

FAMILY AND SUCCESSION LAW IN SOUTH AFRICA

SECOND EDITION

JACQUELINE HEATON
ANNELIESE ROOS

Family and Succession Law in South Africa

Second Edition

**Jacqueline Heaton
Anneliese Roos**

This book was originally published as a monograph in the International
Encyclopaedia of Laws/Family and Succession Law.

General Editors: Roger Blanpain, Frank Hendrickx
Volume Editor: Walter Pintens



Wolters Kluwer

Published by:

Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.wklawbusiness.com

Sold and distributed in North, Central and South America by:

Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

DISCLAIMER: The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

Printed on acid-free paper

ISBN 978-90-411-6755-2

This title is available on www.kluwerlawonline.com

© 2016, Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal & Regulatory U.S., 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Website: www.wklawbusiness.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

Table of Contents

The Authors	3
List of Abbreviations	17
Preface	21
General Introduction	23
§1. GENERAL BACKGROUND OF THE COUNTRY (DEMOGRAPHIC DATA)	23
I. Introduction	23
II. Demography	25
§2. HISTORICAL BACKGROUND OF FAMILY AND SUCCESSION LAW	27
I. Introduction	27
II. Pluralism	28
§3. SOURCES OF FAMILY AND SUCCESSION LAW	28
I. Introduction	28
II. Constitution	29
III. Legislation	32
IV. Treaties	32
V. Jurisprudence	33
§4. THE COURTS ADMINISTERING FAMILY AND SUCCESSION LAW	33
I. Introduction	33
II. Lower Courts	34
III. Superior Courts	35
Part I. Persons	37
Chapter 1. The Status of a Person	37
§1. DEFINITION OF A PERSON	37
§2. CAPACITY	39
I. General	39

Table of Contents

II. Minority in South African Law	39
III. Child as a Term of Relationship	40
§3. ABSENTEES	41
Chapter 2. Registration of Civil Status	43
§1. THE REGISTRAR	43
§2. REGISTERS AND CERTIFICATES	44
Chapter 3. Personality Rights	45
§1. INTRODUCTION	45
§2. MINORS' CONTRACTS	46
I. General	46
A. <i>Infantes</i>	46
B. Minors	46
II. Minors' Marriages and Civil Unions	49
A. <i>Infantes</i>	49
B. Minors	50
1. Civil Marriages	50
2. Customary Marriages	51
3. Civil Unions	51
§3. MINORS' RESPONSIBILITY FOR DELICTS (TORTS)	52
I. <i>Infantes</i>	52
II. Minors	52
§4. MINORS' RESPONSIBILITY FOR CRIMES	53
I. <i>Infantes</i>	53
II. Minors	53
§5. CRIMES AGAINST CHILDREN	54
§6. MINORS' CAPACITY TO ENGAGE IN LEGAL PROCEEDINGS	54
I. <i>Infantes</i>	54
II. Minors	55
Chapter 4. Names	56
§1. COMPOSITION OF A NAME	56
§2. SURNAME	56
I. Acquisition of the Surname	56

Table of Contents

II. Change of the Surname	57
§3. FORENAME/FIRST NAME	58
Chapter 5. Nationality	59
Chapter 6. Domicile and Residence	61
§1. DOMICILE	61
§2. DOMICILE OF ORIGIN	61
§3. DOMICILE OF CHOICE	62
§4. DOMICILE BY OPERATION OF LAW (ASSIGNED DOMICILE)	63
Chapter 7. Mentally Handicapped Persons	64
§1. INTRODUCTION	64
§2. MENTAL ILLNESS	64
§3. MENTAL AND PHYSICAL DISABILITY	67
§4. INTOXICATION WITH ALCOHOL OR DRUGS	68
Chapter 8. Prodigals	69
Chapter 9. Insolvents	71
Part II. Family Law	73
Chapter 1. Marriage	73
§1. THE NATURE OF MARRIAGE AND A CIVIL UNION	73
§2. THE CAPACITY TO ENTER INTO A MARRIAGE OR A CIVIL UNION	74
I. Civil Marriage	75
A. Engagement	75
B. Different Sex	76
C. Consanguinity and Affinity	77
D. Marriageable Age	77
E. Prior Marriage or Civil Union	78
F. Failure to Consent	78
1. Duress	78

Table of Contents

2. Mistake	78
3. Misrepresentation	78
4. Mental Illness	79
G. Failure to Comply with Necessary Formalities	79
H. Consequences	80
II. Civil Union	80
A. Engagement	80
B. Different Sex	80
C. Consanguinity and Affinity	80
D. Marriageable Age	81
E. Prior Marriage or Civil Union	81
F. Failure to Consent	81
G. Failure to Comply with Necessary Formalities	81
H. Consequences	82
III. Customary Marriage	82
A. Pre-marital Negotiations	82
B. Different Sex	82
C. Consanguinity and Affinity	83
D. Marriageable Age	84
E. Prior Marriage or Civil Union	84
F. Failure to Consent	85
G. Failure to Comply with Necessary Formalities	85
H. Lobolo	85
I. Consequences	86
§3. FORMALITIES	86
I. Civil Marriage	86
II. Civil Union	88
III. Customary Marriage	90
§4. EFFECTS	90
I. Taking of Name	91
A. Civil Marriage and Civil Union	91
B. Customary Marriage	91
II. The Duty of Consortium	92
A. Civil Marriage and Civil Union	92
B. Customary Marriage	93
III. Sexual Intercourse	95
A. Civil Marriage and Civil Union	95
B. Customary Marriage	95
IV. Confidences in a Marriage or Civil Union	95
A. Civil Marriage and Civil Union	95
B. Customary Marriage	96
V. Contract	96
A. Civil Marriage and Civil Union	96
B. Customary Marriage	97
VI. Delict (Tort)	97

Table of Contents

A. Civil Marriage and Civil Union	97
B. Customary Marriage	98
VII. Criminal Law	98
A. Civil Marriage and Civil Union	98
B. Customary Marriage	98
VIII. Duty to Maintain (Duty of Support)	98
A. Civil Marriage and Civil Union	98
B. Customary Marriage	99
IX. Succession	99
A. Civil Marriage and Civil Union	99
B. Customary Marriage	99
§5. VOID AND VOIDABLE MARRIAGES AND CIVIL UNIONS	100
Chapter 2. Divorce	104
§1. GROUNDS	104
§2. PROCEDURE	105
§3. EFFECTS	106
I. Settlement Agreements	107
II. Property Division	107
A. General	107
B. Pension (Superannuation)	108
C. Forfeiture	110
D. Redistribution of Assets	111
1. Civil Marriages	111
2. Civil Unions	115
3. Customary Marriages	115
III. Lobolo	115
IV. Post-Divorce Maintenance	116
V. Children	118
VI. Costs	123
VII. Remarriage	123
Chapter 3. Cohabitation without Marriage or a Civil Union	124
§1. INTRODUCTION	124
§2. DEFINITION	124
§3. EFFECTS	125
Chapter 4. Filiation	129

Table of Contents

§1. CHILDREN BORN OF MARRIED PARENTS	129
I. The Status of Legitimacy	129
II. Acquiring the Legal Status of a Child Born of Married Parents	129
A. Marriage or Civil Union of the Child's Parents	129
B. Status of a Child of a Void Marriage	130
C. Status of a Child of a Voidable Marriage	130
III. Disputes as to Birth of Married Parents	130
IV. Effects of Birth of Married Parents	132
§2. CHILDREN BORN OF UNMARRIED PARENTS	132
I. Acquiring the Legal Status of a Child Born of Unmarried Parents	132
II. Disputes as to Paternity of a Child of Unmarried Parents	132
III. Effects of Birth of Unmarried Parents	133
A. Parental Responsibilities and Rights	133
B. Surname	135
C. Maintenance	135
D. Inheritance	136

Chapter 5. Adoption and Foster Care 137

§1. ADOPTION	137
I. Introduction	137
II. Who May Adopt?	137
III. Consent to Adoption	138
A. The Guardians	138
B. The Child	140
C. Dispensing with Consent	140
IV. Who May Be Adopted?	140
V. Factors to Be Taken in Consideration	141
VI. Effect of Adoption Order	142
VII. Access to Information, and Contact	143
VIII. Rescission	144
IX. Inter-Country Adoption	145
§2. FOSTER CARE	145
I. Who May Foster?	145
II. Who May Be Fostered?	146
III. Factors to Be Taken in Consideration	147
IV. Effect of Foster Care Order	147
V. Duration of Foster Care	149

Chapter 6. Parental Authority 151

§1. INTRODUCTION	151
§2. THE CONTENTS OF PARENTAL RESPONSIBILITIES AND RIGHTS	152

Table of Contents

I. Guardianship	152
II. Care	153
III. Contact	154
IV. Maintenance	155
§3. OBTAINING PARENTAL RESPONSIBILITIES AND RIGHTS	157
I. Birth	157
II. Marriage or Civil Union	157
III. Permanent Life Partnership	158
IV. Acknowledging Paternity, Contributing to the Child's Upbringing, and Contributing to the Child's Maintenance	158
V. Parental Responsibilities and Rights Agreement	158
VI. Assignment by an Order of Court	158
VII. Adoption	159
VIII. Appointment in a Will	159
§4. THE POSITION IF MORE THAN ONE PERSON HAS PARENTAL RESPONSIBILITIES AND RIGHTS	159
§5. JUDICIAL INTERFERENCE WITH PARENTAL RESPONSIBILITIES AND RIGHTS	161
§6. TERMINATION OF PARENTAL RESPONSIBILITIES AND RIGHTS	162
Chapter 7. Guardianship and Curatorship	164
§1. APPOINTMENT OF A LEGAL GUARDIAN OR CURATOR	164
§2. THE CONTENTS OF LEGAL GUARDIANSHIP AND CURATORSHIP	165
§3. TERMINATION OF LEGAL GUARDIANSHIP OR CURATORSHIP	166
Chapter 8. Kinship and Relationships of Affinity	167
Part III. Matrimonial Property Law	169
Chapter 1. Rights and Obligations of Spouses and Civil Union Partners	169
§1. GENERAL PRINCIPLES	169
§2. THE HOUSEHOLD EXPENSES	170
§3. THE MATRIMONIAL HOME	170
§4. TRANSACTIONS BETWEEN SPOUSES OR CIVIL UNION PARTNERS	171

Table of Contents

§5. MAINTENANCE BETWEEN SPOUSES OR CIVIL UNION PARTNERS	172
Chapter 2. The Marriage of Civil Union Settlement	174
Chapter 3. The Legal Matrimonial Regime	175
§1. INTRODUCTION	175
§2. COMMUNITY OF PROPERTY	176
I. The Joint Estate	176
II. Administration of the Joint Estate	178
§3. THE CONSEQUENCES OF DIVORCE IN A MARRIAGE OR CIVIL UNION IN COMMUNITY OF PROPERTY	181
§4. THE CONSEQUENCES OF DEATH IN A MARRIAGE OR CIVIL UNION IN COMMUNITY OF PROPERTY	182
§5. ALTERATION OF THE MATRIMONIAL PROPERTY SYSTEM	182
Chapter 4. Conventional Matrimonial Regimes	184
§1. ANTENUPTIAL CONTRACT	184
§2. THE MOST COMMON VARIATIONS OF SEPARATION OF PROPERTY	185
I. The Accrual System	185
A. General	185
B. Calculating the Accrual	186
C. Protection and Satisfaction of the Accrual Claim	187
II. Complete Separation of Property	188
III. Separation of Property with Retention of Community of Profit and Loss	188
§3. THE PROPRIETARY CONSEQUENCES OF A CIVIL OR CUSTOMARY MARRIAGE A MINOR CONCLUDES WITHOUT THE NECESSARY CONSENT	189
§4. THE PROPRIETARY CONSEQUENCES OF POLYGYNOUS CUSTOMARY MARRIAGES	190
I. Marriages Concluded before 15 November 2000	190
II. Marriages Concluded after 15 November 2000	190
§5. THE CONSEQUENCES OF DIVORCE IN A MARRIAGE OR CIVIL UNION OUT OF COMMUNITY OF PROPERTY	191
§6. THE CONSEQUENCES OF DEATH IN A MARRIAGE OR CIVIL UNION OUT OF COMMUNITY OF PROPERTY	191

Table of Contents

§7. ALTERATION OF THE MATRIMONIAL PROPERTY SYSTEM	192
Part IV. Succession Law	193
Introduction	193
Chapter 1. Intestate Succession	196
§1. THE OPENING OF THE SUCCESSION	196
I. Death	196
II. Missing Persons and Absentees	196
§2. THE HEIR	197
I. Capacity to Succeed	197
II. Commorientes	198
III. Unworthiness to Succeed	199
A. Introduction	199
B. Person Who Caused the Death of the Deceased	200
§3. THE SYSTEM OF DESCENT	201
I. The Classes of Heirs	201
A. Surviving Spouse(s) and Civil Union Partners	201
B. Descendants	203
C. Ascendants and Collaterals	204
II. Representation	205
III. Adoption, Artificial Insemination and Surrogacy	207
A. Adoption	207
B. Artificial Insemination	207
C. Surrogacy	208
§4. THE RIGHTS OF THE STATE ON THE <i>BONA VACANTIA</i>	209
Chapter 2. Testamentary Succession	210
§1. THE CAPACITY TO MAKE A WILL	210
I. Testamentary Capacity	210
II. Factors Influencing Free Testamentary Expression	211
III. Delegation of Testamentary Power	212
§2. DIFFERENT TYPES OF WILLS AND TESTAMENTARY FORMALITIES	212
I. Introduction	212
II. Formalities for the Execution and Amendment of Wills	213
A. Formalities for the Execution of Wills	213
B. Formalities for the Amendment of Wills	216
III. Power of the Court to Condone Mistakes in the Formal Requirements – Section 2(3)	218

Table of Contents

§3. CAPACITY TO BENEFIT UNDER A WILL	221
I. Introduction	221
II. Statutory Provisions Dealing with the Capacity to Inherit Under a Will	221
A. Adopted Children and Children Born of Unmarried Parents	221
B. The Unborn Child and Class Bequests	222
C. Persons Taking Part in the Execution of a Will	223
§4. THE JOINT WILL	224
I. Introduction	224
II. Joint Wills, Election and Massing	224
§5. REVOCATION AND REVIVAL OF WILLS	226
I. Revocation of a Will	226
A. Introduction	226
B. Revocation by a Subsequent Will, Codicil or Antenuptial Contract	227
C. Revocation by Destruction	227
D. Court's Power of Condonation at Revocation	229
E. Conditional Revocation or the Doctrine of Dependant Relative Revocation	229
F. Effect of Divorce on a Will	230
II. Revival of a Revoked Will	230
§6. FREEDOM OF TESTATION	231
§7. RESTRICTIONS ON FREEDOM OF TESTATION	233
I. Introduction	233
II. Impossible, Illegal, Vague and Uncertain Conditions and Conditions that Are <i>Contra Bonos Mores</i>	233
III. Maintenance of Children and the Surviving Spouse or Civil Union Partner	235
A. Maintenance of Children	235
B. Maintenance of the Surviving Spouse or Civil Union Partner	235
IV. Other Limitations	236
§8. CONTENT OF A WILL	237
I. Conditions and Time Clauses	238
II. Modus	239
III. Substitution	239
IV. <i>Fideicommissum</i>	240
V. Usufruct	241
VI. Trusts	241
VII. The Right of Accrual	244
§9. INTERPRETATION OF A WILL	245
I. General Principles	245

Table of Contents

II. Presumptions	248
Chapter 3. Acts <i>Inter Vivos</i> Relating to the Estate	249
§1. <i>DONATIO MORTIS CAUSA</i> AND <i>PACTUM SUCCESSORIUM</i>	249
§2. ESTATE PLANNING	250
I. Introduction	250
II. <i>Inter Vivos</i> Donations	250
III. Trusts	251
IV. Insurance Contracts	252
V. Usufruct	252
Chapter 4. Acquisition and Administration of the Estate	254
Selected Bibliography	257
Index	265

Family and Succession Law in South Africa

Second Edition

**Jacqueline Heaton
Anneliese Roos**

This book was originally published as a monograph in the International
Encyclopaedia of Laws/Family and Succession Law.

General Editors: Roger Blanpain, Frank Hendrickx
Volume Editor: Walter Pintens



Wolters Kluwer

Published by:

Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.wklawbusiness.com

Sold and distributed in North, Central and South America by:

Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@wolterskluwer.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

DISCLAIMER: The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

Printed on acid-free paper

ISBN 978-90-411-6755-2

This title is available on www.kluwerlawonline.com

© 2016, Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal & Regulatory U.S., 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Website: www.wklawbusiness.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

The Authors



Jacqueline Heaton lectures Family Law at the University of South Africa. She is an Advocate of the High Court of South Africa.

She is a member of the Advisory Committee of the South African Law Reform Commission for the project on Revision of Legislation Administered by the Department of Home Affairs, an editor of the *South African Law Journal* and a former editor of the *Annual Survey of South African Law*. She is also a former Rapporteur of the Family Law Committee of the International Law Association. She is the author of several books, chapters in books, and articles in law journals on the Law of Persons and Family Law.



Professor Anneliese Roos lectures Law of Succession at the University of South Africa. She also lectures modules dealing with information technology and privacy.

She is an Advocate of the High Court of South Africa. She is the author of a casebook on the Law of Succession and two chapters in a book on Information Technology Law. She has published articles on both Law of Succession and the law pertaining to the protection of the privacy of personal data (data protection).