



FAMILY LAW & VIOLENCE AGAINST WOMEN

INTRODUCTION	333
MARRIAGE	333
Civil marriages	333
Civil unions	333
Requirements for registering a civil union.....	334
African customary marriages.....	334
Does the law distinguish between customary marriages entered into before and after the implementation of the act?	335
Muslim and Hindu marriages	336
The rules of civil marriage	337
Marriages in community of property	337
Marriages out of community of property with an ante-nuptial contract	338
Civil marriages of Africans before 1988	338
Changing the way you were married	339
DIVORCE	339
Divorce in a civil marriage.....	339
Irretrievable breakdown	339
Mental illness or unconsciousness	340
Ending an African customary marriage	340
Ending a Muslim or Hindu marriage	341
The Family Court	341
Arrangements made at the time of divorce	341
Care of the children.....	341
Contact with the children	342
Maintenance of the children	343
Maintenance for the wife	343
Dividing up the family property	343

Housing	344
Bought houses	344
Rented houses	344
CARE AND PROTECTION OF CHILDREN	345
Laws that apply to child care and protection	345
The Children's Act and Children's Amendment Act	345
Summary of the Children's Act	346
Brief summary of certain sections of the Act	346
CUSTODY, GUARDIANSHIP AND SUPPORT OF CHILDREN	348
Custody or care	348
Guardianship	348
The duty to support	349
State child support grants	349
Parental responsibilities and rights	349
General parental responsibilities and rights	349
Parental responsibilities and rights of mothers	349
Parental responsibilities and rights of married fathers	350
Parental responsibilities and rights of unmarried fathers	350
Parental responsibilities and rights agreements	350
Children of African customary unions	351
Children of Muslim or Hindu marriages	351
Adoption of children	351
Consent to adoption	351
Laws on adoption	351
Consent to adopt	351
Child born out of marriage	352
Who can adopt a child	352
When is consent not required?	352
CHILD ABUSE AND NEGLECT	353
Laws protecting abused and neglected children	353
Reporting child abuse	354
Stopping child abuse using the Domestic Violence Act	354
Child sexual abuse	355
The Sexual Offences Act	355
Incest	355
Removing children from abuse or neglect	356
Foster care	356

RAPE, INCEST AND SEXUAL ASSAULT	356
The Sexual Offences Act	356
Rape	357
When does a person consent to a sexual act?	358
Who can consent to a sexual act?	358
Incest	358
Sexual assault	359
Sexual violence and HIV testing	359
Problems with compulsory HIV testing	359
Post Exposure Prophylaxis (PEP)	359
What does the law allow in terms of PEP	359
 DOMESTIC VIOLENCE	 360
The Domestic Violence Act (No 116 of 1998)	360
Domestic violence	361
Sexual abuse	361
Economic abuse	361
Emotional and psychological abuse	362
Protection Order	362
What is a Protection Order?	362
Who can apply for a Protection Order?	363
Where can you get a Protection Order?	363
Costs of getting a Protection Order	363
 ABORTION	 364
When may a woman have an abortion?	364
Consent to an abortion	364
Who may perform an abortion?	364
 DEATH	 365
Dying without a will	365
Domestic partnerships ('vat en sit')	365
Dying with a will	365
Winding up a dead person's estate	366
 PROBLEMS	
1. Getting a divorce	367
2. Entering into a civil union	369
3. Adopting a child	369
4. Getting maintenance through the Maintenance Court	370

5. Maintenance is not paid.....	372
6. Reporting rape or assault and going to court	373
7. Using the law against domestic violence	375
8. Getting a Protection Order	375
9. Making a will	377
Example of a simple will	378

MODEL LETTER

Request for social worker's report to assist with application for legal aid	379
--	-----

CHECKLISTS

Marriage	380
Divorce	380
Maintenance	380
Child abuse and neglect	380
Rape and indecent assault	380

MONTHLY EXPENSES

How to draw up a list of monthly expenses when you apply for maintenance	381
---	-----

RESOURCES	687
-----------------	-----

Introduction

Most people are members of a family – by birth, marriage, adoption, foster care or living together. Family law is about matters like marriage, husbands and wives, parental rights and responsibilities, care and protection of children, foster care and adoption, divorce and death.

Traditionally, the idea of a family was of a working father, a mother working in the home and dependant children. But it is not so common to find this kind of family any more. For example, many married women go out to work, in some families, especially in the rural areas, the children also work to support the family, illegitimate children (children born out of marriage) and divorces mean that there are many 'single-parent families' and gay and lesbian couples can now legally form a civil union. It is hard to say what a typical South African family is.

The Constitution and Bill of Rights guarantees non-discrimination and equality regardless of factors such as race, sex, gender, sexual preference, marriage and religion. This means that different types of families and marriages must be treated equally.

While this chapter covers all the aspects of family law listed above, it also looks at the law regarding sexual and domestic violence and child abuse and neglect.

Marriage

CIVIL MARRIAGES

Marriage is a contract between a man and a woman entered into in terms of the *Marriage Act 25 of 1961*. According to this contract they agree to live together as husband and wife. Like other contracts, a marriage contract has rights and duties for each partner.

South African law recognises civil marriages, civil unions and customary marriages. Marriages according to Muslim or Hindu rites are not 'legal' marriages (see below), but enjoy limited recognition in certain circumstances.

For a civil marriage, there are certain rules that have to be obeyed in order for the marriage to be valid. For example:

- Both parties must agree to marry each other.
- If you are already married civilly you cannot enter into another civil marriage again until your first spouse dies, or until the first marriage ends in divorce. While you are civilly married and you marry someone else civilly you are guilty of the crime of bigamy.
- You cannot marry and/or have sex with close relatives, eg a grandfather cannot marry his granddaughter. If you do, you are guilty of incest.
- Boys under 18 and girls under 15 cannot marry unless they have permission from their parents and the Minister of Home Affairs.
- Minors (persons under the the age of 18 years, as the Children's Act defines a child as a person under 18 years) also need their parents' permission to marry.
- A marriage officer must conduct the civil marriage ceremony to make it legally valid.

CIVIL UNIONS

In November 2006, following a long line of court cases recognising certain rights and responsibilities in same-sex partnerships, the *Civil Union Act 17 of 2006* came into effect. This law provides for the legal recognition of marriages and civil partnerships, collectively referred to as civil unions, between two persons regardless of their sexual orientation or gender identity.

The *Civil Union Act* is in line with the Constitutional Court judgment in the case of *Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs and Others* which found that the common law definition of marriage in the *Marriage Act* was inconsistent with the Constitution and was invalid to the extent that it did not allow same-sex couples to enjoy the same status, benefits and responsibilities given to heterosexual couples.

REQUIREMENTS FOR REGISTERING A CIVIL UNION

The *Civil Union Act* specifies the following requirements for registering a civil union.

- Anyone who is 18 years or older may enter into a civil union (in terms of the *Civil Union Act*) and can choose to register it as a marriage or civil partnership. When it has been registered a certificate will be issued with the details of the union.
- A person may only be a spouse or partner in one marriage or civil partnership.
- A person who enters into a civil union is not allowed to also enter into a marriage under the *Marriage Act* or the *Recognition of Customary Marriages Act 120 of 1998*. In the same way, a person who is already married under the *Marriage Act* or the *Recognition of Customary Marriages Act* may not register a civil union in terms of the *Civil Union Act*.
- If a person wants to enter a civil union and he or she has previously been married under either the *Marriage Act*, *Recognition of Customary Marriages Act*, or registered as a spouse in terms of the *Civil Union Act*, the person must present a certified copy of the divorce order or death certificate of the former spouse or partner as proof that the previous marriage or civil union is no longer valid.
- A civil union may only be registered by two civil union partners who would, apart from the fact that they are same sex, not be prohibited by law from marrying each other under the *Marriage Act* or *Recognition of Customary Marriages Act*.
- A valid South African identity document is necessary for the registration of a civil union.
- All the legal and material benefits and responsibilities that flow from marriages entered under the *Marriage Act* will also apply to marriages or civil partnerships registered in terms of the *Civil Union Act*.
- Any civil marriage officer, for example, a Magistrate, selected government officials and/or special justice of the peace, recognised by the *Marriage Act* are automatically entitled to conduct marriages and civil partnerships under the *Civil Union Act*. A minister of religion and the religious organisation must first get authorisation from the Minister of Home Affairs to register a civil union.

(See page 369 Problem 2: Entering into a civil union)

AFRICAN CUSTOMARY MARRIAGES

When Africans marry, they can choose to marry by African customary law (traditional customs) OR by the ordinary civil law of the land. An African customary marriage takes place without a civil marriage officer. The families agree on the *lobola* or bride-price. The ceremony takes place after the man's family has paid all or part of the *lobola*.

The *Recognition of Customary Marriages Act 120 of 1998*, which came into effect on 15 November 2000, gives full legal recognition to customary marriages. If you got married before the Act came into effect, your marriage will still have legal recognition and protection if it complies with the customary law and was still in existence after the implementation of the Act. If your spouse died or you got divorced before the Act came into force, your marriage is not protected by this Act.

DOES THE LAW DISTINGUISH BETWEEN CUSTOMARY MARRIAGES ENTERED INTO BEFORE AND AFTER THE IMPLEMENTATION OF THE ACT?

Yes, there are different legal implications. Women married before the implementation of the Act fall under the customary law prevailing at the date when the marriage took place. However, in the *Gumede case [Gumede (Born Shange)] v President of the RSA and others* [2008] JOL 22879 (CC) which challenged the failure of the legislature to make the provisions of the *Recognition of Customary Marriages Act* retrospective, the court ruled that this differentiation was unfairly discriminatory. The practical result was that all marriages entered into before the Act came into force which were still regarded as being out of community of property, were now regarded as being in community of property. As a result of this case the law does not distinguish between monogamous customary marriages before and after the implementation of the Act with regard to being in community of property.

The Recognition of Customary Marriages Act states the following:

Equal status and capacity: The wife in a customary marriage is no longer regarded as a minor. She has equal status and capacity to her husband. This means she can buy and sell assets, enter into contracts and take a case to court.

Validity: Both partners to a customary marriage must consent to the marriage and they must be 18 years or older. If a person under the age of 18 wants to enter into a customary marriage, he or she must first get permission from the Minister of Home Affairs.

Registration: The marriage must be registered with a registration officer at the Department of Home Affairs. The main purpose of registering the marriage is to provide proof that a customary marriage exists, which will help the parties if any dispute arises about the validity of the marriage. Failure to register a customary marriage does not affect the validity of the marriage.

Property and assets: All marriages concluded after the Act and monogamous marriages concluded before the Act according to African custom (as a result of the *Gumede case*) will automatically be in community of property unless the parties draw up an ante-nuptial contract. Polygamous unions concluded before the Act are governed by customary law.

Partners to a customary marriage can apply to the High Court to change the property system of their marriage. If the husband wants to enter into another customary marriage, the husband, existing wife/wives, and the future wife must enter into a contract to develop a new property system and ask the High Court or Regional Magistrates court (family court) to approve the contract. The court will try to look after the interests of all the parties by deciding what the assets are worth and making sure that the existing wife and children get a fair deal.

All marriages formed after the Act will automatically be in community of property unless the parties draw up an ante-nuptial contract.

Inheritance: The *Recognition of Customary Marriages Act* does not change the law on inheritance but a new law that deals with this was passed in 2009 called the *Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009*. This legislation does away with the rule of primogeniture (the rule that the oldest male relative inherits all) that was challenged in the case of *Bhe and others v The Magistrate, Khayelitsha and others* 2005(1) SA 580 (CC). In this case the Constitutional Court held that the customary law rule of primogeniture is unconstitutional and that estates of all black people who die without leaving a will should be dealt with as set out in the Intestate Succession Act.

Custody of children: The court can decide who will have custody of children born into a customary marriage and what maintenance should be paid. The decision will be based on what is best for the children. A customary union is still recognised for these cases:

- The partners can claim support money from each other if they are divorced
- A wife can claim inheritance rights if her husband dies
- A wife can claim benefits under a pension scheme if her husband dies
- A wife can claim compensation under the *Compensation for Occupational Injuries and Diseases Act* if her husband dies in an accident at work.

MAY A WOMAN WHO IS MARRIED BEFORE THE IMPLEMENTATION OF THE ACT, HAVE HER CUSTOMARY MARRIAGE GOVERNED BY THE PROVISION OF THE ACT?

Yes, the Act makes provision for these women to change the legal consequences of their marriage in order to create equal status and capacity for both the husband and the wife. The parties must apply to court stating good reasons for the change and show that no third person will be prejudiced.

DOES THE ACT MAKE PROVISION FOR POLYGAMOUS MARRIAGES?

The Act does allow a man to enter into multiple marriages. However, this has to be done in accordance with the provisions of the Act. The Act states that if a man wishes to enter into a polygamous marriage he has to apply to the court for permission. In his application he must set out the property systems for all of his wives. All interested parties must be represented in the application, particularly the existing and future wives. The court must consider the circumstances to ensure that the contract fairly divides the existing marital property. The court has the power to accept, add a condition or refuse to accept a contract. This provision is intended to protect all wives, children and family members.

MUSLIM AND HINDU MARRIAGES

Traditional Muslim and Hindu marriages are not recognised by civil law. But if spouses go through a civil marriage ceremony or are married by a Muslim or Hindu priest who is a marriage officer, the law will recognize their marriage. The husband then cannot marry any other woman by civil law

The legal consequences of recognising Muslim and Hindu marriages have been debated in the South African Law Commission and broader public for a number of years but there is as yet no agreement. The recognition of religious marriages has been on the cards for a long time. In the meantime, rights have been given to spouses in Muslim and Hindu marriages in bits and pieces through court cases.

COURT DECISIONS DEALING WITH RECOGNITION OF MUSLIM MARRIAGES

In the case of *Amod v Multilateral Motor Vehicle Accident Fund* 1999 (4) SA 1319 (SCA), a surviving spouse from a Muslim marriage was given the right to claim damages for loss of support from the Fund when her husband died in a motor accident.

In the case of *Daniels v Campbell N.O. and Others* 2004 (5) SA 331 (CC), the plaintiff was given the right to claim maintenance from the estate of her deceased husband to whom she had been married by Muslim law, in terms of the *Maintenance of Surviving Spouses Act*.

In the case of *Khan v Khan* TPD case no: 82705/03 / A 2705/2003 (not yet reported) a Muslim woman who was party to a polygamous Muslim marriage was given the right to claim maintenance from her spouse in terms of the *Maintenance Act*.

In the case of *Mahomed v Mahomed* (2008 ECP), and in *Hoosain v Dangor* (2009 CPD), the courts recognised the right to claim interim maintenance while waiting for the outcome of the main action which asked the court that Muslim marriages be governed by the Divorce Act.

The courts have recognised the right of a spouse married according to Muslim rites to inherit from her deceased's husband's intestate estate.

In the case of *Daniels v Campbell N.O. and Others 2004 (5) SA 331 (CC)*, the Applicant was given the right to claim maintenance and inherit from the estate of her deceased husband to whom she had been married by Muslim law, in terms of the Maintenance of Surviving Spouses Act and Intestate Succession Act.

In the case of *Hassam v Jacobs N.O. and others [2008] JOL 22098 (C)*, where the Applicant was the wife of the deceased in a polygamous marriage, the court allowed both wives to inherit a child's share of the estate.

COURTS DEALING WITH THE RECOGNITION OF HINDU MARRIAGES

In the *Prag matter (Wynberg court ref.31008MA/000680)* the maintenance court recognised the duty to maintain where the parties were married according to Hindu rites.

In the *Govender matter (Govender v Ragavayah NO and Others (Women's Legal Centre Trust as amicus curiae) [2008] JOL 22653 (D))*, a wife was entitled to inherit from her deceased's husband's intestate estate to whom she was married according to Hindu rites.

THE RULES OF CIVIL MARRIAGE

Marriages create certain rights and duties for the husband and wife. In all marriages, couples have a legal duty to **support** each other. This means that they must look after any children and the home, and provide the family with food and clothing, medical care and other 'household necessities'. Either or both partners work to earn money.

All civil marriages are automatically in **community of property**, unless the parties sign an **ante-nuptial contract** before the marriage (except African marriages before 1998, which were automatically out of community of property unless the partners clearly chose to marry in community of property).

MARRIAGES IN COMMUNITY OF PROPERTY

This is the automatic system of marriage. In other words, if you get married without signing any contract, you will automatically be married in community of property.

'In community of property' means that everything the couple own, and their debts, from before their marriage are put together in a joint estate. And everything they earn or buy and any debts incurred after their marriage are also part of this **joint estate**.

There is **joint administration** of the things the couple own. This means the husband and wife share in controlling their joint property. To protect each spouse, the other partner's written permission is necessary for big things like buying or selling a house, signing credit agreements, withdrawing money from accounts in the other spouse's name and so on.

If they get divorced the joint estate gets divided into half. One half belongs to the wife, the other to the husband. Any debts are also shared. The court does have a discretion to order that one spouse will not get his/her half share that he/she will be entitled to by granting an order of forfeiture of benefits or a redistribution of the assets if, taking into account various factors, it believes it would be unfair for everything to be split equally.

In terms of the *Matrimonial Property Act (No 88 of 1984)*, the marital power of a husband over his wife was scrapped. Now a woman married in community of property:

- Has equal rights to administer the joint estate
- Can enter into contracts without her husband's permission
- Can sue or be sued in her own name

Both men and women must now say what their marital status is when they fill in forms.

MARRIAGES OUT OF COMMUNITY OF PROPERTY WITH AN ANTE-NUPTIAL CONTRACT

Before they marry two people can make an agreement called an **ante-nuptial contract**. Usually this agreement excludes (or cuts out) community of property. This means the husband and wife each own and control their own things – they have **separate estates**.

Under the *Matrimonial Property Act of 1984* the **accrual system** automatically applies to their marriage, **UNLESS** they agree in their ante-nuptial contract that they do not want the accrual system.

'Accrual' means increase. The accrual system recognises that during a marriage the husband and wife keep on adding to their joint property. For example, They may add to their property by both working and bringing money into the marriage. Or one spouse may add indirectly by staying home and looking after the home and children so that they do not need to employ someone to do that. The accrual system allows both partners to benefit from the growth to either of their property during the marriage.

While the marriage lasts, the husband controls his own separate estate and the wife controls hers. But if they divorce or when one spouse dies, any increase in the value of both estates gets shared equally by the partners. If the couple chose not to have the accrual system, in their divorce the partners keep their own things and are responsible for their own debts.

This is how the accrual system works:

- Certain things are excluded from the accrual system, such as inheritances and gifts.
- At the beginning of the marriage the property of each spouse is valued.
- During the marriage each spouse controls and adds to his or her own property.
- When the marriage ends through death or divorce, the value of each spouse's property before the marriage gets compared with the value at the end of the marriage. This shows the increase in each spouse's property. (Inflation is taken into account.)
- Take the smaller increase in value away from the larger increase in value. Divide this amount in half. The spouse with the smaller increase in value has a claim against the other spouse for half of this difference so that they end up with the same accrual.

EXAMPLE

EXAMPLE OF ACCRUAL SYSTEM

	Husband	Wife
Value at end of marriage	R30 000	R4 000
Value at beginning of marriage	R10 000	R2 000
Increase	R20 000	R 2 000

In this example, the husband's estate has grown by R18 000 more than the wife's estate during the marriage (i.e. R20 000 – R2 000). She has a claim against him for half of this difference i.e. R9 000 so that they each end up with an accrual of R11 000.

CIVIL MARRIAGES OF AFRICANS BEFORE 1988

Africans married by civil marriage ceremonies before 2 December 1988 were automatically married out of community of property with no accrual and the husband had marital power in terms of the *Black Administration Act (38 of 1927)*. So, each partner kept his or her separate property and each partner owned any

property he or she got during the marriage. But the husband had the marital power, so he managed both his property and his wife's property.

In 1988 the *Marriage and Matrimonial Property Amendment Act (No 3 of 1988)* changed the laws for civil marriages of Africans and made them the same as any other civil marriage. This meant that marital power was scrapped, the automatic marriage is in community of property unless couples sign an ante-nuptial contract, and out of community of property marriages have the accrual system unless couples choose not to have it.

From 1998, the *Recognition of Customary Marriages Act (No 120 of 1998)* has recognised all African customary unions as legal marriages. All new marriages formed after the Act will automatically be in community of property unless the parties draw up an ante-nuptial contract. In terms of this Act. The husband has no marital power. *(See page 334 African customary marriages)*

CHANGING THE WAY YOU WERE MARRIED

Even though the laws may have changed since you were married, your marriage is still governed by the way you were married and the rules of marriage for that kind of marriage at that time (except that marital power is automatically scrapped).

Married people can apply to the High Court and ask the court to change their marriage from being in community of property to one out of community of property, or the other way around. Both husband and wife must apply together, they must prove that no other party will be disadvantaged, notice of the change has been given to all their creditors and must give the court good reasons for wanting to change the way they were married.

Divorce

Divorce can affect the spouses and their children for the rest of their lives. Before getting a divorce, the husband and wife should try to get help from social welfare agencies or marriage counsellors.

(See page 687 Resources Family and Marriage Society of South Africa (FAMSA)

(See page 367 Problem 1: Getting a divorce)

DIVORCE IN A CIVIL MARRIAGE

A divorce legally ends a marriage. Once a divorce is granted, each partner may legally marry someone else. *(See page 341 The Family Court)*

There are only two grounds for divorce:

- The 'irretrievable breakdown' of the marriage, or
- The mental illness or continuous unconsciousness of one partner

IRRETRIEVABLE BREAKDOWN

This means the couple can no longer live together as man and wife. Both partners or one partner must prove to the court that the marriage broke down so badly that there is no reasonable chance of getting back together.

These are examples of the kind of evidence the court will accept as proof of irretrievable breakdown:

- The couple have not lived together like husband and wife for a period of time.
- One partner had sexual intercourse with somebody else and because of this the other partner finds it impossible to continue living together as husband and wife.
- One partner is in prison after being declared an 'habitual criminal'.
(This means he or she keeps committing crimes, and because of this was sentenced to 10–15 years in prison.)

- One partner deserted the other.
- One partner abused the other, for example the husband keeps assaulting the wife.
- One partner is an alcoholic or a drug addict.
- The partners no longer love each other – they may be too different, or they married when they were too young.
- One of the partners finds it impossible to live together as husband and wife for any other reason.

MENTAL ILLNESS OR UNCONSCIOUSNESS

The person wanting the divorce must show the court that the other spouse was admitted to or detained in a mental institution. The person must also show that the spouse has been in the institution for at least two years and that the doctors do not think he or she can be cured.

A person can also get a divorce if the other spouse is permanently unconscious. The spouse must have been unconscious for at least 6 months, and the doctor must see no hope of recovery.

ENDING AN AFRICAN CUSTOMARY MARRIAGE

Customary marriages can only end if there is a court order. The same grounds for divorce that apply for civil marriages now apply to customary marriages. In other words if the court agrees that there has been an 'irretrievable breakdown' of the marriage then it will agree to dissolve the marriage. The spouses are free to settle on any terms they choose, but the court will make an order regarding the custody and guardianship of any minor children and may make an order for maintenance to be paid, taking into account any arrangement that may have been made in terms of customary law.

CUSTOMARY PRACTICES

Lobolo plays an important role in Customary law. Lobolo is a negotiated sum of money that the groom pays to the bride's family. This payment is done in good faith and is an indication that the groom will be able to provide a good life for the bride and the bride will be a good wife to the groom.

If the customary marriage ends the husband may on certain grounds claim the return of part or all of his lobolo from the wife's family. As there are many African traditions in South Africa the grounds for the return of lobolo might vary from tradition to tradition.

Possible grounds on which husband can claim lobolo

- If the wife absconds for no reason
- If the wife cannot have children
- If the wife neglects her household duties and neglects the children

Possible grounds on which a husband cannot claim the return of lobolo

- If the husband publicly rejects his wife for no reason
- If the husband and husband's family accuses the wife of witch craft
- If the husband abuses the wife
- If the husband abandons the wife

When the parties apply to the court for a divorce and there is a dispute regarding the return of lobolo the parties can ask the court to assist or the parties can approach the Community courts and courts of Chiefs and Headmen. It is likely that a claim for the return of lobolo, without approaching the court for a divorce first, would be subject to challenge on a number of grounds, the most important being that the court would not have jurisdiction to grant an order that is equivalent to dissolving a marriage.

ENDING A MUSLIM OR HINDU MARRIAGE

If a man and woman were married by an Imam in the Muslim religion, or a priest in the Hindu religion, but they did not also have a civil marriage, the law says they were not lawfully married. So they don't need to use the court if they want to get divorced. *(See page 336 Muslim and Hindu marriages)*

THE FAMILY COURT

The Family Court combines issues of maintenance, Children's Court matters, guardianship, parental rights and responsibilities relating to custody and care, and domestic violence.

(See page 348 Custody, guardianship and support of the children)

All Regional Courts are now family courts. One of the purposes of the Regional Court is to make it easier and cheaper for people to get a divorce. In the Regional Court people can choose not to have an attorney or advocate to represent them. The procedures used in the Regional Court are simple and cheap (if no lawyers are used). *(See page 367 Problem 1: Getting a divorce)*

A divorce can be finalised in as little as a month if the parties have signed a settlement agreement at the outset, this is called a Consent Paper. However if there are children, the Family Advocate who is appointed to look specifically at the needs of children in family matters, may become involved to make sure that the arrangements for the children are satisfactory. If there are any disputes about the children or if they have any concerns about the arrangements proposed for the children in the summons, the divorce will take a bit longer to finalise. It will also take longer if it is defended.

(See page 687 Resources for Divorce Court centres)

ARRANGEMENTS MADE AT THE TIME OF DIVORCE

When a couple gets divorced, they have to make a number of arrangements. The most important arrangements the couple must make are:

- Custody (now called care) of the children
- Access (now called contact with) to the children
- Maintenance of the children
- Maintenance for one partner, usually the wife
- Dividing up the family property

Care and maintenance of children are the most important things to arrange. A court will not let a couple get divorced until it is sure that there are satisfactory arrangements for the children.

CARE OF THE CHILDREN

This means the primary person taking care of the children. The law says that children must always have an adult to look after them. The court always takes into account the best interests of the children, not just the interests or wishes of the parents. So if the parents cannot agree on who should have care of the children, then the court looks to see which parent can best look after the children. The courts will ask the Family Advocate to hold an enquiry to see what would be in the best interests of the children who are under 18.

THE FAMILY ADVOCATE

The Family Advocate can look at guardianship and parenting agreements, which make provision for care and contact and other parental rights and responsibilities. There is a Family Advocate's office in each division of the High Court. They assist the parties to come to an agreement that will be in the best interests of the child. If the parents are unable to agree they evaluate the case and make a

recommendation based on the best interest of the child. The Family Advocate will then produce a report for the court. The Family Advocate's recommendations are not binding unless it is approved by the court. The Family Advocate cannot act for either of the parties and they cannot be subpoenaed to court to be a witness for either party.

One of the parents can also ask the Family Advocate to hold an enquiry. For example, if the husband sues for divorce and asks for care of the children but the wife also wants custody, then either of them can complete an 'Annexure B' form which asks the Family Advocate to enquire into the problem. You can get an 'Annexure B' form from the Registrar of the High Court, an attorney, Legal Aid or from the Family Advocate's office.

The Family Advocate does not charge the parent for holding the enquiry.

Divorces can take a long time. If one of the parties wants care of the children (for example, if the children are being threatened) while the divorce is happening, the party can make an application for interim care. This means asking the court for full time care of the children until the divorce is settled. If the party is really worried that the children are suffering or if there is a threat that one of the parties is going to kidnap the children, the other party can make an urgent application for care and that any contact be supervised.

After the divorce, if the parent who doesn't have care of the children tries to take the children, the parent with care can ask the court for an interdict. This is an order for the parent to return the children.

In African customary marriages, the court also decides which parent should have custody and guardianship on divorce, based on the best interests of the children. The Childrens Act and the Maintenance Act make provision for equal rights and duties of parents of children of religious marriages in terms of which the fact that the marriage is not legally recognised is not an issue.

(See page 348 Custody, guardianship and support of children)

CONTACT WITH THE CHILDREN

The court usually gives the parent who does not have the children in their care a right to contact (this used to be called the right of 'reasonable access') with the children. The law aims to maximize the amount of contact children have with both parents. This is where the parents share time with the children without impacting on their routine and which is in their interest, which usually means that the children spend at least every second weekend and every second long and short school holiday with the parent who does not have care of the children.

However this arrangement may not be appropriate for very young children and depends on the circumstances. If the order does not specify how often and for how long the access should take place, then a parental plan must be drawn-up. A parental plan is an agreement in which it specifies when a parent can have access to the child. The Family Advocate can assist the parents in drawing-up a parental plan.

If the parent asking for care does not think the other parent should have unrestricted contact to the children, he or she can ask the court that contact be supervised or restricted. The parent with custody of the children must give good reasons why access should be restricted, for example, that the parent abuses the children or has a serious drinking problem and will not look after the children. That parent's access would then have to be supervised by the mother or another adult person.

Also, if one parent has contact rights, this does not mean that he has the right to see the children in the other parent's home.

(See page 348 Custody, guardianship and support of children)

MAINTENANCE OF THE CHILDREN

Although maintenance for the children is paid to the parent who has care of the children, maintenance is a right which the children have, not the parent. Both parents have a duty to support their children, including children who are illegitimate (according to civil law) such as children of Hindu or Muslim customary marriages. There is no longer a distinction made with children regarded as illegitimate.

When the court gives one of the parents custody, it usually also makes an order for the other parent to pay maintenance.

If a party does not pay maintenance for the children, even though the court has ordered this, then the other party can go to the Maintenance Court to have the order enforced. A maintenance order is an order of the court and so it is a criminal offence to break the order by not paying.

(See page 348 Custody, guardianship and support of children)

(See page 372 Problem 5: Maintenance is not paid)

MAINTENANCE FOR THE WIFE

Maintenance is often just called 'support'. In a marriage, both partners have a duty to support each other and any children. It is usually the woman who takes care of the home and children more than the man. So the wife often cannot earn as much as the husband. Then the husband has a duty to support the wife and children with money to buy the things they need.

If they get divorced, the wife can claim maintenance for **herself** from the husband, at least until she finds a decent job. The court considers a number of factors to establish whether she can get spousal maintenance, like the duration of the marriage, whether she worked during the marriage, her age, what type of work she did/does, etc. She must always claim this money **at the time of the divorce**.

The wife and the husband can agree on what amount he will pay her. If they cannot agree, she should tell the court what amount she wants. If the court agrees that the wife should get maintenance, then the court will order the man to pay a specific amount. The woman can always ask the court to increase the amount later, if her needs change.

If the wife earns more than the husband, he can apply for maintenance from her at the time of the divorce.

Although religious marriages are not legally recognised, the courts have acknowledged the duty to maintain, a spouse can claim for maintenance from her deceased's spouse's estate, claim interim maintenance pending divorce and maintenance during marriage where they were married according to religious rites.

DIVIDING UP THE FAMILY PROPERTY

This happens in different ways depending on how the marriage took place.

(See page 333 Marriage)

If the couple were married in community of property

The joint estate is divided into two equal parts, which includes both assets and liabilities (debts). One half belongs to the husband and the other to the wife. If they cannot agree about how to share the property, the court must decide.

Non-Africans married before 1 November 1984 out of community of property

Each partner keeps his or her own property. They also take any property which the ante-nuptial contract says they must get. The court can give the wife a share of the husband's property if she helped financially to bring up the children or supported the husband in other ways.

Africans married before 2 December 1988 out of community without an ante-nuptial contract:

Each partner keeps his or her own property. The court can give the wife a share of the husband's property if she helped bring up the children or supported the husband in other ways.

*Non-Africans married after 1 November 1984 and Africans married after 2 December 1988 out of community of property with an ante-nuptial contract which **KEEPS IN** the accrual system:*

Each partner keeps his or her own property which he or she brought into the marriage. Any increase during the marriage in the value of either partner's property is shared equally between them.

*Non-Africans married after 1 November 1984 and Africans married after 2 December 1988 out of community of property with an ante-nuptial contract which **EXCLUDES** the accrual system:*

Each partner keeps his or her own property. They also take any property which the ante-nuptial contract says they must get. The court has no discretion to order that one spouse shares the property of the other spouse.

HOUSING

A big problem for women is that they might lose their houses when they divorce. There are some things women can do to make sure that they and their children have a place to stay.

BOUGHT HOUSES

When a couple buys a house it is a good idea to have the house put in both names. If married in community of property, the house has to be registered in both names.

In a divorce situation, it is important that the person who has care of the children is given a sole right to stay in the house until the children are grown up and that at that stage it be sold and the profits divided between the two parties. Alternatively, the person who is the primary carer of the children keeps the house instead of sharing in some other assets such as a pension fund interest. If the parent with only contact rights keeps the house, then the other parent (who has care) should ask to be paid out half the value of the house. Alternatively, the house can be sold and profits shared in half.

In the case of *Solarie v City of Cape Town, Cape High Court number 26186/09*, Ms Solarie challenged the former housing policy of the City of Cape Town to register houses in the name of the husband only when spouses married according to Muslim rites applied for housing as a couple. She argued that this position clearly discriminates against women on the basis of gender and religion. The Court held that the policy was inconsistent with the Constitution, as it unfairly discriminated against women and limited women's ownership of property and constitutional right to access to land. The policy created additional criteria for women to become a property owner, made her vulnerable to eviction, and did not protect her right to security of tenure. The Judge also found that the agreement which gave the ex-husband the sole right to ownership of the property, was contrary to the values enshrined in the Constitution and therefore could not be enforced.

RENTED HOUSES

If you are renting a house and you get divorced, you can ask your landlord to put the house in your name. The landlord will want to make sure that you have enough money to pay the rent, for example that you have a job. If you are renting from a local council, it is a good idea to get the house put into your name.

Care and protection of children

LAWS THAT APPLY TO CHILD CARE AND PROTECTION

- Age of majority Act (No 57 of 1972)
- Child Care Act (No 74 of 1983)
- Children's Status Act (No 82 of 1987)
- Guardianship Act (No 192 of 1993)

However, over the past years, it has become clear that these laws are not able to protect and support children enough. As a result of a long process of consultation, the *Children's Act (No 38 of 2005)* and the *Children's Amendment Act* were passed.

THE CHILDREN'S ACT AND CHILDREN'S AMENDMENT ACT

On 1 April 2010 the *Children's Act 38 of 2005 (as amended by the Children's Amendment Act 41 of 2007)* came into full force. Regulations to the Act also came into effect on the same day. The purpose of this Act is to:

- Give effect to certain rights of children as contained in the constitution
- Set out principles relating to the care and protection of children
- Define parental responsibilities and rights; to make further provision regarding Children's courts
- Provide for partial care of children
- Provide for early childhood development
- Provide for the issuing of contribution orders
- Provide for prevention and early intervention
- Provide for children in alternative care
- Provide for foster care
- Provide for child and youth care centres and drop-in centres
- Make new provision for the adoption of children
- Provide for inter-country adoption
- Give effect to the Hague Convention on inter-country adoption
- Prohibit child abduction and to give effect to the Hague Convention on International child abduction
- Provide for surrogate motherhood and
- Create certain new offences relating to children and to provide for matters connected therewith

In summary the Act makes, inter alia, provision for the following:

- The Act sets out principles relating to the care and protection of children defines parental responsibilities and rights. The best interests of the child is a key consideration in determining disputes with regard to parental responsibilities and rights.
- The Act also contains new provisions on the parental responsibilities and rights of unmarried fathers relating to access to the custody of their children. The Act aims to give unmarried fathers the same rights to parental responsibility that biological mothers have. For example: unmarried fathers who are living with the mother of their child at the time of the birth of the baby have the same rights as the biological mother. Additionally, if the father is not residing with the mother at the time of the baby's birth, he can apply for his rights by giving consent to be identified as the child's father.
- The Act makes provision for children's courts, adoption, child abduction and surrogate motherhood.

- The Act determines that a child becomes a major on reaching the age of 18 and allows children over the age of 12 access to HIV testing and contraceptives.
- The Act now allows for what is known as open adoption so the adoptive family and the biological family can enter into an agreement which caters for the rights of the child and the biological family to know each other.
- The Act also deals with child trafficking, virginity testing and circumcision.
- The Act enables children to approach the court independently of a parent or guardian.
- The Act makes provision for the development of a National Child Protection Register. This register lists the names of people who are unsuitable to work with children as well as all reports of abuse or deliberate neglect of a child made to the Director-General in terms of this Act and all convictions of all persons on charges involving the abuse or deliberate neglect of a child.

SUMMARY OF THE CHILDREN'S ACT

The following is a summary of the chapters in the Children's Act:

- Chapter 1: Interpretation, objects, application and implementation of the Act.
- Chapter 2: General principles underlying the Bill and the best interest of the child; it provides for children's rights and deals with the issues such as child participation, harmful social, cultural and religious practices, access to children's courts and the age of majority.
- Chapter 3 Parental responsibilities and rights and court orders linked to parental responsibilities and rights; this chapter also provides for the rights of fathers, presumption of paternity, parenting plans and the rights of children conceived by artificial fertilisation.
- Chapter 4: The functioning, powers and jurisdiction of children's courts and proceedings before the children's courts.
- Chapters 5, 6, 11, 13 and 14: Partial care, the definition of early childhood development and early childhood development services, children in alternative care, child and youth care centres and shelters and drop-in centres.
- Chapters 7, 9 and 10: Protection of children, the National Child Protection Register and the identification of children in need of care and protection and contribution orders.
- Chapter 8: Provides for prevention and early intervention as a first layer of services provided to children and families in need of assistance.
- Chapter 12 deals with foster care and care by family members.
- Chapters 15 and 16: Adoption and adoption between countries.
- Chapter 17: Give effect to the Hague Convention on the Civil Aspects of International Child Abduction.
- Chapter 18: Gives effect to the UN Protocol to Prevent Trafficking in Persons.
- Chapter 19: Surrogate motherhood.
- Chapter 20: Enforcement of the Bill through powers of inspection and the creation of offences.
- Chapters 21 and 22 of the Bill deal with general administrative issues and other matters

BRIEF SUMMARY OF CERTAIN SECTIONS OF THE ACT

All spheres of government and their departments must work together to deliver services

The Act requires all spheres of government and their departments to work together

in an integrated and co-ordinated way to deliver services to children. This means there is a duty for national, provincial and local governments to work together to ensure that services are provided to children.

The Act brings together all laws relating to children in South Africa and does away with the need for each province to pass its own legislation on children's issues. It should therefore streamline provincial governance. This Act does not however have any direct implications on local government.

Rights of children with disability or chronic illness

Special care must be taken of a child with a disability or chronic illness by:

- Providing the child with parental care, family care or special care
- Making it possible for the child to participate in social, cultural, religious and educational activities, recognising the special needs that the child may have (for a disabled child)
- Providing the child and the child's care-giver with the necessary support services
- Providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community.

Best interests of the child

The principle of the best interests of the child must always be considered when making decisions about children. Some of the factors that should be taken into account include:

- The nature of the personal relationship between the child and the parents
Or care-giver
- The attitude of the parents towards the child
- The capacity of the parents or care-giver to provide for the needs of the child, including emotional and intellectual needs
- The possible effect on the child of any change in the child's circumstances, including being separated from both or either of the parents, any brother or sister or other child, or any other care-giver or person, where the child has been living with the person
- The practical difficulty and expense of a child having contact with the parents on a regular basis
- The need for the child to remain in the care of his or her parent, family and extended family; and to keep a connection with the family, extended family, culture or tradition
- The child's age, maturity, stage of development, gender and background
- The child's physical and emotional security
- Any disability that a child may have
- Any chronic illness that a child suffers from
- The need for a child to be brought up in a stable family environment and, where this is not possible, in an environment that is as close as possible to a caring family environment
- The need to protect the child from any physical or psychological harm that may be caused by exposing the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour
- Any family violence involving the child or a family member of the child.

Right of participation

All children have a right to participate in decisions that affect them.

Age of majority

The age of majority changes from 21 to 18 years.

Parental responsibilities and rights (See opposite page)

Protective measures relating to the health of children

Children over the age of 12 years can consent to HIV testing without involving their parents (in the past the age was 14 years).

Children over the age of 12 years can ask for contraceptives without the consent of their parents or care-giver (in the past the age was 14 years).

Custody, guardianship and support of children

Parents have custody and guardianship of their children, and a legal duty to support them.

CUSTODY OR CARE

Custody or care means:

- Providing a home for the children
- Feeding and supporting the children
- Looking after the day-to-day needs of the children
- Educating the children

When parents are married and live together, they share the custody/care of the children. When they separate or divorce, the court usually gives custody to one parent, either the father or the mother. Often the mother gets custody and the mother and father have joint guardianship of the children.

GUARDIANSHIP

In terms of the *Children's Act* a person who acts as a guardian must:

- Administer and safeguard the child's property and property interests
- Assist or represent the child in administrative, contractual and other legal Matters
- Give or refuse any consent required by law in respect of the child, including:
 - consent to the child's marriage
 - consent to the child's adoption
 - consent to the child's departure or removal from the Republic
 - consent to the child's application for a passport; and
 - consent to a sale of any immovable property of the child

The parents are usually joint guardians and are called the 'natural guardians'. A natural guardian has a duty to support her or his children. If for some reason the natural guardian cannot carry out his or her duties, the court appoints a 'legal guardian' for the children.

NOTE: The Guardianship Act (No 192 of 1993) is repealed by the Children's Act.

THE DUTY TO SUPPORT

Both parents have a legal duty to support their children. Where children are not given reasonable care, then the court may remove the child from the parent's care in terms of child care provisions.

The duty of parents to support their children ends when the children become independent, for example when they marry, or when they become self-supporting.

If the children are not living with the mother or the father, the person who is looking after them can apply for maintenance from the parents. For example, if a child is living with the grandparents, the grandparents can apply to get maintenance from the father and the mother of the child.

(See page 370 Problem 4: Getting maintenance through the Maintenance Court)

STATE CHILD SUPPORT GRANTS

Apply to the Department of Social Development (the SASSA offices) for these grants. The parents will have to go through a means test to qualify for Child Support or Care Dependency Grants.

- **Child Support Grant:** Any parent or whoever is looking after a child can apply for financial help, if you cannot afford to support the child. You can apply for this grant for any child who is 0-17 years old.
- **Foster Care Grant:** This is for children who are placed in the care of foster parents by the Children's Court, because they are considered to be children at risk. The foster parent is not the biological parent of the child.
- **Care Dependency Grant:** You can apply for this if you support a child who is severely disabled and needs special care.

(See page 305 Child Support Grant)

(See page 307 Foster Care Grant)

(See page 308 Care Dependency Grant)

PARENTAL RESPONSIBILITIES AND RIGHTS

When people become parents they have legal responsibilities and rights in respect of their children. Parents must give their children enough support to live at the same standard of living as the parents. This duty continues until the children are self-supporting. This support includes food, clothing, housing, medical and dental expenses, and education. Children are minors until they reach the age of 18.

These responsibilities and rights came into force on the 1st July 2007.

GENERAL PARENTAL RESPONSIBILITIES AND RIGHTS

The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right to:

- Care for the child
- Maintain contact with the child
- Act as guardian of the child
- Contribute to the maintenance of the child

PARENTAL RESPONSIBILITIES AND RIGHTS OF MOTHERS

The biological mother (in other words, the person who gave birth to the child) of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child.

PARENTAL RESPONSIBILITIES AND RIGHTS OF MARRIED FATHERS

The biological father (in other words, the physical father) of a child has full parental responsibilities and rights in respect of the child if:

- He is married to the child's mother, or
- he was married to the child's mother at the time when the child was conceived (in other words, when the mother fell pregnant) or at the time of the child's birth; or any time between these events.

PARENTAL RESPONSIBILITIES AND RIGHTS OF UNMARRIED FATHERS

Unmarried fathers have full parental responsibilities and rights in respect of the child:

- If at the time of the child's birth, he is living with the mother in a permanent relationship
- Even if he is not living with the mother or has never lived with her, he
 - is identified as the child's father or pays damages in terms of customary law
 - contributes or has tried to contribute to the child's upbringing for a reasonable period
 - contributes or has tried to contribute towards the child's maintenance for a reasonable period.

However, this does not affect the duty of a father to contribute towards the maintenance of the child.

If there is a dispute between the unmarried father and the mother of a child regarding any of these conditions, the matter must be referred for mediation to a family advocate, social worker, social service professional or any other qualified person.

Any party to the mediation can ask a court to review the outcome of the mediation.

This section applies regardless of whether the child was born before or after the Act was passed.

The *Natural Fathers of Children Born out of Wedlock Act (No 86 of 1997)* which gave unmarried fathers the right to go to court to ask for access, custody or guardianship of their children has been repealed by the *Children's Act*. The Act no longer makes a distinction between illegitimate and legitimate children.

PARENTAL RESPONSIBILITIES AND RIGHTS AGREEMENTS

The mother of a child or any other person who has parental responsibilities and rights in respect of a child can enter into an agreement with:

- The biological father of a child who for some reason does not have parental responsibilities and rights in respect of the child, or
- Any other person who has an interest in the care, well-being and development of the child.

A parental responsibilities and rights agreement must be registered with the family advocate or made an order of the High Court, a divorce court in a divorce matter or the children's court.

Before registering a parental responsibilities and rights agreement or making it an order of court, the family advocate or the court must be satisfied that the parental responsibilities and rights agreement is in the best interests of the child.

CHILDREN OF AFRICAN CUSTOMARY UNIONS

If a couple was married by African customary law, but they did not also have a civil marriage, the law says the children are legitimate. The natural father has rights over his children and a duty to support them. The *Children's Act* gives parental responsibilities and rights to all fathers whether they are married or not if certain specified conditions are present.*

CHILDREN OF MUSLIM OR HINDU MARRIAGES

If a couple was married by religious rites only (i.e by an Imam in the Muslim religion, or a priest in the Hindu religion), they used to be considered to be illegitimate. However, under the *Children's Act* it removed the status of calling children illegitimate. Both parents have a legal duty to support them. In terms of the *Children's Act*, whether fathers are regarded in law as married or unmarried, they automatically have parental responsibilities and rights if certain specified conditions are present.*

(See page 349 Parental responsibilities and rights)

(See previous page Parental responsibilities and rights of unmarried fathers)

ADOPTION OF CHILDREN

NOTE: The *Children's Act* deals with adoption as well as inter-country adoptions. The sections in the Act on adoption came into force on 1 April 2010.

Adoption is a legal way for an adult single person or a married couple to become the legal parents of a child. The Constitutional Court has decided in *Du Toit and Another v Minister of Welfare and Others 2003 (2) SA 198 (CC)* that the *Child Care Act* was unconstitutional in not providing for partners in same-sex life partnerships to adopt children jointly.

Adoption usually takes a long time. Parties must apply to the Children's Court for an order of adoption under the *Child Care Act*.

A child who is adopted must be under 18. A child can be adopted:

- Jointly by a husband and wife
- By a widow or widower or an unmarried or divorced person
- By a person who married the natural parent of the child
- By the natural father of a child born out of wedlock
- By a couple in a same sex life partnership
- By the foster parent of the child

CONSENT TO ADOPTION

Proper consent (permission) is needed to make an adoption order legal. Consent is written permission that is given to people wanting to adopt a child. Consent can be given by the parents, the guardian of the child or the child. A child older than 10 years can consent to their own adoption.

LAWS ON ADOPTION

Adoption laws in South Africa are outlined by the *Child Care Act* of 1983, which require social workers and adoption agencies to 'give due consideration' to language, religion and culture when matching prospective parents with children.

CONSENT TO ADOPT

A child whose parents are both dead is available for adoption. Where the parents are alive, they must both consent to the adoption.

CHILD BORN OUT OF MARRIAGE

In the case of the child born out of marriage, consent must be given by both the mother and the natural (birth) father provided that he has acknowledged himself in writing to be the father of the child and has made his identity known on the child's birth certificate. Where only one parent has given consent the commissioner will issue a notice to be served on the natural father within 14 days informing him or her of the consent that has been given and giving him or her the opportunity to also give or withhold consent.

The Children's Court does not need to issue a notice of an intended adoption of a child born out of marriage if the commissioner is satisfied that the natural father:

- Deserted the child and/or no one knows where he is
- Did not acknowledge that he was the father of the child or has failed without good reason to carry out his parental duties with regard to the child
- Was in an incestuous relationship with the mother of the child and the child was conceived as a result of this
- Was convicted of the crime of rape or assault of the mother
- Was, after an inquiry by the Children's Court following an allegation by the mother of the child, found on a balance of probabilities, to have raped or assaulted the mother.

WHO CAN ADOPT A CHILD?

- A married couple can jointly adopt a child.
- Partners in a life-partnership (including same-sex partners) can jointly adopt a child.
- A person who has married the natural parent of a child can adopt the child (adoption of a step-child).
- A single person (a widow or widower or an unmarried or divorced person) can adopt a child as a single person if they get the consent of the Minister.

WHEN IS CONSENT NOT REQUIRED?

Consent is not required when:

- The parents of the child have died and no guardian has been appointed for the child.
- The parent:
 - is not competent to give consent as a result of mental illness
 - has deserted the child and it is not known where the child is
 - has physically, emotionally or sexually assaulted, ill-treated or abused the child or allowed assaults or ill-treatment
 - has caused or assisted in the seduction, abduction or sexual exploitation of the child, or has caused or helped the child to commit immoral acts
 - withholds consent unreasonably
 - of a child born out of marriage has failed to acknowledge himself as the father of the child or, for no good reason, did not fulfill parental duties with regard to the child
 - is the father of a child who was born out of marriage and was conceived in an incestuous relationship with the child's mother
 - is the father of a child who was born out of marriage, and was convicted of the crime of rape or assault of the mother of the child
 - after an enquiry by the Children's Court following an allegation by the mother of

the child, found (on a balance of probabilities) to have raped or assaulted the mother of the child: provided that such a finding does not constitute a conviction for the crime of rape or assault

- of a child who was born out of marriage has failed to respond, within 14 days

NOTE: A parent of the child who has consented to the child's adoption has the right to withdraw consent within 60 days of giving the consent.

CASE STUDY

FRASIER VS CHILDREN'S COURT, PRETORIA NORTH

Lawrie Frasier had a child with his partner. They were not married. By the time the baby was born the couple had separated. The mother of the child arranged for the child to be adopted by people that the father did not know and without getting his consent to the adoption. She also didn't ask him whether he wanted to look after the child.

In the case, Mr Frasier said he had rights as the father of the child even though they weren't married. But the Child Care Act said it was not necessary for a mother to get permission from the father of an illegitimate child. If they had been married, then she would have to get his consent. It was as a result of Mr Frasier taking up this case with the Constitutional Court that the Child Care Act was changed and the Natural Fathers of Children Born out of Wedlock Act passed.

(See page 350 Parental responsibilities and rights of unmarried fathers)

The law regards an adopted child exactly as if he or she is the legitimate natural child of the adoptive parents. So there are the same rights and duties, for example the duty of support. All rights and duties between the child and its natural parents end.

Illegal adoption, for example paying to adopt a child, is a criminal offence.

(See page 369 Problem 3: Adopting a child)

Child abuse and neglect

The Constitution guarantees that everyone has the right to be free from all forms of violence in the home. The government and the police have a duty to protect children and implement measures that will prevent abuse of children in the home. For example, the police have established Family Violence, Child Protection and Sexual Offences Units (FCS) which investigate physical and sexual abuse of children and child neglect. They are specially trained to deal sensitively with children.

LAWS PROTECTING ABUSED AND NEGLECTED CHILDREN

There are laws that provide specific protection for children who are abused.

The most important Acts that deal with the protection of children who are or have been abused or neglected are the *Children's Act* and the *Children's Amendment Act*. There are wide ranging provisions that include the provision of child protection services and keeping a National Child Protection Register. The Acts also make provision for children who are in need of care and protection.

(See page 346 Summary of the Children's Act)

The main laws that aim to protect abused and neglected children are as follows:

- *The Children's Act* says that it is a criminal offence:
 - if a parent, guardian, other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or care-giver or other person abuses or deliberately neglects the child, or abandons the child.
 - If a person who is supposed to maintain a child doesn't provide the child with clothes, lodging and medical care.

- The *Domestic Violence Act* defines the different forms of domestic violence against adults and children and says how a child (or other people on behalf of the child) can get a Protection Order against the abuser.
(See page 360 *The Domestic Violence Act*)
- The *Criminal law (Sexual Offences and related matters) Amendment Act (No 32 of 1996)* gives a new definition of rape and includes a sexual offences register.
- The *Films and Publications Act (1996)* protects children from exploitation in child pornography and by being shown pornographic material.
- Criminal law allows a child who was abused to lay a charge against the abuser, for example, of assault, rape and assault with intent to do grievous bodily harm.
(See page 126 *Criminal charges*)
- The *Basic Conditions of Employment Act*, which makes it illegal to employ a child under the age of 15 years.

REPORTING CHILD ABUSE

Many children don't report abuse they are experiencing. There are many different reasons for this. But the law says when people must report child abuse and it is a criminal offence not to report in these circumstances. This law is in terms of the Children's Act.

The *Children's Act* says any doctor, nurse, teacher or person managing a children's home or place of care, must report any suspicion of child abuse in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.

STOPPING CHILD ABUSE USING THE DOMESTIC VIOLENCE ACT

The *Domestic Violence Act* covers domestic violence, sexual abuse, economic abuse and emotional and psychological abuse. This Act covers people who have or had a domestic relationship - for example children, partners, ex-partners, parents, etc. The *Children's Act* says any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, traditional leader or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care must report child abuse immediately to the police or a designated child protection organisation. It is an offence not to report child abuse.

(See page 360 *The Domestic Violence Act*)

The following people can apply for a Protection Order under the *Domestic Violence Act* to stop someone abusing a child:

- Family members
- Parents of a child or people responsible for a child
- A child under the age of 18, without the help of a parent or guardian
- Any person, including a health service provider, police officer, social worker, teacher, neighbour, friend, relative, minister, who has a material interest (not just being a busybody) in a child's wellbeing

The *Domestic Violence Act* says if a person that has a material interest in the wellbeing of a child and believes that the child (under 18 years) is being abused they don't have to wait for the child to give consent to apply for a Protection Order they can bring the application for the Protection Order themselves. It is enough if the person believes that the child is being abused.

(See page 375 *Problem 8: Getting a Protection Order*)

CHILD SEXUAL ABUSE

If a child has been raped or otherwise sexually assaulted, the criminal law can be used to lay a charge against the person who assaulted the child. During the criminal trial it is sometimes difficult to prove 'beyond a reasonable doubt' that a child was sexually abused in order to convict the accused. If it is clear that the child needs protection, the case goes to a Children's Court enquiry to decide the best way of protecting the child. But the Children's Court may not try or convict a person in respect of a criminal charge and thus cannot prosecute the child abuser.

(See next page Rape, incest and indecent assault)

(See page 373 Problem 6: Reporting rape or assault and going to court)

If the person who sexually abused the child, lives or recently lived with the child, is a member of the child's family by blood or adoption, or is or was a partner/spouse of the child's parent, you can use the *Domestic Violence Act* to protect the child.

(See page 375 Problem 8: Getting a Protection Order)

THE SEXUAL OFFENCES ACT

The *Criminal law (Sexual Offences and related Matters) Amendment Act (No 32 of 2007)* – also referred to as the *Sexual Offences Act* – defines a number of sexual offences in relation to children. Some of the most important provisions are as follows:

- Sexual exploitation of children (under the age of 18 years). The Act says that the following actions are offences in terms of sexual exploitation:
 - If a person uses a child to engage in sexual activities for money, even if the child consents to this;
 - If a person offers the sexual services of a child to another person, with or without the consent of the child, for money or any kind of reward;
 - If a person (who is a primary care-giver) allows another person to commit a sexual act with a child, even if the child consents;
 - If a person allows another person to commit a sexual act with a child, with or without the child's consent and is paid for this.
- Displaying child pornography
 - If a person displays child pornography or pornography to a child, with or without the consent of the child they are guilty of the offence of exposing or displaying or causing the exposure or display of child pornography or pornography to a child.
- Using children for child pornography
 - If a person uses a child, with or without the child's consent, for the purposes of creating, making or producing any image, publication, depiction or description of child pornography or assists in any manner in this regard is guilty of an offence of using a child for child pornography.

INCEST

The law says that people who may not get married to each other because they have a blood relationship or an adoptive relationship with one another also may not engage in acts of sexual penetration with each other. If they do, then they are guilty of the crime of incest.

The rules about incest are mostly the same as for rape. But the people involved are usually an adult and a child in the same family where the adult forces the child to have sex. Like rape, there must be sexual penetration as defined in the Sexual Offences Act. In order to prove that sex took place, it is important for the child to immediately see a doctor. *(See next page Rape, incest and sexual assault)*

REMOVING CHILDREN FROM ABUSE OR NEGLECT

The *Children's Act* is designed to look after the interests of children and protect them if their parents abuse or neglect them. The Act says police or a designated social worker can take abused or neglected children away from their homes, to a 'place of safety' without a court order in certain circumstances. The Children's Court will hold an enquiry to decide whether the parents or guardian are fit to have custody of the child. The court says they are unfit if they:

- Are so mentally ill that they cannot provide for the child
- Assaulted or ill-treated the child or allowed someone else to assault or ill-treat the child
- Let the child commit crimes, or be seduced, kidnapped, or used as a prostitute
- Do not support the child by providing maintenance
- Neglect the child or let someone else neglect the child
- Cannot control the child, for example to make sure he or she goes to school regularly
- Abandoned the child
- Do not seem to have any means of support

If the court finds that the child has no parent or guardian, or an unfit parent or guardian, then the court can say the child must go to a foster home or a children's home. Or the court can say the child must go back to his or her parents and the parents must follow any conditions the court gives them, or they will lose the child.

(See page 121 Children's Courts)

FOSTER CARE

The *Children's Act* deals with foster care. In terms of the Children's Act a child is placed in foster care when the Children's Court makes an order that it is in the child's best interests of the child to be placed in foster care or when the provincial head of social development in the relevant province by order in writing transfers a child to foster care.

The foster parents' rights and responsibilities with regard to the child are set out in the Court Order made by the Children's Court or in a foster care plan made between the parents/guardian of the child and the foster parents. . But the natural parents can visit their child at reasonable times, unless the court says they may not.

Foster parents have a duty to give the child food, clothing and education and generally promote the child's wellbeing. Foster parents have the right to discipline the child. But they cannot deal with the child's property, consent to the child's marriage, consent to adoption, consent to the removal of the child from the country or consent to the application for a passport of the child unless they are entitled to act as guardian of the child and in such a case they must consider the views and wishes of the child, bearing in mind the child's age, maturity and stage of development.

Foster parents can apply to the Department of Social Development for a state Foster Care Grant.

(See page 307 Foster Care Grant)

Rape, incest and sexual assault

THE SEXUAL OFFENCES ACT

The *Criminal Law (Sexual Offences and related Matters) Amendment Act (No 32 of 2007)* – usually referred to as the *Sexual Offences Act* – has changed the definition of rape and various other offences linked to sexual violence.

The objects of the Act are to give victims of sexual offences the maximum and least traumatising protection that the law can provide and to introduce measures which will allow the state to give full effect to the provisions of this Act. The Act aims to do this by:

- Bringing together all matters and/or offences relating to sexual offences in a single Act
- Making all forms of sexual abuse or exploitation a criminal offence
- Replacing some common law sexual offences such as incest, with new offences that will apply to both men and women
- Protecting complainants of sexual offences and their families from secondary victimisation
- Promoting the spirit of batho pele ('the people first') in respect of service delivery in the criminal justice system dealing with sexual offences
- Providing certain services to victims of sexual offences, including affording victims of sexual offences the right to receive Post Exposure Prophylaxis in certain circumstances
- Establishing a National Register for Sex Offenders

RAPE

The *Sexual Offences Act* changed the definition of rape so that it now includes penetration of the mouth, anus and genital organs of one person with the genital organs of another person, penetration of the anus and genital organs of one person with any other body part of another person, or any object including any part of the body of an animal, or penetration of the mouth with the genital organs of an animal. In other words, if a man puts his penis into the mouth or anus of another person, male or female, without their consent, this will constitute rape under the law. This means men and boys may now file complaints of rape with the police. Under the old Act, rape was defined only as vaginal penetration and excluded anal and oral penetration. Perpetrators accused of anal or oral penetration were charged with indecent assault, seen as a lesser offence than rape.

The main issue that needs to be determined in a rape trial is whether the person gave his/her consent. If the person said 'yes' to sex, then the court will find that it was not rape. So the prosecutor has to prove to the court that the person said 'no'. Often it is the complainant's word against the perpetrator's word, because no-one else saw the crime.

In terms of the *Criminal Law Amendment Act* a minimum sentence of life imprisonment is prescribed in the following situations:

- The offender injured the victim and grievous bodily harm was inflicted
- There was more than one man raping (multiple offenders)
- The victim was raped several times by the same man (multiple rapes)
- The offender has more than two prior convictions for rape
- The offender has knowledge of positive hiv/aids status
- The victim is under 16 years old, physically disabled or mentally ill

NOTE: Minimum sentences in terms of the Act are not mandatory but the court will have to show that substantial and compelling circumstances existed and that is why the minimum sentence was not applied.

Rape carries a minimum sentence of 10, 15 and 20 years for first, second and subsequent offenders, as per the Criminal Law Amendment Act.

(See page 373 Problem 6: Reporting rape or assault and going to court)

(See page 374 Bringing a civil claim for rape)

(See page 375 Problem 8: Getting a Protection Order)

WHEN DOES A PERSON CONSENT TO A SEXUAL ACT?

A person consents to a sexual act when they willingly and without force or pressure engage in a sexual act with another person. A person can indicate that they do not want to engage in a sexual act verbally, through body language or in another way that tells the other person that they do not want to engage in the sexual act.

A person has not consented to a sexual act if:

- They agreed to a sexual act with somebody because they were afraid of what the other person would do if they did not agree to the sexual act. For example, the person threatens to hurt or harm children or kill the person if they do not engage in the sexual act.
- They agreed to a sexual act but did not know that they were agreeing to a sexual act. For example, Mary agrees to allow a medical doctor to touch her breasts and vagina not knowing that it is not necessary for him to touch her in order to find out whether she has a heart problem.
- He/she was under the influence of drugs or alcohol.
- He/she was unconscious or sleeping.

WHO CAN CONSENT TO A SEXUAL ACT?

- Children under the age of 12 are unable to consent to any sexual acts. Committing a sexual act with a child under the age of 12 years amounts to rape or sexual assault. For example, if Nomphele is 10 years of age and Sipho, who is older than 18 years, engages in a sexual act with her, he has committed a sexual offence.
- Committing a sexual act with a child of 12 years of age or between the age of 12 and 16 years, with the child's consent, amounts to the offence of 'statutory rape'. For example, if Grace is 14 years of age and agrees to have sex with Vuyo, who is older than 18 years, Vuyo has committed a sexual offence.
- Committing a sexual act with a child of 12 years of age or between 12 and 16 years of age, without the child's consent, amounts to rape or sexual assault. For example, if Tania is 13 years of age and Benjamin, who is older than 18 years, forces her to have sex with him, Benjamin has committed a sexual offence.
- Non-penetrative sexual acts (sexual violation) of a child of 12 years of age or between 12 and 16 years of age with the consent of the child amounts to the offence of having committed an act of consensual sexual violation of a child. For example, if Anne is 15 years of age and agrees to John, who is older than 18 years, touching her genital organs John has committed a sexual offence.
- The sexual violation of a child of 12 years of age or between the age of 12 and 16 years without the consent of the child amounts to rape or sexual assault. For example, if Farieda is 13 years of age and Abdul, who is older than 18 years, forcefully fondles her breasts, Abdul has committed a sexual offence.
- Children who are 16 years of age and older can consent to sexual acts. For example, if Zinzi is 16 years of age and agrees to have sex with Shuaib, who is 32 years of age, no sexual offence has been committed.

Therefore, any person who is 16 years of age or older can consent to a sexual act.

INCEST

The law says that people who may not get married to each other because they have a blood relationship or an adoptive relationship with one another also may not engage in acts of sexual penetration with each other. If they do, then they are guilty of the crime of incest. The rules about incest are generally the same as the rules for rape, except with regard to incest the law states that mutual consent is not a defence with regards to incest, whereas consent is used as a defence in rapes.

In cases of adult/child incest only the adult is charged with the crime. Like rape, there must be sexual penetration as defined in the *Sexual Offences Act*.

(See page 356 Rape, incest and sexual assault).

SEXUAL ASSAULT

The *Sexual Offences Act* repealed the common law definition of Indecent Assault and replaced it with Sexual Assault. Sexual assault is when a person unlawfully and intentionally sexually violates another person without their consent. This includes, amongst other things, direct or indirect contact of the genital organs, (for example through clothing), the anus or in the case of a female the breasts, the mouth of one person with the genital organs, anus or breasts of another person or masturbation of one person by another person – but it does not include the act of sexual penetration.

(See page 373 Problem 6: Reporting rape or assault and going to court)

SEXUAL VIOLENCE AND HIV TESTING

A victim of sexual violence can apply to court for an order to have person who committed the sexual violence have an HIV test and for the results of the test to be given to the victim. This application can also be brought by any person that has an interest in the victim's well-being or the investigating officer investigating the case. The application must be brought within 90 days after the act of sexual violence was committed.

If the person is successful with the application, the investigating officer must take the person who committed the act of sexual violence for an HIV test. The HIV test results must then be given to the victim in writing. The HIV test results are private and confidential and should not be disclosed to others.

PROBLEMS WITH COMPULSORY HIV TESTING

The provision for HIV testing was introduced to protect victims of sexual violence. There are however some problems with this. If the person who committed an act of sexual violence was tested for HIV during the window period his body will not indicate that he has contracted HIV yet. This means that the test results can indicate that he is HIV negative even though he is HIV positive. The negative result could therefore be false. The false test results can lead to the victim to believe that she did not contract HIV and therefore does not need to practice safe sex or use anti-retrovirals. The window period can last for up 4 to 6 weeks.

POST EXPOSURE PROPHYLAXIS (PEP)

PEP is an antiretroviral treatment that is used to prevent a person from contracting HIV after having possibly been exposed to the virus.

PEP is however not effective in all instances. It must be taken within 72 hours after having contracted the virus and can have better results if taken before 48 hours have passed after possible contraction of the virus.

It is very important to ask for the PEP as soon as possible but within 72 hours of the sexual assault or rape.

WHAT DOES THE LAW ALLOW IN TERMS OF PEP?

A victim is entitled to:

- Receive pep free of charge at a designated public health establishment
- Free medical advice on pep before using it
- The list with the names, addresses and contact details of designated public health establishments providing PEP

If the victim (or a person who has an interest in the victim's well-being) laid a charge with the police regarding a sexual offence or reported the sexual offence to a designated public health establishment within 72 hours after the sexual offence took place, the police member, medical practitioner or nurse to whom the sexual offence was reported must inform the victim of:

- The importance of getting pep within 72 hours of having been exposed to hiv
- The fact that a victim can obtain PEP free of charge from a designated public health establishment

Domestic violence

Most victims of domestic violence are women and children. Domestic violence happens when a person gets hurt physically, or is abused mentally or emotionally by someone who has a domestic relationship with them. It can include a partner, an ex-partner, a parent, a child, a caregiver, etc.

One out of every six women is battered by her husband or boyfriend. But domestic violence is still not talked about openly. It is generally believed that what goes on in a person's home is their own private affair and people, including the authorities, should not intervene. This leads to a lot of abuse in the home going unpunished. It also makes it hard for battered women and children to look for help.

There are however options available to battered women and a number of organisations that can assist you if you are in such a situation. Getting a Protection Order under the *Domestic Violence Act* is one of the most important steps that a person who has been abused can take to stop the violence.

(See page 375 Problem 7: Using the law against domestic violence and Problem 8: Getting a Protection Order)

THE DOMESTIC VIOLENCE ACT (NO 116 OF 1998)

The *Domestic Violence Act* recognises that domestic violence is a serious crime against society. The Act aims to give greater protection to people in domestic relationships who have been abused.

The *Domestic Violence Act* includes people who are married, living together, dating or ex-partners. Also included are parents and children, people sharing homes, or caregivers to children or older people.

The Act says:

- A person can be charged and convicted with marital rape whether the parties are married according to civil, customary or religious law.
- When police arrive at a scene of domestic violence, they must inform victims that they have a right to ask for police assistance to protect themselves and their children. Police are allowed to seize firearms and other weapons.
- Victims can ask police to help them find a place of safety and for help to move them there.
- Police have to tell victims how to get a Protection Order. The order is issued by a court and will specify conditions that the abuser must stick to. The court will also issue a warrant for the arrest of the abuser if he/she breaks any of the conditions.
- The Act gives police the right to arrest an abuser at the scene of an incident of domestic violence without a warrant of arrest, if the police reasonably suspect that the abuser has committed an offence involving physical violence.
- A person that is subject to domestic violence can also ask for emergency money relief.

DOMESTIC VIOLENCE

The Act says domestic violence includes:

- Physical abuse
- Sexual abuse
- Emotional and psychological abuse
- Intimidation
- Harassment
- Stalking (where someone follows you around, or hangs around your home, or keeps contacting you when this is unwelcome to you and you find it threatening)
- Damage to property
- Entering a person's home without consent where people do not share the same home
- Any other controlling or abusive behaviour that harms or may cause harm to a person

Legal remedies in domestic violence cases include:

- Laying a criminal charge, for example assault, against the abuser
(See page 127 Laying a criminal charge against another person)
- Getting a Protection Order against the abuser under the *Domestic Violence Act*, including if necessary getting an order to have the abuser's gun removed, if the abuser has used a gun to threaten the victim, and/or an order that the abuser be evicted from the common home.
(See page 375 Problem 7: Using the law against domestic violence and Problem 8: Getting a Protection Order)
- Making a civil claim against the abuser to claim compensation money for pain and suffering and any medical costs

SEXUAL ABUSE

The *Domestic Violence Act* says sexual abuse is 'any conduct that abuses, humiliates, degrades, or otherwise violates the sexual integrity of the complainant'. Sexual abuse can, among other things, be the following:

- Forcing sex on a person (rape)
- Sexually assaulting them in other ways
- Sodomy
- Touching someone in a way that makes them uncomfortable
- Forcing oral sex on a person
- Incest (where a child's parent/brother/sister sexually abuses him or her)

Legal remedies in sexual abuse cases include:

- Laying a criminal charge against the abuser, for example for rape or sexual assault *(See page 127 Steps in laying a criminal charge against another person)*
- Getting a Protection Order against the abuser under the *Domestic Violence Act* *(See page 375 Problem 8: Getting a Protection Order)*
- Making a civil claim to claim compensation for pain and suffering *(See page 146 Civil claims)*

ECONOMIC ABUSE

Economic abuse is when the abuser doesn't pay a woman maintenance out of spite towards her, withholds money to control her or takes her salary away from her.

Legal remedies in economic abuse cases include:

- Getting a protection order under the *Domestic Violence Act* for emergency monetary relief, which can include:
 - compensation for loss of earnings
 - medical and dental expenses
 - new accommodation expenses
 - household or family necessities

(See page 375 Problem 8: Getting a Protection Order)

- Claiming for maintenance under the *Maintenance Act*.

(See page 370 Problem 4: Getting maintenance through the Maintenance Court)

The Maintenance Court process can take some time so if money is needed urgently, it is best to apply for a Protection Order for emergency monetary relief. You must still claim maintenance in the Maintenance Court as well because the Protection Order will only give emergency monetary relief for a temporary time because maintenance is supposed to be dealt with by the Maintenance Court. When the Maintenance Court makes an order, this will replace the part of the Protection Order that gives emergency monetary relief.

EMOTIONAL AND PSYCHOLOGICAL ABUSE

The *Domestic Violence Act* says emotional, verbal and psychological abuse is 'a pattern of degrading or humiliating conduct towards a complainant' including:

- Repeated insults, ridicule or name-calling
- Repeated threats to cause emotional pain
- Repeated exhibition of obsessive possessiveness or jealousy, which is a serious invasion of a person's privacy, liberty, integrity or security
- Harassment and stalking

Legal remedies in emotional and psychological abuse cases include:

- Laying a criminal charge against the abuser, for example for kidnapping, abduction, crimen injuria *(See page 127 Laying a criminal charge against another person)*
- Making a civil claim for compensation for pain and suffering

(See page 146 Civil claims)

PROTECTION ORDER

Under the *Domestic Violence Act* a person can get a Protection Order to stop another person abusing them, or for the abuser to leave the home.

The advantages of this process under the Act are:

- You do not need an attorney to help you to apply for this kind of court order, so the process is practical and cheap
- It is much quicker because you do not have to use the normal court procedure
- The abuser is not charged with any crime, but just ordered to stop the abusive behaviour. Many women or children may be reluctant to go so far as to lay a charge against a family member which could land the person in jail. The abuser only gets into trouble with the law if s/he disobeys the Protection Order.

WHAT IS A PROTECTION ORDER?

A Protection Order is an order from the court telling an abuser to stop abusing someone. You can get a Protection Order against anyone who is abusing you and who is in some form of *domestic* relationship with you, for example, a parent or guardian; a husband or wife; a romantic partner. You cannot get a Protection Order against your employer or neighbour.

The Protection Order can also order:

- The police to take away any dangerous weapons from the abuser
- A police officer to go with the abused person to collect their things
- The abuser to move out of the home
- The abuser not to prevent the complainant from entering the common home
- The abuser to continue paying the rent or bond to provide housing for the complainant
- The abuser to pay money to help the person survive or for medical costs

Police may arrest an abuser who has disobeyed a Protection Order, using the warrant of arrest given at the same time that the Protection Order is given by the court, if the person that has been abused is in 'imminent harm'. This is a problem, because the courts have not said what 'imminent harm' is and often the police are reluctant to arrest. They prefer to give the abuser a notice to come to court.

WHO CAN APPLY FOR A PROTECTION ORDER?

Anyone in any of these relationships can apply for a Protection Order :

- Man and wife married according to civil, customary or religious law
- Gay or lesbian couple
- People living together who aren't married
- People who are engaged
- People who are dating
- People who share the same home (housemates, boarding schools, university residences, and so on)
- Family members of the abused
- Parents of a child or people responsible for a child
- A child under the age of 21, without the help of a parent or guardian
- Any person, including a health service provider, police officer, social worker, teacher, neighbour, friend, relative, minister, who has a material interest (not just being a busybody) in a victim's wellbeing provided that the victim consents. No consent from the victim is needed if the victim is a child, mentally retarded, unconscious or for other good reason isn't able to consent.

The *Domestic Violence Act* says if a person believes a child is being abused they don't have to get the child's permission before getting a Protection Order. It is enough to believe that the child is being abused.

WHERE CAN YOU GET A PROTECTION ORDER?

A person can get a Protection Order from a Magistrate's Court or High Court. This court must be close to where the abused person lives or works, or where the abuser lives or works or where the abuse took place. The Act says a person can get a Protection Order from a Magistrate's Court at any time of day or night.

COSTS OF GETTING A PROTECTION ORDER

It is not necessary to get an attorney to get a Protection Order. Getting a Protection Order in the court is free – the person only has to pay for the Protection Order to be served on the abuser. If he/she does not have money to pay for the order to be served, then the Act says the court must help with this.

(See page 375 Problem 8: Getting a Protection Order)

Abortion

WHEN MAY A WOMAN HAVE AN ABORTION?

The *Choice on Termination of Pregnancy Act* says a woman can get a termination of her pregnancy:

- In the first 12 weeks of pregnancy
 - if she asks for one during this period
- From week 13 up to and including week 20, if a doctor after consulting with the pregnant woman thinks that:
 - the continued pregnancy would seriously affect the social or economic circumstances of the woman
 - the continued pregnancy would pose a risk of injury to woman's bodily health or her mental health
 - there is serious risk that the foetus would suffer from severe mental or physical abnormalities
 - the woman is pregnant from rape or incest
- After the 20th week, if a doctor after consultation with another doctor or a registered midwife thinks that:
 - the woman's life is in danger
 - the foetus would be severely malformed
 - there is a risk of injury to the foetus

CONSENT TO AN ABORTION

The termination of pregnancy can only take place once the woman has given her informed consent. No consent other than that of the pregnant woman is necessary for the termination of a pregnancy unless she is so mentally ill that she doesn't understand what abortion is about or what happens as a result of an abortion, or she is continuously unconscious and therefore cannot give consent.

In the case of a pregnant minor (a person under the age of 18 years) a medical practitioner or a registered midwife must advise the minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated. However, if the minor chooses not to consult them, she is still allowed to have the abortion in terms of the Act.

A woman is entitled to counselling before and after the abortion. The counsellor may not force her, nor tell her whether or not she should have the abortion.

(See page 24 Bill of Rights, section 12)

WHO MAY PERFORM AN ABORTION?

- In the first 12 weeks of pregnancy:
 - a registered midwife who has completed the prescribed training course
 - a doctor
- From week 13 to the end of the pregnancy:
 - only a doctor

Government hospitals should provide facilities to carry this out.

Death

When a person dies, the family must report the death to the Registrar of Births and Deaths at the Department of Home Affairs. They must do this as soon as they can practically do so.

As soon as the Registrar is satisfied that everything is in order, he or she will give the family a burial order. This is a certificate that says the dead person can be buried. Usually a burial cannot take place without a burial order.

The family must also report the death to the Master of the High Court within 14 days if the person who died left any property or left a will.

When people die, their belongings and property are given to people called their **heirs**. These are usually members of their family. The way this is done depends on whether or not the dead person left a will. A **will** is a document setting out how someone wants to share out his or her property after death.

The property a dead person leaves is called an **estate**.

DYING WITHOUT A WILL

When a person dies without leaving a will, the law says the person died **intestate**. The law of **intestate succession** is followed in dividing up his or her property.

If a married person dies intestate, his or her property is shared equally by the other spouse and their children except that the spouse will get at least R125 000 so if the estate has less value than this, the children won't get anything. There are complicated rules for deciding who gets the property if the dead person leaves no spouse or children. You should ask an attorney for advice on this. If the dead person leaves no blood relatives at all, the property will go to the government.

If a couple are married according to African customary law, the same intestate rules set out above will apply. They will follow the same intestate rules set out above.

DOMESTIC PARTNERSHIPS ('VAT EN SIT')

There is a common misunderstanding that the law recognizes common-law marriages. Many people who have lived together for a period of time believe that they are entitled to a portion of what their partner owns. This is not true. It does not matter how long the parties have lived together there is no automatic legal protection for people who live together. If the people who live together are not married to each other, the partners cannot inherit property from one another without a will. No valid marriage means no legal protection.

Domestic partners can apply to the court to have a universal partnership declared. This is not easy because the person seeking a universal partnership must prove to the court the contributions that he or she made in the deceased person's estate. A will is the best way for people in domestic partnerships to protect themselves. Children born in domestic partnerships can claim for maintenance from both parents.

DYING WITH A WILL

It is important for people to make wills. In a will people can say what they want to happen to their property after they die.

Any person over the age of 16 can make a will, as long as they know and understand what they are doing. In a will you can leave your property to anyone you wish – wives, husbands, children, relatives, friends or strangers.

When you have decided how you want to divide up your property, you must decide who will do this for you when you die. The person you choose is called an executor.

If you don't choose an executor, the Master of the High Court will name someone executor, usually a member of your family.

You must make a will in writing. You can choose any two people older than 14 years as witnesses, but they must not be people that you left anything to in the will. You must initial the will on every page and at the end, in the presence of the witnesses, sign in full. The witnesses must also initial on every page and sign in full at the end.

(See page 378 Example of a simple will)

WINDING UP A DEAD PERSON'S ESTATE

A member of the dead person's family or a close friend must report the death to the Master of the High Court within 14 days if the deceased person had any property or left a will. If they do not do this, it is a criminal offence. They must get a form called a **Death Notice** from the Master's office and fill it in. Anyone who has a copy of the will must also send it to the Master of the High Court.

The dead person's husband or wife, or nearest relative or close friend must also send an **inventory form** to the Master within 14 days of the death. This is a list of all the property that belonged to the dead person.

All this property is called the **estate**. The estate has assets and liabilities. Assets are all the things the person owned. Liabilities are the person's debts.

The dead person's estate does not go straight to the heirs. It first goes to the executor.

The executor must draw up an account, adding up all the person's assets. Then the executor subtracts all the debts from this amount. The executor must pay any income tax the dead person owed, and also pay the 'death duties' tax on the estate. The executor sends the account to the heirs and to the Master of the High Court. When the Master is satisfied, and the debts are all paid, the rest of the property goes to the heirs.

If things are complicated, for example if the estate cannot pay all the debts, the executor should consult an attorney to help.

If the dead person's property is worth less than R125 000, the Master may say an executor is not necessary. The Master then gives directions as to how the estate is to be dealt with and usually gives the dead person's husband or wife permission to keep all the dead person's property unless they leave a will giving it to someone else.

1. Getting a divorce

My husband and I want to get a divorce. Where do we start? How can we get help with attorneys, legal fees and so on? What steps must we follow to get a divorce?

WHAT DOES THE LAW SAY?

Divorce cases are heard in the High Court and in most Magistrate's Courts. A law was passed recently that gave all regional magistrate's courts jurisdiction to hear family matters. A divorce can be simple and cheap in these courts. This means that people wanting to get a divorce do not have to go to the cities to use the High Court to get a divorce. You can choose whether to do your divorce in the Family Court or the High Court.

WHAT CAN YOU DO?

Even when there is serious trouble in a marriage, sometimes the couple can avoid a complete breakdown. Before going to an attorney or the court for a divorce, the married couple could speak to a social worker or marriage guidance counsellor to see if they can solve their problems. Divorce is a last resort. The Family Advocate helps the Regional Court or High Court with divorce cases where there are minor children involved.

The Family Advocate works together with family counsellors in divorce and similar cases. Their main role is to work out what will be the best arrangement for children when the parents want a divorce. The Family Advocate is important because it allows the two sides to meet together with an independent person to sort out differences on the arrangements for the children. If the case goes to court then the Family Advocate will represent the best interests of the children in the trial.

A divorce can be defended or undefended.

- A **defended** divorce means that one partner wants a divorce and brings the case to court but the other partner does not want the divorce OR does not agree on how the property should be shared, or about the maintenance and custody arrangements. The other partner wishes to argue in court about these things. This is called defending the divorce action.
- An **undefended** divorce means the other partner agrees to the divorce AND agrees to the arrangements suggested by the divorcing partner. If a divorce is undefended the cheapest and quickest way to get a divorce is to use the Regional Court. *(See page 341 The Family Court)*

If you cannot afford a divorce attorney you can get legal aid if you qualify according to the means test. *(See page 159 Applying for legal aid)*

(See page 379 Model letter: Request for social worker's report to assist with application for legal aid)

A wife who wants to divorce her husband, but does not have enough money to pay for an attorney, can ask her attorney to claim some money towards her legal costs from her husband. If she needs support for herself and the children, she can ask her attorney to claim maintenance from her husband. A woman can also claim maintenance at the Maintenance Court from a husband who deserted her and the children. She can do this without consulting an attorney.

(See page 339 Arrangements made at the time of the divorce)

If the divorce is undefended and there are no complications, you can cut out legal expenses and do the divorce yourselves. To do this you should check with the Registrar of the High Court or Regional Court.

STEPS IN A DIVORCE ACTION

- 1 **CONSULTATION WITH AN ATTORNEY** The spouse (husband or wife) who wants the divorce takes his or her marriage certificate and goes to see a lawyer. The spouse explains why he or she wants to get divorced. The attorney gives advice on whether there are proper legal grounds for divorce. You can also go to one of the volunteers at the Regional Family Court and they will assist you to fill out the forms.
- 2 **SUMMONS** The attorney or divorcing spouse draws up a summons against the other spouse. This is a document which tells the other spouse about his or her right to defend the divorce. The Registrar of the Court issues (stamps) the summons.
- 3 **PARTICULARS OF CLAIM** The summons is attached to the Particulars of Claim. This document sets out the reasons for the breakdown in the marriage. It also sets out what the divorcing spouse claims, for example custody of the children.
- 4 **NOTICE OF INTENTION TO DEFEND** The other spouse usually has 10 days to file (send to court) a Notice of Intention to Defend. If he or she does not do this within 10 days, the court sets a date for an undefended court hearing. If he or she does file the Notice within 10 days, then the spouses must send in their Pleadings. Pleadings are legal documents in which the husband and wife try to work out exactly what their claims and defences are.
- 5 **CONSENT PAPER** If the other spouse does not file a Notice of Intention to Defend or if the parties reach a settlement, where they agree on what should happen to the property, children and maintenance, they can write their agreement down in a Consent Paper. Then only the spouse seeking the divorce action has to go to the court hearing.

Even if the divorce is defended at first, the parties can reach a settlement at any stage. They also write this down in a Consent Paper.

Both the husband and wife sign the Consent Paper. When the divorce is granted, the magistrate makes the agreements in the Consent Paper an order of court. This means that if either person breaks the agreement on purpose, the court can send him or her to jail for contempt of court. Regardless of what the parties put in the consent paper, the court will make sure it is in the best interests of the children and ask for the recommendation of the Family Advocate.
- 6 **THE COURT HEARING (TRIAL)** In an **undefended** case, only the spouse who seeks the divorce must attend the court hearing. The divorce only takes a few minutes.

If the case is **defended**, both spouses must attend the court. If the spouse bringing the action proves his or her case, the court will grant a Divorce Order and also an order about the marriage property, care and contact in relation to the children, and maintenance. The court sends a copy of the Divorce Order to each spouse. At the Family Courts the Divorce Order must be collected.

Using the Regional Court

A person using the Regional Court does not need to have an attorney. A person wanting a divorce can go to the court on any day during the week from 9 a.m. An assistant will help complete the necessary forms. A summons will be issued and then served on the spouse.

The divorce will take longer to settle if:

- The other spouse chooses to defend the matter
- There are children and this usually involves a Family Advocate.

If a couple doesn't have children, a divorce can be finalised in about two weeks if it is not contested by either of the parties. They must both fill in a notice of non-defence. This only gets signed by the defendant when the summons is served on him/her. A date for the court appearance is then set. If one spouse refuses to sign the notice of non-defence when it is served with the summons, but does not defend the matter, it can take about five weeks to finalise. However certain courts are so busy that people sometimes wait longer than 6 months for a date for an undefended divorce.

If the couple has children, the Family Advocate will be involved to make sure that the interests of the children are seen to.

The costs of using the Regional Court are very low. Contact the Regional Court that is closest to you for information on up-to-date costs and procedures.

(See page 341 The Family Court)

2. Entering into a civil union

Riana and Charlene, both South Africans, have a lesbian relationship and want to get married. Riana is 21 years and Charlene is 25 years old. Riana has been married before but is now officially divorced

WHAT DOES THE LAW SAY?

Riana and Charlene are not legally allowed to marry each other in terms of the *Marriage Act*. The *Civil Union Act*, however, allows them to enter into a civil union which can be either a marriage or civil partnership. If they do this they will get a certificate that indicates that they have either entered into a marriage or a civil partnership, depending on their choice. This registration certificate, shows that the civil union has been registered under the *Civil Union Act* and is not a marriage certificate under the *Marriage Act*. The certificate will serve as a legal proof that the two partners are married or have become civil partners.

Riana and Charlene will be able to register a civil union because (a) they are both over the age of 18 years, (b) while Riana was previously married, she is divorced and has divorce documents to prove this, and (c) both women are South African citizens.

WHAT CAN THEY DO?

Riana and Charlene can get married or enter into a civil partnership in terms of the Civil Unions Act at any public office, including the Department of Home Affairs and magistrate's court in their area, in any private dwelling, including their own home, or any other place that is used for the purposes of marriages or civil partnerships.

They will need to supply the following documents:

- Identity documents (or an affidavit if an ID or passport is not available to confirm their identity);
- Application forms specific to the *Civil Union Act* which can be obtained from the Department of Home Affairs in their area;
- Riana's divorce documents

Finally, they will need to have two witnesses to the ceremony.

3. Adopting a child

"My husband and I wish to adopt a child. What must we do to find a child to adopt? What are all the steps to follow before we can bring a baby home?"

WHAT DOES THE LAW SAY?

(See page 351 Adoption of children, which briefly sets out the law about adoption)

WHAT CAN YOU DO?

There are many different places you can approach in order to adopt a child, for example, the Child Welfare Society in your area or voluntary or charitable adoption agencies.

STEPS IN AN ADOPTION

- Make an application for adoption at one or more adoption agencies.
- Social workers from the agency check that you are suitable people to be adoptive parents.
- If the agency finds a child, you must apply to the Children's Court in the district in which the child lives.
- The court holds a formal court hearing which is not open to the public.
- The Commissioner of Child Welfare sits in the court. You must satisfy the Commissioner that you have a good reputation and are fit to have custody of the child. You must also show that you can support and educate the child.
- The social workers from the agency also make a report to the Commissioner, saying if they think you are suitable parents. The Commissioner **can** consider the religion, culture and race of the child's natural parents and its adoptive parents. **BUT** the *Child Care Act* does **not** say the Commissioner **must** match these matters. The welfare of the child is most important.
- The Commissioner must see a consent form signed by the natural parents. Usually your names as the adoptive parents are filled in on the consent form. But you can have a 'secret adoption'. This means the adoptive parents and the natural parents agree that the natural parents will not know the names of the adoptive parents.
- If the Commissioner is satisfied with everything, he or she gives an **order of adoption**. This can happen months after you first apply to adopt a child.

CANCELLING AN ADOPTION

The natural parents, adoptive parents or the Minister responsible can apply to the Children's Court for a Rescission (an order cancelling the adoption), within two years of the date of the adoption, if:

- The adoption is not in the interests of the child
- The child was mentally ill at the time of the adoption and the adoptive parents did not know this
- There was some fraud or mistake that persuaded the adoptive parents to adopt the child
- The natural parents did not give proper consent

4. Getting maintenance through the Maintenance Court

"I have two children of four and seven years. How can I get the father of the children to pay me support money for them?"

WHAT DOES THE LAW SAY?

Both parents have a legal duty to support their children, including children from unmarried fathers. This duty of support ends when the children become independent, for example, when they marry, or when they become self-supporting. One parent can apply to the Maintenance Court for the other parent to pay support for their children. Once there is a court order instructing a parent to pay child support, it is a criminal offence not to pay. The parents have to pay in proportion to their income. (See page 349 *The duty to support*)

For children up to the age of 17 you can also apply to the Department of Social Development (represented by the South African Social Security Agency SASSA) for a Child Support Grant if they comply with the means test.

(See page 305 *Child Support Grant*)

There are special Maintenance Courts at every Magistrate's Court. Maintenance clerks working in these courts help people who want to apply for maintenance and also deal with applications to get more or to pay less maintenance.

WHAT CAN YOU DO?

Check when applications can be made at the Maintenance Court as some Maintenance Offices are only open on certain days of the week. These are the steps you must follow:

- Go to the Maintenance Office at the Maintenance Court in your area.
Take with you:
 - the name and address of the father, as well as details of where he works
 - photographs of the father (if available) so that the court can identify him
 - if you were married and are now divorced, a copy of the divorce order
 - proof of your income (like a wage slip)
 - your papers, receipts and accounts, showing all the things you must pay every month. *(See page 381 Monthly expenses)*
- The maintenance officer sends a letter, called a **summons**, to the father asking him to come to the maintenance office on a certain date.
- On the date, you and the father must go to the office. You must try to agree on how much the father must pay for his children.
- The maintenance officer will work out with you all the things you must pay for every month, and how much money you earn and how much money the father earns. Then you can see how much you need from the father.
- It is important to get the court to make an order to do a paternity test if the father denies that he is the father.
- If you **agree** on how much the father must pay for his children, the maintenance officer will get both of you to sign a paper called an **order of court**. This states how much, when and where it must be paid.
- If you **do not agree**, then the officer will say your case must go to the **Maintenance Court** on a certain date. The court will warn both parties verbally of the date that they must appear in court.
- If the father does not come to court on the date that he was supposed to, and he has been properly informed, you can ask that a default order be made in his absence. Often the court issues a warrant for his arrest instead of giving a default order but it is better for you to get a default order otherwise there is more delay in getting the maintenance.

If the father seems to have disappeared, then the court can order any person who knows where he is to come to the court and tell them where he is. It is the responsibility of the state to trace the father. However this is very difficult and it is a better idea to claim maintenance from the grandparents (this sometimes brings the father out of hiding!).

- At the maintenance enquiry in the court, the magistrate listens to both parties and finds out how much their income and expenses are every month.
(See page 381 Monthly expenses)
- The magistrate then decides how much the father must pay for his children. The magistrate makes this amount an order of court, in writing. It is called a **maintenance order**. Then the father must pay that amount every week or month to the maintenance office or into the mother's bank account.
- The court can also order a stop(debit) order to be put on the person's account without their consent or make an order that the employer deduct the money from an employee's salary.

- If the father is out of work, he will not have to pay maintenance straight away. The magistrate will tell him that he has a certain time, say three months, to look for work. He will be given a form to be signed by employers he has approached if they do not give him a job. The enquiry will then be postponed to a future date. Once he has work, an enquiry will be held and the magistrate will make an order. But if the father stays out of work a long time, and doesn't look hard to find work, the magistrate might send him to jail for not paying support. If the father stays out of work a long time, you can try claiming maintenance from the grandparents as they have a duty of support towards their grandchildren if the parents can't support the children.

5. Maintenance is not paid

*"I got a maintenance order against the father of my children.
But he still doesn't pay support."*

WHAT DOES THE LAW SAY?

- Go to the maintenance office and complain. It is important to make a formal complaint every time when the father doesn't pay.
- If the father is employed and failed to pay his maintenance, the mother must ask the court to make an order to get the maintenance deducted from the father's wage by the employer. This is called a *garnishee order*. The consent of the father is not required for a garnishee order and the employer has a duty to obey the court order.
- If the father does not pay, he will be in **contempt of court** which is a criminal offence. The police will give him a paper telling him he must come to court where he must explain why he did not pay the money. If he doesn't have a good reason, the court usually tells him that he must pay all the maintenance he owes, or he will go to jail.
- If maintenance is not paid you can ask the court to issue a warrant of execution. This means the court orders property of the father to be attached and sold to cover the cost of the maintenance. Complainants sometimes have to pay a fee of approximately R150 towards the costs of the sheriff. This cost varies but it can be recovered from the maintenance debtor in the end.

SOME MORE POINTS ABOUT MAINTENANCE

You can ask the maintenance court to make the maintenance amount **higher** even if the father is behind in his payments. You must show good reasons for needing more money. You can ask the court to make an order that the maintenance goes up automatically every year either by a set percentage, for example 10% or by the official inflation rate. This means you won't have to go back to court regularly just to keep up with the rising cost of living. There may still be other reasons to apply for an increase, for example, you lost your job, the father got a much better job or a child had unexpectedly high medical expenses.

The father can also ask the maintenance court to make the maintenance money **lower**. He must show the court that since the court order was made, he earns less money. Or he can show that the mother or children can now support themselves.

You **do not need an attorney** to get maintenance through the maintenance courts. So it does not cost you anything. But some people **want an attorney to help** them when they go to court. You can do this, but then **you have to pay the attorney**. Legal aid will not help you get maintenance because you do not need an attorney.

Other points about maintenance are:

- If a man pays maintenance directly to the mother of his children, he should get a receipt from her to prove this.

- A mother is also entitled to get back-payments of maintenance and medical expenses during her pregnancy and during or after the birth of her child.
- You are entitled to charge interest on any back-payments of maintenance.
- To prevent wasting time and travelling, you can telephone the maintenance office and ask whether your maintenance was paid or not.

6. Reporting rape or assault and going to court

I was raped and I want to report the rape. How do I do this? What will happen to me when I go to the police? And what will happen in the court case?

WHAT DOES THE LAW SAY?

If you make a complaint to the police, the police must investigate the matter. They must arrest the accused and may arrange identity parades, for you to point out the criminal. They must collect evidence that will help the court to properly try the person accused of the crime. They must get statements from any witnesses (people who saw the crime). *(See page 356 Rape, incest and sexual assault)*

Other rights that you have when reporting a rape are the right to:

- Call the police and have them come to you
- Have a friend or a family member with you to support you
- Give your statement in privacy
- Give your statement to a female officer (if you are female), if there is one available

WHAT CAN YOU DO?

- **Go to the charge office** at the nearest police station and make a complaint. You can go to any police station. If you report it at a police station that does not cover the area where the assault took place, it will be referred to the appropriate station for investigation. You should try to go within 48 hours of the attack. If you leave it longer, you may have to explain why it took you so long to go to the police. It is advisable to report it to the police or a health facility within 72 hours, then you can access PEP treatment against a possible HIV infection.
- **Make a statement to the police.** The detective will take a statement from you. You have the right to make the statement in your own language or have it translated. Because you are making a complaint, you will be called a complainant. You must then swear that you are speaking the truth and sign your statement. If you forget something and think about it later, you can add it to your statement.
- **Ask for a copy of your statement** and the police reference number before you leave the charge office. You have the right to get a copy. The police reference number is called an OB number (Occurrence Book Number) or a VB-nommer (Voorvalleboeknummer).
- **Get a medical report.** If you have any injuries, the police will ask you to get a medical report form filled in. This form is called a J88 medical report. You can go to your own doctor or to a district surgeon (a government doctor) to get this form filled in. This form must go back to the police station where you laid the charge. If you go to a district surgeon, he or she will send it back for you.
- After you make your statement to the police, they must **open a case docket** and investigate a criminal charge against the person who sexually assaulted you. Then there will be a CR (Criminal Register) or MR (Misdaadregister) number.
- **Check on the progress of your case** a week or two later to see what is happening. **Ask for the name of the investigating officer** so you can speak to him or her when you contact the charge office.

Sometimes nothing happens because the police investigation is stopped or the National Prosecutions Authority decides not to charge the person who raped or assaulted you. You can ask the investigating officer for reasons. If you are not satisfied, you can ask your lawyer to make the authorities take your case more seriously.

- **Identity parade.** You may have to identify the person who assaulted you by pointing out the person in an identify parade.
- **Evidence.** The police must gather as much evidence as possible to show that the story you have told is the truth, for example, the clothes that you were wearing when the attack happened, etc. They may be needed in the court case.
- **Medical evidence.** The police also need the medical report and samples taken by the doctor. Do not wash yourself after the attack until you have seen the district surgeon or your doctor. Also do not drink any alcohol or take any other drugs such as strong painkillers or tranquillisers. You have a right to ask the doctor what he or she is doing and why. You should also ask the doctor to treat you in case you may be pregnant from the rape. The doctor is not legally obligated to treat you for pregnancy, sexually transmitted diseases or HIV/AIDS. You may need to see another doctor to be treated for these problems or any other injuries.
- **The court case** (*See page 130 Steps in a criminal court case*)
 - If the man who raped you is charged, you must give evidence in court. You will be cross-examined by the accused or their attorney.
 - The state prosecutor will present the case against the accused. You will be called as a **state witness** to say what happened to you. Tell the court about the effects the sexual assault has had on you.
 - The prosecutor must prove the charge against the accused **beyond a reasonable doubt**. This means there should be no doubt in the magistrate's mind that the man is guilty. The magistrate might decide that the prosecutor has not proved the case well enough and then find the attacker 'not guilty'. This does not always mean that the accused did not do it. It just means there was not enough evidence to prove the case.
 - Even if the magistrate or judge finds the attacker guilty, the **sentence might be light** – a fine or only a short time in jail. You have no say over what sentence the accused gets.
 - If the accused is found guilty, ask the prosecutor if you can submit a Victim Impact Statement or testify how the rape or sexual violation affected you and your life.
 - You can ask for certain damages in terms of the Criminal Procedure Act. If you do then you may not be able to bring a claim for civil damages against the perpetrator.

BRINGING A CIVIL CLAIM FOR RAPE

A person who has been raped can also bring a civil case against the person who has raped and/or sexually assaulted them. (*See page 146 Civil claims*)

EXAMPLE

In a civil claim a young girl sued the man who had been raping her for many years for damages in a civil case. The civil claim was made after the man was found guilty of rape in a criminal court. The man was sued for depriving the young girl of freedom of movement, and for raping and/or sexually assaulting her. Because of this she suffered shock, pain, discomfort, mental anguish and humiliation. The damages claimed were:

- *R30 000 general damages for pain and suffering, hurt feelings, anguish and stress*
- *R10 000 for wrongful deprivation of freedom of movement*
- *R10 000 general damages for shock, pain and suffering*
- *R20 000 for disablement in respect of enjoyment of the amenities of life*

You can also sue for child sexual abuse many years after it happened if you only became aware and truly understood the impact it had on your life later eg after seeing a counsellor.

If the state does not prosecute, you can conduct a private prosecution. The only problem is that this is expensive.

7. Using the law against domestic violence

"What are all the legal options I can try to stop my partner from beating me up?"

WHAT DOES THE LAW SAY?

Domestic violence is an assault and therefore a crime. If a court finds a man guilty of assault, he can get a fine or a prison sentence.

WHAT CAN YOU DO?

These are the legal options you can try:

- **Call the police** to stop your husband or boyfriend from hitting you. They will probably not take him away or arrest him.
- **Lay a charge of assault against your husband or boyfriend.**
(See page 373 Problem 6: Reporting rape or assault and going to court)

You must be prepared to make a statement to the police and later to go to court. Many women are scared to do this because they fear that their husband or boyfriend will beat them up even more if they find out. Also, if the man is found guilty, the sentence is usually just a small fine.

- **Get a Protection Order**. This is an order from the court to your boyfriend/husband to stop him hitting you, or to tell him to stay away from you or to have him removed from the home. *(See below: Getting a Protection Order)*
- If you are married to the man who batters you, you may want to end the violent relationship. You may want to leave him and get a divorce.
(See page 339 Divorce)
(See page 367 Problem 1: Getting a divorce)
- **Lay a charge of trespass.** You can do this if you own or rent a house and someone keeps coming onto your property without your permission. It is important that you have told the person before not to enter your property or your house. If he does not obey, you can tell the police he is trespassing.

8. Getting a Protection Order

This is the procedure for getting a Protection Order under the *Domestic Violence Act* in order to stop abuse or domestic violence.

WHAT DOES THE LAW SAY?

The *Domestic Violence Act of 1998* protects people (men, women and children) in abusive relationships. *(See page 357 Reporting child abuse; page 352 Stopping child abuse using the Domestic Violence Act; page 358 the Domestic Violence Act)*

WHAT MUST YOU DO?

If you want to get a Protection Order you will have to go to the court on two separate days. The first time you go, the magistrate might give you an interim order if he/she believes there is a threat to your safety. If the magistrate gives you an interim order, he/she will set a return date when you have to go back to the court.

The return date is the second time you have to go to court, and the abuser is also called to appear in court on this day. You do not need an attorney to get a Protection Order .

STEPS IN GETTING A Protection Order

- 1 APPLY FOR A PROTECTION ORDER** You go to the magistrate's court to apply for a Protection Order . The clerk of the court must explain what your rights are and how to get a Protection Order . Take with you any documents like medical reports, photographs of the injuries, supporting affidavits from family members, neighbours or children who know about the abuse.
- 2 COURT ISSUES INTERIM PROTECTION ORDER** The magistrate will listen to your story and read any affidavits that you have brought with you. If the magistrate believes there is enough evidence of abuse he/she will give you an interim or temporary Protection Order . The magistrate will also give you a suspended warrant of arrest which you can use to get the abuser arrested if he disobeys the order.
You can ask the magistrate:
 - for protection from domestic violence
 - to have a firearm confiscated, if you explain how this has been used to threaten you
 - for the abuser to have no contact with the children, if appropriate
 - for the police to come with you to collect your belongings at your home
 - not to say where you have moved to, if you are leaving or have left home
 - for the abuser to be evicted from the home
 - for the abuser not to prevent you from entering the common home
 - for emergency monetary relief, for example for loss of earnings because you can't work, medical and dental expenses, accommodation expenses, money for food or clothes
- 3 PROTECTION ORDER SERVED ON ABUSER** The Sheriff of the Court, or the police will serve the Protection Order on the abuser. You can ask the court to phone you and tell you when the Protection Order has been served. The order is only effective from the time that it has been served on (delivered to) the abuser by the Sheriff or the police.
If you do not hear from the court that the Protection Order has been served within one week, then you should check with the clerk of the court whether it has been served or not. Sometimes the Sheriff of the Court can't find the abuser.
The Protection Order tells the abuser that he must be at court on a return date written on the Protection Order. He must go to court to tell the magistrate why the Protection Order shouldn't be made final. The return date is usually a few weeks after serving the documents.
- 4 GO BACK ON RETURN DAY** You must go to court on the return day written on the Protection Order. The abuser will also be there. You can ask the police to protect you if necessary. The court will decide whether to make the temporary order final or to set it aside. If the abuser doesn't come to court then the court will probably make the order final.
- 5 COURT ISSUES THE FINAL PROTECTION ORDER AND WARRANT** Once the magistrate has heard all the evidence, he/she will issue a Protection Order. The magistrate also issues a warrant of arrest, to be used if the abuser disobeys the Protection Order. The Sheriff or police serve the final Protection Order on the abuser. You get a copy of the order signed by the court (certified copy), together with the warrant. The order lasts until you choose to cancel or change it.

IF THE ABUSER DOESN'T OBEY THE PROTECTION ORDER

If the abuser doesn't obey the Protection Order:

- You can go to any police officer with the warrant of arrest which is attached to the Protection Order
- You tell the police how the abuser has broken the protection order
- The police will charge him with breaking the Protection Order

- The police must arrest the abuser if you are in danger (they can also do this without a warrant) or if they think you are not in immediate danger, they will warn him to appear in court

IF YOU LOSE YOUR WARRANT OF ARREST

If you lose your warrant of arrest and Protection Order you can go back to the clerk of the court and get another copy.

WHAT HAPPENS TO THE ABUSER?

- If the abuser is arrested, he will be kept in jail until he goes to court within 48 hours.
- Besides being charged with disobeying the Protection Order, he can be charged with any other criminal offence he has committed while abusing you, for example if he assaulted you or pointed a firearm at you.
- If he is found guilty in court, he will be fined or sent to jail.

CHANGING THE PROTECTION ORDER

If you want to change the Protection Order, you can give written notice to the abuser and to the court to apply to change the order or to withdraw it completely. You must say why you want to change it or withdraw it.

9. Making a will

"I want to make a will, leaving small sums of money to my friend and to Child Welfare, and the rest of my estate to my wife. Should I consult an attorney? What should I say in my will?"

WHAT DOES THE LAW SAY?

Remember the will **must be in writing** and it must be signed on each page by you the testator (the person making the will), and by **two witnesses** who are not named in the will, all present at the same time.

(See page 365 Dying with a will)

WHAT CAN YOU DO?

Making a will is very important. Unclear language in a will can cause problems. And if the legal requirements are not met, the Master of the High Court can ignore your will.

So it is best to consult an attorney or a bank if you want to make a will, or you can buy a will form from a stationery shop. A good attorney can draft a will that includes ways of saving tax when dividing up your estate. A bank may draw up your will without charging, if you are a client of the bank.

Your will can be simple, like the example below, or it can have detailed instructions. For example, it can say what must happen to everything you own and what must happen at the funeral. It can name someone to be guardian of your young children.

If you want to leave something special to someone, for example a sum of money to a charity, or a book or watch to a friend, you can write this in your will. This is called a **legacy**. The rest of your estate, after legacies and debts are all paid out, goes to your **heir** or **heirs**.

You can write your will in handwriting, as long as it is clear and neat. You can change it at any time. You and your witnesses must sign any changes you make. If there are big changes, it is best to make a new will.

(See the example of a simple will on the next page)

EXAMPLE OF A SIMPLE WILL

LAST WILL AND TESTAMENT OF ROWAN DANIELS
of 42 Blouboom Drive, Blikkiesfontein, Port Elizabeth

- 1. *I hereby cancel all previous wills made by me.*
- 2. *I appoint as Executor of my estate, my brother
PETER DANIELS, of 12 Marais Street, Aurora, Port Elizabeth.*
- 3. *I bequeath the following legacies:*
 - a) *to my friend, JOSEPH WITBOOI, R2 000 (two thousand rand)
and my books on motor mechanics.*
 - b) *to Animal Welfare (W.O. 2345) the sum of R2 000 (two thousand rand)*
- 4. *The rest of my estate I leave to my wife, SORAYA DANIELS (nee FREDERICKS),
to whom I am married out of community of property by ante-nuptial contract.
If she does not survive me, I leave the rest of my estate to our daughter,
ELSIE DANIELS.*
- 5. *Should my wife die before me, or at the same time, and should
our daughter at that time still be a minor, I appoint my brother,
the said PETER DANIELS, to be her guardian.*

*SIGNED by Rowan Daniels, the testator of this will,
In the presence of the undersigned witnesses
who signed in presence of the testator and each other, all being present
at the same time at PORT ELIZABETH this 5th day of August 2015.*

.....

ROWAN DANIELS
Testator

As witnesses:

- 1.
- 2.

MODEL LETTER

EXAMPLE

REQUEST FOR SOCIAL WORKER'S REPORT TO ASSIST WITH APPLICATION FOR LEGAL AID

*Benoni Advice Centre
PO Box 2345
Benoni 0100
Tel. 011 8877440
10 August 2015*

*The Social Worker
Child Welfare
Hammanshand Road
Benoni*

Dear Madam / Sir

SOCIAL WORKERS REPORT: MELANEY ROBERTS

We have been approached by the above person, who wishes to make an application for a divorce.

Ms Roberts intends to apply to the Legal Aid Board for financial assistance in obtaining this divorce, and therefore requires a social worker's report.

We accordingly request that you interview Ms Roberts and draw up a social worker's report for her to submit with her application.

Yours faithfully,

.....
C QEGU
Advisor

CHECKLISTS

Marriage

1. Were you married in a church or magistrate's office?
2. Or were you married according to customary law?
3. Did you sign an ante-nuptial contract with your partner before you got married?
4. What was the date of your marriage?

Divorce

1. Do you want to separate from your partner or do you want to divorce your partner?
2. What are your reasons for wanting a divorce?
3. Do you have any children with your partner?
4. Does your partner agree to the divorce?
5. Can you afford to pay for an attorney to deal with your divorce?
6. Do you want to apply for legal aid to pay for an attorney?
(See page 159 *Applying for legal aid*)
7. Has your husband treated you or your children cruelly or violently while you were married?
8. If the children are being maltreated, have you reported the case to Child Welfare or the police?
9. Does the father pay any maintenance for the children?
10. What are the respective contributions of the parties and do you want to apply for forfeiture of benefits or a redistribution of assets?

Maintenance

1. When were you married?
2. Are you living together or apart?
3. How many children do you have?
4. Where does the father of the children live, and where does he work?
5. Have you applied for maintenance to the maintenance court?
6. Have you worked out what your living expenses are
(See opposite page *Monthly Expenses*)

Child abuse and neglect

1. Has the problem of neglect been referred to the nearest Child Welfare Society?
2. Has the problem of abuse been referred to the nearest Child Welfare Society, a social worker or the police?
3. Have you applied for a Protection Order under the *Domestic Violence Act*?

Rape and indecent assault

1. Have you been to a doctor for a medical check-up?
2. Do you know the name of the person who raped or assaulted you?
3. Where does the person live (his address)?
4. Have you laid a charge against the person at the police station?
5. Have you reported the case to any welfare organisation, for example, Rape Crisis, church welfare organisation, or social work agency?

MONTHLY EXPENSES

How to draw up a list of expenses when you apply for maintenance

When you are getting ready to go for maintenance from the father of your child or children, you should make a list of what you spend every month. Here is an example of a list as it should be set out for the court enquiry. [The explanation parts in italics are just there so you can see what goes onto the list and why.]

This is a maintenance claim by Ruby Brown to get money from Jack Mhlope, the father of her daughter Thandi who is 11 years old. Ruby has 3 other children who are not Jack's children, and her mother lives with them.

EXAMPLE

APPLICATION FOR MAINTENANCE: CASE NUMBER 276/99

APPLICANT: RUBY BROWN

DEFENDANT: JACK MHLOPE

Ruby is applying for maintenance so she is called the APPLICANT.

Jack is the person from whom she wants the money so he is called the DEFENDANT.

INCOME PER MONTH

This is where Ruby puts down all the money she gets every month. Ruby should put it all down. It doesn't matter where it comes from as long as it isn't money she gets from doing something illegal, like selling dagga or drink, or from illegal sex work. It is also a good idea to explain in your list of income and expenses why or how you get that amount.

DOMESTIC WORK	R 1 612.50
25 hours a week at R15 an hour (R375 per week x 4.3 = R1 612.50 per month)	
<i>Amounts should be given per month. To calculate a monthly amount multiply the weekly amount by 4.3</i>	
RENT	R 500.00
Rent for room from boarder	
SOFT GOODS SALES	R 500.00
Income from sale of soft goods (R72 per week x 4.3)	
MAINTENANCE	R 550.00
Paid monthly by K Cupido for Daniel	
TOTAL INCOME PER MONTH	R 3 162.50

EXPENDITURE PER MONTH

Ruby must show how much she spends on Thandi every month. The Maintenance Court will not make Jack pay half of all her expenses which include expenses for children that are not his and her mother.

	GENERAL	THANDI
	<i>What it costs Ruby for everyone</i>	
RENT	R 900.00	R 150.00
R900 per month (R300 divided by 6 = R150)		
<i>6 people live in the house (Ruby, mother, Thandi and 3 other brothers and sisters). A share for each of them is R150.</i>		

EXAMPLE OF AN APPLICATION FOR MAINTENANCE *continued*

ELECTRICITY/WATER R 94.00 R 15.67
 Electricity account is usually R94 (R94 divided by 6 = R15.67)
6 people live in the house. A share for each of them is R15.67.

FOOD R 1 138.64 R 189.87
 Meat: R130 per week = R559 per month
 Bread and milk: R8.40 per day = R126.42 per month
 Vegetables etc: R76 per week = R326.80 per month
*6 people live in the house. A share for each of them is R189.87.
 Although Thandi is only 11 she probably needs as much food as a grown-up.*

SCHOOL R 322.50 R 80.62
 Fees: R20 per term x 4 terms x 4 children = R320 per year
 Stationery and text books: R100 per term x 4 terms = R400 per year
 School dresses: R98 x 6 = R588 per year
 Shirts: 8 x R66 = R528 per year
 Trousers: 5 pairs x R84 = R420 per year
 Shoes: R118 a pair x 8 pairs = R944 per year
 Jerseys: R90 x 6 = R540 per year
 Socks etc: R130 per year
Total: R3 870 per year
*Ruby adds up how much she spends on all the children at school for the year.
 Then she divides by 12 to make that into a monthly amount.
 Then she divides that amount by 4 to get the total for each child per month.*

CLOTHES R 590.00 R 116.68
 Ruby: Truworths budget account R100
 Children: Jet budget account R240
 Children: Edgars budget account R180
 All: Layby General Clothing Store R70
*Remember with this one that when Ruby works out what she spends
 on Thandi's clothes, she doesn't put in her own Truworths account.
 And where she spends only on the children, she must divide the total by the number of
 children she has (4) and for the lay-bys she divides it by all of them in the house (6).*

INTERESTS / HOBBIES R 120.00 R 40.00
 Karate: Thandi, Robert, Kholeka R40 per month each

FURNITURE R 130.00 R 21.66
 Ellerines Furniture Store: fridge R130 per month
6 people live in the house. A share for each of them is R21.66.

MEDICAL R 310.00 R 170.00
 All: R100 (generally 1 hospital visit per month each)
 Thandi: doctor once a month at R50 a visit
 Chemist account for all: R160 per month
*Thandi has asthma and so she costs more in doctors and medicine every month.
 So R120 of the R160 chemist account every month is for Thandi.
 If Ruby was on medical aid and she paid, say, R200 per month for it, and it helped
 Ruby and her 4 children, then Jack should be made to pay for Thandi's share of
 the medical aid (R200 divided by 5 = R40).*

TRANSPORT R 173.60 R 32.00
 Bus fares for school for 2 children
 R6 each per week x 2 x 4.3 = R51.60
 Train fares for Thandi + Ruby + one other child
 monthly tickets R24 x 3 = R72
 Casual fares for all R50

TOTAL EXPENDITURE PER MONTH R 3 778.74 R 726.40

EXAMPLE OF AN APPLICATION FOR MAINTENANCE *continued*

LOANS

From mother to get through the month	R 600.00	R 100.00
Employers	R 200.00	R 40.00

LOAN REPAYMENTS

Repayment of loans	R 466.68	R 77.80
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Mother: R200 less for her rent / board

Employers: Ruby works for R2 less per hour than she usually charges,
and her employers pay the children's school fees for her

It is important to work out how much extra you are using every month and to work out where it is coming from. Otherwise you may be accused of lying about your claim for maintenance.

TOTAL FOR THANDI	R 726.40
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TOTAL CLAIMED FROM JACK FOR MAINTENANCE OF THANDI	R 358.20
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This will depend on what Jack earns and what his monthly expenses are.

But Ruby should ask for at least half of what Thandi costs.

And if she knows that Jack earns a lot more than she does,

Ruby should ask for more from Jack.

Don't forget to put on your list any OTHER ACCOUNTS / EXPENSES you might have.

Model prepared by Pat Anderson.