Barnard  Cronjé  Olivier

The South African Law of Persons and Family Law

Third edition by

D S P Cronjé
Hons-BA (Stell) LLB(Unisa) LLM LLD(RAU)
Professor of Private Law, University of South Africa

BUTTERWORTHS
DURBAN
TABLE OF CONTENTS

Preface to the first edition .............................................................................. v

**PART 1: LAW OF PERSONS**

**Chapter 1**

THE CONCEPT LEGAL SUBJECT ............................................................... 3
  Definition of the law of persons ............................................................ 3
  Law and rights .................................................................................... 3
  Legal subject and legal object ............................................................... 4
    Corporeal things ........................................................................... 6
    Performances ............................................................................... 6
    Personality property ................................................................. 6
    Immaterial objects .................................................................. 7
  Different kinds of legal subjects ....................................................... 7
    The natural person .................................................................. 7
    The juristic person ............................................................... 9

**Chapter 2**

THE BEGINNING AND END OF LEGAL SUBJECTIVITY .......................... 11
  The beginning of legal subjectivity .................................................... 11
  Registration of births .................................................................. 12
  The interests of the unborn child ...................................................... 13
  The interests taken into account ...................................................... 15
    Patrimonial interests ................................................................ 15
    Succession ............................................................................... 15
      Intestate succession ............................................................... 15
      Testate succession ................................................................ 15
    Maintenance ........................................................................... 18
    Personality interests ................................................................ 19
    Protection of life ..................................................................... 20
      Abortion ............................................................................... 20
      Death sentence upon a pregnant woman ................................ 23
    Custody .................................................................................. 23
      Birth control and sterilisation ................................................. 23
    Is the *nasciturus* a legal subject? .............................................. 24
    The end of legal subjectivity ......................................................... 25
    Presumption of death ................................................................ 26
    The effect of an order of presumption of death ............................ 29
    Presumptions regarding sequence of death .................................. 31
    Registration of deaths ................................................................ 32
    Duty to bury the deceased .......................................................... 32
### Chapter 3

**STATUS**

- Legal capacity ......................................................... 34
- Capacity to act ...................................................... 34
- Capacity to litigate .................................................. 35

### Chapter 4

**DOMICILE**

- General ............................................................................. 37
- Importance of domicile ................................................. 37
- Kinds of domicile ......................................................... 40
  - Domicile of origin (*domicilium originis*) ......................... 40
  - Domicile of choice ..................................................... 41
    - General ...................................................................... 41
    - Requirements of a domicile of choice ......................... 41
  - Domicile by operation of law ........................................ 44
  - Domicile of a child .................................................... 44
  - Domicile of an insane person ....................................... 45
- Persons who are not free to choose where to reside .......... 46
  - Domicile of soldiers and civil servants ......................... 46
  - Domicile of a prisoner ................................................ 47
- Domicile of a prohibited immigrant ............................. 47
- The Domicile Act is not retrospective ............................ 47

### Chapter 5

**EXTRA-MARITAL CHILDREN**

- Introduction .................................................................... 49
- Proof of paternity .......................................................... 49
  - Married persons ......................................................... 49
  - Unmarried persons ..................................................... 51
- The *exceptio plurium concubentium* ................................ 52
- Corroboration of the mother’s evidence ......................... 54
- The role of blood tests in the proof of paternity ............ 54
- The gestation period .................................................... 60
- Classes of extra-marital children .................................. 61
  - Natural children (*spurii or liberi naturales*) .................. 61
  - Adulterine children (*adulterini*) ................................ 61
  - Incestuous children (*incestuosi*) ................................ 61
- The status of the extra-marital child ............................. 62
  - Parental power .......................................................... 63
    - The extra-marital child’s relationship with his mother .... 63
    - The extra-marital child’s relationship with his father .... 64
  - Maintenance ............................................................. 69
- Right to inherit ............................................................ 70
  - Intestate succession .................................................. 70
  - Testate succession ..................................................... 71
- The legitimation of extra-marital children ....................... 72
# Table of contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legitimatio per subsequens matrimonium</td>
<td>72</td>
</tr>
<tr>
<td>Legitimatio per rescriptum principis</td>
<td>74</td>
</tr>
<tr>
<td>Legitimation by adoption</td>
<td>75</td>
</tr>
</tbody>
</table>

## Chapter 6

### AGE

- Introduction                                                           | 77   |
- The *infans*                                                           | 78   |
  - Capacity to act                                                      | 78   |
  - Delictual and criminal liability                                     | 79   |
  - Capacity to litigate                                                 | 79   |
- The minor                                                             | 79   |
  - Introduction                                                         | 79   |
  - Capacity to contract                                                 | 79   |
    - General                                                             | 79   |
    - Fraud by the minor                                                 | 82   |
    - Undue enrichment                                                   | 86   |
    - *Negotiorum gestio*                                                | 87   |
    - Assistance by the parent or guardian                               | 87   |
    - Ratification                                                       | 88   |
    - Liability of the guardian                                          | 89   |
    - *Restitutio in integrum*                                           | 90   |
- Other agreements                                                      | 92   |
  - Capacity to make a will                                              | 93   |
  - Capacity to marry                                                    | 93   |
  - Capacity to hold certain offices and perform certain functions       | 93   |
  - Delictual and criminal liability                                     | 94   |
  - Capacity to litigate                                                 | 95   |
- Termination of minority                                               | 95   |
  - Attainment of the prescribed age                                     | 95   |
  - Marriage                                                             | 95   |
  - *Venia aetatis* and release from tutelage                             | 95   |
  - Age of Majority Act 57 of 1972                                       | 96   |
  - Emancipation                                                         | 98   |

## Chapter 7

### INSANITY

- Definition of mentally ill persons                                    | 103  |
- Reception and detention of patients                                   | 107  |
  - Voluntary patients and patients by consent                           | 108  |
  - A patient admitted to an institution by virtue of a court order      | 109  |
    - Report by a medical practitioner or police official                | 109  |
- Place of admission and detention                                      | 110  |
- Discharge of a patient                                                | 110  |
- State patient                                                         | 110  |
- Care and administration of the property of mentally ill persons       | 110  |
- Civil and criminal liability                                          | 111  |
Chapter 8
INABILITY TO MANAGE OWN AFFAIRS.............................................. 113
Drunkenness............................................................................. 116

Chapter 9
PRODIGALITY........................................................................... 119

Chapter 10
INSOLVENCY............................................................................ 125

PART 2: FAMILY LAW

Chapter 11
INTRODUCTION TO FAMILY LAW.............................................. 129
General....................................................................................... 129
Brief historical survey of the law of marriage......................... 129
Roman law............................................................................... 129
Germanic law (to circa 1000)..................................................... 130
Canon law (circa 1100 – 1580).................................................... 130
The reformation period – Roman-Dutch law......................... 131
South African law................................................................... 132

Chapter 12
THE ENGAGEMENT................................................................. 135
Requirements for a valid engagement........................................ 135
Consent...................................................................................... 135
Mistake..................................................................................... 135
Misrepresentation.................................................................... 136
Capacity to act......................................................................... 138
Lawfulness................................................................................. 139
Possibility of performance....................................................... 139
The content and consequences of the engagement.................. 140
Termination of the engagement................................................ 141
The action for damages based on breach of promise................. 143
Satisfaction for personality infringement................................. 145
The return of engagement gifts............................................... 146
Satisfaction and damages on the ground of seduction.............. 147

Chapter 13
LEGAL REQUIREMENTS FOR THE CONCLUSION OF A VALID
MARRIAGE.................................................................................... 149
Capacity to act.......................................................................... 149
Declared prodigals................................................................... 149
Insane persons.......................................................................... 150
Persons under curatorship due to mental disorder or mental disease 151
Minors....................................................................................... 151
Consent necessary for the marriage of a minor......................... 152
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The parents of the minor</td>
<td>152</td>
</tr>
<tr>
<td>The guardian (&quot;other than the &quot;natural guardian&quot;)</td>
<td>152</td>
</tr>
<tr>
<td>The Minister of Home Affairs</td>
<td>152</td>
</tr>
<tr>
<td>The commissioner of child welfare</td>
<td>153</td>
</tr>
<tr>
<td>The supreme court</td>
<td>154</td>
</tr>
<tr>
<td>Instances in which a minor requires no consent to marry</td>
<td>155</td>
</tr>
<tr>
<td>Minors who have already been married</td>
<td>155</td>
</tr>
<tr>
<td>Persons under 21 years of age who have been declared majors</td>
<td>155</td>
</tr>
<tr>
<td>Effect of the absence of the necessary consent</td>
<td>155</td>
</tr>
<tr>
<td>Effect of the failure to obtain consent from the parents or guardian, on the validity of the marriage</td>
<td>155</td>
</tr>
<tr>
<td>Effect of the failure to obtain consent from the parents or guardian, on the patrimonial consequences of the marriage</td>
<td>155</td>
</tr>
<tr>
<td>Effect of the Matrimonial Property Act on marriages contracted by minors before the commencement of the Act, without the consent of the parents or guardian</td>
<td>157</td>
</tr>
<tr>
<td>Consensus</td>
<td>158</td>
</tr>
<tr>
<td>Mistake</td>
<td>159</td>
</tr>
<tr>
<td>Misrepresentation</td>
<td>160</td>
</tr>
<tr>
<td>Duress</td>
<td>160</td>
</tr>
<tr>
<td>Undue influence</td>
<td>161</td>
</tr>
<tr>
<td>The marriage must be lawful</td>
<td>161</td>
</tr>
<tr>
<td>Ethnically mixed marriages</td>
<td>161</td>
</tr>
<tr>
<td>Persons already married</td>
<td>162</td>
</tr>
<tr>
<td>Persons of the same sex</td>
<td>162</td>
</tr>
<tr>
<td>Adoptive parent and adopted child</td>
<td>163</td>
</tr>
<tr>
<td>Persons within the prohibited degrees of relationship</td>
<td>163</td>
</tr>
<tr>
<td>Blood relatives in the direct line (ascendants and descendants)</td>
<td>164</td>
</tr>
<tr>
<td>Collateral blood relatives</td>
<td>164</td>
</tr>
<tr>
<td>Relationship by affinity in the direct line</td>
<td>165</td>
</tr>
<tr>
<td>Relationship by affinity in the collateral line</td>
<td>166</td>
</tr>
<tr>
<td>Guardian and ward</td>
<td>167</td>
</tr>
<tr>
<td>The prescribed formalities</td>
<td>167</td>
</tr>
<tr>
<td>Marriage officers</td>
<td>167</td>
</tr>
<tr>
<td>Formalities preceding the marriage ceremony</td>
<td>169</td>
</tr>
<tr>
<td>Formalities to be observed during the marriage ceremony</td>
<td>170</td>
</tr>
<tr>
<td>Registration of the marriage</td>
<td>172</td>
</tr>
</tbody>
</table>

Chapter 14

VOID AND VOIDABLE MARRIAGES........................................................................ 173
The distinction between void and voidable marriages                       173
Grounds for the nullity of a marriage                                       175
Non-compliance with the formal requirements for a valid marriage           175
Non-compliance with the material requirements for a valid marriage         176
Grounds for the voidability of a marriage                                   176
Minority                                                                  176
Stuprum (sexual intercourse before marriage)                               176
### Chapter 15

**THE INVARIABLE CONSEQUENCES OF MARRIAGE**

- Status of spouses .......................................................... 181
- Attaining majority ......................................................... 182
- *Consortium omnis vitae* ................................................ 182

**Protection of the marriage relationship against interference by third parties**

- The action on the ground of adultery ................................ 185
- The action on the ground of enticement ............................ 187
- The action on the ground of harbouring ............................ 188

**Reciprocal maintenance** ................................................. 189

**Purchase of household necessaries** .................................. 192

- The existence of a valid marriage .................................... 193
- The existence of a joint household ................................... 193
- The transaction must relate to household necessaries .......... 194
- Defences that can be raised ............................................ 195

**Maintenance Act 23 of 1963** .......................................... 197

**Parental power** ............................................................ 199

**Donations between spouses** .......................................... 199

**Family name** ............................................................... 200

### Chapter 16

**THE VARIABLE CONSEQUENCES OF MARRIAGE – MARRIAGES IN COMMUNITY OF PROPERTY**

- Historical background of universal community of property .... 201
- The nature of universal community of property .................... 202
- Cases where community of property will not arise ............... 203
- The content of universal community of property .................. 204

**Joint assets** .............................................................. 204

- Assets excluded in an antenuptial contract .......................... 205
- Assets excluded by will or deed of donation ....................... 205
- Assets subject to a *fideicommissum* or usufruct ................ 206
- *focalia* (small gifts) .................................................... 206
- Certain life insurance policies ....................................... 207
- Benefits under the Friendly Societies Act 25 of 1956 ............ 208
- Satisfaction recovered by a spouse .................................. 208
- Costs in a matrimonial action ........................................ 208
- The maxim *pretium succedit in locum rei, res succedit in locum pretii.* ......................................................... 208

**Joint liabilities** .......................................................... 208

- Antenuptial debts ......................................................... 209
- Contractual debts incurred *stante matrimonio* .................... 210
### Chapter 17

**ADMINISTRATION OF THE JOINT ESTATE**

- **The marital power**
- **The effect of the abolition of the marital power**
- **The requirement of joint consent by both spouses**
  - Prior written consent, attested by two competent witnesses, in respect of each transaction separately
  - Written consent, attested by two competent witnesses, in respect of each transaction separately
  - Written consent without any further requirements
  - Oral or tacit consent
- **Household effects**
- **Money**
- **Donations**
- **No consent**

Protective measures in the Matrimonial Property Act in respect of the administration of the joint estate
- Protection of third parties
- Protection of the spouses *inter partes*

Capacity to litigate

### Chapter 18

**MARRIAGE OUT OF COMMUNITY OF PROPERTY**

- **General**
  - The purpose of the antenuptial contract
  - The nature of an antenuptial contract
  - Requirements for the creation of a valid antenuptial contract
  - The principle of immutability in matrimonial property law
  - Termination, cancellation and amendment of the antenuptial contract
- The minor's antenuptial contract
- The interpretation of antenuptial contracts

The contents of the antenuptial contract

- Provisions concerning liability of the spouses with regard to household necessaries
- Succession clause (*pactum successorium*)
- Marriage settlements (donations)
- Matrimonial property system

Various matrimonial property systems

- Exclusion of community of property and community of profit and loss
- The accrual system
- Exclusion of community of property with retention of community of profit and loss
The accrual system ........................................... 239
  General .................................................. 239
The meaning of the accrual system ....... 240
The determination of the accrual ........... 242
An example of calculation of accrual ...... 243
Protection of a spouse’s right to share in accrual .... 244
Satisfaction of accrual claim ................. 245
The application of the accrual system to marriages entered into before commencement of the Matrimonial Property Act .......... 246
Which matrimonial property system now? .................................................................. 246
  The primary matrimonial property system - marriage in community of property .......... 247
  The secondary matrimonial property system - the accrual system ................. 247
Marriage out of community of property and loss without the accrual system .......... 248

Chapter 19
THE DISSOLUTION OF MARRIAGE .......... 249
  General .................................................. 249
The dissolution of marriage by the death of one or both spouses .......... 250
  Marriage in community of property ........................................ 250
  Marriage out of community of property .................................. 251
  Maintenance of Surviving Spouses Act 27 of 1990 ......................... 251
Dissolution of marriage by divorce ........ 252
  General .................................................. 252
The objectives of a sound divorce law .......... 253
  The grounds for divorce (Divorce Act 70 of 1979 sections 3, 4 and 5) .......... 254
    Section 3 (general provision) ........................................ 254
    Irretrievable breakdown of the marriage as a ground for divorce - section 4 .......... 255
      The problem of establishing a criterion in the principle of irretrievable breakdown .......... 255
      The criteria laid down in section 4 .................................. 256
      The guidelines in section 4(2) .................................... 258
      Concluding remarks on section 4 ................................. 262
  Divorce on the ground of mental illness or continuous unconsciousness – section 5 .......... 262
    The criteria contained in section 5 .................................... 263
    The connection between section 4 and section 5 ....................... 263
    Special rules in respect of divorce on the ground of mental illness and continuous unconsciousness .......... 264
  Defences against an action for divorce .......... 264
  The consequences of divorce .......... 265
  General .................................................. 265
  The patrimony of the spouses .......... 265
  Divorce Amendment Act 7 of 1989 .......... 265
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Forfeiture of patrimonial benefits</td>
<td>266</td>
</tr>
<tr>
<td>Redistribution order in terms of section 7(3) of the Divorce Act 70 of 1979</td>
<td>269</td>
</tr>
<tr>
<td>Maintenance of the spouses</td>
<td>279</td>
</tr>
<tr>
<td>General</td>
<td>279</td>
</tr>
<tr>
<td>The granting of maintenance orders</td>
<td>280</td>
</tr>
<tr>
<td>The rescission, suspension or variation of maintenance orders</td>
<td>285</td>
</tr>
<tr>
<td>The termination of maintenance orders</td>
<td>288</td>
</tr>
<tr>
<td>The interests of the children</td>
<td>289</td>
</tr>
<tr>
<td>General</td>
<td>289</td>
</tr>
<tr>
<td>Statutory protection of the children's interests</td>
<td>289</td>
</tr>
<tr>
<td>Guardianship</td>
<td>293</td>
</tr>
<tr>
<td>Custody and access</td>
<td>293</td>
</tr>
<tr>
<td>Maintenance of the children</td>
<td>295</td>
</tr>
<tr>
<td>Miscellaneous matters in connection with divorce</td>
<td>297</td>
</tr>
<tr>
<td>Divorce procedure</td>
<td>297</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>297</td>
</tr>
<tr>
<td>The procedure</td>
<td>298</td>
</tr>
<tr>
<td>The institution of the action</td>
<td>299</td>
</tr>
<tr>
<td>Relief <em>pendente lite</em></td>
<td>299</td>
</tr>
<tr>
<td>Costs</td>
<td>299</td>
</tr>
<tr>
<td>Recession, suspension or variation of orders</td>
<td>300</td>
</tr>
<tr>
<td>Limitation on the publication of particulars of divorce actions</td>
<td>300</td>
</tr>
<tr>
<td>Abolition of orders for the restitution of conjugal rights and judicial separation</td>
<td>301</td>
</tr>
</tbody>
</table>

Chapter 20

PARENTAL POWER

The nature of parental power                                           | 303  |
The acquisition of parental power                                       | 303  |
Birth from a valid marriage                                             | 304  |
Birth of an extra-marital child                                         | 304  |
Legitimation of an extra-marital child                                 | 304  |
Adoption                                                              | 304  |
  Who is competent to adopt a child?                                     | 304  |
  Requirements for adoption                                             | 305  |
  Procedure                                                            | 305  |
  The interests of the child                                            | 305  |
  Consent to the adoption                                               | 305  |
  The effects of adoption                                               | 306  |
  The rescission of an adoption order                                   | 307  |
  Miscellaneous provisions concerning adoption                           | 308  |
The contents of parental power                                          | 308  |
Guardianship                                                          | 308  |
  Assistance in the performance of juristic acts                        | 308  |
  The administration of the child's estate                              | 309  |
  Appointment of testamentary guardians                                | 310  |
<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Custody</td>
<td>310</td>
</tr>
<tr>
<td>During the marriage</td>
<td>311</td>
</tr>
<tr>
<td>During the marriage where the parents live apart</td>
<td>311</td>
</tr>
<tr>
<td>After divorce</td>
<td>311</td>
</tr>
<tr>
<td>After the death of one of the parents</td>
<td>311</td>
</tr>
<tr>
<td>The duty of support</td>
<td>311</td>
</tr>
<tr>
<td>The duty to support legitimate children</td>
<td>312</td>
</tr>
<tr>
<td>The duty to support extra-marital children</td>
<td>313</td>
</tr>
<tr>
<td>The duty to support step-children and children-in-law</td>
<td>314</td>
</tr>
<tr>
<td>Enforcement of the duty of support between parents and children</td>
<td>314</td>
</tr>
<tr>
<td>The reciprocity of the duty of support</td>
<td>315</td>
</tr>
<tr>
<td>Termination of parental power</td>
<td>315</td>
</tr>
<tr>
<td>Judicial interference with parental power</td>
<td>315</td>
</tr>
<tr>
<td>The court as upper guardian</td>
<td>316</td>
</tr>
<tr>
<td>Statutory powers of the court</td>
<td>316</td>
</tr>
<tr>
<td>In terms of the Matrimonial Affairs Act 37 of 1953</td>
<td>316</td>
</tr>
<tr>
<td>In terms of the Divorce Act 70 of 1979</td>
<td>316</td>
</tr>
<tr>
<td>In terms of the Marriage Act 25 of 1961</td>
<td>317</td>
</tr>
<tr>
<td>In terms of the Child Care Act 74 of 1983</td>
<td>317</td>
</tr>
<tr>
<td>Bibliography</td>
<td>321</td>
</tr>
<tr>
<td>Table of cases</td>
<td>327</td>
</tr>
<tr>
<td>Table of statutes</td>
<td>345</td>
</tr>
<tr>
<td>Index</td>
<td>353</td>
</tr>
</tbody>
</table>