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# Module I

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## COURSE INTRODUCTION

Hello dear learner! Well come to Family Law course. Family Law is the law that regulates family as whole. It is the law that governs the relationship between persons related to each other by blood and /or marriage in general.

This Module contains three chapters. Chapter one introduces you to different types of relationships which give rise to the concept of family in the first place. Chapter two guides you through conclusion of marriage and its legal effects. The last chapter of this Module discusses dissolution of marriage and its effects, and proof of marriage.

Note that self-assessment questions are given at the end of each section and review questions at the end of each chapter. Key answers for the review questions are provided on the last page of this Module. It is advisable for the students to have on their hands family codes, especially the revised family code when reading this Module for better understanding.

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# CHAPTER ONE

# RELATIONSHIP UNDER FAMILY LAW

## Introduction

Dear distance learners! You are welcome to the first chapter of this Module. This chapter is devoted to a thorough discussion of the legal relationship under Ethiopian Law. The chapter has three major sections dealing with origin and kinds of family relations as well as their legal effects under Ethiopian family Law. Accordingly, under the first three Sections, sources and kinds of family relations will be dealt with while the last section shades light on the legal effects of the relationship.

## Objectives:

At the end of this chapter, you will be able to:

- understand the concept of family relationship
- Explain the Sources of family relations
- Identify the kinds of family relationship
- Elaborate some of the legal effects of the relationship from different perspectives
- determine the degree of relationship under Ethiopian family Law
- Assist prospective spouses in understanding the legal effects of the relationship on their marriage.

## 1.1 Concept and Types of Family

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### 1.1.1. Brief concept of Family and Its protection

***Q. Dear learner! How do you understand the concept of family in family Law? Is there any single Coined definition of the term '' family" which is of a universal application? Is the term defined under our relevant law(s)?***

To begin with the definition, a quest for a working definition of universal acceptance is an unattainable in the sense that the term is defined from different perspectives in different legal systems. However, most people understand that the word '' family'' refers to a group of persons related to each other by blood and/or marriage. The Lexical definition of the term as provided in the Black's Law Dictionary refers to '' a group consisting of parents and their children or a group of persons connected by blood, affinity or law. Therefore, it obvious that even from the alternative lexica definitions quoted from the above dictionary, there is disparity in the definitions. Yet, none of them is comprehensive enough to elaborate the concept of family despite the fact that the second alternative lexical definition is broader in its scope than the first one. The reasons for the disparity in the definition of the word '' family '' are, inter alia, the variance in the family's Structure from culture to culture as well as the types of family adopted or prevalent in a certain legal system.

Apparently for the same reasons in dictated, above, the word family is defined nowhere under our law.

**Q.*Why do we protect family and how is the protection effected?***

Apart from discrepancies in the definitions '' the term for which there is no comprehensive and working definition it is undebatable that family is the natural basis of Society worthy of protection both by the society and the state for which the means of protection is effected by regulating and governing family relation by law. This protection is similarly guaranteed by the FDRE Constitution. Accordingly, the latter States under its Art 34(2) that family is the natural and

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fundamental unit of the Society and is entitled to protection by State and the Society. In response to the constitutional guarantee, the legal protection of family under the contemporary Ethiopian legal system has been ensured both at federal and States' level by their respective family laws enacted by their legislative organs. Nevertheless, in regional states where family laws are not enacted so far, the relevant provisions of family law in the civil code are applied to govern family relations and thereby ensure the legal protection of family in light of Federal and their respective constitutions.

### 1.1.2. Types of Family

As indicated above the absence of uniform definition of family and variation in elements of the concept, of it is logically inevitable that there will be different types of family. Such a difference is mainly based up on the scope of the groups or members that constitute family. Accordingly, there are three different types of family. Namely, Simple, extended, and multiple family. Thus, each one of them is treated distinctly hereunder in order.

#### i. Simple Family

This type of family is alternatively known as nuclear family law. In other legal systems, it is usually referred to as biological family law. It consists of a married couple, or a married couple with offspring, or of a widowed person with offspring. The concept is of the conjugal link as the structural principle and conjugal linkages is nearly always patent in the lists of persons referred to in a nuclear family. That is, Simple family is constituted of spouse(s) and the children. Thus, for a simple family to exist, it is necessary for the individuals to be in conjugal family unit (i.e. at least two individuals connected by that link or arising from that link to be coresident). In other words, no solitary can form a conjugal family unit and for such a group to subsist it is necessary for at least two immediate partners (spouses and /or offspring) to be present. More remotely connected persons, whose existence implies more than one conjugal link do not constitute conjugal family unit if they reside together with none else except servants.

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Nor do brothers and sisters. Hence, a widow with a child may form a conjugal family unit, but a widow with a grandchild does not, nor does an aunt with a nephew.

### ii. Extended Family

The other type of family which is different in its Component from Simple family is known as extended family. An extended family consists in a conjugal family unit with addition of one or more relatives other than offspring, the whole group living together on its own or with servants. It is thus identical with the nuclear family except for the additional relative(s). If the resident relative is of a generation earlier than that of the spouse(s) such as the Spouse's father, mother, or aunt, then the extension is said to be upwards.

Similarly, the presence of a grandchild (without either parent) or a nephew or niece creates down ward extension while that of a brother, sister or cousin of the spouses implies sideways or lateral extension. Some groups may still be extended vertically and laterally that the presence of any such kin or affine of the conjugal family unit creates extension however distant the relationship may be. Therefore, it is important to note that the whole phrase extended family denotes this category of domestic group.

### iii) Multiple Family

This last type of family is usually called a mixed family. Accordingly, multiple family comprise all forms of domestic group which include two or more conjugal family units connected by kinship or by marriage. Such units can be simple, extended, and can be disposed vertically and laterally. Stated, otherwise, this type of family as is implied by its name is the blend of nuclear and extended family and

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is broader in its scope than the former. For instance, a simple family comprising in addition a married living along with his wife and perhaps offspring can be referred to as multiple family.

In conclusion it should be noted that owing to lack of a fixed definition of family which could have been used as point of reference for various legal purposes none of the aforementioned types of family has been clearly adopted as such in our laws. However, inferential analysis of the relevant provisions may be used to indicate the type contemplated by the legislator.

Self assessment question

1. Is any uniform definition of family that is worthy of universal acceptance?
2. What do you of think is the reason behind the legal protection of family in any legal system?
3. How is protection of family ensured in the various regional states of Ethiopia?
4. What are the different types of family?
5. Which type of family do you think is common in your locality region as well as in Ethiopia?

## 1.2. Sources of Family Relationship

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***Q. What do you think are the origins of family relationship? For instance, what is the source of your relationship with your brother or with your father–in-law in case you are a married one?.....***

**……**

Dear learner, family relationship as discussed thoroughly below emanates from other relationship recognized by law. These relationships are marital and parent-child relationship. The former relationship in turn originates from marriage, whereas the latter relationship stems form filiations. In other words, the two major sources of family relationship are marriage and filiation. These sources of the relationship are clearly under Art.1 of the Oromiya Regional Family Code. Deeply treated here in this section are, thus, the basic sources of family relationship.

### 1.2.1. Marriage as a Source of Family Relationship

***Q. How does marriage act as a source of family relationship and what relationship emanates thereof?.....***

**……**

Marriage as a basic unit of family is the source of family relationship in the sense that marriage which creates marital relationship between the spouses in turn engenders a bond of family relationship between one spouse and the relatives of the other. Such a bond of family relationship that flows from marriage is known as a bond of affinity in family law. In addition to being a direct source of affinal relationship, marriage, with regard to the relationship between the spouses and their children, is also considered to be the origin of natural filiation –another source of family relationship as elaborated in the subsequent sub-section.

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### 1.2.2. Filiation as a Source of Family Relationship

***Q. What bond of family relationship derives from filiation*?.....**

**……**

As indicated above, filiation is the other major origin of family relationship. To shade light on the concept of filiation before dealing with it as a source of the relationship, filiation, despite absence of a legal definition, may be defined as parent-child relationship.

Accordingly, filiation is of two kinds: natural and artificial /adoptive filiation. The former kind refers to a bond of blood relationship that exists between a parent and a child, whereas adoptive filiation refers to the legal relationship created artificially between an adopter and the adopted based on contract of adoption. In both cases, a bond of family relationship called consanguinity derives from the bond of filiation. Natural filiation may, in turn, emanate from marriage or irregular union. Moreover, it may also arise from other relation though not established legally as far as there exists a bond of natural filiation which is commonly known to the community to create family relationship. There fore, filiation from which consanguinal relationship derives its origin is the second major source of family relationship.

**Self- assessment questions**

1. What do you understand by family relationship?
2. Identify and explain the major sources of family relationship under family law.
3. Based up on their sources, what are the major family relationships?
4. Which source of family relationship is broader in its scope?
5. From what dos natural filiation emanate?

## 1.3 Relationship by Consanguinity

***Q. What is the essential feature of consanguinal relationship?***

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It has been mentioned in the preceding Section that bond of consanguinity is one of the two basic family relationships under family law. Even though a direct and Comprehensive definition of the relationship is not provided under our law Art.550(1) of the Civil Code refers to it as a bond of natural relationship that derives from Community of blood. It should, however, be noted at this juncture that consanguinal relationship created in adoptive filiation does not naturally involve bonds of natural relationship that derive from community of blood since the relationship is artificially created by contract of adoption. Yet, it has the same legal effect with the natural bond of consanguinal relationship.

In general, a bond of relationship by consanguinity exists in the direct as well as collateral line.

### 1.3.1 Consanguinity in the Direct Line

As per Art.550(2), direct relationship by consanguinity exists between ascendants and descendants. For instance, a family relationship between a father and his son is a direct consanguinal relationship as is ascendant- descendant relationship. Such relationship by consanguinity in the direct line is seemingly limitless. That is the relationship exists infinitely between ascendants and descendants no matter how remote their relationship may be.

### 1.3.2. Consanguinity in the collateral Line

Unlike direct consanguinity, relationship by consanguinity in the collateral line exists between collateral relatives. As is provided under Art.550(3) of the Civil Code, in the collateral line, the relationship exists between persons who descends from one or more common ascendants.

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For example, brothers and sisters are consanguinally related to each other in the collateral line since they descend from the same or common ascendant i.e. their father. In addition, the relationship between a man and his uncle or aunt is collateral consanguinity in the sense that they all descend from a common grand father.

Regarding the degree of collateral consanguinity, the degree of relationship as opposed to that of direct consanguinity is limited to a certain degree of generation. Accordingly, Art.551 (1) of the Civil Code states that the degree of relationship by consanguinity in the collateral line may not exceed seven generations. Thus, beyond the seventh generation which is the maximum limit, relationship by consanguinity shall be of no effect. Moreover, this degree of relationship shall be calculated by counting seven generations in each line from the common ancestor.

Nevertheless, the degree of relationship by consanguinity in the collateral line is not limitless as is the case for direct consanguinity. Rather, the law has set a certain degree of relationship beyond which consanguinal relationship bears no legal effect. the maximum limit of degree of relationship by consanguinity in the collateral line is, thus, set to be the seventh generations from the common ancestor .

As is incorporated under Art.551 (1) of the Civil Code, such a degree of relationship by consanguinity in the collateral line shall be calculated by counting seven generations in each line from the common ancestor. There are two different approaches: canon and civil law approaches that are applied in determining this degree of relationship. Canon law approach which has its origin in Roman canonical law is based on counting generations on each line separately from the common ancestor as opposed to civil law approach in

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which the generations on both lines are jointly counted together and summed up to determine the degree of relationship.

**Self assessment questions**

1. Elaborate relationship by consanguinity as enshrined in our law.
2. How is adoptive filiation the source of relationship by consanguinity?
3. Compare and contrast consanguinity in the direct and collateral line.
4. What is the difference between the two approaches in the calculation of generations for consanguinity?
5.

**1.4 .Relationship by Affinity**

***Q. What is the source of affinal relationship and how is it different from consanguinity***?

……

……

Aforementioned herein above is marriage as one of the sources of family relationship . Accordingly , such a bond of family relationship that derives from a marriage is known as affinity relationship. Thus as opposed to consanguinal relationship which naturally flows from community of blood , affinal relationship originates from marital relationship. You should also bear in mind that bond of affinity may be simple or double . A bond of simple affinity normally exists between a person and his /her spouse's relatives , whereas a bond double affinity as provided under Art. 554 of the Civil Code exists between a person and the spouse of the persons to whom he is related by affinity .

For instance , a bond of double affinity exists between say, Tola and the wife of his brother in-law. In other words , simple affinity exists between Tola and

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his brother -in- law and at the same time the former is related to the wife of the latter by a bond of double affinity. Moreover, it is worthy noting that despite its distinction in this regard from simple affinity, a bond of double affinity shall produce the same legal effect as a bond of simple affinity . This similarity in their legal effects for all legal purposes is expressly indicated under Art. 554 (2) of the Civil Code. Such a relationship as elucidated under Art , 552 of the Civil Code exists in both direct and collateral lines as elaborated above with regard to relationship by consanguinity .

### 1.4.1. Direct Affinal Relationship

***Q. Identify a bond of family relationship that exists between the current husband of a women and her daughter born of her ex- husband in the previous marriage?***

A bond of direct affinal relationship emanating from a marriage exists between a person and the ascendants or descendants of his spouse. To elaborate the point further, a direct bond of affinity exists between a husband and his wife's father, mother, grandfather/ mother, great grandfather/ mother , etc as the latter are all the ascendants of his wife or between the former and his step-child, step-grandchild, etc, if any for the step-children are the descendants of his wife. The same holds true between a wife and the ascendants or descendants of her husband.

Another point of paramount importance to be raised here is the fact that there is no limit for a family relation ship by affinity. Hence, a bond of affinity exists indefinitely between a person and the ascendants or descendants of his/her spouse even if the degree of relationship between the latter and his/her

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ascendants or descendants is too remote. This is obviously due to the reason that there is no limit set by law for degree of family relationship in the direct line.

### 1.4.2. Collateral Affinal Relationship

***Q. What kind of affinity does exists between a person and the sister or brother of his wife, and in which line does the relationship exist?***

In contrast to affinity in the direct line relationship by affinity in the collateral line exist between a person and the collaterals of his spouse. It exists between a husband and the collaterals of his wife as well as between the wife and the collaterals of her husband.

For further illustration, assume that Ato Bonsa is the husband of W/ro Bontu, then all the collaterals to W/ro Bontu such as her sisters, brothers, cousins, etc are related to Ato Bonsa by affinity in the collateral line. Likewise, all the collaterals of Ato Bonsa within the limit provided by law are related to W/ro Bontu by affinity in the same line.

Furthermore it should be borne in mind that affinity in the collateral line is subject to limitation. That is, unlike affinity in the in the direct line which is with out limit, a bond of affinity in the collateral line shall be of no effect beyond the third degree as embodied under Art.553 of the Civil Code. The determination of the degree of relation ship in this regard may be made based up on relationship by consanguinity as counted up to the third degree for this purpose either on the basis of canon or civil law approach, explained herein above, as the case may be. Thus, beyond the third degree, there shall be no family relationship by affinity between the person and the collaterals of his spouse.

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In concluding this section, it is worth mentioning that such a bond of affinity once created by marriage shall subsist in both lines not with standing that the marriage is dissolved. Therefore, the dissolution of the marriage subsequent to creation of the relationship does not affect the existence of the latter. Explained otherwise, a bond of affinity created once by a valid marriage shall remain intact irrespective of the fate of the marriage.

**Self-assessment Questions**

1. Explain the destruction b/n relationship by consanguinity and affinity.
2. What is the source of relationship by consanguinity?
3. Distinguish b/n direct and collateral consanguinity.
4. Compare and contrast b/n simple and double affinity.
5. What is the maximum limit for degree of family relationship in the direct line? How about in the collateral line?
6. Elaborate the two approaches adhered to in the determination calculation of degree of family relationship in the collateral line?
7. Does the dissolution of a marriage affect affinity? Why?
8. Is there any family relationship b/n the respective spouses of brothers or sisters? Why?
9. What family relationship exists b/n you and your brother - in- laws spouse?
10. Identify the possible family relationship that emanates from adoptive filiation.

## 1.5 Legal Effects of Family Relationship

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The family relationships recognized or created by law as thoroughly dealt with above are not without certain legal effects. Instead, those bonds of family relationship do produce various legal effects for various legal purposes. The legal effects may be of paramount significance with respect to succession, maintenance and marriage for the legal effects involve rights and reciprocal corresponding duties as well as legal impediments between or among the persons so related. To this end, some of the legal effects of family relationships under our law are briefly treated here under.

### 1.5.1 Creation of Rights

***Q. What rights do you think may be created by any one of the family relationship elaborated in the previous section?***

From bonds of family relationship there flow certain rights for certain legal purposes. For instance, for the purpose of succession under law of successions, the existence of family relationship by consanguinity is a pre-condition for right of inheritance particularly in case of intestate succession. In this regard the degree of relationship for intestate successions as provided under Art.842-847 of the Civil Code is based on relationship by consanguinity. Furthermore Art.856 of the code providing for bond of necessary legal relationship for representation in intestate succession, states that representation shall not take place where, in terms of the law, there is no bond of relationship between the persons who claim to have right of representation and the deceased. There fore, it follows from the reading of the aforecited provisions in general that the existence of family relationship by consanguinity between a person and the deceased entitles the former to the right to inherit the property of the latter as provided by law.

Likewise, the right to claim maintenance is the other right that ensues from family relationships both affinity and consanguinity in the direct line. Thus,

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where a person related to another by any of this relationship is in need and not in a state of earning his livelihood by his work, such a person has the right to claim maintenance from the other. Moreover, the right claim maintenance similarly exists between brothers and sisters in the collateral line. The origin of such a right in both cases is indisputably the family relationship provided by law.

### 1.5.2 Imposition of Duties

***Q. Dear learns can you guess any legal duty that emanates from family relationship between you and your parents?***

By the same token as certain rights derive from family relationship, there emanate certain reciprocal duties from the same that are imposed up on persons so related with in the limit or without limit as the case may be. A typical example in this respect may be cited of the reciprocal duty to supply maintenance and which exists between relatives by consanguinity or affinity in the direct line . In addition an obligation to supply maintenance likewise exists between brothers and sisters born of the same patents or born of the same father or of the same parents or born of the same father or of the same mother. The obligation exists on the same conditions provided for the right to claim maintenance.

The other instance for the imposition of duties as a legal effect of family relationship, in particular by consanguinity is with regard to parent-child relationship. This duty arises where torts are committed by the child under the age of 18 years.

In this case, the parents /father, as provided under the, At.2124 of the Civil Code, have/ has the duty to bear liability for the actions of their/his minor. In other words, the parent has the duty to bear the liability vicariously where his minor

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child incurs a liability the duty which inturn arises presumably from the formers breach of his duty to properly supervise the conduct of his minor.

In a nut shell, the aforementioned duties, among others, are imposed up on the person(s) as legal effects of family relationship. This indicates the fact that the existence of family relationship between persons does not only entitle them to rights but also it imposes reciprocal duties up on the persons so related.

### 1.5.3 Legal Impediments

***Q. In respect of what are legal impediments created by family relationship? What are legal impediments?***

Legal impediments, as another legal effects of family relationship, are legal prohibitions against the performance of certain Juridical acts or formation of legal relationships. Hence, legal impediments stemming from family relationship are created against conclusion marriage or formation of irregular union the acts of which are both juridical acts as well as formation of relationship recognized by law .

Concerning conclusion of marriage, marriage between persons related by consanguinity and affinity on the direct line is prohibited. Consanguinity in the collateral line acts as an impediment against conclusion of a marriage between a man and his sister or aunt and a women and her brother or uncle. In case of affinity in the collateral line, the impediment is operative against marriage between a man and the sister of his wife and a woman and the brother of her husband. The legal impediments deriving from family relationship in the collateral line are limited in the revised family code (s) only between the persons so mentioned under the relevant provisions while

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the scope of the impediments are relatively broader under the civil code up to seventh generation for consanguinity and third degree for affinity. The other relationship worthy of note against which the same legal effects are operative in the same way is an irregular union. That is, persons related by family relationship as provided for marriage can not form an irregular union between themselves. To this effect, Art.100 (2) of the Federal Revised Family Code states that the provisions concerning impediments to marriage in the case of affinity shall, apply in case of an irregular union. The same holds true for impediments arising out of consanguinity against commencement of irregular union even though it is not expressly provided as such by law.

The last point of paramouncy is the fact that these impediments by their nature are absolute in the sense these that any legal relationship, whether marriage or irregular union, created in violation of these impediments is subject to dissolution or termination by court at any time up on the application of any interested person or the public prosecutor.

Self- assessment Questions

1. *What are the legal effects of family relationship?*
2. *How does right of succession depends or family relationship?*
3. *What duties are imposed up on relatives due to their family relationship?*
4. *Elucidate the major legal impediments that ensue from family relationship?*
5. *Contrast the scope of the impediments between the Revised Family code and the civil code.*

**Chapter Summary**

Family law, a branch of civil law, is concerned with inter alia the regulation of family relationship. The word family is a generic term without a universally coined definition as the concept may be approached or viewed from different perspectives. Even in our law, the word has no fixed definition. However, despite the absence of a unanimous definition or a working definition of

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general acceptance, there is no doubt that family is the fundamental unit of a society entitled to legal protection both by the state and the Society.

Due to variance in the definition of family, it is natural that there exist different types of family based on its components. These are simple, nuclear, extended and multiple/mixed family. Worth noting in the types of family is the existence of nuclear/simple family as a component in the other two types.

The relationship between/among the members of the family as regulated by family law has its origin in marriage and filiation. A bond of family relationship that derives from marriage is known as relationship by affinity whereas, a bond of family relationship arising from community of blood is called Consanguinity. Both type of relationship exists in direct and collateral lines. Unlike affinity the source of which is marriage, the source of relationship by consanguinity is, thus, filiation. Filiation may be natural or adoptive/ artificial but with the same legal effects.

Family relationships in the direct line are without limit as opposed to relationships in the collateral line which exist only up to a certain degree beyond which the relationships shall be of no effect. From the latter category of relationships, consanguinity exists up to seventh generations while affinity is applicable only up to third degree as provided in the civil code. Such a degree of relationship may be determined on the basis of canonical approach or civil law approach, which ever is reasonable and practicable.

Once these family relationships are created, there ensue certain legal effects from the relationships. The legal effects may involves5 rights, duties and impediments with regard to various legal purposes. For instance, right to intestate inheritance, duty to supply maintenance and impediments against marriage are some typical legal effects of family relationship in Ethiopia.

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# Review Questions

***Direction: Attempt to answer the following questions before you consult the key answers attached her to at the end.***

1. Explain the rational behind protection of family, the organs to ensure its protection and the way the protection is effected.
2. Form the joint reading of the relevant provisions, which type of family is adopted in Ethiopian family law? Which family type is commonly observed in practice in Ethiopia?
3. Does an irregular union create family relationship by consanguinity?
4. Marriage can be source of filiation which in turn is a source of family relationship by consanguinity. Is this assertion valid? Why?
5. Assume that Lensa and Lensie are spouses a couple living in addition . to their two children of opposite sex with their respective relatives Lulit, the sister of the husband and Gada, a brother of the wife . Then, answer the following questions.

   A) What are the relationship between Lensa and Gada ?
   B) Is there any family relationship between Lulit and Gada ?
   C) Can Gada marry Lulit?
   D) What about the relationship between the children and what is the degree of the relationship?

6. Family relationship by consanguinity the emanates from adoptive filation does not necessarily derive from community of blood rather it flows from the contract of adoption legal created . Is it valid?
7. Is family relationship by double affinity as recognized in the civil code operative under the revised Family code ? Why?

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8. Identify the destruction between the degree of consanguinal relationship provided in the Civil Code from that of the revised family code with respect to the legal impediments they produce against marriage .

9. Suppose that H and W are a couple having their respective ascendants and descendants living together. Furthermore, they have both personal and common property.

A) What right does exist between the couple and their descendants over the property of the former and up on the death of the same ?

B) What duty there exist between H and the ascendants of W in case the latter are needy ones with out the capacity to earn their livelihood by their work? What is the basis for the duty?

10) Dear learner! By now you are familiar with the legal impediments flowing from family relationship . You also know the legal consequences of the non –observance of these impediments.

Now take the two legal relationship marriage and irregular union created in your own Kebele and then make a sample assessment whether the impediments are observed or not . If not, what would be your action against such vilation of the impediments?

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# CHAPTER TWO

# MARRIAGE AND ITS LEGAL EFFICTS

## INTRODUCTION

Dear students, welcome to the second chapter of the module. Under this chapter, you are going to learn about marriage and its effects.

Marriage is the main and important step that leads to the creation of institution of family which is fundamental and essential for the continued existence of a society. When a man and a woman decide to enter into the bond of marriage, innumerable situations will be surfaced concerning the mode of celebration of marriage, essential conditions that need to be fulfilled, change in material interest and personal relations of the spouses.

This chapter is aimed at providing you with the clear and basic understanding of the various forms of marriage, conditions of marriage and the effect of their violation, and legal effects of marriage. Thus, you will be given the basic concept of marriage, and will be guided through its conclusion, necessary conditions like consent, capacity, etc and factors vitiating validity of marriage, legal effects of marriage and their regulation.

## CHAPTER OBJECTIVE

At the end of the chapter, the students should be able to:

- Grasp the various forms of marriage.

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- Explain the conditions of marriage – essential and non essential and consequences of their violation.
- Understand the effects of marriage on personal and material relation of spouses.
- Appreciate problems and issues likely to crop up in their day to day encounter with the family issues in relation to marriage so as to assist them in strengthening problem-solving skill.

## 2.1 CONCLUTION OF MARRIAGE

Before we start discussion on how marriage is concluded, it is natural to start with the definition of marriage.

**?** What do you think is marriage? Do you think that it is possible to provide a definition that will cover every aspect of marriage as recognized and known in every corner of the world?

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The views among the communities of the world concerning marriage are not exactly the same even if there may be similarities between them. Therefore, it seems difficult to find a definition which applies to all institutions which are viewed as marriage by different communities. For instance, some define marriage as "a voluntary union for life of one man and one woman to the exclusion of all others." However, in some places marriage can be concluded involuntarily. It is true for some communities that one man can marry more than one woman. Union between the same sexes is also considered as marriage in some countries.

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One writer suggested the definition based on a 'bundle of rights' will give the general concept about what marriage means as at least one part of the bundle must be present before the term 'marriage' can be used. Some of the rights that arise from marriage are listed as follows:

i. To establish the legal father of a woman's children.
ii. To establish a legal mother of a man's children.
iii. To give the husband a monopoly in the wife's sexuality.
iv. To give the wife a monopoly in the husband's sexuality.
v. To give the husband partial or monopolistic rights to the wife's domestic and other labor services.
vi. To give the wife partial or monopolistic rights to the husband's labor services.
vii. To give the husband partial or total rights over property belonging to or potentially accruing to the wife.
viii. To give the wife partial or total rights over property belonging to or potentially accruing to the husband.
ix. To establish a joint fund of property – a partnership – for the benefit of the children of the marriage.
x. To establish a socially significant 'relationship of affinity' between the husband and his wife's brothers.

**?** What is marriage under Ethiopian jurisdiction?

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Legislative power is allocated to the federal government and the States in such a way that powers of the Federal Government are enumerated while the residual

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areas of legislation are left to the states. One such law which is not specifically given to the Federal Government is family law. Therefore, Tigray Regional State, Oromia Regional State, Amhara Regional State and The Southern Nations, Nationality and People's Regional State have enacted their own family laws. In addition to this, we have the Revised Family Code, herein after called as RFC, which was enacted by the House of Peoples' Representatives which applies in Addis Ababa and Dire Dawa.

When we come back to the main point of our discussion, RFC, Tigray National Regional Government Family Law Proclamation and Oromia National Regional Government Family Law Proclamation did not provide a definition for the term marriage. However, the Amhara National Regional Government Family Law Proclamation has provided the meaning of marriage. Art 11 of this proclamation states that marriage is a relationship whereby a man and a woman, having attained majority, officially establish out of their own free will and consent with an intention to sustain ably live together united in law, or a legal institution structured as a result of this relationship thereto.

It has been suggested specially for the lack of definition of marriage on the RFC that as it is difficult to formulate a definition that describe all and important aspect of marriage in a sufficient way. Therefore, the best way seems to be to understand the meaning of marriage from the different provisions of family law. Even if the family code fails to define clearly the word marriage, one can identify the relation of two individuals as marriage by giving answers for the following questions. What are the necessary conditions for the conclusion of marriage? What are the effects of marriage? , and etc…

Having said this much about the concept of marriage, now we shall proceed into the discussion of the forms of marriage.

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## 2.1.1 FORMS OF MARRIAGE

Can you mention at least one form of celebration of marriage?

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Marriage can be celebrated in three different ways under the jurisdiction of Ethiopian legal system. Marriage can be concluded before an officer of civil status or in accordance with religion or custom of the future spouses. The future spouses are free to choose one of the forms of marriage to conclude marriage.

Below detailed account of each of the forms of marriage is given.

1. **Civil Marriage**

***Important provisions***

***RFC***

***Art 2*** –**Marriage concluded before an officer of civil status**

*Marriage shall be deemed to be concluded before an officer of civil status when a man and a woman have appeared before an officer of civil status for the purpose of concluding marriage and the officer of civil status has accepted their respective consent.*

***Art 22-Authorized officer of civil status***

*Civil marriage shall be concluded before the officer of civil status of the place where one of the future spouses or one of the ascendants or close relatives of one*

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*of them has established residence by continuously living there for not less than six months prior to the date of the marriage.*

***Art 23-* Request for celebration of marriage**

*The future spouses shall inform the officer of civil status of their intention to conclude marriage not less than one month prior to its celebration.*

***Art 24- Fixing the date of marriage***

*Upon receipt of the request, the officer of civil status shall, in consultation with the future spouses, decide the exact date of the conclusion of marriage and publicize same by any appropriate means.*

***Art 25- Formalities of celebration***

*1. Marriage shall be concluded publicly in the presence of the future spouses and two witnesses for each of the future spouses.*

*2. The future spouses and the witnesses shall declare, under oath, that the essential conditions of marriage are not violated.*

*3. The officer of civil status shall inform the future spouses and their witnesses, before taking oath, of the consequences of their declaration.*

*4. Each of the future spouses shall declare openly to the officer of civil status that they consented to conclude marriage on their own free will.*

*5. Each of the spouses and their witnesses shall sign in the register of civil status.*

*6. upon fulfillment if the formalities prescribed above, the officer of civil status shall pronounce them united in marriage and shall issue a certificate of marriage to that effect.*

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- **The Amhara Regional Government and Oromia Regional Government Family Law proclamations have exactly the same provisions on civil marriage as that of RFC. The Tigray Regional Government Family Law proclamation's provision on civil marriage has some deviation from the RFC.**

Civil marriage is said to be concluded when the future spouses appear before an officer of civil status under take whatever procedure the law requires and the officer accepts the consent of the man and woman. The Tigray family law requires the future spouses to appear before a person who register a marriage if they want to conclude national marriage (civil marriage).

? Who is an officer of civil status?

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The Ethiopian civil code has introduced in Ethiopia the office of civil status. The institution is responsible for registering births, deaths and marriage (Art 74 of civil code). A Person who is responsible to draw up such records is called officer of civil status. However, such institution has never been established in Ethiopia. When the RFC was enacted the government is given 6 months to establish such institution (Art 321 of RFC). Still up to now, nine years after RFC's enactment, the office is not a reality. Some give the reason that as the institution is indigenous to Ethiopian law (does not exist in other countries); it was not possible to find any model that will be the basis for making it function able.

The appropriate question that will come into your mind by this time is, "Where do births, deaths, and marriage get registered?" The office of the municipality is

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undertaking the registrations work in addition to many other separate mandates it has. Given the reality in Ethiopia concerning officer of civil status, it may be better to use the phrase a person who registers marriage like the Tigray Family Law proclamation.

? What are the procedures to be passed through to conclude civil marriage?

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Let us list some of them:

- ✓ Marriage should be concluded before the officer of civil status of the place where one of the future spouses or one of their parents or close relatives has established residence by continuously living there for not less than six months before the marriage is concluded.
- ✓ Future spouses have to inform the officer of civil status their intention to get married one month or more before the date of celebration (in the case of Tigray family law before one week or more).
- ✓ The exact date of celebration is to be fixed by the future spouses and the officer of civil status.
- ✓ On the date of celebration, the future spouses are required to be present. Two witnesses for each of them are also required to appear before the officer if civil status.
- ✓ The future spouses and the witnesses should swear that the essential conditions of marriage are not violated.

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- ✓ After the future spouses declare openly to the officer that they consented to get married to each other without any kind of influence they should sign in the register of civil status.

- ✓ And finally, the officer of civil status pronounces the future spouses' union in marriage.

### 2. Religious Marriage

**Important provisions**

**RFC:**

**Art 3- Religious marriage**

*Religious marriage shall take place when a man and a woman have performed such acts or rites as deemed to constitute a valid marriage by their religion or the religion of one of them.*

**Art 26- Religious marriage**

*1. The conclusion of religious marriage and the formalities thereof shall be as prescribed by the religion concerned.*

*2. The provisions of this code relating to the essential conditions of marriage shall be complied with in religious marriage.*

- **Essentially the same provisions have been provided in Amhara, Oromia and Tigray family laws.**

Religious marriage is said to be concluded when future spouses have concluded marriage by fulfilling the requirements or procedures put forward by their religion or the religion of one of them. Depending on the type of religion, the acts or rites the future spouses are required to perform may differ.

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? Can you mention some of the acts or rites required by religion to be performed by future spouses in your locality?

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The important point that should not be left unmentioned is that upon the conclusion of religious marriage, the conditions that the law has put forward as essential should be fulfilled. These conditions are going to be discussed on the next section.

## 3. Customary Marriage

**Important provisions**

**RFC:**

**Art 4- Marriage according to custom**

*Marriage according to custom shall take place when a man and a woman have performed such rites as deemed to constitute a valid marriage by the custom of the community to which they belongs.*

**Art 27- Customary Marriage**

*1. The conclusion if customary marriage and the formalities thereof customary marriage and the formalities thereof shall be as prescribed by the custom of the community concerned.*

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*2. The provisions of this code relating to the essential conditions of marriage shall be complied with in customary marriage.*

- **The Amhara, Oromia and Tigray family laws have provided essentially similar provisions concerning customary marriage.**

When future spouses conclude marriage after performing acts or procedures considered to constitute a valid marriage according to the custom of the community to which they belong or in which they live or to which one of them belongs, it is called customary marriage.

Ethiopia is a home of a multitude of customs and cultures. Therefore, the procedures that are required to be performed by future spouses who want to conclude customary marriage may differ from one community to another. Whatever acts the custom may require the future spouses to perform, the essential conditions that the law provided to be fulfilled by any type of marriage should be complied with.

? What happens if marriage concluded abroad by a form which cannot be categorized under one of the three forms of marriage discussed above? Can it be recognized as valid under Ethiopian jurisdiction?

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Art 5 of the RFC states that marriage celebrated abroad in accordance with the law of the place of celebration shall be valid in Ethiopia so long as it does not contravene public moral. It can be understood, from this Article that marriage concluded abroad by a form which cannot be categorized under one of the three

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forms provided by Ethiopian law can be considered valid unless the things or acts required to conclude a marriage by the foreign law are against the Ethiopian society's morality.

Apart from what so far have been discussed about forms of marriage, during the celebration of marriage whatever the form, the future spouses should be personally be present and consent to the marriage at the time and place of its celebration. The RFC under Art 12(1) prohibited representation for the purposes of conclusion (celebration) of marriage. The same rule is provided by Amhara, Oromia and Tigray family laws.

Sub Art (2) of Art 12 of the RFC however, by way of exception, permits the conclusion of marriage by proxy not withstanding the mandatory provisions of sub-Art (1) of Art 12. Pursuant to sub-Art 2 of Art 12, celebration of marriage by representation may be allowed by the ministry of justice where it has ascertained that there is a serious cause and the person who intended to do so have fully consented thereto. The same rule has been provided on the above mentioned three regional states family laws except that permission is to be given by justice bureau, instead of Ministry of Justice, in their region. Art 12(2) begs a number of unaddressed questions and as such has left issues like: what is a serious cause? How would the Ministry of justice ascertain that there is a serious?

**Self-assessment Questions**

**Answer the following questions.**

1. Discuss the forms marriage recognized under the Ethiopian family laws.
2. What is the legal effect of forms of marriage? Do marriages concluded by different forms of marriage produce different effects?

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### 2.1.2 CONDITIONS OF MARRIAGE

So far we have discussed about various forms of marriage. Under this sub-section, we will discuss the conditions that are required to be fulfilled by a marriage whatever the form of its conclusion.

Conditions of marriage can be categorized as natural and moral conditions. Natural conditions are those conditions dealing with age and consent. Moral conditions are those conditions that deal with the existence or nonexistence of consanguine or affine relations between the future spouses, bigamy and period of widowhood.

However, below we are going to discuss conditions of marriage by dividing them in two major parts- essential conditions and non essential conditions of marriage. The division is based on the effect of the violations of the conditions of marriage. The conditions that are categorized under essential conditions of marriage have the effect of making a marriage invalid if not fulfilled. Non essential conditions are those conditions that the law requires to be complied with, but their non fulfillments do not render a marriage invalid. Keeping this in mind, let us proceed to individual discussion on essential and non essential conditions of marriage.

#### 2.1.2.1 Essential Conditions of Marriage

The following are considered as essential conditions of marriage:

A. Free and full consent
B. Capacity – age and judicial interdiction
C. Observance of impediments:

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i. Consanguinity
ii. Affinity
iii. Bigamy

**A. Free and Full Consent**

**Important provisions**

**RFC:**

**Art 6-**

*A valid marriage shall take place only when the spouses have given their free and full consent.*

**FDRE Constitution:**

**Art 34(2)-**

*Marriage shall be entered into only with the free and full consent of the intending spouses.*

? When is it said that consent is free and full?

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Consent is said to be free when a person has given it without any kind of influence or pressure from another person. Consent given as result of threat or violence is not considered as free consent. Even when consent is given without any kind of threat or violence, in some cases, it may have no legal effect. The civil code of Ethiopia provides that a person who has not attained the full age of 18 years

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cannot perform acts that have legal effects( juridical effects) except in the cases provided by the law(Art199(3)). In this case giving consent has a legal effect as marriage is to be concluded as a result. Therefore, consent given by a person under the age of 18 years cannot be the basis of valid marriage even if it is free.

In some areas in Ethiopia, for conclusion of marriage, the consent of the future spouses might not be asked at all. Marriages are arranged by parents of the future spouses. There is also a practice in which a man will choose his wife to be and then he will ask her families permission for her hand. The consent of the woman may not be considered important. These kinds of practices may be rare in urban areas of Ethiopia but they are used as the right way of concluding marriage in the rural areas which of course is against the law.

In conclusion, marriage shall be considered valid when the future spouses have given their free and full consent on its conclusion. But note that there are other conditions that render a marriage invalid if not complied with even when spouses have given free and full consent.

**B. <u>Capacity- Age and Judicial Interdiction</u>**

- **Age**

**Important provision**

**RFC:**

**Art 7- Age**

1. *Neither a man nor a woman who has not attained the full age of 18 years shall conclude marriage.*
2. *Not with standing the provisions of Sub-Art(1) of this Article, the Ministry of Justice may, on the application of the future spouses, or the parents or*

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*guardian of one of them, for serious cause, grant dispensation of not mare than two years.*

**The Tigray National State Family Law Proclamation:**

**Art 27 –*Customary marriage***

*A man who has not attained the full age of 22 years and a woman who has not attained eighteen years may not contract marriage.*

- **The Oromia and Amhara National States Family Laws have provided the same provision as that of the RFC on age except that both States family laws state that marriage at the age less than 18 years permitted exceptionally by their respective Justice Bureaus.**

In the olden days, chronological maturity as a pre-requisite for marriage was not an important focus. Before the French revolution in France, under the older English law and Roman law, the legal minimum age for marriage was 14 years for boys and 12 years for girls. During those times, marriages were arranged by parents for their children when ever it seemed suitable. Maturity was not the point of consideration for marriage to take place but whether a good match could be found for a boy and especially for a girl.

Until very recently, marriage of a girl at a very early age has been very common. The RFC sets the minimum marriageable age for both sexes at the age of 18 years.

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The Tigray family law has set the minimum marriageable age for a male at 22 years while it set 18 years for a female.

For setting minimum marriageable age at the age of 18 years by the RFC, justifications are suggested. Firstly, the Ethiopian civil code has provided that a person who have not attained the full age of 18 years cannot perform any juridical act except in the cases provided by the law. Entering into marriage gives arise to several legal effects. Therefore, a person who is under the age of 18 years cannot conclude marriage unless permitted by the law. Secondly, medical experts state that marriage for a girl before the age of 18 years has detrimental effect on her health and life. Giving birth for such a girl most of the time will harm the health and endanger the life of both the mother and the child as her body will not finish its full growth. Finally, most students finish high school at the age of 18 years. If marriage is allowed for persons who are under the age of 18 years, it will encourage the dropping out of schools especially by female students. Therefore, the above given are the main factors which contributed in fixing the minimum marriageable age at 18 years.

On the other hand, there are situations where marriage for a person under the age of 18 years might be allowed. For instance, if a girl, before she attains 18 years of age got pregnant or her future spouse is about to leave for war field, by considering the legal, social and psychological pressure when a child is born out of a wed lock, marriage will be permitted to be concluded. But, whatever the situation, marriage under the age of 16 years cannot be allowed.

- **Judicial Interdiction**

**Important provisions**

**RFC:**

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**Art 15 – Judicially Interdicted persons**

1. *Any person who is judicially interdicted shall not conclude marriage unless authorized, for that purpose, by the court.*
2. *An application to this effect may be made by the interdicted person himself or by his guardian.*

- **The exact same provision is provided under Art 26 of the Amhara National State family law.**

**Civil Code of Ethiopia:**

**Art 339 – Definition**

1. *An insane person is one who, as a consequence of his being insufficiently developed or as a consequence of a mental disease or of his senility, is not capable to understand the importance of his actions.*
2. *Persons who are prodigals shall in appropriate cases be assimilated to insane persons.*

**Art 340 – Infirm persons**

*Deaf-mute, blind persons, and other persons who, as a consequences of a permanent infirmity are not capable to take care of themselves or to administer their property may invoke in their favor the provisions of the law which afford protection to those who are insane.*

**Art 351 – Judgment of interdiction**

1. *The court may pronounce the interdiction of an insane person where his health and his interest so require.*
2. *The interdiction may also be pronounced in the interest of the presumptive heirs of the insane person.*

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3. *It may also be pronounced in the case of person who is unable through permanent disability to govern himself or to administer his estate (Art 340).*

**Art 369 – Marriage**

1. *A person who has been judicially interdicted may not contract marriage unless he is authorized for that purpose by the court.*
2. *An application to this effect may be made by the interdicted person himself or by his guardian.*

? Who is a judicially interdicted person?

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A judicially interdicted person is a person who because of his or her insanity (refer to Art 339 of the civil code given above) or because of infirmity (refer to Art 340 of civil code given above) declared incapable by court to administer his or her person and his or her property.

Such person can conclude marriage but because of his or her insanity or infirmity, he or she may not fully understand the effects that follow the marriage. This is the main reason for not allowing an interdicted person to conclude a marriage unless permitted by court of law.

The family laws of Oromia and Tigray National States did not provide provision that regulate a marriage of judicially interdicted person. As the civil code of Ethiopia has provided provision in this area, they are going to be bound by it.

**C. Observance of Impediments**

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Below the lists of the things that impedes the conclusion of marriage are given.

1) Consanguinity
2) Affinity
3) Bigamy

Let us consider each of them separately.

1) **Consanguinity**

The concept of consanguinity and the persons who are considered to have consanguine relationship have been discussed under chapter one of this module. Please revise that part before starting to read this discussion.

**Important provisions**

**RFC:**

**Art 8 – Consanguinity**

1. *Marriage between persons related by consanguinity in the direct line, between ascendants and descendants, is prohibited.*
2. *In the collateral line, a man cannot conclude marriage with his sister or aunt; similarly, a woman cannot conclude marriage with her brother or uncle.*

- **The exact copy of this provision is provided on the family law of Amhara National State under Art 19.**

**Tigray National State Family Law:**

**Art 2 –**

*The degree of relationship by consanguinity in the collateral line shall be calculated by counting seven generations in each line form the common ancestor.*

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**Art 28 –**

*Marriage between persons related by consanguinity is prohibited.*

**Oromia National State Family Law:**

**Art 27 – Consanguinity**

1. *Marriage between person related by consanguinity in the direct line (between ascendants and descendants) is prohibited.*
2. *In the collateral line, marriage cannot be concluded between persons up to the seventh degree of relations.*

Marriage between persons related by consanguinity is prohibited. You have already understood from the discussion under chapter one of this module that consanguine relation can be in two ways – in the direct line and in the collateral line. Direct line relationship exists between ascendants and descendants. There is no limitation on the number of generation on where the relation seizes to exist. You may go as far as you want, the relationship will exist. This implies that marriage between ascendants and descendants regardless of the degree is always prohibited.

Concerning consanguine relation in the collateral line, a man cannot conclude marriage with his sister or aunt; similarly a woman cannot conclude marriage with her brother or uncle under the RFC and the Amhara family law. In other words, the limitation on conclusion of marriage between persons related by consanguinity in the collateral line goes only up to the second degree of relationship. However, under the Tigray and Oromia National States family laws, the limitation goes as far as the seventh degree of relationship. This means that within seven generations in each line from the common ancestor, marriage cannot be concluded.

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? What do you think is the justification for not allowing marriage between persons related by consanguinity?

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There are two possible justifications for not allowing marriage between persons related by consanguinity. Prohibiting marriage between persons related by consanguinity has a medical science basis. Medical experts indicated that marriage between persons related by consanguinity will make the diseases which passes from one person to another genetically such as diabetes and blood pressure more dangerous and complicated to cure. The other justification is believed to be that marriage concluded between persons related by consanguinity is against morality of the society.

2) **Affinity**

Before starting to read this discussion, please revise the part that deal with affinity under chapter one of this module for better understanding.

**Important provisions**

**RFC:**

**Art 9 – Affinity**

1. *Marriage between persons related by affinity in the direct line is prohibited.*
2. *In the collateral line, marriage between a man and the sister of his wife, and a woman and the brother of her husband is prohibited.*

- **Amhara National State family law has provided the exact copy of this provision.**

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**Oromia National State family law:**

**Art 28 – Affinity**

1. *Marriage between persons related by affinity in the direct line is prohibited.*
2. *Marriage between persons related by affinity in the collateral line up to the third degree is prohibited.*

- **Similar rule has been provided in the Tigray National State family law.**

According to the law, marriage between persons related by affinity in the direct line is prohibited which means that a man can not conclude marriage with his wife's mother and his wife's child; a woman cannot conclude marriage with her husband's father and her husband's child. In addition, marriage between persons related by affinity in the collateral line is prohibited. Pursuant to the RFC, a husband cannot conclude marriage with his wife's sister; a wife cannot conclude marriage with her husband's brother. In the case of Tigray and Oromia national states family laws, marriage between persons related by affinity in the collateral line up to third degree is prohibited.

3, **Bigamy**

**Important provisions**

**RFC:**

**Art 11 – Bigamy**

*A person shall not conclude marriage as long as he is bound by bonds of a preceding marriage.*

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- Tigray and Amhara National States Family laws provide the same rule as that of the RFC. Oromia National State family law does not have a provision which prohibit bigamous marriage.

Barron's Legal Guides Law Dictionary defines bigamy as "the state of a man who has two wives, or of a woman who has two husbands, living at the same time."

Marriage for a person who is already in a union of marriage is prohibited by the law. Such person can conclude another marriage after dissolving the previous marriage.

In Ethiopia, bigamous marriage is common in some communities' culture and Islamic religion followers. Moreover, polygamous marriage is also common in some areas. This is a case where a person has more than two spouses living at the same time. Even though, it is possible for a woman to be married to more than one husband living at the same time, the common practice is for a man to have more than one wife at a time.

? What is the justification for not permitting a bigamous marriage?

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Several justifications are given for prohibition of a bigamous marriage. Some state that allowing a man to be married to more than one wife at a time will have negative impact on the constitutional right given to a woman to have equal rights with husband during marriage. Others (especially Christians) say that bigamous marriage breaks down the strong bond of trust that should exist between husband and wife.

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It has been stated that bigamous marriage is permitted by Islamic religion. However, there are different opinions among the Muslim scholars. Some are of the opinion that bigamous marriage is permitted by the Holy Qura'an only when the man can give equal love and financial support to his wives. Even if it is possible for a man to equally support his wives financially, as it is not possible for him to love his wives equally it may be said the Holy Qura'an indirectly prohibit bigamous marriage. Others are of the opinion that though the Holy Qura'an has permitted bigamous marriage, it can only be concluded on the permission of the first wife. Finally, some say that bigamous marriage can be concluded only when one gets permission from a religious leader. Accordingly, bigamous marriage can only be concluded when one presents acceptable reasons like the first wife as a result of accident contacted an incurable disease or incapable of producing children. In conclusion even if it said that the Islamic religion permits bigamous marriage, its practical applicability might be limited by several things.

Keep in mind that the law prohibits bigamous marriage whatever the situation might be. Under the RFC, Amhara, and Tigray family laws, a person is not allowed to conclude marriage when he/she is already bound to another person by the bond of marriage. Whatever the justification for concluding bigamous marriage, unless the bond of marriage with the current wife or husband has come into an end by dissolution, another marriage is unlawful.

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### 2.1.2.2 Non Essential Conditions of Marriage

Under this sub-section, we are going to consider period of widowhood and marriage registration.

- **Period of Widowhood**

**Important provisions**

**RFC:**

**Art 16**

1. *A woman may not remarry unless one hundred and eighty days have elapsed since the dissolution of the previous marriage.*
2. *The provisions of Sub-Article(1) of this Article shall not apply where:*
    a) *the woman gives birth to a child after the dissolution of her marriage.*
    b) *the woman remarries her former husband;*
    c) *it is proved by medical evidence that the woman is not pregnant;*
    d) *the court dispenses the woman from observing the period of widowhood.*

**Tigray National State Family Law:**

**Art 40-**

1. *A woman may not remarry unless 90 days have elapsed since the dissolution of the previous marriage.*
2. *If the woman gives birth to a child after the dissolution of her marriage, the provisions of Sub-Article (1) of this Article shall not apply.*

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- **The Amhara and Oromia National States family laws provided the same rule on period of widowhood as that of RFC under Art 27 and Art 33 respectively.**

A woman is not allowed to remarry immediately after the dissolution of her previous marriage. The period within which the woman is prohibited to remarry is within six months of the dissolution of her previous marriage. The Tigray National State family law requires a woman to wait only three months before remarrying.

? At this point, you may ask yourself why a woman is not allowed to remarry immediately after the dissolution of her previous marriage. Why make her wait six months or three months? And why impose such rule only on a woman?

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Some people consider this as a rule which does not respect equality between women and men. While men can remarry immediately after the dissolution of their previous marriage, women have to wait six months or three months to remarry.

The reason behind enacting such rule is to protect the best interest of a child who may be born in the specified period. The FDRE constitution under Art 36(1) and the Convention on the Rights of the Child (ratified by Ethiopia) under Art 7 provide that a child has the right to know and be cared for by his or her parents. Therefore, the observance of this right cannot be fulfilled unless to the extent possible, conflict of paternity is avoided before hand. If it cannot be ascertained whether the child is born from the previous marriage or from the latter marriage, the chance of knowing from whom the child should get care will be difficult. Period of widowhood is important for avoiding this kind of situation. It protects

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the child from the painful experience of having to pass through conflict of paternity.

It is in the nature of a woman to be able to give birth to child. So, since it is impossible for a man to conceive and give birth to a child, it is appropriate to impose the limitation of not remarrying unless six months or three months have passed after the dissolution of the previous marriage on a woman.

? If the reason behind proving the period of widowhood is to avoid conflict of paternity in general, do you think there are situation where such conflict may not arise even if marriage is concluded immediately after the dissolution of the first marriage?

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The law provides exceptional cases where a woman might not have to wait six months or three months to remarry after the dissolution of her previous marriage. If she gave birth to a child after the dissolution of her previous marriage, she is free to remarry without waiting for the provided period of time. In this case it is known that the child belongs to the previous marriage. The other situation where a woman is dispensed from waiting the given period of time is when she decides to remarry her ex-husband as conflict of paternity is not an issue in this case. A woman can also remarry without having to wait six months or three months, if she is able to present medical evidence that proves she is not pregnant. A court might also dispense a woman from observing the period of widowhood. For instance, if it is proved that a woman is not capable of bearing a child or according to Islamic religion belief, after the dissolution of her previous marriage for three respective months she continued to experience monthly period, it shows that there is no pregnancy from the previous marriage. The court depending on the sufficiency of

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the evidence presented can dispense the woman from observing period of widowhood in these cases. In addition to this, if the woman can prove that she did not undertake sexual intercourse with x-husband; in some countries court may dispense her from observing the period of widowhood.

- **Registration and Record of Marriage**

**Important provision**

**RFC:**

**Art 28 – Record of Marriage**

1. *Marriage shall be registered by a competent officer of civil status irrespective of the form according to which the marriage is celebrated.*
2. *The officer of civil status who recorded the marriage in accordance with Sub-Article (1) of this Article shall issue a certificate of marriage to the spouses.*
3. *Any marriage shall have effect from the date of its conclusion.*

**Art 29 – Record of Marriage**

1. *Where the spouses have failed to have registered their marriage in accordance with Sub-Article (1) of Article 28, the officer of civil status shall draw up the record of marriage of his own motion whenever he becomes aware of the marriage.*
2. *In such cases, the officer of civil status shall summon the spouses and their witnesses to sing in the record of marriage.*

**Art 30 – Particulars of the Record of Marriage**

*The record of marriage shall show:*

***a)*** *The full names, dates and place of birth, of each of the spouses and their addresses;*

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***b)*** *The full names, dates and place of birth, of the witnesses, and their addresses;*

***c)*** *The form of the marriage, the date on which it has been concluded and the date of its registration.*

- **The exact copies of the above provisions are provided on Amhara and Oromia Regional States family laws.**

After reading the above provisions, one can understand that whatever the form of celebration, marriage needs to be registered by officer of civil status who issues a certificate of marriage to the spouses. Art 28(3) of RFC has provided that marriage starts to have effect from the date of its conclusion. This indicates that the registration does not give marriage it's effectively. Registered or not, the marriage will have effect from the date of its celebration or conclusion.

? If registration does not determine the effectiveness of marriage then what is its use?

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Registration of marriage leads to issuance of a certificate of marriage which helps to proof the existence of marriage if its existence is alleged. For various reasons, interested persons can raise the nee to proof the existence of marriage in the court of law. It may be raised by the spouses or by any person who wants either to object the marriage or take advantage of its non existence. According to Art 94 of the RFC, marriage can be provided by adducing a certificate of marriage. A certificate of marriage is a document that is issued by the officer of civil status who is authorized to record the marriage in accordance of Art 28 of the RFC. The certificate of marriage, inter alias indicates the form of marriage i.e. under which

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form out of the three forms of marriage the celebration was carried out as per Art 30(c ) of RFC.

In conclusion, Registration and record of marriage helps to proof marriage when its existence is doubted.

- **Formalities of Marriage**

When we discussed about forms of marriage under sub-section 2.1.1, the formalities that should be passed through by spouses who want to conclude civil marriage have been dealt with. Please revise that part. About customary and religious marriage, their formalities for celebration depend on what is required by custom and religion. So, it is not necessary to bother one self on what exactly is required to celebrate marriage according to custom or religion as there is difference between different communities' custom and between religions.

**Self Assessment Questions**

**Answer the following questions.**

1. What is meant by free and full consent?
2. What is the reason behind prohibiting a marriage between persons related by consanguinity?
3. Do you think marriage concluded by a person under the age of 18 years can be valid? If yes explain the conditions?
4. What is the practice in your locality concerning bigamous marriage? Do think it is reasonable to prohibit bigamous marriage? Why?
5. "Marriage will start to have effect from the date of its celebration not from the date of its registration." Explain what this statement implies.

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6. Abebe is divorced from Abebech. Now, he wants to marry Abebech's sister. Can he do so?
7. Can a man marry his dead wife's sister-in-law?
8. Can two brothers marry two sisters?

### 2.1.3 EFFECTS OF VIOLATIONS OF CONDITIONS OF MARRIAGE

Under this sub-section, the legal effects of not observing the conditions of marriage that have been discussed in the previous sub section shall be dealt with. We have categorized conditions of marriage into two -essential and nonessential conditions of marriage. Now, let us examine the effects of violation of each of the conditions. One thing that should be made clear at this point is we are only going to deal with the civil effects not the criminal effects of violation of conditions of marriage.

I. **Violations of Essential Conditions Marriage**

- **Consent**

**Important provision**

**RFC:**

**Art 33**

1. *Whoever has concluded marriage under the influence of violation may apply to the court to order the dissolution thereof.*
2. *Such as application may not be made six months after the cessation of such violence and, in any case, two years after the conclusion of the marriage.*

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**Art 36 – Error**

1. *Whosoever has concluded marriage due to fundamental error may apply to the court to order the dissolution thereof.*
2. *Such as application may not be made six months after the discovery of such error, and, in any case, two years after the conclusion of the marriage.*

**Art 13 – Fundamental error**

1. *Marriage concluded as a result of error in consent shall not be valid.*
2. *Consent is deemed to be vitiated as a result of error where such error is a fundamental error.*
3. *without prejudice to the provisions of Sub-Art (2) of this Article, the following shall be considered to be fundamental errors:*
    a) *error on the identity of the spouse, where it is not the persona with whom a person intended to conclude marriage.*
    b) *error on the state of health of he spouse who is affected by a disease that does not heal or that can be genetically transmitted to descendants;*
    c) *error on the bodily conformation of the spouse who does not have the requisite sexual organs for the consummation of the marriage;*
    d) *error on the behavior of the spouse whop has the habit of performing sexual acts with person of the same sex.*

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**Art 14 – Consent Extorted by Violence**

1. *Marriage concluded as a result of consent which is extorted by violence shall not be valid.*
2. *Consent is deemed to be extorted by violence where it is given by a spouse to protect himself or one of his ascendants or descendants, or any other close relative from a serious and imminent danger or threat of danger.*

- **The same rules are provided on the family laws of Oromia, Tigray and Amhara Regional States.**

? When do we say that the condition of free and full consent is violated?

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Free and full consent can be violated generally in two ways:

1. violence (Art 14 of RFC and Art 1706 of Civil Code of Ethiopia )
2. mistake (Art 13 of RFC and Arts 1697- 1698 of the Civil Code)

If one of the spouses has agreed to enter into the marriage to protect himself or one of his ascendants or descendants, or any other close relative from a serious and imminent danger, then it is said that consent is given as a result of violence. Moreover, as marriage is one type of contract, it may be relevant to mention what the provisions of general contract on the Civil Code state about this issue. Pursuant to Art 1706 of the civil code, when a person enters into a contract on the ground of duress or violence where the acts of duress led a party to believe that he, one of his ascendants or descendants, or his spouse, were threatened with a serious and imminent danger to the life, person, honor

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or property, it will be invalidated. The civil code further provides that the duress should be determined having regard to the age, sex and the positions of the parties concerned as the act of violence that lead a young person to under take contract may have different effect on an older man for instance. The danger that is believed to happen unless a person gives his or her consent to conclude marriage should be serious and is expected to happen in a near future, to invalidate the marriage.

Mistake or error is one of the ways by which consent can be violated. Consent is said to be violated as result of error where such error is a fundamental one. A person is said to have given consent to marry another as result of error when if he or she have known the truth, she or he would not have given the consent in the first place. The RFC under Art 13(3) has listed things that are considered to be fundamental errors. Accordingly, if a person marries a person he or she does not intend to marry, the consent is said to be given because of fundamental error. The other situation is when a person marries another assuming that he or she is free from diseases that is incurable or can be genetically transmitted to descendants. Or if a person marries another by assuming that he or she has the requisite sexual organs when he or she doesn't or assuming he or she is heterosexual when he or she has the habit performing homosexual.

? What is the legal effect of consent given as a result of violence or error?

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If a person has given consent to conclude marriage under the influence of violence or due to fundamental error, he or she can apply to the court of law to

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order the dissolution of the marriage. One thing that should be known here is the marriage will continue to have legal effect or will be considered as valid unless and until invalidated by the court of law. Therefore, if the person who has concluded marriage by a consent given under the influence of violence or due to one of the fundamental errors discussed above fail to apply to the court to dissolve the marriage, it will continue to have the effect of valid marriage. The reason behind considering such marriage valid unless and until invalidated is that common property and children may result from the marriage. In such situation, if the marriage is considered as void (non existent from the start), complicated and unwanted problems or situation might arise concerning the property and the children. On the other hand, even if a marriage based on consent given as result of violence or error can be invalidated on application; such application can only be made six months after the violence has stopped or six months after the discovery of the error. In any case, whatever the reason for failure to apply, application can not be made after two years of the conclusion of the marriage.

- **Violation of Capacity**

**Important provisions**

**RFC:**

**Art 31 – Age**

1. *Without prejudice to Sub-Art (2) of Art 7 of this code, marriage concluded by a man or a woman under the age of 18 years shall dissolve on the application of any interested person or the public prosecutor.*

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2. *It may no longer be applied for after the age required by law for marriage is satisfied.*

- **The Amhara, Oromia and Tigray Regional States' family laws provided similar rule except that the in the case of Tigray the minimum marriageable age for a male is 22 years.**

The minimum marriageable age has been provided by the law. If it can be proved that marriage has been concluded under the provided age, upon the application of any interested party or public prosecutor the court will order the dissolution of the marriage.

? Who are "interested parties in this case?

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Interested parties can include relatives of the spouses, non governmental organizations which work around children and women.

Note that the marriage will continue to have legal effect unless and until invalidated by the court of law after application has been made for this purpose. Application for purpose of invalidation of the marriage, after the person who is said to have concluded it under the minimum age has attained the minimum marriageable age requirement, will have no effect.

- **Judicial Interdiction**

**Important provisions**

**RFC:**

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**Art 34 – Dissolution of marriage of a judicially interdicted person**

1. *When a judicially interdicted person has contracted marriage without prior authorization of the court, the dissolution of such marriage may be requested from the court by the judicially interdicted person himself or by his guardian.*
2. *The judicially interdicted person may no longer make an application for dissolution six months after the date of termination of his disability.*
3. *An application for dissolution by the guardian may no longer be made six months after the day on which the guardian came to know the existence of the marriage or in any case after the disability of the interdicted person has ceased.*

When a judicially interdicted person concludes marriage with out the prior permit ion of court, it will be invalidated or dissolved by the court up on an application by judicially interdicted person himself or his guardian for this purpose.

However such application cannot be made by the judicially interdicted person six months after the date of termination of his disability. The right of the guardian to apply for dissolution of the marriage will be taken away six months after the day on which he came to know the existence of the marriage. Whatever the case might be the guardian can not make such application two years after the disability of the interdicted person has ceased.

- **Failure to Observe Impediments**

  - ✓ **<u>Consanguinity or affinity</u>**

**Important provision**

**RFC:**

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**Art 32**

*The dissolution of marriage concluded in violation of impediments arising out of consanguinity or affinity shall be ordered on the application of any interested person or the public prosecutor.*

If a marriage is concluded between persons related by consanguinity or affinity, the court dissolves it upon the application of any interested person or the public prosecutor. There is no period of limitation concerning the time of the application for the dissolution of such marriage. The application can be made immediately after the conclusion of the marriage or many years after. This seems reasonable because relation by consanguinity or affinity is permanent.

- ✓ **Bigamy**

**RFC:**

**Art 33-**

1. *The dissolution of a bigamous marriage shall be ordered in the application of either of the spouses of the bigamous marriage or the public prosecutor.*
2. *The dissolution mentioned in Sub-Article (1) of this Article may no longer be applied for where the former spouse of the bigamous marriage has died.*

Bigamous marriage will be invalidated (dissolved) by the court on the application of one of the spouses of the bigamous marriage or the public prosecutor. However, such application for dissolution of the bigamous marriage may not be made when the former spouse of the person who enters in to the other marriage.

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## II. Violation of non essential conditions of marriage

The violation of non essential conditions will not cause the dissolution of marriage as their violation is more of procedural irregularities rather than substance.

- ✓ **Non observance of period of widowhood**

**Important provision**

**RFC:**

**Art 37-period of widowhood**

*The dissolution of marriage may not be ordered for the sole reason that the period of widowhood specified under Sub-article (1) of Article 16 has not been observe.*

If a woman remarries without waiting six months (three months in the case of Tigray family law) after the dissolution of the previous marriage, the latter marriage may not be invalidated for the sole reason of not observing the period of widowhood.

- ✓ **Failure to Register Marriage**

As we discussed on the previous sub-section, the purpose of registration and record of marriage is for the sole purpose of proof of marriage. The certificate of marriage that is issued by the officer of civil status will serve as evidence that shows the existence of the marriage whenever necessary.

A given man and woman might have concluded marriage and live together. However, they may have failed to register such marriage with the competent officer of civil status. The only effect of such failure is rather than using certificate of marriage, which is easy, when a need arise to proof the marriage; they have to

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produce any kind of evidence which shows the existence of possession of status of the spouse. Therefore, the existence of certificate of marriage makes proofing marriage easy. Otherwise, it has no effect whatsoever on the validity of the marriage if spouses fail to get registered their marriage.

- ✓ **Non observance of formalities in the case of civil marriage**

**Important provision**

**RFC:**

**Art 38 – Incompetence of officer of civil status**

*The dissolution of marriage may not be ordered solely on the ground of incompetence of the officer of civil status who celebrated the marriage.*

**Art 39 – Non observance of formalities**

*The dissolution of marriage may not be ordered on the sole ground that the formalities of celebration specified under Sub-Articles (3) and (6) of Article 25 have not been observed.*

On our discussion of civil marriage, it has been stated that civil marriage should be conclude before the officer of civil status of the place where one of the future spouses or one of the ascendants or close relatives of one of them has established residence by continuously living there for not less than six months prior to the sate of the marriage (Art 22 of RFC). However, if the spouses concluded marriage before another place's officer of civil status unless there is a doubt whether the person is an officer of civil status, the marriage will continue to be valid.

Moreover, if during the celebration of civil marriage, the officer of civil status failed to inform the future spouses and their witnesses, before taking oath, of the consequences of their declaration or if he failed to pronounce them as husband and

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wife and issue certificate of marriage, it will not cause the dissolution of the marriage. However, if this procedural irregularity brings about the non fulfillment of the essential condition of marriage, it will definitely lead to the dissolution of the marriage.

**Self-assessment Questions**

**Answer the following.**

1. During a civil marriage if the spouses fail to declare openly to the officer of civil status that they consented to conclude marriage on their own free will, what do you think is the legal effect?
2. What is the legal effect of violations essential conditions of marriage generally?
3. In the case of non observance of the impediments, especially of consanguinity and affinity there is no period of limitation concerning application for dissolution of marriage unlike the others. What do you think is the reason?
4. "Valid unless and until invalidated." Explain this in connection with effect of violation of essential conditions of marriage.

## 2.2 LEGAL EFFECTS OF MARRIAGE

After the creation of the bond of marriage there are several legal effects that come into existence. The effects of marriage come into being once the marriage is concluded, not upon real or presumed consummation (sexual intercourse) of the marriage (Art 41 of RFC and the regional family laws).

Regardless of the mode of celebration of marriage, marriage produces the same legal effects (Art 40(1) of RFC and the regional family laws). The effects of

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marriage can be divided into two major parts – personal effects and pecuniary effects (effects on the material interests of the spouses). Under this section detailed account of each type of effects of marriage is provided.

### 2.2.1 PERSONAL EFFECTS OF MARRIAGE

Marriage is a relationship of two individuals affecting their position for a presumably longer period of time. Once they commit themselves to live together in the bond of marriage, some crucial changes in their personal situations is inevitable. Once a person is married, he or she can not maintain some of his or her previous personal situations as they were. Such changes are important in marriage as they are part and parcel of the institution of marriage.

The most important personal effects of marriage are:-

- The duty to respect, assist, and cooperate with each other
- Responsibility to administer the family **jointly** and equally,
- The duty to cohabit, and
- The duty of fidelity

Let's discuss each of them separately.

a) **<u>The duty to respect, assist and cooperate with each other</u>**

**Important provision**

**RFC:**

**Art 49 – respect, support and assistance**

1. *The spouses owe each other respect, support and assistance.*
2. *The contract of marriage shall not derogate such rule.*

- **The same rule is provided on the regional family laws.**

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Once a marriage is concluded, the spouses should be able to respect each other. Respect can be on ideas, opinions, work, tests and personality. They should also be able to support, financially or morally, and assist each other. These are after all the important flavors of marriage.

Actually, morally it is believed that marriage is concluded to share happiness and sadness together. It might be helpful to mention here that in some forms of celebration of marriage, the spouses swore not to leave each other in sickness or in health and in poorness or in richness.

The law prohibits any kind of agreement between spouses to not respect, support and assist each other.

a) **Responsibility to ad mister the family jointly and equally**

**Important provisions**

**RFC:**

**Art 50 – Joint management of family (1) General rule**

1. *The spouses shall have equal rights in the management of the family.*
2. *The spouses shall, in all case, co-operate, to protect the security and interest of the family to bring up and ensure the good behavior and education of their children in order to make them responsible citizens.*

**Art 51- (2) Inability of one of the spouses**

1. *Where one of the spouses is under disability, absent, abandons his family or is away or, for any other reason, is not on a position to give his consent the other spouse shall alone carry out the duties mentioned in Article 5.*

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2. *The spouses shall not agree to the contrary in the contract of marriage.*

**Art 52 – Children of previous marriage**

1. *Each of the spouses shall retain an exclusive right of decision on maters concerning the up bringing of children who he had before the marriage.*
2. *Any agreement to the contrary shall be of no effect.*

**Art 54- Determination of residence**

*The spouses shall jointly decide their common residence.*

- **The regional family laws provided substantially similar provisions as the above provided ones.**

In the past, the husband is considered to be the head of the family. Important decisions concerning the family are to be made by the husband. The old family law in Ethiopia even gave the husband expressly the upper hand to control the behavior and relationship of his wife with others. It created some thing like a relation of a boss and an employee or servant between a husband and wife. Some tried to justify this position by raising the issue that in the past only the husband participates in activities that bring income in the household (bread winner).

The constitution of FDRE has ensured that men and women have equal rights while entering in to, during marriage and at the time of divorce (Art 34(1)). From this we can understand that spouses have equal rights on whatever issue during marriage. Our main point of discussion here is concerning management of the family. Pursuant to Art 40(1) of RFC persons who are united by marriage have equal right on the management of their family.

? What is meant by management of family?

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Management of family involves making decisions, and taking actions to protect the interest of the family. Some of the actions that involve management of family are disciplining children, deciding which school the children attend, deciding where the family lives and etc. Generally, decisions or actions that concern the household as whole involve management.

Spouses have equal rights to participate in the management of the family. While managing the family is the equal rights of spouses, they have the duty to co-operate in the course of doing so.

On the other hand, there are cases where management of family will be under taken only by one of the spouses. In the cases where one of the spouses is under disability or absent or has abandoned his family or is away or for any other reason is not in a position to carry out the duties of managing the family, the work of managing the family will be undertaken by the other spouse alone. In addition to this, where either or both of them have a child or children from their previous marriages, they hold an exclusive right of decision making in matters concerning the bringing up of such children. In both of the situations, spouses are prohibited from agreeing to the contrary.

### a) <u>The duty to cohabit</u>

**Important provisions**

**RFC:**

**Art 53- Cohabitation**

1. *The spouses are bound to live together.*

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2. *They shall have with one another the sexual relations normal in marriage unless these relations involve a risk of seriously prejudicing their health.*
3. *Any agreement to the contrary shall be of no effect.*

**Art 55- Separation by Agreement**

1. *Notwithstanding the provision of Article 53(1) of this code, the spouses may agree to live separately for a definite or indefinite period of time.*
2. *Any agreement made to this effect may be revoked at any time by one of the spouses provided that such revocation is not arbitrary.*

After conclusion of marriage, the spouses have the duty to live together. Basically, the main reason of protection of marriage by the law is that it is the basis of the society. It is the main thing that ascertains the continuity of the society by the birth of tomorrow's generations which will replace today's generation. The constitution of FDRE indicated this fact by stating that family is the natural and fundament unit of society and is entitled to protection by society and the State (Art 34(3)).

This important function of marriage will be realized when spouses live together and undertake sexual intercourse unless it is dangerous for their health. Even if it is presumed that spouses will understand this from their life experience, it seems necessary to remind them about it by the law also.

Even though it has been stated that spouses have the duty to live together, they can agree to live separately for fixed period of time or undetermined period of time. The main reason for allowing such kind of agreement is that living apart may be required because of the nature of their jobs.

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### *b)* The duty of fidelity

**Important provision**

**RFC:**

**Art 56- Duty of fidelity**

*The husband and the wife owe fidelity to each other.*

- **The regional family laws provided the same rule.**

The law doesn't provide the meaning of the duty of fidelity. Neither does it tell us its extent. However, the word fidelity can be defined as faithfulness or loyalty. From this, we can infer that the duty is to be faithful or loyal to one's spouse. Cheating or adultery for instance shows the non fulfillment of the duty of fidelity.

? Why is it important for spouses to be faithful to each other?

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Trust is the one thing that holds a family together. If spouses are allowed to go about with out the need of being faithful to each other, it will have negative impacts on the well being of the family as a whole. It will be difficult in the absence of trust for the other personal effects of marriage to take hold. The unfaithfulness of spouses to each other may lead to health crises which in addition to the spouses' might endanger the life of a child or children born to them.

More over, the criminal law provides punishment for a person who commits adultery.

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### 2.2.2 PECURAIRY EFFECTS OF MARRIAGE

In addition to the personal effects of marriage that will be surfaced after conclusion of marriage, there are the effects on the material interests of the spouses. This interest is very detrimental taking into account the sentimental value that human beings attach to their belongings. Right to property has been and still is the grandest of all rights that individuals adore and is given recognition by the law.

It therefore, seems that such property interests of the spouses are the most important effects of marriage to be observed. After conclusion of marriage, the material interest of the spouses can be categorized as common property and personal property.

#### 2.2.2.1 Personal Property

**Important provisions**

**RFC:**

**Art 57 – Personal property of spouses (1) property not acquired by onerous title**

*The property which the spouses possess on the day of their marriage, or which they acquire after their marriage by succession or donation shall remain their personal property.*

**Art 58- (2) Property acquired by onerous title**

1. *Property acquired by onerous title, by one of the spouses after marriage shall also be personal property of such spouse where such acquisition has been made by exchange for property owned personally, or with monies owned personally or derived from the sale of property owned personally.*

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2. *The provisions of Sub- Article (1) of this Article shall apply only when the court, at the request of one of the spouses, has decided that the property thus acquired shall be owned personally by such spouse.*

- **The same provisions are provided on regional family laws.**

Taking note of the modern conception of marriage, which is different from the belief that under some legal systems and ancient socio-legal understanding of our country, marriage will dissolve the wall that stood to distinguish the wife's belongings from that of the husband's and vise versa, the statutory regime has come up with two distinct treatment of property and one of which is the property that remains under the separate ownership of each spouses. To this effect the RFC has provided those properties that may be considered as personal property of the spouses. This thus, shows the possibility of owning personal property while living under a common roof. The following constitute personal properties:

- Properties which the spouses possess on the day of their marriage or which they acquire after their marriage by succession or donation.
- Properties acquired by exchange of the personal property or of by personal money and where after presentation of such fact by the interested spouse, the court declare the property as personal.

These are therefore, the properties that are considered as the personal property of the spouses.

? How is personal property administered?

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**RFC:**

**Art 59 – Administration of personal property (1) principle**

1. *Each spouse shall administer his respective personal property and receive the income thereof.*
2. *Each spouse may freely dispose of his personal property.*

**Art 60 – (2) Determination by contract of marriage**

1. *It may be agreed in the contract of marriage that one of the spouses shall administer all or part of the personal property of the other spouse and that he may dispose of such property.*
2. *The spouse who is entrusted with the power of administering the property under Sub-Article (1) of this Article shall, at the request of the other spouse, submit an annual statement of accounts of the management of property.*

**Art 61 – (3) Agency**

*One of the spouses may freely entrust to the other spouse the administration of all or part of his personal property.*

The owner of personal property in marriage can administer such by three different ways:

a. He or she can administer the property by himself or herself(Art 59) or
b. he or she may agree in the contract of marriage that the other spouses administer all or part of his or her personal property(Art 60) or
c. He or she may entrust to the other spouse the administration of part or all of personal property in the absence of contract of marriage regulating such (Art 61).

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The main principle here is that the spouses have the right to administer their personal property by themselves.

#### 2.2.2.2 Common Property

**RFC:**

**Art 62 – Common property of spouses**

1. *All income derived by personal efforts of the spouses and from their common or personal property shall be common property.*
2. *All property acquired by the spouse during marriage by an onerous title shall be common property unless declared personal under Article 58(2) of this code.*
3. *Unless otherwise stipulated in the act of donation or will, property donated or bequeathed conjointly to the spouse shall be common property.*

**Art 63 – Legal Presumption**

1. *All property shall be deemed to be common property even if registered in the name of one of the spouses unless such spouse proves that he is the sole owner thereof.*
2. *The fact that certain property is personal may not be set up by the spouses against third parties unless the latter know or should have known such fact.*

We can broadly define matrimonial (common) property to mean the property of both parties acquired during marriage, and also includes the property owned by one party before the marriage, but to which there has been substantial improvements made by the other party or by joint effort during marriage. This definition, which seems some what comprehensive, has been understood under different legal systems broadly or narrowly by including or excluding certain acquisitions into or from common property.

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Let us discuss how common property is conceptualized under Ethiopian legal system. When we discussed about personal property it was made clear that the conclusion of marriage will not call common property to existence. This does not mean that common property will not exist at all. The basic obligation of spouses to contribute for the economic good of the family makes the creation of communal property inevitable.

Under the RFC properties that constitute the matrimonial ( common ) property are in short:-

- Those incomes which are derived from the personal efforts or from the personal or common properties of spouses.
- Those incomes derived from personal transactions and not declared as personal by court of law and
- Properties donated, or bequeathed to the spouses unless the donor or testator has provided other wise.

These are just a legal stipulation and the parties are free to add other properties under the categories of common property by agreement.

The law has made distinction between personal effort and income derived by personal effort; and between personal property and income derived from such property. Even if the personal effort or the knowledge is personal, salary or other income derived from it is a common property of spouses (Art 62(1)). And again even if personal property is personal, income derived from such property is a common property. According to the legal assumption, unless such incomes are made common property, covering the budget of the household will be difficult. Moreover, it will be difficult for the spouses to undertake their legal duty of

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assisting or supporting each other depending on their capacity. Finally, as it is believed that spouses have direct or indirect contribution for derivation of income by the other spouse, making the income common property is believed to be proper.

The other issue that must get attention while discussing about common property is the fate of a common property registered in the name of one of the spouses only. For properties like a house and a car ownership is ascertained by certificate of ownership. The problem here is even if the property is common, it may be registered in the name of one of the spouses only. Preparing or getting co-ownership certificate is not a common practice in Ethiopia. The law regulated this problem by presuming all properties that are registered in the name of only one of the spouses to be common properties unless such spouse proves that he is the sole owner of the properties.

We have said that income whether raised from the personal property or common property is the common property of the spouses. However, concerning the management of the income, the spouse who is the source of the income will receive and deposit in what ever way he or she decides. The other spouse has the right to request the spouse who is the source of the income to render an account of the income received by him or her (Art 64).

One of the spouses may freely give the other spouse a mandate to receive the income which is due to him. And the other case where the spouse who is not the source of income might receive it is when court of law gives such power to him or to her depending on the reason of the spouse who is the source of income have the problem of spending money unnecessarily. Finally the court may order to full or partial attachment of the income of either spouse unless it is provided otherwise by other laws.

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? How is common property administered?

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**RFC:**

**Art 66– Administration of common property**

1. *Common property shall be administered conjointly by the spouses unless there is an agreement which empowers one of them to administer all or part of the common property.*
2. *Where one of the spouses is declared incapable, or is deprived of his right of property management or for any other reason is unable to administer the common property, the other spouse shall alone administer such common property.*

- **The same rule is provided on the regional family laws.**

The law nominated both spouses to be the administrators of their common property. Since both have an interest in the proper handling of such property, it will be unwise and unjust to exclude either of the legitimate owners when it comes to administration.

In addition, excluding one of the spouses from administering the common property will go against the nature of the property which is named as common. It will also go against the constitutional right which provides equal rights to the spouses up on the conclusion, during and in the dissolution of the marriage.

However, there are situations where common property will be administered by one of the spouses only. If one of the spouses is declared incapable or is deprived of his right to property management or for any other reason is unable to administer

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the common property, the sole administration of the common property by the other spouse will be allowed. So, when managing of the property undertaken is by one of the spouses only, such spouse has the duty to inform the other about his act (Art 67of RFC).

One thing that must not be left untouched concerning the administration of common property is that the law has provided cases where the agreement of both of the spouses is required to make important decisions on the common property. Article 68 of RFC has provided the cases. They , unless otherwise provided by other laws, are:-

- Sale, exchange, rent out, pledge or mortgage or alienate in any other way a common immovable property to confer a right to third parties in such property.
- Sale, exchange, rent out, pledge or mortgage or alienate in any other way a common movable property or securities registered in the name of both spouses; the value of which exceeds five hundred Ethiopian birr.
- Transfer by donation of a common property the value of which exceeds one hundred Ethiopian birr.
- Transfer by donation of a common property the value of which exceeds one hundred Ethiopian birr, or money which exceeds such amount.
- Borrow or lend money exceeding five hundred Ethiopian birr or to stand for surety for a debt of such amount to another person.

? What if one of the spouses entered into one of the above listed things without the agreement of the other spouse?

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In the case where one of the spouses entered into the above provided obligations without the agreement of the other, the law has given the other spouse who did not give consent to request the court for such obligations' revocation. However, such request cannot be made six months after the day on which the spouse who hasn't given consent came to know the existence of such obligation, or in any case, two years after such obligation is entered (Art 69 of RFC). The justification of limiting the period within which the request to be made is that to keep the security of transaction. If the spouse who has not given his or her consent is allowed to request revocation entered into (e.g. transfer of common property to third parties by selling) by the other spouse any time, it sure will affect the security in transaction as the person who bought a property from one of the spouses will be forced to return it after years of the selling ,for instance. This will affect the security of once you bought some thing it will be yours.

So, the law in this way has tried to balance the interest of the spouse who haven't given his consent and the interest of third parties who entered into transaction with the other spouse.

We have already discussed that spouses can continue to have personal property during the marriage. As a result, the personal property might bring debt besides bringing income. The debt can arise from the personal fault of one of the spouses or can be entered into for the interest of the household. The RFC under Art 70 has provided that the payment of such debts can be from personal property or from common property. In principle, personal debt will be paid (recovered) from personal property while debt entered into for the interest of the household will be paid or recovered from common property. But, when the personal property is insufficient to cover the payment of personal debt, common property will be used to cover the rest. And, at the same time, if common property is insufficient to cover the payment of debt entered into for the interest of the household, personal

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property will be used. In this way, the right of the third party who lent the money will be protected. Moreover, this goes in line with the duty of the spouses to assist, support and contribute to the house hold expenses in proportion to their respective means.

### 2.2.3 REGULATION OF EFFECTS OF MARRIAGE

The effects of marriage – personal and pecuniary can either be regulated by the spouses' contractual agreement or by the law or by both. The spouses have the discretion to determine in advance as to how their relationship could go. However, such contract will have the desired effect only where it doesn't contradict with the mandatory provisions of the law. There is also the statutory regime that will be operative to have effect on the couples' relationship where there is no contract by the spouses or even if there is, if it is contrary to what the law has already set as mandatory provisions concerning the effects of marriage.

Below, salient discussed of both the contract regime and legal regime is provided.

#### 2.2.3.1 **Regulation by Agreement/contract**

**RFC:**

**Art 42 – (1) Contract of marriage**

1. *The spouses may, before or on the date of their marriage, regulate by a contract the pecuniary effects of their marriage.*
2. *They may also specify in such contract their reciprocal rights and obligations in matters concerning their personal relations.*
3. *Such contract shall not affect mandatory provisions of the law.*

**Art 43- (2) Incapacity of spouses**

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1. *The contract of marriage of a judicially interdicted person shall be of no effect unless it is entered into by the interdicted person himself and approved by the court.*
2. *A legally interdicted person shall not be subject to incapacity as regards the making of a contract of marriage.*

**Art 44 - (3) Form of Contract**

*A contract marriage shall be of no effect unless made in writing and attested by four witnesses, two for the husband and two for the wife.*

**Art 45 – (4) Deposit of Contract**

1. *A copy of the contract of marriage shall be deposited in the court or with the office of civil status.*
2. *It may be freely consulted by any one of the spouses or by persons authorized by court or by any one of the spouses.*

**Art 46- (5) Restrictions to Freedom of Contract**

1. *The spouses shall not impose an obligation upon third parties by their contract of marriage.*
2. *The contract of marriage shall be of no effect where it simply refers to local custom, religion or law of a country.*

**Art 47 – (6) Modification to Contract of marriage**

1. *Where the interest of the family so requires, the spouses may, by agreement, modify the terms of the contract of marriage and request the court for approval of such modifications.*
2. *The court may approve such modifications where it ascertains that it does not affect the interest of the family.*

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3. *Where the modifications are approved by the court under Su-Article (2) of this Article, a copy of the modified contract shall be deposited in the court or with the office if civil status.*

**Art 73 – Contract Between Spouses**

*Contracts entered into between spouses during marriage shall be of no effect unless approved by the court.*

Marriage contract is an agreement of the couples by which they may determine some points concerning their pecuniary matters as well as their future personal relations (Art 42 of RFC). If the parties decide to make an agreement, the contract must be written and attested by four witnesses, two for each of the spouse (Art 44 of RFC).

There are two very important preconditions as to the validity of such contract. They are the time aspect and non derogation of the contract from the mandatory provisions of the law.

To be of any legal significance, the contract must be made at the latest on the day of the celebration of the marriage or before the day of celebration of the marriage (Art 42(1) of RFC). The Oromia and Amhara Regional States family laws provide the same rule. The Tigray Regional State family law also provided the same rule except that it has not put forward the time when contact of marriage may be made at the latest. It generally provides that contract of marriage should be made before the date of the marriage. Generally, it seems as if the law is implying that any contract of the spouses affecting their personal or pecuniary relations will be void if made during marriage (after the conclusion of the marriage).

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However, the Art 73 of RFC seems to imply the existence of valid contract even if it is concluded or entered into by the spouses after the conclusion of marriage with the preconditions of approval of the same by court of law.

The law used a general term 'contract' when it implied the possibility of the existence of contract during marriage. Then, the main issue here will be 'whether or not the general term contract refers to the contract of marriage provided under Art 42 of RFC which affects the personal and or the pecuniary relations of the spouses.

There is an argument that states that the type of contract as stated under Art 73 of RFC should never be understood to mean marriage contract because of the importance that the law attaches to such kind of agreement due to the impact that it will have on the contracting parties (spouses). The proper question that should come in your mind will be, if not contract of marriage, what does Art 73 addresses? The persons who support the above line of argument provide that Art 73 applies to, apart from agency contract which does not need to be approved by court of law, contract entered into between spouses when one of them is on the verge of death or agreement made on how to partition property upon a divorce proceeding.

The other line of argument is that Art 73 applies both to contract of marriage and other types of contract. But, the contract of marriage which is entered into during marriage has to be approved by court of law to be valid. The approval by the court of law is there to check whether there are freedoms of arms length transactions between spouses. This is because it is possible for one of the spouses to influence the other to accept an obligation which is too onerous as a result of the special nature of the relation. Apart from this, the spouses may use their contract of marriage entered into during marriage to affect third parties' interest negatively. In

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conclusion, as the possibility of the new contract affecting the interest of the spouses themselves or the family's interest or the interest of third parties is wide, the need of the court's interference is necessitated.

The law has also provided that contact of marriage can be modified during marriage (Art 47 of RFC). But the approval by a court of law is essential here. The same reasons given above on the interference of the court works here too.

The second important precondition for a valid marriage contract to exist is that it must not derogate from the mandatory provisions of the law (Art 42(3) of RFC). In other words, if the term of a contract of marriage is against the things that the law provided as mandatory, the contract will be considered non existence (void). For instance, if the spouses agreed not to be faithful to each other, the contract will have no legal effect whatsoever as the spouses have the mandatory duty of owning each other fidelity (Art 56 of RFC).

There are points that deserve to be raised before wounding up our discussion on contract of marriage. The law required the contract of marriage to be putted under the custody of the court or the office of civil status (Art 45 of RFC). The depositing of the contract in court or with the office of civil status required as security from being lost and to create an opportunity to look at it by third parties who want to enter into contract with the spouses or one of the spouses.

However, the effect for the non fulfillment of this requirement is not provided by the law. Taking into account the silence of the law, there are two lines of arguments. Some suggest that the deposition of the contract is required by the law; its non fulfillment will render the contract void. But others suggest that taking into account the purpose of deposition of the contract, the contract will continue to have effect only on the spouses not on the third parties if not deposited.

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The last point we are going to touch is spouses can not impose an obligation up on third parties by their contract of marriage. The contract will be of no effect also if it simply states that the pecuniary effects or personal relations will be regulated according to local custom or religion or law of specific country. Using such general phrases will lead to many different interpretations which give rise to conflict or disagreement.

### 2.2.3.2. Regulation by operation of the law

Statutory regulation cone into force when there is no marriage contract of marriage or even when there is a contract but which conflict with the mandatory provisions of the law (Art 48 of RFC). In the cases of personal and pecuniary effects of marriage will be regulated by statutory regime, according to the law, if spouses decide to regulate their personal or pecuniary relations by a marriage contract and if the contract does not contradict with the mandatory provisions of the law, then the contract governs their relations. However, the law comes to the rescue when there is no marriage contract or the marriage contract is considered to have no legal effect. The law in this case is used for gap filling purpose. It is important to note here that whether or not contract of marriage exists, there are some mandatory provisions of the law which will regulate the personal and pecuniary relations of spouses.

**Self-assessment Question**

**Answer the following.**

1. What constitute personal effects of marriage?
2. How is common property formed during marriage?
3. Is it possible for the spouses to have personal property in marriage? If yes how?

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4. Can personal debt of one of the spouses be paid from the common property? If yes, Why?
5. Can spouses regulate all of their personal and pecuniary relations by a contractual agreement?

## CHAPTER SUMMARY

There is no single universally accepted definition of the term marriage. Its concept can be best understood from the provisions of the law dealing with marriage.

Marriage can be celebrated by three different modes under Ethiopian legal system. It can be celebrated according to custom or religion or before officer of civil status. Regardless of the modes of celebration of marriage, essential conditions like consent, capacity and observance of impediments (bigamy, consanguinity and affinity) are essential for the validity of marriage as their non fulfillment lead to the invalidation of marriage by a court.

After the conclusion of marriage, personal and pecuniary effects of marriage come into existence. Personal effects of marriage are generally the duty to respect, support and assist each other, the duty to administer the family jointly, the duty to live together and the duty of fidelity between spouses. Pecuniary effects of marriage deal with the material interest of the spouses - personal and common property.

The spouses are free to regulate pecuniary effects and sometimes personal effects of marriage by agreement (contract of marriage) entered into before or on the date of conclusion of marriage. When there is no such contract or when the contract is invalid, the provisions of the law dealing with effects of marriage starts of apply.

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## Review Questions

**Case I**

Alemayew and Tewabech concluded marriage 3 years ago. For about two years their home was full of happiness. But after spending two wonderful years together, they started to argue with each other day through nights. The husband blames his wife for using birth control. But Tewabech always tries to make him understand that she wants a child too and she is not using any thing to control birth of a child. Alemayew always believes that she is lying to him. One day Tebawabech went to the hospital to check whether something is wrong with her for not being able to conceive a child. The result was shocking because the doctor told her that she will not be able to get pregnant not now and not ever. She kept the secret to herself. Exactly on their three years anniversary she filed a petition for divorce in court. Two months after the dissolution of the marriage, she decided to be married to another person. Can she do this?

**Case II**

A man of 21(A) married his first cousin of 16(B) without the consent of his parents. On the wedding night (A) discovered that it was impossible to consummate the marriage with (B) due to the fact that she does not have the requisite sexual organ. However, (A) loved (B) very much and remained married to her for 5 years. At that time he met (C) with whom he developed a satisfactory sexual relationship. Six years after his marriage to (B), (A) now wishes to have his marriage with (B) dissolved and he wants to legalize his relationship with (C). Can (A) apply to the court to order the dissolution of the marriage with (B) based on

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error? Can the dissolution of the marriage be required also based on the fact that (B) was under the minimum marriageable age when the marriage is concluded?

**Case III**

A woman (w) and a man (x) were married at the municipality in Addis Ababa. After they had live together for one year, (x) discovered that he has seriously ill with cancer. (w) being very afraid of disease if afraid to live with (x) any more. She wishes to have the marriage annulled. Is it possible for her to this? If yes, how?

**Case VI**

W/ro (X) and Ato (Y) were married in 1996(E.C). W/ro (X) knew that Ato (Y) had been married before, but she believed him to be divorced. After two years of marriage, Ato (y) one day went out and never returned. Sometimes latter, W/ro (X) heard from mutual friends that Ato (Y) had gone back to live with his first wife to whom he was legally married and from whom he had never been divorced. What do you think is the fate of W/ro (X)'s marriage with Ato (Y) if the first wife of Ato (Y) came to know the existence of the marriage and wants it to end?

**Case V**

Beletech is a very smart student. Immediately after she finished high school, her parents told her that it is time for her to get settled down. She said that she is not ready to settle down or have her own family. However, her parents told her that she is going to get married to Abera whom she barely knew, within a very short period of time as the marriage has already been arranged with the family of her husband to be. She tried to convince her parents to let go of the idea of marriage by telling them that she wants to continue her education and even if she decides to get married it should be to a man of her choice. Her parents told that they know better and she wouldn't argue with them. After one month the marriage is

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celebrated according to the custom of the community where her parents reside. What option does Beletech have to get the marriage dissolved? Is it possible to use the ground of violation of consent as the bases for the dissolution of the marriage in this case?

Advise Beletech.

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# CHAPTER THREE

## DISSOLUTION , IT LEGAL EFFECTS AND PROOF OF MARRIAGE.

### Introduction

Dear leaner! As you remember from your previous study of chapter two of this module marriage as one of the most important social institution is a cornerstone for a society in general and a family in particular . It is a country legal union founded on the free and full consent of the spouses between whom is creates personal and pecuniary effects which are operative only insofar as the marriage is in fact . However, the continuing marital relationship once created between the spouses may be susceptible to termination on various grounds.

Therefore this chapter is concerned with the dissolution of marriage on carious grounds and the legal effects therefore Finally, proof of the existence of marital relationship between two parties foe various legal purposes and the different modes of proving the same are dealt with in depth .

**Objectives:**

*At the end of studying this chapter the learner will be able to .*

- *explain the concept of dissolution of marriage under Ethiopia family law .*
- *identify the carious grounds for dissolution of marriage as embodied under our law .*
- *Point out the complete tribunal to adjudicate issue of dissolution of a marriage .*
- *Elaborate the legal effects of dissolution of marriage*
- *Understand liquidation of Pecuniary effects .*
- *Analyze the different modes of proof of marriage under our family law.*

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- *Give legal advises to spouses (s) with family matters pertaining to proof and dissolution of marriage as well as legal effects .*
- *Appreciate how cases of dissolution and its effects are practically r egulated in his / her vicinity .*

### 3.1. Dissolution of Marriage

***Q. Dear learner , how do you understand dissolution of marriage and the grounds there of ?***

The legal bond once created between the spouses with the consent of the latter as its underlying foundation may unfortunately be terminated resulting in the consequential rupture of its legal effects . Though a quest for a legal definition of " dissolution " under our law remains with out success it may roughly be defined for the purpose of this course as " the breaking of conjugal bond and the cessation of the legal effects the union of the spouses produced either as regards themselves or third parties " . It is apparently understand able that the definition underlies the termination of the legal union and its effects due to dissolution of marital relationship . Dissolution of a marriage signifies the process of dissolving either a valid marriage or annulment of invalid marriage effected for a cause by the judgment of a competent court . Hence dissolution of a marriage may be made on various grounds as elaborated below . Further it should be noted that the grounds and effects of dissolution of marriage shall be the same whichever the form of celebration of the marriage .

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### 3.1.1. Grounds for Dissolution

***Q. can you enumerate the various grounds of dissolution of marriage in general under any family law and in particular under ours ?***

Generally speaking dissolution of marriage signifying the termination of legal union may be effected up on divorcement , death , and declaration of absence of civil death . In Ethiopia under Art 75 of the F.R.F.C the various grounds for dissolution are however limited to violation of essential condition(s) of marriage , declaration of absence by the court, death and divorce .

**Q. Are all the grounds for dissolution similar through out legal systems ?**

……

In general and those embodied under our family law that various grounds for dissolution under out family law that various grounds for dissolution of marriage may differ from one legal system to another though the difference is not basic as such in certain legal systems . That is some countries reasonably limit the grounds for dissolution while other are liberal with some rationale behind limited and stringent grounds of dissolutions is apparently embedded in the necessity to maintain the unity of the family and to ensure the continuity o the marital relationship once established by the marriage. To this and the spouses ate not permitted to obtain dissolution of a marriage on every ground other than those provided by law .

Even in out case this approach was adopted in the civil code where causes of divorce were limited and further divided into serous and non serous ones and there by limited grounds of dissolution . On the other hand , other legal systems

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provide for liberal founds of dissolution of marriage . Such liberal stand finds its justification in the premise that marriage as a voluntary legal union fundamentally founded on the mutual consent of the spouses shall naturally perpetuate only in so far as such consent exists . To state same otherwise up on the disappearance of the mutual consent of the spouses that underlined their marital life there inevitably follows the dissolution of the marriage . Therefore the attempt to prohibit the inevitable dissolution serves no purpose and is against the nature of the voluntary legal union when the spouses are not voluntary to remain in the bond of the marriage . This is the stand currently held by our modern family law in light of the FDRE constitution . Yet it does not necessarily imply that dissolution should be as easy as this against the society's legitimate interest in maintaining marital relations .

## 2. Violation if Essential condition (s) of Marriage

***Q. What are the essential conditions of a valid marriage ? Then, what is the consequence of this violation ? ……***

**……**

As you remember from your previous study of the second chapter of this module in order to ensure the validity of marriage and guarantee the utmost protection accorded to the complied with . In the absence of the fulfillment of the requirement the marriage would be subject to annulment by the court or dissolution of the marriage on the ground (s) .

The violation of the essential condition (s) of a valid marriage would ultimately invalidate the marriage for which order of dissolution would be granted by the court despite its celebration . This is due to the fact that the non observance of the conditions acts as impediments against a marriage.

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Normally the impediments in this regard in this regard may be minor , relative or absolute depending up on the nature of the condition (s) involved . Minor impediments are those impediments to the celebration of a marriage such as non- observation of period of widowhood and some formalities for example want of publication ( registration ) both of which do not affect the substantial validity of the marriage .These do not constitute the essential conditions to affect the continuance of marriage .

On the other hand relative impediments are those which shall initially prevent the conclusion of marriage but which disappear through passage of time and entail un itself rectification of the defect at the conclusion of the marriage . The typical example of relative impediments is age the effect of which ceases to exist as of the time the spouse (s) attain (s) marriageable age .

Lastly , those impediments which are so grave and whose invalidation effect does not cease to exist through passage of time ate called absolute impediment > Any marriage affected by such impediments is susceptible to invalidation at any time . the violation of the prohibited degree of consanguinity and affinity as essential conditions inter alia and conclusion of marriage are instances of absolute impediments entailing dissolution of the latter by court up on application . The same is partly true for bigamy the effect which may disappear up on the death of one of the spouses of the big amps person .

There fore a marriage may be dissolved when concluded in violation of the essential conditions required by law to be fulfilled . Hover a point of especial emphasis is the difference in the legal effects of violation of the essential conditions as the law does not attach the same importance to all of them .

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This as comprehensively elucidated above due to the simple reason that some conditions are temporary in their legal effects while other are permanently severe the violation of which necessarily entail s dissolution of the marriage .

**ii Declaration of Absence**

***Q. In what way declaration of absence be considered of absence be considered as a ground for dissolution of marriage ? marriage ? When is the declaration usually made ?***

The other grounds of dissolution that brings a marital relationship to an end is declaration of absence by the court . This is true where one of the spouses is declared absent by the court up on fulfillment of the conditions provided by law. To elaborate the point further , as may be noted from the personal effects of marriage , the principle is that spouses are mutually bound to cohabit despite the exception where they may agree to live separately for definite or indefinite period . However other than this exception where one of the spouses disappears and his/her where a bouts can not be traced by the other declaration of absence may be made by the court up on application made to this effects by that other spouse . Consequently , one of the special legal effects of such a declaration is the dissolution of a marriage that existed between the surviving spouse and the absentee .

In this case the date of dissolution of the marriage is presumed to be the day on which the judgment declaring the absence becomes final . Implied here of is thus the mere declaration of the absence of the spouse by the other on a certain date does not have any legal effects in it self unless it is officially made by the court despite the disappearance of the absentee for a longer period of time .

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**iii Death of the spouses**

***Q. Which death legal or physical death cause dissolution of a marriage ?***

The third ground for dissolution of a marriage as provided by law is the death of one or both of the spouse Death of the spouse (s) may be physical or civil both having similar legal effects with regard to marriage . Even though there is no legal definition for both types the former commonly refers to a physical phenomenon that brings to an end the life of the spouse (s) entailing the end of personality where by rights and duties including marital are all extinguished . Where as the second type of death refers to declaration of death made by the court after declaration of absence for which the latter comes to an end up on the coming into existence of the former .

The commencement of such a death of the spouse is marked with a proof to the satisfaction of the court that the absentee was dead on a date different from that indicated in the Judgment declaring the absence of the spouse and when the death is so declared by the court . In both case , the legal effect is one and the same : dissolution of the marriage between the surviving sponse and the deceased one. The same assertion with identical effects holds true for the death of both spouses .

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## iV. Divorce as a Ground of Dissolution

***Q. How is divorce different from other grounds of dissolution and what are the grounds/ causes for divorce ?***

The last but not least important and common ground of dissolution of a marriage is divorce . Divorce as defined in the Blacks law dictionary ( 6 the ed , 1990) , is the legal separation of man and wife , effected by the marriage relation . or suspending its effects so far as concerns the cohabitation of the parties " This definition reveals two important points : pronouncement of divorce in the world.

**Q.What is the difference between the two conceptions of divorce ?**

……

……

Accordingly, one type totally and absolutely dissolves the marriage while the other simply orders the legal separation of the husband and wife which is commonly referred to as separation from bed and board. The idea of separation from bed and board was developed from The con caption that '' Marriage is indissoluble in any way other than death '' This was predominantly the catholic percept of marriage where each spouse is prevented from of remarriage during tie of the previous marriage. The decree of separation would be granted only when a party to a marriage had been guilty of a serious breach of marital duty, Such as adultery, on the wits part or extreme cruelty or abandonment on that of the husband.

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Strict divorce laws were a later development in the history of divorce. Foe instance, the classical divorce law of Rome war extremely liberal for a marriage could be dissolved by the mutual agreement of the spouses of at the will of either party. Even there was no requirement by the spouses to give the reasons there of . It was as result of religions intervention that marriage became an indissoluble institution and consequently divorce was avoided.

Absolute divorce was thus not granted in various parts of the world until recently. Instead, grounds for judicial separation were in or eased. In England, in 1987, adultery, Cruelty and desertion were grounds for the judicial separation. In France, Keeping with the Catholic Character of the state, marriage was treated as indissoluble all through the ancient regime. But the 1799, Revolution brought the extremely liberal of the dissolution of a marriage up on mutual consent of the spouses.

In Muslim socielty, divorece may be effected by the mutual agreement of the spouses or even by the notion of '' indissolubility of marriage'' has no place at all.

In Some parts of the world , the evolution of divorce reform passed through rules of divorce to fault based divorce and finally now no fault divorce is the rule in many countries. It is believed that the proliferations of individual liberties have contributed a lot in the liberalization of stricter divorce laws.

***Q. How was the evolution of divorce in Ethiopia?.....***

……

Marriage in Ethiopia was dissolved by mutual consent of the spouses or even unilaterally. According to the Feta Nagast'' the Law of Kings'' which is a collection of laws that had been in use in Christian Ethiopia for many centuries,

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there were three grounds for divrce. These were divorce by mutual consent, divorce by unilateral repudiation of the wife by the husband or by filing a suit in court of law unless they were married by taking the sacrament together, and divorce conducted before the elders or by arbitrators.

In the words of a certain writer coati Rossini '' Marriage was dissoluble by mutual consent of the Couples or even unilaterally. in fact it is even enough that only one of them should no longer feel willing to continue that marital life, even without special reason and the marriage world come to an end even against the will of the other party

From the foregone disbudding it is pretty clear that varions forms /gruinds of easy divorce proceedings were available in the pre-code Ethiopia Not only men but against the will of their husbands before the coming into force of the Civil code.

**A. Divorce under the Civil Code**

***Q. How are divorce and its grounds treated under the civil code ?***

Under the civil code regime the freedoms available to either of the spouses in the pre –code era has been restricted by the code which provides for serious and non- serious causes of divorce . But the existence or non – existence of these cause is irrelevant as far as the order of divorce by the family arbitrators is concerned . The existence or non existence of serious causes is relevant only in the determination of the conditions on which divorce is ordered and the effects of divorce .

When there is a serious cause for divorce it shall be pronounced with in one moth from the petition . However when divorce is pronounced for other non-serious causes it shall be pronounced within one month from the petition for

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divorce with the possible extension of the period up to five year having regard to the agreement between the parties Moreover the liquidation of pecuniary effects is highly affected by the existence or non-existence of a serious cause .

***Q. Should the spouse claiming divorce prove the fault of the other for the cause ?***

**……**

As a rule the family arbitrators grant divorce whatever the case may be that proof of fault of the other party is not important to get the determination of divorce. Hence Ethiopia has incorporated anon fault divorce into the 1960 civil code from its custom with some important modifications to the customary practices.

Under Art 669 of the civil code there are five serious causes of divorce and only two of them put a party at fault . These are adultery and deserting the conjugal residence for at least tow years and where other spouse does not know the where about of the spouse who has deserted . Except these two there are no other serious causes that put a party at fault . On the other hand there are several non- serious ( other) grounds of divorce for which a divorce may validly be ordered . The third case that makes a party responsible for the dissolution of the marriage in addition to the above two cases is his/her petition for divorce without having a serious ground of divorce in his/her favour . In all these three cases the party who is responsible shall be penalized property – wise during the liquidation of the pecuniary relations between the spouses .The imposition of penalty is taken by the law as one of the divorce hindrance devices .

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When petition is made for a divorce in the absence of a serious cause either by two spouse conjointly or by one of them according to Art . 666 (1) of the civil code the family arbitrators are duty bound to attempt to reconcile the to reconcile the parties . In case the attempt fails they have to permit the parties agree on the conditions of divorce and where the requirement is reached the agreement . Thus divorce shall be pronounced without imposition of a penalty even where divorce is sought in the absence of a serious cause if the parties agree on conditions of divorce .

The other point in the system of fault – divorce is the one in which one of the parties proves a fault committed by the other party the fault that is recognized by law as a ground to demand divorce . In this system divorce is a privilege granted to an innocent spouse . That is unless one of the parties proves a fault recognized as aground for divorce , no divorce would be granted . This situation is totally inexistent in the Ethiopia setting and a party is not required to prove the fault of the other for the purpose of getting a divorce pronouncement .

Distinctly from the previous grounds of divorce elaborated herein above , divorce may be obtained up on the mutual consent of the spouses for which the parties have to present their petition for divorce to the family arbitrators . The parties , in this case for divorce . Proving the existence of a serious cause results in the penalty of the guilty party , mutual consent of the spouses . The spouses who need to end their marital relationship by their mutual consent shall conduct their divorce proceedings on other grounds ( Other than the serious causes ) or they have to conceal the serious ground if there is one. Finally , they are expected to regulate the conditions or consequences of their divorce . parties who dissolve their marriage in such friendly manner are

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said to have divorced by their mutual consent in accordance with the law . The door for such divorces is not closed under the 1960 civil code .

**B. Divorce under the Revised Family Codes**

***Q. Based on the previous discussions, what are the points of departures between the civil code and the Revised family code on issues of divorce as a ground of dissolution of marriage***?

It has been discussed in-depth that the categorization of causes of divorce intended to discourage spouses from divorce on each and every minor ground. Ultimately, the purpose of the hindrance is to ensure the continuity of a marital relationship once created. Currently, the divorce-hindrance device arising out of a distinction categorization of the causes of divorce has been abrogated by the Federal Revised Family code and the family codes of several regional states in Ethiopia.

The stepping stone in this regard was laid down by the Family Code of Tigray, in November 1998, which has introduced landmark change in the divorce proceedings of the spouses. That is, it abolished the penalty of the spouse responsible for dissolution of a marriage by divorce.
Moreover, it is explicitly stated that divorce is aright. According to Art 102 of this code, when one or both of the spouses claim that they can no mare live together in their marriage, their right to get divorced is respected. This idea finds its root in the FDRE constitution, which prescribes that'' marriage shall be entered into only with the free and full consent of the intending spouses'' under its At. 34(2).

This constitutional rule has to be interpreted to mean that consent is required not only at the conclusion of the marriage but also during the whole lifetime of the marriage. The code allowed the parties to divorce without the need to penalize him. It seems that the code is of the opinion that, to exercise ones constitutional right one should not be penalize. At the same time the code has liberated divorce proceedings owning to easy divorce practice of the society which holds true for other regional states as well.

According to the Federal Revised Family Code entered subsequently in 2000, marriage shall dissolve by divorce in two ways. Namely, divorce by mutual consent of the spouses where their concept is accepted by the court and divorce by petition of both spouses conjointly or by a petition made only by one of the spouses. There is no major departure from the Civil Code with respect to both types of divorce proceedings were prescribed by the Civil Code, especially by the

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Amharic version. The only difference one can note here is that divorce by mutual consent is prescribed in the Civil Code is in prohibitive or negate approach as opposed to the approach under the Revised Family code which is permissive one.

***Q. Is the divorce under the Revised Family Code as easy as this to be made without procedures?***

Even though divorce under the new codes is relatively relaxed, is does not, however, mean that marital relationship is lift to be terminated in an irresponsible manner. The law has laid down necessary hindrances in view of maintaining marital relationship to the extent possible. Thus strictly speaking the divorce procedure under the Revised Family Code is not entirely free as it may appear at first sight since society and government have legitimate interest in maintaining marital relations. Unless the marriage is irreparably broken, they will not go for divorce and hence there are legal mechanisms in place to this end under the present law.

***Q What are divorce procedures under the RFC?.....***
***……..***

In case of divorce by mutual consent, the spouses are expected to come up with agreement both on the dissolution of the marriage and the consequences or conditions of their divorce. It does not mean that the court would immediately approve the agreement of the parties to the divorce. Worth mentioning is also the fact that spouses whose marriage lasted for less than six months are not permitted to divorce by mutual consent. For marriage lasting for more than months, the court may counsel the parties separately or jointly so that they may renounce their intention to divorce. The court may where the attempt fails dismiss the by giving them a cooling period for not more than three months.

Finally, the court approves the divorce agreement of the spouses when they still stick to their intention to dice after the cooling period. In approving the agreement, the court has to ensure that the agreement is the true intention of the spouses and is not contrary to law and morality.

The other mechanism by which the parties proceed their divorce is through petition for divorce. In this case, either both spouses jointly or one of them can lodge his/her petition for divorce to the court. The difference of this procedure from the previous one is that there is no prior agreement as the dissolution of their marriage. But either both or one of them requires the court to end their marriage by way of divorce. When seen in depth, apart from the aforesaid one, there is no fundamental difference between the two procedures other certain minor

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differences. Such as court's direction of the spouses to settle their dispute through arbitrators of their choice in case attempt to make them renounce their divorce petition fails.

In both procedures, the court after pronouncing divorce, shall request the spouses to agree on the conditions of divorce. If the Spouses fail to agree on the consequences of divorce or if the agreement, if any, is invalid the court shall, by itself or up on the assistance of arbitrators or experts, decide up on the conditions of divorce.

**Self-assessment Questions**

1. Enumerate and explain the various grounds of dissolution of marriage
2. What is the difference between dissection of essential conditions of marriage and divorce?
3. Identify the departure between the civil code and Revised Family Code on issues of dissolution by divorce.
4. What is the difference between divorce by mutual consent and petition for divorce?
5. What is the distinction between relative and washout impediments for dissolution of marriage?

### 3.1.2 The Competent Tribunals over Dissolution

**Q. Which is are the competent tribunal(s) with adjudicatory power over issues of dissolution under Ethiopia family law ? ……**

**……**

In the preceding section, the various grounds of dissolution of marriage both under the Civil Code and the Revised Family Code have been dealt with at length .Now , the question is as regards the competent tribunal (s) with adjudicatory power over issues of dissolution of the marriage on those grounds . To this end, a closer study of the various provisions of the civil

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code and the Revised Family codes reveals the existence of two competent adjudicatory tribunals namely court and family arbitrators . The adjudicatory competence of each of them is clearly elaborated in this sub-section .

**i. The Adjudicatory Power of the Court**

**Q. Dear learner , what are the grounds of dissolution up on which courts exercise adjudicatory power under the Civil Code as well as the Revised Family Code ?.....**

**……**

As a rule, the adjudicatory power of the court to decide on dissolution of marriage as discussed above may be broader of narrower based up on the law from which the power emanated . Accordingly the power of the court of decide on dissolution of a marriage under the civil code was or is limited only to the three grounds of dissolution excluding divorce . That is under the code court has the power to order for dissolution of marriage on the grounds of violation of essential conditions of a marriage declaration of absence and death of the spouses . It thus follows that the court has non adjudicatory power to pronounce divorce under the code as the power is vested in the family arbitrators to whom the matter should be referred back by the court . under the Federal Revised Family Code as well as regional family laws the power has been shifted to the court in which the court currently exercises fully adjudicatory power over issues of . Regarding court adjudicatory power to order for dissolution of a marriage, under both codes the it is only the court is that competent to order for its dissolution up on application whichever the condition may be . . Art . 663 (2) of the Civil Code and Art. 75 (b) of the FRFC clearly indicate dissolution order by court due to violation of one of the essential conditions of marriage For instance, the dissolution of marriage concluded in violation of impediments arising out of consanguinity or affinity

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shall be ordered by court on the application any interested person or the public persecutor .

Further more, the court has the power to adjudicate over dissolution of marriage on the ground of declaration of absence of one of the spouses . As explained in the previous section the court shall declare the absence of the spouse where his death appears to it to be probable and the marriage of the absentee shall be dissolved on the day on the day on which the judgment declaring the absentee becomes final . That is, since the marriage is dissolved by declaration of absence of the spouse by the court it follows that only the court has the adjudicatory power over the dissolution on this ground .

The same is true for dissolution of marriage up on death particularly where the death of the spouse(s) is declared by the court . Move ove,r as per Art .111 (1) of the Civil Code where one of the spouse (s) has disappeared in such circumstances that his /her death is certain although no corpse has been found any interested person may apply to the court to give .Judgment declaring the death of the spouse . Consequently dissolution of marriage occurs due to the declaration of death of the spouse by the court.

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**ii. The Adjudicatory Power of Family Arbitrators**

**Q. Is there any distinction between the civil code and revised family code in the power of family arbitrators over dissolution ?**

In contrast to the power of the court, the adjudicatory power of family arbitrators over dissolution of marriage is limited or non –existent their power is limited in the sense that family arbitrators exercise their adjudicatory power over dissolution of marriage if any only on a specific ground of dissolution . In this regard a typical mention of the adjudicatory power of family arbitrators under the 1960 Civil Code may be made . Under the Code, family arbitrators had or even have in some regional states an adjudicatory power over dissolution of a marriage on the ground of divorce.

Fore example, in accordance with Art. 666 (1) of the Code, a petition for divorce may be made to the family arbitrators either by the two spouse conjointly or by one of them . The family arbitrators shall make an order for divorce within three months from the petition having been made where the petitioner establishes in his favour the existence of a serious cause of divorce . However , Where there is no serious cause of divorce, the family arbitrators the parties pronouncing divorce attempt to reconcile the parties and to make them renounce the petition for divorce . Hence the power of. The family arbitrators to decide on dissolution of marriage under the civil code is exclusively limited to the ground of divorce while in other cases the power is conferred up on the court .

**Q . Dear learner, are the local elders acting as family arbitrators over family matters in your vicinity legally empowered to pronounce divorce under the Revised Family Codes ? ……**

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With regard to the power of the family arbitrators over dissolution of marriage under the revised family code(s) a different approach in the civil code . There has been a shift of the power of the family arbitrators to the court to precede on dissolution of a marriage even on the ground of divorce . For instance the former power of the family arbitrators to entertain a petition and pronounce a divorce there on has been totally done a way with under the revised family code in favor of the court . They have only an advisory or reconciliatory role in such a way that the court may direct the spouses to settle their despites through arbitrators of their choice who shall make reports to the court regarding the out come of their attempt to reconcile the spouses . Therefore it should be noted that the advisory role of the family arbitrators in itself depends up on the discretion of the court which may direct the matter to the former only . When it thinks necessary . In conclusion family arbitrators under the revised family code has no adjudicatory power over dissolution of marriage even on the ground of divorce due to various reasons associated with the functions of the tribunal .

## Self assessment Questions

1. Identify the adjudicatory power of the court and the family arbitrators under the civil code on dissolution of marriage .
2. Explain the nature of the power of the court and family arbitrators on issue of dissolution of marriage under the revised family code .
3. Compare and contrast the respective powers of the aforementioned tribunals under both codes .
4. How does a court exercises its adjudicatory power over dissolution on the ground of declaration of absence and death ?

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5. Do family arbitrators under the Received Family Code have any power over dissolution of marriage as of right ? Why?
6. What is the practice of arbitrators on family matters in your locality?
7. Which tribunal do you think is appropriate to handle matters of dissolution? Why?

### 3.1.3. Parties Entitled to Claim Dissolution

So far we have thoroughly elaborated the various grounds of marriage as well as the competent tribunal(s) to decide on the dissolution Now , in this selb-section we shall identify the parties entitled to claim dissolution of marriage on each of the grounds provided law.

Q. so who are the possible parties to claim for dissolution of a marriage under our family law?

It is a obvious that a case for dissolution of a marriage may be initiated by certain parties . That is whether the dissolution is ordered by the tribunal(s) up on application directly or in directly made or by petition for divorce , there would be a party or parties claiming for the dissolution . Accordingly for the sake of convenience , the possible parties may generally be divided in to Haw : the spouses(s) and third parties others based up on the grounds of dissolution .

**i. The Spouse (s)**

***Q. On what ground (s) the spouse (s) is /are entitled to claim dissolution of marriage?.....***

As is noted from the previous discussion on the grounds of dissolution of marriage the possible Parties to claim for dissolution of marriage on the ground of divorce are the spouses . Both spouses may apply to the court for divorce by

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mutual consent. secondly a petition for divorce may be made by the two spouses conjointly or by one of them . The other ground of dissolution where one of the spouses may be entitled to claim dissolution is up on the death of the other spouse declared by court . For instance where a spouses has disappeared in such circumstances that his death is certain any interested person including the serving spouse may apply to the court to five A judgment declaring the death of the spouse . The declaration in effect results in the dissolution of the marriage between the applicant spouse and the deceased.

The third instance where one of the spouses may be qualified party to claim for dissolution of marriage is when the dissolution is made due to declaration of absence of the other spouse by the court up on the application of the remaining spouse . Consequently the judgment of declaration of absence would dissolve the marriage. The last instance where one of the spouse may be entitled to apply for dissolution is in case of a bigamous marriage. This one of the instances for dissolution of a marriage by courts order due to violation of the essential conditions of a marriage. Thus the dissolution of a bigamous marriage may be ordered on the application of either of the spouses. Like wise, the spouse whose consent is vitiated by defects may apply to the court for dissolution of the marriage so affected.

**ii. Third parties / others**

***Q. What are the possible grounds where third parties are entitled to apply for dissolution of a marriage ? ……***

Except on the ground of discourse in which the competent parties are only the spouses, third parties may also be entitled to claim dissolution of marriage on other grounds . The rational behind entitling the parties has its roots in the dual nature of a marriage in which both the state and the society have a

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legitimate interest over the marriage in addition to the private interest of the spouses . The parties may include public prosecutor the patents guardian or and any interested party as the case may be based up on the grounds of dissolution .

For example dissolution of a marriage concluded in violation of essential conditions of marriage such as age affinity or consanguinity shall be ordered on the application of any interested person ( such as the patents or other relatives ) the public prosecutor . However in case of bigamy only the public prosecutor is entitled as a third party to apply for the dissolution of the marriage. In this case it should be noted that the public prosecutor is authorized by law as a qualified party representing the state . As regards the dissolution of a marriage of a judicially interdicted person concluded with out prior authorization of he court the guardian of such a person may be a qualified third party to apply for dissolution .

Other than on the grounds of violation of essential conditions of a marriage third parties may also be qualified to claim for dissolution non the ground of declaration of absence of death of the spouse(s) by the court . This occurs particularly .Where the application for the declaration is a filed by the interested party other than the spouse if any .

## Self – assessment Questions

1. Enumerate the possible parties qualified to apply for dissolution of a marriage.
2. Explain cases where only the spouse(s) are entitled to apply for dissolution s of a marriage .

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3. Point out instances where third parties are qualified to apply for dissolution of a marriage .
4. State the reason behind authorizing third parties to apply for dissolution of a marriage between the spouses?
5. Whom does the public prosecutor represent in the application for dissolution of a marriage?

### 3.2. Legal Effects of Dissolution of Marriage

***Q. Can you guess the possible legal effects arising out of dissolution of marriage? If yes, what are they?*.....**
**…….**

Whatever the cause may be, once a marriage is dissolved due to any of the aforesaid grounds, the dissolution gives rise to various legal effects. Generally, the effects of dissolution of marriage are the same whichever the form of celebration of the marriage. Accordingly, the dissolution of a marriage terminates the personal and pecuniary relations established during marriage. The rights and obligations created between the spouses by the marriage inevitably come to an end. Whereas, the pecuniary effects created up on conclusion of the marriage would be liquidated as the other legal effects of dissolution of marriage. That is, the pecuniary interest established by marriage between them dissolves due to the termination of the marriage. In-depth discussions of the legal effects are made hereunder separately under different topics.

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### 3.2.1. Termination of Personal Effects

**Q. What various personal relations existing between the spouses are terminated up on dissolution of the marriage?.....**
**……**

Dear learner! As you remember from your previous study of chapter two, t there are various personal relations that come into existence between the spouses following conclusion of the marriage. These relations are the sum total of rights and duties of the spouses towards each other. The personal effects come to an end up on the dissolution of the marriage for the existence of the former depends up on the latter. For instance, once a marriage is dissolved the spouses have no duty of cohabitation or fidelity or nor do they exercise the right to joint administration of their family.

***Q. What is the reason behind termination of these personal effects of a marriage during dissolution of the marriage?*****.....**

……..

The reason is that these personal relations have originally stemmed from the legal union established between the spouses which has been terminated. So, the stem having been uprooted from its very bottom, the branches thereon will naturally wither away.

These personal effects of a marriage are usually created by the operation of the law up on conclusion of a marriage that they are accordingly terminated by operation of the law up on its dissolution. Nonetheless, some of these personal effects may also be regulated by the agreement of the spouses provided that the terms and conditions of the agreement may not be contrary to mandatory provisions of the law and morality.

To put in another way, dissolution of a marriage in effect dismantles the two underlying principles of the equality of the spouses and the unity of the family up on which the personal relations were established. However, the responsibility of the spouses to maintain their children endures regardless of their separation.

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**Self-assessment Questions**

1. Explain the cause for termination of personal effects of a marriage.
2. Describe manner of liquidation of personal effects up on dissolution of marriage.
3. Are all personal effects of a marriage terminated automatically up on dissolution?
4. Does the termination of personal effects of a marriage separately require the adjudicatory power of the court?
5. Is there any agreement to be concluded by the spouses to regulate liquidation of the personal effects of their marriage up on dissolution?

### 3.2.2. Liquidation of Pecuniary Effects

***Q. What is meant by liquidation of pecuniary effects? ……***

***……..***

Greatly important task, during dissolution of marriage, is the liquidation of the pecuniary effects established by the marriage. As has been discussed under the preceding chapter, personal and common properties are the two major pillars and constituents of pecuniary effects. Thus, liquidation of pecuniary effects in effect means the disentanglement of the constituent elements in the course of which it is necessary to distinguish between personal and common property of the spouses, retaking of the personal property and partitioning of the common property as well

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as payment of the debts of the spouses incurred during marital life. All these issues are thoroughly addressed under this sub-section.

***i.Manner of Liquidation of pecuniary Effects***

***Q. How is liquidation of pecuniary effects of a marriage regulated during its dissolution?.....***

**……**

To begin with, personal property may be distinguished from common property of the spouses based on their agreement or failing such agreement, in accordance with the provisions of the law. Hence, priority is usually given to the agreement of the spouses to determine as to which items constitute personal or common property on the basis of which the liquidation of pecuniary relations will be made. It is only when there is no such agreement, or as discussed in the previous chapter, where the agreement is invalid that a resort to the law would be made to regulate the liquidation of the pecuniary effects of a marriage.

***A)Liquidation by Agreement of the Spouses***

***Q. What are the possible agreements of the spouses the may regulate the process of liquidation of pecuniary effects of a marriage up on its dissolution?.....***

**……**

During dissolution of marriage, it is an inevitable consequence that the pecuniary interests of the spouses would be liquidated. The spouses usually come up with their claim over their personal and common property which indispensably necessitates the real distinction between them. It is not unusual that disputes over the marital property arise between the spouses regarding the character of the

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property either to retake as their respective personal property or to share between themselves as their common property.

***Q. How is the characterization of marital property be made by agreement of the spouses?.....***

***.....***

Then, the first possible solution to such controversy is the agreement of the spouses serving as a basic frame of reference for the amicable resolution of the matrimonial dispute. Worthy of note at this point is that the agreement of the spouses may refer either to their contract of marriage or an agreement concluded during dissolution of marriage to regulate the liquidation of their pecuniary relations. In either case, the personal property of the spouses would be distinguished from their common property in accordance with the terms stipulated in their agreement.

But, one has to note at this moment the difference in the purposes of both contract of marriage to be concluded prior to or on the date of marriage and other agreement concluded usually at the end of the marriage. The difference is that unlike the former which generally regulates the overall pecuniary matters during marriage the purpose of the later is confined only to regulating the manner of the liquidation of pecuniary effects of the marriage. Despite disparity in the purpose they are originally concluded for, they have the same importance for the purpose of distinguishing between personal and common properties since the subject matter of the agreements is often the same, i.e., pecuniary matters.

As regards the importance of contract of marriage to distinguish between personal and common property, it has been dealt with in-depth from different angles in the

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previous chapter that, in this topic, attempt is made to show only its significance particularly during the dissolution of the marriage to make the liquidation.

Hence, at the end of the marriage pecuniary effects of the marriage could be liquidated on the basis of the stipulations in the contract of marriage. The contract containing specification of property of the spouses facilitates the proof of the mutual rights of the spouses with regard to recovery of their personal and common property. So, they might have agreed on or before the date of their marriage that all or only part of the property they acquired prior to marriage would remain their respective personal property while the property they acquire onerously during their marriage would fall with in the realm of common property. The stipulations, if so made, are all the confirmation of what the law expressly provides.

All the property designated in marriage contract to remain personal must so remain. The spouses could nevertheless enter it into common property by an approved subsequent agreement amending the original contract. Therefore, during dissolution of the marriage, the distinction would be made in accordance with the terms agreed up on in the contract of marriage.

***Q. Is an agreement made to convert a premarital property into common property during marital life valid to liquidate the property accordingly during dissolution of the marriage?.....***
**……**

The spouses might have also agreed further in their contract of marriage that all the property they acquired prior to and during marriage even gratuitously would wholly be part of their common property. Regarding the possibility to make such stipulation, our law is mute. Many writers agree that there is no prohibition that such agreement could freely be made by the spouses. Further, as stated earlier in

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the preceding chapter, the practice of other legal systems clearly evidences such possibility. The practice is also evident even in the reasoning of some of the decisions of courts in Ethiopia.

It is thus worth noting that where there is such an agreement that entirely avoids the existence of personal property, there would be no such task of distinction to be carried out at he end of the marriage since a mere reference to the agreement readily shows only the existence of common property.

Nonetheless, is it not reasonable to imagine the existence of personal property irrespective of the agreement of the spouses that purports to convert the entire personal property into common property? For instance, can property donated or bequeathed separately to the spouses on condition that it will not enter the common property be converted into common property by the agreement? What about interests which by their very nature are not assignable? Indeed, these instances must be considered as exceptional cases.

Such exceptions are unavoidably recognized even in those legal systems universal community system is adopted. That is, even if the spouses are permitted to make a stipulation to convert all their property in to common property there are still some exceptional assets, like the aforementioned ones, which are not subject to such stipulation and which should naturally remain personal.

After all, if it is agreed in principle that the spouses can convert part or all of their personal assets in to common property, the issue to be raised in connection with it is that whether or not a mere indication of personal property in the contract of marriage amounts to its conversion into common property with out an express intention of the spouses to that effect. Further, they may regulate the manner of

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partitioning the common property so identified. Similarly, the issues of payment of debts of spouse may be regulated by the agreement.

The other agreement that is of a great importance to distinguish between personal and common property is the agreement concluded between the spouses during dissolution of marriage. The purpose of such agreement, as stated earlier, is to regulate the manner of the liquidation of their pecuniary relations. Thus, the spouses can usually agree on their personal and common property and the manner of the partitioning of their common property between themselves.

The agreement made accordingly in contemplation of the end of the marriage and to regulate the consequence thereof should necessarily be approved by the court for its validity. Previously, under the Civil Code regime, the agreement was used to be brought before the family arbitrators who had the power to decide on the pecuniary issues between the spouses. Presently, under the Revised Family Code, such power has been taken away from the family arbitrators and vested on the court.

In approving the agreement, the court has to closely examine the terms of the agreement so that they are not contrary to law and morality. Furthermore, where the court finds the agreement that it adversely affects the interests of one of the spouses and the well-being of their children, it may give appropriate decisions to correct the defects therein.

Hence, for the agreement to be approved, the interests of the spouses and of their children must, *inter alia*, be taken in to account. For instance, the court should not approve the agreement in which the spouses agree that the common property acquired during marriage would entirely be given to one of the spouses. Undoubtedly, such agreement adversely affects the interest of the spouse whose

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share in the common property has been unfairly taken away in consequence of the agreement.

So far, it has been discussed at length that personal property of the spouses may be distinguished from their common property during dissolution of the marriage by reference to either contract of marriage or a valid agreement concluded at the end of the marriage. Nevertheless, worth envisaging at this point is that there may be an instance when there are both contract of marriage and other agreement entered into during dissolution of the marriage both of which may substantially contradict each other as regards the distinction between personal and common property.

***Q. So, how would the court treat both agreements? Which one shall prevail over the other to distinguish personal property from common one?.....***

**……**

Actually, it appears that the occurrence of such an instance may be very rare. Despite the rarity of the instance which is, however, a potential challenge up on its occurrence, the writer's inquiry for any provision of law governing this issue shows that the law is silent on issue of this sort. In spite of the seemingly silence of the law on such an issue, where it unfortunately arises, the court should carefully meticulate both agreements to decide in favor of one and give effects to its application.

In may be the case that the agreement validly made during or at the end of marriage may either impliedly or expressly modify the terms of matrimonial agreement in the contract of marriage. In such a case, if it is so approved, by way of interpretation, the posterior agreement may be given much weight to prevail over the prior one. Then, the manner of liquidation of the pecuniary effects would

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be made in accordance with the terms of the latest agreement concluded by the spouses and approved by the court.

### *B) Liquidation by the Operation of the Law*

***Q. When does liquidation of pecuniary effects by operation of the law come into existence?.....***
***……***

Unfortunately, the spouses might have married each other without marriage contract or the contract might have been invalid, lost, or destroyed in its totality. Likewise, even during the dissolution of their marriage, the spouses may fail to conclude an agreement to regulate the liquidation of the pecuniary consequences of their marriage or even if there is one, it may be rejected and rendered invalid by the court requested to approve it. In such instances, how could one distinguish between personal and common property without any agreement would be a painstaking question for the moment. Ultimately, the only way out to be opted for is a resort to the relevant provisions of the law provided in contemplation of such instances.

Hence, the second way of distinguishing personal property from common property is by the operation of the law. The operation of the law comes into picture where the regulation cannot be made by the agreement of the spouses for any reason mentioned herein above. This inevitably necessitates the regulation to be made during dissolution in accordance with the gap filling provisions of the law.

To this end, the law has somehow tried to draw a line of distinction between personal and common property. It accordingly provides that the property which

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the spouses possess on the date of their marriage or which they acquire after their marriage through succession or donation shall remain their personal property while all other property acquired during marriage shall be presumed to be common property of the spouses. In the course of liquidation in accordance with the law, there come the application of the legal presumption of common property and proof personal property that rebuts the presumption.

### 1. The Legal Presumption of Common Property

***Q. In whose favor the legal presumption of common property is applicable during liquidation of pecuniary effects? What is the legal significance of the presumption?.....***
**……**

As is mentioned under chapter two, the presumption of common property, beyond any doubt, is a cardinal principle of an immense importance in the determination of personal and common property during the dissolution of marriage. The significance of the fundamental principle becomes more vivid in its fullest application in particular where determination by agreement of the spouses partly or wholly proves to be of no help for reasons priorly discussed above

Embodied in Art. 63(1) of the Revised Family Code is the legal presumption of common property which may be regarded as the legal linchpin of the property aspects of the institution of marriage. This being the underlying reason, the aforecited provision provides that “all property shall be deemed to be common property even if registered in the name of one of the spouses unless such spouse proves that he/she is the sole owner thereof.”

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The generalization of *"all property"* to be presumed as common property with out any further specification unquestionably draws the conclusion that the presumption exclusively operates in favor of common property. In effect the purpose of the law basically seems to achieve unity in the material interests of the spouses and there by attaining the development of common property (single patrimony) between them.

Under French law, for example, the major part of the property of the spouses presumably enters the common property and only by exception do certain items remain in their personal ownership. A *fortiori*, the presumption of ownership is in favor of the common property.

The theory underlying the legal presumption of common property seems to have been originally conceived of the notion of sharing of effort and results whose very purpose in turn is to keep intact the matrimonial union. In other words, analogous to that of a partnership the reason behind common property is based on the fact that each spouse contributes labor or capital for the benefit of the community, and shares equally in the profits and income earned therefrom. And it is this philosophical underpinning that gives birth to the presumption of common property. The presumption is almost universal in that it has been enshrined in many laws of community property systems.

Coming back to the aforementioned provision of our law, the comprehensive nature of the presumption hardly calls for a detailed elucidation. As has been noted from the wording of the aforecited provision, the presumption, put in a nutshell, encompasses *" all property"* with no subsequent qualification restricting the generic charter of the phrase. In effect, the law seems to have closed up many determinant matrimonial issues in favor of the presumption of common property.

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Thus, the careful deduction possibly drawn from a closer reading of the provision is that all movables and immovable, no matter how and when they are acquired, fall within the scope of the presumption unless proved to the contrary. The presumption is so significant, for instance, where both personal and common property are so intermixed that their separation is insurmountably impossible. So, in this regard, the only safest way out the court should opt for is to apply the presumption that the intermixed property is common property.

The importance of this cardinal presumption for the determination of personal and common property during dissolution of marriage need in no way be overlooked. The spouse claiming for a common property relies on the presumption that s/he bears no burden of proof. The proper application of the presumption itself totally makes it unnecessary that one need not look for evidence in support of his claim for common property. In other words, the spouse alleging that a certain matrimonial asset is a common property certainly benefits from the presumption as of right without any duty to adduce evidence to that effect.

There is no onus of proof on the spouse maintaining that the property is common. Furthermore, the statements of the spouse who maintains that a given property is common need not be used as a pretext to derogate from the presumption unless such statements amount to a clear admission that the property in question is personal.

Another point of noteworthy at this moment is with regard to the nature of the presumption. Accordingly, the legal presumption of common property is amenable to rebuttal by the spouse claiming the property to be personal. The standard of proof to rebut the presumption must be the preponderance of the evidence. Only persuasive arguments as substantiated with an evidence on the strength of proof would bar its enforcement and in all other cases, the application of the

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presumption must remain unaffected. In the course of determining the character of a property in dispute, if at all a proper determination is to be made, there must be a full application of the presumption by complete observance of the rules implicit therein.

### *2. Proof of Personal Property*

***Q. On what bases proof of personal property may be made during liquidation of pecuniary effects?.....***
**……**

Comprehensively dealt with in the proceeding sub-section is the determination of personal and common property during dissolution of marriage through the application of the bases legal presumption of common property. It has been stated that everything in the matrimonial estate is presumed to be the common property of the spouses. The determination of personal and common property must accordingly be made primarily on the basis of the presumption. This cardinal presumption of common property would only be rebutted by a preponderance of evidence.

Hence, it is absolutely necessary that a claim to personal property has to be substantiated sufficiently with the required proof. That means proof is a condition for personal property and the onus of the proof is thus on the spouse insisting on the assertion of the sole ownership of a given property. Therefore, only a successful proof made by the spouse would determine the character of the property as a personal one.

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Usually, proof of personal property may pragmatically be a cumbersome task for the spouse under duty to adduce sufficient evidence in support of his/her claim. Often, relevant evidence may not be readily available. Besides, it strictly requires the court's meticulous consideration of the evidence adduced as proof of personal property. There may arise complicated issues necessitating cautious scrutiny by the court in determining the personal character of the property.

Before an attempt is made to bring in to light the practice, the writer opts to highlight some major approaches followed in the course of the proof. Accordingly, there are some approaches on the basis of which proof of personal property is to be made. A closer scrutiny of the relevant provisions of our law indicates that the approaches, as followed by some foreign legal systems, are more or less enshrined in our law with certain limitations. Herein under are some of the selected approaches conforming to those embodied in our legal system.

***Proof on the Basis of Tracing***

As has been mentioned with special emphasis in this paper, it is a general presumption that property acquired during marriage constitutes common property. The source of the property so acquired may however vary. In such a case, one method of rebutting the general presumption is to trace the acquisition to personal property based on it source. Thus, "tracing" is the process of determining the character of the property by identifying the source from which it is derived. The approach is based on the notion that a property acquired subsequently retains the character of its source. For instance, if the property in question was acquired in exchange for entirely personal property during marriage, it will be personal property up on the demonstration of such fact.

In this example, the approach as employed in foreign legal system merely refers back to the character of the source of the property acquired later. However, under

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our law, the significance of the application of such method to rebut the presumption in this instance is incumbent up on the decisive declaration of the court approving the property so acquired to be personal. Thus, a mere indication of the source of a property through tracing alone is of no significance to determine the personal character of the property particularly when the source of the property is personal property. This is one of its limitations when employed under our law. Nevertheless, where the property in question is acquired in exchange for a common property, the property would unconditionally be common. This too seems somehow to be superfluous for the property, even without tracing, shall automatically be common.

Anyway, the spouse asserting that a certain property is his/ her own personal property can rebut the presumption by adducing evidence tracing to the source of the property.

***Proof on the Basis of Time of Acquisition***

In case the source of the property in question cannot successfully be traced or even if traced, where the approach proves to be of no help in determining the character of the property, then its time of acquisition is material. On the basis of this second approach, property acquired prior to marriage would be personal one up on production of evidence showing such time. Therefore, during dissolution of marriage, if any dispute arises between the spouses as to the character of a certain property, the determination would be made on the basis of its time of acquisition.

The approach may not, however, function where there existed a valid agreement that had transmuted the property acquired prior to marriage into common property. Thus, the mere reliance of the spouses on the approach may prove to be of no use

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where the other contesting spouse successfully produces the agreement showing the community of the property.

In connection with the approach at hand, despite its apparent simplicity, some delicate issues deserving special emphasis may crop up in determining the character of a property. Unavoidably, problems arise in case the process of acquisition overlaps both pre and post marriage period. For example, what is the exact point at which an asset is said to have been acquired when there is a series of steps in the acquisition? The acquisition of a property is usually the net effect of a series of acts over a period of time. One may thus hardly point out the exact time of acquisition to determine the character of the property.

For such a perplex issue, some foreign legal systems apply the theory of "inception of title" that fixes the character of the property at the time when a property interest is acquired. The theory usually characterizes property at the point in time when it expands from a "mere expectancy" to a property interest which may vary depending on the nature of the property. In this regard, it may be important to envisage instances like when property is acquired through prescription or adverse possession or like the case of insurance policy for which the process of acquisition may overlap both pre and post marriage period.

***Q. Can a spouse claim for a payment from an insurance policy entered into on the life of the other as a common property?.....***

**……**

An insurance policy purchased by the husband on his life and in which no one was designated as a beneficiary would be personal property of the spouse under the

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inception of right test up on its purchase through the first payment made prior to marriage despite the subsequent payments made during marriage. In this regard, Art.659 of the Commercial Code of Ethiopia provides that the insurance policy shall come into force on the day when the policy is signed unless otherwise expressly specified to the effect that the policy shall only come into force after the first premium has been paid. Thus, the characteristic of the inception of title theory is that the character of property remains that which it was at the inception of right unless positively changed by operation of law or act of the parties such as transmutation agreement or gift.

At this juncture, based on the foregoing example, it is important to contemplate the case where the insurance policy with no designated beneficiary is entered into during marriage. From a quest to this end in the cumulative reading of Art.705 and 706 (3) of our Commercial Code, it could be noted that where no beneficiary has been specified in a life insurance (whether the policy is entered into prior to or after the marriage), the capital to be paid by the insurer to the subscriber- spouse shall be regarded as the personal property of that spouse. However, there is an inconsistency between the aforecited provisions of the Code and Art. 62(2) of the Revised Family Code particularly where the policy has been entered into during marriage.

The Commercial Code which specifically deals with life insurance as per the aforementioned provisions characterizes the sum obtained thereof as the personal property of the subscriber- spouse, whereas the Family Code generally characterizes "all property" acquired onerously during marriage as common property unless declared personal as per Art.58(2) of the Code. In such a case, whatever the tenability of the argument may be, in an attempt to remove the inconsistency, one may logically argue on the basis of rule of interpretation that the provisions of the Commercial Code are special to prevail over that of the

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Family Code phrased in general terms. Recognizing that the abovementioned codes are of two different fields of law, the sense of the term "special" for the propose of this interpretational must be construed to mean that the former is greatly devoted to govern the point in issue as opposed to the latter which fails to make even a specific mention of it.

In a nutshell, despite some complicated issues, the proof of personal property may be made on the basis of the date when the property is acquired where sufficient evidence to that effect is made by the spouse.

***Proof on the Basis of the Manner of Acquisition***

The manner of acquisition, like the foregoing ones, may also be used as a ground of proof of personal property. On this ground, the spouse claiming the property as personal one may prove it by showing unequivocally the manner in which the property was originally a acquired. This approach may be of a great importance as far as the property is acquired gratuitously.

In this respect, the spouse may rebut the presumption of common property showing that the property in question was acquired through inheritance or donation solely made in his/her favor. To this end, the spouse could produce the document such as the will or the act (instrument) of donation evidencing the gratuitous acquisition of the property. But, in case the spouse fails to prove these facts persuasively to the satisfaction of the court, the unrebutted presumption remains intact to operate in favor of common property.

***Proof on the Basis of Declaration by the Court***

It has been expressly provided under Arts. 58(1) & 62(2) of the Revised Family Code that all property onerously acquired during marriage shall be the personal

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property of the spouse so acquiring it subject to the declaration to be made to that effect by the court as per Art. 58(2) of the Code. Then, the declaration of the property as personal one by the court would eventually be used as a ground to rebut the presumption of common property during dissolution of marriage. Hence, the spouse so claiming could simply produce an evidence showing the declaration.

The declaration has an overriding importance as compared to those discussed herein above in that proof on the basis of the declaration is so simple as far as the declaration is made. Furthermore, where there is such declaration, a resort to the aforementioned approaches would be of no significance as such for the demonstration of the declaration itself suffices to rebut the presumption.

It must further be noted that such declaration should be made during the continuance of the marriage. Because when the marriage is terminated, the issue would normally be the determination of personal and common property inconsequence of the liquidation of pecuniary relations rather than the declaration required under Art. 58(2) of the Revised Family Code. With this point in mind, a question may be posed as to whether separation of the spouses without dissolution of the marriage has the same effect regarding the declaration.

***Q. When should such a declaration be made?.....***
***……...***

In must further be noted that such declaration should be made during the continuance of the marriage. Because when the marriage is terminated, the issue would normally be the determination of personal and common property in consequence of the liquidation of pecuniary relations rather than the declaration required under art.58(2) of the revised family code with this point in mind, a question may be posed as to whether separation of the spouses without dissolution of the marriage has the same effect regarding the declaration.

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In this instance, as opposed to the formal dissolution, the living apart of the spouses does not prohibit the spouses from requesting the court for the declaration. Another important point worthy of note is also that the scope of art 58(2) in accordance with which the declaration may be made by the court is limited only to *property acquired by onerous title*. Thus, for a proof of a certain property acquired gratuitously, such as inheritance and donation, there is no instance to rely on the ground of the declaration since no declaration would totally exist for the property so acquired.

Generally, the proof of a personal property acquired during marriage may easily be made by showing the fact that the property has been declared personal by the court. But where there is no declaration to that effect by the court the property shall be *ipso jure* part of the common property unless proved to the contrary on the basis of other grounds. Moreover, in course making the declaration itself, the court must be furnished with convincing evidence showing that the acquisition was made with onerous title of a personal nature. Inability to adduce the required evidence to buttress the request entails its rejection and consequently the application of the presumption.

The other method employed, for instance under French law to establish the character of the property is property title. Under its family law, in particular, for immovables, property titles usually prove the origin of the property either as personal or common property.

Therefore, in all the foregoing approaches, the spouse claiming for a personal property during dissolution of marriage is duty bound to adduce sufficient evidence to buttress her/his allegation. The methods may be used separately or jointly depending on the nature of the case.

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In nutshell, for a proof of personal property, there are several grounds under our law on which a claim to personal property may be made. Those grounds are, in one way or the other, embodied in the approaches comprehensively illustrated above and need not be reiterated further.

For any of assertion made on any of those grounds, it is necessary that the claim must be substantiated with proof. The evidence required to substantiate such a claim may not always be of the same sort as the evidence has to be determined in light of the grounds for the allegation having due regard to the relevant provisions of the law.

Under French law, for example, the spouse seeking to retake movable property acquired prior to marriage must establish his/her sole ownership according to general law which excludes proof by hearsay evidence unlike movable property acquired during marriage. Thus, for a premarital movable asset, the presumption of common property can be rebutted only by the proof of adverse title that in turn excludes proof by witnesses for fear of fraud. Under our law, as far as the knowledge of the writer is concerned, there seems to be no such distinction between the nature of the evidence to be adduced as regards property acquired prior to and during marriage.

So far, a thorough discussion has been made with regard to the various grounds on the bases of which proof of personal property could be effected to rebut the presumption of common property. It has also been attempted to deal with some important issues susceptible to arise in connection with proof of personal property.

Once the marital properties are characterized as such up on any of the above grounds, each spouse has the right to retake his personal property in kind. In case

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the price of a personal property alienated has fallen in the common property, the owner has the right to withdraw there from, beforehand, money or thing of value corresponding to such property.

Where both spouses have such right, each of them shall take their respective share from the common property in proportion to their contribution. Such aright under the civil code should, however, be exercise prior by the wife before the husband takes such a share from the common property. Moreover, the concerned spouse may also claim indemnities from the other on the ground of bad administration kind of the property committed or on the ground of adverse acts or acts without mandate or fraud as far the acts are performed within five years before the dissolution of the marriage.

***Q. What rule of partition of common property is adopted in our law?***

***At 90-(1) partition of common property***

***Without prejudice to the provisions of the preceding Articles and agreements entered into by the spouses, Common property shall be divided equally between the spouses.***

After retaking of personal property and up on partition of common property, the principle of equitable division may be applicable as par the agreement of the spouses as opposed to the principle of equal division of common property between the spouses adopted by our family law

Even under the law, the pinnacle of equal division by itself is subject to an exception where indemnity awarded by the court to one of the spouses due to the fault of the other spouse is to be deducted from the share of the spouse at default in the common property. In such case , there shall not be an equal division of a common property between the spouses.

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As a rule, partition shall be made in kind in such away that each spouse receives some property from the common property unless it is not possible to divide such property equally. Where such an instance occurs the inequality of shares in kind shall be set off by the payment of sums of money. In the course of partition in kind, the utmost care shall be taken with regard the preference of the spouses so as to give each of them the most useful property. For example, for a spouse who is a tailor a sewing machine if any is a property most useful to him.

***Q What if the properties can't be divided in kind?.....***

**……**

Despite the general rule of partition in kind for most properties, there are properties which are indivisible by their nature or though divisible, where are difficult to divide.To this effect, as per Art.92(1) the R.F.C failing agreement of the spouses as to who shall have that property in his share, such property shall be sold and the proceeds thereof shall be divided between them. The condition of sale may be agreed up on by the spouses or in its absence; the sale shall be made by auction.

Finally, a point of worthy note as part of liquidation of pecuniary effects is the payment of debts of the spouses. Accordingly, where there is a debt incurred by ether spouse or both spouses conjointly, and such debt is confirmed by judicial decision, or acknowledged by the spouses, such debt shall be paid before partition of property. However, regarding a dent which was to be paid from the common property but due b after dissolution of the marriage and after partition of the property, each spouse shall be liable in proportion to his share, For a debt concerning one of the spouses, only such spouse shall pay it

*Self-assessment Questions*

*1. Explain what liquidation involves in the liquidation of pecuniary relations.*

*2. How is liquidation of pecuniary effects regulated up on dissolution of marriage?*

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*3. Distinguish between liquidation by agreement of the spouses and liquidation by operation of the law.*

*4. Identify the grounds for the application of the approaches in the process of liquidation.*

*5.What is the difference between marriage contract and other agreement of the spouses in regulating liquidation of the pecuniary effects?*

*6 "The provisions of the law provided in the family code are all gap filling provisions applicable only where the parties fail to regulate the liquidation of their pecuniary relations." Is this assertion tenable? Why?*

*7. The rule of partition of common property is always in kind'' Is this statement valid?*

*8. Can you mention some of common properties which are indivisible by their nature?*

*9. Who should pay a debt in cured before marriage for the construction of a hues completed after marriage in case the marriage is disc owed before the debt is paid?*

### *3.2.3. Competent Tribunal(s) Over Liquidation of Pecuniary Effects*

***Q. Which tribunal do you think is authoritative over issues of liquidation of the pecuniary effects during dissolution of marriage under the Civil Code as well as under other revised family codes in Ethiopia?.....***
***…….***

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Under the preceding topic, unreserved attempt has been made to dwell in-depth on the liquidation of pecuniary effects during the dissolution of marriage. Numerous issues pertaining to the determination have also been thoroughly hammered out.

Now, under this section, too, a similar endeavor would be made to indicate the authoritative body (tribunals) having the power to make the regulation. Accordingly, a brief highlight would be made to show specifically the power of the court and the family arbitrators both under the 1960 Civil Code regime and the Revised Family Code currently in force in adjudicating over the various issues of liquidation during dissolution of marriage.

Under the 1960 Civil Code of Ethiopia, both the family arbitration and the court have the primary power to liquidate pecuniary effects at the end of the marriage. However, there is a basic difference in their power over the liquidation of the pecuniary matters during dissolution of marriage..

***i.The Adjudicatory Power of the Family Arbitrators Over Liquidation***

***Q. Dear learner, can you identify the difference in the adjudicatory power of the family arbitrators over liquidation of pecuniary effects under the Civil Code and revised family codes in Ethiopia?.....***

**……**

Basically, the adjudicatory power of the family arbitrators under the 1960 Civil Code regime over family cases is so vast. For that matter, the Code compels a

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resort to the arbitrators whenever there arises a family dispute. Such compulsory resort to the arbitrators has made the dispute out of the original jurisdiction of the regular courts. As a result, except when it comes by way of appeal and under certain limited circumstances, it is entirely within the power of the family arbitrators to settle amicably family dispute of matrimonial nature or others.

The assumption of the drafter of the Code in this regard is that, for purposes of deciding family disputes, family arbitrators are more qualified than the judges in the regular courts, in other words, that the former are experts in the field. The assumption seems to have been inspired by the fact that the family arbitrators, in contrast to the courts, are often closer to the litigant-spouses to fish out informally the necessary information to resolve the dispute amicably.

Now, to begin with, as may be noted from the previous discussion made in relation to the power to adjudicate over dissolution of marriage under Civil Code, the family arbitrators have the power to pronounce divorce following a petition made to that effect either by both spouses conjointly or one of them. Once the divorce is pronounced, the family arbitrators shall then regulate the consequences thereof in their judgment. In particular, they may make some provisions in the judgment as may be necessary for the liquidation of the pecuniary relations between the spouses.

Hence, the family arbitrators have the power to make the determination of personal and common property by making certain guidelines in their judgment for the liquidation of pecuniary relations. For the purpose of the liquidation, the family arbitrators shall primarily attempt to make the spouses agree on the conditions of divorce particularly where the former fail to make the spouses renounce the petition for divorce based on non-serious cause.

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In such a case, the agreement may fortunately put an end to further disputes when the family arbitrators approve the agreement on the basis of which the sensitive issues of determination would safely be disposed of in accordance therewith. The family arbitrators may also approve the validity of other contracts concluded during marriage regarding the pecuniary relations of the spouses. This means that the family arbitrators, through its approval of the contract, would in effect determine the character of the matrimonial estate based on the agreement of the spouses on the basis of which the liquidation would be made.

In default of any agreement serving as a basic frame of reference for the determination, the family arbitrators have the power to determine personal and common property in pursuance of the law. In furtherance of their power, they may also award to one of the spouses a greater portion or even the whole of the common property as well as a portion not exceeding one-third of the personal property of such other spouse.

It is also worth mentioning that as per Art. 648(2) of Civil Code, the power of the family arbitrators stretches to the designation of property acquired onerously during marriage to be personal at the request of the spouse concerned.

On the other hand, as opposed to their power under the 1960 Civil Code, the power of the family arbitrators over liquidation of pecuniary effects under the Revised Family Code has been greatly reduced only to limited instances. Following the dissolution of marriage by divorce, upon the refusal of the spouses to agree on the conditions thereof, the family arbitrators may also be authorized by the court to decide on the conditions of divorce which is in fact subject to the approval of such court. Hence, the power of the family arbitrators over liquidation of pecuniary effects of marriage upon divorce depends *ipso jure* on the authorization from the court.

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Moreover, they have been denied of their former power to designate a certain item of property as a personal property of the spouse making the request. The power has been vested on the court which had formerly no such power to designate the property.

Therefore, from the foregoing overview, it is crystal clear that the former immense power of the family arbitrators under the previous Code in settling pecuniary disputes during dissolution of marriage has been shifted to the court. The reason behind such a gross shift of power may be attributed to the ineffectiveness of the institution as it was supposed to be.

### *ii. The Adjudicatory Power of the Court Over Liquidation*

***Q. What is the scope of the adjudicatory power of the court over liquidation of pecuniary effects of marriage as compared to that of the family arbitrators?.....***
**……**

Under the Civil Code, the power of the regular courts to determine matrimonial issues is confined only to limited instances and appellate cases. One of the limited instances where the regular court may exercise first instance jurisdiction to liquidate pecuniary effects of a marriage is in case the marriage is dissolved by the order of the court as a sanction of one of the conditions of the marriage. In this instance, following the dissolution of the marriage for want of the fulfillment of the required conditions, the court shall regulate the consequences of such dissolution. As it is one of the consequences of the dissolution to be regulated in this instance, the court has thus an original power over the liquidation of

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matrimonial effects. The justification to this end seems to emanate logically from the fact that, in this particular instance, it is only within the competence of the court to terminate such marriage by its order the consequence of which should so be decided by the court itself.

The other situation where the court could indirectly exercise any power over the determination of pecuniary matters may be where contracts made between the spouses during marriage are brought to the court for approval. In exercising such concurrent power, the approval when made by the court may inevitably determine the character of a certain matrimonial asset especially where the subject matter of the contracts is pecuniary in nature. With no doubt, the contracts so approved would serve as a frame of reference during liquidation of pecuniary effects.

Therefore, a part from the aforementioned instances, the power of the regular courts to liquidate pecuniary relations during dissolution of marriage is, in principle, confined to where the case is lodged before them by way of appeal. Thus, all appellate cases against the awards of the family arbitrators are, both *ipso facto* and *ipso jure*, with in the power of the regular courts.

However, the adjudicatory power of the court over family matters under the law currently in force is relatively broader in the sense that the determination of all issues of divorce and the consequences thereof has been made to fall within the competence of the court. That is, only the court is competent to decide on divorce as well as to decide or approve the effects of divorce among which liquidation of pecuniary interest is important one.

Likewise, where the marriage is dissolved on other grounds, it is the power of the court to regulate the consequences thereof. Because, once the marriage is terminated by the order of the court as a sanction or by the declaration of absence,

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as the case may be, it is logically within the power of the court to settle, *inter alia*, matrimonial issues arising there from.

The court, in determining pecuniary issues arising in relation to the liquidation of pecuniary effects may rely on the agreement of the spouses or the law or both as is elucidated above. The court may thus base the exercise of its power on the agreement as its basic frame of reference for purposes of determining personal and common property at the end of the marriage.

In doing so, the court shall have due regard to the true expression of the intention and free consent of the spouses to avoid any adverse effect on the interest of the spouses.

Where there existed no valid agreements or contract of marriage to serve as a frame of reference, as per Art. 83(2) of the Code the court may by itself or though arbitrators, or experts, or by any other means it thinks appropriate, decide on the conditions of divorce. In such a case, the court would liquidate the pecuniary effects of the marriage through the operation of the gap filling provisions of the law as elaborated earlier.

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### 3.3. Proof of a Marriage.

**Q When dose proof of marriage arise and what are the purposes of proving it?.....**

**……**

Basically, proof of marriage could be understood to mean ascertainment of the existence of marital relationship between two persons of opposite sex. The time when proof of marriage arises depends on the reasons for proof of marriage or the purposes contemplated to be achieved based on proof of a marriage. In case the existence of marriage is disputable, there is the need for proof of marriage in court.

It may be raised by the spouses or any person who wants either to object the marriage or take advantage of it. It is a rule of evidence that the party who alleges the existence of a certain fact has to prove its existence.

**Q. What are the possible modes of proof of marriage?**

……
……
……

Under Ethiopian family law, there are three modes of proof under the civil code while only two of them all currently adopted under the Federal Revised Family code and the family codes of other regional states. The modes of proof of by certificate of marriage, possession of status and act of notoriety whiled the revised Family code does not include proof by act of notoriety.

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### 3.3.1. Proof by Certificate of Marriage

***Q. How does Certificate of marriage prove the existence of marriage and what is the certificate?***

In accordance with Art. 94 of the Revised Family code, marriage is proved by producing the certificate of marriage drawn up at the time or after the celebration of the marriage in accordance with the Law. Even though there is no definition of the tem, a certificate of marriage is that which is issued by the officer of Civil status who is authorized to record the marriage in accordance with Art.28 of the code.

It may be recalled from the previous discussion made under chapter two that certificate of marriage shall be issued for all from of marriage up on their registration by officer of Civil status or in has default by the competent organ authorized for this purpose Hence, the certificate of marriage, inter alia, indicates the form of marriage under which the celebration was carried out. In other words, The certificate of marriage as a primary documentary evidence proves the type of the celebration of the marriage, the fact that indicates the existence of a marriage.

***Q. What is the practice with regard to proof by marriage certificate*?**

Presently the most widely established practice in most parts of the country is that the officer of a particular municipality instead of officer of civil status issues certificate of marriage only when the marriage is celebrated in accordance with the formalities of civil marriage . Registration of and issuance of certificate marriage for other forms of marriage are not a common practice . Further more courts usually accept marriage licenses issued by religious institutions and written documents of customary marriages as a proof for the existence of a valid marriage .

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### 3.3.2 Proof by Possession of status

***Q. When does proof by possession of status apply?***

……

……

……

Proof by marriage applicable in default of certificate of marriage. As is stated under Art. 95 of the R.F.C when it is difficult to prove marriage by producing the certificate of marriage due to non registration or if any loss of such register marriage shall be proved by the possession of status of spouse .

Q. What does possession of status mean and how is the status established ?

***Art. 96- Possession of status (1) Definition***

***A man and a woman are deemed to have the possession of status of spouses when they mutually consider them selves and live as spouses and when they are considered and treated as such by their family and the community .***

From the reading of the above cited provisions two essential elements of possession of status may be pointed out from the definition . These elements are:-

- the fact that a man and a woman mutually consider themselves and live as spouses and;
- the fact that they are considered and treated treated as such by their family and the community .

There for the existence of possession of status would be established only when both of the above of the above elements are proved by reliable evidence. In proving the first element worth noting is the fact that unilateral consideration of the status does not amount to its existence . Where a person alleging the

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existence of marriage proves the possession of status spouse in accordance with the preceding provisions the court may presume that marriage has been concluded .

Nevertheless, it should be borne in mind that this second mode of proof of marriage is entirely different from the first mode of proof . the distinction lies in the point that celebration of marriage is not indicated as one of the requirements to prove marriage by possession of status which is the case for the first mode of proof. Furthermore despite the silence of he revised family code as to the nature our type of evidence in proof of existence pf the status . Art .700 (1) of the civil code as well as Art. 109 (1) & (2) of the family code of the SNNP regional states provide for proof by producing four witnesses who were present at the conclusion of the marriage . The presumption of the status so established may be rebutted by producing any kind of reliable evidence But under the civil code and that of SNNP, the possession of the status established may be contested by producing four witnesses .

The third mode of proof which is applicable only under the civil code is proof by act of notoriety . In terms of its significance this mode of proof is the last mode resorted ot in default of the aforementioned modes of proof . This is clearly provided under Art.701 & 702 of the code that in default of possession of status or where it is contested , the existence of the marriage is proved by an act of notoriety approved by the court where such mode of proof is authorized by the court .

## Self assessment Questions

1. Mention some of the purposes of proof of marriage
2. Point out and explain the modes of proving existence of marriage under our family law.

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3. Distinguish between proof of marriage by marriage certificate and possession of status .
4. When is proof by act of notoriety is applicable?

## Chapter Summary

Even though marriage is a continuing relationship between the spouses that is presumably intended to remain intact for a long period, possibly lifetime, the relationship may be susceptible to termination on various grounds. The legal bond once created between the spouses, having their consent as its underlying foundation, may unfortunately be broken resulting in the rupture of the relations stemming from the marriage.

The dissolution of marriage is defined as" the breaking of the conjugal bond and the cessation of the effects the union of the spouses produced either as regards themselves or as regards third parties. This definition underlies the termination of the legal union and its effects due to dissolution of marriage. Dissolution of a marriage signifies the process of dissolving either a valid existing marriage or annulment effected for a cause by the judgment of a competent court. Hence, dissolution of a marriage is the termination of legal union as husband and wife together with its effects due to divorce, annulment of marriage, refusal to cohabit, abandonment, death and declaration of absence.[1]

However, the various grounds for the dissolution of marriage, though not basic, may differ from one legal system to the other. That is, some countries reasonably

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limit the grounds for dissolution while others are liberal with some rationale behind their stand. The reason behind limited and stringent grounds of dissolution of marriage seems to have been embodied in the necessity to maintain the unity of the family once established by the marriage. So, the spouses are not allowed to obtain dissolution of marriage on every ground other than those provided by law.

On the contrary, other legal systems provide for more liberal grounds of dissolution of marriage. Such liberal stand finds its justification in the fact that marriage, which is fundamentally founded on the mutual consent of the spouses, naturally perpetuates only insofar as such consent subsists (exists).

Under Ethiopian legal system, there are various grounds for dissolution of marriage that are almost similar to the grounds mentioned herein above. Accordingly, pursuant to Art. 663 of the Civil Code of 1960, the various grounds are death, annulment of marriage as a sanction of one of the conditions of marriage and divorce.

However, the code amazingly categorizes the causes of divorce into serious causes and other grounds (non- serious causes). Such categorization in effect serves as divorce hindrance device intended to discourage spouses from divorce on each and every minor grounds and is ultimately meant for the purpose of keeping the marriage intact. Currently, such distinctive categorization has been abrogated under the Federal Revised Family Code and the family codes of several regional states in Ethiopia.

The other ground that brings the dissolution of marriage is the declaration of absence or death by the court. In principle, the spouses are mutually bound to live together though exceptionally they may agree to live separately for definite or indefinite time. But, where one of the spouses disappears and his/her whereabouts

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is unknown to the other or his death is certain, following declaration of absence or death to be made by the court up on the application made to this effect by that other spouse, the existing marriage would be dissolved.

Annulment of marriage, as mentioned above, is also another ground for termination of marriage. Basically, for the existence of a valid marriage, the essential conditions required by law should be complied with. The conditions, when not complied with, serve as impediments to invalidate a marriage for which impediments to a marriage may be classified as minor, relative and absolute impediments.

Therefore, a marriage may be dissolved when concluded in violation of the essential conditions required by law to be fulfilled. However, it should be noted that the effects of the conditions are not the same and the law does not attach the same importance to all of them. As comprehensively elucidated above, some allow the marriage to stand once celebrated while others are more severe and their violation entails dissolution of the marriage.

So far, it has been discussed that a marriage may be dissolved on any of the above-mentioned grounds. It is also worth mentioning that, despite the various forms of marriage in Ethiopia as recognized by the law, the causes of dissolution of the marriage are the same.

Nevertheless, as regards the party having the right to require the dissolution of a marriage, it depends on the ground of dissolution. Thus, apart from dissolution of marriage by court's order due to violation of one of the essential conditions of marriage, the parties are usually the spouses themselves. For instance, it is the right of either or both spouses to petition for divorce and nobody else. But, where the marriage is dissolved due to violation of one of the essential conditions of

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marriage, the parties may be the spouses, the public prosecutor or any interested person as the case may be.

Whatever the cause may be, once a marriage is dissolved due to any of the aforesaid grounds, the dissolution gives rise to various legal effects. Generally, the effects of dissolution of marriage are the same whichever the form of celebration of the marriage. Accordingly, the dissolution of a marriage terminates the personal and pecuniary relations established during marriage. The rights and obligations created between the spouses by the marriage inevitably come to an end.

Therefore, the various personal effects of marriage such as the duty to cohabit together and the duty to fidelity, *inter alia,* will be no more inexistence. The reason is that these personal relations have originally stemmed from the legal union established between the spouses which has been terminated. So, the stem having been uprooted from its very bottom, the branches thereon will naturally wither away.

To put it in a nutshell, dissolution of a marriage in effect dismantles the two underlying principles of the equality of the spouses and the unity of the family up on which the personal relations were established. However, the responsibility of the spouses to maintain their children endures regardless of their separation.

Aforementioned above as the other effect of dissolution of marriage is the liquidation of pecuniary relations between the spouses. That is, the pecuniary interest established by marriage between them dissolves due to the termination of the marriage. The matrimonial property of the spouses, which is the direct outcome of the marriage, will be liquidated and partitioned between the spouses. The matrimonial liabilities, if any, shall also be divided between them.

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Similarly, incases the spouses have personal property of their own, subject to the necessary proof, they can retake their respective personal property. There is a presumption of law that all property acquired during marriage shall be the common property of the spouses. Therefore, during liquidation of pecuniary effects of marriage, every thing in the matrimonial estate is presumed to be the common property of the spouses and accordingly be partitioned. As a result, any claim to personal property has to be substantiated with sufficient proof.

Any potential disputes likely to arise during dissolution of marriage as regards liquidation of pecuniary effects of marriage may be settled in accordance with the marriage contract or other agreement made during the continuance of the marriage and approved by the court, if any. That is to say, the manner of the liquidation of their pecuniary relations would be regulated by the agreements. In default of such agreements, the legal provisions of the law will come in to application.

Proof of marriage under Ethiopian legal system has remained one of the most complex areas for courts. One of the fundamental reasons for such complexities is the absence of the office of civil status to register marriages and issue the certificates therefore. In case the existence of a marriage is disputable for various reasons interested person can raise the need for proof of marriage in court.

It is a deep rooted rule of evidence that the party all legging the existence of a marriage has to prove it by the modes of proof provided by law . Generally a marriage may be proved by marriage certificate or in its default by possession of status of the spouses . The third and last mode of proof which is however , not recognized under the various revised family codes bother than the civil code is proof by an act of notoriety up on authorization and approval by the court .

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## Review Questions

***Answer the following questions in accordance with the relevant provisions of law.***

1. H and W are spouses who got married two years ago when W was 17 years old. A public prosecutor has come to know of this fact very recently after the spouse has attained 18 years of age. Then, can the public prosecutor apply to the court for the dissolution of the marriage? Why?

2. Mohammad and Kedija is couple with two children. Their marriage was concluded in Afar as per the provisions of the civil code as there was no revised family code enacted by the regional state. Despite their marital relationship for a period of six years, kedija has not been happy as such with her husband for which she wants to divorce him. Assume that she seeks your legal advice as to whether she can file a petition for divorce in the regional court. So, what would be your legal advice on the issue? Would your advice be different in case the petition is to be filed in oromiya regional court?

3. Assuming that Ato Tufa and W/ro Bontu had been spouses for about 10 years before they go to divorced a year ago. The husband had acquired a villa and a taxi before the marriage. The contract of marriage concluded on the data of their marriage did not include the properties. The taxi was replaced by a minibus. Now, the wife claims for her share in the properties arguing that they belong to common property. Is her argument valid? Why?

4. If a man fills a woman's name in a " Kebele " record or an "Idir" record as his wife can that be a conclusive evidence to prove that the man and the woman are spouses?

5. H and W were spouses having both personal as well as common assets. H had entered into a contract of loan before the marriage. He built a house the money he borrowed form Ethiopia Commercial Bank. Now, after ten Years of marital life, their marriage is dissolved on the ground of the existence of a prohibited degree of relationship by consanguinity. Then, who should pay the debt owed to the Bank?

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6. "In determining the character of a marital property as a personal or common property, no proof is required from the spouse claiming common property."
Is this statement valid?

## CHAPTER ONE

### Key Answers for the Review Questions

1. The rational behind the protection of the family is due to the fact that family is a fundamental unit of society. Hence, family is entitled to legal protection by the state and the society. Such a protection is further justified by the dual nature of the family as a private relationship and public institution.

3. Dear learner, read Art. -100 (1) of the Revised Family Code.
A). Affinity relationship.
B). No relationship!
C). Yes!
D). There is a family relationship by consanguinity between the children.

7. No! The reading of Art. 9 the RFC does not indicate the existence of double affinity.

9. A). The right to intestate succession which emanates from blood relationship.

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B). The duty to supply maintenance and the legal basis for such a duty is the family relationship.

## CHAPTER TWO

- ✓ Case I – refer to the part that deals with non-observance of period of widowhood .
- ✓ Case II – refer to the part that deals with violation of consent and to the part that deals with violation of the minimum marriageable age set by the law .
- ✓ Case III - refer to the part that deals with violation of consent.
- ✓ Case IV - refer to the part that deals with effect of conclusion to bigamous marriage.
- ✓ Case V - refer to the part that deals with violation of consent.

## CHAPTER THREE

1. Because of the disappearance of the ground of impediments, the public prosecutor can't apply for the dissolution of the marriage after the spouse has reached majority.

4. No! It is not a conclusive proof. Rather, it may be considered as supportive evidence in addition to others.

6. Yes. since the existence of common property is legally presumed, the spouse claiming on this ground is entitled to the benefit of the legal presumption .