* (2004) 248.

14. Bekker *Seymour’s Customary Law in Southern Africa* 5 ed (1989) 129–134.

You should note that the differentiation between men and women in customary law has largely been abolished, as can be seen from the following examples:¹⁵

- In *Bhe v Magistrate, Khayelitsha (Commissioner for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 (CC) the Constitutional Court declared the principle of male primogeniture that favoured male heirs to be unconstitutional.
- Although the official version of customary law required the *lobolo* agreement to be negotiated by the bride's guardian, the living law allows her mother to do the negotiations.¹⁶ This gender-neutral custom is in line with the Bill of Rights.

6.2

Legal capacity is the capacity to have rights and duties

LEGAL CAPACITY

Heaton explains on page 36 that legal capacity is the capacity to have rights and duties, a capacity held by all human beings. However, although all legal subjects have legal capacity, their legal capacity does not necessarily extend equally far. That is because there is a difference between the **capacity to have rights and duties**, and the **particular rights and duties** that a person has at a specific time. Make sure that you understand this distinction.

6.3

Capacity to act is the capacity to perform valid juristic acts

CAPACITY TO ACT

When you study page 36 of Heaton, you will learn that capacity to act is the capacity to perform valid juristic acts. Heaton explains that a juristic act is a human act to which the law attaches at least some of the consequences wanted by the parties who perform the act. The author also explains that some persons have no capacity to act whatsoever, and some persons have limited capacity to act. Make sure that you understand the reason for this limitation on certain persons' capacity to act.

6.4

Capacity to litigate is the capacity to appear in court as a party to a lawsuit

CAPACITY TO LITIGATE

Heaton explains the meaning of the concept "capacity to litigate" on page 37. She also indicates that there is a close correlation between "capacity to act" and "capacity to litigate", which means that a person's capacity to litigate may be limited for the same reasons as explained in 6.3 above.

6.5

CAPACITY TO BE HELD ACCOUNTABLE FOR CRIMES AND DELICTS

When you study page 37 of Heaton, you will learn why the capacity to be held accountable for crimes and delicts is influenced by a person's age and mental capacity.

TEST YOURSELF

- (1) What do you understand by the term "status"?
- (2) How is the concept "status" understood in customary law?

15. Kruger and Skelton (eds) *The Law of Persons in South Africa* 2 ed (2018) 60.

16. On the difference between "official" and "living" customary law, see Learning unit 2 above. See also Bennett 231; *Mabena v Letsoalo* 1998 (2) SA 1068 (I).

- (3) What do you understand by the term “legal capacity”?
- (4) Explain the concept of “capacity to act”.
- (5) What do you understand by the concept of “capacity to litigate”?
- (6) What do you understand by the phrase “capacity to be held accountable for crimes and delicts”?

CONCLUSION

In this learning unit we explained to you what is understood by a person’s status, what the meaning of legal capacity is, what the meaning of capacity to act is, what is understood by a person’s capacity to litigate, and what is understood by a person’s capacity to be held accountable for crimes and delicts.

In the next learning unit we discuss domicile. Domicile has an influence on a person’s legal status, since status is determined by the law of the place where the person is domiciled.

LEARNING UNIT 7

Domicile

Module map 7

LU1 General information and overview				
LU2 Introduction to the law of persons				
LU3–5 The beginning and end of legal personality				
LU6–20 Factors which determine status				
LU6 Definition of concepts	LU7 Domicile	LU8–9 Children born of unmarried parents	LU10–19 Minority	LU20 Diverse factors

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PRESCRIBED MATERIAL TO STUDY

- Heaton pages 39 to 46 (4.1–4.5)

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) explain what is meant by the term “domicile”
- (2) explain what the importance of domicile is
- (3) set out the general principles governing domicile
- (4) identify the different kinds of domicile, and explain what each involves
- (5) apply the above principles to given sets of facts, with reference to authority

7.1 INTRODUCTION

In this learning unit we focus on domicile as a factor that affects status. Study Heaton page 39–40 in this regard. Since legal systems differ from one another, it is necessary to establish which legal system determines a person’s status – in other words, according to which legal system it must be determined whether and to what extent a person has legal capacity, capacity to act, capacity to litigate, and capacity to be held accountable for crimes and delicts. The law which determines a person’s status is the law which is in

force at the place where that person is domiciled, that is, his or her *lex domicilii*.

MNGUNI FAMILY

The following scenario will more effectively illustrate some of the principles of domicile.

Mr Mnguni and Mrs Mnguni have been staying in Springs for the past 25 years. They have three children. The eldest son, Bongani, is 23 years old and is mentally ill. His younger brother, Jabulani, is 20 years old, and their little sister, Ntombi, is nine years old. Mr Mnguni recently got a lucrative job offer, which requires him to relocate to Mafikeng. After discussing the offer with his wife, he accepts the offer and they intend to relocate to Mafikeng with the whole family. Jabulani is not happy to relocate. As a result, he moves out of his parents' home and is now renting an apartment in Pretoria. He is also working there full time.

After having worked through this learning unit, you should be able to answer questions regarding the Mnguni family scenario. The activities in this regard are available under the following activities: 7.2–7.5.

7.2 REPLACEMENT OF THE COMMON-LAW RULES ON DOMICILE BY THE DOMICILE ACT 3 OF 1992

In this regard you must study 4.2 in Heaton on page 40. You should note that the Domicile Act 3 of 1992, which currently governs domicile, is not retrospective. The Act thus does not affect 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, namely 1 August 1992. The coming into operation of the Act also does not affect the legality of any act performed before that date.

7.3 DEFINITION OF DOMICILE

The term “domicile” is explained in Heaton on page 41. This definition comprises important components which determine a person’s domicile.

ACTIVITY 7.1

List the different components of the definition of domicile.

■ FEEDBACK

In law, domicile is the place where a person is deemed to be constantly present

- for the purpose of exercising his or her rights
- and fulfilling his or her obligations
- even in the event of his or her factual absence (Heaton p 41)

7.4 GENERAL PRINCIPLES GOVERNING DOMICILE

Before we discuss the different kinds of domicile, we should deal with some general principles on the law of domicile.

Three basic principles

You should further know that three basic principles govern domicile (see Heaton p 41). The following are the three basic principles:

- (1) **Every person must have a domicile at all times.** The reason for this principle is that a person's status is 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 or she retains that domicile until the contrary has been proved.
- (3) **No one can have a domicile in more than one place at the same time.** This principle is quite logical if one considers (1) above.

ACTIVITY 7.2

Consider the Mnguni family scenario in the introduction above.

Suppose that Jabulani has not found a place to stay after moving out of his parents' home. Can Jabulani relinquish his previous domicile before acquiring a new domicile? Explain in two sentences.

FEEDBACK

The Domicile Act provides that a person does not lose his or her previous domicile until he or she has acquired a new domicile, whether by choice or by operation of law (s 3(1)). Therefore, Jabulani cannot relinquish his domicile until he has acquired a new domicile (Heaton p 41).

7.5**KINDS OF DOMICILE****7.5.1****Domicile of origin**

Study Heaton pages 41 to 42, where the author explains how a person acquires a domicile of origin and how this domicile can become a domicile of choice.

7.5.2**Domicile of choice****7.5.2.1****Definition**

The term "domicile of choice" is explained in Heaton on page 42. This definition comprises important components which determine a person's domicile of choice.

7.5.2.2**Persons who can acquire a domicile of choice**

Study Heaton pages 42 to 43, where the author indicates which persons are competent to acquire a domicile of choice. Whenever you are confronted with a scenario regarding a person's domicile, it is important to first establish the competency of the person to acquire a domicile or the person's

capacity to act. This approach will guide you as to the correct type of domicile in any given scenario.

ACTIVITY 7.3

Consider the Mnguni family scenario in the introduction above.

Does Bongani qualify as a person who can acquire a domicile of choice in terms of section 1(1) of the Domicile Act 3 of 1992?

FEEDBACK

In terms of section 1(1) of the **Domicile Act 3 of 1992**, anyone of **18** years of age or older, or anyone **under** the age of 18 who by law has the status of a **major**, is competent to acquire a domicile of choice. This is so, regardless of a person's **sex** or marital status. The second requirement set out in section 1(1) is that the person must have the mental capacity to make a rational choice. Consequently, a mentally ill person or a person with a serious intellectual disability cannot acquire a domicile of choice. Although Bongani is a major, he does not qualify as a person who can acquire a domicile of choice in terms of section 1(1), because he lacks the mental capacity to make rational a choice, as a result his mental illness (Heaton pp 42–43).

7.5.2.3 Presence and intention as requirements for acquiring a domicile of choice

On pages 43 to 46 Heaton discusses the two requirements for acquiring a domicile of choice, namely lawful presence and the intention to settle for an indefinite period. She indicates that the lawful presence requirement is determined objectively, whereas the intention to settle for an indefinite period requirement is determined subjectively.

7.5.3 Assigned domicile (domicile by operation of the law, domicile of closest connection)

On page 46, Heaton explains that anyone who does not have the capacity to acquire a domicile of choice has a domicile by operation of law. This applies to children under 18 years of age and mentally incapacitated persons. Because they cannot acquire a domicile of choice, they are granted a domicile by operation of law for as long as their minority or mental incapacity continues.

7.5.3.1 Domicile of a minor

Study Heaton on page 46. The law assigns a domicile to a minor for as long as his or her minority lasts. The author discusses how this takes place. Whenever you are confronted with a scenario regarding a minor's domicile, it is important to first establish the domicile of the place to which the minor is most closely connected. This approach will guide you as to the correct type of domicile in any given scenario.

ACTIVITY 7.4

Consider the Mnguni family scenario in the introduction above.

Suppose the family has already relocated to Mafikeng. Where is Ntombi domiciled? Explain in a few sentences, with reference to authority.

■ FEEDBACK

Section 2(1) of the Domicile Act 3 of 1992 provides that a person who is incapable of acquiring a domicile of choice (i.e. among others, a minor) is domiciled at the place to which he or she is most closely connected (Heaton p 46).

On page 46, Heaton explains that section 2(2) of the Domicile Act contains a rebuttable presumption that if a minor's home is with one or both of his or her parents, it is presumed that this parental home is the minor's domicile. "Parents" include the adoptive parents of a child, and also the parents of a child who are not married to each other. Therefore, Ntombi is domiciled in Mafikeng.

7.5.3.2

Domicile of a mentally incapacitated person

This work is discussed in Heaton on page 46. The author discusses a mentally incapacitated person's domicile by operation of law. Whenever you are confronted with a scenario regarding a mentally incapacitated person's domicile, it is important to first establish the domicile of the place to which the mentally incapacitated person is most closely connected. This approach will guide you as to the correct type of domicile in any given scenario.

ACTIVITY 7.5

Consider the Mnguni family scenario in the introduction above.

Draw up a table in which you list and explain, with reference to authority, the domicile of the Mnguni children in the following three instances:

- (1) Ntombi's domicile whilst the family reside in Springs.
- (2) Jabulani's domicile after he rents an apartment in Pretoria.
- (3) Bongani and Ntombi's domiciles after the family relocate to Mafikeng.

FEEDBACK

(1) Ntombi's domicile whilst the family resides in Springs	(2) Jabulani's domicile after he rents an apartment in Pretoria	(3) Bongani and Ntombi's domiciles after the family relocates to Mafikeng
Since Ntombi is a minor, she does not have the capacity to acquire a domicile of choice. The Domicile Act provides that, in this instance, Ntombi will be domiciled at the place with which she is most closely connected (s 2(1)). The Act also contains a rebuttable presumption that, if a minor normally has his or her home with one or both of his or her parents, that parental home is the minor's domicile (s 2(3)). Ntombi is therefore domiciled in Springs whilst the family resides there (See Heaton p 46).	As Jabulani is a major, he has the capacity to acquire a domicile of choice (s 1(1) of the Domicile Act). He is lawfully present in Pretoria, and he has the intention to settle there for an indefinite period (s 1(2) of the Domicile Act). Jabulani has therefore acquired a domicile of choice in Pretoria (See Heaton pp 42–43).	Minor persons cannot acquire a domicile of choice but are assigned a domicile by operation of law for as long as their minority continues (Heaton p 46). Bongani and Ntombi will therefore be assigned a domicile at the place with which they are most closely connected (s 2(1) of the Domicile Act), which is Mafikeng (See Heaton p 46).

TEST YOURSELF

- (1) What do you understand by the term “domicile”?
- (2) A man who is domiciled in Zambia enters into a contract while vacationing in South Africa. Which legal system determines his capacity to act?
- (3) Kgomo and Leah, both South African citizens domiciled in South Africa, decide to get married in Lesotho during their holiday there. Which legal system determines whether they may marry each other?
- (4) Is it possible for a person to be without a domicile at any particular stage of his or her life?
- (5) Does the Domicile Act 3 of 1992 have retrospective effect?
- (6) What is the standard of proof for the acquisition or loss of a person's domicile?
- (7) Is it possible for a person to have more than one domicile at any time?
- (8) Explain the term “domicile of origin”.
- (9) Can a married woman acquire her own domicile of choice? Explain your answer.

You should be able to apply the principles you learnt in this Learning unit to problem-type questions. Question 10 is an example of a problem-type question:

- (10) Michael, who has been resident in South Africa for the past 30 years, leaves the country with the intention never to return. He spends three weeks in the Seychelles while deciding where to settle permanently. Where will he be domiciled during this period? Explain your answer.
- (11) List and explain the requirements for the acquisition of a domicile of choice.

- (12) Can a prohibited immigrant acquire a domicile of choice in the country where he or she is unlawfully present? Explain your answer.
- (13) While he is domiciled in Cape Town, Andrew murders his brother. Andrew flees from South Africa to Nigeria in order to avoid arrest. Andrew does not intend ever returning to South Africa. Is Andrew domiciled in South Africa or Nigeria? Briefly explain your answer.
- (14) Busi recently moved to Durban from Johannesburg. When she moved to Durban her intention was to live there permanently. Last week Busi's mother was diagnosed with inoperable cancer and was told that she would die within the next six months. Busi immediately returned to Johannesburg to care for her mother. However, she intends returning to Durban after her mother's death. Is Busi domiciled in Durban or Johannesburg at present?

Question 15 is an example of an essay-type question:

- (15) Explain the legal position with regard to the domicile of choice of persons who cannot freely choose where they wish to reside (e.g. soldiers, civil servants and prisoners).
- (16) What groups of persons acquire a domicile by operation of law?
- (17) Explain the principles applicable to the domicile of minors.
- (18) Can a mentally incapacitated person acquire a domicile of choice? Explain your answer.
- (19) Where is a mentally incapacitated person domiciled?

CONCLUSION

In this learning unit we explained to you what domicile is, what the general principles governing domicile are, what different kinds of domicile there are, and what the requirements for a domicile of choice and for an assigned domicile are. In the next two learning units we discuss the status of children born of unmarried parents.

LEARNING UNIT 8

Children born of unmarried parents

Module map 8

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LU2 Introduction to the law of persons				
LU3–5 The beginning and end of legal personality				
LU6–20 Factors which determine status				
LU6 Definition of concepts	LU7 Domicile	LU8–9 Children born of unmarried parents	LU10–19 Minority	LU20 Diverse factors

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PRESCRIBED MATERIAL TO STUDY

- Heaton pages 47 to 49 (up to and including 5.4.2), 52 to 65 (5.5)
- *YM v LB* 2010 (6) SA 338 (SCA) (Case [2] in the Prescribed Reader)

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) explain what is understood by the term “child born of unmarried parents”

- (2) list and explain the categories of children born of unmarried parents
- (3) explain the status of a child conceived as a result of artificial fertilisation
- (4) explain the presumptions of paternity that exist for married and unmarried persons respectively
- (5) explain whether the mother's evidence regarding proof of sexual intercourse still needs to be corroborated
- (6) explain in detail how a person can prove that he cannot be the father of a child
- (7) apply the principles mentioned in this learning unit to a given set of facts, with reference to authority

8.1 INTRODUCTION

This learning unit looks at the status of children: where parents are married; where parents are not married; where there is a single parent; and where paternity is in dispute.

8.2 DEFINITION OF "CHILDREN BORN OF MARRIED PARENTS" AND "CHILDREN BORN OF UNMARRIED PARENTS"

Study Heaton page 47. In this section, the author indicates what is understood by the concepts "child born of married parents" and "child born of unmarried parents". It is important to note that these concepts solely influence the parents' status, and that they by no means influence the status of a child. Thus, the terms "child born of unmarried or married parents" is important for purposes of determining parental responsibilities and rights.

ACTIVITY 8.1

- (1) What do you understand by the term "child born of married parents"?
- (2) What do you understand by the term "child born of unmarried parents"?

FEEDBACK

- (1) A child born of married parents is one born of parents who are legally married to each other at the time of the child's conception or birth or at any intervening time. The definition of the term "marriage" contained in the Children's Act 38 of 2005 is a comprehensive one, covering civil, customary and religious marriages. Civil unions are also covered by this term in the Civil Union Act 17 of 2006 (except in so far as the Marriage Act 25 of 1961 and the Recognition of Customary Marriages Act 120 of 1998 are concerned) (Heaton p 47).
 - (2) If a child's parents are not parties to a valid marriage or civil union with each other at the time of the child's conception or birth or at any intervening time, the child is regarded as a child born of unmarried parents (Heaton p 47).
-

ACTIVITY 8.2

Nancy and Nsizwa finalised their divorce in March 2018. In April Nancy discovered that she was five months pregnant. In August, she gave birth to a daughter, Owami. Nsizwa denies Owami's paternity – he alleges that he did not have sex with his ex-wife for 10 months prior to their divorce.

Indicate whether Owami is a “child born of married parents or unmarried parents”. Explain your answer in each scenario.

FEEDBACK

Owami is considered a child born of married parents. It is important to note that although the parents were getting divorced when Owami was conceived, the parents were still legally married to each other (Heaton p 47).

8.3 CATEGORIES OF CHILDREN BORN OF UNMARRIED PARENTS

Study Heaton, page 48. In this section the author explains the different categories of children born of unmarried parents, namely natural children, adulterine children and incestuous children. She adds that the differences between the categories are of little importance in modern law.

8.4 ARTIFICIAL FERTILISATION

8.4.1 Meaning of “artificial fertilisation”

Study Heaton pages 48 and 49 (5.4.1), where it is explained that artificial fertilisation refers to the introduction, by artificial means, of a male gamete into the internal reproductive organs of a woman for the purpose of human reproduction.

8.4.2 Status of a child who is born as a result of artificial fertilisation

Study Heaton page 49 (5.4.2), which contains a discussion on the status of a child born as a result of artificial fertilisation.

ACTIVITY 8.3

Indicate whether a child in the following scenario's is a child born of married parents or unmarried parents. Explain your answer in each scenario:

- (1) Cathy and Steve are married. Without Steve's knowledge, Cathy decided to be artificially fertilised using Steve's sperm that was stored in a sperm bank. Cathy gives birth to a baby boy, John.
- (2) Jane and Thandiswa are each other's civil union partners. Thandiswa has indicated to Jane that she is not ready to be a parent. Without Thandiswa's knowledge, Jane decided to be artificially fertilised using sperm from an anonymous sperm donor. Jane gives birth to a baby girl, Noxolo.

■ FEEDBACK

- (1) John is considered a child born of married parents. If a woman is married, and the sperm of her husband was used for the artificial fertilisation, the child is a child born of married parents, regardless of whether or not the woman's husband consented to his sperm being used (Heaton p 49).
 - (2) Noxolo is considered a child born of unmarried parents. The child is a child born of married parents only if both spouses or civil union partners consented to the artificial fertilisation. Thus, although Jane and Thandiswa were in a civil union when Noxolo was conceived, Thandiswa did not consent to the artificial fertilisation (Heaton p 49).
-

8.4.3 Relationship between the child and the birth mother, and between the child and the person whose gamete was used for the artificial fertilisation

Study Heaton pages 49 to 52, where the author discusses the difference between artificial fertilisation without the use of a surrogate mother and with the use of a surrogate mother. You have to take note of who has the parental responsibilities and rights in the following instances: where there is a valid surrogate motherhood agreement, where there is an invalid surrogate motherhood agreement, and where a surrogate mother terminates a valid surrogate motherhood agreement.

8.5 PROOF OF PARENTAGE

8.5.1 Introduction

Study Heaton pages 52 and 53. Take note that, in terms of the Children's Act, three categories of persons are now excluded from legally qualifying as a child's "parent".

8.5.2 Presumption of paternity

8.5.2.1 A child born of a woman who is a party to a marriage or a civil union

Study Heaton pages 54 to 56, where the author explains the rebuttable presumption that exists in our law in respect of the paternity of children born from a legal marriage or civil union.

ACTIVITY 8.4

Consider the Nancy and Nsizwa scenario in activity 8.2 above.

Who is responsible for maintaining Owami? Explain in a few sentences.

■ FEEDBACK

Nsizwa is liable for the maintenance of Owami. Our law recognises the rebuttable presumption that a child is the child of the man to whom the mother is married (be it at the time of the child's birth, or at his or her conception, or at any intervening time). When a woman who is validly married gives birth to a child, it is presumed that the woman's husband (Nsizwa), and not some third party, is the father of the child and

that the child is therefore a child born of a woman who is party to a marriage or a civil union. The maxim is *pater est quem nuptiae demonstrant*.

However, this presumption is rebuttable: either of the spouses, the child or any interested party can prove that the husband is not the father of the child. This can be done by, for example, proving that the husband is impotent or sterile. The fact that the spouses did not indulge in sexual intercourse during the period of conception could also be sufficient proof that the husband is not the father of the child (Heaton pp 56 & 57–58 – also see 8.5.4 below). If Nsizwa succeeds in proving that he is not Owami's father, he will not be liable for Owami's maintenance.

8.5.2.2 **A child born of a woman who is not a party to a marriage or a civil union**
Study Heaton page 56 where the author explains the rebuttable presumption that exists in our law in respect of men who had sexual intercourse with the mother of the child at the time when the child could have been conceived.

8.5.3 **Corroboration of the mother's evidence**
Heaton indicates on pages 56 to 57 whether the mother's evidence as far as proof of sexual intercourse is concerned still has to be corroborated. This section must be studied.

8.5.4 **Factors that may be relevant in proving paternity or rebutting a presumption of paternity**
The following factors can be considered when proof is sought that a man is not the father of a child (this applies to children born of both married and unmarried parents):

8.5.4.1 **Absence of sexual intercourse**
Study Heaton page 57. In this section, the author explains how absence of sexual intercourse may be considered a relevant factor to rebut a presumption of paternity.

8.5.4.2 **The gestation period**
Study Heaton page 57. In this section the author indicates that the courts today decide on an *ad hoc* basis, with reference to medical evidence or by taking judicial notice of the "normal" period of gestation, when conception could possibly have taken place. In our law today, there is no fixed gestation period as was the case in the common law. The author adds that the courts are disinclined to declare a child to have been born of unmarried parents, resulting in rather lengthy periods of gestation being accepted.

8.5.4.3 **Sterility**
Study Heaton page 58. The author explains how sterility may be considered a relevant factor to rebut a presumption of paternity.

8.5.4.4 The *exceptio plurium concubentium*

Study Heaton pages 58 and 59. In this section, the author indicates what the position is if the child's mother in a paternity suit names a particular man as the child's father. Here, the man admits that he has had sexual relations with the woman during the time conception could possibly have taken place but alleges and proves that another man or other men also had intercourse with the woman during that period. The question now arises as to whether this defence, the *exceptio plurium concubentium*, is a valid defence in our law

8.5.4.5 Physical features

Study Heaton page 59. In this section the explains the role of the child's physical features in proving or disproving paternity.

8.5.4.6 Contraceptives

Study Heaton page 59. The author indicates that the use of contraceptive devices – such as a condom – during sex it is not enough proof to rebut presumption of paternity for the father.

8.5.4.7 Scientific tests

Study Heaton pages 59 to 65. In this section it is indicated that the courts have accepted blood tests as sufficient proof that the spouse could not have been the father of the child. This has happened in cases where blood tests were submitted to voluntarily. The issue of whether the court has the power to compel a child and/or an adult to submit to blood or DNA tests remains complicated. The Children's Act 38 of 2005 has also failed to settle the issue. This question has been raised in several cases, which are discussed by Heaton on pages 59 to 65. With regard to the court's power to order that scientific tests be performed on a child's blood or DNA, the matter has finally been settled. In the prescribed case of *YM v LB* 2010 (6) SA 338 (SCA), the Supreme Court of Appeal confirmed that the High Court as the upper guardian of minors has the inherent power to order such tests in paternity disputes if the order is in the child's best interests. Heaton is in favour of this child-centred approach.

Heaton pages 63 and 64 looks at the constitutional dimension of blood and DNA tests on adults, on the ground that these orders would violate not only the right to privacy (Constitution of the Republic of South Africa, 1996 s 14) but also the right to bodily and psychological integrity (Constitution s 12(2)) of the person concerned. On the other hand, section 28(1)(b) and 28(2) of the Constitution, which entitle a child to parental care and provide that the best interests of the child must be of paramount importance in every matter concerning the child, also come into play. The court will, in future, have to weigh up these competing interests of the child and the adult to determine which rights should prevail in a particular case.

On page 64, Heaton also discusses the implications of a request for samples to be taken from a corpse for DNA tests.

Finally, on pages 64 and 65 (iii), the author raises the issue of whether a court can take judicial notice of the technique and reliability of scientific paternity tests.

ACTIVITY 8.5

Consider the Nancy and Nsizwa scenario in Activity 8.2 above.

After Owami's birth, Nsizwa requested Nancy to consent to DNA tests to determine whether he is Owami's father. Nancy refused and Nsizwa indicated that he would be going to court to get an order to force Nancy to submit Owami to these tests. With reference to case law, indicate what the court's view is on ordering a minor to undergo DNA tests in a paternity dispute.

■ FEEDBACK

Until recently the position was uncertain. In *YM v LB* 2010 (6) SA 338 (SCA) the Supreme Court of Appeal confirmed that the High Court as the upper guardian of minors has the inherent power to order such tests in paternity disputes if the order is in the child's best interests (Heaton pp 61–62). If Nsizwa thus were to go to court to obtain an order to force Nancy to submit Owami to DNA tests, he would succeed if the court deemed these tests to be in Owami's best interests.

TEST YOURSELF

- (1) What do you understand by the term “child born of married parents”?
- (2) What is the status of a child born as a result of the artificial fertilisation of a single unmarried woman? Explain your answer.
- (3) Would your answer to (2) above have been different if the woman had been living with another woman in a same-sex life partnership? Explain your answer.
- (4) What would your answer have been if the woman in (3) above had been married or a partner in a civil union? Explain your answer.
- (5) With reference to authority, list the three categories of persons who are legally excluded from qualifying as a child's parent.
- (6) What do you understand by the maxim *pater est quem nuptiae demonstrant*?

You should be able to apply the principles you have learnt in this learning unit to problem-type questions. Question 7 is an example of such a question:

- (7) Mr and Mrs Miller are married. Mrs Miller has an adulterous affair with Mr Dlamini as a result of which a child, Fikile, is born. Will Mr Miller or Mr Dlamini be liable for maintaining Fikile? Discuss with reference to authority.
- (8) Is the mere acknowledgment or proof of sexual intercourse (at any time) sufficient for a man to be presumed the father of the child of the woman with whom he had sexual intercourse? Explain your answer.
- (9) Does the mother's evidence, as far as proof of sexual intercourse is concerned, still have to be corroborated?

Question 10 is an example of an essay-type question:

- (10) Fully discuss those factors which could be applied successfully by a man in order to rebut a presumption of paternity.
- (11) With reference to case law, explain how the courts currently determine the gestation period.
- (12) What do you understand by the *exceptio plurium concubentium*? Comment on the applicability of this defence in South African private law.
- (13) Will a man be able to prove that he is not the father of a child by proving the following:
 - (a) that the child's physical features do not resemble his
 - (b) that he used contraceptives

CONCLUSION

In this learning unit we explained what a child born of unmarried parents is, what presumptions of paternity there are in respect of a child of a woman who is a party to a marriage or a civil union or a woman who is not a party to a marriage or a civil union, whether the mother's evidence in paternity suits has to be corroborated, and how presumptions of paternity can be rebutted.

In the next learning unit we deal with the status of a child born of unmarried parents (with reference to parental responsibilities and rights, maintenance, succession and the Constitution of the Republic of South Africa, 1996) and changing the status of a child born of unmarried parents.

LEARNING UNIT 9

The status and change of status of children born of unmarried parents

Module map 9

LU1 General information and overview				
LU2 Introduction to the law of persons				
LU3–5 The beginning and end of legal personality				
LU6–20 Factors which determine status				
LU6 Definition of concepts	LU7 Domicile	LU8–9 Children born of unmarried parents	LU10–19 Minority	LU20 Diverse factors

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PRESCRIBED MATERIAL TO STUDY

- Heaton pages 65 to 72 (5.6.1–5.6.4), 76 to 77 (5.6.7–5.7.3)
- *KLVC v SDI* [2015] 1 All SA 532 (SCA) (Case [3] in the Prescribed Reader)

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) explain the legal relationship between a child and his or her unmarried parents with reference to parental responsibilities and rights and succession
- (2) explain how the status of children born of unmarried parents may be changed
- (3) apply the principles mentioned in this learning unit to a given set of facts, with reference to authority

9.1 INTRODUCTION

In this learning unit we consider the legal relationship between a child and his or her unmarried parents. We consider this legal relationship in the context of the parental responsibilities and rights of both the child's mother

and father. Before we do this, we explain the concept parental responsibilities and rights. We also consider the ways in which the status of children born of unmarried parents may be changed.

9.2 THE LEGAL RELATIONSHIP BETWEEN A CHILD AND HIS OR HER UNMARRIED PARENTS

9.2.1 Introduction

The coming into operation of certain sections of the Children's Act 38 of 2005 in 2007 gave rise to a dramatic change in the parental responsibilities and rights that parents of a child born of unmarried parents have. This matter is explained in your textbook (Heaton p 65). You have to study this section.

CUSTOMARY LAW

Customary law requires that a child must be affiliated to a particular family group (or clan). The payment of damages and *lobolo* indicate the group to which the child is affiliated (see 9.2.4 below). Affiliation to a family group is important because it allows children to use specific ancestral surnames and to follow the customs and traditions of the identified group.¹⁷

9.2.2 Definition and components of parental responsibilities and rights

On pages 65 to 67, Heaton explains the four components of parental responsibilities and rights, namely care, contact, guardianship and maintenance. Study this discussion.

9.2.3 Parental responsibilities and rights of the mother

When you study page 67 of Heaton, you will learn that, in terms of the Children's Act, a biological mother acquires full parental responsibilities and rights in respect of her child when she gives birth to the child. Heaton explains the exception relating to guardianship of the child if the mother is unmarried and a minor. You should study this section.

9.2.4 Parental responsibilities and rights of the father

9.2.4.1 Introduction

Study Heaton page 67–68. The Children's Act replaces the common-law and statutory provisions and automatically confers parental responsibilities and rights on certain unmarried fathers.

17. Kruger & Skelton (eds) *The Law of Persons in South Africa* 2ed (2018) 87, 119–120.

9.2.4.2 Automatic parental responsibilities and rights for certain unmarried fathers

Study Heaton page 68 to 69 in this regard. Heaton explains that, in terms of section 21(1) of the Children's Act, an unmarried biological father can acquire parental responsibilities and rights in respect of his child if he is living with the mother in a permanent life partnership when the child is born. He can also acquire parental responsibilities and rights in the following circumstances, regardless of whether he ever lived with the mother:

- By consenting or successfully applying to be identified as the child's father, or by paying damages in terms of customary law;
- By contributing or attempting in good faith to contribute to the child's upbringing for a reasonable period; and
- By contributing or attempting in good faith to contribute to the child's maintenance for a reasonable period.

One of your prescribed cases, *KLVC v SDI* [2015] 1 All SA 532 (SCA), is relevant here. In this case the Supreme Court of Appeal gave some guidance on the interpretation of section 21(1).

ACTIVITY 9.1

Read *KLVC v SDI*, and answer the following questions that relate to the case:

- (1) According to the Supreme Court of Appeal, which factors should be taken into consideration when determining what constitutes "a reasonable period of time" in section 21(1)(b)?
- (2) Explain in one sentence how the Supreme Court of Appeal interpreted the maintenance contribution referred to in section 21(1)(b).

FEEDBACK

- (1) The court held that the question of what constitutes "a reasonable period of time" required the court to consider the facts, exercise a value judgment and come to a conclusion, with reference to a wide range of circumstances (*KLVC* case paras [13] – [14]; Heaton p 69).
- (2) The court held that the maintenance contribution required in section 21(1)(b) does not imply that the father must have provided maintenance as defined in the Maintenance Act 99 of 1998. Any contribution to the maintenance of the child is sufficient (*KLVC* case paras [29] – [34]; Heaton p 69).

CUSTOMARY LAW

The payment of damages in terms of customary law provided for in section 21(1)(b) of the Children's Act refers to the custom in terms of which a natural father of a child could pay damages to the family of the woman for causing an extra-marital pregnancy. These damages are called *inhlawulo* in Nguni communities, and *dikotlo* in Sotho communities.¹⁸

18. Kruger & Skelton (eds) 106.

In some communities (Cape Nguni and Swazi), the payment of damages gave the father the right to claim custody of the child, and the child was affiliated to his family group.¹⁹

In other communities (Sotho-Tswana, Tsonga and Zulu) the payment of damages did not give the father any rights to the child. To acquire parental rights, the father had to obtain the consent of the family head or the father of the woman with whom he had a child.²⁰ This differs from the position in terms of section 21(1)(b), which provides that the unmarried father automatically acquires parental responsibilities and rights if he pays damages in terms of customary law, and contributes to the child's upbringing and maintenance, as explained above.

9.2.4.3 Parental responsibilities and rights agreement

An unmarried father who does not qualify for automatic parental responsibilities and rights in terms of section 21(1), can acquire full parental responsibilities and rights by entering into a parental responsibilities and rights agreement with the child's mother in terms of section 22 of the Children's Act. Study Heaton pages 70 to 71 in this regard.

9.2.4.4 The assignment of parental responsibilities and rights by a court

An unmarried father who does not qualify for automatic parental responsibilities and rights in terms of section 21(1) can acquire full parental responsibilities and rights by means of a court order in terms of section 23 of the Children's Act. Note that any person who has an interest in the care, well-being or development of a child may bring this type of application. It is not restricted to unmarried fathers. Study Heaton pages 71 to 72 in this regard.

9.2.4.5 Adoption

A child may also be adopted by his or her unmarried father. Study Heaton page 72 in this regard.

CUSTOMARY LAW

As explained by Heaton, adoption is regulated by the Children's Act. Note that there is a principle in South African law that courts must recognise traditional customary law adoption, even if the adoption does not comply with the requirements of the relevant adoption legislation.²¹ Traditional customary law adoptions have unique requirements, for example the requirement of an agreement of adoption of a child by the relevant families, and the requirement that the adoption must be announced to the members of the relevant families.²²

19. Kruger & Skelton (eds) 106.

20. Kruger & Skelton (eds) 106.

21. See e.g. *Maneli v Maneli* 2010 (7) BCLR 703 (GSJ).

22. Kruger & Skelton (eds) 109–110.

9.2.5 Succession

9.2.5.1 Intestate succession

On page 76, Heaton explains how the fact that a child was born of unmarried parents affects his or her capacity to inherit the intestate estate of his or her parents and other blood relations.

CUSTOMARY LAW

As indicated in Learning unit 6 (see 6.1 above), the Constitutional Court held in *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)*²³ that the customary law rule of primogeniture was unconstitutional because it prevented intestate inheritance by girls, children who were not the eldest and children born outside marriage.

You should also take note of the provisions of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009. This Act expanded the definition of “descendant” for purposes of intestate succession, provided that the deceased was subject to customary law. The additional beneficiaries include children who the deceased “accepted” as his or her children in terms of customary law, irrespective of any biological connection to the child.

9.2.5.2 Testate succession

On page 76, Heaton explains how the fact that a child was born of unmarried parents affects his or her capacity to inherit the testate estate of his or her parents and other blood relations.

9.3 CHANGING THE STATUS OF A CHILD BORN OF UNMARRIED PARENTS

On pages 76 to 77 (up to before 5.7.4), Heaton explains the ways in which a child born of unmarried parents can acquire the status of a child born of married parents.

ACTIVITY 9.2

List the ways in which the status of children born of unmarried parents may be changed.

FEEDBACK

The status of children born of unmarried parents may be changed as follows:

- (1) by the subsequent marriage or civil union between the child’s parents (Heaton p 77)
- (2) by adoption (Heaton p 77)

23. 2005 (1) SA 580 (CC).

CUSTOMARY LAW

The payment of *lobolo* in contemplation of a customary marriage traditionally had the effect of transferring parental responsibilities and rights in respect of the child to the family group of the father. If *lobolo* had not been paid, parental responsibilities and rights automatically vested in the mother's family group.²⁴

Lobolo means "the property in cash or in kind ... which a prospective husband or the head of his family undertakes to give to the head of the prospective wife's family in consideration of customary marriage" (s 1 of the Recognition of Customary Marriages Act 120 of 1998).

TEST YOURSELF

- (1) Explain why affiliation to a particular family group is important in customary law.

Question 2 is an example of an essay-type question:

- (2) Explain the parental responsibilities and rights in respect of a child born of an unmarried mother.
- (3) Explain the parental responsibilities and rights of an unmarried father.
- (4) Explain how payment of damages affect parental responsibilities and rights in respect of children born of unmarried parents in customary law.

You should be able to apply the principles you learnt in this learning unit to problem-type questions. Question 5 is an example of a problem-type question:

- (5) Mark and Lisa, who are both unmarried, have a relationship as a result of which a child, Zoë, is born.
 - (a) Mark, the father, wishes to see his child on a regular basis. Advise him with reference to authority.
 - (b) Lisa, the mother, is struggling to cope financially, since she has been unable to work since the birth of Zoë. Can she claim a contribution towards Zoë's maintenance from Mark? Discuss with reference to authority.
- (6) List and explain the ways in which the status of children born of unmarried parents may be changed.
- (7) Explain the effect of the payment of *lobolo* on the status of a child in customary law.

CONCLUSION

In this learning unit we dealt with the classes of children born of unmarried parents in our law, the legal relationship between children and their unmarried parents, and the ways in which the status of children born of unmarried parents may be changed.

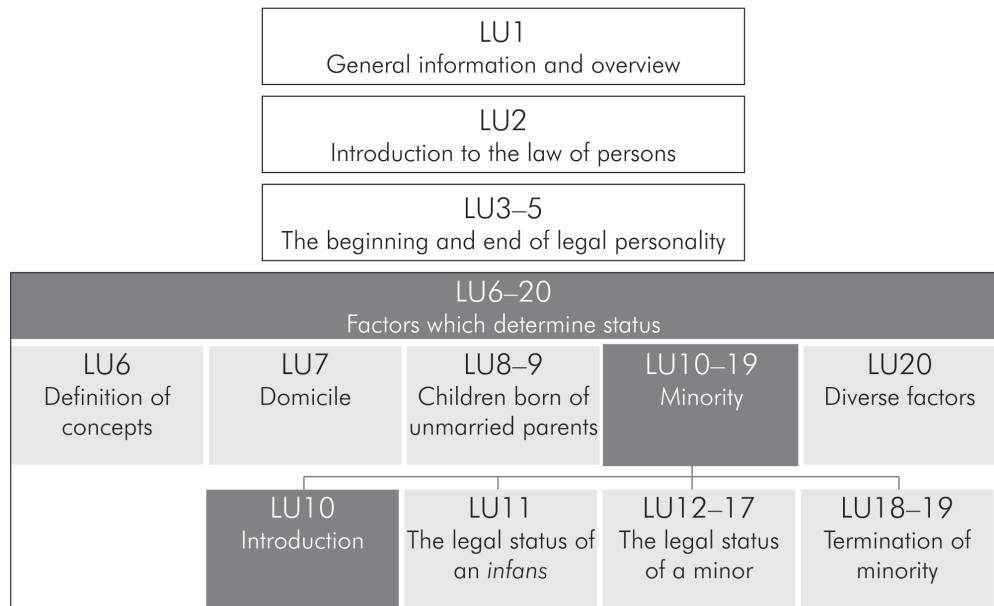
In the next few learning units we discuss the effect of age on a person's status.

24. Kruger & Skelton (eds) 105–107.

LEARNING UNIT 10

Minority – introduction

Module map 10



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10.3 FUNDAMENTAL CONCEPTS	80

PRESCRIBED MATERIAL TO STUDY

- Heaton page 79 (1st par under "Introduction")
- Heaton pages 80 to 84 (6.2)
- Heaton pages 86 to 87 (1st par) – also see Learning unit 12

READ

- Heaton page 79 (2nd par under "Introduction")

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) explain the level of intellectual ability required for a person to perform valid juristic acts, for example contracts
- (2) explain why a young age affects a person's capacity to participate in legal interaction
- (3) explain how a young age affects a person's capacity to perform valid juristic acts, for example contracts.
- (4) explain how the Constitution of the Republic of South Africa, 1996 and the Children's Act 38 of 2005 protect the rights of children
- (5) define the following concepts: agreement, contract, contractual liability, obligation, performance, civil obligation, natural obligation, unilateral contract, multilateral contract and reciprocal contract

10.1

Purpose of
limitation:
protection of
youth

INTRODUCTION

A person's status (legal capacity, capacity to act, capacity to litigate, and capacity to be held accountable for delicts and crimes) is affected by age. Heaton explains the reason for this in terms of the capacity to act (the capacity to conclude valid juristic acts). The reasons a person's status is affected by age are discussed below (see the text after Activity 10.1). **Further**, you need to study only the first paragraph on page 79 and to read only the rest of the work under "6.1 Introduction".

ACTIVITY 10.1

The aim of this activity is to help you understand what level of intellectual ability is required before a person acquires the capacity to participate in juristic acts. Read the next paragraph carefully and then fill in the missing words.

A person's juristic acts are dependent on his or her expression of will, and for this reason only persons who have reasonable understanding and judgement should have capacity to act. Reasonable understanding and judgement can be defined as the ability to understand the and of one's acts. In our law it is accepted that the of of persons under the age of majority has not yet developed fully and that their capacity to act should thus be limited.

FEEDBACK

Before the law confers capacity to act on a person, he or she should be able to comprehend the **nature, purport and consequences** of his or her acts. Another word for "purport" is "meaning". The **powers of judgement** of persons under the age of majority are insufficiently developed, resulting in limited capacity to act (Heaton p 79). Our law accepts that it is in the young person's best interests to deny him or her some of the adult's capacities.

10.2 CHILDREN'S RIGHTS**10.2.1 Constitution of the Republic of South Africa, 1996**

Study Heaton page 80. In terms of the Constitution, everyone is granted rights, with minors being afforded, over and above these rights, special protection through some additional rights in terms of section 28. You have to know what these rights are.

10.2.2 Children's Act 38 of 2005

Children are granted rights not only in terms of the Constitution, but also in terms of the Children's Act. These rights are supplementary to those in the Constitution, and are discussed in your textbook (Heaton pp 80–83).

ACTIVITY 10.2

Answer the following questions that deal with section 12 of the Children's Act ("Social, cultural and religious practices"):

- (1) At what age and under which circumstances may a virginity test be performed on a child? Explain your answer with reference to authority.
- (2) At what age and under which circumstances may a male child be circumcised? Explain your answer with reference to authority.

FEEDBACK

- (1) Virginity testing of children younger than 16 is prohibited. If the child is older than 16, a virginity test may only be performed in the following circumstances:
 - if the child has consented in the prescribed manner,
 - after the child has received proper counselling, and

- if the tests are done in the manner that is prescribed by the regulations under the Act (Heaton pp 81–82). The authority for this answer is section 12 of the Children's Act.
- (2) Circumcision of male children younger than 16 is only allowed for medical reasons on the recommendation of a medical practitioner, or for religious purposes in accordance with the practices of the particular religion (e.g. the Jewish faith).

Once a male child turns 16, he may be circumcised only in the following circumstances:

- if the circumcision is performed in the manner that is prescribed in the regulations,
- if the child has given consent in the prescribed manner, and
- if he has received proper counselling (Heaton page 82). The authority for this answer is also section 12 of the Children's Act.

Please note that we touch on the issue of circumcision again in Learning unit 18 below (see para 18.2), where we deal with initiation ceremonies in customary law.

10.2.3 United Nations Convention on the Rights of the Child and African Charter on the Rights and Welfare of the Child

Study Heaton pages 83 to 84. South Africa ratified both these international instruments, thereby confirming its commitment to international efforts directed towards the protection of children's rights in accordance with the standards of those instruments.

10.2.4 Customary law and children's rights

In customary law, the concept of children's rights (including the best interests of the child) have different meanings than in western legal systems:²⁵

- First of all, in customary law, the interests of the child and the family could not be separated. It was believed that, by protecting the interests of the family, the child's interests would also be protected.
- Secondly, the idea of individual rights (which includes children's rights) was in conflict with African culture, where the emphasis was on duties.
- Thirdly, children were not powerless to express their views. Custom gave them opportunities to express their needs and desires, often by means of ritualised songs, dances and plays. In their families, there were also channels through which they could appeal for protection.

Heaton argues that section 28(2) of the Constitution, which provides that the best interests of the child are of paramount importance in every matter that affects the child, is flexible enough to allow the court to take all relevant

25. Bennett "The best interests of the child in an African context" 1999 *Obiter* 146, 149–151.

factors into account. This includes the child's cultural background.²⁶ Therefore, the court could take into consideration that a child lived under customary law when deciding how the best interests of the child should be interpreted.

10.3 FUNDAMENTAL CONCEPTS

To enable you to understand the contractual capacity of a minor (including an *infans*), you must master the concepts discussed below. With the exception of performance, civil and natural obligations, these concepts are not defined in Heaton. Study these definitions before you continue with the next learning unit, and make sure that you know and understand them.

- There is an **agreement** (*ooreenkoms*) 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. unjustified 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 Heaton on page 86 (2nd par). 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

26. Heaton "An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context" 2009 *Journal for Juridical Science* 9.

R200. Chris is debtor as regards the payment of R200 and creditor as regards the delivery of the bicycle.

TEST YOURSELF

- (1) Explain what is required before a person can have the capacity to perform valid juristic acts, and why this is required.
- (2) Do restrictions on a minor's capacity amount to unfair discrimination on the ground of age (which is prohibited by s 9 of the Constitution)? Explain your answer.
- (3) Discuss the provisions of section 28 of the Constitution of the Republic of South Africa, 1996, which protects the rights of children.
- (4) Discuss the provisions of the Children's Act 38 of 2005 that protect the rights of children.
- (5) Explain how the concept "children's rights" (including the best interests of the child) are understood in customary law.
- (6) What do you understand by the following concepts?
 - (a) agreement
 - (b) contract
 - (c) contractual liability
 - (d) obligation
 - (e) performance
 - (f) civil obligation
 - (g) natural obligation
 - (h) unilateral contract
 - (i) multilateral contract
 - (j) reciprocal contract

CONCLUSION

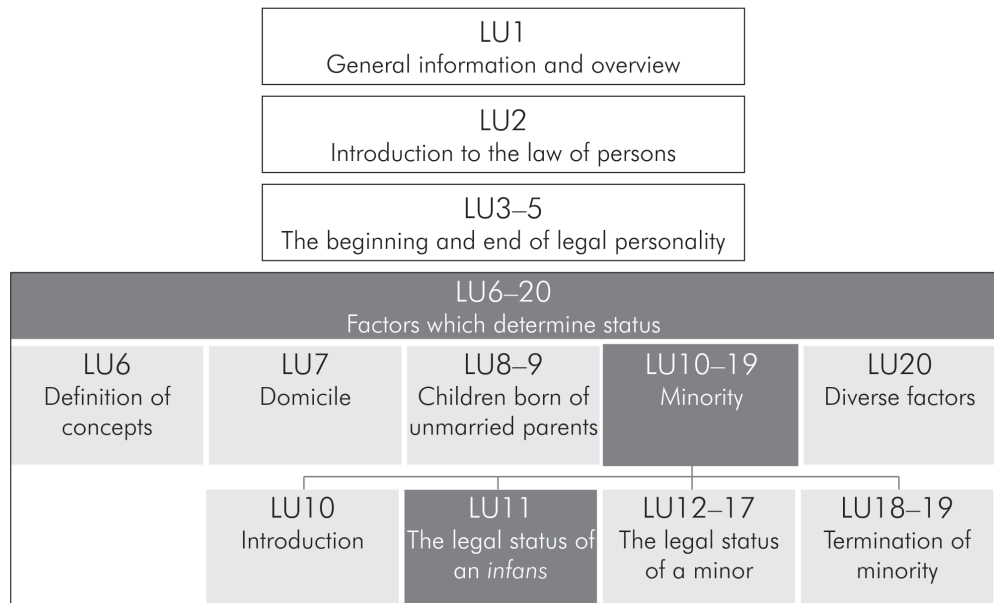
In this learning unit you learnt what level of intellectual ability is required before a person can acquire capacity to perform valid juristic acts and why persons under the age of 18 have limited capacity to act. We dealt with the protection of children's rights in the Constitution of the Republic of South Africa, 1996, the Children's Act 38 of 2005, the United Nations Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child. We also considered the meaning of children's rights in customary law.

Further, we defined certain important fundamental concepts. In the next learning unit we deal with the legal position regarding the capacity to act, delictual and criminal liability and capacity to litigate of the *infans*.

LEARNING UNIT 11

The legal status of an *infans*

Module map II



CONTENTS

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11.3 THE CAPACITY TO LITIGATE OF THE <i>INFANS</i>	84
11.4 THE DELICTUAL AND CRIMINAL LIABILITY OF THE <i>INFANS</i>	84

PRESCRIBED MATERIAL TO STUDY

- Heaton pages 84 to 85 (6.3)

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) define and understand the differences between the terms “*infans*” and “minor”
- (2) explain the legal principles that deal with the capacity to act, capacity to litigate and delictual and criminal liability of the *infans*
- (3) apply the legal principles that deal with capacity to act, capacity to litigate and delictual and criminal liability of the *infans* to a given set of facts

11.1

Definitions –
infans and
minor

INTRODUCTION

In the next few learning units you will regularly come across the words “*infans*” and “minor”:

- An *infans* is a person under the age of seven years.
- A **minor** is a person under the age of 18 years.

Note that, in the prescribed textbook, the word **minor** is used to denote persons between the age of seven years and the age of majority, because no better word exists. Remember, however, that the word **minor** also includes persons under the age of seven. The Children’s Act also defines a child as a person under the age of 18 years. For examination and assignment purposes, you must thus define a **minor** as someone under the age of majority.

11.2

THE CAPACITY TO ACT OF THE *INFANS*

On pages 84 and 85, Heaton explains the legal position regarding the capacity to act of the *infans*. You should study this section. You will learn that an *infans* has no capacity to act. However, where liability is not based on the capacity to act, as is the case for liability on the grounds of unjustified enrichment (where one person obtains a patrimonial advantage at the expense of another in the absence of a legal ground justifying the enrichment) or *negotiorum gestio* (where a third party fulfils the duty of

support of a child on behalf of a parent), an *infans* may be held liable. These concepts are dealt with later in this study guide and in your textbook.

ACTIVITY 11.1

The four contracts mentioned below are hypothetical contracts (you can, for the purpose of this activity, accept that they have indeed been concluded). Some of the contracts are valid and some are invalid. Indicate whether each contract is valid or invalid and substantiate each answer.

- (1) Thandi is six years old. She herself, without any assistance, buys a tricycle from a dealer.
- (2) Thandi, with her father's assistance, buys a tricycle from a dealer.
- (3) Thandi's father, on her behalf, buys a tricycle from a dealer.
- (4) Thandi's uncle gives her a tricycle as a gift. She accepts the donation herself, without any assistance.

FEEDBACK

- (1) An *infans* has absolutely no capacity to act and cannot conclude any juristic act whatsoever. Contract (1) is invalid.
- (2) An *infans* cannot conclude a juristic act, even with the assistance of his or her guardian. The guardian has to act for him or her and on his or her behalf. Contract (2) is invalid.
- (3) The only way for a contract with an *infans* to be valid, is for the guardian to enter into the contract on behalf of the *infans*. Contract (3) is valid.
- (4) An *infans* cannot enter into a contract even if it confers only rights and does not impose any duties on him or her. He or she thus cannot even accept a donation; this has to be done on his or her behalf by the court, the Master of the High Court, or his or her guardian. Contract (4) is invalid.

(Heaton pp 84–85).

11.3

Capacity to litigate = capacity to be a litigating party in a civil case

THE CAPACITY TO LITIGATE OF THE *INFANS*

Heaton deals with the capacity to litigate of the *infans* on page 85. Note that an *infans* is incapable of being a party to a lawsuit, even if he or she is assisted by his or her guardian. You must study this section.

11.4

Definitions – delict and crime

THE DELICTUAL AND CRIMINAL LIABILITY OF THE *INFANS*

The legal position regarding the delictual and criminal liability of the *infans* is discussed in Heaton on page 85. Delictual liability results from committing a delict and criminal liability results from committing a crime. In further legal studies you will learn precisely what the requirements for a delict and a crime are. For our present purposes it is sufficient for you to know that a **delict** is a wrongful (i.e. in conflict with legal norms) and intentional or negligent act as a consequence of which another suffers a loss, and a **crime** is an act prohibited by the law (whether by a statute or by the common law).

**Accountability =
capacity of fault**

It is a requirement of both a delict and a crime that the perpetrator must be at **fault**, that is, he or she must have acted intentionally or negligently. The capacity to be at fault is known as **accountability**. A person can be accountable only if he or she can differentiate between right and wrong and act accordingly. Since an *infans* does not have the capacity to be at fault, he or she is not accountable. The *infans* can thus not incur criminal liability. The Child Justice Act 75 of 2008, which governs criminal accountability, provides that a child under the age of 10 who commits an offence does not have criminal capacity and cannot be prosecuted for that offence. An *infans* can also not incur delictual liability, unless the delict is not based on fault. Heaton lists two examples of liability without fault. Although we do not expect you to know these two actions, you should take note of the fact that liability without fault exists.

TEST YOURSELF

- (1) What do you understand by the terms "*infans*" and "minor"?
- (2) Explain the capacity to act of the *infans*.
- (3) Explain the capacity to litigate of the *infans*.
- (4) Briefly explain the liability of an *infans* for crimes and delicts he or she has committed.

CONCLUSION

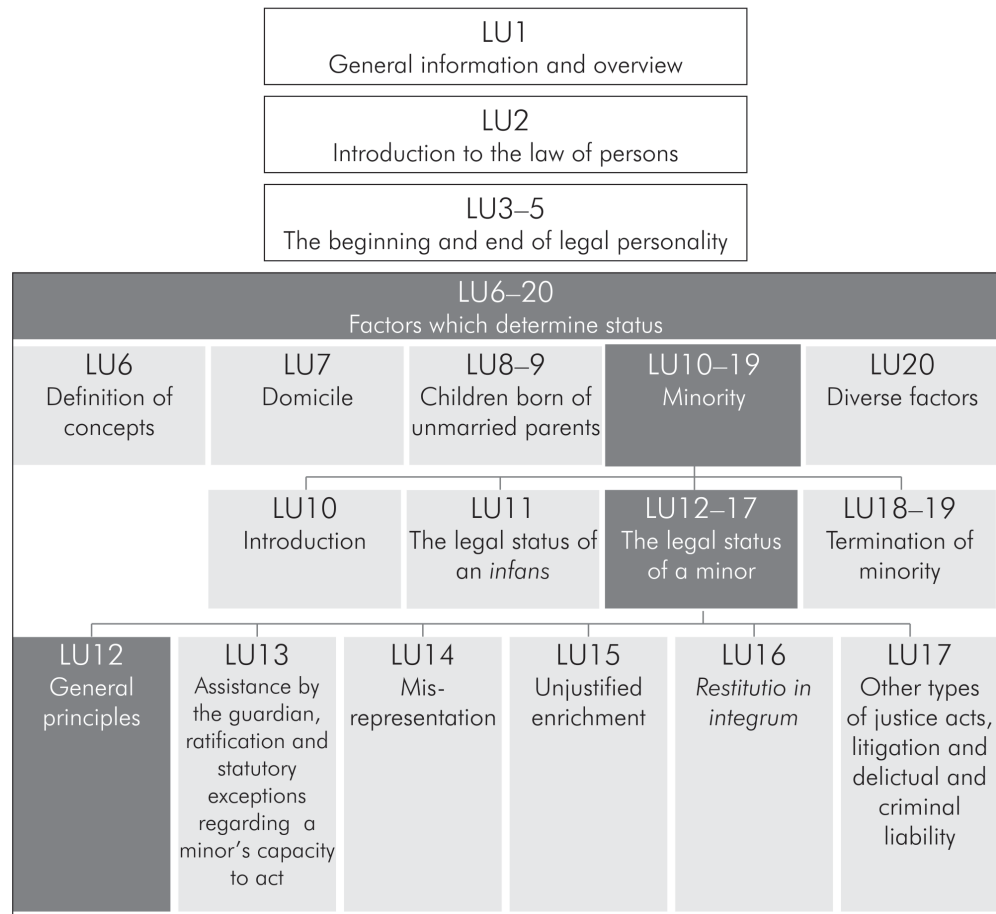
In this learning unit we considered the effect of age on the capacity to act, delictual and criminal liability, and capacity to litigate of the *infans*.

In the next learning unit we deal with the general principles applicable to a minor's capacity to act.

LEARNING UNIT 12

The legal status of a minor – general principles

Module map 12



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PREScribed MATERIAL TO STUDY

- Heaton pages 85 to 88 (up to before “(ii) *Assistance by the guardian*”)

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) explain the general principles regarding a minor's capacity to contract (a subcategory of the capacity to act)
- (2) explain the position when a minor enters into a contract without the necessary assistance
- (3) understand when the *exceptio adimpleti contractus* can be invoked
- (4) discuss the various forms that the guardian's assistance may take

12.1

Point of departure: minor's capacity to conclude a contract

INTRODUCTION

In this learning unit we explain a minor's capacity to act with reference to his or her capacity to perform a particular type of juristic act known as a **contract**, since contracts are a part of everyday legal practice. A minor's capacity to act in respect of other types of juristic acts is dealt with in Learning unit 17.

12.2

Minors have limited capacity to act

THE MINOR'S CONTRACTUAL CAPACITY – GENERAL PRINCIPLES

The **general rule** is that minors between the ages of seven and 18 have limited contractual capacity, in other words such persons cannot be liable for the fulfilment of a contract (i.e. incur contractual liability) if they are not assisted by a guardian in concluding the contract. Heaton explains this general rule on pages 85 to 88. She also explains the consequences of a contract concluded by a minor without the assistance of his or her guardian. You must study those pages. In her discussion the author, *inter alia*, refers to the fact that the other party to the contract (in other words the party who entered into the contract with the minor) has to abide by the guardian's decision on whether or not the contract will be upheld. This means that he or she cannot rely on the minor's minority to avoid his or her own contractual obligations. If the guardian decides to uphold the contract, the other party to the contract must comply with the contract.

Also take note of the author's submission with regard to the impact of the Consumer Protection Act on a minor's unassisted contract. Section 39(1)(b) of this Act provides that an agreement to enter into a transaction for the

supply of goods or services to an unemancipated minor consumer and an agreement to supply goods or services to such a consumer is “voidable at the option of the consumer”, unless it is ratified by the minor’s guardian, or by the minor after he or she becomes an adult. Heaton submits that the legislature did not deviate from the common-law position regarding a minor’s unassisted contract (Heaton p 87).

The author also points out that the other party to the contract cannot rely on the *exceptio non adimpleti contractus* to escape his or her contractual obligations. On pages 87 to 88 the author briefly explains what the *exceptio non adimpleti contractus* entails: one party to a contract which provides for **reciprocal** performance cannot sue the other party for performance, without also performing or offering to perform. It is important to note that the *exceptio non adimpleti contractus* can be used only by a party to a **reciprocal contract**. As was indicated in Learning unit 10, a reciprocal contract is a contract in terms of which performance is promised by one party in exchange for performance by the other party. Because the *exceptio* is founded on the principle of reciprocity it cannot be used against someone who is not contractually bound to perform at all – as is the position of an unassisted minor. In other words, because the minor’s unassisted contract is not enforceable against the minor, the other party to the contract cannot use the *exceptio non adimpleti contractus* against the minor.

ACTIVITY 12.1

One of the following contracts is valid, while the other is unenforceable. Indicate whether the contract is valid or unenforceable by underlining the correct option and also give a reason for your answer.

- (1) Vusi is 16 years old. He buys a motorcar, without any assistance, from a car dealer. (Valid/Unenforceable)
- (2) Vusi receives a motorcar from his uncle as a gift. He accepts the donation, without any assistance. (Valid/Unenforceable)

FEEDBACK

Minors may conclude certain contracts without any assistance, for instance contracts which will improve a minor’s position without imposing any duties on him or her. An example of such a contract is a donation. The contract in (2) is therefore valid.

If a minor enters into a contract without his or her guardian’s consent, and that contract imposes duties upon the minor, the contract will be unenforceable. The contract in (1) is thus unenforceable (Heaton pp 85–88).

ACTIVITY 12.2

What remedy is available to a minor who has concluded a contract, without the assistance of his or her guardian, to claim back performance that he or she has already rendered in the following cases?

- (1) The minor's performance consisted of money.
- (2) The minor's performance consisted of something other than money.

■ FEEDBACK

A monetary performance can be reclaimed by a *condictio*, and things other than money can be reclaimed by the *rei vindicatio* (Heaton p 88).

TEST YOURSELF

Explain the general rule on a minor's capacity to enter into a contract. Also explain the juristic consequences of a contract which a minor has concluded without the assistance of his or her guardian.

CONCLUSION

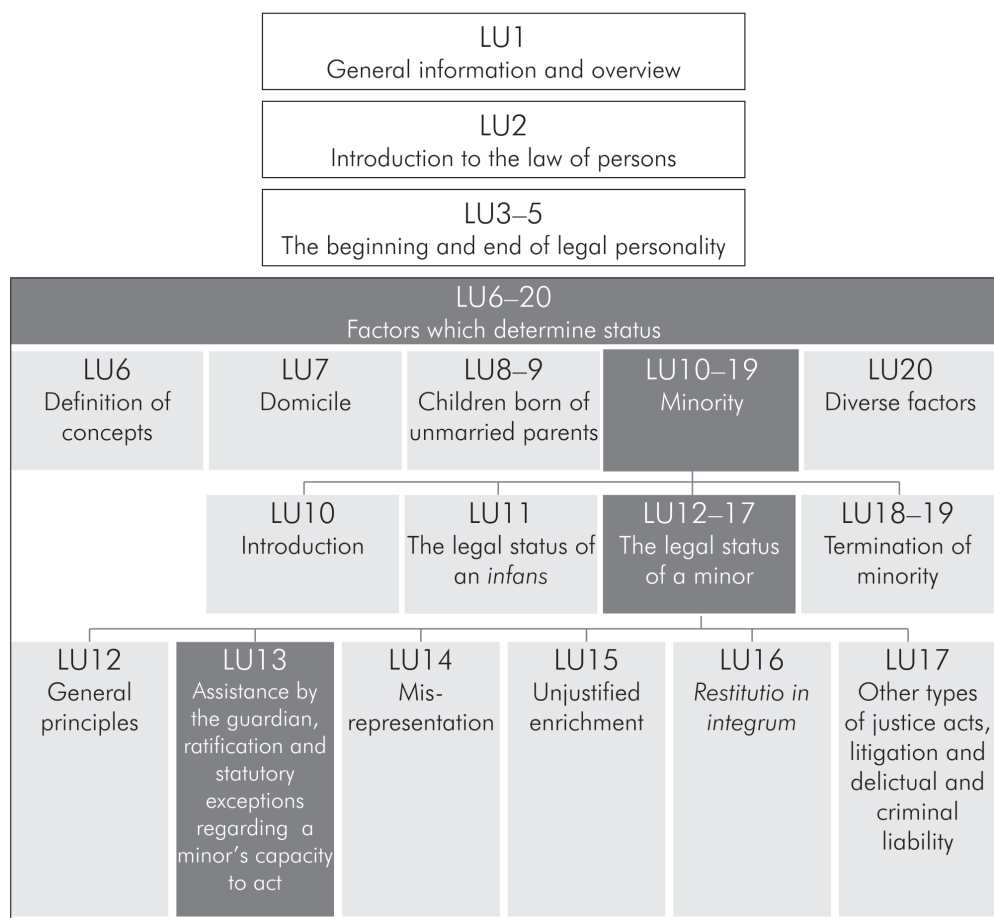
In this learning unit you studied the general principles regarding a minor's capacity to contract.

In the next learning unit we deal with the position if a guardian consents to a minor's contract. We also refer you to statutory exceptions to the rule that a minor needs his or her guardian's consent to enter into a contract.

LEARNING UNIT 13

The minor's contractual capacity – assistance by the guardian, ratification and statutory exceptions regarding a minor's capacity to act

Module map 13



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PRESCRIBED MATERIAL TO STUDY

- Heaton pages 88 to 93 (up to before “(v) *Misrepresentation by the minor*”)

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) explain the ways in which a minor's guardian can assist him or her to conclude a contract, and the effect of contracts which a minor has concluded with the assistance of his or her guardian
- (2) explain the effect of ratification by a minor's guardian or the minor himself or herself
- (3) explain when a minor's guardian will be personally liable to the party with whom the minor contracted unassisted
- (4) point out statutory exceptions to the rule that a minor cannot incur contractual liability without the assistance of his or her guardian

13.1 INTRODUCTION

You already know that a minor who contracts without his or her guardian's assistance cannot be held contractually liable. In this learning unit we consider the position where the minor has acted with assistance, or where the contract has been ratified.

13.2 ASSISTANCE BY THE GUARDIAN

On pages 88 to 90 ((ii) up to before “*Liability of the guardian*”) Heaton explains the **ways** in which a parent or guardian can assist a minor in contracting, and the **effect** of such assistance. It is also important that you take note of the fact that there are certain contracts that the guardian cannot conclude on behalf of the minor, for example an antenuptial contract (i.e. contracts of a personal nature).

ACTIVITY 13.1

- (1) List the forms the guardian's assistance to the minor's contract may take. After that, indicate the effect of such assistance in one sentence.

- (2) Name the specific contracts that a guardian cannot enter into on behalf of a minor, although the guardian may consent to the minor's entering into such contracts.

■ FEEDBACK

- (1) The assistance of the guardian may take the following three forms: In the first place the guardian can enter into the contract on behalf of the minor. Secondly, the minor can enter into the contract himself or herself with the consent of the guardian. Thirdly, the guardian can ratify the agreement after it has been concluded. The effect of proper assistance by the guardian is that the minor is liable *ex contractu* as if he or she were a major (Heaton p 88).
 - (2) Firstly, the guardian may not enter into contracts of a closely personal nature on behalf of a minor. Secondly, the guardian may not enter into a contract on behalf of a minor if the contract will come into operation only when the minor has attained majority. Thirdly, you could have mentioned that it is submitted by Heaton that a guardian may not conclude a contract on behalf of a minor that contravenes section 43 of the Basic Conditions of Employment Act 75 of 1997. (Note that minor below 15 years of age is not allowed to work. See Heaton pp 89–90.)
-

13.2.1 Liability of the guardian

Heaton pages 90 and 91 explains when a minor's guardian will incur personal liability towards the party with whom the minor has contracted.

ACTIVITY 13.2

List the circumstances in which the minor's guardian will incur personal (contractual) liability for contracts concluded by the minor. You should also indicate the effect of such assistance in your answer.

■ FEEDBACK

Firstly, the guardian will be personally liable if the minor acted as his or her agent. Secondly, the guardian will be personally liable if he or she guaranteed performance by the minor. The same applies if the guardian bound himself or herself as surety for the minor. Liability on the ground of *negotiorum gestio* is not contractual liability, and you need not have referred to it here (Heaton pp 90–91).

13.3 RATIFICATION

Upon coming of age, a minor can ratify his or her own contract. This is explained in Heaton on pages 91 and 92. She also explains the effect of ratification.

ACTIVITY 13.3

Can a minor or his or her guardian ratify an antenuptial contract that was concluded without the necessary consent, after the marriage? Refer to authority for your answer.

■ FEEDBACK

In *Edelstein v Edelstein* 1952 (3) SA 1 (A) (Heaton p 92) it was decided that an antenuptial contract concluded by a minor without assistance is void and cannot be ratified by the minor or his or her guardian after the marriage has taken place. (The Family Law module deals with the antenuptial contract in detail.)

13.4

STATUTORY EXCEPTIONS REGARDING A MINOR'S CAPACITY TO ACT

Heaton pages 92 and 93 indicates that various Acts create exceptions to the rule that a minor cannot incur contractual liability without his or her guardian's assistance, and lists some of those exceptions. You should study that list.

TEST YOURSELF

- (1) Under what circumstances can a guardian be held personally liable in terms of a contract which a minor has concluded?
- (2) Fill in the missing term:
If parents do not fulfil their duty of support, they can be held liable on the ground of for expenses a third party incurs in regard to the maintenance of those children.
- (3) What do you understand by the term "ratification"?
- (4) How can a minor ratify a contract that he or she concluded without the assistance of his or her guardian?
- (5) Can an antenuptial contract which was concluded by an unassisted minor be ratified after the marriage has taken place? Substantiate your answer with reference to case law.
- (6) List three statutory exceptions to the rule that a minor cannot incur contractual liability without the assistance of his or her guardian.

CONCLUSION

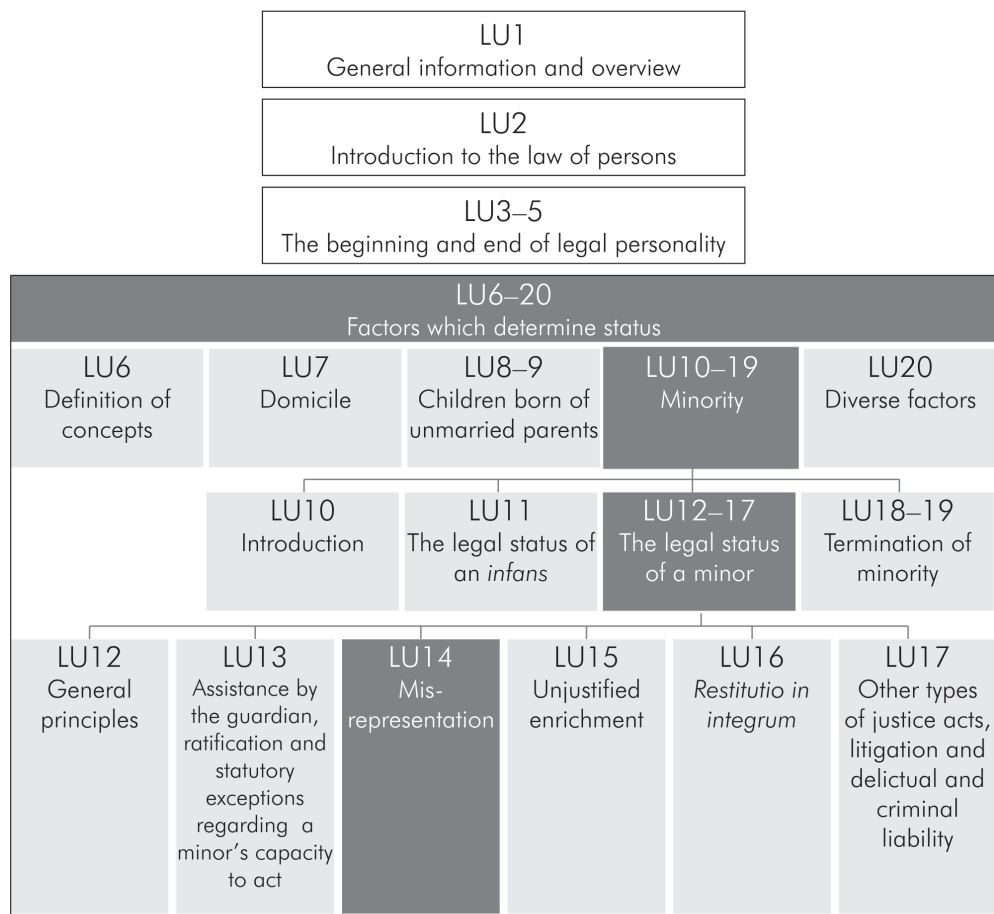
In this learning unit we dealt with the ways in which a minor's guardian can assist him or her to conclude a contract and the effect of such assistance. We further dealt with the circumstances in which a minor's guardian will be personally liable towards the party with whom the minor has contracted. We also considered the legal principles applicable to the ratification of contracts. Lastly we looked at statutory exceptions to the rule that an unassisted minor cannot incur contractual liability.

In the next learning unit we look at misrepresentation.

LEARNING UNIT 14

The minor's contractual capacity – misrepresentation

Module map 14



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PRESCRIBED MATERIAL TO STUDY

- Heaton pages 93 to 96 (“(v) *Misrepresentation by the minor*”)

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) explain the position where a major has entered into a contract with a minor who claims that he or she has the capacity to enter into the contract, whereas in fact he or she does not
- (2) explain that the minor is liable on the ground of misrepresentation
- (3) show that in such a case the minor should be delictually liable
- (4) apply these principles to a given set of facts

14.1 INTRODUCTION

In the previous two learning units we saw that, as a general rule, a minor cannot incur contractual liability if he or she did not have his or her guardian's assistance when concluding the contract. An adult who enters into a contract with a minor is, however, obliged to render performance. Nevertheless, the adult's position is not as hopeless as it appears at first glance, since an adult who has entered into a contract with an unassisted minor can rely on certain remedies. In this learning unit we deal with one of those remedies, namely misrepresentation. You will learn that the major who has concluded a contract with a minor who misrepresented himself or herself has a delictual claim on the ground of the minor's misrepresentation.

14.2

GENERAL

General view:
fraudulent
minor must be
held liable

A question that sometimes arises is whether a minor who has falsely misrepresented himself or herself as a major, or as being emancipated (Learning unit 19 covers emancipation), or as being a married person, or who has falsely claimed that he or she has the necessary permission to contract, can be held liable if the other person concluded a contract with him or her on the ground of this misrepresentation. The **generally accepted view** is that the minor should be held liable in these circumstances, but there is no consensus on what the basis for this liability should be. There are two possibilities:

- (1) The minor can be held liable on the basis that the contract he or she 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 or she committed, namely, misrepresentation (i.e. the minor can be held **delictually** liable).

In Heaton, on page 93 (the first paragraph under “(v) *Misrepresentation by the minor*”), the author explains why the minor’s liability under these circumstances cannot be based on a contract. She also shows that the minor should instead be held delictually liable. You must understand this discussion fully.

Students often find this section of the work challenging. They find it difficult to understand the different approaches and to apply the facts to problem-type questions. You may want to follow the way in which the work has been set out below when you study this section. This discussion does not replace the prescribed textbook, but is a short summary of the different points of departure, and indicates where to look in Heaton. We also divide this section into a few subsections. You must still study the prescribed textbook carefully. The discussion below just explains the work in a different way. Make sure that you can fully explain each aspect mentioned below, that you understand it properly and can apply it to problem-type questions.

14.3

BASIS FOR LIABILITY

14.3.1

Contract as a possible basis for liability

14.3.1.1

First point of view in support of this approach

Can an
unassisted
minor be
contractually
liable?

You must study Heaton pages 93 and 94 in this regard. Those in favour of contractual liability for a minor who misrepresented himself or herself, rely on the argument that the Roman-Dutch writers denied the fraudulent minor the remedy of *restitutio in integrum* (a return to the previous condition – see Learning unit 16). Therefore this minor could not claim back the performance he or she had already rendered in terms of the contract. This argument is flawed. Misrepresentation occurs where the minor has acted

without the required assistance, whereas *restitutio in integrum* is actually applicable to contracts which the minor concluded with assistance (and which are therefore valid and enforceable), but which are prejudicial to the minor. You will learn more about *restitutio* in Learning unit 16.

Some legal writers argue that the mere fact that *restitutio* is at all at issue implies there is an underlying binding contract in cases of misrepresentation. This viewpoint cannot be accepted for the following two reasons:

- First, in Roman-Dutch practice, *restitutio* was also used where a minor had contracted without the necessary consent, so it is clear that there need not have always been a binding contract when *restitutio in integrum* was at issue. Today, *restitutio* is only possible where the minor has concluded a valid contract with the necessary consent.
- In the second place, a contract concluded by a minor without the necessary assistance is unenforceable, as was indicated in Learning unit 12. Therefore it is unnecessary for the minor to recover the performance by means of *restitutio*. He or she can simply recover property by means of the *rei vindicatio*, or money by means of a *condictio*.

Hence, the fact that the minor is denied *restitutio* does not mean that the contract is valid and enforceable. It simply means that he or she is denied the possibility of a remedy, which he or she does not require in any event.

On page 94, Heaton discusses *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (I). Make sure that you understand the reasoning behind this judgment. Note our one point of **criticism** against the decision: the court should have permitted the minor to recover that part of the purchase price he had already paid with a *condictio*. Since he was not bound by the contract, he should have been allowed to recover the money he had paid.

14.3.1.2 Second point of view in support of this approach

Study Heaton page 95. Some legal writers argue that the fraudulent minor is bound to the contract by the rules of estoppel. In terms of estoppel, the minor is bound by his or her pretence that he or she was an adult. The minor is therefore not permitted to rely on the true state of affairs, namely, that he or she is not contractually liable. The minor thus cannot avoid contractual liability by raising minority as a defence and must fulfil the provisions of the contract. As explained in the first paragraph of Heaton page 95, this argument is flawed, as it creates a situation where the minor's capacity to act (i.e. that he or she has the capacity to enter into a contract) is altered.

14.3.1.3 Third point of view in support of this approach

It has also been argued that the minor may be held contractually liable in terms of section 39(2) of the Consumer Protection Act 68 of 2008. As discussed in the second paragraph of Heaton page 95, the argument against

this is the same as for liability on the ground of estoppel, namely that it would allow the minor to alter his or her capacity to act through misrepresentation.

14.3.1.4 Conclusion – contractual liability as basis of the minor’s liability is unacceptable

Delictual liability more acceptable

We submit that it is incorrect to hold a fraudulent minor liable on the ground of the contract. Such liability would mean that a minor who enters into a contract without the assistance of his or her guardian is permitted to supplement his or her limited capacity to act by misrepresentation. In other words, the fraudulent minor can then alter his or her capacity to act and enter into a valid contract without the necessary consent. This would be unacceptable. Remember, the minor’s capacity to act is limited to protect him or her against his or her own lack of judgement (see Learning unit 10). This limitation is laid down by the law to protect the minor and his or her best interests.

14.3.2 Delict as a possible basis for liability

Fraudulent minor should pay damages to the prejudiced party

Study Heaton pages 95 and 96. We submit that a fraudulent minor must be held delictually liable. A minor who makes a misrepresentation commits a **delict** (a wrongful [contrary to the norms of the law], culpable act which causes damage to another), and can therefore be held delictually liable. One of the consequences of delictual liability is that the duty rests on the person committing the delict to compensate the prejudiced party for the damage he or she has suffered as a result of the delict. This means that the prejudiced party (the major) has a claim against the person who committed the delict (the minor).

It is important that you understand why we do not support contractual liability here. The liability of minors for misrepresentation can exist completely independently of contractual liability, thus our support for delictual liability here. Its application does not allow the minor to extend his or her capacity to act by means of misrepresentation. The protection offered to minors (namely that a minor may not enter into a contract unassisted) remains, but the major who has been prejudiced as a result of the minor’s misrepresentation, is also protected.

Whether the minor actually misrepresented his or her age is a question of fact. It will depend on the circumstances of each case. For instance, consider the following examples and make sure that you understand and are able to answer the questions:

- (1) What is the position of the adult who is not misled by the misrepresentation, for example if the adult knows the minor and knows that he or she is a minor?

- (2) What is the position if the adult does not know the minor's age, but should know it, such as where the minor is a family member of the adult?
- (3) What is the position if the minor is so young that he or she cannot reasonably be mistaken for an adult, such as a minor who is 10 years old?
- (4) Can the adult accept the minor's stated age, or must the adult investigate the minor's true age?
- (5) What is the position if the minor does not claim to be a major, but his or her conduct suggests that he or she is a major?

ACTIVITY 14.1

Read the examples below carefully and then answer the questions that follow. Substantiate each answer in one paragraph. For the purpose of this activity you need not discuss the different viewpoints regarding the basis of the minor's liability. You can accept that delict is the correct basis for liability.

Example 1:

Sipho is 17 years old. He concludes a contract with Mr Molefe, an adult, to buy a second-hand car for R30 000. Sipho brings Mr Molefe under the false impression that he is 18 years old by producing a forged identity document. Sipho pays a deposit of R3 000 and Mr Molefe delivers the car. Sipho now refuses to pay the remainder of the contract price on the ground that he is a minor and therefore not liable in terms of the contract. Indicate whether Sipho will be delictually liable to Mr Molefe on the ground of the misrepresentation that he made.

Example 2:

Justice is 17 years old. He concludes a contract with Mrs Moloi, an adult, to buy a second-hand car for R30 000. Justice makes the false representation to Mrs Moloi that he is 18 years old. It is quite obvious to Mrs Moloi that Justice cannot be older than 17. Justice pays a deposit of R3 000 and Mrs Moloi delivers the car. Justice now refuses to pay the remainder of the contract price on the ground that he is a minor and therefore not liable in terms of the contract. Indicate whether Justice will be delictually liable to Mrs Moloi on the ground of the misrepresentation that he made.

Example 3:

Minnie is 17 years old. She concludes a contract with Mr Ismail, an adult, to buy a second-hand car for R30 000. Minnie does not tell Mr Ismail that she is 18 years old, but she knows that she looks much older than she is, and during the negotiations Mr Ismail says that it is the perfect car for a "young lady in her early twenties". She pays a deposit of R3 000 and Mr Ismail delivers the car. Minnie now refuses to pay the remainder of the contract price on the ground that she is a minor and therefore not liable in terms of the contract. Indicate whether Minnie will be delictually liable to Mr Ismail on the ground of the misrepresentation that she made.

Example 4:

Maria is 17 years old. She concludes a contract with Mr Baloyi, an adult who has been living next to her parents since before Maria was born, to buy a second-hand car for R30 000. Maria does not discuss her age with Mr Baloyi. She pays a deposit of R3 000 and Mr Baloyi delivers the car. Maria now refuses to pay the remainder of the contract price on the ground that she is a minor and therefore not liable in terms

of the contract. Indicate whether Maria will be delictually liable to Mr Baloyi on the ground of misrepresentation.

■ FEEDBACK

General feedback:

The requirements for delictual liability on the ground of a minor's misrepresentation are dealt with in your textbook (Heaton p 96 – the last paragraph before “(vi) *Unjustified enrichment*”).

The three requirements for liability as a result of a misrepresentation are that the minor made a misrepresentation regarding his or her majority or capacity to act, the other party to the contract was induced to enter into the contract by the misrepresentation and the other party suffered damage as a result of the misrepresentation.

Other important principles are that the minor, in order to be liable, should be old enough to be reasonably mistaken for a major. The other party is entitled to accept the minor's statement that he or she is of age. The other party is under no obligation to enquire into the truth of the minor's statement unless he or she has good cause to believe that he or she is dealing with a minor (Heaton p 96).

Example 1:

Sipho indeed made a fraudulent misrepresentation about his majority by producing a forged identity document. Mr Molefe was clearly misled by this misrepresentation and induced to enter into the contract, and he acted to his detriment (he suffered a loss). Since there is no indication in the set of facts that Mr Molefe had good reason to believe that he was dealing with a minor, Mr Molefe was entitled to accept Sipho's statement that he was of age. In example 1, Sipho would thus be liable to Mr Molefe for delictual damages on the ground of his (Sipho's) misrepresentation.

Example 2:

Justice made a fraudulent misrepresentation regarding his majority, but Mrs Moloi was not misled by this misrepresentation. It was clear to her that Justice could not be older than 17, and that she was dealing with a minor. Mrs Moloi was therefore not induced to enter into the contract by Justice's misrepresentation. Furthermore, since Mrs Moloi had good cause to believe that she was dealing with a minor, she was not entitled merely to accept Justice's statement regarding his majority. Justice would thus not be delictually liable to Mrs Moloi on the ground of the misrepresentation.

Example 3:

Minnie did make a fraudulent misrepresentation to Mr Ismail. She knew that Mr Ismail thought that she is a major and did nothing to remove this erroneous belief. Mr Ismail was clearly misled by this misrepresentation and induced to enter into the contract, and he acted to his detriment (he suffered a loss). Minnie would thus be liable to Mr Ismail for delictual damages on the ground of her misrepresentation.

Example 4:

Since Mr Baloyi has been Maria's neighbour since before she was even born, it can be accepted that he knew that Maria is in fact a minor. Mr Baloyi was therefore not induced to enter into the contract by Maria's misrepresentation, and Maria would not be delictually liable to Mr Baloyi on the ground of the misrepresentation.

14.4

IN A NUTSHELL

It is very important that you understand and master this section of the work. **If, in an assignment or examination, you have to answer a problem-type question in which a minor has made a misrepresentation, there are a few questions you need to ask:**

- Was there a misrepresentation?
- If there was, is the minor is liable? You cannot simply assume that a minor is delictually liable just because he or she has made a misrepresentation. In order to determine liability (whether the prejudiced party has a delictual claim for damages against the minor), the following requirements have to be met:
 - The *onus* rests on the minor to prove that the other party was not misled.
 - The misrepresentation must have been the cause that induced the other party to enter into the contract with the minor.
 - The other party must have suffered loss.

Only once you have established that there was in fact a misrepresentation, and that **all three** requirements for delictual liability have been met, can you say that the minor is delictually liable and that the other party has a claim for damages against the minor.

TEST YOURSELF

(1) **Question 1 is an example of an essay-type question:**

Discuss in detail the question of the liability of a minor who fraudulently misrepresents himself or herself as an adult, or claims to be emancipated or to be acting with the necessary assistance, following which a party contracts with him or her on these grounds. If there is liability, on what grounds is this minor liable?

(2) **Question 2 is an example of a problem-type question:**

Norman is 17 years old. He concludes a contract with Alfred, who is an adult, to buy Alfred's motorbike for R2 000. Norman gives Alfred the false impression that he is 18 years old, and therefore does not need his guardian's consent to conclude a contract. Norman pays a deposit of R500 and Alfred delivers the motorbike to him. Now Norman refuses to pay the rest of the purchase price on the ground that he is a minor and therefore cannot be held liable. He also wants to reclaim his deposit. Advise Norman, with reference to authority, on whether Alfred can recover the contract price, or any other price, from him. Also indicate whether Norman will be able to reclaim his deposit.

CONCLUSION

In this learning unit you learnt what the position is when a minor fraudulently represents that he or she has capacity to act, while he or she does not, and the other person contracts with him or her on the ground of

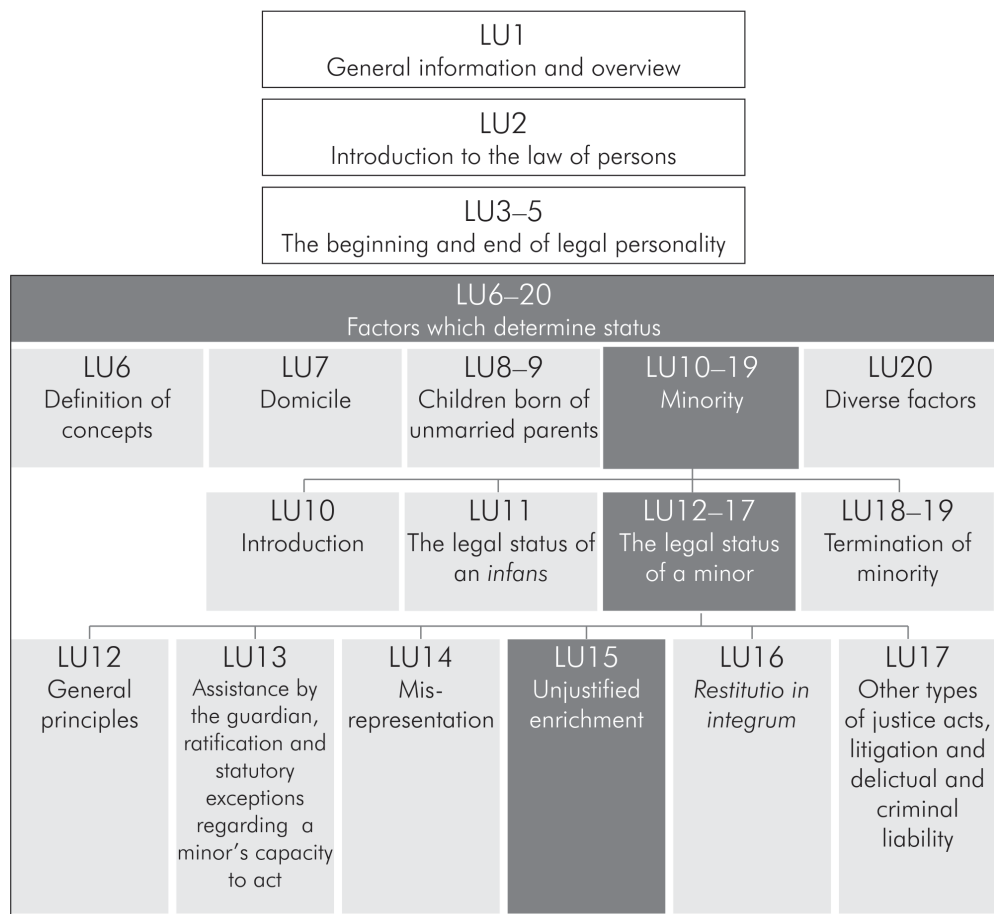
this misrepresentation. You learnt that the minor would be held liable in these circumstances.

In the next learning unit we look at another remedy available to the adult: a claim based on unjustified enrichment.

LEARNING UNIT 15

The minor's contractual capacity – unjustified enrichment

Module map 15



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PRESCRIBED MATERIAL TO STUDY

- Heaton pages 96 to 97 (“(vi) *Unjustified enrichment*”)

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) explain unjustified enrichment
- (2) explain how the remedy operates in the case of contracts between minors, and adults
- (3) calculate the amount by which a minor's estate has been enriched
- (4) apply these principles to a given set of facts

15.1 INTRODUCTION

You already know that a minor who enters into a contract, without the assistance of his or her guardian, cannot be held liable in terms of the contract. This was explained in Learning units 12 and 13. We have also shown that the adult who entered into a contract with such a minor has certain remedies available to him or her. In this learning unit we deal with one of those remedies, namely unjustified enrichment.

15.2 UNJUSTIFIED ENRICHMENT

This remedy is discussed in Heaton pages 96 to 97. You must study that discussion. As students often struggle to understand unjustified enrichment and, in particular, how the enrichment claim is calculated, we explain the remedy in a slightly different way below. You must use the explanation below, together with the information in your textbook, to master this section of the work well enough to be able to answer problem-type questions on the subject.

15.2.1

What is unjustified enrichment?

General rule: A person's estate may not be enlarged at the cost of another without legal ground

A person (A) is **unjustifiedly enriched** at the expense of another person (B) if A gains a patrimonial benefit (i.e. increases the value of his or her estate) **at the expense of B without there being a recognised legal ground justifying the transfer of the benefit** (Heaton p 97). There is a **general rule** in our law that a person may not be **unjustifiedly enriched** at the expense of another. In such a case, the law obliges A (the recipient) to return to B (the prejudiced party) the amount by which A's estate has been and remains enlarged. B thus has a claim against A on the ground of unjustified enrichment.

This general rule can also be applied where a minor (A) enters into a contract with an adult (B) without the necessary permission. If B has already performed in terms of the contract and A in turn refuses to perform, A (the minor) is **enriched at the expense** of B by the already delivered performance. Then adult B can hold minor A liable on the ground of unjustified enrichment for the repayment of the amount by which A was enriched.

Heaton on page 96 explains the benefit theory. You do not need to know this theory, or the case that relates to it (*Nel v Divine Hall & Co* (1890) 8 SC 16). You do need to know that in *Edelstein v Edelstein* 1952 (3) SA 1 (A), the Supreme Court of Appeal confirmed that the contract of a minor who acted without assistance can never be valid, even if it is to his or her benefit. However, even though there is no valid contract, the minor is indeed liable if he or she has been unjustifiedly enriched. It is very important that you understand the difference between liability where there is a contract, and liability where there is no valid contract, as the amount that the minor might be liable for if there is contractual liability can differ greatly from the amount in terms of unjustified enrichment, as explained in Heaton on page 97.

A minor's liability for unjustified enrichment can be explained by way of an example. Linda, an adult, concludes a contract with Paul, a minor, in terms of which Paul buys a motorbike from Linda for R50 000. Paul does not have the assistance of his guardian. He now refuses to pay for the motorbike. There is not a valid contract, as Paul acted without his guardian's assistance. There is no indication that Paul misrepresented himself as an adult (you learnt about misrepresentation in the previous learning unit), so the question that follows is whether Paul has been enriched. He definitely has been enriched (by receiving the motorbike without paying for it), and there is no justification for this enrichment.

Once you have established unjustified enrichment, you have to determine the extent of the minor's enrichment. There are several factors that you have to consider. These are explained below.

15.2.2 How is the extent of the minor's enrichment calculated?

Heaton explains this on page 97. The following three principles are used to calculate the extent of the minor's enrichment. You must know these principles well, because you will have to be able to apply them to problem-type questions.

Calculation based on moment when other party institutes claim

(1) *When is the enrichment calculated?*

The moment on which the calculation must be based is that moment when the other party institutes his or her claim. For this calculation it is not important when the contract was entered into.

Work with actual value, not purchase price

(2) *How much is the enrichment?*

There are two important amounts that have to be calculated:

- a. The amount by which the minor's estate is **increased** owing to the performance of the other party. Here we look only at the actual value of the performance and ignore the contract price.
- b. The amount by which the estate of the other party is **decreased** as a result of the performance. Here again look only at the actual value of the performance and not at the contract price.

You can now determine two amounts. The minor is liable for the **lesser** of the two.

(3) *What if the circumstances change?*

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 has **sold** the performance before the action was instituted, his or her liability for the purchase price (money) received depends on how he or she applied the proceeds thereof:
 - i. If the **money** is 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.
 - ii. If the minor has used the money for **necessaries**, he or she is still liable for the purchase price of these necessities, 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 unjustifiedly enriched at the expense of the other party. Explained differently, it must be established whether the minor's estate is larger than it would have been had the

Necessary purchases enrich minor

minor not received the performance of the other party to use for the necessities. Suppose Lynette, a minor, has an estate of R5 000. She receives a performance which she sells for R2 500. She uses this money to buy necessities. At the time of the institution of the claim for enrichment her estate is now:

$R5\ 000 + R2\ 500$ (the value of the performance) = $R7\ 500 - R2\ 500$ (with which she bought the necessities) = $R5\ 000$.

Had it not been for the performance of R2 500, her estate would have been as follows:

$R5\ 000 - R2\ 500$ (with which she bought the necessities) = $R2\ 500$

It is therefore clear that Lynette was enriched by the full amount (R2 500) spent on necessities.

- iii. If the minor purchased **luxury items** with the money, he or she is liable for the value of whatever still remains.

Therefore, supposing that in the above example Lynette used the R2 500 to pay for a luxury seaside holiday, she will not be liable towards the other party. However, if she bought a luxury item, for example an expensive hi-fi, with the money, she will be liable for the value of the hi-fi set if she still has it.

ACTIVITY 15.1

Themba, a 15-year-old minor, concludes a contract of sale with Mr Khumalo, an adult, without the assistance of his legal guardian. In terms of the contract, Mr Khumalo sells Themba a motorcycle for R6 000. The actual value of the motorcycle at the time of conclusion of the contract is R5 000. On 20 March, a month after delivery of the motorcycle to Themba, he sells the motorcycle for R2 000. He spends the R2 000 as follows: R800 on liquor and other refreshments that were consumed at a party on 1 April, and the remaining R1 200 on his accommodation. On 5 April, Mr Khumalo institutes action against Themba.

Indicate which amount Mr Khumalo will be able to claim from Themba on the ground of unjustified enrichment. In your answer, you should indicate the steps you followed to reach your answer.

FEEDBACK

The three principles that have to be applied to calculate the extent of the minor's enrichment are set out above. You should have written down each step, and applied it to the given set of facts. When answering an examination question, you do not need to set out the three principles, they are just there to make it easier for you to answer the question.

When is the enrichment calculated?

The moment on which the calculation must be based is that moment when Mr Khumalo institutes his or her claim. In the given set of facts this happens on 5 April.

How much is the enrichment?

Remember that we work with two amounts – the amount by which Themba's estate is **increased**, and the amount by which the estate of Mr Khumalo is **decreased**. To determine the amount by which Themba's estate is increased owing to the performance of the other party, we look only at the actual value of the performance and not the contract price. Themba has sold the motorcycle, and therefore the principles set out below will have to be used to do this calculation. The amount by which the estate of Mr Khumalo is decreased as a result of the performance must also be calculated. Here again we look only at the actual value of the performance and not the contract price. In the set of facts under discussion, that amount is R5 000, being the actual value of the motorcycle at the time of conclusion of the contract. However, since we still have to calculate Themba's enrichment, we have to go to step three to be able to determine the amount for which Themba will be liable.

What if the circumstances change?

Themba sold the motorcycle before the action was instituted, which means that the following rules apply:

- 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.
- If the minor has used the proceeds for necessities (food, clothing, accommodation and medical treatment), he or she is still liable for the purchase price of these because the minor would have had to purchase the necessary items out of his or her own estate. By saving on these expenses, the minor is regarded as having been unjustifiedly enriched at the expense of the other party.
- If the minor purchased luxury items with the proceeds, he or she is liable for the value of whatever still remains.

Let us apply these principles to the given set of facts. Themba did indeed sell the motorcycle before institution of the action. However, the proceeds are no longer in his possession. He spent R1 200 on his accommodation, a **necessary** expense. He has been unjustifiedly enriched by this. The rest of the money (R800) was spent on **luxury** items. If he still had any of the liquor or other refreshments, Themba would have been liable for the value thereof, but since nothing remains of these items, he will not be liable for this amount.

You have now calculated two amounts. Themba is liable for the lesser of the two. The amount of Themba's enrichment (the amount by which his estate has increased) is R1 200 (the amount spent on necessary items). We have already established that Mr Khumalo's estate has decreased by R5 000. Themba is liable for the lesser of these two amounts, which is R1 200.

ACTIVITY 15.2

Use the same facts as in activity 15.1 above. Would it have made any difference to your answer if Themba had not sold the motorcycle, but he had been involved in an accident on 20 March, as a result of which the value of the motorcycle decreased to R1 000?

FEEDBACK

When is the enrichment calculated?

The answer is the same as in 15.1 above.

How much is the enrichment?

The answer is the same as in 15.1 above, except that Themba has not sold the motorcycle. He was involved in an accident.

What if the circumstances change?

Themba was involved in an accident before the action was instituted, which means that we have to determine the decreased value. The amount of Themba's enrichment (the amount by which his estate has increased) is thus R1 000 (the value of the motorcycle after the accident). We have already established that Mr Khumalo's estate has decreased by R5 000. Themba is liable for the lesser of these two amounts, which is R1 000.

ACTIVITY 15.3

Use the same facts as in activity 15.1 above. Would it have made any difference to your answer if Mr Khumalo had already instituted the action on 5 March, instead of 5 April? Explain briefly.

■ FEEDBACK*When is the enrichment calculated?*

You already know that the calculation is based on that moment when the other party instituted his or her claim against the minor. It would indeed have made a difference to the set of facts if this had occurred on 5 March. On that date Themba had not yet sold the motorcycle.

How much is the enrichment?

Remember that we work with two amounts – the amount by which Themba's estate is **increased**, and the amount by which the estate of Mr Khumalo is **decreased**. At the time of institution of the action Themba was thus enriched by R5 000 (the actual value of the motorcycle which was still in his possession) and Mr Khumalo's estate was decreased by the same amount. Themba is liable for R5 000.

What if the circumstances change?

Themba has not lost the performance he received, its value has not decreased, and Themba has not sold it. This third principle thus does not apply.

ACTIVITY 15.4

Use the same facts as in activity 15.1 above. Would it have made any difference to your answer if Themba had spent R1 200 on his accommodation, but the remaining R800 on a television set (worth R800), instead of on liquor and refreshments? Explain briefly.

■ FEEDBACK*When is the enrichment calculated?*

The answer is the same as in 15.1 above.

How much is the enrichment?

The answer is the same as in 15.1 above.

What if the circumstances change?

Themba spent R1 200 on his accommodation, a **necessary** expense. He has been unjustifiedly enriched by this. The rest of the money (R800) was spent on a luxury item – a television. If a minor had sold the performance before institution of the action and purchased luxury items with the proceeds, he or she would be liable for the **value** of whatever still remained, in this case R800. The answer would thus be different to activity 15.1, where nothing remained of the luxury items he had purchased. Themba's enrichment is R2 000 (R1 200 [the amount spent on necessary items] plus R800 [the value of the television set]). The amount by which Mr Khumalo's estate was decreased is R5 000 (the actual value of the motorcycle). Themba is therefore liable for R2 000, the lesser of these two amounts.

15.3 IN A NUTSHELL

In order to understand this section of the work, keep the following in mind:

- A minor is unjustifiedly enriched if his or her estate has increased in value while the other party's estate has decreased in value, but there is no legal ground for this increase. An example of a legal ground would be where a minor buys something and pays for it. However, if the minor receives a performance and does not pay for it while the other party expects payment, there is no legal justification.
- When you have to calculate the amount of the minor's unjustified enrichment, you have to bear in mind the three principles mentioned in 15.2.2 above.

TEST YOURSELF

- (1) What do you understand by the concept "unjustified enrichment"?
- (2) How is the amount calculated by which a minor's estate is enriched when a minor contracts without the necessary assistance, and when the other party has already performed?

You should be able to apply the principles you learnt in this learning unit to problem-type questions. Question 3 is an example of a problem-type question.

- (3) Suppose that Peter, a 16-year-old boy, buys a motorbike for R2 000 from Dan, an adult, without the necessary assistance of his guardian. At the time of concluding the contract, the motorbike is worth R1 500. Dan delivers the motorbike to Peter, but Peter refuses to pay for it. On 3 March, Peter sells the motorbike for R1 000. He spends R500 of the proceeds on clothes and food, and R500 on a holiday at the coast. On 20 March, Dan institutes a claim against Peter on the ground of unjustified enrichment.
 - (a) What amount is Peter liable for?
 - (b) Suppose that Peter sold the motorbike on 30 March. What amount is he liable for?
 - (c) Suppose that Peter was involved in an accident on 10 March, and the motorbike is now worth R800. What amount is he liable for?
 - (d) Suppose that the motorbike was stolen on 10 March. What amount is Peter liable for?

CONCLUSION

In this learning unit we dealt with the legal principles regarding a minor's liability on the ground of unjustified enrichment, against a party with which the minor has contracted without assistance.

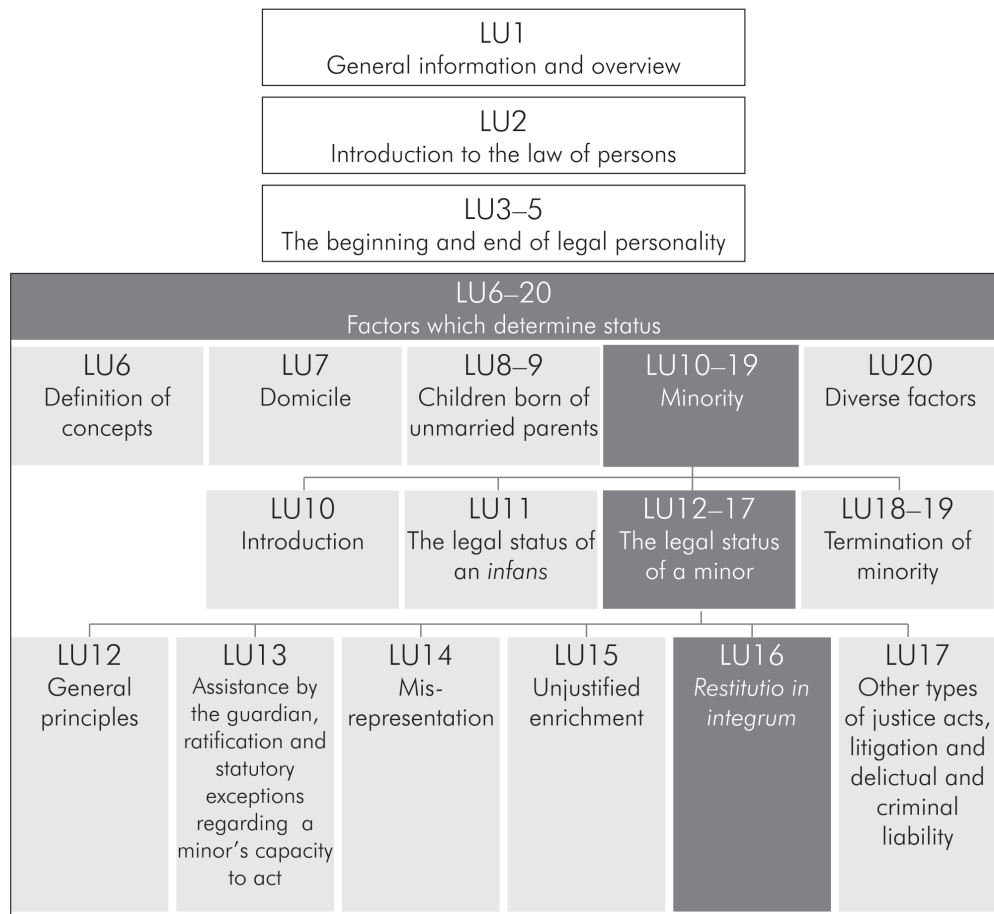
In Learning units 14 and 15 we considered the remedies available to the adult contracting party who has contracted with a minor who acted **without assistance** (in other words where there was no valid contract). These remedies are the delictual claim on the ground of the minor's misrepresentation and the claim based on unjustified enrichment.

In the next learning unit we consider *restitutio in integrum*. This remedy is available to a minor who acted **with assistance**, or whose contract has been **ratified** (in other words where there is a valid contract).

LEARNING UNIT 16

The minor's contractual capacity – *restitutio in integrum*

Module map 16



CONTENTS

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16.3 IN A NUTSHELL	114

PRESCRIBED MATERIAL TO STUDY

- Heaton pages 97 to 99 (“(vii) *Restitutio in integrum*”)

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) explain what *restitutio in integrum* is
- (2) explain how *restitutio in integrum* operates in the case of a minor's contract
- (3) apply the principles that relate to *restitutio in integrum* to a given set of facts

16.1 INTRODUCTION

In the previous two learning units, we explained the legal position where a minor has entered into an **invalid** contract. In this learning unit, we deal with *restitutio in integrum*, which is a remedy that is available to the minor where there is a **valid** contract.

16.2 *RESTITUTIO IN INTEGRUM*

Prejudicial contracts concluded with assistance can sometimes be set aside

Restitutio in integrum is an extraordinary legal remedy whereby a minor can **escape contractual liability**. Both parties are placed in the position they would have been in if the contract had never been entered into. You will come across a discussion of this remedy in Heaton pages 97 to 99 (vii). You must make sure that you master this section thoroughly. There are two requirements for this remedy to be applicable:

- there must be a valid contract, i.e. the minor must have contracted with the assistance of his or her guardian (or the guardian contracted on his or her behalf), and
- the contract must have been **prejudicial** to the minor at the moment it was entered into.

ACTIVITY 16.1

Study Heaton pages 97 to 99 (vii) and then answer the following questions:

- (1) What does *restitutio in integrum* mean?
- (2) List the two requirements for the application of this remedy.
- (3) In what circumstances is *restitutio in integrum* not available to the minor?
- (4) May an emancipated minor rely on *restitutio in integrum*?
- (5) What can be reclaimed by this remedy?

- (6) Who can seek restitution?
- (7) When does the remedy prescribe?

■ FEEDBACK

- (1) *Restitutio in integrum* means that the *status quo ante* must be restored, in other words there must be a return to the previous condition, that is the position which applied before the contract was concluded.
- (2) The two requirements for this remedy are, first of all, that the minor should have concluded the contract with the assistance of his or her guardian or that the guardian should have concluded the contract on behalf of the minor, and secondly that the contract should have been prejudicial to the minor at the moment it was made.
- (3) *Restitutio in integrum* cannot be relied upon to escape the bonds of marriage or criminal or civil liability. Neither is it available to a minor who fraudulently represented himself or herself as a major or in some other fraudulent way persuaded the other party to enter into a contract.

Lastly, a minor who has ratified the contract after attaining majority is barred from using the remedy.

- (4) It is uncertain whether an emancipated minor may apply for *restitutio in integrum*. However, there seems to be no reason why he or she should be denied the remedy.
- (5) The purpose of this remedy is to place both parties in the position they would have been in had they never entered into the contract. Each party must thus return everything received under the contract, as well as the proceeds or any advantage derived from the contract. He or she must also compensate the other party for any loss that party has suffered as a result of the contract.
- (6) Before the minor attains majority, the minor's guardian may apply for restitution on behalf of the minor, or the minor may do so himself or herself with the assistance of his or her guardian. If the guardian fails to assist the minor, a *curator ad litem* may be appointed to assist the minor.

The minor may also wait until he or she has reached majority and then apply for the remedy himself or herself, taking into account the possibility of prescription of the claim.

- (7) The claim based on *restitutio in integrum* prescribes, at most, three years after the date upon which the minor became a major, but prescription cannot occur less than one year after the minor became a major.

16.3

IN A NUTSHELL

By now, you should be able to work out when a minor will be contractually liable and when not. You should also be able to decide which remedies are available to the parties to the contract. Just to refresh your memory:

- The general rule is that a minor cannot be liable to fulfil a contract, unless he or she is assisted by a guardian.
- A minor who enters into a contract without his or her guardian's assistance cannot incur contractual liability, but the adult who entered into the contract still has to perform. In such a case, the **adult** has two remedies, namely misrepresentation or unjustified enrichment.

- A minor who enters into a contract with his or her guardian's assistance does incur contractual liability, but if the contract is prejudicial to the minor at the moment it was entered into, the **minor** has a remedy, namely *restitutio in integrum*.

Make sure that you understand these principles. Once you do, test your knowledge with the questions below.

TEST YOURSELF

- (1) Discuss *restitutio in integrum* as an extraordinary legal remedy whereby a minor can escape contractual liability.

You should be able to apply the principles you learnt in this study unit to problem-type questions. Question 2 is an example of a problem-type question:

- (2) Stephen, a minor, buys a surfboard from Harry, an adult, for R3 000,00. Stephen's father is unable to go with him to buy the surfboard as he has a meeting at work, but he tells Stephen that he may purchase the surfboard, as long as it does not cost more than R4 000,00. A week later, Stephen discovers that the surfboard is of inferior quality, and that he should not have paid more than R1 000,00 for it. Discuss in detail whether, and if so, under which circumstances a court could set aside this contract between Stephen and Harry.

LET US RECAP

Before we carry on to the next learning unit, it is important that you are able to apply all the principles you have learnt in study units 14 to 16 to problem-type questions. You should be able to identify which remedy is relevant to the question. Consider the facts below:

Thomas is a 17-year-old minor. He enters into a contract with Sibongile, who is 25 years old, to buy a laptop. They agree that Thomas will pay R7 000 for the laptop. Use these facts and answer each of the following questions:

- (1) When they conclude the contract, Thomas takes his guardian, Maria along. Maria assists him to enter into the contract. They pay for the laptop, but the following day Thomas finds out that the laptop is actually worth R5 000.
 - a. Is there a valid contract?
 - b. Is Sibongile liable to Thomas? If so, on what basis and for which amount? Briefly explain.
- (2) Thomas knows that Maria does not want him to have a laptop. He does not tell her about the contract, but tells Sibongile that he is 19 years old, and shows her a forged student card to convince her. Sibongile believes him and gives him the laptop. Thomas pays her a deposit of R500. He then refuses to pay the rest of the money.
 - a. Is there a valid contract?
 - b. Is Thomas liable to Sibongile? If so, on what basis?

- (3) Thomas does not pretend to be a major, but he enters into the contract with Sibongile without the assistance of Maria. He knows that Maria will not allow him to keep the laptop, so the day after he receives it, he sells it to his friend for R3 000. He uses R900 of the money to take his girlfriend out for dinner, R700 to buy himself Levi's jeans worth R600, and he puts the other R1 400 in his drawer to use at a later date. Three days later, Sibongile takes legal steps to get the money from Thomas.
- a. Is there a valid contract?
 - b. Is Thomas liable to Sibongile? If so, what is the amount that she may claim from him? Explain how this amount is calculated.

CONCLUSION

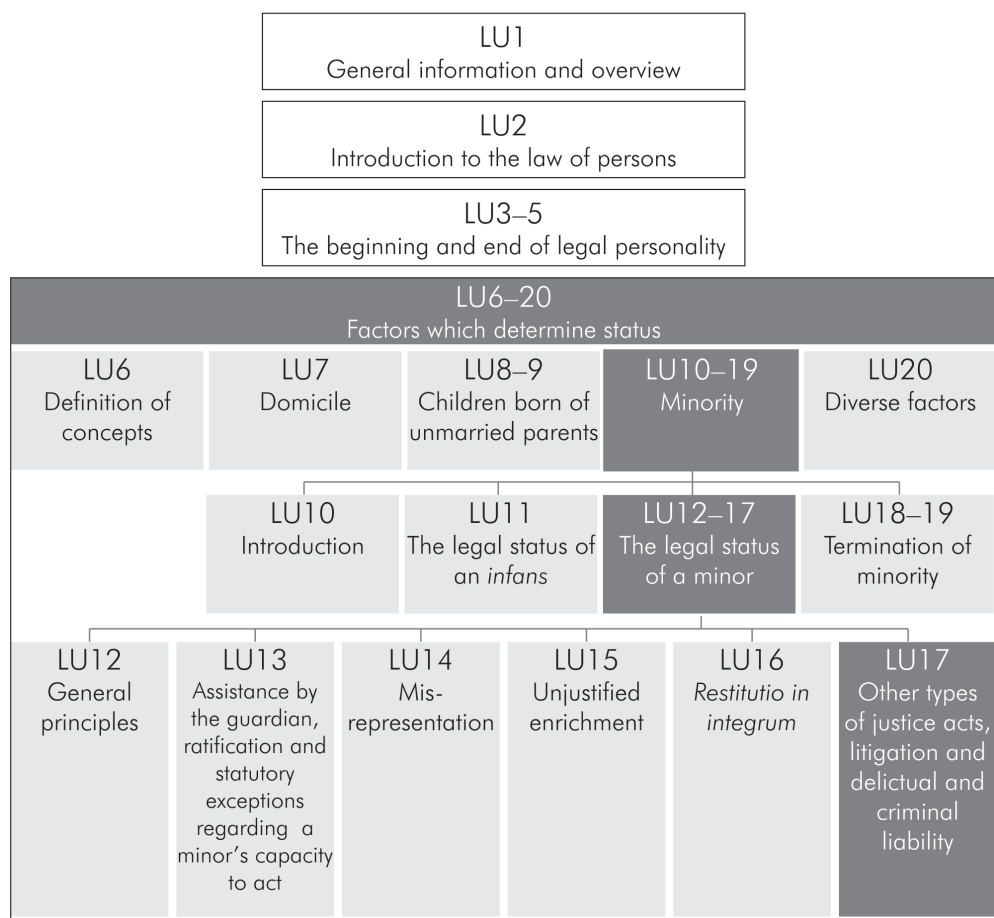
In this learning unit you studied the legal principles applicable to *restitutio in integrum*. Before you carry on to the next learning unit, make very sure that you understand when a minor has entered into a valid contract and when the contract is not valid. Also make sure that you understand the different remedies that are applicable when a minor enters into a contract.

In the next learning unit we look at the minor's capacity in regard to other types of juristic acts, litigation and delictual and criminal liability.

LEARNING UNIT 17

The minor's capacity in respect of other types of juristic acts, litigation and delictual and criminal liability

Module map 17



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PRESCRIBED MATERIAL TO STUDY

- Heaton pages 99 to 106 ((b)–(e), 6.4.2–6.4.4))

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) explain how minority affects a person's capacity to make agreements other than contracts
- (2) indicate what effect minority has on a person's capacity to make a will
- (3) indicate what effect minority has on a person's capacity to witness a will
- (4) explain what effect minority has on a person's capacity to marry
- (5) explain a minor's capacity to consent to medical treatment and operations
- (6) explain the limitations on the offices a minor may hold
- (7) explain the legal position with regard to the minor's capacity to litigate
- (8) explain whether minors are liable for the crimes and delicts they commit
- (9) apply these principles to a given set of facts

17.1 INTRODUCTION

In this learning unit we focus on the minor's capacity in respect of other types of juristic acts, litigation, delictual liability and criminal liability.

17.2 THE MINOR'S CAPACITY TO MAKE OTHER AGREEMENTS

This topic is dealt with in Heaton on page 99. In this section, the author explains whether a minor can enter into an agreement with someone else by which the minor's debt is extinguished (there is thus **release** from the debt owed **by** the minor). She also explains the position when the minor enters into an agreement with another by which the latter's debt to the minor is extinguished (there is thus **release** from the debt owed **to** the minor).

Release from a debt should be distinguished from **performance** of an obligation by the minor. The author indicates whether a minor can render performance without his or her guardian's assistance.

Definition – real agreement

You should also know the legal position in the case of real agreements. A **real agreement** is an agreement by which a right, for instance the right of ownership, is transferred. You should distinguish between real agreements by which a right is transferred to a minor, and real agreements by which a minor attempts to transfer a right to another person

ACTIVITY 17.1

Indicate, by underlining the correct option, whether the following agreements are valid or unenforceable:

- (1) Maria, a minor, owes Mrs King, an adult, R250. Without her parent's or guardian's assistance, Maria concludes an agreement with Mrs King in terms of which Maria's debt to Mrs King is extinguished.
(Valid/Unenforceable)
- (2) Mr Molefe, an adult, owes Peter, a minor, R1 000. Without his parent's or guardian's assistance, Peter concludes an agreement with Mr Molefe in terms of which Peter extinguishes Mr Molefe's debt to him.
(Valid/Unenforceable)
- (3) Ben, a minor, owes Mr Smith, an adult, R500. Without his parent's or guardian's assistance, Ben pays his debt to Mr Smith.
(Valid/Unenforceable)

FEEDBACK

A minor can enter into a valid agreement with someone else by which the minor's debt is extinguished (thus there is release from the debt owed by the minor). The agreement in (1) is therefore valid.

However, a minor cannot, without assistance, enter into a valid agreement with another by which the latter's debt to the minor is extinguished (thus there is release from the debt owed to the minor). The agreement in (2) is therefore unenforceable.

A minor cannot perform in terms of an obligation without his or her guardian's assistance. The agreement in (3) is thus also unenforceable (Heaton p 99).

17.3 THE MINOR'S CAPACITY TO MAKE A WILL AND WITNESS A WILL

Heaton page 99 touches on this topic. You must study that brief explanation.

17.4 MARRIAGES AND CIVIL UNIONS

Heaton pages 100 to 102 deals with the minor's capacity to marry. She explains that minors usually require their parents' consent in order to get married. However, minors must sometimes also obtain the consent of the Minister of Home Affairs. In certain circumstances, consent may be granted by the Commissioner of Child Welfare or the High Court. The author also explains the effect of absence of consent to marry.

17.5 THE MINOR'S CAPACITY TO CONSENT TO MEDICAL TREATMENT AND OPERATIONS

Heaton indicates on pages 102 to 104 that, once he or she reaches certain ages, a minor may independently consent to medical treatment and even surgery. In terms of section 129 of the Children's Act 38 of 2005, a minor who is 12 years old may independently consent to his or her own medical treatment (or the medical treatment of his or her child), provided that the minor is of sufficient maturity and has "the mental capacity to understand the benefits, risks, social and other implications of the treatment". In the case of surgery, a minor may consent to the performance of a surgical operation on him or her (or his or her child) if the minor is over the age of 12 years, has sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation, and the minor is duly assisted by his or her parent or guardian. The minor must thus have the **assistance** of his or her parent or guardian, although the parent or guardian's consent is not required. The minor's parent's or guardian's consent is required if the minor is under the age of 12 years, or over that age but is of insufficient maturity or is unable to understand the benefits, risks and social implications of the treatment or operation.

17.6 THE MINOR'S CAPACITY TO HOLD CERTAIN OFFICES AND TO PERFORM CERTAIN FUNCTIONS

This is dealt with in Heaton on page 104 and 105. Note the following:

- the question of whether a minor can be the director of a company or mutual bank
- the question of whether a minor can be the trustee of an insolvent estate
- the question of whether a minor can be the executor of a deceased estate
- the question of whether an emancipated minor can hold these positions (Learning unit 19 covers emancipation)
- the question of whether a minor who has attained majority status through marriage (see Learning unit 18), can hold these positions

- the question of whether a minor can be someone else's guardian
- the question of whether a minor can be someone's agent

17.7

Locus standi = capacity to litigate in a civil suit

THE MINOR'S CAPACITY TO LITIGATE

This matter is dealt with in Heaton on pages 105 and 106. It is often said that a minor has no *locus standi in iudicio*, in other words that the minor does not have the capacity to be a party (plaintiff, defendant, applicant or respondent) in a civil (private law) lawsuit. This statement is not completely true, however. A minor has limited capacity to litigate in most private-law lawsuits. Therefore, a minor himself or herself can sue or be sued with his or her guardian's assistance, or his or her guardian can take up the case on his or her 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. You should note that in *Vista University, Bloemfontein Campus v Student Representative Council*, *Vista University* 1998 (4) SA 102 (O) the court relied on its powers as upper guardian of all minors and itself assisted the minors in the particular litigation.

Minor has capacity to litigate if *venia agendi* is granted

However, in certain **exceptions**, a minor has full capacity to litigate. The only exception you need know about is the following: if the High Court, as upper guardian of all minors, grants a minor *venia agendi* (permission to conduct a suit), the minor does not require assistance at the proceedings. *Venia agendi* is granted only if the minor has reached a relatively advanced level of intellectual development.

The above applies only to private-law proceedings. In other **civil cases**, the minor thus requires the assistance of his or her guardian. You must note that a minor may be charged **criminally** without the assistance of his or her guardian. However, the parent or guardian must be present at the court proceedings if the child is younger than 18.

17.8

Delict is distinguished from crime

THE MINOR'S CAPACITY TO INCUR DELICTUAL AND CRIMINAL LIABILITY

This section is dealt with in Heaton on page 106. In further legal studies you will learn precisely what the requirements for a delict and a crime are. For our present purposes, it is sufficient for you to know that a delict is a wrongful (i.e. in conflict with legal norms), culpable act causing damage to another, and a **crime** is an act prohibited by the law (whether by statute or by the common law).

Accountability = capacity of fault

It is a requirement of both legal concepts that the perpetrator must be at **fault**, that is he or she must have acted intentionally or negligently. The capacity to be at fault is known as **accountability**. However, a minor's

capacity to be at fault – his or her **accountability** – differs from that of adults. Obviously this affects the minor's delictual and criminal liability. The reason is that a person can be accountable only if he or she has the mental facilities to

- differentiate between right and wrong
- act accordingly

There is a difference between delictual accountability and criminal accountability. Criminal accountability is governed by the Child Justice Act 75 of 2008. Heaton fully explains the different ages for both delictual and criminal accountability. Take note of these.

Capacity to act is distinguished from accountability

Remember that **capacity to act** (the capacity to perform valid juristic acts) has nothing to do with accountability. We have already seen (in Learning unit 10) that a person must be able to understand the nature, extent and consequences of his or her acts before he or she can have capacity to act. However, accountability concerns the capacity to distinguish between right and wrong. Therefore, a minor may be accountable even though he or she does not have the capacity to act.

ACTIVITY 17.2

Study Heaton pages 106 and 17.8 above and then answer the following questions:

- (1) Distinguish between capacity to act and accountability.
- (2) Fill in the missing words:

Regarding delictual accountability, it is presumed that minors between the ages of 7 and 14 years are, and it is presumed that minors between the ages of 14 and 18 years are

- (3) Fill in the missing words:

A minor below the age of years cannot be held accountable at all for a crime he or she commits, while a child between the ages of and years is presumed to be criminally unaccountable and a minor over the age of years is criminally accountable

FEEDBACK

Capacity to act refers to the capacity to enter into valid juristic acts. In order to have capacity to act, a person must be able to understand the nature, extent and consequences of his or her acts. However, accountability concerns the capacity to distinguish between right and wrong, and act accordingly (see 17.8 above).

It is **rebuttably** presumed that minors between the ages of 7 and 14 years are **unaccountable**. It is thus accepted that it may emerge from the evidence that such a child is accountable. It is **rebuttably** presumed that minors between the ages of 14 and 18 years are **accountable**. It may thus emerge from the evidence that they are unaccountable (Heaton p 106).

A minor below the age of **ten** years cannot be held accountable at all for a crime he or she commits, while a child between the ages of **ten** and **fourteen** years is

presumed to be criminally unaccountable and a minor over the age of **fourteen** years is criminally accountable (Heaton p 106).

TEST YOURSELF

- (1) How does minority affect a minor's capacity to come to an agreement with someone which extinguishes this person's debt to the minor?
- (2) How does minority affect a minor's capacity to come to an agreement with someone which extinguishes the minor's debt to this person?
- (3) How does minority affect a minor's capacity to perform in terms of an agreement?
- (4) How does minority affect a person's capacity to conclude a real agreement?
- (5) How does minority affect a person's capacity to:
 - (a) make a will?
 - (b) act as a witness to a will?
- (6) How does minority affect a person's capacity to marry? What is the effect of absence of consent to marry?
- (7) At what age may a minor independently consent to medical treatment?
- (8) At what age may a minor independently consent to an operation being performed on himself or herself?
- (9) What restrictions are there on the offices a minor may hold?
- (10) Explain fully the legal position with regard to the minor's capacity to litigate.
- (11) What do you understand by "accountability"? What are the requirements for accountability?
- (12) Are minors liable for crimes and delicts committed by them? Explain your answer.

CONCLUSION

In this learning unit we looked at how age affects a minor's capacity to conclude certain types of juristic acts, and at the effect of age on a person's capacity to litigate.

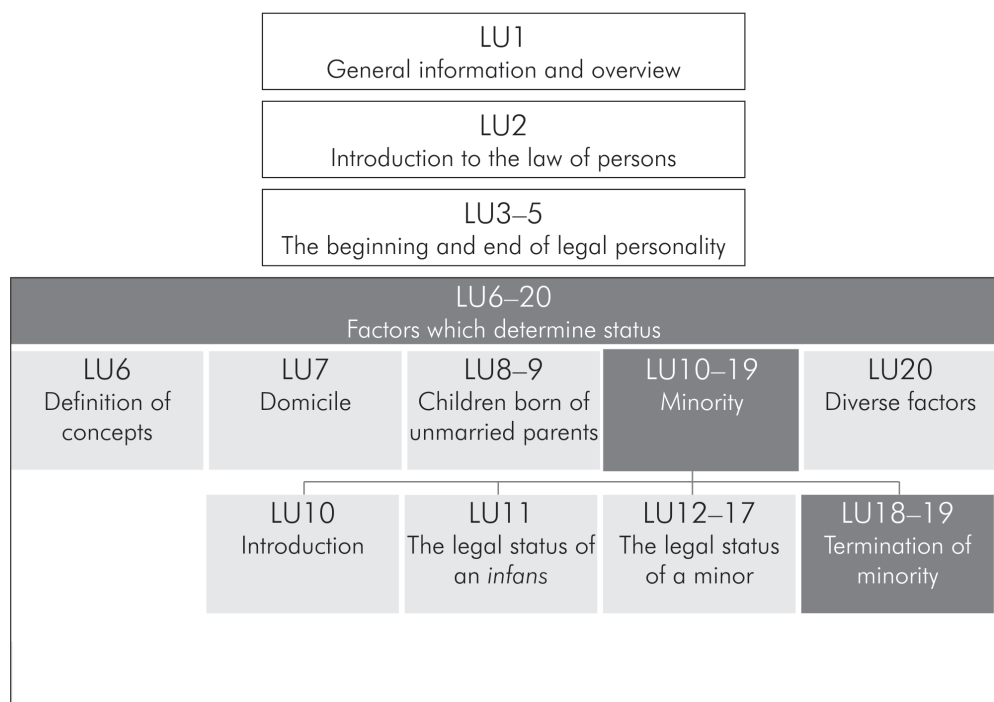
In the next two learning units (Learning units 18 and 19) we look at the termination of minority.

Learning unit 18 deals with the termination of minority by means of attainment of the prescribed age, marriage, *venia aetatis* and release from tutelage.

LEARNING UNIT 18

Termination of minority – attainment of the prescribed age, marriage, *venia aetatis* and release from tutelage

Module map 18



CONTENTS

18.1 INTRODUCTION	125
18.2 ATTAINMENT OF THE PRESCRIBED AGE	125
18.3 MARRIAGE OR A CIVIL UNION	127
18.4 <i>VENIA AETATIS</i> AND RELEASE FROM TUTELAGE	127

PRESCRIBED MATERIAL TO STUDY

- Heaton pages 107 to 109 (6.5.1–6.5.3)

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) explain how minority is terminated by attainment of the prescribed age
- (2) explain how minority is terminated by marriage or a civil union
- (3) apply the principles dealing with termination of minority to a given set of facts, with reference to authority

18.1 INTRODUCTION

This learning unit deals with the ways in which minority is terminated. In this learning unit we will consider termination of minority by attainment of the prescribed age, marriage or a civil union. In Learning unit 19 we will consider termination of minority by emancipation.

18.2 ATTAINMENT OF THE PRESCRIBED AGE

In this respect you should study Heaton pages 107 to 108 (6.5.1).

Previously, the age of majority was fixed at 21 years in terms of section 1 of the Age of Majority Act 57 of 1972.

The Children's Act 38 of 2005, a single, comprehensive children's statute, *inter alia* repealed and replaced the Age of Majority Act. The **age of majority** was lowered in section 17 to **18 years** for all children in South Africa on 1 July 2007.

The Children's Act does not have retroactive effect, in other words it does not retroactively affect rights that vested in a person who was younger than 21 before it came into operation on 1 July 2007. This principle was confirmed in *Malcolm v Premier, Western Cape Government* NO 2014 (3) SA 177 (SCA). This case dealt with the prescription of a minor's claim. Keep in mind that, normally, prescription of claims takes place three years after the date on which the claim arises. In the case of minors, however, prescription is postponed until one year after the minor becomes a major.

Carefully study the discussion of the *Malcolm* case in Heaton page 107 before you attempt to do the activity below.

ACTIVITY 18.1

This activity will help you understand the fact that the Children's Act does not have retroactive effect, with reference to the prescription of a minor's claim.

- (1) Malcolm was born in June 1987. When he was six years old, in 1993, he contacted Hepatitis B. When did prescription of Malcolm's claim take place? Refer to authority for your answer.
- (2) Would it have made a difference to your answer if Malcolm had been born in June 2008? Explain.

FEEDBACK

- (1) Prescription of Malcolm's claim took place one year after he turned 21, as this was the position before section 17 of the Children's Act came into operation on 1 July 2007. It was confirmed by the Supreme Court of Appeal in *Malcolm v Premier, Western Cape Government* 2014 (3) SA 177 (SCA) that the lowering of the age of majority by section 17 of the Children's Act did not affect periods of prescription that were running before 1 July 2007 (Heaton p 107).
- (2) If Malcolm was born in July 2008, prescription of his claim will take place one year after he turns 18, as the Children's Act lowered the age of majority to 18 years on 1 July 2007, before Malcolm was born (Heaton p 107).

CUSTOMARY LAW

In customary law, there is no set age at which majority is obtained. Rather, attainment of majority depends on various factors, such as the child's physical and intellectual maturity, initiation, marriage, and the fact that the child has established a separate household.²⁷

Different communities have different initiation ceremonies, as can be seen from the following examples:²⁸

- A Xhosa boy acquires the status of a man when he goes through an initiation ceremony, which goes hand in hand with circumcision (see 10.2.2 above, where we discuss the provisions of the Children's Act that deal with circumcision).
- The status of a Xhosa girl is raised to that of an adult when she reaches puberty and goes through a ceremony called *intonjane*.
- Zulu boys do not go through a specific ceremony to mark the transition from boyhood to adulthood. Their transition is a gradual process.

When there is a legal conflict, for example determining a child's contractual capacity, or his or her capacity to marry without parental consent, the statutory age of majority will prevail.²⁹

27. Kruger and Skelton (eds) 145.

28. Mosikatsana "Children's rights and family autonomy in the South African context: A comment on children's rights under the final Constitution" 1998 *Michigan Journal of Race and Law* 347.

29. Bekker "Commentary on the impact of the Children's Act on selected aspects of the custody and care of African children in South Africa" 2008 *Obiter* 398–399.

18.3 MARRIAGE OR A CIVIL UNION

On page 108 (6.5.2), Heaton explains that a person who enters into a valid civil or customary marriage before turning 18, becomes a major for all purposes. She also explains what happens when the marriage is dissolved by death or divorce before the person reaches the age of 18 years. You must study this section.

18.4 VENIA AETATIS AND RELEASE FROM TUTELAGE

On pages 108 and 109 (6.5.3), Heaton explains that *venia aetatis* is the authority that the head of state had at common law to grant a permission to act as a major. She indicates why *venia aetatis* can no longer be granted. She also explains that the so-called “release from tutelage” can still be granted by the High Court as upper guardian of all minors. You must study this section.

ACTIVITY 18.2

- (1) Distinguish between *venia aetatis* and release from tutelage.
- (2) What is the effect of these two legal concepts?

FEEDBACK

- (1) *Venia aetatis* refers to the concession to act as a major, granted to the minor in the common law, by the sovereign. Release from tutelage refers to the authority the courts had to confer full capacity to act on a minor. The 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).
- (2) The effect of *venia aetatis* is to make the minor a major in law with the exception that he or she cannot alienate his or her immovable property or burden it with a mortgage, unless this capacity was expressly conferred. On page 108 Heaton submits that *venia aetatis* can no longer be granted, but that release from tutelage, which has the same practical effect as that of *venia aetatis*, might still be possible. She then explains that the judicial power embodied in section 28 of the Children’s Act may well replace release from tutelage (Heaton pp 108–109).

TEST YOURSELF

- (1) What is the prescribed age of majority? Give authority for your answer.
- (2) The Children’s Act does not have retrospective effect. With reference to an example, explain how this fact affects prescription of a minor’s claim.
- (3) Explain how majority is attained in customary law.
- (4) Does minority revive if the marriage of a minor is ended by death or divorce?
- (5) What effect does annulment of a voidable marriage have on minority?
- (6) What effect does a void marriage have on minority?
- (7) What do you understand by the concept of “*venia aetatis*”?
- (8) Does *venia aetatis* still exist in South African law? Explain your answer.
- (9) What do you understand by the concept of “release from tutelage”?

- (10) In South African law, can minority still be terminated by release from tutelage?

CONCLUSION

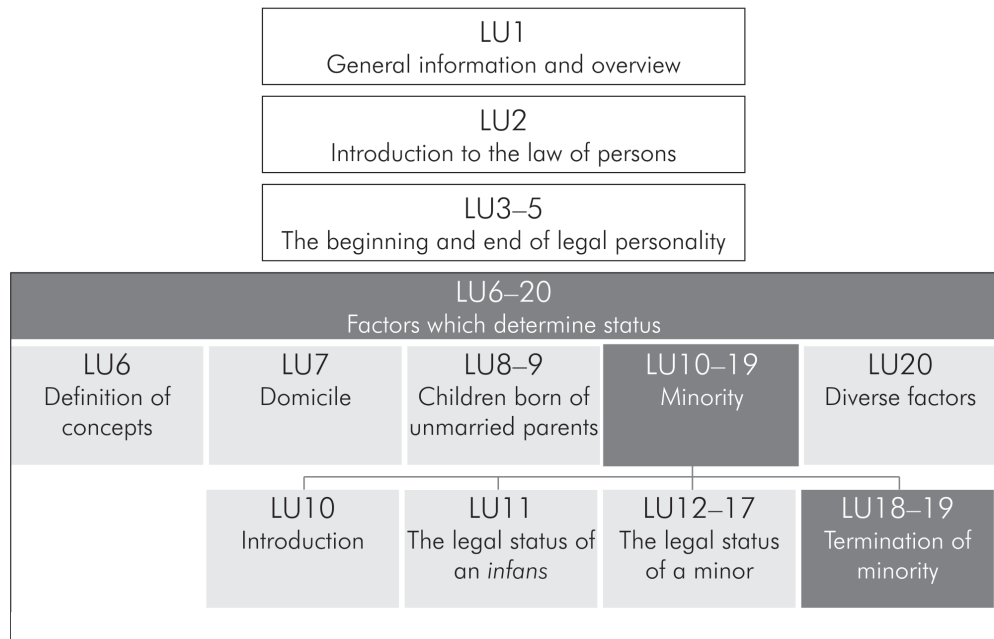
This learning unit dealt with the termination of minority through the attainment of the prescribed age, marriage, *venia aetatis*, and release from tutelage.

In the next learning unit we look at the termination of minority through emancipation by a parent or guardian.

LEARNING UNIT 19

Termination of minority – emancipation

Module map 19



CONTENTS

19.1 INTRODUCTION	130
19.2 EMANCIPATION	130

PRESCRIBED MATERIAL TO STUDY

- Heaton pages 109 to 111

LEARNING OUTCOMES

Working through this learning unit should enable you to explain

- (1) the concept of “emancipation”
- (2) the difference between express and implied (tacit) emancipation
- (3) who must agree to the emancipation of the minor
- (4) the circumstances that the court can take into consideration
- (5) the effect of emancipation on the minor’s capacity to act
- (6) the circumstances under which an emancipated minor can claim *restitutio in integrum*
- (7) the circumstances under which an emancipated minor has the capacity to litigate
- (8) the circumstances under which a guardian can revoke emancipation
- (9) on whom the onus of proving tacit emancipation rests

19.1 INTRODUCTION

In this learning unit you will realise that it is not possible to study the learning units in isolation. Although this is a short learning unit, you have to keep in mind several concepts that you have already learnt about with regard to the minor, such as capacity to act (Learning unit 13), *restitutio in integrum* (Learning unit 16), and capacity to litigate (Learning unit 17), if you want to understand emancipation. Heaton explains why you need to have knowledge of several legal concepts if you want to consider the emancipation of a minor on pages 110 to 111.

19.2 EMANCIPATION

Emancipation is dealt with in Heaton on pages 109 to 111. She explains that emancipation takes place where a guardian grants a minor the freedom to enter into contracts independently. She also explains who is able to emancipate a minor. Thereafter, she considers the position where it is unclear whether emancipation has taken place, to what extent, whether emancipation may be revoked, and how emancipation affects other abilities of the minor. You must study this section, especially with a view to the outcomes set out above.

ACTIVITY 19.1

In a short paragraph, distinguish between express and implied (tacit) emancipation.

■ FEEDBACK

Express emancipation refers to a declaration before the court by the parent or guardian that he or she had emancipated his or her child from parental authority. This form of emancipation was later replaced by *venia aetatis* (see Learning unit 18). Implied emancipation occurs when a minor lives apart from his or her parents and manages his or her own undertaking. It is important to understand that this form of emancipation (implied emancipation) can, in turn, take place either expressly or tacitly (Heaton p 109).

ACTIVITY 19.2

Briefly indicate which factors will be used to determine whether a minor has been emancipated.

■ FEEDBACK

Whether a minor has been emancipated is a question of fact, and it depends on the facts and circumstances of each case. In case law, the courts have considered the following factors in order to determine whether emancipation has taken place: that the minor lives on his or her own and manages his or her own business; the minor's age; the relationship between the minor and his or her guardian; the nature of the minor's occupation; the length of time for which the occupation has been carried on.

ACTIVITY 19.3

Indicate how the different forms of emancipation will affect a minor's capacity to act.

■ FEEDBACK

The issue is whether the minor has been emancipated regarding all contracts, or only to conclude contracts dealing with his or her occupation or business. This question has not been authoritatively decided. The extent of the emancipation is a question of fact depending on the circumstances of each case.

A general emancipation can exist with reference to all contracts (not only contracts connected to the minor's occupation or business), but it should then be clearly proved. If the minor's parent or guardian has given him or her "complete freedom of action with regard to his mode of living and earning his livelihood", he or she is emancipated for all intents and purposes, except alienation or encumbrance of immovable property and marriage. However, if a guardian has emancipated a minor only for matters connected to his or her business, his or her capacity to act is restricted to matters connected with that business.

TEST YOURSELF

- (1) What do you understand by emancipation?
- (2) What do you understand by the terms "express emancipation" and "implied emancipation"?
- (3) Who must agree to the emancipation of a minor?

- (4) What circumstances do the courts take into consideration when they have to decide whether a minor is emancipated?
- (5) Is emancipation applicable only to transactions related to the minor's trade, occupation or business, or does it also apply to juristic acts which fall beyond the scope of such undertakings?
- (6) Can an emancipated minor claim *restitutio in integrum*? Explain your answer briefly.
- (7) Does an emancipated minor have capacity to litigate?
- (8) Can the minor's guardian revoke emancipation? Explain your answer with reference to authority.
- (9) On whom does the onus of proving tacit emancipation rest?

CONCLUSION

In this learning unit we looked at emancipation, which is the freedom to contract independently, granted to a minor by his or her parent or guardian. This was the last learning unit to deal with age. Minority is an incredibly important section of this module. Before you continue with the next learning unit, make sure that you understand all the principles that relate to a minor, his or her status and his or her capacities.

In the following learning unit we look at the effect of certain other factors on a person's status.

LEARNING UNIT 20

Diverse factors which affects status

Module map 20

LU1 General information and overview				
LU2 Introduction to the law of persons				
LU3–5 The beginning and end of legal personality				
LU6–20 Factors which determine status				
LU6 Definition of concepts	LU7 Domicile	LU8–9 Children born of unmarried parents	LU10–19 Minority	LU20 Diverse factors

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PRESCRIBED MATERIAL TO STUDY

- The prescribed study material for the work in this learning unit is set out below

LEARNING OUTCOMES

Working through this learning unit should enable you to

- (1) explain how mental illness affects a person's status
- (2) explain how a person's inability to manage his or her affairs affects his or her capacity to act
- (3) explain how intoxication affects a person's capacity to act

- (4) explain what procedure is followed to declare a person a prodigal, and how a declaration of prodigality affects a person's status
- (5) briefly explain how insolvency affects a person's status

20.1 INTRODUCTION

In this learning unit we explain how certain factors affect a person's status. In Learning unit 6 you learnt that a person's status refers to his or her legal capacity, capacity to act, capacity to litigate, and capacity to be held accountable for crimes and delicts. In this learning unit, we refer to the effect of certain factors (mental illness, inability to administer affairs, influence of alcohol and drugs, prodigality, and insolvency) on a person's legal status while such a factor persists.

20.2 MENTAL ILLNESS

STUDY

- Heaton pages 113 to 118 (7.2–7.5, excluding 7.1)
- Heaton 124–125 (7.6.6)

READ

- Heaton page 113 ("7.1 Introduction")

20.2.1 Introduction

On page 113 Heaton explains how the law protects the mentally ill person from exploitation. The author then discusses how mental illness affects the person's capacity to act and litigate.

20.2.2 The definition of mental illness

In 7.2 on page 113 Heaton deals with the definition of mental illness. All you need to know is that, according to the Supreme Court of Appeal (*Lange v Lange* 1945 AD 332), a person is mentally ill for the purposes of private law if either:

- he or she cannot understand the nature and consequences of the transaction he or she is entering into
- or
- 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

20.2.3 Proving mental illness

On page 114 Heaton explains how mental illness is to be proved. All you need to know is that 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.

20.2.4 The 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.

Heaton discusses the consequences of mental illness on a person's legal status on pages 114 to 116. You must study that discussion. Note that all juristic acts a mentally ill person enters are invalid unless they were performed during a *lucidum intervallum* (lucid interval). The moment which is of importance in judging whether the juristic act is valid is that moment at which the juristic act is entered.

You should further note that the issue of whether a person has been declared mentally ill does not determine whether he or she has capacity to act. Someone who has not been certified does not have capacity to act if he or she is in fact mentally ill at that moment when the transaction is entered, and a person who has been certified has capacity to act if he or she is in fact not mentally ill at the time the juristic act is performed. The legal position is thus determined by whether the person was mentally ill at a specific moment. In other words, it is not the declaration itself which affects a person's status, but rather the factual question whether he or she is mentally ill at a specific moment. Certification merely shifts the burden of proof. An uncertified person is deemed normal until the opposite is proved, while a certified person is deemed mentally ill until the opposite is proved.

Heaton discusses section 39(1)(a) of the Consumer Protection Act 68 of 2008. This section, which operates regardless of the *de facto* mental condition of the person at the time of the particular agreement, renders all persons who have been declared mentally ill incapable of entering into agreements with a supplier under certain circumstances. She further questions the constitutionality of this limitation. You should make sure that you understand this discussion.

20.2.5 The appointment of a curator

On pages 117 and 118 (7.5) Heaton explains that a *curator bonis*, a *curator ad litem* or a *curator personae* can be appointed for a mentally ill person. You must be able to indicate what these different curators do in respect of mentally ill persons. The author explains that a *curator bonis* looks after the mentally ill person's estate and supplements his or her capacity to act, while a *curator ad litem* represents a mentally ill person's interests in legal proceedings. A *curator personae*, on the other hand, cares for the mentally ill person's person (body), either generally or for a specific purpose.

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 that he or she loses all capacity to act. This is explained in the quotation from *Pienaar v Pienaar's Curator* 1930 OPD 171 that appears in Heaton on page 117.

20.2.6 Care and administration of the property of mentally ill persons

On page 124 to 125 (7.6.6) Heaton explains the care and administration of the property of mentally ill persons.

20.3 INABILITY TO MANAGE ONE'S OWN AFFAIRS

STUDY

- the discussion below

READ

- Heaton page 127–130 (ch 8)

The 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. This 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 needs 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.

20.4 THE INFLUENCE OF ALCOHOL AND DRUGS

STUDY

- the discussion below

READ

- Heaton page 131 (ch 9)

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.

20.5 PRODIGALITY

STUDY

- Heaton pages 134 to 138 (10.2–10.6)

READ

- Heaton pages 133 to 134 (10.1 – “Introduction”)

20.5.1 The definition of “prodigality”

Definition – 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 powers of judgement 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.

On pages 134 to 138 Heaton explains the effect of prodigality on a person's status.

20.5.2 Legal capacity

Study Heaton page 134 (10.2), where the author explains the limitations on an interdicted prodigal's legal capacity.

20.5.3 Capacity to act

Study Heaton pages 135 to 137 (10.3), where the author explains the prodigal's capacity to act. It is important to note the difference between a person who has merely been declared to be a prodigal and an “interdicted prodigal”. An interdicted prodigal is a prodigal who has been interdicted from administering his or her estate.

20.5.4 Capacity to litigate

Study Heaton page 137 (10.4), where the author explains the prodigal's capacity to litigate.

20.5.5 Capacity to be held accountable for crimes and delicts

Study Heaton page 137 (10.5), where the author explains the prodigal's capacity to be held accountable for crimes and delicts.

20.5.6 Constitutional implications of interdiction as a prodigal

Study Heaton pages 137 and 138 (10.6), where the author discusses the constitutional implications that may arise because of interdicting a prodigal from administering their estate.

20.6 INSOLVENCY

STUDY

- Heaton page 140 (11.2–11.3)
- Heaton page 141 (11.5)

READ

- Heaton pages 139 and 140 (11.1)
- Heaton pages 140 and 141 (11.4)
- Heaton page 141 and 142 (11.6)

20.6.1 The definition of “insolvent”

A person is insolvent if his or her liabilities exceed their assets (in other words when the person has more debts than assets). If the person's estate is sequestrated by the High Court because of this, the sequestration affects his or her status.

20.6.2 Legal capacity

Study Heaton page 140 (11.2). Heaton explains the insolvent person's legal capacity and discusses some limitations that arise as a result of being declared insolvent.

20.6.3 Capacity to act

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 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. On page 140 (11.3), Heaton indicates which contracts the insolvent may still conclude independently, and which contracts the insolvent can conclude

only with the trustee's consent. She also discusses the validity of a contract an insolvent enters in breach of the limitations placed on his or her capacity to act. You must study these rules.

20.6.4 Capacity to litigate

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.

20.6.5 Capacity to be held accountable crimes and delicts

Insolvency does not affect the insolvent's capacity to be held accountable for crimes and delicts. However, if the insolvent commits a delict after sequestration, the compensation must be paid out of those assets the insolvent acquired after sequestration and that fall outside the insolvent estate.

TEST YOURSELF

- (1) How has the Supreme Court of Appeal defined mental illness? Give authority for your answer.
- (2) How is mental illness proved?
- (3) What effect does mental illness have on a person's legal status?
- (4) What effect does mental illness have on a person's capacity to act?
- (5) What is the effect of a juristic act performed by a mentally ill person during a *lucidum intervallum*?
- (6) Which curators can be appointed for a mentally ill person and what is each type of curator's function?
- (7) Does the mere fact that a *curator bonis* has been appointed to administer a mentally ill person's estate mean that the mentally ill person has no capacity to act? Give authority for your answer.
- (8) Explain how a person's inability to manage his or her own affairs owing to physical or mental disability or incapacity affects his or her capacity to act.
- (9) Explain how intoxication affects a person's capacity to act.
- (10) What do you understand by the term "prodigal"?

Question 11 is an example of an essay-type question:

- (11) Fully discuss a prodigal's legal status.
- (12) Are the limitations that are placed on interdicted prodigals unconstitutional? Explain your answer.
- (13) Explain the effect of the sequestration of an insolvent person's estate on his or her status.

CONCLUSION

In this learning unit we looked at the effect on a person's status of mental illness, inability to manage one's own affairs, intoxication, prodigality and insolvency. This brings us to the end of the module on the law of persons.

GLOSSARY



<i>a quo</i>	from which (The judgment from the court <i>a quo</i> means a judgment of a court of first instance or an inferior court or the court appealed from, that is the court before which the matter served before it was brought before the present court)
<i>ab initio</i>	from the beginning
<i>actio</i>	action
<i>actio de pauperie</i>	action due to damage or injury caused by someone's domestic animal
<i>ad hoc</i>	for a specific purpose
<i>ad idem</i>	agreed
<i>ad infinitum</i>	to infinity
<i>ad litem</i>	for the case or suit
<i>affidavit</i>	sworn statement
<i>bona fide</i>	in good faith
<i>compos mentis</i>	sane; in his or her right mind
<i>condictio</i>	action with which property is recovered
<i>consensus</i>	consent; agreement
<i>contra bonos mores</i>	contrary to good morals
<i>curator ad litem</i>	a person appointed by the court to assist someone (usually a minor or mentally ill person) in litigation
<i>curator bonis</i>	a person appointed by the court to administer someone else's estate/property
<i>curator personae</i>	a person appointed to look after the personal and health affairs in cases where someone is unable to manage his or her own personal affairs.

GLOSSARY

<i>cur ad vult = curia advisari vult</i>	the court wishes to consider its decision
<i>de bonis propriis</i>	out of his or her own pocket
<i>de facto</i>	in fact; judged according to the factual position
<i>de iure</i>	in law; judged according to the law
<i>de minimis non curat lex</i>	the law is not concerned with trivialities
<i>doli capax/culpa capax</i>	accountable
<i>doli incapax/culpa incapax</i>	unaccountable
<i>error</i>	mistake
<i>(ex) mero motu</i>	spontaneously; of (his or her or its) own accord
<i>exceptio</i>	exception
<i>exceptio non adimpleti contractus</i>	exception or defence of unfulfilled contract because the plaintiff is also in default to perform
<i>ex parte</i>	as the only interested party
<i>ex post facto</i>	seen in retrospect; seen in hindsight
<i>functus officio</i>	no longer functioning in an official capacity
<i>ignorantia iuris haud excusat</i>	ignorance of the law is not an excuse
<i>infans (pl. infantes)</i>	a child(ren) below the age of 7 years
<i>in fine</i>	at the end
<i>infra</i>	below
<i>in limine</i>	at the beginning of the case
<i>in loco parentis</i>	in the position of a parent
<i>in re</i>	in the case of
<i>inter alia</i>	among other things
<i>interim</i>	in the meantime
<i>in utero</i>	in the womb
<i>in ventre matris</i>	in the mother's womb
<i>in vitro</i>	in a test tube (lit. "in glass")
<i>iusta causa</i>	just cause
<i>lex</i>	statute or legal rule
<i>lex (loci) domicilii</i>	law or the place of domicile
<i>litis contestatio</i>	moment when the suit is instituted between the parties; alternatively, the moment when the pleadings are closed
<i>locus standi in iudicio</i>	capacity to litigate
<i>lucidum intervallum</i>	lucid interval

<i>mala fide</i>	in bad faith
<i>maxim</i>	legal maxim; adage
<i>naturalis obligatio</i>	natural or unenforceable obligation
<i>negotiorum gestio</i>	taking care of someone else's interests
<i>NO (nomine officii)</i>	in an official capacity
<i>non compos mentis</i>	not in full possession of his or her faculties; mentally ill
<i>obiter dictum</i>	passing remark
<i>onus</i>	burden of proof
<i>per se</i>	in itself
<i>postea</i>	afterwards
<i>prima facie</i>	at first sight
<i>quasi</i>	as if
<i>ratio</i>	reason; ground
<i>rei vindicatio</i>	the action with which an owner may reclaim his or her property from any person if the property has been unlawfully removed from the owner's possession
<i>res</i>	thing
<i>res ipsa loquitur</i>	the case speaks for itself
respondent	the opposing party in an application or appeal
<i>restitutio in integrum</i>	return to the previous condition
<i>sine</i>	without
<i>spes</i>	expectation; hope
<i>stare</i>	to stand
<i>stare decisis</i>	decided cases remain authoritative
<i>status quo ante</i>	the previous legal position
<i>stipulatio alteri</i>	a contract for the benefit of a third party
<i>sub indice</i>	pending
<i>sui generis</i>	of its own kind
<i>sui iuris</i>	capable of performing juristic acts; having capacity to act
<i>supra</i>	above
<i>venia aetatis</i>	release from tutelage
<i>venia agendi</i>	permission to conduct litigation
<i>vice versa</i>	conversely; the other way round
<i>vis</i>	force
<i>viva voce</i>	orally