

UNIVERSITY OF SWAZILAND
FACULTY OF SOCIAL SCIENCE
DEPARTMENT OF LAW

MAIN EXAMINATION PAPER, MAY 2010

TITLE OF PAPER: THE LAW OF PERSONS & THE FAMILY

COURSES CODE: L203

TIME ALLOWED: 3 HOURS

INSTRUCTIONS: (1) ANSWER QUESTION ONE (1) AND QUESTION 6

WHICH ARE COMPULSORY AND ANY OTHER TWO (2)

ADDITIONAL QUESTIONS OF YOUR CHOICE

**(2) MARKS FOR QUESTIONS OR PARTS THEREOF ARE
INDICATED IN BRACKETS**

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BY THE INVIGILATOR**

QUESTION 1

Nolwazi Mabuya, an expectant woman, is injured in a motor vehicle accident. Her child is subsequently born alive with severe brain damage which leads to the death of the child three (3) hours after birth. The accident was later proven to have been caused solely by the negligence of the driver of the other motor vehicle and now Nolwazi wishes to institute an action for damages on behalf of the child.

- (i) Briefly explain the operation of the *nasciturus fiction*. (5)
- (ii) For the *nasciturus fiction* to apply, two (2) requirements must be met, which are these? (5)
- (iii) Would the *nasciturus fiction* apply in this case? Explain briefly. (5)
- (iv) Would your answer in (iii) above have been different if the child had died at the age of six (6) years? Discuss. (5)
- (v) Almost similar facts obtained in the case of *Pinchin and Another N.O. vs Santam Insurance 1963 (2) SA 254 (W)*, but the Claimant therein did not succeed. Why did claim in that case fail?

TOTAL :[25 MARKS]

QUESTION2

A person's legal personality is terminated by death. Under certain circumstances however, a presumption of death can be pronounced in terms of either the Common Law or in terms of statute.

(a) In terms of the Common Law who may apply for a presumption of death and where? [4 marks]

(b) Who initiates the statutory procedure in countries where the presumption of death is provided for by statute, for example, in the Republic of South Africa?

[1mark]

(c) Edward, a medical surgeon, is working for an organization known as Doctors Without Borders. For the past two (2) years his organization had posted him to assist victims of war in Iraq. Edward has been well and doing his work and frequently communicating with his family in Mbabane until the 23rd of March 2009. On this date, on or about 11hrs00, a massive bomb blast ripped apart the Shalom Medical Centre in Bagdad where he was stationed. All occupants of the medical Centre at the time were reduced into unrecognizable pieces of human flesh. Since that day his family in Mbabane has not heard from him and all their efforts to contact him have proven futile. In December 2009, (nine months after they have not heard from Edward), his family approached the High Court for a presumption of death order which was granted in the same month. Edward's estate was subsequently liquidated and distributed among his heirs in accordance with the rules of intestate succession. In February 2010 Edward's wife Lungi, approached the same Court for an order to dissolve her marriage to Edward, which was indeed granted. Thereafter, Lungi got married to Mphathi.

Just recently in March 2010 Edward arrived home, having survived the bomb blast in Bagdad.

- (i) Did the Court err in granting the presumption of death order? Explain briefly. [10 marks]

- (ii) What is the impact of Edward's return on the division of his estate and on Lungi's second marriage? [10 marks]

TOTAL: [25 marks]

QUESTION 3

In terms of South African Law, a South African woman does not lose her South African citizenship by virtue of marrying an alien husband, unless after the marriage she takes the necessary steps to renounce her South African citizenship. If she does not do the foregoing, she may enjoy dual citizenship. Basego is a South African woman, has been married to Muntu, a Swazi citizen since June 2008. Well before the marriage Basego filed a declaration with the Swaziland Citizenship Board to acquire Swazi citizenship by marriage as per the provisions of Section 44 (1) and (2) of the Constitution of Swaziland. She received no objection and as such has become a citizen of Swaziland by marriage from her date of marriage.

Towards the end of 2009 the Ministry of Home Affairs in Swaziland has approached her and informed her that she cannot have dual citizenship in Swaziland, as the laws of this country prohibit same.

Basego and her husband are completely confused and now seek your legal assistance.

Advise them accordingly, which country's law must prevail?

TOTAL: [25 marks]

QUESTION 4

B has been serving in the British Army in India since 1926. In 1936 he got married to W in India. In 1938 he returned to England together with his wife to deliver their first born. During all this time B intended to resign from the army and settle with this wife in the Cape of Good Hope in South Africa. As he was entertaining these thoughts, the start of the Second World War supervened and B was recalled from England to India and his wife also came along with him.

In 1941 B sent his wife to the Cape in South Africa with all their belongings. He also gave her money with which to hire a house in Cape Town.

In 1943, B came to Cape Town for the first time on a three (3) weeks leave and lived with his wife in their rented house and returned to India after the expiry of his leave days.

In 1945 he came back to Cape Town on leave again and once again lived with his wife in their rented house. B has now instituted divorce proceedings against his wife in Cape Town.

(a) Where is B domiciled and what is his type of domicile, if any? Discuss.

[15 marks]

(b) In his position can B acquire domicile of choice anywhere? If so, what are the legal requirements that he must satisfy?

[10 marks]

TOTAL: [25 marks]

QUESTION 5

In terms of our laws, when a party to a marriage relationship seeks a divorce, before the Court can grant a final decree of divorce, first it must order the restoration of conjugal rights by the other spouse. It is only after the other party has failed, refused and/or neglected to restore that a final decree may be granted.

(a) What does this restoration of conjugal rights process entail?

[5 marks]

(b) Is this procedure still a necessary component of our divorce law today? If not, can you highlight the potential and actual dangers that it may bring to one of the parties.

[15 marks]

(c) How can the Defendant abuse this process?

[5 marks]

TOTAL: [25 marks]

QUESTION 6

Should the procreative potential of a spouse to a civil inter marriage be the defining characteristic of conjugal relationships in our society?

Discuss with the support of legal authority

TOTAL: [25 marks]