BAHIR DAR UNIVERSITY
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Commentary on Family Law
(For Distance Education)

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TABLE OF CONTENTS

TITLE

PAGE

INTRODUCTION

----------1

CHAPTER ONE GENERAL REMARKS ---------- 4

Definition of Family ---------- 4

Significance of the Family ---------- 5

Legal protection of the Family ---------- 9

Family Law Reform and the Forces at the Background ---------- 11

General ---------- 11

Ethiopian perspective ---------- 13

Power to Enact Family Law ---------- 14

Sources of Family Relationship ---------- 15

Relationship by Consanguinity ---------- 16
Relationship by Affinity ---------- 21
Adoption ---------- 23
Legal Effects of Family Relationships ---------- 24
Family Relations Confer Rights on Persons ---------- 24
Family Relations Impose Obligations on Persons ---------- 24
Family Relationships as Ground of Prohibition ---------- 25

Exercise

CHAPTER TWO CONCLUSION OF MARRIAGE ---------- 27

Definition of Marriage ---------- 27
Betrothal ---------- 31
General ---------- 31
Parties to the Contract ---------- 32
Form and Other Requirements ---------- 33
Effect of Betrothal ---------- 34
Breach of Betrothal ---------- 35

TITLE

PAGE

Essential Conditions for the Validity of Marriage ---------- 37

Formality Requirements of Marriage ---------- 37
Civil Marriage ---------- 38
Religious Marriage ---------- 39
Customary Marriage ---------- 39
Substantive Requirements of Marriage ---------- 42
Consent ---------- 43
Marriageable Age ---------- 47
Relationship by Consanguinity and Affinity ---------- 49
Bigamy ---------- 52
Representation not Allowed ---------- 55
Judicially Interdicted Persons ----------56
Period of Widowhood ---------- 56
Opposition of Marriage ---------- 58
Registration of Marriage ----------61

Exercises

CHAPTER THREE EFFECTS OF VIOLATIONS OF ESSENTIAL CONDITIONS OF MARRIAGE ---------- 64

General ---------- 64
Void Marriage ---------- 65
Voidable Marriage ---------- 66
Effects of Violations of Marriage Requirements Under the Federal Revised

Family Code ---------- 67
Effects of Violations of Substantive Requirements of Marriage -- 67
Absolute Impediments to Marriage ---------- 67
Relative Impediments to Marriage ---------- 68
Prohibitive Impediments ---------- 73
Effects of Violations of Formality Requirements of Marriage ---- 74

TITLE

PAGE

Exercises

CHAPTER FOUR EFFECTS OF MARRIAGE ---------- 76

General ---------- 76
The Contractual Regime (Contract of Marriage) ---------- 77
Legal (Statutory) Regime ---------- 82
Personal Effects of Marriage ---------- 83
Pecuniary Effects of Marriage ---------- 89

Exercises

CHAPTER FIVE DISSOLUTION OF MARRIAGE AND ITS EFFECTS -- 119

Causes of Dissolution of Marriage ---------- 119
Divorce as a Cause of Dissolution of Marriage ---------- 122
Divorce by Mutual Consent of Spouses ---------- 125
Divorce by Petition ---------- 129
Liquidation of pecuniary Relations Between Spouses ---------- 138
Liquidation by Agreement ---------- 139

Liquidation in Accordance with the Law ---------- 140

Exercises

CHAPTER SIX PROOF OF MARRIAGE ---------- 146

Certificate of Marriage ---------- 147

Possession of Status ---------- 148

Exercises

CHAPTER SEVEN IRREGULAR UNION ---------- 154

Definition ---------- 154

Why Do People Cohabit? ---------- 156

Is It Justified to Recognized Irregular Union Under the FRC? ---------- 157

Effects of Irregular Union ---------- 159

TITLE

PAGE

Absence of Bond of Affinity ---------- 159

Duty to Contribute the Common Expense ---------- 161

Community of property ---------- 161

Filiation of Children ---------- 165

Termination of the Union ---------- 165

Proof of Irregular Union ---------- 166

Exercises

CHAPTER EIGHT FILIATION ----------169

Ascertainment of Paternity and Maternity ---------- 169

Maternal Filiation ---------- 170

Paternal Filiation ---------- 172
Presumption of Paternity ---------- 173
Acknowledgement of paternity ---------- 177
Judicial Declaration of Paternity ---------- 183
Legal Conflicts in Regulating Paternity ---------- 191
Assignment of Paternity by Agreement ---------- 196
Proof of Filiation ---------- 198
Record of Birth ---------- 198
Possession of Status ---------- 199
Action to claim Filiation ---------- 200
Contestation of Filiation and Disowning ---------- 202
Contestation of Filiation ---------- 202
Disowning ---------- 204
Exercises
CHAPTER NINE - ADOPTION ---------- 212
Definition and Purpose of Adoption ---------- 212
Essential Conditions of Adoption ---------- 213
The Requirement of Consent ---------- 213
Who may Adopt? ---------- 218

TITLE

PAGE

Age of the Adopter ---------- 218

Mental and Physical Capacity of the Adopter ---------- 220

Adoption Between Blood Relatives ----------220

Nationality of the Adopter ---------- 220

Who may be Adopted? ---------- 222

Impossibility of Adoption by Several Persons ---------- 224

Approval of the Court ---------- 225

Effect of Adoption ---------- 226

General Effects of Adoption ---------- 226

Specific Effects of Adoption ---------- 227

Status of the Adoptive Parent and the Adopted Child ---------- 227

Rights and Duties of the Adoptive Parent and the Adopted Child ---------- 228

Effect of Adoption on the Right of Inheritance ---------- 228

Inheritance from the Adopted Child ----------228

Inheritance by the Adopted Child ---------- 230

Revocation of Adoption ---------- 231

Exercises

CHAPTER TEN OBLIGATION TO SUPPLY MAINTENANCE ---------- 235

Subject Matter of the Obligation ---------- 235

Persons Between Whom the Obligation Exists ---------- 237

Possibility of Losing the Right to Claim Maintenance. ---------- 238

Conditions for the Existence of the obligation and its Execution. ---------- 240

Plurality of Debtors ----------243

Exercises

INTRODUCTION

Family as a fundamental unit of a society has existed perhaps since the existence of mankind though its form might vary from place to place and time to time. It is composed of members united by ties of marriage, blood or adoption. It is, among other things, the center of procreation, socialization and companionship. This unit has been given due recognition and protection by different international instruments and domestic laws of virtually every legal system. As this institution is most often formed by marriage, the state through the machinery of law controls the form of marriage relationship of spouses, parents and children and even the relationship between relatives to a certain degree.

The state regulation of family and marriage reflects the attitude of the society towards them and differs from jurisdiction to jurisdiction mainly depending on socio-economic development. Accordingly, virtually in every legal system, family law has been in a state of flux or reform.

Ethiopia has also been reforming her family law since the past few years. As the country has embarked on federal system of government since 1995, the law making power is shared between the Federal Government and the States. Hence, by revising the Civil Code provisions, the Federal Government has enacted a Family Code for the Administrative Council of Dire Dewa and Addis Ababa Administrative Region. The Regional States of Tigrai, Amhara, Oromia and SNNPE have also adopted their respective Family Codes.

This module aims at giving commentary on provisions of the Revised Family Codes so that the distance learner will have the requisite knowledge of the recently enacted Family Laws of Ethiopia. It also aims at high lighting the basic departures of the new Family codes from the 1960 Civil Code of Ethiopia and evaluating the rational behind the departures and the extent to which the Codes have rectified the short comings of the Civil Code.

The structure of the module normally follows the structure of the civil code and the revised family codes because structure wise they are more or less similar. It is believed that this approach makes the points of departure of the Revised Family Codes from the Civil code and the different positions taken by the new codes easily understandable.

The module is divided into ten chapters. Since one has to have the idea of the family before referring to the laws, governing it, in the first chapter attempt is made to define the institution of family, its significance, legal protection and general trends towards family law reforms. The final sub-section of this chapter briefly addresses the sources and effects of family relationship.

Chapter two deals with the definition of marriage, the institution of betrothal and conditions of marriage. Chapter three is devoted to the discussion of effects of violation of minimum marriage conditions.

In chapter four and five, effects and dissolution of marriage are dealt with respectively. Personal and pecuniary effects of marriage are the main points addressed under chapter four Causes and effects of dissolution of marriage are deeply considered in chapter five.

Chapter six and seven addressed proof of marriage and the institution of irregular union. Chapter seven, specifically, studies the definition of irregular union, the justification for recognition of the institution under the Revised Family Code, its legal consequences, and other related issues. Chapter eight highlights points pertaining to filiation including ascertainment of maternal and paternal filiation, proof of filiation and contestation of filiation.

In the ninth and the last chapter, adoption and obligation to supply maintenance are discussed respectively. Even if adoption as a source of family relationship is introduced in chapter one, it is deemed important to discuss in chapter nine the definition, conditions, effects and revocation of adoption in a detailed fashion. One of the effect of family relationship slightly touched upon in chapter one, i.e, the obligation to supply maintenance is elaborately discussed in chapter ten.

Finally, it is important to note that this distance education teaching material is written on the basis of the Federal Revised Family Code. The main reason for this is other regional family codes have been enacted by taking this code as a model. As a result, there is a close similarity among most provisions of the Federal Family Code and other Regional Family CodeS. Where the Regional Family Codes take a different stand on a certain matter, a comparative disussion is made. To have a clear understanding of the departures of the newly enacted Family Codes from the Civil Code, relevant provisions of the Civil Code are analyzed.

CHAPTER ONE

GENERAL REMARKS

Dear student, before going deep into analyzing the legal provisions relating to law of family, it is of a paramount importance to discuss some points that throw light to our further discussion. Therefore, it should be clear that this introductory chapter is inserted with this understanding.

In general, at the end of this chapter; the student is expected to:

- Define the concept of family;
- Enumerate the significance of family;
- Reason out as to why the law and the society extend legal protection to the institution of family;

- Discuss the justifications that warranted family law reform in Ethiopia;
- Explain sources of family relationships; and
- Identify legal effects of family relationships.

1.1 Definition of Family

The study of family falls within the scope of different disciplines of social science; such as, sociology, anthropology and social history. Because family relation gives rise to various relationships of great legal importance, it is, like wise, in some ways the concern of the law. The term "family" is defined in each discipline in a way that is fitting to the area.

In law, the concept of family could generally be understood in two senses in broad and narrow senses.

Understood in a broad sense, family is "a collective body of persons who live in one home or management". This is a definition given by Black's Law Dictionary. Family is also further defined to mean a collective body of persons, consisting of a parent and children, or other relatives, domestic or servants together in one house under the same head. It is evident, therefore, that the term family refers to group of persons related each other by marriage or blood or even with out any relation and living together under a single roof or management and comprising a house hold. Accordingly, distant relatives and even for that matter people living without having any relationship such as domestic servants may be regarded as members of the family. The important elements to be considered in this definition are:

1. The persons have to live in one house. That is to say, the residence element must be satisfied.

2. They must live under one management Stated other-wise, there must be a head who has a right, at least in a limited way, to direct and control those gathered in the house hold.

In a narrow sense, the term family has been defined as the group of persons who are united by marriage, by filiations or, even, but very exceptionally, by adoption. Compared to the broad or definition, this definition applies to family comprised of small number of persons. The important point here is the notion of relationship by blood, marriage or adoption.

In the narrower definition of family given by Planed, adoption is considered an exceptional way of creating family relationship. However, the exception element of adoption may not be viable for now a days adoption is being widely practiced as a natural consequence of recognition of same sex marriage, at least in some countries and an increasing tendency even among women of hetro sexual families not to give birth, though the expensive alternative of artificial insemination is there.

Another definition of the term (family) that can be categorized under the narrower definition is the one provided by the US Census Bureau. According to such definition, family is two or more persons who are related by birth, marriage or adoption who live together as one household. The last defining element that they live together though might be important for census enumeration and reporting, there are instances where family members do not live in the same household due to one or another reason.

Form wise, family may be of two kinds, namely nuclear and extended family.

A nuclear family consists of parent(s) and child (ren) though some argue that both parents must be present to constitute a nuclear family. Extended family, on the other land, includes relatives, in addition to the nuclear family, members who are ascendants and descendants (other than children) of the spouses and those who are collateral relatives.

When we come to the Ethiopian context, neither the 1960 Civil Code of Ethiopia nor the currently enacted Federal and Regional Family Codes define the term "family." Nonetheless, we have elements of relationship here and there which could serve as a base for a definition. In all laws, relations by blood and by marriage are recognized. There is relationship between ascendants and descendants in the direct line, and between persons who descend from one or more common ascendants in the collateral line up to certain degrees. There is also affinal relationship between a person and the ascendants and descendants of his spouse, and between a person and the collaterals of his spouse to certain degrees. Furtheremore, it is clearly provided that relationships would be created by a contract of adoption.

So, more or less, the concept of family under our family laws is similar to the second definition i.e., the narrower one, discussed above because, under such definition, too, the basic relations are emanated from blood, marriage or adoption.

At this juncture, it is essential to draw a distinction between a "family" and' "marriage", since some times the terms are used interchangeably. Where as marriage refers to the relationship between spouses(married couples), family arises out of marriage. The

term family usually connotes children and blood relations in contrast to the marital or conjugal ties formed legally through marriage. Marriage may be monogamous or polygamous which may take the form of polyandry or polygyny. However, valid marriage is not a necessary precondition for the existence of the institution of family as defined earlier. For instance, though a number of countries used to deny irregular union the status of marriage, it is unquestionable that children born of such unions and couples, may, at least if they live together, be considered as forming a family.

1.2. Significance of the Family

Why should we study, care for or protect the institution of family? What roles does the family play in the present day society?

Family, as a fundamental unity of a society, has been playing a number of roles. The most dominant view, however, is that, with industrialization, various activities once associated almost exclusively with the family including economic health and welfare, and educational ones have been taken over by other institution, newly created specifically for these purposes. As a result, the bonds that previously held the wider extended family became denuded, structurally, peripheral and potentially disorganized.

Though it is submitted that most functions formerly performed within or by families are now shared with or provided by other institutions, contemporary family in almost every society can carry out certain basic functions though there is no consensus as to whether any or all of these functions are universal. These function include the following.

A. Procreation

The family is the center of procreation. For the society to continue to exist, human beings should reproduce to replace the dying and this function is performed by the family. This is a function that, especially among under developed societies, cannot be replaced by any other institution Where as in the developed ones, this domain has not remained immune to technological changes. Because developments in artificial insemination and in vitro fertilization have separated reproduction from sexual intercourse, which diminishes the very purpose of family.

B. Socialization

While mating and procreation provide for the continuity of the biological species, socialization relates to the equally important continuity of social structure and cultural patterns. In particular, the family has, through socialization, a central role in education and care for the children. Because children need care and help as to how to do things and act during their early years and, usually, the assistance is given by the family. It is laid however, that such function is dramatically shifting away from the family to nurses, schools and some times to televisions.

C. Providing personal Security and Acceptance

Individuals need to live lives of dignity and worth. Within the family, individuals can make mistakes and learn from them in an atmosphere of protective security. The family is one of the few remaining places where complementary rather than competitive relation ships can be fostered and enjoyed. Thus, a family provides a home base with stability that allows its members to develop in their own way, at their own pace.

D. Ensuring Continuity of Companionship

As opposed to friends, neighbors, colleagues and others who may or may not remain close by for more than a few years, in most cases, family associations alone can be expected to endure. In ways not expected out side of the family, the continuing presence of sympathetic companions encourages family members to relate the happenings of the day and to shake the disappointments and satisfactions of life as they occur.

E. A Unit of Economic Cooperation

Family is also a unit of economic cooperation that traditionally divides the labour along gender lines; that is between male and female. Regardless of what activity men and women do, work is traditionally divided in to □men□s□ and □women□s□ work. This makes the sexes interdependent, cementing their need for each other. Some argue that now adays such division of labour has disappeared, at least in the developed societies, and the function is eroded or lost; while others assert its maintenance no matter what. According to the latter argument, in modern world, husband and wife, each with special skills, considering themselves as partners contribute definite service to the marriage partnership, which, in effect, serves as economic cooperation.

In carrying on the above and other similar functions the family is an instrument or agent of the larger society; its failure to perform adequately means that the goals of the larger society may not be attained effectively.

1.3. Legal Protection of the Family

Under the above section we have noted certain functions or roles of the family in a society. Hence, state is interested not only in the regulation of the institution of family, but also in the institution of marriage which, as has been pointed out earlier, gives rise to the former.

There are three views regarding marriage and the family. The first view is that the family and marriage are divine and holy institutions created and maintained by God. Hence, the view holds, marriage is centered in religious obligations. The second view considers marriage and the family as social institutions and hence rooted in social obligations. In this context, the primary values of marriage and the family are to maintain social respectability, conform to kin and community wishes. The third view of marriage and the family suggests that families and marriage exist for the individual; neither God nor the society can dictate personal behaviour, nor can people be forced to endure an unhappy marriage or relationship. In this context, the source of authority is the person alone; individuals are responsible for their own success or failure, without regard to the community, structure or the social conditions in which they operate.

However, this third view has no (and should not have in the opinion of the writer) wide recognition even though there are some indications, particularly in western countries, of extending legal recognition to the types of marriage individuals opt for. The general agreement is that sole reliance on individual rights threatens the social role of the family; and that in the absence of effective alternatives, the family must stand as more than the sum of its constituent parts. Hence, a state should exercise a reasonable control over the institution of family because, those important functions pointed out under section 1.2. are most effectively fulfilled by marriage the family, consistently,

with modern pragmatism as well as our diverse culture, our political philosophy and universal human needs.

That is why the institution of family is backed by different legal standards and instruments. The United Nations Universal Declaration of Human Rights of Dec, 1948 The African Charter on Human and Peoples Rights of 1981, and the International Covenant on Social, Economic and Cultural Rights of Dec. 1966, for instance, extended protection to the family as a natural and fundamental group unit of the society and the state, and also impose on the state parties the duty to preserve the institution.

One way in which state parties discharge this obligation is by enacting or incorporating legal provisions which serve the same purpose into their domestic laws. Examples of such domestic laws are constitutions. Virtually all modern constitutions have got provisions protecting the institution of family and marriage. The 1955 Revised Constitution of Ethiopia and the 1987 Constitution of Peoples Democratic Republic of Ethiopia for instance recognized family as a natural and fundamental unit of the society and entitled it to protection by both the society and the state. With similar manner, the 1995 FDRE Constitution and other Regional Constitutions extended the same protection to the family.

Other domestic laws such as the Civil Code and other recently enacted federal and regional family codes also regulate conditions for conclusion of marriage, effects of marriage and its dissolution as well. Some of these provisions are also backed by Penal Code provisions.

To put it in a nut shell, though some argue that the institution of family has lost its traditional roles especially in Western countries

following the establishment of specialized institutions, there is little or no argument that it gave up those functions completely to the said institutions. In fact the third world reality is that traditional family rules are as important now as they have been for centuries. That is why the law has been and should always be behind this institution with the view to enable it to continue discharging these functions failure of which would possibly cause chaos to the society at large.

1.4 Family Law Reform and the Forces at the Back ground

1.4.1 General

Generally speaking family law has undergone great changes especially since the 2nd half of 20th century though the changes in some countries are so traumatic and divisive while in others very gradual.

There are a number of reasons which play a great role with respect to family law revolution. Among other things, we have socio-economic changes. In the past century, there have been profound transformations in the whole society which compelled corresponding changes in the nature and function of the family particularly, the impact of industrialization and urbanization affected the family and consequently its laws.

These changes involve especially the position of the woman in the economy, the altered education of the woman and the authority structure of the family. During the old times in which land constituted the principal source of wealth, the family operated as the basic unit of society and marriage functioned as a highly structured, indissoluble, hierarchical institution. Up on marriage, the wife becomes totally

separated from her family and is placed under the authority of her husband who becomes her master or protector. She was, there fore financially, psychologically and practically dependent on her husband. For this reason, it has been said that, marriage provided for woman the only available form of support and the only socially sanctioned role outside the convent.

However, industrialization and urbanization have brought the seeds of change on the roles of the couple within the family. The former created more jobs so that women can work outside of homes, and the latter develops their educational and skill level. As a result, employment outside of home has become common for women of all ages and marital status. Even more important is education, i.e, the incomparable higher training and educational level of women has been increased and they became equally rewarded with men based on merit than other grounds which in the long-run facilitated their emancipation. This gives women a completely different point of departure on the labour market, which in turn again increased their bargaining power during the marriage as well as upon its dissolution.

In addition to changes of socio-economic climates, the passion for freedom, liberty and equality of the feminist struggle has also contributed in molding the attitude of the society and there by the law. It seems, especially, as a result of the struggle for equality of the sexes different national and international laws have been adopted which ensures the equality of husband and wife within a family. For example, inter alia, the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the African Charts on Human and People□s Right are citable.

As a result of the aforementioned reasons the family law has under gone reformation. Some of the pillars of the family law revolution are equality of men and women, at least in law following remarkable increase in education, employment and economic independence of women along with the associated improvement in the status of women. Following the adoption of the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) and even before, a number of countries, by introducing a constitutional principle of equality of spouses, have repealed their pre-existing laws which established the supposed male superiority and dictated, for example, that the husband is the head of the family and also similar discriminating provision on personal and pecuniary effects of marriage.

As accommodation between divergent philosophies and religions, and the battle that was fought between traditional grounds and the break down of marriage grounds for divorce were either broadened or a totally non-fault based divorce law has been enacted in a number of countries.

The other pillar of the family law revolution relates to the legal filiations system; that is, abolition of legitimate (those born in wed lock) and illegitimate (not born in wed lock) children particularly following the adoption of the International Convention on the Rights of the Child. This eliminates especially the attitude of the society which used to prohibit children born out of marriage to have their fathers name in their birth certificate and it is a step towards recognition of true paternity which was beyond social affective paternity.

Recognition and better protection of other forms of family than those established by marriage could also be taken as pillar of the family law reforms.

1.4.2 Ethiopian Perspective

As pointed out earlier, in principle family law reform follows the socio-political and economic conditions of a given society; and one can hardly find any two countries which have identical such conditions. It follows that we have different family law reforms for one country might have incorporated into its legal system a provision or protection which the other country is striving for.

In the case of Ethiopia, unlike other African countries which had codified their customary laws and began adopting distinct family laws of particularly their former colonial powers, only in the 1970^{s}, Ethiopia began to codify her customary and statulory laws in the 1950^{s}, and 60^{s}. One out come of this codification process was the 1960 Civil Code of Ethiopia. It is Book II, Title IV of this Code that used to regulate (and still regulates in some of the States) the institution of family in Ethiopia.

This Code, which encompasses all the major areas of the civil law, is the first comprehensive legal instrument in the history of hither to traditional society of Ethiopia; and the incorporation of provisions in the conditions of marriages, matrimonial property regime, recognition of marriage as monogamous and lasting social institution, the abolition of traditional source of inequality such as the privilege of primogeniture, legitimacy and masculinity parallels the Code with the standards of the most developed legal systems.

This, however, does not mean that all the provisions of the Code fit in to the objective realities of present day Ethiopia. Consequently, revision of the basic laws of the country including family law and successions began during the Dergue Regime of 1980^{s}, though the work was discontinued for unknown reason. Following the fall of Dergue in 1991, the Transitional Government of Ethiopia (TGE) assumed power and adopted a Transitional Period Charter following which the government acceded to a number of International Human Rights Instruments including the United Nations Convention on the Elimination of All forms of Discrimination Against Women (CEDAW).

Then the government embarked on federal system of government. By virtue of the 1995 Constitution of the Federal Democratic Republic of Ethiopia, about one third of whose provision are devoted to human rights. The constitution, among other things, extended protection to the institution of family and marriage, and recognized equality of sexes and spouses, and the rights of the children as well. Hence, revision of the Civil Code provisions relating to family matters have been necessitated by keeping place with the constitutional provisions and objectives as well as the current democratic thinking and stage of development of our society.

It could, therefore, generally be said that as elsewhere the factors behind family law reform in Ethiopia are recognition of equality of spouses (sexes), better protection of children s right and extending better legal protection to a union other than marriage that is irregular union. These being the general factors behind the reform, so far the Regional States of Tigrai, Amhara, Oromia and Sothern Nations, Nationalities and Peoples of Ethiopia, and the Federal Government (for Addis Ababa and Diredawa) have enacted their respective family codes.

1.5 Power to Enact Family Law

As stated earlier, Ethiopia has embarked on federal system of government by virtue of the 1995 Constitution and atypical feature of a federal system of government is that the power of law making, enforcement and interpretation apportioned between the federal government and states or regions. Accordingly, the constitution clearly recognize that both the federal government and states shall have legislative, executive and judicial powers. Art 52 (1) of the constitution also provides that all powers not given expressly to the Federal Government alone or concurrently to the Federal Government and the states are reserved to the states. And nowhere in the constitution is the power to enact family law expressly given to the Federal Government alone or concurrently with the states.

Of course, one may argue that since the constitution empowers the House of Peoples Representatives which is the federal law making body to enact civil laws if the House of Federation deems that the law established and sustains one economic community per Art.55(6) of the constitution, enacting family law is under the jurisdiction of the Federal Government. Because, the subject matter of family law is the institution of family and the better protection of this institution and there by ensuring its integrity reflects on having one economic community and sustains same as family is the fundamental unit of the society.

However, family law is local in its nature and neither did the House of Federation take a stand that family law should be uniform through out the country nor is it a type of civil law that creates and sustains one economic community so that it falls under the jurisdiction of the federal government. So it could be concluded that enacting family law is within the power of states.

Accordingly, it has been suggested that let the Federal Government inact a family code for the administrative region of Addis Ababa and Diredewa Administrative council and then states adopt family laws of their own through their respective state councils after a necessary modification in accordance with their constitutions. It has, of course, been stressed that each state should freely accept this approach and that such family laws should not contravene the FDRE Constitution. Quite in line with this suggestion, the Federal Government enacted a family code fore Dire Dewa and Addis Ababa and all other regional family codes are modeled on the basis of this Revised Federal Family Code of 2000.

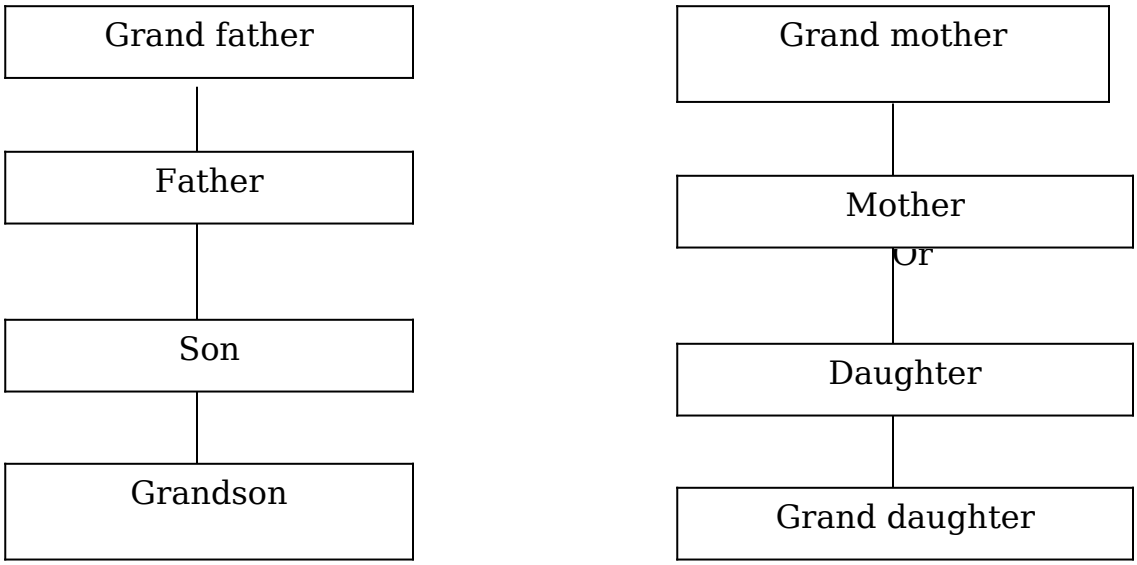
1.6. Sources of Family Relationship

In section 1.1, it is said that family, in our family laws be it in the Civil Code or the Revised Family Code, is understood in its narrower sense. As per the narrower definition of family given by planion , family is a term that comprises persons who are related by blood, marriage or by adoption. From this definition, family has three recognized sources; namely, relation by blood (consanguinal relationship), relationship that arises from marriage (affinal relationship), and agreement of adoption. Now let us see each source of family relationship turn by turn.

1.6.1 Relationship by Consanguinity

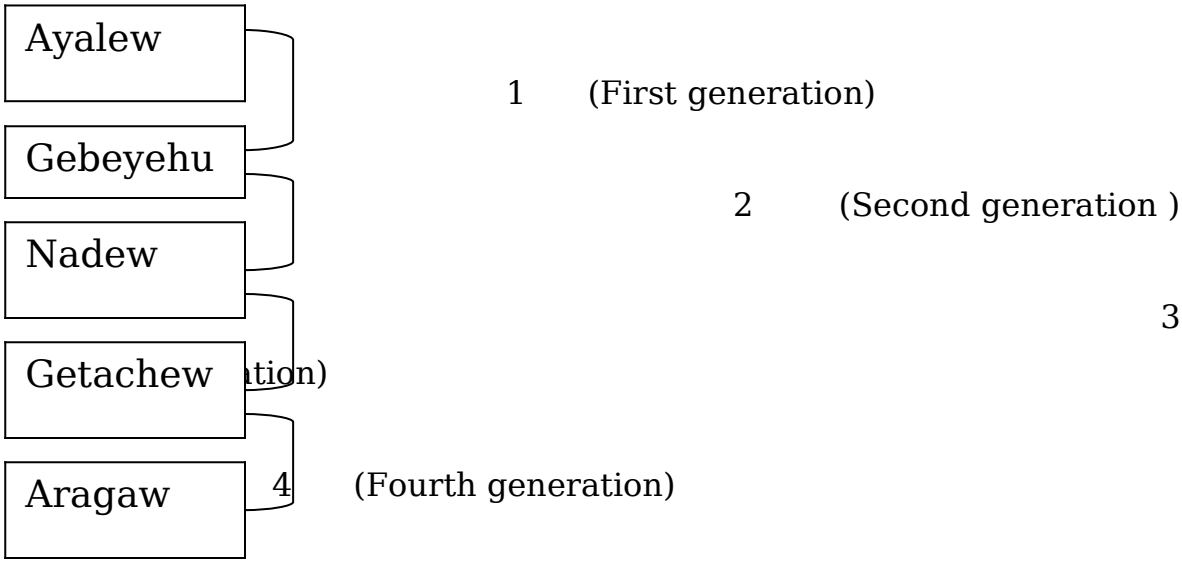
Consanguinal relationship is a relationship derived from community of blood. This kind of relationship arises from birth. This type of relationship can be divided in to two groups. Consanguinal relationship in the direct line and consanguinal relationship in the collateral line.

What is consanguinity in the direct line? As indicated under Art 550 (2) of the 1960 Civil Code and Art. 8 (1) of the Revised Family Code a bond of relationship by consanguinity exists, in the direct line, between ascendants and descendants. For instance, a relationship between a father and a son, a relationship between a person and his grand parents or the relation ship between a person and his mother is a consanguinal relationship in the direct line. The following figure shows a relation ship in the direct line.



Another question that deserves consideration is as to how the degree of relationship by consanguinity in the direct line is to be calculated? The Ethiopian law does not specifically indicate as to how to calculate the degree of relationship in the direct line. In European countries, however, the degree of relationship is computed simply by counting the number of generations. That is, the number of generations is equal to the number of degrees of relationship. There is one generation between a father and a son or two generations between a

person and his grandson. To make the discussion clear, look at the following figure

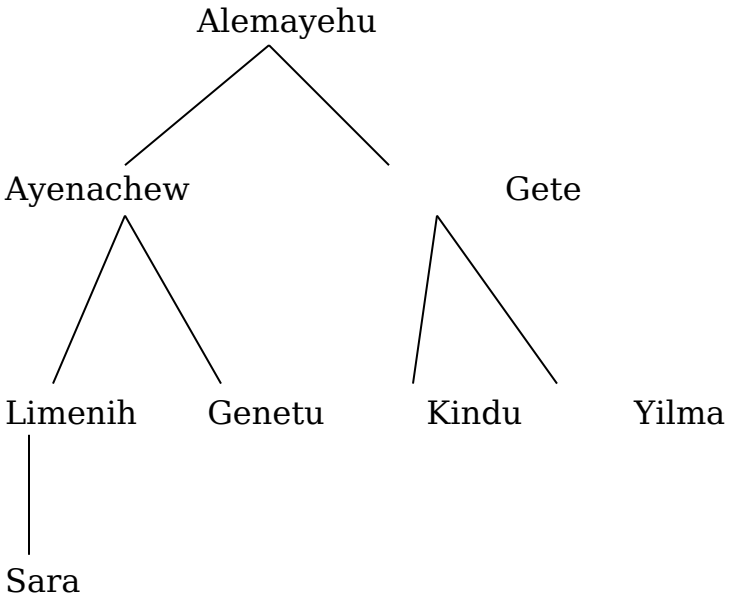


As can be seen from the figure, there are four generations between Ayalew and Aragaw and hence, the degree of relationship between Ayalew and Aragaw is four. Besides since there are two generations from Gebeyehu and Getachew, these individuals are second degree consanguinal relatives in the direct line.

There is no point at which consanguinity relation ships stop in consanguinal relationship in the direct line. That is, provided that two person are ascendants and descendants, there always exists consanguinal relationship between them no matter how the degree of relationship is remote.

The second type of consanguinal relationship is consanguinal relationship in the collateral line. Pursuant to Art 550 (3) of the Civil Code, consanguinal relationship in the collateral line exists between persons who descend from one or more common ascendants. For

instance siblings who have a common father or a common mother or those who have common father and mother are related by consanguinity in the collateral line. The same relationship exists between a person and his uncle, a person and his cousin, a person and his nephew, and an individual and his niece. For better understanding, look at the following figure.



As can be under stood from the figure, there exists consanguinal relationship in the direct line between Alemayehu, Ayenachew, Limenih and Sara and between Alemayehu, Gete and Kindu. On the other hand, Sara and Yilma are consanguinal relatives in the collateral line. This is because they have one common ancestor, namely, Alemayehu. If we single out Limenih and Genetu, they are consanguinal relatives in the collateral line because Ayenachew and Alemayehu are their common ancestors.

One point that must be made clear at this juncture is that all persons who are related by consanguinity do not have equal proximity among themselves. Some are close relatives and other are distant relatives.

This means, the degree of relation varies from person to person, even if all of them are related by consanguinity in the collateral line.

There are two approaches in computing the degree of relationship by consanguinity in the collateral line. These are:

- The civil law approach and
- The canon law approach

Thie civil law approach of calculating degree of relationship between two collaterals is used in many European countries. According to this approach, the degree of relationship between two collaterals is computed by counting the number of generations in each line departing from the nearest common anscestor and taking the summation thereof. To take examples from the above figure; from Sara to Alemayehu (common anscestor) we have three generations, and also from Kindu to Alemayehu (common anscestor) we have two generations. When these are added, we get five generations. So, the degree of relation- ship between Sara and Kindu is five or Sara and Kindu are five degree consanguinal collateral relatives. By the same token, Genetu and Yilma have a fourth degree relation ship. What is the degree of relation between Ayenalchew and Gete, Genetu and Gete and Limenih and Genetu?

The second method of calculating degree of relationship between two consanguinal collateral relatives is the canon law approach. Unlike the case of the civil law approach under the canon law approach the number of generations are counted only on one of the lines of descent.

That is, we will not add generations of both lines. When the collateral relatives are on equal distance from their common anscestor, the counting of generation is made only on one of the lines of descent. In

other words, the generations in each line of descent are not counted separately and added together. Only one of the lines is taken in to consideration. For example in the above figure Limenih and Yilma are on equal distance from their common ascendant (Alemayehu). Since the number of generations in each lines is two, we will take one of them. So, the degree of relation between Liminih and Yilma is two. On the other hand, when the related persons are not on equal distance from their common anscestor, the line that has a greater number of generations is taken in to account and the other is ignored. If, for example, we want to know the degree of relationship between Sara and Yilma who are located at different distance from their common anscetor, we will take a line that has a greater number of generation and disregard the other. We have three generations from Sara to Alemayehu and two generations from Yilma to Alemayehu. Therefore, the degree of relationship between Sara and Yilma according to the canon law system is three.

If these two approaches are employed to calculate degree of relation, which of the two approaches is incorporated in our family laws? The pertinent provision to this question is Art. 551 (1) of the Civil Code. According to this article, the degree of relationship by consanguinity in the collateral line shall be calculated by counting seven generations in each line from the common anscestor. But this article is not as such clear as to which approach is included in the Civil Code. Some of the judges argue that what is incorporated is the civil law approach and others interprete this article in a way similar to canon law approach. Hence, there was not consistency among decisions of various courts because of the confusion that arises in interpreting Art. 551 (1) of the Civil Code. To avoid such confusion, the Revised Family Code ignores calculation of degree of relationship and specifically indicated as between whom such relationship exists. Accordingly, as per Art 8 (2)

consanguinal relation in the collateral exists between a man and his sister or aunt and a woman and her brother or uncle.

Unlike consanguinal relationship in the direct line, collateral relation beyond certain point shall not produce any legal effect. This is supported by Art. 551 (2) which provides relationship by consanguinity shall be of no affect beyond the seventh generation. Therefore, if the degree of relation between two collateral relatives is beyond seventh degree it can not have any legal consequence. Like wise, under the Revised Family Code, consanguinal relation in the collateral line for the purpose of prohibition of marriage is limited to the relation between a man and his sister or his aunt and a woman and her brother or uncle.

1.6.2. Relationship by Affinity

Relationship by affinity is the second source of family relation ship. That is, persons who are related by affinity may be considered as members of a family. This is a type of relationship derived from marriage even if the law attaches some legal effects to it. Irregular union can not create affinal relation ship.

More specifically affinal relation ship is a relationship that exists between a person and the consanguinal relatives of his/ her spouse. In other words, this relationship is created between the husband and the consanguinal relatives of his wife and between a woman and the consanguinal relatives of her husband. On the basis of this definition, affinal relation can not exist between the spouses themselves as they are points of departure. By the same token, there is no affinal relationship between consanguinal relatives of the husband on the one hand and the consanguinal relatives of the wife on the other hand.

We may classify the bonds of affinity into two categories- affinity in the direct line and affinity in the collateral line.

As per Art. 552 (2) of the Civil Code (CC) and Art. 9 (1) of the Revised Family Code of the Federal Government (RFC), a bond of affinity in the direct line exists between a person and the ascendants or descendants of his spouse let us explain this with the help of an example. If Zemene and Selam marry each other, they are husband and wife. Zemene's Father and mother become Selam's parents in law. Likewise, Selam's father and mother become Zemene's parents in- law. Therefore, Selam and Zemene's parents, and Zemene and Selam's parents are related by affinity in the direct line.

Let is also assume that Zemene had a child from a previous marriage. Selam had also been married previously to another man and has a child from this marriage. There is affinal relationship in the direct line between Zemene and Selam's child. In the same manner affinity relationship in the direct line exists between Selam and Zemene's child.

On the basis of the definition given to affinal relationship hereinabove, do you think, a relationship of affinity exists between Zemene's parents and Selama's parents or between Zemene's child and Selam's child? Why/ Why not?

The second type of affinal relation ship is affinity in the collateral line. Persuant to Art. 552 (3) of the CC., a relation of affinity exists between a person and the collaterals of his or her spouse. To put it in a bit elaborate fashion, this sort of relationship exists between the husband vs. the collateral relatives of his wife, and between the wife vs the collaleral relatives of her husband. In the examples given

above, relations of affinity in the collateral line exists between Zemene and Selam's brothers and sisters, and between Selam and Zemene's brothers and sisters.

With regard to scope of such relationship, it produces equal legal effects no matter how the degree of the affinal relationship in the direct line between two individuals is remote. But in the collateral line affinal relation ship shall not have any legal consequence beyond a certain degree. According to Art. 553 of the CC., affinal shall be of no effect beyond the third degree in the collateral line. Under Art. 9 of the RFC, affinity relationship is limited between a man and the sister of his wife, and a woman and the brother of her husband.

In addition to the type of affinal relationships mentioned above the Civil Code has recognized another type of relationship, namely, double affinity. As per Art. 554 (1) of the Civil Code, a bond of double affinity exists between a person and the spouse of the persons to whom he is related by affinity. To cite one instance, a bond of double affinity exists b/n the husband and the spouse of the brother of his wife. It is also mentioned that such bond of double affinity shall produce the same effect as a bond of simple affinity. However, such type of affinity is disregarded under the Revised Family Code.

It has been mentioned that the source of relation by affinity is marriage. If this is so, do you think that the dissolution of marriage entails the termination of affinal relation created as a result of that particular marriage. The Civil Code answers this question negatively. As indicated under Art. 555 of the Civil Code, a bond of affinity shall subsist in the direct line and collateral line notwith standing that the marriage by which it was created is dissolved. From the cumulative reading of Art. 178. 9 and 11 of the RFC, we may reach in the same

conclusion. As has been mentioned under Art. 11, a person may not conclude another marriage while he is bound by a preceding marriage. Therefore, while his/her marriage is pending, a person can not conclude another marriage with another person including his affinal relatives. Art. 9 specifically provides that a person can not conclude marriage with affinal relatives. But the massage of Art. 9 is not to prohibit a person from concluding marriage with his has affinal relatives while he is bound by a preceding marriage as this message is already covered under Art. 11. Hence, the message behind Art. 9 is that a person is prohibited from concluding marriage with his affinal relatives even if his preceding marriage is dissolved. This is because the affinal relationship continues despite the dissolution of the marriage that created the affinal relation.

1.6.3. Adoption

Adoption is the third source of family relationship. In fact, it is an artificial means of creating family tie. Once an agreement of adoption is entered between the adopter and the adopted, consanguinal and affinal relation shall be created between the adopted, and the family of the adopter. But for an agreement of adoption to have the desired legal consequence, the agreement must comply with all the requirements of the law. With regard to the formality requirements, other essential conditions, and effect of adoption, it will be dealt in a different chapter.

Before closing this chapter, let me remind you one important point under the Civil Code, sources of family relationship, i.e, relation by way of consanguinity, affinity and adoption were given a separate chapter. But this is not done under the Revised Family Code. The law maker has its own reason to do so. Firstly, calculation of degree of relation ship between consanguinal and affinal relatives under the

Civil Code was not clear and as a result, it was a source of confusion. Secondly, the aim of stipulating those sources of family relationship is to attach different legal consequences among members of the family. Since the two legal effects that arise among family members are prohibition of marriage and the obligation to supply maintenance, it has been preferred to include those sources & family relationship in areas dealing as to between whom conclusion of marriage is prohibited and the obligation to supply maintenance exists.

1.7. Legal Effects of Family Relationships

So far you might have been wondering why we need to study the sources of family relationship. Reason for studying those sources of family relationships is that such relation is backed by legal consequences. The fact of being related by blood, marriage or adoption has it sown legal effects. To put in slightly different words, the existence of relationship by consanguinity and affinity will produce some effects between persons who have such relation ship. When broadly seen, these effects may be divided in to three, those effects which confer rights, effects which impose duties and effects that prescribe prohibition.

1.7.1. Family Relations Confer Rights on Persons

The existence of family relationships may give rise to rights to its members. Examples are given below.

- Father and mother have the right to become guardians and tutors of their minor children (Art. 219 of the R.F.C.)
- People who are related by consanguinity have a reciprocal right to succeed each other under rules of intestate succession (Art 842 and the following of the C.C.)

- Persons who are very poor and are unable to get their livelihood by their work, have the right to require maintenance from their relatives who have a better means. (Art. 198 of the R.F.C)

1.7.2. Family Relations Impose Obligations on Person

In addition to rights, there are also obligations which are imposed on people as a result of their being relative of other persons. Among other things:

- Members of the family may be obliged to supply maintenance, if other member of the family is in need and unable to earn his livel-hood (Art. 198 of the R.F.C.)
- Parents are bound to protect and give due care for their minor children. (Art. 36 (1) (c) of the FDRE Constitution)
- The father shall be obliged to make the damage good if his minor children incurs extra contractual liability (Art. 2124 of the Civil Code)
- The spouse is duty bound to be fidel

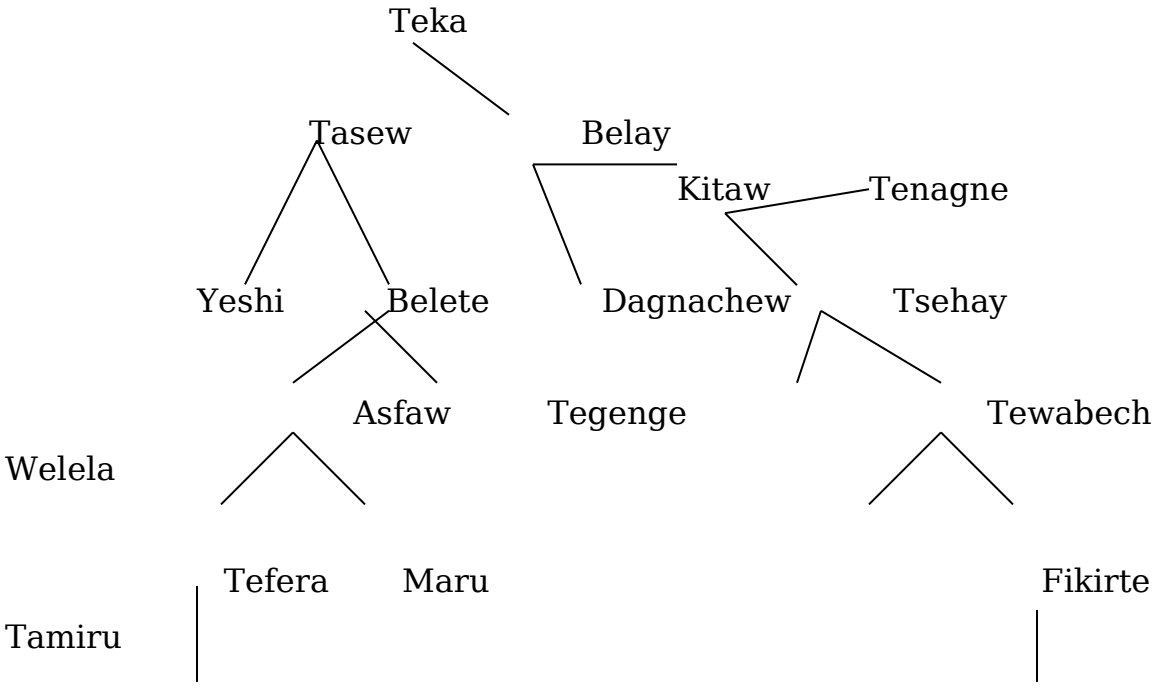
1.7.3. Family Relationships as Ground of prohibition

The existence of family relationship would also result in prohibitions. Marriage between persons who are related by consanguinity or affinity is prohibited

Exercises

1. Is the term Family defined under our family codes? Compare and contrast the different definitions given to the term family.

2. List the role of family in the society.
3. As we all know, the Federal Government and some other Regional Governments have revised the part of the Civil Code governing family matters and put in to force the revised family law. How could you justify such family law reform?
4. State some of the legal effects of family relationships?
5. What is affinal relation? Sort out the types of affinal relations and identify their differences.
6. Study the following diagram which shows relations by consanguinity, and then answer the questions given beneath the diagram.



Nadew

Cheru

What is the type relation that exists between Cheru and Teka ?

What about their degree of relationship ?

Show whether there exists relation ship between Asfaw and Tamiru?

What about their degree of relation ship ?

Nadew wants to marry Fikirte. Is thir any legal impediment? Why/ why not ?

Is there any relation between Belay and Welela? If your answer is in the affirmative, state its type and degree of relation ship.

CHAPTER TWO

CONCLUSION OF MARRIAGE

Dear students, in the introductory chapter we have seen general points about the institution of family. Inter alia, we have seen that marriage is the foundation of family. In this chapter, we will elaborately discuss issues pertaining to establishment of marriage.

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

- Define marriage;
- Discuss as to why betrothal is excluded from the Revised Family Code;

- Enumerate the forms of marriage ;
- List down essential conditions of marriage;
- Identify individuals entitled to make opposition to conclusion of marriage.

2.1 Definition of Marriage

There seems to be a consensus among legal writers that it is difficult to come up with a single universally acceptable definition of "marriage" applicable in every legal system. This is, it is believed, due to the fact that each and every legal system sets forth distinct conditions and procedures for the conclusion and termination of marriage as well as the differences in the effects of such marriage and the consequences of its termination.

Despite such difficulties in giving full-fledged definition to the term "marriage", some writers and family codes of different countries have made an attempt to define this term. Let us see some of them herein below.

According to Planiol, "marriage is a contract between two parties sanctioned by law and cannot be broken by free will." Marriage here is considered as one type of contract. Is it a valid assertion? Marriage and contract undeniably have common characteristics since what is possessed by one of them is also what is required by the other. To discuss some of the common features that put marriage and contract in the same position would be of crucial importance to determine as to whether or not marriage is a contract. One of these common features is a valid consent of the two parties in order to validate the agreement entered in to while capacity is also the other aspect that put together, though the capacity required for the conclusion of marriage and

contract are not identical. It seems due to these and other factor that Planoil and others defined marriage in terms of contract.

Nevertheless, at least under the Ethiopian legal system, marriage is not a contract for the following reasons. Firstly, ordinary contracts are of proprietary nature (Art. 167s) (of the CC) while marriage is not. The object of the contract is not to create obligations of monetary nature, rather to make the spouses to live together. Secondly, as indicated under Art. 1675 of the CC, ordinary contracts may be extinguished by mutual agreement of the contracting parties. But marriage can not be terminated only by the consent of the spouses. Its terminations require the order of the court (Art 117 of the RFC.) Thirdly, there is no variation of obligation in marriage unlike the contract of proprietary nature, and fourthly, marriage invariably requires formality for its conclusion but form is an exceptional requirement for ordinary contracts.

For all these reasons, marriage is not a contract, rather it is a status, an institution and social relationship between a man and a woman within a society.

Other writers define marriage as a union for life and is an institution to bring about property relations. (Emphasis supplied). This definition has also its own draw back in that all marriages may not create property relations between the spouses. Because, as we will see later, establishment of common property can be set aside by contract of marriage to be concluded between the spouses.

Still others define marriage as a society of man and woman who join together to perpetuate their species, to help each other through mutual assistance to bear the burden of life and to share their

common destiny. Once again this definition is narrow because it exclude the conclusion of marriage between sterile individuals.

In the legal systems of states of the western civilization, and those other states whose legal system are influenced by the former, marriage is defined as:

> "a voluntary union for life of one man and woman as husband and wife, to the exclusion of all others, for the discharge to each other and to the community of duties legally incumbent up, on married person."

This definition, though incomplete consists some basic features of marriage. In the first place, a "voluntary union" free consent of the parties to live together as husband and wife is one of its essential elements. As we will see, consent, in Ethiopian legal system, too, is one essential condition to marriage.

The second element which distinguishes marriage from other sexual unions and other contracts is its permanence. Which means, the union, so far as the parties can foresee at the time of entering in to it, must be for a potentially indefinite period of time even though supervening factor later lead to its dissolution by divorce. When we consider Ethiopian law in this respect, the permanence of the union seems to have been accepted and given due consideration. The provisions of our family code dealing with the causes of dissolution of marriage reflect this element.

The third element to be fulfilled is the element of monogamy. Marriage involves a sexual relation between "one man and one woman to the exclusion of all other", i.e, for a certain union to be considered as marriage it must involve only one man and one woman.

When examined in light of this element, monogamy is a type of marital union accepted in Ethiopian legal system. This proposition is based on the provisions of the family codes prohibiting bigamy.

Generally, one can safely conclude from the above observations that, even though the Federal Revised Family Code and other Regional Family Codes fail to define the concept of marriage, the legal provisions scattered therein imply that the legislatures had such elements of the definition in mind in drafting the rules on marriage and the Ethiopian laws accord in this respect with the laws of western legal systems.

Even if the Civil Code, the Revised Family Code of the Federal Government and other Regional Family Codes fails to define marriage, The Amhara Region Family Code under Art. 11 has provided the definition of family as follows:

> □□ a relationship where by a man and a woman having attained majority, officially establish out of their own free will and consent, with an intention to sustainably live together united in law or □legal institution structured as a result of this relationship there to□

So the definition of marriage under the Amhara Region Family Code has the following important points:

1. Marriage is essentially entered between a man and a woman. This implies two things; First, only monogamous marriages are recognized under the Amhara family law. So bigamous and polygamous marriage are excluded. Second, marriage concluded between persons of the same sex, that is gay and lesbian are also excluded.
2. The spouses are required to attain the age of majority.

3. The marriage should be established officially. So any undertaking by the spouses to conclude marriage does not have any effect if it is not made either before the officer of civil status, or according to the formalities required by their religion or their custom.
4. The full and free consent of the spouses is required.
5. There must be an intention to sustainably live together. So, marriage concluded for a specified period of time does not have any effect. Is this definition complete in the sense that it consists all points that should be covered under marriage?

Having said this much about the definition of marriage, now let us turn our attention to betrothal before discussing points having to do with forms of marriage.

2.2. Betrothal

2.2.1. General

Betrothal is an agreement where by the future spouses or both the future spouses and their respective families under take that the former conclude marriage. The term betrothal is called by different names in different legal systems. Promise to marry, agreement to marry and engagement are some of the synonyms of betrothal.

Although the parties to a marriage are under no legal obligation to go through it, betrothal used to be widely accepted virtually in every

legal system though modern legislations either denied it legal recognition or devoted to it one or few provisions.

Under the 1960 Civil Code, betrothal is regulated by Arts 560-576. However, during the revision of the family law, the legislature of the Revised Family Code of the Federal Government has totally excluded these provisions. So, under this Code, we can't find a single provision dealing with betrothal. So, the question is why the House of People's Representative opted to exclude provisions governing betrothal? Some of the reasons given for such exclusion are the following:

- Betrothal is not a precondition to marriage. Nothing will prohibit the couple from concluding their marriage in the absence of prior betrothal or promise. So, if it is not a requirement to marriage, betrothal serves nothing other than affecting economically the future spouses and/or their family for it is common in the society to incur costs for unnecessary ceremonies.
- With respect to problem of property exchange through gift as a consequence of betrothal, it could, if any, be governed by other provisions of the Civil Code. That is the situation can be governed by the general law of obligation.
- As long as no legal ban is put on the practice of betrothal, it can continue in its cultural form there by making it part and parcel of the family law having no significance than imposing additional burden on the court during dispute settlement.
- There is no uniform culture of betrothal. This is especially true in the two cities which are governed by this Code, Addis Ababa and Dire Dewa. In these cities, where people from different walks of life are living together, applying a uniform law seems to be difficult.

However, the Tigray, Amhara, SNNP, and Oromia Regional family Codes have retained this institution with certain modifications. The respective Regional Councils of these regions have opted to expressly recognize betrothal. More or less, the reason for such recognition is that betrothal is the tradition of the society and hence, the family Code should uphold the traditional values of the society for which it is enacted. Even if the law fails to recognize it, the majority of the future spouses inevitably pass through it. And since a certain relationship would for one reason or another gives rise to a conflict or disagreement, the law should respond to such circumstances. More over, as it gives the future spouses a better opportunity to know each other the law should back the practices.

Because of the afore mentioned reasons, betrothal is included in these regional family codes with the necessary modifications. Let us see some areas of reform.

2.2.2. Parties to the Contract

Under the Civil Code betrothal is defined as "a contract where by two members of two families agree that a marriage shall take place between two persons, the fiancé and the fiancée belonging to these two families." (Art. 560). Betrothal shall be of no effect unless both the future spouses and their respective families consent to (Art. 565). Thus under the Civil Code, for the existence of valid betrothal contract, the consent of at least four individuals must be secured. That is, the consent of the fiance, the fiancee, the fiance's family and the fiancee's family, the latter two being represented by an individual member.

In doing so, it is said that betrothal under the Civil Code is reconciliation between parental authority and the desire of the

parties to marry. This seems, however, a mere statement, which in reality does not amount to any thing since parents have still substantial role and influence over their children. So, it is quite clear that the future spouses have no freedom to choose their future mate because of the encroachment of the heavy hand of families in mate selection of their children.

The regional revised family Codes in similar manner, on the other hand, define a contract of betrothal as a contract where by the fiance and the fiancee agree that marriage shall take place between them in the future. And the contract shall be of no effect unless the future spouses consent thereto. Thus, the consent of the future spouses is a necessary and sufficient condition for the existence of a valid contract of betrothal, where as under the Civil Code, it is only a necessary but not sufficient condition. This is in line with Art. 34 (2) of the FDRE Constitution that provides marriage shall be entered into it only with the free and full consent of the intending spouses.

2.2.3. Form and Other Requirements

Under the Civil Code and the Tigray Family Code, the form of contract of betrothal shall be regulated by the usage of the place where it is celebrated. Under the civil code, however, there shall be no valid contract of betrothal unless made in the presence of at least four witnesses, two for the fiance and two for the fiancee. Thus, to know whether a contract of betrothal has complied with a form provided by the law, one has to determine the custom of the place of its celebration and the roles in that custom. If it is customary that betrothal is concluded orally in that area, then it has to be concluded orally. By the same token, if written form is the rule, it has to be concluded in a written form.

The Amhara Family Code, on the other hand, provides that betrothal shall be in written form. Beyond this, it also requires the presence of four witrenes. The Oromia Family Code in its part under Art 11 provides that the form of betrothal may be regulated by the usage of the place where it is celebrated or written form. Thus under the Oromia Code, a contract of betrothal, even if fails to comply with the usage of the place where it is celebrated, is valid if made in written form leaving a wide room for the parties.

In addition to the formality requirements, betrothal must also be concluded in compliance with other essential requirements. Among other things, the parties there to should have capacity Under Amhara Family Code, a man and a woman who do not attain majority (18 years) can not conclude an agreement of betrothal. In this regard the Tigray Family Code requires 18 and 22 yearsfor woman and man respectively.

Since betrothal is a means to marriage, impediment ts to marriage shall be equally applicable to it. Hence betrothal can not be concluded between a man and a woman if they are related either consanguinally or affinally. .

2.2.4. Effect of Betrothal

As can be understood from the definitional articles of our family Codes, the sole object of betrothal, whether consented to only by future spouses or both the latter and their respective families, is to conclude marriage in some future time. However, since marriage shall be entered in to with full and free consent of the spouses, and even after its conclusion, the spouses can be divorced with almost no precondition, betrothal does not entitle either parties to forced

performance though its breach carries certain consequences as we shall see later.

Under the revised family Codes, the parties are at liberty to fix the date on which marriage is to be concluded. Failing such, however, the law comes in and fixes the period within which marriage should be concluded. Under the Civil Code, if the parties haven□t agreed up on the date of celebration of marriage, the marriage shall take place within six months from either of the future spouses or the authorized representative of their family having expressed his or her wish that the marriage celebrated. (Art. 570).

This provision has been criticized as being unsatisfactory in that the six months period is counted as one of the four parties to the contract expressed his wish that marriage be celebrated, which causes a problem of proof in case such date is challenged by other party.

The Amara and Oromia Family Codes responded to the above problem as they fix the time within which marriage has to be concluded as of the conclusion of betrothal. That is, if at the time of betrothal no period has been agreed up on for the celebration of marriage, this codes provides that the marriage shall take place within two years and one year respectively. The rational behind fixing such period is to protect the interest of parties to betrothal; particularly, to prevent those individuals who jeopardize the fact of their fiance (e) by unduly prolonging the period under the pretext of conclusion of marriage.

Relatively speaking, the period fixed by Amhara and Oromia family codes is fair as compared to the six months because, as pointed out

earlier, one of the purposes of betrothal is that it gives a better opportunity for the future spouses to know better about each other, to plan their future life and generally enable them to predict to the extent possible what their marriage would look like and hence serve as a stepping stone. Under normal circumstances, the longer the duration between the conclusion of marriage and that of marriage, the more probable that the parties would arrive at a reasonable decision including decision of renouncing the idea to conclude marriage with a given fiance (e). Moreover, this relatively longer period would enable the future spouses to build their financial capacity though not invariably. If the period is too long, on the other hand, either party may renounce the ida of marriage to the detriment of the other party. So, it could generally be said that the departure of these Codes from the civil Code in this regard is better.

At this juncture, it is logical to ask, what if after the lapse of the period fixed by law marriage is not concluded? Ovirusly, the betrothal would lose its effect by virtue of law. However, if the parties subsequently fix the date of celebration of marriage which is commonly done, betrothal may not lose effect for the mere fact that the date of celebration of marriage is not fixed on the date of celebration of the betrothal.

2.2.5. Breach of Betrothal

Though the parties to a contract of betrothal are presumed to have entered into it with good faith to discharge their respective obligation, that is, concluding marriage, it may happen that either party fails to discharge this obligation for one reason or another. It

is the situation where a party without good cause fails to consent to marriage or makes the conclusion of marriage morally or in fact impossible that the law calls breach of betrothal.

From the a forementioned explanation if the failure of the party to consent to the marriage is because of good cause, this can not fall under the breach of betrothal agreement. As a result, the party under this situation will not be obliged to incur any liability.

A party who breaches the betrothal agreement, that is the one who fails to consent to marry without good cause, is responsible to cover expenses relating to betrothal, return presents made there to, redress moral damage, and pay an amount agreed up on as a penalty clause, if any.

But unlike the Civil Code and some other regional family code like Oromia, the Amhara Family Code made inapplicable the provisions of the Civil Code dealing with penalty clause attached to a contract of betrothal and left the provision dealing with moral compensation to be awarded to a person who is not responsible for the breach of the contract. Under Art. 9 of the Code, it is provided that a contract of betrothal, other than creating the duty to cover all the expenses and to return the present received by the person who is responsible for the breach of the contract without a justified cause, doesn't impose any other obligations, even if a provision introducing a penalty clause is inserted in the contract.

To sum up this section, betrothal is one of the traditional institutions of Ethiopia owing to which it got the recognition of the Civil Code. As it has also been long practiced by the respective peoples of the regions, the new family codes recognized it. However, the revised

family codes departed from the Civil Code, among other things, in that it makes betrothal an agreement between future spouses and hence consent of the families of the future spouses have no place while recognition of betrothal and detail regulation of the same may be seen as reflection of the traditional value of the society and responding to the practical problems emanating from the practice of betrothal, action for breach of betrothal should be carefully entertained by courts with the view to ensure that marriage is entered into with free and full consent of the future spouses.

2.3. Essential Conditions for the Validity of Marriage

Broadly speaking, essential condition to the validity of marriage can be divided in to two categories. These are:

1. Formality (procedural) requirements of marriage; and
2. Substantive requirements of marriage

2.3.1. Formality Requirements of Marriage

Formality requirements of marriage have to do with the manner of conclusion of marriage. They are procedural in nature. The idea is that the marriage shall be celebrated (solemnized) in the light of the formality requirements laid by the law. If the marriage is not concluded in accordance with these formalities, it may not be conferred up on legal recognition.

Persuian to Art. 1 of the RFC, for a certain cohabitation to be considered as marriage, it should be celebrated in accordance with one of the following three forms of marriage. These are civil marriage (marriage to be concluded before a officer of civil status), religions marriage (marriage to be concluded in accordance with the religion of the future spouses), and customary marriage (marriage to be

concluded in accordance with the custom of the future spouses). Regardless of the form of celebration, marriages celebrated in different formalities are equally recognized by the law (Art 34 (4) of the FDRE Constitution). Let us see the three forms of marriage in detail as follows.

2.3.1.1. Civil Marriage

As per Art. 2 of the RFC, "marriage shall be deemed to be conciuded before on 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." One of the elements under this provision is that it is only a man and a woman who shall appear before the officer of civil status for the purpose of conclusion of marriage. From this, we can say that what is accepted in Ethiopia is monogamous; there by excludes bigamous and polygamous marriage. Moreover, the law excludes the possibility of same sex marriage.

As can be understood from this provision, this is a type of marriage to be concluded before an officer of civil status. The question here is, what type of person is termed as "officer of civil status"? The officer of civil status is an officer who registers births, deaths and marriage of people (Art. 47 of the C.C) The status of birth, death and marriage are generally called civil status. At present, there is no officer of civil status in Ethiopia. For the moment, however, the records of birth, death and marriage are kept only in towns through the municipalities Municipalities are involved in recording the civil status by way of delegation, until when the officer of civil status is established. (Art. 321 of the RFC.) For the people of the countryside, there is as institution that is engaged in recording the civil status of the people.

When a man and a woman intend to conclude marriage, they are required to personally appear before the officer of civil status at the time and place of celebration of marriage. From this we can see that at least in principle marriage can not be concluded by way of representation. We shall deal this point in detail a moment later.

Even if civil marriage is to be concluded before the officer of civil status, this by it self does not mean that all officers of civil status are authorized to celebrate a particular marriage. This is to say that civil marriage must be celebrated before an officer of civil status having jurisdiction to do so. But it is logical to raise one question, how could we identify whether a certain officer of civil status is competent to celebrate a particular marriage? In this regard Art. 22 of the RFC stipulates that 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 of them has established residence by continuously living, there for not less than six months prior to the date of the marriage.

Once the future spouses identify the officer of civil status authorized to celebrate their marriage, they shall inform such authorized officer of civil status of their intention to conclude marriage not less than one month prior to its celebration (Art. 23 of the RFC). 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. 24 of the RFC). The aim of publicizing the date fixed for celebration is to give a room for individuals who are entitled to make opposition if the marriage is to be concluded in violation of one of the substantive requirements of marriage.

On that particular date of celebration of marriage, the formalities of celebration enumerated under Art. 25 of the RFC must be observed. To begin with the marriage shall be concluded publicly in the presence of the future spouses and two witnesses for each of the future spouses. (Art. 25 (1) of the RFC) After the future spouses and their witnesses appear before the officer of civil status on the dated fixed for celebration, they shall declare, under oath, that the essential conditions of marriage are not violated. Of course, before taking oath the officer of civil status shall inform the future spouses and their witnesses of the consequences of their declaration. That is, if the marriage is found to have been concluded in violation of the substantive requirements of marriage, it may be dissolved on the application of the concerned persons. Besides the celebration of marriage in violation of essential conditions to marriage may also entail the criminal liability of the spouses, the witnesses and the officer of civil status who celebrated such marriage.

After taking oath, the next procedure is that 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. Finally each of the spouses and their witnesses shall sign in the register of civil status. Up on the fulfillment of 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.

2.3.1.2. Religious Marriage

According to Art. 3 of the RFC, religions 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. From this provision, it is clear that the future spouses may conclude marriage by the religion of both future spouse or the

religion of one of the future spouses. However, to say that a marriage has been concluded in accordance with a particular religion, the future spouse should perform such acts or rites as deemed to constitute a valid marriage by that religion. Whether all formalities in particular religion have been complied or not will be answered having regard to the rules or practice of celebration of marriage of that religion. This is because as indicated under Art. 26 (1) of the RFC, the conclusion of religious marriage and the formalities thereof shall be as prescribed by the religion concerned. You must note here that the manners of celebrations of marriages could differ according to the rules of the respective religion. The law is not interested in the details of the rites of each religion.

2.3.1.3. Customary Marriage

The third form of marriage is customary marriage. By virtue of Art 4 of the RFC, 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 in which they live or by the custom of the community to which they belong or to which one of them belongs.

You may have noted from this article that customary marriage is celebrated in accordance with one of the following:

- → Custom of the community in which both spouse live, or
- → Custom of the community to which one of them belong, or
- → Custom of the community they belong to.

Since conclusion of customary marriage and the formalities thereof shall be prescribed by the custom of the community concerned, the formalities of celebration of customary marriage differ from custom to custom.

To put in a nut shell, while marriage celebrations in all civil marriages follow similar procedures, the procedures followed in religious and customary marriages vary from religion to religion and from culture to culture.

From the fore going discussions, it can be safely concluded that marriages to be included in Ethiopia should be celebrated either before on officer of civil status, in accordance with religion or custom of the future spouses. Provided that marriages concluded in Ethiopia are done in either of the three forms of marriage, they are valid marriage. But here we don't have to forget the fact that marriages may be celebrated abroad. Marriage celebrated abroad (out side of Ethiopia) may be recognized in Ethiopia provided that the condition under Art. 5 of the RFC are fulfilled.

Art. 5 Marriage celebrated abroad.

Marriage celebrated abroad in accordance with the law of the

place of celebration shall be valid in Ethiopia so long as it doesn't contravene public moral.

Hence, for marriage celebrated abroad to be recognized in Ethiopia two conditions should be there: Firstly, the marriage must be celebrated in accordance with the law of the place of celebration. For instance if the marriage is celebrated in Kenya, it will be acceptable in Ethiopia provided that it is celebrated in accordance with the law of celebration of Kenya. Therefore, when the marriage is celebrated abroad, what will be considered is the law of the place of celebration. Here we have to note that the law of the place of celebration might be totally different from its Ethiopian counter part. Some countries may

allow for a marriage to be celebrated before a court or a city mayor. Had a certain marriage been concluded before such authorities in Ethiopian it wouldn't have been acceptable. However since marriage celebrated abroad in accordance with the place of celebration is recognized despite the type of celebration, it is still acceptable in Ethiopia.

Secondly, the celebration shall not contravene public moral. Therefore, even if a marriage concluded abroad is celebrated in accordance with law of the place of celebration, if may not be valid in Ethiopia if such celebration contravenes public moral.

At this juncture, the student should note the fact that what the revised family Codes allows is with regard to the celebration of a certain marriage. When we come to substantive requirements of marriage, a marriage celebrated abroad must be consistent with the Ethiopian laws. For example, the law of the country of celebration may allow conclusion of marriage before courts. The marriage concludes before a court in this country is valid in Ethiopia even if the revised family code doesn't allow conclusion of marriage before courts. However, although the country of the celebration of marriage allows marriage between the same sexes, this can not be valid in Ethiopia because what is allowed in Ethiopia is heterosexual marriage. By the same token, other substantive requirements must be observed.

2.3.2. Substantive Requirements of Marriage

Substantive requirements are the second requirements of marriage. The marriage is said to be defective, unless the essential conditions are fulfilled. As opposed to the manner of celebration, substantive conditions of marriage have to do with the content of the marriage itself.

In discussing the formality requirements of marriage, it is said that marriage in Ethiopia may be concluded in either of the three forms of marriage. In addition to this, it is also said that marriage celebrated abroad is valid so long as it is concluded in line with Art. 5. of the RFC So, we have varieties in celebrating marriage. But regard less of the type of celebration of marriage, a certain marriage should be in compliance with substantive conditions of marriage. This can be inferred from the cumulative reading of Art. 25(2), 26(2), and 27(2) of the RFC.

As pointed out in chapter one, marriage is an institution which gives rise to family and hence more than a mere personal relationship between two persons. Marriage, as creating the most important relationship in life and as having to do with morals and civilization of a people than any other institution, has always been subjected to the control of the legislature.

The validity of state regulation of marriage depends on a balancing of interests. That is, the individuals interest in marrying the chosen partner (Art. 34(1) of the FDRE Constitution) is measured against possible state interest in regulation. The state is highly interested towards greater marriage stability and enjoyment. The legislature, therefore, based on such interests prescribes substantive essential conditions and formalities for a valid marriage.

The Revised Family Code of the Federal Government provides for age, consent, consanguinal and affinal relationships, monogamy, mental condition and period of widowhood as substantive essential conditions of marriage in what ever form the marriage might be concluded. These will be dealt as follows.

2.3.2.1. Consent

One of the substantive conditions to marriage is consent. In fact, a valid marriage shall take place only when the spouses have given their free and full consent (Art 6 of RFC and Art. 34 (2) of the FDRE Constitution). Hence for the marriage to valid, the parties should give their consent sustainable at law.

Not only the Federal Family Code, but also in other regional family codes, marriage is based on the full consent of the spouses. However, the Oromia Family Code has placed much emphasis on consent when it clearly out laws marriage by abduction under Art 3 (1) which is prevalent in the region. According to the base survey by the National Committee on Traditional Practices of Ethiopia, Oromia is only second to SNNPR in prevalence of marriage by abduction. In fact, marriage by abduction has long been practiced in the region for one reason or another.

Realizing this problem, the regional legislature has expressly outlawed the practice. Hence, even if the woman has consented to the marriage subsequently, it can not be valid though one wonders how such a marriage might be annulled if the parties (both spouses) opt for maintaining it. After all, it is only a party who alleges to have been affected by violence that applies for the dissolution of such marriage. (Art. 51(1)).

Under all revised family codes, what is expected is full and free consent of the spouses to conclude marriage. If consent is given and that consent in not given freely, then this is a defective consent. A defective consent results in a defective marriage.

The question here is, when do we say that a given consent is defective? Error and violence are those two circumstances that vitiate consent under the Revised Family Code. Let us see each of them separately.

A. Fundamental Error

Error is one way which makes consent defective. As result, marriage concluded as a result of error in consent shall not be valid Art. (13 (1) of the RFC). However, here we have to bear in mind that any ordinary error doesn't vitiate consent. Consent is deemed to be vitiated as a result of error where such error is a fundamental error (Art. 13 (2) of the RFC). The problem here is that the family law doesn't specifically give us a definition of 'fundamental error' except enumerating instances of fundamental error.

When the provisions of the family law are silent on certain issue, we can apply the pertinent provisions of the Civil Code in general and contract provisions in particular. Even if the general contact provisions are primarily applicable to settle disputes arising from contractual agreement, these provisions might also be applicable to other obligations in general and marriage in particular when a need arises (Art. 1677 (1) of the Civil Code). There fore, we can apply contract provisions to marriage where the family law is silent in resolving a certain issue. By Appling Art. 1697 of the Civil Code, we can define as to what is meant by fundamental error. Pursuant to this article, a certain error (mistake) is fundamental when it is established that person world not have entered in to a contract (marriage) had he known the truth. Even though the Revised Family Code, as mentioned above, doesn't give us a clear definition of 'fundamental error', it has given as examples of such error under Art. 13 (3) as follows.

Art. 13 (3) with out prejudice to the provisions of sub-article (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 person with whom a person intended to conclude marriage;
(b) error on the state of health of the 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 doesn't have the requisite sexual organs for the consummation of the marriage;
(d) error on the behavior of the spouse who has the habit of performing sexual acts with person of the same sex.

Under letter (a), mistake as to the identity of the spouse constitutes fundamental error. The identity of the spouse should be taken as a physical identity of the person. That is to say, if, for instance A while having in mind to marry B married C, it constitutes an error of identity. In such conditions, the qualification, character, poverty or richness of the person are disregarded.

The second category of error mentioned under (b) is error on the state of health of the pouse. Dear student, what kinds of diseases are diseases that do not heal? What about genetically transmitted diseased to descendants? Do you think that HIV/AIDS a under the first category?

Under letter (c), error on the bodily conformation of the spouse who doesn't have the requisite sexual organs for the consummation of the marriage constitutes fundamental error Art 53 (2) of the RFC provides that the spouses shall have with one another the sexual relations normal in marriage unless these relations involve a risk of seriously

prejudicing their health. This obligation of the spouses is mandatory and hence can not be set a side by contrary agreement. But such obligation can be put in to effect if and only if the two spouse have the requisite sexual organ. Therefore if one of the spouses is mistaken the fact that the other spouse doesn□t have the requisite sexual organ for the consummation of marriage, the marriage is going to be defective.

In connection with fundamental error, another question that needs answer is whether art 13 (3) is exhaustive or not. In my opinion Art. 13 (3) is not exhaustive. This can be inferred from introductory phrase □with out prejudice to the provisions of sub-Article (2) this article □.□ Hence so long as a certain error passes the criteria of Art. 13 (2), it can still be fundamental error even if it is not listed under Art. 13 (3) (a-d).

B. Violence

Like fundamental error, violence vitiates consent. As a result, marriage concluded as a result of consent which is extorted by violence shall not be valid. (Art 14 (1) of the RFC) 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. (Art 14 (2) of the RFC).

As can be understood from Art. 14 (2), there is violence when in order to procure consent, serious and imminent force is employed even though the provision does not enumerate constituents of serious danger. Does this serious and imminent danger be directed only against life? Or does it include dangers against honor and property of the aforementioned persons?

The family law doesn't also provide as to whether the nature of violence has to be judged by the objective or subjective standards. Where as the duress under ordinary contact requires the objective standard for the fact that the essence grave evil of the danger depends only up on the decisiveness of the duress in the eyes of a reasonable person who takes in to consideration the age, sex and positions of the parties concerned (Art. 1706 (2) and (3) of the Civil Code). Shall we apply the Civil Code provisions to the family law by way of analogy?

To put in short, error and violence are two circumstances that vitiate consent. Does this mean that fraud doesn't vitiate consent? In other countries, consent procured by fraud invalidates the marriage, but typically only if the fraud goes to the essence of the marriage. Of course, there is a variation concerning what is considered to be the 'essence.' for instance, false representations as to wealth usually are not considered to be essential, but a misrepresentation concerning willingness to have children is considered as essential

In our case, we have two positions as to whether fraud should be taken as a factor that vitiates consent or not. The first position is that it is only violence and error that are taken as factors that vitiate consent. Including fraud will be contrary to the intention of the legislature. Hence, fraud can not be considered as a factor that vitiates consent. The second position upholds the inclusion of fraud as a third factor that vitiates consent. According to this position, even if the Family Code is silent, we can apply the pertinent contract provisions from Art. 1677 (1) cum. 1704 of the Civil Code by analogy. It is strongly argued that if error and violence are deemed to be factors that vitiate consent, so does fraud.

2.3.2.2. Marriageable Age

Age is the second substantive requirement of marriage next to consent. Virtually every legal system pitches a certain minimum marriageable age though the age varies from jurisdiction to jurisdiction. Age limitations on marriage originally were founded on the reasonable consideration that candidates for marriage should have reached puberty stage. Accordingly, the common law, for instance, permitted males to marry at 14 and females at 12 though the ages were raised latter on.

The presumption behind a certain marital age generally is to make sure that the couples are mature enough both biologically and psychologically so as to discharge those functions which the society expects from a family unit or those functions mentioned under section 1.2. of this module.

The Civil Code under Art. 581 fixed marriageable age at 18 for men and 15 for woman of uite exceptionally, however, a dispensation of not more than two years may be granted by the Emperor or a special person appointed by him where there exists a good cause justifying the dispensation. Here it may be asked, why the Civil Code opted for different marriageable age for men and women? The following justifications were given:-

- women attain puberty earlier than men;
- increasing the marriageable age of women above 15 has adverse affect in that women will be vulnerable to abduction and birth out of wedlock.

Even if marriage below the minimum marriageable age entails civil and criminal liability, the practice is quite the contrary. That is, child marriage has become the rule of the practice.

When we come to the revised family Codes, they took a different stand from the Civil Code. The Federal, Amhara and Oromia family, codes, for example, set a minimum marriageable age for both sexes at 18 years. Hence, Neither a man nor a woman who has not attained the full age of eighteen years shall conclude marriage. (Art 7(1) of the RFC) Exceptionally, however, a dispensation of not more than two years may granted by the Ministry of Justice where there exists serious cause justifying the dispensation and where the future spouses or parents or guardian of one of them apply to that effect (Art 7 (2) of the RFC. Dear student, What constitutes serious cause that warrants dispensation? Do you think that dispensation is allowed if the woman become pregnant below 18 years?

The rational behind departing from the Civil Code and raising the lower marriageable age for women are legal, scientific and socio-economic grounds which are explained as follows. Under Art. 299 cum. 215 of the RFC, a person performs a juridical act only if he attains the age of majority; that is, 18 years Marriage, being one such act and in fact, more than a mere juridical act as it is an institution which entail various socio-economic responsibilities, it would be prejudicial to fix a lower marriageable age for women at 15. Because, it can hardly be said that she can, at this stage, give her free and full consent to marriage as required by Art. 34 (2) of the FDRE Constitution. Generally, setting different marriageable ages for the sexes would be against the constitutional equality of sexes in all respects including marriage as enshrined under Art. 25, 34 (1) and 35 (1) and (2) of the FDRE Constitution. Moreover, if women are allowed to conclude marriage before eighteen years, usually, they face so many biological problems which in turn results in psychological and socio-economic problems. Early marriage will have adverse effect on the health of the woman and the baby particularly at the time of

pregnancy and birth Early marriage may also create obstacles on the woman to attain her education because it might be immediately followed by birth.

With regard to minimum marriageable age, the Tigrai Family Code has taken a different stand. Pursuant Art. 27 of the Code, the minimum marriageable age for man and a woman is 22 and 18 respectively. This approach might have socio-economic justification of its own. However, even if marriageable age may be greater than the age of majority, that age should be the same for both sexes in as far as we are furthering the constitutional equality of sexes and spouses.

Therefore, it could generally be said that, the Federal, Amhara and Oromia took a proper stand in fixing the minimum marriageable age at 18 for both sexes which is the majority age. Since a person who attained majority is presumed to understand the pros and cons of his acts, prescribing an age greater than 18 may amount interfering with the choice of individuals and of course, their right to marriage.

2.3.2.3. Relationship by Consanguinity and Affinity

An important prerequisite to marriage is that the intending spouses must not be closely related. Prohibition of marriage within the immediate family (ascendants, descendants, siblings, etc) are universal and Ethiopia is not an exception. More over, various relation ships created by a former marriage (affinity) continue to be considered impediments to marriage in a small minority of jurisdiction and one of them is the law of our country.

Be it in the Civil Code and the Revised Family Code, marriage between consanguinal relatives (incestuous marriage) is prohibited. The basis for prohibiting such kind of marriage arises from scientific

and moral reasons. Science has established beyond doubt that such incestuous marriage will cause genetically transmitted diseases to be transmitted more rapidly and seriously. That is, when the extent of marriage between close relatives increases, the transmission of such diseased will be more complex and fast. The moral reasoning relates to the fact that marriage between closely related persons is repugnant to good morals.

In this regard, the Civil Code provided rules as to what constitutes relationship by consanguinity. Accordingly as we have seen in chapter one, it is provided that bonds of relationship by consanguinity exists in the direct line between ascendants and descendants. (Art 550 (2)) In the collateral line, consanguinal relationship exists between persons who descend from one or more common ascendants up to the seventh degree (Art. 551).

When we come to the Federal Revised Family Code, in the direct line, it is similar to the Civil Code in that marriage between persons related by affinity in the direct line, between ascendants and descendants, is prohibited (Art. 8 (1)). In the collateral line, the Revised Family Code took a different position. The degree of relationship in the collateral line under the Civil Code was found out to be too long. Therefore, under the Federal Revised Family Code prohibition of marriage between collaterals is inlinewith the above (scientific) justification. As a result, in the collateral line, a man can not conclude marriage with his sister or aunt; similarly, a woman can not conclude marriage with her brother or uncle (Art. 8 (2)).

From the fore going discussion, it is clear that under the Federal Family Code, the concept of consanguinity in the collateral line has been relatively narrowed to include only limited persons when

compared to the provisions of the Civil Code. It might be said here that, the degree of prohibited relationships on marriage provided by the Federal and Amhara codes are too narrow contrary to the culture of the people living there where, prohibition up to the seventh degree is widely practiced. Also one may argue here saying these provisions deny the right guaranteed by the Constitution Art. 39 (2) to the people of Ethiopia to express, develop and promote their own culture.

These arguments were shared by some of the drafters of these codes. But justification was given saying that provisions are adopted to accommodate the needs of the two main religions and only the minimum requirement to be fulfilled is provided. Hence any one who wants to count the degree of relationship beyond this can do so. One wants to adhere to his/her tradition, he/she can simply refrain from doing so despite what the law says.

Under the Civil Code and the Federal Family Code alike, marriage between persons related by affinity in the direct line is prohibited. (Art. 9 (1)) In the collateral line, there are differences. Under the Civil Code, affinity shall be of no effect beyond third degree in the collateral line (Art. 553). Under the Revised Family Code, on the other land, the degree of relationship is narrowed. Accordingly, in the collateral line, marriage between a man and sister of his wife, and a woman and brother of her husband is prohibited (Art. 9 (2)).

Dear student what is the justification in prohibiting marriage between affinal relatives? One reason is simply for moral consideration of the society. The other reason is securing the sustainability of marriage. The fear is that a man or a woman has ample opportunity to create close friend ship with his affinal relatives. If marriage is not prohibited between these persons, he or she may opt for dissolving his

/her previous marriage and concluding marriage his/her affinal relative with whom he has close friend ship.

So far, we have seen that marriage between consanguinal and affinal relatives is prohibited. This prohibition is equally applicable to filiations not established legally. Let us read the content of Art. 10 of the RFC as follows.

Art. 10 – Filiations not Established Legally

The existence of a bond of natural filiations which is commonly known to

the community is sufficient to render applicable the impediments to

marriage referred to in Articles 8 and 9, not with standing that the filiations

is not legally established.

How could a filiations commonly known to the community but a non-legal established one occurs? The idea here is that a certain father child relationship may be known and recognized by the community and still may not be legally known or established. This may occur in the following situation. Paternity, under our family codes, is legally ascertained in three ways. These are, one, by way of legal presumption when the child is conceived or born in a legally recognized union; i.e, marriage and irregular union. Second, by way of acknowledgement, and third, by way of judicial declaration of paternity. Let us assume that a certain child is born or conceived as a result of sexual inter course outside of marriage and irregular union; For instance, sexual intercourse performed as a result of rape or abduction. Let us further assume that the community knows the fact that father of that child is a person who is engaged in the act of

abduction or rape. Furthermore, the community also is aware of the fact the rapist, as a father, covers the food, cloth, education and other expenses of the child. Despite all these acts of this person, the paternity is not established legally until he acknowledges the child formally or is judicially declared to be the father of the child. Notwithstanding that the filiation is not legally established since the filiation is known to the community, it shall serve as an impediment to marriage hence the child can not marry the other child of the rapist because she is his sister.

2.3.2.4. Bigamy

Bigamous marriage is void under most jurisdictions, while it is a valid type of marriage inothers. The Civil Code under Art. 585 also outlaws bigamy. Violation of this provision also entails dissolution of such marriage and criminal liabilities. The Revised Federal Family Code and the Amhara Family Code have expressly outlawedbigamy by saying a person shall not conclude marriage as long as he is bound by bonds of a preceding marriage. The Tigrai Family Code, on the other land, prohibited it in principle, and allowed the practice by way of exception on grounds of religion and custom. (Art. 31 cum. Art 32).

The Oromia Family Code is silent on bigamy; and this is one of the basic departures of the Code from the Civil Code. In fact, this is one of the controversial points which attracted the attention of many. Some argue that silence of the Code on bigamy amounts to allowing it while others argue that failure to prohibit it does not necessarily mean that it has been allowed; that is, silence in case of civil laws doesnt necessarily imply permission of same. The question is, therefore, what does the silence really mean? In other words, what would an Oromia court before which a case requesting dissolution of bigamou marriage concluded by fulfilling all other conditions of marriage required by the

Code or a case requiring punishing a bigamous marriage is brought do? Can the court dissolve the marriage and punish the bigamous spouse (s) as the case might be?

For one thing, as the code is silent on the issue, it doesn't provide for persons entitled to attack such marriage. It might be logically argued that the first wife has a vested interest as the outcome of the case directly affects her interest. But on what legal basis can the court dissolve the marriage? What about if a public prosecutor brought a criminal action against a bigamous spouse (s)?

It may be argued that, since bigamy is a crime under the Penal Code, a bigamous spouse is punishable irrespective of whether the practice is expressly prohibited by the Oromia Family Code.

However, this is only a principle. That is, bigamy is punishable under the Penal Code only where it is not allowed under civil laws on grounds of tradition and moral usage, (Art 651 of the FDRF Penal Code). Since the Oromia Family Code is silent and it is not clear, at least apparently, whether it allows bigamy, the criminal bench can not hold the defendant liable because by virtue of Art. 2 of the Penal Code it is forbidden to create a crime by analogy or interpretation.

The question remains with the civil bench. The judge is now expected to interpret the law, because silence of the law is one ground which calls for interpretation of law. The judge may apply argument apari- for similar reason, argument a fortiori- for stronger reason and argument acontrario- for contrary reason to know the intent of the legislature for our purpose, arguments apari and acontrario may be helpful.

One may, on the basis of argument a pari, argue that since the Oromia Family Code, has regulated all other impediments to marriage including requisite of consent, requirement of equal marriageable age for both sexes and generally recognizes equality of sexes on marriage, for similar reason, it prohibited bigamy which affects equality of spouses.

It may also equally be argued on the basis of argument a contrari; inclusion of certain items is a clear exclusion of others. In our case, the regulation by the Oromia Family code of other impediments to marriage such as consent, age and relationship is a clear exclusion of bigamy and permission of same.

Both arguments are not ends in themselves; rather they are a means to get the intention of the legislature since legislature history is also one way of arriving at the intention of the legislature, as to which of the two lines of arguments are tenable could be decided by having reference to the minutes of State Council during deliberation on the Code. The state council had a hot debate on the issue and latter inclined to be silent on the ground that expressly prohibiting bigamy would be interfering with the culture and religion of the people.

Therefore, under the Oromia Family Code, concluding a bigamous marriage does not entail judicial dissolution of marriage. But one point that should be borne at this juncture is that maintaining the religion and culture of peoples of the region can not be legal justification for allowing bigamy. It is true that polygamy is the culture of the society and it is also correct that the right to promote and develop ones culture is recognized by the constitution (Art. 39 (2) of the FDRE Constitution). But it is only □□ Culture and traditions that are compatible with fundamental rights, human dignity, democratic

norms and ideas and the provisions of the Constitution that deserve promotion and enrichment (Art. 91(1) of the Constitution). Polygamy violates the right to equality of spouses which is a fundamental right, a democratic norm and the provision of the constitution. Hence, the right to polygamy as a component of right to culture is restricted under the Constitution. Therefore, right to culture can not be a ground for allowing bigamy under the Oromia Family Code. We can follow similar argument for religion form the commutative reading of Art 27 (1) and Art. 27 (5) of the Constitution.

So, should the law uphold bigamy by the mere fact that people is practising? Could prohibiting bigamy be taken as enacting an unenforceable law? Despite all the vices to bigamy, the idea is that let the behavior of the people guide the law.

2.3.2.5. Representation not Allowed

According to Art. 12 (1) of the Federal Revised Family Code, a marrying spouse should conclude the marriage by physically appearing before the celebrating authority, i.e., the officer of civil status, religious authority or customary authority depending on the form of marriage. He/she is not allowed to delegate some one to conclude marriage on behalf of him her. Since personal appearance is more of procedural requirement; it is also indicated under Art 2 and Art 25 (1) of this Code.

Even though this is the rule under Art 12 (1), its exception is provided for in Art. 12 (2). According to this sub article, the Ministry of Justice may allow marriage through representation when the Minister believes that there is a serious cause for doing this and if the marrying spouse gives his/her consent for the representation.

What do you think constitutes a serious cause? If for example, a marrying spouse, while preparing to conclude marriage, is sent to a war front to defend his country, do you think this can be a serious cause for his being represented by another person?

The law does not define what really constitutes a serious cause in this matter. Wether a certain cause is serious enough to allow marriage by representation is left to the judgment of the Ministry of Justice. But as an exception, the minister should apply narrow interpretation.

You should also note at this point that the marrying spouse is represented only for the purpose of signing on the certificate of marriage on behalf of the marrying spouse. For that matter, a man may be represented by another man or even by a woman.

2.3.2.6. Judicially Interdicted Persons

As per Art. 15 (1) of the RFC, any person who is judicially interdicted shall not conclude marriage unless authorized, for that purpose, by the court. An application to this effect may be made by the interdicted person him self or by his guardian. (Art 15 (2)).

You may have learnt in your law of person course that a judicially interdicted person is a person who is pronounced by a court of law as incapable to perform juridical acts. Even if marriage is a juridical act, the interdicted person can conclude marriage up on the authorization of the court since an interdicted person can not duly understand the consequence of marriage, prior permission of the court is necessitated to avoid unwanted effects. For instance if the interdicted person is not capable of rearing the children born out of marriage, the court may not give permission to conclude marriage.

2.3.2.7. Period of Widowhood

Period of widowhood is the last substantive requirement of marriage mentioned under the law. In this regard, Art 16 of the RFC provides the following;

Article 16 – period of widowhood

1) A woman may not remarry unless one hundred and eighty days have lapsed 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

As can be understood from this article, period of widowhood is a condition of marriage applicable only to women. In as much as a woman can not conclude marriage while she is bound by the bond of the preceding marriage, she can not also remarry unless 6 months elapsed since the dissolution of the preceding marriage.

Why do you think is a woman obliged to stay with out remarrying up to six months from the dissolution of her previous marriage? The justification lies in protecting the right of children to know their parents which is recognized under the FDRE Constitution and International Treaties ratified by Ethiopia. In order to enforce such

right, the family law strives to avoid any kind of conflict that may arise on the question of paternity that is created when the women is allowed to remarry shortly after the end of her previous marriage. Particularly a child could be attributed to two fathers if he is born in less than 300 days as of the date of dissolution of the first marriage (Art. 126 cum. 128 (1)).

To make it more clear, if a woman gets married after two month as of the dissolution of her previous marriage and gave birth to a child at the seventh month of the conclusion of her second marriage, both the ex-husband and the present husband are presumed to be the father of the child under the eyes of the law. This is because since the child is born at the 9th month which is within 300 days after the dissolution of the first marriage, the ex-husband is presumed to be the father as per Art. 128 (1). Besides since the child is born after the 7th month as of the conclusion of the second marriage, the second husband is presumed to be the father as the child is born in wedlock (Art 126).

To avoid any possible conflict that arises in ascertaing paternity, the woman should refrain from concluding a second marriage until 180 days lasped since the dissolution of her former marriage. The 180 days period of widowhood may some how minimize the problem. However, it doesn□t totally avoid the problem. In other countries, the period of widowhood is 300 days. This period of widowhood should have been included under Art. 16. The problem is that even if the woman observes the 180 days and remarry after 180 days since the dissolution of the first marriage, conflict may arise if the child is born within 300 day as of the date of dissolution of the first marriage. This is because Art 128 (1) provides that if the child is born within 300 days after the dissolution of the preceding marriage, the ex-husband

shall be deemed to be the father of the child. So, to avoid conflict of paternity, the period of widow hood should be ten months.

Art. 16 (2) indicates circumstances where by observance of period of widow hood is unnecessary. Where the woman gives birth to a child after the dissolution of her marriage, she is not obliged to comply with period of windowhood. This is because, in this case, the father of the child is deemed her previous husband and hence conflict of paternity will not arise. In addition to this, where the woman remarries her former husband, she can remarry even without observing the legally stipulated period of widowhood because conflict in regulating paternity will not arise as the presumed father will be the husband. Where it is also proved by medical evidence that the woman is not pregnant from the first marriage, she can remarry with out complying period of widowhood.

Realizing that the exhaustive enumeration of reasons that warrant nonobservance of period of windowhood is difficult, the power of dispensing the woman from observing the period of widowhood is given to the court. What additional reasons might be considered by the court to dispense the woman from observing period of widowhood? For instance, if the woman is strile and this fact is evidenced by medical evidence. Besides, if a menstruation flows for three consecutive months after the dissolution of marriage, the court may relieve the woman from observing period of widow hood.

2.4 Opposition to Marriage

In the preceding sub-section, we have exhaustively discussed those substantive requirements of marriage that should be fulfilled before a marriage is celebrated. When marriage is to be concluded in violation of one of the substantive essential condition of marriage, opposition

may be made notwithstanding that it is possible to apply for dissolution of such marriage after its conclusion (Art. 17). Therefore, the objective of the discussion of this section is to take preventive or precautionary measure of a defective marriage from being concluded. Needless to say, it is better to prevent a defective marriage from being concluded than dissolving the already established marriage in all respects we can prevent conclusion of a defective marriage by way of opposition.

Having mentioned the objective of this section, let us briefly analyse the provision of the law. Art. 18 of the RFC enumerates persons entitled to make opposition. If the marriage is to be concluded without observing the minimum marriageable age by the future spouse (s), opposition to the conclusion of marriage may be made only by the parents of the minor, public prosecutor or any other interested person. Government represented by public prosecutor is a concerned body to make opposition because child marriage is against the FDRE Constitution, International conventions ratified by Ethiopia and other ordinary laws of Ethiopia. In addition, "any interested person" is entitled to make opposition. Here the term "any interested person" doesn't and shouldn't include any by passer. The aim of the law is to indicate those non-governmental organizations that work on children and women rights.

Where the ground of opposition is relationship by consanguinity or affinity, opposition by virtue of Art 18 (b) shall be made by the ascendants of the future spouse(s), or the ascendants of one of them, or brothers or sisters of the future spouse(s), who have attained the age of eighteen years or the public prosecutor. In case of bigamy, opposition shall be made by the person alleging to have had a prior marital relationship with the bigamous spouse or by the public

prosecutor. Where a judicial interdicted person is to conclude marriage without the permission of the court, opposition may be made by his guardian, or by the public prosecutor.

Who is entitled to make opposition if marriage is to be concluded without the free and full consent of the spouse (s) or without observing period of widowhood? Discuss!

The next issue that needs consideration is for whom is opposition to be made? If marriage is concluded in violation of one of the essential conditions to marriage, its dissolution may be required by making an application to a court. But opposition to marriage is not to be made to courts. By virtue of the English version of Art 19 (1) of the RFC opposition to marriage shall be submitted to the officer of civil status The Amharic version of the same article, on the other hand, provides that opposition to marriage shall be submitted to KÒw eðíT>¨< vKeM×.. Obviously, there is inconsistency between the Amharic and English version. In the event of inconsistency, the official (Amharic) version shall prevail.

On the basis of the Amharic version of Art 19 (1), opposition to marriage shall be submitted to the marriage celebrating authority. The marriage celebrating authority varies from one form to another form of marriage. If marriage is to be concluded before an officer of civil status, opposition should be made to the same. When marriage is to be concluded in accordance with the religion of the future spouse(s), opposition shall be made to the religions authority. If, on the other hand, marriage is to be celebrated in accordance with custom, opposition shall be made to arbitrators.

As regards form and time of opposition, Art 19 (1) provides that opposition to marriage shall be made in writing and submitted to celebrating authority at least fifteen days prior to the date of celebration of marriage. A written formality is required because opposition reduced in writing is a more deliberate action and has more evidential value when compared to the oral one. Concerning the time of opposition, it shall be made at least 15 days before the date of conclusion of marriage. The 15 days time of opposition compromises two interests. From the view point of the future spouses, it helps to avoid unnecessary expenses that may be incurred to celebrate marriage in case the opposition is sustained. It is clear that when the date of opposition is nearer to the date of concussion of marriage, the spouses and their families may carry out some preparatory acts which invite the expense of a large amount of money. From the perspective of persons who are entitled to make opposition, it gives enough time to make an application thereby prevents a defective marriage from being concluded.

Once an opposition is made in compliance with the foregoing provisions, the celebrating organ shall decide on the opposition within five days (Art. 20(1)). Of course, before rendering a decision on opposition the authority shall receive the opinion of the future spouses. (Art. 19 (2). The decision of the officer to celebrate the marriage shall be final. (Art. 20 (2). Where the opposition is sustained, on the other hand, the officer of civil status shall refuse to celebrate the marriage (Art. 20 (3). In such case, the officer of civil status shall give reasons of his refusal and inform same forthwith to the future spouses (Art 20 (4)). As indicated under Art. 21, the future spouses or one of them may petition to the court against refusal to celebrate marriage. When the court over rules the decision of the officer of civil status, such officer shall celebrate the marriage.

Per Art. 20 (2), a decision against opposition to marriage is final with no possibility of appeal. On the other hand, a decision against celebration of marriage is apellable to courts. What is the rationale behind to make such distinction? The decision of the authority against celebration of marriage should not be final as it affects the right of future spouses to marry and found a family. This constitutional right can not be deprived of by administrative decisions and hence appeal is possible. In contrast, a decision against opposition doesn't have a far reaching consequence when compared to a decision against celebration of marriage. Even if the opposition is sustained a defective marriage may be attacked and dissolved after the conclusion of the marriage.

2.5. Registration of Marriage

In sub-section 2.3.1, we have seen that marriage may be concluded in either of the three forms of marriage. Irrespective of the form according to which the marriage is celebrated, however, marriage shall be registered by a competent officer of civil status (Art. 28 (1).

Why do you think is the power of registration of marriage is given to officer of civil status? Why not to for other marriage celebrating authorities? Two justifications have been given. Firstly, organizational and efficiency wise, government institutions are in a relatively better position; and, secondly, some international instruments, such as Art. 16 (2) of Convention Against Elimination of All forms of Discrimination Against Women, make registration of marriage compulsory. To discharge its commitment, government should under take registration of marriage through its institutions.

Another point worth consideration is the purpose of registration. Registration of marriage is not a validity requirement to marriage. Regardless of the fact that marriage has been registered or not, it shall have effect from the date of its conclusion (Art. 28 (3). Hence, the purpose of registration is for evidencial purpose. Once the officer of civil status registers marriage, it shall issue a certificate of marriage to the spouses. (Art. 25 (2). Such certificate of marriage shall be produced to prove marriage where the existence of a certain marriage is challenged.

To assure the establishingment of the registering organ, the Federal Revised Family Code, under Art. 321, compels the Federal Government, with in six months from the coming in to force of the Code, to issue registration law applicable to the Administrations where this code is to be enforced and establish the necessary institutions. Until the officer of civil status is established within the time specified above, it has been made that certificates of birth, marriage, and other relevant certificates issued or to be issued by an appropriate authority of the administration where this code is applicable shall be deemed to have been issued by the office of civil status and considered valid (Art. 321 (2)), despite Art 321 (1), the officer of civil status is not yet established.

Exercise

1. Is marriage a contract? If not, list some of the major differences between marriage and other ordinary contracts.
2. As can be understood from the respective family codes, betrothal is not included under the Revised Federal Family Code but is incorporated in other regional family codes. What

justifications are given by the respective legislators of the federal and regional family codes?

3. What is the main differences between substantive requirements and formality requirements of marriage?
4. Marriage concluded as a result of error in consent or consent which is extorted by violence shall not be valid. But with regard to marriage concluded as a result of fraud, the law is silent. What is the implication of the silence of the law?
5. Explain the distinction between opposition to the conclusion of marriage and dissolution of marriage? For whom is opposition to the conclusion of marriage to be submitted?
6. Enumerate persons entitled to make opposition to the conclusion of marriage. When is opposition to be made?
7. As to registration of marriage, Art. 28 (1) of the RFC provides that marriage shall be registered by a component officer of civil status irrespective of the form according to which the marriage is celebrated. Does it mean that marriage concluded in accordance with religion or custom of the spouses shall have no legal effect unless registered by an officer of civil status?

CHAPTER THREE

EFFECTS OF VIOLATIONS OF ESSENTIAL CONDITIONS FOR THE VALIDITY OF MARRIAGE

3.1 General

Dear student, I welcome you to the third chapter of this module. In the second chapter, we have studied substantive and formality requirements of marriage. In this chapter, we will study the effects of violation of substantive and procedural requirements of marriage. In general, at the end of this chapter, the students will be able to:

→ Discuss the differences between void and voidable marriages;
→ Distinguish the differences between absolute, relative and prohibitive impediments to
marriages;
→ Elaborate what sanctions will be imposed when each of the essential conditions are
not fulfilled, and
→ Identity the persons that can bring the case before the court.

Broadly speaking non-observance of essential condition to marriage may entail both criminal and civil liability. With regard to the criminal sanction, it is a matter that is dealt under the FDRE Penal law. What we shall discuss under this chapter is the civil liability that arises from - non compliance with the essential conditions for the validity of marriage.

Generally, a marriage concluded with out fulfilling one or more essential conditions to marriage shall be a defective marriage. Defective marriage is of two types these are void and avoidable marriage. To put in different words, violation of essential conditions to

marriage may result in either void or voidable marriage. What is the difference between void and voidable marriage?

3.1.1. Void Marriage

Void marriage is a marriage, which has no any legal effect from the very inception. Such marriage is also known as void abinitio. This kind of marriage is a marriage that is deemed as never to have taken place. It is a non-existent marriage or a dead marriage as soon as it is made. The natural consequence of void marriage is no effect in the eyes of the law. In the Ethiopian family. law, there is no concept of void marriage. Therefore, it is impossible to give example of a defect that results in void marriage in Ethiopia. How ever, in some other countries, there is a concept of void marriage. In these jurisdictions, void marriage may arise from incestuous marriage, non - observance of minimum marriageable age, bigamy and lack of requisite mental capacity to conclude marriage.

In France, for instance, if a brother and sister conclude marriage, their marriage is void from the time of its conclusion. This means, the marriage is not deemed to have existed at all. Therefore, the man and the woman will not have a community of property. If children born of such void marriage, they are considered as illegitimate children (born out side of wedlock). It can not also create affinal relationship.

Void marriage is absolute in that it can be attaeked by all affected and any interested person. Once attached, it will become invalid for the past and for the future. Void marriages donot require special formality

to come to an end. Nevertheless, a declaratory judgment is required to the effect that a void marriage really is void.

As has been slightly touched up on, all family laws of Ethiopia opted for not to include the concept of void marriage. Because if a certain marriage is rendered void abinitio, the effect is that no common property and illegitimating of children. But this effect is highly prejudicial to the children who are born out of this void marriage. In general, void marriage will result in chaos in the society.

3.1.2. A Voidable Marriage

A voidable marriage is also a defective marriage. Voidable marriage has the following features.

- A voidable marriage is a marriage which is deprived of effect for the future but which holds good for the past.
- It is a marriage susceptible to invalidation when attacked and it remains valid until it would be attacked for defect and dissolved by court order.
- Order of invalidation is requested only by specified persons.

Voidable marriage, in other jurisdictions, is the result of less serious defects in marriage. For instance, marriage concluded without parental consent, marriage concluded with out formal requirements and marriage concluded as a result of fraud.

The Ethiopian family laws, be it the Civil Code or the newly enacted Federal and Regional family codes, adopted only voidable marriage. Because a marriage concluded without the observance of one or more essential conditions to marriage (defective marriage) shall be

invalidated by a court of law if and only if an application is made by an authorized person to it for invalidation. The defective marriage shall produce all legal effects of a normal marriage unless and until it is invalidated by a court of law. For example, according to our family laws, even if a brother and sister marry each other, their marriage is effective until and unless it is invalidated by the court. By the same token, if a man concludes a second marriage without dissolving the previous marriage the second marriage produced all legal effects of a normal marriage. Therefore, a bigamous marriage, even though it is prohibited, is regarded as effective marriage as long as it is not invalidated by a court. In view of this, there will be community of property between the bigamous spouses and the children born of such relation are also legitimate.

Having said these general points, now, let us proceed to deeply analyse effect of violation of essential conditions to marriage in the Ethiopian context.

3.2. Effects of Violations of Marriage Requirements under the Federal Revised Family Code

3.2.1 Effects of Violations of Substantive Requirements of Marriage

Taking in to consideration the effect of their violation, substantive requirements of marriage or impediments to marriage could be divided in to three groups. These are:

- Absolute impediments to marriage

- Relative impediments to marriage and
- Prohibitive impediments to marriage

3.2.1.1. Absolute Impediments to Marriage

The violation of impediments to marriage under this sub-section makes the marriage voidable. That is, these are impediments that shall always be there. Neither the passage of time nor change of circumstances remedies the defect. The marriage will always remain defective if it is affected by such impediments and it is always possible to invalidate the marriage. To put in short, the defects that arises from the violation of such impediment can not be removed.

Under the Federal Family Code, an impediment that falls under this heading is a relationship either by consanguinity or affinity. Study Art. 32 of the Revised Family Code.

Art. 32 – Consanguinity or Affinity

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.

In chapter two we noted that a person may not conclude marriage with another person to whom he/she is related by consanguinity or affinity. We also identified the persons that are related to each other by consanguinity and affinity. If a marriage is found out to be concluded between consanguinal and affinal relatives, dissolution shall be ordered at any time on the application of any interested person or the public prosecutor. Even if persons who are related by

consanguinity and affinity marry each other, their relation shall subsist forever. For example, if a brother and a sister get married they will be siblings for ever, even if they married each other. That is, their defective marriage is always susceptible to invalidation.

3.2.1.2. Relative Impediments to Marriage

Like absolute impediments, relative impediments are essential conditions that prohibit celebration without the fulfillment of the same. Marriage concluded in violation of these impediments may be invalidated. However, removal of the impediment or passage of time may bring about validity. So, an application for invalidation can not be brought after a period of time fixed by the law lapsed or circumstances are changed.

Under this category, we have:

- Marriage concluded without the observance of minimum marriageable age;
- Bigamous marriage;
- Marriage concluded by a judicially interdicted person without the authorization of the court.
- Marriage concluded under the influence of violence; and
- Marriage concluded due to fundamental error

As we have discussed in chapter two, no person is allowed to marry before he/she attains the age of 18 years. What do you think is the effect if a man or a woman marries at the age of 15 or 16 years, setting aside the exception? Art. 31 prescribes the following sanction.

Art. 31 – Age

1) Without prejudice to sub-Article (2) of Art 7 of this Code, marriage concluded by a man or a woman under the age of eighteen years shall dissolve on the application of any interested person or the public prosecutor.
2) It may no longer be applied for after the age required by law for marriage is satisfied.

According to sub-article (1) of Art. 31, marriage concluded between a man and a woman under the age of 18 years shall be dissolved. An application to the court to that effect may be made by interested person or the public prosecutor. The phrase "any interested person" could be interpreted to include any citizen who is concerned about the well-being of the society and respect of law.

Although a marriage is concluded between a man and a woman without attaining 18 years of age, an application may no longer be applied for after the age required by law for marriage is satisfied. For example, if a girl of 17 years old concludes marriage, her marriage is a defective one. But application to invalidate her marriage is possible until she attains a full age of 18 years. After then, the law doesn't allow any application for invalidation.

The second impediment to marriage that falls under relative impediments is bigamy. The Federal Revised Family Code is based on the concept of monogamy, that is, a one man- one woman type of marriage. Hence a person cannot conclude another marriage while bound by the bond of the preceding marriage. What is the effect if a bigamous marriage is concluded in violation of Art. 11 of the RFC? Study the following Article from the Revised Family Code.

Art. 33 □ Bigamy

1) The dissolution of a bigamous marriage shall be ordered on 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.

As can be understood from Art. 53 (1), if a bigamous marriage is found out be concluded, it shall be dissolved by the order of the court. However, its dissolution can not be ordered unless: one, an application is made by either of the relatives of the bigamous spouse, the bigamous spouse or the public prosecutor; two, an action of dissolution is brought before the death of the former spouse of the bigamous marriage. Here we have to note that only some individuals are entitled to apply for dissolution. Since bigamy is allowed in certain cultures and religions, a need arises to exclude the dissolution of a bigamous marriage on the applications of persons who donot belong to that religion or culture. That is why the law limits the identity of individuals entitled to apply for dissolution.

Another point that must be borne in mind is that an application for dissolution of the bigamous marriage may not be ordered where the former spouse of the bigamous marriage has died. The idea here is that if the first marriage has been dissolved because of the death of the former spouse of the bigamous marriage, the second marriage turns out to be monogamous and hence, the court may not order dissolution thereafter.

At this juncture, it is of fundamental importance to pose the following questions. Is the dissolution of the former marriage due to divorce causes the validity of the second (□bigamous□) marriage? What if the first marriage is dissolved because of declaration of absence of the first spouse of the bigamous spouse or non-observance of essential conditions to marriage? Do you think that application for dissolution of the bigamous marriage is prohibited in these circumstances? Why/ why not?

The third impediment to marriage that falls under relative impediments is a marriage concluded by a judicially interdicted person. In chapter two, we have discussed that a judicially interdicted person can not conclude marriage unless he is authorized to do so by a court of law. What do you think will be the consequence if such person conclude marriage without the prior permission of the court? Examine the following article from the Revised Family Code.

Art. 34 □ Dissolution of Marriage of a Judicially Interdicted Person

1) Where a judicially interdicted person has contracted marriage with out 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.

Hence, a marriage concluded by a judicially interdicted person without the permission of the court may be dissolved on the application of the same or his guardian. Nevertheless the law stipulates a sort of period of limitation within which an action of invalidation must be brought. If the action of dissolution is brought by the interdicted person himself it may not be accepted six months after the date of termination of his disability. Once his disability is terminated, his marriage will turn out to be a non-defective one. However, the interdicted person is given six months after the termination of his disability to request the dissolution of his marriage. The reason is that as long as he is in disability, he is not entitled to apply for dissolution. If the action of dissolution is brought by his guardian, on the other hand, it will not be entertained after the date of the termination of the disability of the interdicted person. This is because after the termination of his disability, the interdicted person can require for dissolution.

Dear student before closing our discussion pertaining to judicially interdicted person, it suffices to raise one point. That is unlike judicially interdicted person, a legally interdicted person has capacity with regard to conclusion of marriage (Art. 386 (1) of the Civil Code). So, the marriage concluded by him shall be valid even if it is done without the authorization of the court.

The fourth impediment that could be categorized under relative impediments is consent. If the consent is given either under the influence of violence or due to fundamental error, the marriage shall be defective. Let us see the fate of such defective marriage from the reading of Art. 35 and Art. 36 of the Revised Family Code.

Art. 35 – Act of Violence

1) Who so ever has concluded marriage under the influence of violence may apply to the court to order the dissolution thereof.
2) Such an 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.

Art. 36 – Error

1) Whosoever has concluded marriage due to fundamental error may apply to the court to order the dissolution thereof.
2) Such an 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.

As we can see from the close reading of Arts. 35 (1) and 36 (1), marriage concluded under violence or due to fundamental error could be invalidated by the application made to the court by the victim of such acts. However this person can not bring an action to invalidate the marriage if six months have elapsed since the cessation of the violence or the discovery of the error as the case may be. Moreover, after two years from the conclusion of marriage, no application could be made to invalidate the marriage. The two years period of limitation is set because within the two years period, circumstances which strengthen the sustainability of the union like birth of a child could possibly occur.

To put in a nutshell, the victim of an act of violence or error is no more allowed to apply for dissolution of the marriage on the ground of violence or fundamental error after the lapse of the time stipulated under Art. 35 and 36. But this doesn't totally bar the individual to request dissolution on the basis of other grounds. For instance, he/she may avail her/him self of divorce provisions.

3.2.1.3. Prohibitive Impediments

These are impediments to the conclusion of marriage. But once the marriage is concluded in violation of these impediments, dissolution shall not be ordered by the court. The only impediment that falls under this category is period of widowhood.

As you may recall from chapter one of this module, a widow is required not to remarry before the expiry of six months from the dissolution of the previous marriage. See Art. 16 (1). What do you think is the consequence of the failure to meet this condition?

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 observed.

As can be understood from Art. 37, even if the law requires that a woman should stay for six months without remarrying after the dissolution of her prior marriage, the non observance of this requirement shall not entail the invalidation of her new marriage. As we have seen in chapter two, the aim of observance of period of widowhood is to avoid conflict in ascertaining paternity. Once a woman concludes the second marriage without staying 180 days after the dissolution of her first marriage, we can not avoid the conflict in regulating paternity by dissolving the second marriage. Hence, the law opted the sustainability of the second marriage despite the violation of the law.

3.2.2. Effects of Violations of Formality Requirements of Marriage

In the previous sub – section, we have elaborately studied effects of violation of substantive requirements of marriage. In this sub-section we shall briefly study effect of non – observance of formality requirements of marriage.

In chapter two, it is said that marriage shall be concluded before an authorized officer of civil status. However, the invalidation of marriage shall not be ordered for the sole reason that the officer of civil status who celebrated the marriage is not competent and as a result failed to do what he ought to do.

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.

In similar manner, the invalidation of marriage shall not be ordered by the court on the ground of non-observance of some formalities specified by the law.

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 Art. 25 have not been observed.

Does it mean that the dissolution of marriage shall be ordered if the formalities under Sub articles (1), (2), (4) and (5) of Article 25 are not complied with? Why/why not?

Exercises

1. One student told to his friend the following.

   "The violations of all essential conditions to marriage entail the dissolution of marriage."

   State the validity or other wise of the assertion in the light of relevant provisions of the Federal Revised Family Code.

2. Ato Alebachew and W/o Mahlet concluded their marriage in 1990.

   They lived for six years together happily. But Ato Alebachew also married W/o Tigist in 1996. Though he concluded a second marriage, Alebachew did not dissolve his former marriage. Shortly after conclusion of his second marriage, Ato Alebachew died of a fatal car accident. Following his death, both W/o Mahlet and W/o Tigist appear before the court claiming that each of them is the wife of the deceased. What would be your ruling assuming that the case is brought to the court to which you are a presiding judge?

3. Assume that Ayalneh and Belaynesh got married in 1993. However, Ayalneh concluded another marriage with Chaltu in

1995. He concluded the second marriage without dissolving his marriage with Belaynesh.

3.1 Which of the two marriages, would you think, is bigamous?

3.2 List the person that can apply to the court for invalidation of the bigamous marriage. Which of the marriages would the court dissolve?

3.3 If Belaynesh died some time after her husband get married to Chaltu, can the bigamous marriage be invalidated after this incident?

CHAPTER FOUR
EFFECTS OF MARRIAGE

4.1. General

In the last two consequentive chapters, we have studied essential conditions to the validity of marriage and the consequence of their violations. In this chapter, we shall study effects of marriage. As you may recall from your law of persons course, marriage is a juridical act. And we know that juridical acts are acts followed by legal effects. Therefore, marriage, as a juridical act, has its own effects which we are going to discuss in this chapter. In general, a student, who has successfully completed this chapter, will be able to:

→ Explain the essence of contract of marriage;

→ Understand personal effects of marriage;

→ Discuss pecuniary effects of marriage;

→ Distinguish between contractual regime and legal regime;
→ Identify personal property of the spouses;
→ Define common property of spouses and
→ Distinguish between personal and common debts of the spouses.

Before going deep in to the merit of this chapter, it is of a paramount importance to raise some general points. To begin with, whether the marriage is celebrated with the formalities of civil marriage, religions marriage or customary marriage, the law does not make any distinction among them with regard to the effects of marriage. In this regard, Art. 40 (1) of the RFC provides that marriage produces the same legal effects what ever the form according to which it has been celebrated.

Another point worth mentioning is that the effects of marriage shall not depend on the real or presumed consummation of the marriage (Art. 41). That is to saw the effect of marriage shall be operative as of the date of conclusion of marriage regardless of the fact that the spouses have performed sexual inter course or not.

As has been said above, marriage is not without effect. And its effects are derivatives of either the spouses contractual agreement (contract of marriage) or the legal stipulations (legal regime) or both. Since marriage is a lifetime relationship between the two couples, they 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 does not contradict with the mandatory provisions of the law. There is also statutory regime that will be operative to have effect on the couples relationship where there exists no contract by the spouses or even if there is, it goes contrary to what the law has

already imposed as mandatory provisions concerning the effects of marriage. Here in follows a brief discussion on these two regimes.

4.2. The Contractual Rigime (Contract of Marriage)

In a nut shell, contract of marriage is an agreement of the spouses by which they may determine some points concerning their pecuniary matters as well as their future personal relations. Of course, for marriage contract to be valid, there are a number of pre conditions that we will consider a moment later. But for the moment it suffices to understand that the purpose of this contract is to regulate both the personal as well as the pecuniary effects of marriage Read Art. 42 of the Federal Revised Family Code here in below.

Article 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 contracts shall not affect mandatory provisions of the law

Under the Civil Code, there were difficulties in making a distinction between contract of marriage and record (certificate) of marriage. Under the Revised Family Code, these are two separate and unrelated documents. As we have discussed here in above, contract of marriage is a document that shows the intention of the future spouses as to how they regulate their personal and their pecuniary relations. Certificate of marriage, on the other hand, is a document issued by the officer of civil status after registration of marriage pursuant to Art. 28(2) of the RFC. The aim of certificate of marriage is to proof the existence of marriage. So, what will be produced to prove marriage is certificate of marriage, not contract of marriage. Apart from their purpose, another

difference is that contract of marriage may be concluded even before the conclusion of marriage but the issuance of certificate of marriage always follows celebration of marriage.

Having said this as to the distinction between contract of marriage and certificate of marriage, now let us study preconditions to the validity of contract of marriage.

One is the time aspect. To be of any legal significance, the contract must be made before or on the date of celebration of the marriage (Art. 42 (1)). It seems, therefore, that any contract of the spouses affecting their personal or pecuniary relations will be void if made during the life of their marriage.

However, there is Art. 73 that implies the existence of a valid contract of marriage even if drawn after the conclusion of the marriage. This article provides that contracts entered in to between spouses during marriage shall be of no effect unless approved by the court.

In the opinion of the writer of this module, the contract mentioned under Art. 73 shall be extended to cover a type of contract expressed under Art 42 i.e. affecting the personal and or the pecuniary relations of the spouses. This argument is tenable particularly when the provision says Any contract . Since marriage contract is one type of contract, it can be entered on the ongoing marriage. The only precondition is the necessity of getting the approval of the same by the court of law.

Here we have to note that contract of marriage concluded before or on the date of celebration of marriage does not require the approval of the court. On the other hand, contract of marriage made during

marriage shall have no legal effect unless approved by the court. Here it is logical to ask, why the law requires the confirmation of judges in the latter case. Every person in general and the spouses in particular have contractual freedom. But the aim of Art. 73 in requiring approval of the court is not to limit such freedom, rather to check whether that contract is free from influence. The fear of the law is that if a contract is concluded during marriage, it would be possible that it prejudices the interest of either of the spouses. Even if it is a contract, either of them may win dominance over the other to make him/his accept an obligation. One of the spouse may be influenced by the other and the sourceof the influence is the cohabitation it self. To put in short, to ensure that a certain contract of marriage is made free from influence, the intervention of the court is undoubtly important.

The second and most important pre-condition for a valid marriage contract is that it must not derogate from the mandatory provisions of the law (Art. 42(3)). It is crystal clear that if and when a marriage contract is made in a manner contradictory to the mandatory provisions of the law, it will be null and void.

What are mandatory provisions of the law? Mandatory provisions of the law are rules stated by the law that should be strictly observed. To put in other words, these are rules that may not be set a sided by the agreement of the parties. These rules are different from permissive rules where the individual could or could not act in line with such rules. An example of a mandatory rule is Art. 49 (1) of the Revised Family Code. It reads as, "the spouses owe each other respect, support and assistance" since it is a mandatory rule, spouses coan not agree, in their contract of marriage, in violation of this mandatory rule.

The third pre condition to the validity of contract of marriage is form. With respect to form, Art. 44 provides that a contract of marriage shall be of no effect unless made in writing and attested by four witnesses, two for the husband and two for the wife. Even if Art. 44 is silent, we can also add the requirement of signature. As the name indicates cortract of marriage is one type of a contract. Hence pursuant to Art. 1676 (1) of the Civil Code, general contract provisions are applicable to contract of marriage. By virtue of Art. 1727 (1) of the Civil Code, any contract required to be in writing shall be supported by a special document signed by all parties bound by the contract, if one of the aforementioned formality is not observed, the contract of marriage shall remain a mere draft.

The fourth requirement for the validity of contract of marriage is capacity. Even if the capacity of a certain physical person with regard to conclusion of contract is presumed, the contract of marriage of a judicially interdicted person shall be of no effect unless it is entered in to by the interdicted person himself and approved by the court (Art. 43 (1)) A legally interdicted person shall not, however, be subject to incapacity as regards the making of a contract of marriage (Art. 43 (2)).

Fivethly, the spouses shall not impose an obligation up on third parties by their contract of marriage (Art. 46 (2)). From general contract provisions, one of the avowed principle is that contracts lawfully formed shall be binding between the contracting parties. So any attempt to impose obligation on third parties through contractual agreements shall be followed by nullification. But how can spouses impose obligation up on third parties? For instance, assume that a man, who is getting married, had a child prior to this marriage. Now this man and his marrying spouse can not agree that only the relatives

of the child on his mother□s side are responsible for the up bringing of the child.

Further more, the contract of marriage shall be of no effect where it simply refers to local custom, religion or law of a country (Art. 46 (2)). If two spouses, under their contract of marriage, simply agree to govern their personal and pecuniary relation by local custom, religion or law of a country, it will be too general. This generality in turn may lead to different interpretations Under the general contract provisions, it is given that the obligation of the parties as stated in the contract should be ascertained with sufficient precision (Art. 1714 (2)). There fore, if the spouses under their contract of marriage agree to be governed by the law of Japan, it will make the obligation of the spouses undefined.

The last point that deserves to be mentioned here is the requirement of putting the marriage contract under the custody of the court or with the office of civil status (Art. 45 (1)). However, the effect for the non fulfillment of this requirement is not provided. Although there is a contrary argument, it is more tenable to say that even if not deposited, the validity of the contract of marriage will not be affected. One reason that strengthens this argument is the silence of the provision. In other provisions dealing with essential conditions of contract of marriage like form, the effect of non-observance is explicitly stated in that it shall render the contract of marriage null and void. But under Art. 45, the sanction for failure to deposite is not stated. The second reason is that the aim of depositing the contract of marriage either in court or with office of civil status is for safety and to protect the intereste of third parties. Hence, failure to do so doesn□t affect the validity of the contract.

Once a contract of marriage is concluded in the light of the preconditions there to, it will produce all the desired legal effects. But this does not mean that the spouses are not entitled to modify it. As we understand from general contract principles, in as much as the parties are at liberty to enter into contracts, they are also entitled to alter an existing contract. Unlike other ordinary contracts, however, the modification of contract of marriage shall fulfill stringent conditions. Read Art. 47 here in under.

Art. 47 □ (6) Modifications 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 doesnot affect the interest of the family.
3) Where the modifications are approved by the court under sub-Article (2) of this article, a copy of the modified contract shall be deposited in the court or with the office of civil status.

Based on this article, the following conditions should be full filled for a modified contract of marriage to be valid,

→ The modification shall be necessitated by the interest of the family. Therefore, it can not be modified to promote the sole interest of one of the spouses.
→ The spouses shall consent for such modification.
→ Even if it is not explicitly stated, from the reading of Art. 47 (3) and Art. 1722 of the Civil Code, such modification shall be made in writing. To that effect Art. 1722 provides that a contract made in special form shall be varied (modified) in the same form since a contract of marriage is originally to be concluded in special or, it must be modified in the same form. By the same token, the

phrase □□ a copy of the modified contract shall be deposited □ □ under Art. 47 (3) shows the requirement of writing for modification of contract of marriage. If it is not reduced in written form we can not imagine depositing.

→ The modification shall be approved by the court. How could we justify the confirmation of the court? Doesn□t it contradict the contractual freedom of the spouses? The justification that could be given here is similar to the one that is given for Art. 73. So, the student is referred to read the justification given for Art. 73 here in above. To put in short, the idea of freedom of contract gives sense when the contracting parties have equal bargaining power. It is very much questionable whether such kind of freedom and equality (arms length transaction) exists when the husband and wife conclude contract. It is highly probable that contracts or modifications thereof may be made by the influence of one spouse without equally bargaining. It is also understood that so long as the two spouses are under the marital bond, such influence could possibily arise. Therefore the aim of requiring the blessing of the court is to ensure whether such modification is clear from such undue influence and there by check whether the modification is made in the interest of the house hold.

4.3. Legal (Statutory) Regime

Dear student, as you may recall, in the preceding section we have studied that the spouses are at liberty to govern their personal and pecuniary relationship by their contract of marriage. However, it may so happen that the spouses may not enter in to a contract of marriage for one reason or the other. Even if it is made, the contract of marriage may be contrary to mandatory provisions of the law, or the contract of marriage may be rendered invalid due to non-observance of one of its essential conditions. In either of these three cases, the

personal and pecuniary effect of marriage shall be regulated by law (Art. 49-73). In support of this, Art. 48 provides the following.

Art. 48 – (7) legal Regime

In the absence of contract of marriage or where the contract of marriage is not valid under the law, the following provisions shall apply.

Hence, if and where there is no marriage contract or even if there is one but that conflicts with the mandatory provision of the law, the statutory regime will operate on its behalf. The legal regime regulates effects of marriage in two ways. The first is as a gap filling provision. That is, the law by its provisions from Art. 49 – 73 govern the effect of marriage only where there is no contract of marriage, or the contract of marriage is invalid or contravenes mandatory provisions of the law. In this aspect, the legal provisions are operative as a last resort. The second aspect of application of the legal regime (Arts. 49 – 73) is in their mandatory nature:- to put in different words, mandatory provisions such as Arts. 49, 50 and 53 are always applicable no matter how the spouses concluded contract of marriage.

We may consider the legal regime governing effects of marriage under two heading:

- Personal effects of marriage and
- Pecuniary effects of marriage.

4.3.1. 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, it is not only their material interest that may change its previous existence but also there are crucial impacts on their

personal situations. It is the objective of this sub-sub section to analyse provisions relating to personal effect of marriage.

A) Head of the Family

Under Art 635 (1) of the Civil Code the husband is the head of the family. The rational behind the provision is fairly clear; it is a reflection of a patriarchal society which is characterized by men's dominance. This has long been internalized virtually in every society; in fact, female subordination within the family has become institutionalized, and codified in laws which entitled men to have rights over women which women didn't have over men. This is exactly what is reflected in the Civil Code.

The husband as the head of the family is entitled to obedience of his wife in all lawful activities which he orders. Moreover, he guides the management of the family, protects his wife and watches over her relations and guides her in her conduct in the interest of the family, though the guidance should not be arbitrary or abusive. These provisions reveal that women are not capable of guiding themselves let alone to be the head of the family. In fact it is what Ethiopians have internalized.

However, these provisions of the Civil Code are in clear contradiction with the constitutional principle of equality of sexes and equality of spouses in marital life as enshrined under Arts. 25, 34 (1) and 35 (1) and (2) of the FDRE Constitution Consequently, with the view to eliminate the subordination of woman reflected in these provisions and to guarantee equality of spouses, the Revised Family Code has

omitted these provisions. Thus, under the Revised Family Code, these old sex type division of family responsibility are swept away in favor of new principles, i.e. mutual support and equality of spouses. The new Code hence introduce the concept of collective leadership of family in which both the husband and the wife have equal rights and duties over their personal relation ship. According to Art. 49 (1), an equal and mutual obligation of support, respect and assistance applies.

The obligations of the spouses to respect, support and assist each other under Art. 49 (1) is mandatory which can not be set asided by contract of marriage (Art. 49 (2)). The obligation of mutual respect, support and assistance may be manifested in different ways. If the spouses live together, such obligation may be put in to effect by contributing all expenses for the well being of the house hold. If the spouses are living separately, they may discharge their obligation by supplying maintenance for the needy spouse. If one of the spouses is unable to pay his personal debt, the other spouse may discharge his obligation by paying from their common property.

B) Management of the Family

The second personal effect of marriage is the duty of the spouses to jointly manage the family. Read the relevant provisions here in below.

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 cases, 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 citizen

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 in a position to give his consent, the other spouse shall alone carry out the duties mentioned in Article 50.
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 in matters concerning the up bringing of children whom he had before the marriage.
2) Any agreement to the contrary shall be of no effect.

With regard to the management of the family, Art. 637 (1) of the Civil Code provides that the spouses shall cooperate, under the guidance of the husband, in the interest of the family, to ensure the moral and material direction of the family, to bring up the children and to prepare for their establishment. This duty is concerned with the family and the future destiny of the children. The problem with this provision, however, is that the family management and its moral set up are to be exercised Under the guidance of the husband. Therefore, it is the husband who decides what is moral and what is immoral for the family. It seems also he, the husband, is the one who determines the material direction what occupation the spouse shall have, whether a domestic servant is necessary or not, how much budget shall be enough, where and what kind of education the children have to get and so on. Though it seems the wife must be given the right to participate in these activities, the final veto power was left in the hand of the husband.

In line with Art. 34 (1) of the FDRE Constitution which declares the spouses have equal right during marriage, under the Revised Family Code, however, the spouses shall have equal rights in the management of the family and in all cases cooperate to protect the security and interest of the family to bring up and ensure the good behavior and education of their children to make them responsible citizen. (Art. 50). Evidently, therefore, the husband is deprived of the unilateral / veto power that was vested up on him. As in the case of the Civil Code, however, each of the spouses shall retain an exclusive right of decision in matters concerning the up bringing of children whom he had before the marriage, and the responsibility of family management is taken over by the other spouse where one of the spouses is unable to jointly carry out the task for one reason or another. (Art. 52 cum. 53).

Though it is expected that the spouses shall on the basis of equality, support and assist each other, live together at their common residence and manage the family, things may not always go smooth and the spouses may be at disagreement on, say the management of the family. This may lead to a problem. Because neither of the spouses has a casting vote over such matters as both are authorized to be equal. The Revised Family Code doesn't have a ready made solution to the problem. Under the Civil Code, there is no such problem in case of management of the family as the husband has a veto power and in case of disagreement on determination of residence, the wife may appeal to the family arbitrators as provided under Art. 641 (2).

We may propose two solutions: the first solution may be given depending on economic considerations, as some American courts tend to favor. That is to say, if the spouses disagree as to the family management and the moral and material direction of the children,

then, the casting voice has to be given to the principal family bread winner. Two things can be said in favor of this proposition. One, the principal family bread winner deserves this place for he/she is the source of the sustenance of the family's livelihood. Two, giving veto power to one of the spouses is paramount in having immediate decisions taken and there by reducing court litigations. But since in Ethiopia, most of the time the bread winners are husbands, advocating this proposition would be returning to the old anachronistic tradition of husband's dominance and the wife's subordination. Hence, one may say, this solution is fraught with danger.

The second and, I think, the better solution is referring the dispute to family arbitrators. The spouses' disagreement on matters of family management is a dispute during marriage. Persuant to Art. 118 (1), disputes between spouses during marriage is to be adjudicated by arbitrators appointed by the spouses as long as that dispute doesn't lead to divorce. The arbitrators to whom the dispute is submitted shall convince the parties to reach an amicable solution. Any party who is dissatisfied with the decision of arbitrators may appeal to the court having jurisdiction whose decision shall be final (Art. 118 (2) and (3)).

C) The Duty of Cohabitation

The duty to cohabit is another personal effect of marriage. By virtue of Art. 53 (1) and (2), cohabitation involves the duty to live together and to have a normal sexual relation with one another. This obligation is too fundamental to be excluded by contrary agreement of the spouses (Art. 53 (3)).

One can say that the duty of cohabitation is the supreme duties of the spouses. Because it acts as the foundation and condition of other

duties, and because the object of marriage is the establishment of a life in common. Therefore, marriage requires not only an agreement between the parties henceforth be husband and wife, but also that such agreement be carried out usually by way of cohabitation, meaning, by living together and having sex, unless of course, it involves risk to one of the spouse's health.

Even though the spouses are bound to live together exceptionally, they may agree to live separately for a definite or indefinite period of time (Art. 55 (1)). Dear student, don't you see any apparent or real contradiction between Art. 53 (3) and Art. 55 (1)? Read the provisions her in under.

Article 53 – cohabitation

1) The spouses are bound to live together
2) They shall have 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

Article 55 – Separation by Agreement

1) Notwithstanding the provisions of Article 53 (1) of this Code, the spouse 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.

Some writers try to reconcile in the following way. According to them what is prohibited under Art. 53 (3) is agreement to live separately in the contract of marriage. However where a compelling situation

arises, like change of business place of one of the spouses, agreement to live separately is allowed under Art. 55 (1). Do you agree with this?

D) Choice of Residence

So far, we have said that the spouses are duty bound to live together. The obligation to live together begs the question as to who should choose the common residence. In this regard Art. 641 (1) of the Civil Code provides that the common residence shall be chosen by the husband. (Common residence in this case must be referring to domicile where the woman is bound to live with her husband. The residence that is stated under Art. 178 of the CC which a married woman can have, is a kind of temporary one that the woman may reside during separation as envisaged under Art. 642 of the same).

When we turn our faces to the Revised Family Code, it is provided under Art. 54 that the common residence shall be decided by joint agreement of the spouses. So, the choice of residence falls within the category of decisions which must be taken jointly by the spouses in view of their reciprocal duty to live together. The Revised Family Code departed from the Civil Code in this regard to make it in harmony with Art. 34 (1) of the FDRE Constitution that guarantees the equality of man and woman during marriage.

E) Duty of Fidelity

The last personal effect of marriage indicated under Art. 56 of the RFC is that the husband and the wife owe fidelity to each other. This, from moral point of view, is the principal duty created by marriage. The non observance of this duty usually leads the spouses to divorce. Non-compliance with the duty to fidelity (adultery) is also criminally sanctioned. (Art. 652 of the FDRE Penal Code). It is also a tort, for

which civil action for damage may be brought. (Art. 2035 of the Civil Code cum. Art 652 of the FDRE Penal Code)

4.3.2. Pecuniary Effects of Marriage

Dear student, In the foregoing sub-section, we have studied personal effects of marriage. In this sub section, we are going to discuss pecuniary effects of marriage. As is provided in various legislations, there are two ways of looking into this matter. Herein under is provided a separate treatment of each.

A. Personal Property and Its Administration

Taking note of the modern conception of marriage which in no way is considered as a mechanism of creating primitive way of life (where everything is produced, owned as well as consumed communally), and which is completely at variance with the socialist understandings of marriage, the statutory regime has come up with two district treatment of property and one of which is that remain under the separate ownership of each spouse while the marriage survives. To this effect, the law has provided for those properties or belongings that may be considered personal.

Thus, it is possible to own a property personally while living under a common roof. Read Art. 57 and 58 of the RFC to understand as to what constitutes personal property of spouses.

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

The property which the spouses posses 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.
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.

As can be understood from Arts. 57 and 58, there are two types of personal property. These are: property not acquired by onerous title and property acquired by onerous title.

Acquisition by onerous title is the acquisition of a property through an effort or work, or by exchange of one property by another or through purchase by expending money. Acquisition not by onerous title means the opposite of the former, that is acquisition of a property which is obtained not through effort, or not by way of exchange of one property by another or not by way of purchase by expenditure of money.

Art. 57 deals about property not acquired by onerous title. According to this provision, any property that is owned by a spouse on the day of marriage shall remain his personal property. This is to mean; any property owned by a spouse prior to marriage (he is already the

owner of such property on the day of the marriage will be his own property even after the conclusion of marriage. For example Zemene had a house while he was concluding marriage with Meseret. The house would belong personally to Zemene alone and Mesert would have no right of ownership over this house unless such property is made common property under contract of marriage. The house is property not acquired by onerous title.

This article also states that if one of the spouses acquires property by way of donation or succession in marriage, such property shall belong to the spouse to whom the donation was made, although the property is acquired after the celebration of the marriage.

As we have mentioned hereinabove, the second type of personal property is property acquired by onerous title. Persuant to Art. 58 (1), the following properties are personal properties acquired by onerous title.

i) property acquired by the spouse during marriage in exchange of personal property.
ii) Property acquired by the spouse during marriage by monies owned personally.
iii) Property acquired by the spouse during marriage where such acquisition is derived from sale of property owned personally.

For example, let us assume that Getu and Mulu are married couples. Getu has a minibus taxi car before he got married to Mulu. After their marriage, Getu may do one of the following to his taxi.

a) He may sell it and deposite money.
b) He may exchange it with another car.

c) He may sell it and buy another property by the money obtained by the sale of the minibus taxi.

The money deposited, or the other car or any other property bought shall remain personal property of Getu. Such property is said to be acquired by onerous title.

Dear student, one point that you should bear in your mind is that property acquired by onerous title needs the approval of the court to continue as personal property. In the above example it is clear that Getu was originally the owner of the minibus taxi. But if he sells it and buys another car, Getu is required to have the approval of the court for the second car to be personal property failing such, persuant to Art. 62 (2), this property shall be deemed to be common property.

Here one may ask, why the law requires the decision of the court that property acquired by onerous title shall be owned personally by a spouse? Because there is a possibility of mixing personal property with common property. For instance, a personal property of a spouse may be maintained or repaired by common property. Let us assume that the owner of this property sold this property and bought another car by the proceed of the sell of the first property. In this case, even if the property is originally owned personally by one of the spouse, it has been mixed with common property in due course. As a result, the car can not be personal property automatically. It requirer the approval of the court. If the court found out that the car (personal property acquired by onerous title) is mixed with common property, the court may not decide to the effect that the car is personal property because it will be prejudicial to the other spouse.

It has been stipulated that for property acquired by onerous title to be deemed as personal property, it requires the decision of the court to that effect on the application of one of the spouses. What is the period of limitation within which such application is to be made? Art. 58 (2) is silent in this regard. In view of the silence of the law, it may be argued that an application may be made until the marriage is dissolved. Since most of the time disputes over a certain property arises after dissolution of marriage, it is logical to say that an application shall not be barred by period of limitation until the time of dissolution. But such argument should be taken with a foot note. As time goes, the probability of the mixture of personal property with common property is high. So, if the owner of property acquired by onerous title is too late in making such application, it is highly probable that court may not declare that property to be personal. Hence it is advisable to make an application in the earlier possible opportunity.

Dear student, we have discussed as to what constitutes personal property of spouses. Who do you think is authorized by law to administer the personal property of spouses? Consider the following articles from the Federal Revised Family Code.

Art. 59 – Administration of Personal Property (1) Principle

1) Each spouse shall administer his respective personal property and receive the encome 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 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 account of the management of such family.

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.

By virtue of Art. 59, in principle, each spouse shall administer his own personal property. It also rules that if this property generates income, the owner spouse is entitled to collect the income. Moreover it points out that the owner spouse can freely dispose of his property. By free disposal, we mean the power of selling or exchanging or donating the property to somebody by one's free choice. In general, the owner of personal property shall have all private property rights indicated under Art. 1204, 1205 and 1206 of the Civil Code.

The only restriction imposed on an owner of personal property is with respect to ownership of income derived from personal property. In this regard, Art 62 (1) provides that all income derived from personal property shall be common property. Therefore, though the spouse is an owner of a certain property, he is deprived of being an owner of the fruit thereof. Of course, from the relevant provisions of property law, ownership is the widest right. It includes the right to use the property (usus), the right to collect the income or fruit of that property (fructus), and the right to dispose (abusus). If ownership right includes all these rights, would it be logical to prohibit an owner of personal property to collect the fruits (incomes) derived from his personal property? As a matter of principle, property right consists

the above three rights. However, indicated under Art. 1204 (2) of the Civil Code, such right may be restricted by law. One of the laws that restrict such right is Art 62 (1) of the RFC. When a person voluntarily enters to social status (marriage), it is with the presumption that he knows and accepts such reasonable limitation on ownership right.

Though the law in principle provides that personal property shall be administered by the owner of that property, the owner may transfer such right of administration to the other spouse either by contract of marriage or other agency contract. As provided in Sub-article 60 (1) spouses may agree in the contact of marriage that the whole or part of personal property of one spouse to be administered by the other spouse. However sub article (2) of the same article obliged the spouse to whom this power is given to submit a yearly report of accounts regarding the property at the request of his/her spouse. If such matter is not governed under their contract of marriage, the owner of the personal property may still delegate his power of administration of personal property by agency contract on the ongoing marriage.

At this juncture, it is logical to raise one question, could we expect the spouses to ask the confirmation of the judges for the contract of agency to be valid within the meaning of Art. 61? Some individuals argue that since the contract of agency is a contract that is to be concluded during marriage it shall be of no effect unless approved by the court as required under Art. 73.

Ato Mehari Redae, in his book entitled Some Enlightening Points on the Revised Family Law, Volume 1, 1995 - ¾}hhK¨< ¾u?}Ww IÓ KSÑ²w ¾T>[Æ É É Øx , page 66-67 argues that we could not. To this effect, he raised two justifications. If either of the parties

wants to grant agency power, it must be considered no more as a family matter. The power giver (the principal) can reclaim at any time the representation power that he once extended. (Art. 2183 of the Civil Code) If we were to ask him to seek the blessing of the court, this right of the principal, i.e., giving or retaking the power at any time he wants would be neutralized. And this may have a negative impact on the spouse who wants to go for representation for various reasons.

The other is that even in the Civil Procedure Code Art 58 (a), the law permits the spouses to represent each other in bringing a claim, or defend actions. Even if this is a representation, there must not be a requirement to get an approval of the court, and there exists no statement in the Civil Procedure Code.

The writer of this module is of the opinion that the latter argument is more tenable. Thus it can be concluded that Art. 61 has to be considered as an exception to Art. 73. That means, Art. 73 must not be taken to refer to agency contact.

B. Common Property of the Spouses and Its Administration

It is not only the personal property that has been given treatment in law, but the common property of the spouses has also been provided. Just like, as there may be a personal property so also communal property, which is, even more certain to exist. Though the traditional understanding together with the socialist view is done away with, this could never be taken to mean that matrimonial property will not exist. The basic obligation of the parties to contribute for the economic good of the family makes the creation of communal property inevitable.

Thus, the legal regime has provided the properties that constitute the matrimonial property. However before directly go deep into analyzing as to what constitutes common property, let us study briefly the difference between co-ownership and common property of the spouses.

Co-ownership has an apparent similarity with property owned by spouses in common. Nonetheless, they are two distinct regimes in fact. Joint ownership which is extensively dealt under the Civil Code (Art. 1257 – 1308) is a situation where a single object of ownership is made to fall under two or more individuals. True, matrimonial property (common property) is a species of co-ownership. Yet it must be distinguished from co-ownership governed by the law of property.

Firstly, matrimonial is created principally by operation of the law, and not by the will of the parties unlike joint ownership proper. The agreement of two or more enumerable individuals is behind the joint ownership of property law (Art. 1258). In fact some times, the law could also be source of joint ownership, but this is an exception.

The other distinction is that during the existence of the marriage neither spouse can apply simply for the division of the matrimonial property. Where as in case of joint ownership as a rule one of the joint owners may transfer his right to some body while the indivision lasts. In principle, therefore, joint ownership, unlike communal property, is not perpetual.

The other minor difference is the number of the co-owners. In case of owning a certain property in common, the number could be as many as the parties want it to be. Nevertheless, practically, it does not go to the extent of hampering proper administration that must be exercised

on the object of joint ownership. In fact for matrimonial property the co-owners are always two, no more no less.

These and some other points make matrimonial property to be distinct from co-ownership, which is the basic property law concept.

Having distinguished common property of spouses from co-ownership, herein below is discussed properties that constitute common property.

Article 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 spouses during marriage by an onerous title shall be common property unless declared personal under Art. 58 (2) of this Code.
3) Unless otherwise stipulated in the act of donation or will, property donated or bequeathed conjointly to the spouses shall be common property.

According to sub-article (1) of the above Article, all incomes of the spouses that are derived by their efforts shall make the common property of the spouses. Salaries and wages of spouses are their incomes derived by their efforts. Moreover, any income from an income generating property is also a common property. This is true whether the income generating property is personal or a common property.

Under Art. 58 (2) we have said that any transaction made with personal property shall be reported to the court to get declaration to the effect that the newly acquired property is the personal property of the owner spouse. However, if the spouses fail to apply to the court

about the change made in the personal property of one of the spouses (that is if they simply remain silent about the change (transaction) made on the personal property), the newly acquired property shall become the common property of both spouses as ruled in Art. 62 (2).

What do you understand from Art. 62 (3)? According to this sub-article, any property acquired through donation or inheritance during marriage shall be the common property of the spouses. However, this rule will not apply if the act of the donation or will clearly states that the donation or bequest is made to one of the spouses.

These are, therefore, those properties that the law considers as common. This is just a legal stipulation and the parties are not prevented from adding other properties as being common by their contract. Could we say there exists no prevention to exclude any of these assets as not communal either ? For instance can the spouses by a contract of marriage stipulate the exclusion of salary from common property? Possibly , two arguments may be forwarded.

The first line of argument action proposes the spouses are at liberty to exclude one of those properties under Art 62 from being common property. The argument is that so long as the spouses are not prevented from adding other properties as being common by their contract, there should not be a bar to exclude. The idea is that Art. 62 is not mandatory and hence can be set a side by contrary intention of the parties. Particularly, taking in to account clear provisions that outlawed any contrary acts by the spouses, like Art. 49, 51, 52, 53, etc and the silence of Art. 62, it is argued that the latter provision is not mandatory. In a nut shell, the spouses can prevent the creation of common property.

The second line of argument strongly rejected the possibility of exclusion of properties under Art. 62 from being common property. The following reasons are raised to support this conclusion. Though property matters are the most important subjects of law of contract and such the parties are at liberty to covenant on whatever basis they want with in the limits of the law, it seems wise to neutralize such freedom when it comes to spouses, and spousal property. If we were to allow them to agree to the extent of making their wages fall under their personal ownership, it would be very difficult to imagine the existence of a fiscal unit constituting a family. As indicated above, marriage stands on the mutual support and good will of the spouses. Therefore, the larger the gap in their economic relations, the higher will be the risk of disunity. Moreover, one can sense the mandatory nature of Art. 62 though it failed to provide prohibition on contrary and mutual agreements. The conclusion is that Art. 62 is a mandatory and a non-derrog able provision. Dear student, which of the above two arguments seems more tenable?

As discussed above, the Revised Family Code has distinctively put what is meant by communal as well as personal property of spouses. When we closely consider our family law, however, there seems lack of indispensable clarity. A clear demarcation doesn t exist between those properties which may be considered personal and which are not. It is, therefore, important to discuss some border line cases.

On this particular issue, Ato Belachew Mekuria, in his Article entitled Effects of Marriage Vis a Vis the Pecuniary Interests of Spouses, November 10, 2002, Bahir Dar University posed some points for discussion that have both academic as well as practical relevance. I have forewarded that part of the article dealing with the issue at hand as follows.

i) Lost and Found Objects

An individual may find an object, and passing through all the procedures in the property law provisions, he may sometimes be made to own that object or as provided under the Ethiopian Civil Code Art. 1159, one of the spouses may get a treasure put underground. Then the question is, will such lost and found object or treasure be considered as personal or common property of the spouses?

In the absence of effort and any other source from which a lost and found object is considered to have been derived, it will be very difficult to decide one way or another. As it is a wind fall acquisition, we have to decide in favour of the communal property since deciding either way is warranted in the absence of a clear provision. Actually it is not warranted to stipulate about such incomes either because one couldn't be certain as to their existence

ii) Patents and Copy Rights

These and the above mentioned ones might not have been litigated in court of law as contentious ones, nonetheless, the discussion is pertinent for they are potential sources of contentions.

A business may consist of patents relating to inventions, trademarks, designs, models and literary or artistic copy rights. (Art. 148 cum. 149 of Com. Code). This patent gives an exclusive right which is in the nature of monopoly over particular objects. Under the property law part of the Civil Code Art. 1647 (1) provides that "the author of the work of the mind shall have on the work he created, by the mere fact of his creation an incorporeal right of ownership". What the law affords to the author of the work of the mind is, protection of his right

to exploit his work as best as he could, and also protection against any injury directed on his ownership.

Then, the problem to be posed here is whether this right when acquired during the life of the marriage belongs to the author spouse alone or both spouses. The author or innovator of such property may argue that this property should not be included under communal ownership, as it must be considered strictly personal. However, such argument has faced criticism on the ground that the income received should not be treated differently from "wage", which are defined as common property. The issue has been solved for good in the Polish Family Law regime because the Code provided that copy rights, and rights acquired as an inventor, or as the maker of a design or a rationalization proposal are separate property of each spouse. This seems to accept the strictly personal character of such work and thus reasonable to entitle the creator as a sole beneficiary. The new family law has changed the Civil Code provision that said "wages and other incomes" by "incomes from personal efforts and incomes from personal or common properties." Then can we consider patent and copy right deriven incomes as wages, or income from personal efforts?

This is very problematic. On one side there is an interest of the family that must stand on the financial contribution of the spouses and on the interest of the author who is the sole creator / inventor who must be rewarded with undivided and satisfactory compensation for his effort. Especially where the spouse has no other professional carrier other than such artistic or scientific undertakings, it would be unfair to the family to make the proceedings of his/her efforts personal entitlements. Even if it is not the case, the writer argues, that such entitlements can safely be made to fall under "incomes from personal

efforts of a spouse. This is justified on the ground that for such creations of a mind directly or indirectly, we can find the contribution of the other partner since the whole surrounding environment matters a lot for any inventory and/ or artistic work.

iii) Damages to Bodily Injury

For a material damage that an individual suffers due to the faulty act of another, person, the law makes the latter to compensate the former as a restitute for any damage that he has caused. This is neither a wage nor an income from the effort of either of the spouses.

Compensation for an injury is redressable to the extent of the damage that the victim suffered. Then the logic behind this principle is that the injured must regain, by way of compensation, whatever he has lost as a result of the injury. Under the Polish Family Law, damages for bodily injury or impairment of health are made to be separate property of that spouse who suffered the injury.

Since our law has not taken any clear position, it is for the judge to answer as to the fate of such income, which could not be equated with an income from the efforts of either of the spouses nor with the income generated from the personal or common properties of the spouses. It is further submitted that we could not include it as income, which is a derivative of a transaction by either of the spouses since such income if not declared as personal will be presumed to be common property.

Therefore, as to what name we should give to such kind of income is just a question that begs legislation action. Based on the Civil Code Art. 2095 (1), one may tend to argue that since the spouse is named as the first to be called as a claimant on behalf of the deceased due to

a fatal accident, then if not fatal, the entitlement that a spouse gets as a result of an injury must be considered as common. This seems a crippling argument for the two situations are very much at variance. The fact that a spouse may be made to benefit from such material compensation due to the death of his/her met by way of maintenance since the death of the spouse will have a devastating impact on the family. If the situation is where the spouse has survived after the injury and was made to benefit from a compensation for whatever damage he received, it is inevitable that the issue will arise as to the status of such property.

iv) Moral compensation

This is another area where our various legislations on family matters have not taken a clear stand. Damage to one□s moral may ensue due to defamatory words, physical assault, physical restraint or it may also be ordered together with compensation for bodily injury.

Moral damage is strictly personal to the one who has suffered it. Taking into account this nature of the damage, will we consider it to be a shared income of the spouses? Again unlike our law, under Polish Family Code, compensation for moral damage is clearly made to be under the personal property of the spouses concerned.

The writer not failing to recommend the importance of clear provision with this respect as well, there seems no reason even now to consider such income as forming part of the matrimonial property. After all this is a damage that brings neither material nor psychological damage on the individuals other than the one who bears it. As such we have to make him a sole beneficiary of the payment that is meant to resituate the damage which is solely relative of his internal self.

v) Bonuses, Prizes, and Similar Payments Distinct from Wage

An employer may decide to reward his employees by way of bonus for the efficient accomplishment they have demonstrated making the undertaking get unexpected profit. This is normal in a competitive free market system or it may happen that an individual is nominated and awarded with a prize entitling to a huge amount of money. Still the basic question that is due to be asked is if it is a spouse that was a beneficiary of the bonus scheme or the award, will he/she be asked to put it on the table where the common treasure is meant to lie?

This one, unlike the above two, seems arguable for we can see elements of effort of the person entitled. And our law has made whatever income so long as it is effort generated to be considered as common. On the other hand, a similar defense could exist favoring the personal nature of the income. What is expressed as effort generated income by the law must be construed as not to by pass income as a wage. This is not a normal entitlement since it may happen intermittently or not at all. Therefore, it must be the spouse who demonstrated the exceptional efficiency or talent alone that should be made to receive the payment and the law must allow to put it clear marked as his/her personal property.

vi) Pension Allowance

A pension scheme is a scheme, which comes at the rescue of an individual whose capacity to produce, as a rule, has been exhausted due to old age. Like the above cases, the same question is due to be raised here also as to where we may put such property.

There are three arguments raised by various scholars. It is known that wage is under the communal ownership of the spouses. Based on this some argue that as pension is an income similar with wage we have to

take it as an income derivative of the personal efforts of the spouse concerned and must be made to fall under the communal ownership.

Some other still contend that after all pension allowance is constituted of a continuous contribution of four percent (4%) by the individual and six percent (6%) by the government. Therefore, a spouse if at all is given to extend her/his hands to such allowance it has to be to the extent of half of the four percent contributed by the individual since one can gues the existence of the other spouses contribution on that part.

The last is grounded on Art. 404 (e) of the Civil Procedure Code of Ethiopia which excluded pension allowance not to be subject to any claim or its consequent attachment.

I personally go for the second since it seems reasonable and just. The six percent contribution made by the government is some thing to which the other spouse may not be considered to have contributed in any case.

Having sepent this much time for making distinction between personal and common property, it is the right time to consider the legal presumption of common property. Art. 63 of the RFC lays down the presumption which may be regarded as the legal linchpin of the property aspects of the institution of marriage as follows.

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 latter knew or should have known such fact.

The comprehensive nature of the presumption hardly calls for an elucidation. The relevant provision begins with the words "all property" and contains no subsequent qualification restricting the generic character of the phrase. Thus all movables and immovable, no matter how and when they are acquired, fall within the scope of the presumption.

The presumption serves as a point of departure in the adjudication of all disputes over the division of matrimonial estate. In resolving these disputes, rules implicit in the presumption that are out lined herin under have to be observed.

First, one need not look for evidence in favour of "common property" as the presumption makes it totally unnecessary. Proof is a condition of personal property and not vice versa.

Second, it is only the spouse who asserts sole ownership of a given property who has the legal duty to adduce in support of his or her claim. There is no onus of proof on the spouse maintaining that the property is common. He must not be called upon to provide evidence in support of his assertion.

Third, statements of the spouse who maintains that a given property is common need not to be used as pretext to derogate from the presumption unless such statements amount to a clear admission that the property in question is personal.

Fourth, the standard of proof to rebut the presumption must be the preponderance of the evidence. Only pervasive arguments on the strength of proof must bar its enforcement. In all other cases, its application must remain unaffected.

As has already been stated, everything in the matrimonial estate is presumed to be the common property of the spouses. Hence, a claim to personal property has to be substantiated with proof. This is absolutely necessary. From the commulative reading of Arts. 57 and 58, one can easily learn that there are several grounds on which a claim to personal property may be made. Either of the spouses may assert sole ownership of a given item of property by alleging that:

- It was owned by him or her on or before the day on which the marriage was celebrated.
- It was donated exclusively to him or her after the marriage was celebrated.
- It was bequeathed exclusively to him or her after the marriage was celebrated.
- It was acquired by means of exchange of property which belonged to him or her personally.
- It was purchased with money owned by him or her personally, or,
- It ws acquired with money derived from the alienation of property owned by him or her personally.

Whatever be the grounds, a claim to personal property requires the production of proof. The evidence required to substantiate such a claim may not always be of the same sort. For instance, if H, the husband of W, alleges that he is the sole owner of a dwelling house on the ground that it was owned by him before their wedding day, he will be called up on to adduce proof to establish the fact that the house

belonged to him prior to the celebration of marriage. But on the other hand, if H makes the claim on the ground that the dwelling house was bequeathed for his exclusive advantage, he will be required to, produce the will that established this fact. Consequently, what the claimant must be called up on to adduce as evidence has to be determined in the light of the grounds for the allegation having due regard to the provisions of Arts. 57 and 58 of the RFC.

One point that has to be borne in mind is that the Revised Family Code has introduced some change in relation to legal presumption. That is, even if a certain property is registered in the name of the spouse the legal presumption is equally applicable. This element is not included under Art. 653 of the Civil Code. Hence persuant to Art. 63 (1) of the RFC, even if the property is registered in the name of one of the spouses, he is required to proof the fact that he is the sole owner there of. If he fails to do so, the property shall be presumed to be common property. The reason for such departure is to avoid unfairness where a property is registered in the name of one of the spouses despite the fact that the property is acquired during marriage. Some properties like house and car requires registration. And in Ethiopia, it is not usual to register these properties in the name of both spouse. When the property is registered in one of the individual, it is understood that it will be prejudicial to the other spouse. Therefore, it is stipulated that although a property is registered in one of the spouses, this can not be a conclusive evidence to show that the property is personal. It requires additional evidence. Form this we can say that the family law provisions shall prevail over ownership certificate given by the concerned government organ.

The presumption laid down, by the law is also equally applicable to third parties. As a result of this presumption of the law, every one can

assume any property in the possession of the spouses as common property of the same. For instance let us say that C is a neighbour of married couples namely, A and B. Let us assume that A and B, by their common consent received money in loan from C. In this situation, C can simply consider the Toyota car in possession of the spouses as their common property. In view of this, C can move to attach the Toyota car if A and B fail to pay back the money to him. In this case, A may not claim that the Toyota car is his personal property to stop C□s action over the car. Here, A can, however, set up a defense against C if and only if A shows that C knew the fact that the Toyota car is his personal property or C should have known of such fact as ruled in sub-article (2) of Art. 63 If A fails to show that C knew or should have known about this fact, C can persue against the Toyota car to get his money paid back.

In the preceding discussions, we have studied that all income derived from salary, personal and common property shall form common property. When we come to the administration, i.e., collection and depositing of the income, however, the law allows each spouse to collect and/or desposite his income. Therefore, it is the owner or the source of the income who has an ultimate say the way the income is to be deposited or received, (Art. 64 (1) 4 (2). He may deposite his earnings either in the personal or joint bank account. But this does not mean that each spouse can dispose his earning freely. As you may recall, it has been stipulated under Art. 62 (1) of the RFC that all incomes obtained from the personal effort of spouses shall be their common property. Moreover, according to Art. 64 (3), each spouse is expected to show the other spouse the amount of earnings and expenditure.

The provisions of Art. 65 of the RFC, by way of exception to the provisions of Art. 64 are about mandate to receive in come. In the first sub-article of Art. 65, it is provided that one of the spouses may freely give the other spouse a mandate to receive the in come which is due to him. The mandate may be given through a contract of marriage or any other agency contract. Per sub-article (1) of Art. 65, one of the spouse who ought to have received his in come may by free will and consent confer agency on the other to receive his income which he ought to have received personally. On the other hand, though the grounds under which such request may be presented to the court is not mentioned, sub-article (2) of Art. 62 also provides where one of the spouses requests, the court may authorize the requesting spouse to receive the income of the other spouse and give receipt there of. It is suspected that the grounds on which the request envisaged under sub-article under consideration is granted may be because of behaviors such as extravagancy or prodigality of the other spouse.

Art. 65 (3) provides that the court may also order the full or partial attachment of the income of either spouse. But such order shall not include income of the spouses that is not subject to attachment by the clear prohibition of various laws. For, instance the Federal Civil Servant Proclamation Number 262/2002 prohibits attachment of pension allowance. More over Art. 404 of the Civil Procedure Code enumerates those types of properties and amount of salary that can not be subject to attachment.

Although both the Civil Code and the Revised Family Code in similar manner entrust each spouse to administer his personal property at least in principle, the latter departed from the civil code when we come to administration of common property. The Civil Code under

Art. 656 (1) entrusts to the husband the power to administer the common property of the spouses. Since it is only an insignificant number of wives who are wage earners or have any type of special income in present day Ethiopia, the Civil Code in effect makes almost the whole community of property under the administration of the husband.

As a response to such discriminatory provision of the Civil Code and the need to be consistent with Art 34 (2) and 35 (7) of the FDRE constitution that ensures equality of the spouses with regard to administration of common property as well, the Revised Family Code has given both spouses equal power on administration of their common property. Study the following articles.

Article 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.

Article 67 Duty to give Notice

The spouse who performs an act of management in respect of common

property is duty bound to inform the other spouse thereof.

As stipulated in sub-article (1) of Art. 66, both spouses shall administer their common properties conjointly. Such principle may , however, be rendered ineffective in two situations.

Firstly, spouses may by their contract of marriage or other agency contract entrust the power of administration of all or part of the common property to one of them. This contract will give the power of administering their common property either to the husband or wife only. However, the spouse who is in charge of the administration of the common property under Art. 67 is duty bond to inform (to give notice to) other spouse about the administration of their common property. Unless there is a duty of notification about the administration of the common property of spouses, the spouse that is engaged in the function of administration may abuse his power. He may unduly appropriate some part of the common property as his personal property or he may take an action that might negatively affect the interest of the other spouse.

Secondly, as indicated under Art 66 (2), if one of the spouses becomes incapable (sicken, judicially interdicted, away from home, etc) to involve in the administration of the common property, the other spouse alone shall take the responsibility of administering their common property.

At this point, it is important to raise one question. If one of the spouses is given a power to administer common property, what will the scope of such power? In my opinion, Art. 67 by itself tells us the scope of the power to be exercised by the agent when it says □the spouse who performs an act of management □□ (Emphasis supplied). That is, if the agency receiving spouse is conferred with an agency expressed in general terms he/she would only be performing acts of management in relation to the common properties of the spouses. To put in different words, if one of the spouses is given the power to administer common property in an agency expressed in general

terms, this agency only confers up on the agent the authority to perform only acts of management (Art. 2203 of the Civil Code), Acts of management per the provisions of Art. 2204 are:

1. Acts done for the preservation or maintenance of property, leases not exceeding three years, the collection of debts, the investment of income, and the discharge of debts shall be deemed to acts of management.
2. The sale of crops, goods intended to be sold or perishable commodities shall be deemed to be acts of management.

Dear student, as you can read in this provision, the agent authorized to administer common property by general agency is entitled only to perform ordinary administration or transaction of an every day occurrence involving relatively less risk to the house hold. This argument is supported by Art 68 that requires the consent of both spouses to perform the acts there in or extra ordinary administration, such as alienation. One spouse alone can not perform the transactions under Art. 68.

If the spouse conferring agency, on the other hand, is expecting the agency receiving spouse to perform acts other than acts of management such as sale of immovable the agency to be conferred must necessarily be special agency. Special agency, as it transpires from the Code, is an agency not expressed in general terms and that does not expressly mention the acts listed in Art. 2205 of the Civil Code. Incidentally, it is also important to note that for one of the spouses to peform the activities listed under Art. 68 of the RFC, he/she needs to be conferred with a special agency though some of the acts mentioned under Art. 68 of the RFC fall within acts of management as listed under Art 2204 of the Civil Code.

The Civil Code, though gave the power of administration of common property to the husband, also seems to restrict the power of the husband by requiring the consent of both spouses for certain acts enumerated under Art. 658. The Revised Family Code also, apart from empowering the spouses to jointly administer their common property, made similar prerequisites with minor variations. Read the following articles.

Article 68 □ (1) Requisite of Agreement of Spouses

Unless provided otherwise by other laws, the agreement of both spouses shall be required to.

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

Article 69 □ (2) Absence of Agreement

1) Where one of the spouses has entered in to obligations in violations of the provisions of the preceding Article, the court may, at the request of the other spouse, revoke such obligations.

2) An application for cancellation may not be made six months after the day on which the other spouse came to know the existence of such obligation, or, in any case, two years after such obligation is entered.

Thus the agreement of both spouses is required for the acts mentioned above. The rational of requiring the joint consent of the spouses to perform these acts of extra ordinary administration seems to protect the squandering of the common property through unwise and unilateral administration of one spouse. In a word, its aim is protecting the interest of the spouse as well as their children and such interest could be impaired more than any thing if the common immovable property is going to be sold without due care and agreement of the couple.

Even though the law in principle requires the agreement of both spouses to perform acts under Art. 65, such requirement may be excluded by other laws. That is, if other laws allow the activities mentioned under Art. 68 to be done without the consent of both spouses, then one spouse alone may undertake them. To cite one instance, as indicated under Arts. 16 21 of the Commercial Code, any married person may carry on a trade as though he were unmarried unless his spouse objects thereto. So, from this, we can see that a married trader can enter in the aforementioned transactions without the consent of the other spouse and the latter can t set up a defense against third parties who enter in to these transactions unless he/she made an opposition which is entered in commercial register.

One short coming of the Civil Code on the requisite of agreement of both spouses is that, it didn t attach a clear effect to the non-compliance with such a requisite. In other words, the fate of an

obligation which is entered in to by a spouse without securing the consent of the other spouse are required by law is not clear under the civil code which led judges and legal scholars to different interpretations.

Some argue that a contract concluded in violation of Art. 658 of the Civil Code is subject to invalidation as provided under Art. 1808 of the same where as the other group argues that the scope of pecuniary effect of marriage is restricted to only as between the spouses and should not extend to third parties for that would endanger security of transaction. This group holds that the party affected by the transfer of the property may claim indemnity up on dissolution of marriage per Art. 658 of the Civil Code.

The Revised Family Code has attached a clear effect to contracts or acts done with out securing the consent of the other spouse as required by Art. 68. Thus, under Art. 69 (1) of the RFC, the spouse whose consent is not secured may request the revocation or cancellation of such an obligation. However, such a spouse is not entitled to cancellation of the obligation indefinitely; rather, he has to bring an action within six months after he came to know the existence of the obligation, or at any rate within two years after the obligation is entered (Art. 69 (2)). This approach aims at striking the balance between the interest of the spouses by guarding them not to commit a prejudicial act on each, and by giving additional ground of cancellation of contract other than those indicated in general contract provisions, on the one hand, and security of commercial transaction on the other.

The presumption behind fixing a shorter period of time for invalidation of such an obligation seems that since the spouses are

presumed to live together, both know what is going on their common property or even if for one reason or another both do not know the daily state of their property, two years is a fair period to enable the consenting spouse to be aware of such facts and if after being aware of the circumstance such a spouse kept quite for six months, the presumption is that he/she has tacitly accepted the obligation. If however, the non-consenting spouse didn't come to know the existence of the obligation within two years he/she can't in any manner revoke it. The remedy in such case is to claim indemnity up on divorce per Art. 87 of the RFC provided of course, that the divorce is declared within three years since the obligation has come to existence. This seems to prevent the non-consenting spouse from unjustifiably benefiting from the conduct which has been tolerated for years.

Dear student, what is the purpose of Art. 68 in the face of Art. 66 ? Unlike the Civil Code, the Revised Family Code introduced joint administration of common property. There fore, every act relating to all common property requires the consent of the spouses. Doesn't it amount to redundancy to select some acts under Art. 68 and put the requirement of both spouses to perform them. Under the Civil Code, Art. 658 (a similar provision) is important as common property is administered by the husband; putting some restraint against such power is undoubtly important. As result, the husband is prohibited to unilaterally enter into acts of extra ordinary administration envisaged under Art. 658. When we come to the Revised Family Code, since Art. 66 requires the consent of both spouses to perform all acts pertaining to common property, it doesn't give sense to select some transactions under Art. 68 and requires consent of both spouses be cause the situation is already covered under Art. 66. Hence Art. 68 is of no use when common property is conjointly administered. Art. 68

gives much sense when common property is administered by one of the spouses as authorized by their contract of agency. When the common property is administered only by one of the spouses, it is important to put a restriction. Particularly in case where the agency conferred to the spouse is general agency, he is prohibited to perform acts under Art. 68.

Before we close this chapter, another important point worth discussion is debts of the spouses. In as much as the spouses may have personal and common property during marriage, they may also incur a personal or a common debt. Read the following provisions having to do with debts of the spouses.

Art. 70 ‐ Debts of spouses

1) Debts due by one of spouses may be recovered on the personal property of the indebted spouse, and in the absence of such personal property, it may be recovered on the common property.
2) Where the debt is incurred in the interest of the household, it shall be deemed to be joint and several debt of both spouses and may be recovered on the common property and on the personal property of the spouses.

Art. 71 ‐ Debts in the Interest of Household.

The following debts shall be deemed to be debts incurred in the interest of the household:

a) debts incurred to fulfill the livelihood of the spouses and their children;
b) debts incurred in order to fulfill an obligation of maintenance to which both the spouses or one of them is bound;

c) Other debts which are acknowledged to be such by the court at the request of either of the spouses or the creditor.

As can be understood from these provisions, debts of the spouses may be personal or common debt. Though the law doesn't give us a clear definition of 'personal debt', from the reading of Art 70 (2) it might be said that personal debt is a debt that is not incurred in the interest of the household. For instance if one the spouses borrowed money before he/she concluded marriage, this is a personal debt.

Under Art. 659 of the Civil Code, personal debt was made to be paid from personal or common property. Therefore creditors may demand payment either from personal property of the indebted spouse or the common property of the spouse in the order he likes. But this provision is criticized mainly because payment of personal debt from common property is prejudicial to the other spouse.

To avoid this unfairness, the Revised Family Codes of the federal government and regions took different stands. For instance the Tigrai Family Code under Art. 97 (1) provides that personal debt of the spouses may recovered on the personal property of the indebted spouse, and in the absence of such personal property, it may be recovered on the common property to extent of the share of the indebted spouse. (Emphasis added) Though the Tigrai Family Code took a fair stand it is difficult to enforce for the following reasons. Firstly, so long as the marriage is not dissolved, common property of the spouses is a single patrimony (undivided estate). Therefore, we can not for sure sort out the share of the indebted spouse. Secondly, even if we are able to identity the respective share of the spouses, as long as the marriage is not dissolved, the remaining property will continue to be common property once the debt has been paid from the

share of the indebted spouse. As a result, this approach is found out to be prejudicial to right of third party creditors, and away that may lead to divorce.

Learning from the short comings of the civil code and the Tigrai Family Code, the Amhara and the Federal Family Codes respective legislatures come up with a different approach. According to this approach, if one of the spouses is a personal debtor, such debt may be recovered from his personal property. If the indebted spouse has no person property or his personal property is not sufficient to recover the debt, a personal debt of one of the spouses may be recovered on the common property of the spouses. This approach not only broadens the right of third party creditors but also strengthens the principle that the spouse should support and assist each other during marriage.

The second type of debt that may exist during marriage is common debt. As can be under stood from sub-article (2) of Article 70, common debt is a type of debt incurred in the interest of the household. Instances of common debts are given under Art. 71. Bear in mind that the enumeration under Art. 71 is not exhaustive.

With regard to payment of common debt, the Civil Code, the Tigrai Family Code and the English version of Art. 70 (2) of the Federal Family Code state that common debt may be recovered either form common or personal property. Creditors, if they wish, can demand payment from personal property without proceeding to the common property of the spouses. The Amharic version of Art. 70 (2) of the

Federal Family Code, on the other hand, provides that common debt may be recovered from common property, and in the absence of such common property, it may be recovered on the personal property of one of the spouses. Since the official Amharic version prevails over the English version, under the Federal Family Code, common debt (debt incurred in the interest of the house hold) shall first be recovered from common property. It is only in the absence or insufficiency of common property that common debt may be demanded from personal property of either of the spouses. Hence if a creditor of a common debt brings a direct action against personal property of either of the spouses, each spouse may raise the defense of benefit of discussion so that the claim will be restricted to their common property. But here we have to not that in as far as the debt is not fully paid from the common property, the spouses shall be obliged to pay from their personal property.

Exercise

1. Art. 45 (1) of the FRC states that a copy of contract of marriage shall be deposited in court or with the office of civil status. What is the effect of non-compliance with this requirement particularly with reference to the validity or otherwise of the contract of marriage?

2. If and when the contract of marriage is concluded during marriage, it shall be approved by the court. Why the law puts this condition for such contract of marriage? Doesn't it contravene the contractual freedom of the spouses?
3. Gadise, while in marriage, acquired by way of succession, a TOYOTA CARRINA II car from her deceased father. Now she wants to donate the car to her daughter begotten prior to the present marriage. Should she get the permission of her present husband to donate this property? Why/why not?
4. As we all know, that part of the Civil Code dealing with family matters has been repealed by the federal and other regional family laws. One of the reason that necessistated family law reform is to ensure equality of men and women at the time of conclusion of marriage, during marriage and up on dissolution of marriage. Cite three provisions governing personal effects of marriage that guarantee equality of the spouses during marriage?
5. To strength on the mandatory nature of the obligation of the spouses to live together, Art. 53 (3) prohibits contrary agreement. Art. 55 (1), on the other hand, allows the spouses to conclude an agreement to live separately. Is there any apparent or real contradiction between Art. 53 (1) and (3), on the one hand, and Art 55 (1) of the RFC on the other hand? Why / why not?
6. Ato Teberga and W/o Zinash were living as husband and wife since 1974 after performing a rite that constitutes valid marriage under the Guraghe people's custom. In the contract of marriage, among other things, it was agreed that the Mercedes Benz plate No. 02 – AA 00034 to be the personal property of Ato Tiberga . In fact both of them used the car to travel to and from work place.

In 1985, Ato Tiberga borrowed 13,000 birr from his uncle, Ato Goitom

to repair the normal wear and tear that occurred on the above mentioned

car. The debt was to be paid back on sene 1989. As soon as the car

wasout of garage, Ato Tiberga bequeathed it to his younger brother on

the occation of his graduation with Great Distinction from Addis

Ababa University.

After the due date of the debt, the creditor demanded the payment of

his money from the common property of the spouses. W/o Zinash

strongly protested against such demand saying that it is personal debt

and it should not be paid from the common property.

Ato Goitom wants to take the matter before court of law but before

that he wants to know if he has any legal ground for his claim. Avail

your self of your family law knowledge give him your well considered

legal opnion on the matter.

7. What is the main difference between property acquired by onerous title and property not acquired by onerous tiltle.

CHAPTER FIVE

DISSOLUTION OF MARRIAGE AND ITS EFFECTS

Marriage is thought to have been entered in to as a life time relationship. However, the relation may come to an end due to circumstances which may or may not be within the control of the spouses. Under this chapter, we shall study points relating to dissolution of marriage and the effect thereof.

To be more specific, at the end of this chapter, the student will be able to:

- Identify causes of dissolution of marriage;
- Explain the two ways by which divorce shall be declared;
- Understand as to how the pecuniary relationship of the spouses shall be liquidated.

5.1. Causes of Dissolution of Marriage

With regard to causes of dissolution of marriage, Art. 75 provides the following

Article 75 – Causes of Dissolution of Marriage

The following shall be causes of dissolution of marriage:

a) death of one of the spouses, or declaration of absence, by the court, of one of the spouses;
b) dissolution order by court due to violation of one of the essential conditions of marriage; or
c) divorce.

These are the only grounds of dissolution of marriage.

Before going deep in to considering each cause of dissolution of marriage, from the out set it is important to note that the causes and effect of dissolution of marriage are the saqme regardless of the form of marriage celebration. (Art. 74 (1)). No distinction shall be made concerning dissolution whichever the form according to which the marriage is celebrated. (Art. 74 (2)). That is, all forms of marriage stand on the same footing as far as dissolution of marriage is concerned. This means that any cause that dissolves, say civil marriage will also dissolve a religious marriage. This is also true for customary marriage. The effects of dissolution of marriage are also similar in all cases.

When we turn our face to causes of dissolution of marriage, the first cause of dissolution of marriage is death of one of the spouses. Though the law doesnot specifically provide, as to whether the death of both spouses at a time shall cause the dissolution of marriage, we may reach on the same conclusion. If the death of one of the spouses causes the dissolution of marriage, by argument of a fortiori (for stronger reason), the death of both spouses shall be the cause of dissolution of marriage.

Marriage while concluded is intended to last for the life time of the spouses. And legally speaking, the existence of marriage presupposes the existence of the two parties, i.e., the husband and the wife. If one of these parties dies so does the marital relationship and the law did recognize the status of widower and widow.

The second ground which does bring the dissolution of marriage is the declaration of absence, by the court, of one of the spouses. As provided under Art. 154 (1) of the Civil Code, where a personal has disappeared and has given no news of himself for two years, any interested party may apply to the court to declare his absence. And it is also given that the court shall declare the absence where the death of the absentee appears it to be probable. (Art. 157 (1) of the (Civil Code).

The question is that: does the declaration of absence result in the automatic dissolution of the marriage of the absentee with out any other formality or does dissolution of marriage require further formality after the declaration of absence like making an application to the court to dissolve the marriage?

Art. 163 (1) of the Civil Code allows the automatic dissolution of marriage of the absentee when the judgment declaring absence becomes final. Hence, this provision requires no further formality. The declaration of absence entails the automatic dissolution of marriage. This dissolution is the same as when marriage is dissolved by death of either one of the spouse. Therefore, an application to dissolution of marriage shall not be made to family arbitrators.

According to Aricle 670 (b) of the Civil Code, on the other hand, if the court declares absence, it becomes a serious cause for divorce. If this

is the case, divorce shall be declared by family arbitrators. Hence pursuant to Art 670 (b), in addition to declaration of absence, request shall be made to the family arbitrators for dissolution which is further formality. Therefore, there is a clear conflict between Art 163 (1) and 670 (b) of the Civil Code. So, under the Civil Code whether declaration of absence automatically results the dissolution of marriage was controversial.

So as to avoid the controversy under the Civil Code, the Revised Family Codes have taken a clear stand in this regard. Therefore under Art. 75 (a) and Art. 86 (1) of the Federal and Amhara Family codes respectively, declaration of absence, by the court, of one of the spouses is taken as a cause of dissolution of marriage. The rationale is that, even though there is a narrow probability of reappearance of the absentee, the absentee is more or less similar to the deceased.

The third cause of dissolution of marriage is violation of the essential conditions of marriage. As we have studied in chapter two, marriage will be valid provided that the substantive and procedural requirements are fulfilled. With regard to substantive requirements, we have seen consent, age, consanguinal and affinal relationship, judicial interdiction and period of widow hood. As to formality requirements, it has been said the marriage shall be concluded in either of the three forms of marriage. If the marriage is concluded in violations of these requirements of marriage, it shall be rendered invalid. Such void able marriage may be dissolved by the order of the court if an application is made to that effect. For detail discussion, you may refer chapter three of this module.

Divorce is the fourth ground for dissolution of marriage. Since it requires a detailed discussion, it is discussed hereinunder.

5.2. Divorce as a Cause of Dissolution of Marriage

Divorce as mentioned under Art. 75 (b) is the fourth ground for dissolution of marriage. Even if our family laws don't give us a clear definition of divorce according to Black's Law Dictionary, 'divorce is the legal separation of man and wife, effected by the judgment or decree of a court, and either totally dissolving the marriage relation, or suspending its effects so far as concerns the cohabitation of the parties."

This definition reveals the following important points. One, divorce is pronounced by a court of law. Consistent with this element, Art. 117 of the RFC provides that only the court is competent to decide on divorce. Thus, unlike any other ordinary contracts, parties to a marriage can't terminate the relationship at their own free will with out the declaration of the court. Second, divorce is of two types one type totally and absolutely dissolves the marriage, (our family laws adopt this type of divorce). The other type simply orders the legal separation of the husband and wife. The latter is commonly refered to as separation from bed and board.

The idea of separation from bed and board was developed from the conception that marriage is indissoluble in any way other than death. This was prominently the Catholic precept of marriage. In this arrangement, a party to a marriage was absolved from his duty to live with the other without being freed, however, from the tie of the marriage. That is, each spouse is prevented from a remarriage during the life time of the other spouse.

The olden days notion that marriage is not susceptible to divorce once concluded does not hold true to day because divorce is considered to be a constitutional right in as much as marriage is. The point on which states are at variance, however, is on grounds of divorce. That is, some countries make the grant of divorce so stringent while others make it more liberal. In other words, some countries follow fault based divorce system while others follow a no fault divorce system.

The Civil Code follows a fault based divorce system Art. 665 CC provides that divorce by mutual consent is not permitted by law. The Code classified causes of divorce in to serious and other causes. The existence or non-existence of serious cause is relevant in determination of the condition on which divorce is ordered and effects of divorce.

When there is a serious cause for divorce, it shall be pronounced within one month from the petition; however, when divorce is pronounced for other causes, it shall be pronounced within one year from the petition for divorce (Art. 668 cum. 678 (1) of the civil code). A relatively longer period is given to declare divorce for non-serious causes for the family arbitrators have to do all the best to reconcile the spouses.

Moreover, the liquidation of pecuniary relations is highly affected by the existence or non existence of a serious case. In case where divorce is declared due to serious cause of divorce imputable to a spouse, the spouse at fault may be condemned to the extent of forfeiting the whole of the common property to the other (innocent) spouse. (Art 693 (1) of the CC). Where, on the other hand, the divorce is not ordered for a serious cause, the penalties mentioned herinabove shall be imposed to the spouse who has made the petition for divorce

(Art. 694 of the CC). The reason given to penalize a spouse who petitions for divorce on non-serious grounds is to a void dissolution of marriage for insignificant causes.

Though the rational behind classifying causes of divorce in to serious and non-serious and punishing the party at fault from common property is to safe- guard the institution of marriage, during the reform of the Revised Family Code it has been argued that the institution of family can not be protected by prohibiting the spouses to get divorced or punishing them from the common property. If the parties have conclusively arrived at the decision to get divorce punishment from common property does not save the marriage; quite the contrary, it triggers the disagreement of the parties in the post divorce which have also an adverse effect on the children born in the marriage, if any.

Consequently rules of divorce under the revised family code are liberalized. As we will see later, under the current law, with out classifying causes of divorce as serious and others, it is able to get divorce even by mutual consent of the spouses. Therefore, there is a move from fault based divorce to non fault divorce. Here the question is: why the new law opted for the liberalization of divorce rules? Doesn't it go against the responsibility of state to maintain the stability of marriage? In other words, what are the possible reasons that warranted for the reformation of divorce rules? The possible rational behind the reform are:

a) Marriage is a result of consensual relationship of two parties since it should be entered only with the free and full consent of the intending spouses. If the consent of one of the parties completely disappear so does the marriage. Neither narrowing

down the grounds of dissolution nor punishing the spouses will be the solution for such marriage. If the legislature narrows down the grounds or even if the legislature wants to have causes for dissolution, it is in a way violating right of a person to marry, since by a *contrario* reading individuals have a right to walk out of relationships to meet the person of his choice.

b) The belief that the test for successful marriage was its durability is found out to be wrong. Because in addition to durability, the rest of effective marriage are consent and love. If the law stick families together, despite the fact that they run out of love, it would have a negative effect on future spouses for they might not be motivated or encouraged to conclude marriage. Therefore, in order for the law to achieve its goal, that is, to have stable family and society, the law should not in any way deter divorce if the spouses can not live together with harmony.

c) When we say that government should protect the family, the previous perception was that it is possible to achieve this purpose by narrowing down grounds of divorce or by ordering punitive divorce. But this understanding is now changed. So, the government rather than trying to protect a broken home by making divorce proceedings rigorous, it is better to protect the family through its policies that insure economic and social needs of the family.

d) The other area that provokes the legislature□s and the women□s right activists towards the reform is the issue of children. Children ought to live with both of their parents in order to get full care and support to their upbringing. If the law forced the spouses to live together where there is no love, respect to each other and affection, then the children may end up in psychological trauma and unhealthy state of mind. This in a way adversely affects the society since children are the next

generation. So the amendment is necessary for the well being, up bringing and protection of children.

Having said this much about divorce in general, next we shall see ways by which divorce shall be declared. Under the Revised Family Code, divorce can be obtained in two ways. These are divorce by mutual consent and divorce by petition. Study the following article.

Article 76 Conditions of Decision for Divorce

Marriage shall dissolve by divorce where:

a) the spouses have agreed to divorce by mutual consent and such agreement is accepted by the court; or
b) the spouses or one of them made a petition, for divorce, to the court.

5.2.1 Divorce by Mutual Consent of Spouses

Under Art 665 of the Civil Code, marriage by mutual consent of the spouses was prohibited. Under the Revised Family Code, however, marriage by mutual consent is allowed. But here we have to bear in our mind that even if the law allows divorce by mutal consent, according to Art. 77 (1), the spouses can not end their marriage without the knowledge and approval of a court of law. As the formation of the marriage has followed a certain procedure, its dissolution also requires some procedures. Hence, the spouses, if they are determined to dissolve their marriage by their mutual consent, they should submit their agreement in writing to the court and get its approval, the spouses are not allowed to simply dissolve their marriage on their own without getting the approval of the court. This is an additional procedural requirement of the law.

Moreover, according to the same article, spouses are required by law to regulate the consequences or conditions of divorce. There are many consequences of divorce. Liquidation of pecuniary relation between spouses is one of the conditions/ consequences of divorce. Another effect is determining the custody of children. As a result of divorce, the spouses are going to live separately, with which parent should the custody of children be? With the father or with the mother? When the spouses submit their mutual consent of divorce to the court, they are also expected to regulate such consequences of divorce.

Art. 77 (2) shows that divorce by mutual consent is not permitted for all spouses. Particularly, spouses whose marriage lasted for less than six months shall not be permitted to divorce by mutual consent. The reason for such prohibition is that since these spouses stayed in marriage for short period of time, the law doesn□t presume that they have agreed to divorce. Even if the spouses whose marriage lasted for less than six months are not permitted to divorce by mutual consent, they can avail them selves of divorce by petition. Hence, they are not totally barred from petitioning for divorce.

Provided that the conditions under Art. 77 (1) and (2) are fulfilled, spouses who petition for divorce by mutual consent are not obliged to state the reason thereof (Art. 77 (3)). This provision reveals that what has been adopted under the revised family code is a no fault divorce and without giving any reason whatsoever.

Assuming that the spouses have agreed to divorce in compliance with Art. 77 (1) and (2), does it mean that the court shall give immediate approval to every agreement proposed by the parties to be divorced? The obvious answer is in the negative. There are some procedural mechanisms and rules (Arts. 78 □ 80) that need to be observed by the

court, which are considered as marriage preservation methods. A balance has been sought to be created between individual freedom and social control.

The fact that the spouses have agreed does not mean that the court will automatically approve their agreement. True, the government does not oblige the spouses to live together nor does it threatens by pecuniary penalty to oblige the spouses to live together. But, once again, it does not mean that the government will not intervene and exert all possible efforts to persuade the spouse to live together. The government, represented by courts, shall assure whether those spouses agreed to divorce have firmly decided to divorce and accept the effect thereof. Beyond this, the government shall try to cause the spouses to renounce their intention to divorce. The whole purpose of all these efforts of the government is the manifestation of the fact that government is highly interested towards marriage stability. To discharge its commitment of protection of family and ensure sustainability of marriage, the government through its courts shall not declare divorce carelessly. Courts are duty bound to adhere to some guidelines before declaring divorce. These guidelines are enshrined to avoid arbitrary declaration of divorce. If these guidelines (obstacles) are properly implemented, it is believed that it will be more effective in protecting marriage when compared with mechanism of protection of marriage by prohibiting divorce by mutual consent. Here in under are the guide lines (from Arts. 78 – 80).

First, where a petition for divorce is made under Art. 77 (1), the court may discuss separately or jointly and counsel to renounce their intention to divorce (Art. 78 (1). The reason for such discussion is to assist the spouses and eventually to renounce their petition for divorce and to continue to live together. If the spouses, however are

still determined to get divorced inspite of the attempt made by the court to reconcile them, the court may dismiss the spouses to comeback after a period of not more than three months (Art 78 (2). This period is known as cooling period. Here it must be noted that neither cooling the spouses nor granting cooling period are mandatory. While giving cooling period, the court must assure that there would be an opportunity for couples to rethink the whole matters and abandon their intention to divorce. Therefore, the rationale of granting clouding period is to cause the spouse to reconsider their actions and give the family members sufficient time to persuade the spouses to like together. If the court, having regard to the circumstance of the case, believes that the spouse will not renounce their intention to get divorce, it may not grant cooling period.

There are two consequences to spouses who are dismissed by giving a cooling period. One, where the spouses decided to renounce the divorce agreement, within the cooling period they can continue to live together peacefully. If this is the choice of the spouses, it is encouraged as the cooling period has achieved its purpose, and the court shall close the file.

Second, where the spouses did not change their intention to divorce within the given cooling period, they may reapply to the court to approve their agreement to divorce within six months from the last date of such cooling period (Art. 79 (1)). Even if the spouses did not make an application within six months from the expiry of the cooling period, they are not precluded from submitting a new application for divorce (Art. 79 (2).

Another limitation imposed on divorce by mutual consent is that the court shall approve the divorce agreement only when it believes that the agreement is the true expression of the intention and free consent of the spouses and is not contrary to law and marality. (Ar. 80 (1)). For instance if the divorce agreement is procured as a result of fraud or violence, the court shall not approve the agreement. More over, one of the spouses may intend to get divorce while the other spouse is seriously sick or in other difficult situation, in this case the divorce agreement is contrary to law and morality and hence, it shall not be approved because the agreement is done to evade the duties of the spouse to help and assist each other.

As we have studied in connection with Art. 77 (1), it is provided that the spouses shall submit to the court their agreement with respect to effects of divorce in addition to their agreement relating the divorce it self. When the spouses petition in this way, the court shall approve the conditions or effects of the divorce agreed between the spouses together with the divorce agreement (Art. 80 (2) However, where the agreement of the spouses on the conditions of divorce does not sufficiently protect the interest and well being of their children, or, where it adversely affects the interest of one of the spouses, the court may approve only the divorce agreement and give decisions it may deem appropriate to correct the defects on the conditions of divorce.

For example, Ato H and Wro W, while deciding on condition of divorce agree Ato H will surrender all the common property to W/o W on the condition that she will revoke every right she has on children custody and visitation. This sort of agreement may not be approved as it is contrary to Equity and right of children. Such agreement of parents outrageously affects the interest of the parents and their children. Waiver of parental right shall not be binding by the mere agreement

of the parents because the law is also interested. Under the law, children have the right to know their parents and to have the benefit of such parental love and guidance through adequate visitation. Hence, the court shall not approve such proposals since most elements of parental power and right are non-negotiable. And the court shall correct such defects in agreement relating to condition of divorce.

5.2.2 Divorce by Petition

Divorce by petition is the second way though which divorce shall be declared. Read the following article to understand the main difference between divorce by mutual consent and divorce by petition.

Article 81 □ (1) Petition for Divorce

1) A petition for divorce may be made to the court either by the two spouses conjointly or by one of them.
2) The spouses or one of them may state in the petition the reasons for divorce.

As discussed above, in the case of divorce by mutual consent, the spouses agree to get divorced before they take their case to the court only for approval. What makes divorce by petition different from divorce by mutual consent is that, there may not be prior knowledge as to the intention of one of the party to institute divorce. Even if there is, there might not be consensus as to the dissolution of the marriage by divorce and the effect thereof this fact calls for utmost protection by the court while entertaining such cases. In case of divorce by petition, the role of the court is not limited to approval of the divorce agreement. It shall also attempt to rectify defects in the marriage by the assistance of the spouses and arbitrators. If the attempt of the court fails in this regard, it shall proceed to decide on

divorce and its effects. Therefore, the role of the court in case of divorce by petition is multifaceted.

Before going deep in to analyzing the role of the court in case of divorce by petition, two points need consideration. First, as indicated under Art. 81 (2), when spouses or one of them submits his petition for divorce, they are not mandatorily required to state why they petition for divorce. If they want to state their reason, they can do so.

Second, it needs discussion as to whether divorce can be conducted through an agent with out the personal appearance of the spouses.

Unlike the chapter that dealt with conclusion of marriage, (see Art. 12), chapter four of the RFC, dealing with dissolution is silent as to whether marriage may be dissolved through agent when the cause of dissolution is divorce. The silence, therefore, necessarily triggers questions like: can divorce petitions be submitted and processed by proxies?

As stated earlier, the RFC doesn't address the above queries. Neither is there any provision in the RFC that explicitly prohibits representation in matters of divorce. It may therefore be argued on the basis of can one of interpretation that whatever is not explicitly prohibited should be deemed to have been permitted and that a spouse may submit her/his petition for divorce through his agent. A close scrutiny of the relevant provisions of the RFC, however, may prove that the argument 'whatever not prohibited should be deemed to have been permitted' may be wrong.

A look at Art. 82 (1) of the RFC seems not to allow representation when it provided that the court should speak to the spouses

separately or jointly with the view to persuade them to ren ounce their petition for a divorce and solve their disputes amicably. It transpires from this provision that the court shall talk to the spouses personally and not to their representatives. Per Art. 78 (1), the same is true for cases where the spouses submit their petition for divorce by mutual consent. Thus, at least in principle, divorce by representation may not be allowed. In case of conclusion of marriage, it is said that since marriage is strictly personal, it can not be concluded by an agent. It is only in rare circumstances that conclusion of marriage by representation is allowed. (Art. 12 (2)). By the same token, divorce by representation shall be allowed only in exceptional situation when the spouses can not appear personally. Last but least, even if it is allowed to litigate civil cases by a lawyer, the personal appearance of the party to the dispute may be ordered by the court if such appearance is indispensable to render justice. In divorce cases, the personal appearance of the spouses to settle the dispute is unquestionable.

As we have slightly touched upon earlier, when a petition for divorce is submitted to the court, it is expected to discharge a number of duties. First, where the petition for divorce is made either by the two spouses conjointly or by one of them, the court shall speak to the spouses separately or jointly with a view of persuading them to renounce the petition for divorce and solve their disputes amicably. (Art. 82 (1)) Here note that, it is mandatory to the court to consult the spouses either separately or jointly, unlike the case in divorce by mutual consent, where the court could consult the spouses only if it thinks fit. The purpose of this consultation is to persuade the spouses to renounce their petition for divorce and solve their problems in a friendly manner.

Where the attempt made by the court to speak the spouses separately or jointly has been fruitless or is likely to be fruitless, the court may direct the spouses to settle their dispose through arbitrators of their own choice. However this is not a mandatory provision. There for the court is not necessarily required to refer the spouses to arbitrators. However, if the court believes that the family arbitrators will succeed in reconciling the spouses even if it is not succeeded by it self, it could direct the case to arbitrators who are elected by the spouses themselves. (Art. 82 (2)) If the case is referred to family arbitrators, it will be the power of the court to accept the report of the family arbitrators and to give guide lines to the same as envisaged under Arts. 119 – 122 of the RFC.

Where the spouses did not agree to settle their dispute through arbitration, the court may dismiss the parties by giving them a a cooling period of up to three months. (Art. 82 (3)). The importance of this procedure is to give chance for the spouses to rethink on the matter so that they could renounce their petition for divorce. However, the court is not necessarily required to dismiss the spouse by giving them a cooling period. If the existing circumstances show that the spouses can no more tolerate each other and continue to live together, the court has to entertain their case and make a decision on the divorce. If, for instance, the case for divorce is a serious quarrel between the spouses, there is no need to give cooling period for there is little chance of change of mind of the spouses. If, on the other hand, the case for petition for divorce is incidental disagreement between the spouses, it is highly probable that the spouses may change their intention to divorce within the cooling period.

Where all the efforts to reconcile the spouses fail, the court shall pronounce divorce within one month from the date of receipt of the report of the arbitrators, or the end of the cooling period as the case may be (Art. 84 (2)).

From the time petition for divorce is brought before it, there are some orders to be given by the court while the divorce proceeding is going: on. From the date of application for divorce up to the final date of declaration of divorce, it may take long time to settle the dispute through arbitrators and to cause the spouses to renounce their intention in the cool period. In the mean time, the court is expected to give provisional / temporary instructions regarding the maintenance of the spouses, the custody and maintenance of their children and the management of their property (Art. 82 (5). Particularly if the man is the bread winner of the family and if the woman is a house wife without any personal income, the court may order the man to pay a certain amount of money to the woman as a maintenance. This is because, it is customary that after making petition for divorce, the spouses live separately. The court is also expected to give temporary order with regard to management of property. If this is not done, the common property of the spouses may be subject to various abusive actions.

Directions regarding custody of children is not only a temporary one it also requires due attention and well considered decision at the time of divorce. In deciding as to which spouse shall have custody of children, the court shall take into account the income, age, health, and condition of living of the spouses as well as the age and interests of the children. (Art. 113).

Another issue that requires the temporary order of the court is as to which spouse may leave the common abode of the spouses until divorce is finally pronounced. Art. 82 (6) provides that where circumstances absolutely require that one of the spouses leave their common abode, the court shall, when given an order under sub-article (5) of this article, take in to consideration the interest of children and the condition of the spouse who may be affected more by leaving their common abode. Where there is a serious fued between the spouses, it may not be possible for the spouses to live together in their common abode. In this particular circumstance, the court is expected to give temporary order as to which spouse shall leave their common abode. The court shall give order taking into account the interest of the family.

Where the court declares divorce after passing through the procedures mentioned here in above, it shall request the spouses to agree on the conditions of divorce. (Art. 83 (1)). If the spouses are not willing to agree or have failed to agree on the conditions of divorce, the court shall, by itself, or through arbitrators, or experts appointed by it, or by any other means it thinks appropriate, decide on the conditions of divorce. (Art. 83 (2)). The conditions of divorce agreed upon by the spouses or decided by arbitrators or experts shall be submitted to the court for approval. (Art. 83 (3)). After deciding the divorce, the court may post pone the judgment on conditions of divorce for not more than six months. (Art. 83 (4)).

Under the Civil Code, as has been mentioned above, a party who requests divorce may be punished. The punishment may be effected at the time of partition of property between the spouses. As indicated under Art. 694 (1) of the Civil Code, a spouse who petition for divorce on non serious causes may be penalized to the extent of losing the

whole of the common property to the other spouse. Under the Revised Family Code too the concept of indemnity is included. But unlike the Civil Code, the spouse who may be required to indemnify the other spouse is the one who commits a misconduct which is the cause of the divorce as opposed to the spouse who petition for divorce.

Article 84 – Indemnities

Where the cause of the divorce is imputable to one of the spouses and

justice so requires, the court may order such spouse to make good the

damage sustained by the other spouse.

Though the Revised Family Code provides that the parties in case of divorce by petition may not be obliged to state the reason for divorce, a party who claims indemnity should disclose the reason or cause of the divorce. Therefore, even if stating reason is irrelevant in petitioning for divorce, the same is relevant when we come to partition of common property. For instance, if the cause of divorce is the commission of the act of adultery by one of the spouses, the partition of common property shall be conducted having regard to this particular situation. Since the party at fault may be required to pay compensation to the other spouse, common property may not be partitioned equally.

Thus, Art. 84 can be taken as an exception to the equal apportionment common property as envisaged under Art 90. As an exception, Art. 84 shall be interpreted narrowly. The phrase □□ where justice requires □□ is the manifestation of the fact liberal interpretation shall not be applied for Art. 84.

From the close reading of Art. 84, one can see that where the cause of the divorce is imputable to one of the spouses, the court may order such spouse to compensate the other spouses. At this point, it is logical to ask one question, what will be the type and the amount of compensation to be paid by such spouse? The law simply says □□ to make good the damage □□ In the face of this generality, the damage to be made good may be moral or material damage or both. So, the compensation to be paid under Art. 84 is not limited to moral damage. It also includes material damage if the spouse in whose favors the compensation to be paid is able to prove that he has sustained material damage as a result of the misconduct of the other which led to divorce.

With regard to the extent of compensation, too, the Revised Family Code is silent. If this is so, the dispute shall be resolved having regard to law of extra □ contractual liability. As per these provisions, except the case of moral damage, the damage shall be made good by awarding the victim an equivalent amount in damage. It is also provided under this law that the party who claims compensation is required to prove the amount of damage he sustained. However, if the judge assures the existence of the damage, and where the exact amount of damage cannot be calculated, the court shall fix it equitably, taking in to account the ordinary course of events (Art 2102 (1) of tehe CC).

Provisions of indemnities (Art 84) is located under the section dealing with divorce by petition. Doesn□t it mean issues of indemnity may not arise in case where divorce is requested by mutual consent? As its very name implies, divorce by mutual consent of the spouses is an agreement to disagree. The source of disagreement may also be the fault or misconduct of one of the spouses. So long as the other spouse

is able to prove the existence of damage, nothing will prohibit him from demanding compensation.

Once dissolution of marriage is declared by the court, be it in case of divorce by mutal consent or divorce by petition, no appeal shall lie solely on the judgment of the court deciding divorce. (Art. 112) This is because where the subordinate court decides on divorce, it is assumed that at least one of the spouses is not willing to the continuity of the marriage. The appeal ate court shall not also oblige the spouses to live together with out their joint consent. It this is so, appeal will not achieve any purpose.

Before closing our discussion pertaining to divorce as one ground of dissolution of marriage, let us raise some points with regard to the roles of family arbitrators under the Revised Family Code. Under the Civil Code (Arts. 677 – 679), family arbitrators were given a number of powers including passing decision on divorce. Even under the currently Revised Federal and regional family codes, the institution of family arbitrators is granted some limited roles. Of course, contradictory views have been forwarded during discussing the draft Revised Family Code. On the one hand, it has been argued that the institution of family arbitrators has to be accorded legal recognition on the following grounds.

- It should be accorded legal protection because since members of the family arbitrators are close relatives of the spouses, they will exert all possible efforts to reconcile the spouses. So, in view of the government's policy to maintain marriage, this traditional institution of family arbitrators should be backed by the law.

- Since members of the arbitrators are the spouses close relatives or neighbors, the parties would not be ashamed of disclosing the facts which they may not explain to court, but which if disclosed may save the marriage from divorce.
- Since adjudication of family matters by arbitrators doesn't require representation of lawyer, the spouses can settle their dispote with low cost.
- It is a deep rooted Ethiopian culture to adjudicate cases through arbitrators and this practice should be encouraged.
- In view of the congestion of cases in regular courts, authorizing the family arbitrators to handle family cases would help regular courts dispense justice duly.

On the other hand, against recognition of the institution, it has been argued that:

- Family arbitrators intentionally delay cases for the sake of allowance which clearly jeopardizes the interest of the spouses.
- Since they have no legal knowledge required by law, leaving such institution as marriage at the hand of these lay men would adversely affect the parties to it and is against the constitutional protection of the institution of marriage.
- Since the institution of family arbitrators takes the power of the courts its constitutionality is questionable.

Under the Revised Family Code disputes are divided into two categories; namely, disputes arising during marriage and divorce. As per Art. 117, only the court is competent to decide on divorce, decide or approve the effects of divorce in accordance with Art 83 of this Code. Disputes arising during marriage, i.e., dispute short of divorce and the effect there of shall be decided by arbitrators chosen by the spouses (Art. 118 (1).

In addition to the above mentioned departure, the Revised Family Code is also departed from the civil code as regards the number and compositions of arbitrators. Under the Civil Code, family arbitrators are appointed two from the side of the husband and two from the side of the woman. But such composition is found out to be the source of complexity of many cases as arbitrators from the husband side far our the husband and arbitrators from the woman side favour the woman. To avoid this problem, under the RFC, all the arbitrators shall be appointed by the mutual consent of the spouses. Their number may also be less or greater than four in so far as the spouses agree on this point.

Dear student, the fact that courts are only competent to decide on divorce doesnot mean that family arbitrators have no role under the Revised Family Code (look Art. 118 above). They still play a vital role in reconciling the spouses but not deciding on divorce. Arbitrators, under the Revised Family Code, are responsible to reconcile spouses who petition for divorce.

But here it should be noted that even if family arbitrators play a great role in reconciling the spouses, the responsibility of the arbitrators is subject to the close scrutiny of the court. To put in other words, this is a court supervised arbitration. This is manifested in various ways. As soon as the arbitration is commenced, the court shall give direction as to how the reconciliation has to proceed and to submit the result of the arbitration or the attempt of reconciliation within three months (Art. 119 (2). Where it deems necessary, the court may also examine the progress of the arbitration and make orders for submission of periodical reports there on (Art. 119 (3) such court supervised

arbitration helps to minimize unnecessary delay of dispute adjudication by arbitrators.

Arbitrators also play un undermined role in assisting the court to decide on effects of divorce once a marriage is dissolved. (Art. 83 (21). To put in a nut shell, even under the Revised Family Code, the situation of arbitrators is recognized in spite of the fact that their composition and role is changed. The law opted for such stand mainly because alternative dispute resolution is more useful to the disputant parties, the society and the state.

5.3. Liquidation of Pecuniary Relations Between Spouses

Dear student, in the preceding two sections, we have studied causes of dissolution of marriage in general and divorce in particular. Under this section, we shall study the main effect of dissolution of marriage, namely, liquidation of pecuniary relations between the spouses. Thus, the purpose of this section is to discuss the manner in which liquidation of the pecuniary relations of the spouses is made.

Study the following article from the RFC.

Article 85 □ Liquidation by Agreement

1) With out prejudice to the provisions of this code relating to compensation, where marriage is dissolved in accordance with the provisions of this code, the pecuniary relation between spouses shall be liquidated in accordance with the agreement entered in to by the spouses or the contract of their marriage.
2) In default of a contract of marriage or an agreement, or if these are not valid under the law, the pecuniary relations between

spouses shall be liquidated in accordance with the following provisions.

Upon dissolution of marriage, all relationships that may exist between the spouses automatically comes to an end. And in the event of dissolution of marriage by death, declaration of absence, divorce, failure to fulfill essential conditions to marriage property of the spouses is subject to liquidation, either in accordance with the agreement of the spouses or the law. Here in below is given a separate discussion of the two ways by which the pecuniary relationship of the spouses is liquidated.

5.3.1. Liquidation by Agreement

One way by which the court resolves disputes over the divisions of the matrimonial estate upon the termination of marriage is by applying the agreement of the spouses to that effect. In the preceding chapter of this module, we have studied that the spouses may regulate the pecuniary effects of their union by a contract of marriage. Such contract may be drawn up before the celebration of marriage and it is also possible for them to enter into an agreement of this sort after their wedding, provided that they obtain the approval of the court. There is also a possibility for the spouses to agree how their pecuniary relations shall be liquidated after divorce upon the request and approval of the court. (Art. 83 (1) & (3).

Where the spouses have a valid agreement on the pecuniary effects of their marriage, it shall govern their property rights. Where their marriage is dissolved, the matrimonial assets and liabilities shall be

divided between the formerly married couple in accordance with what they have validly agreed. If disputes arise between them, they shall be resolved by giving effect to the terms of their agreement.

Therefore the spouses are at liberty to agree as to how their pecuniary relationship shall be liquidated. However, there is a restriction to such contractual right, that is, the spouses,by their agreement can not set aside indemnity provisions. This can be discerned from Art. 85 (1) when it says with out prejudice to the provisions of this Code relating to compensation Thus, compensation provisions of this Code are mandatory provisions which can not be rendered in applicable by the agreement of the spouses governing their pecuniary relationship.

At this juncture, a question worth posing is, what are those compensation provisions which can not be derogated by the agreement of the spouses?

One of these provision is Art 84 which we have discussed in the previous section (Section 5.2) As per Art. 84, if one of the spouses commits a misconduct that causes dissolution of marriage by divorce, the court, may order this spouse to pay compensation to the other spouse, where justice so requires. To explain this situation by way of example, let us assume that marriage between the spouses has been dissolved by divorce. The cause of divorce is the commission of adultery by the husband. These spouses have agreed that their common property shall be apportioned equally. In the example under consideration since the husband commited adultery the court may decide the same to compensate his wife. Such compensation shall be paid by taking from the share of the husband during partition of common property. Thus the agreement of the spouses with a view to

equal apportioning their common property shall be modified so as to make it in line with the decision of the court on compensation contrary to what has been agreed upon. The husband shall not receive equal share from the common property.

The second non – derogable indemnity provision is Art 87 of the RFC.

Article 87 – Indemnities

1) Where one of the spouses who has been vested with the power to administer the common property or the personal property of the other spouse in accordance with this law, has performed acts which adversely affect such spouse, or where the spouse who has performed such acts did not have the mandate, or where such acts constitute acts of bad administration, or have been performed in fraud of the right of the spouse making the claim, the court may, at the request of the aggrieved spouse, award damage to such spouse.
2) No claim for indemnity based on sub – article (1) of this article may be made by reason of acts which have been performed five years before the dissolution of the marriage.

5.3.2. Liquidation in Accordance with the Law

As has been mentioned above, if the spouses agreed as to the manner of liquidation of their pecuniary relationship, the court shall apply such agreement in resolving the dispute. In default of a contract of marriage or an agreement, or if these are not valid under the law, the pecuniary relations between spouses shall be liquidated in accordance with law, i.e., Arts 86 – 93

Pursuant to these articles the first step in liquidating pecuniary relations between the former spouses is retaking personal property if that personal property is found in kind. (Art. 86 (1). That is, up on

termination of marriage, each spouse is entitled to retake in kind the property owned by him or her personally. The right is, however, hinged upon the requirement to adduce appropriate evidence to that effect. In the absence of such evidence, it remains unenforceable.

Where retaking of personal property in kind is difficult, i.e. where personal property has been alienated and that the price thereof has fallen in the common property, the spouse who proves such an allegation shall, up on the dissolution of the marriage, be entitled to withdraw, thereform beforehand, money or things of value corresponding to such price. (Art. 86 (2). Where both spouses have such right, each of them shall take their respective share from the common property in proportion to their contribution (Art. 86 (3). Here again, one need not lose sight of the fact that the production of appropriate evidence is a requisite to the enforcement of the right.

As explained in the previous paragraph, where personal property has been alienated and the price thereof has fallen in the common property, each spouse is given the right to withdrawal thereform money or things of value corresponding to such price. In doing so, the Civil Code has given priority to the wife. That is, the wife shall make her with drawl before the husband. (Art. 685). Such priority right, however, is not stipulated under Art. 86 (3) of the RFC. The question is, why the revised family code fails to provide such priority right to the wife?

It is argued that the Civil Code provide priority right of withdrawal to the woman because under the Civil Code, only the husband was authorized to administer their common property. The wife is deprived of such power. To compensate the wife, she has been given the priority right of withdrawal under the Revised Family Code. The

situation is different in that both spouses have equal right to administer their common property. In the face of this equality, it is argued that the woman shall not be given the priority in doing so. If the otherwise were stipulated, it would have violated the constitutional provision that ensures equality of spouses during divorce.

Before partition of common property, the second step in liquidating pecuniary solutions between the former spouses is payment of debt. To that effect, where there is a debt incurred by either 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. Since common debts are incurred in the interest of the house hold, it is a plane fact that they shall be paid from common property before partition (Art. 70 (2) cum Art. 71). The problem is as to whether personal debts shall be paid from common property within the meaning of Art 89 where such debt is due after dissolution of marriage and before partition of common property. Here, we have two lines of arguments.

The first argument is that even if personal debt is due after the dissolution marriage, it shall be paid from common property where the indebted spouse doesn□t have personal property or his personal property is not sufficient to cover his debt. (Art. 70 (1) It is also argued that Art. 89 simply says □ □ such debt shall be paid before partition of property.□ (Emphasis added). Since it refers to all debts, be it common or personal, it shall be paid from common property.

The second argument is that Art. 89 shouldn□t be interpreted to included the payment of personal debt from common property. It is argued that after dissolution of marriage, it is only common debt that

has to be paid from common property. With regard to personal debt, even if Art 70 (1) provides the possibility for payment of personal debt from common property it shall be interpreted to be applicable where the maturity date of the personal debt is before dissolution of the marriage. After dissolution, personal debt had to be claimed only from personal property. The reason forwarded to support this argument is that once the marriage is dissolved, the former spouses are not duty bound to support and assist each other. In the absence of such legal obligation, it will be prejudicial to the other spouse if personal debt of his spouse is to be paid from common property. Dear student. Which argument seems to be more tenable? Why/ Why not?

What is indicated under Art. 89 is payment of debt before partition of common property but after dissolution of marriage. How the law protects creditors where the maturity date of either personal or common debt is after dissolution of marriage and partition of common property? Art. 93 has an explicit answer for this question.

Article 93 □ Debts of Spouses after Dissolution of the Marriage.

1) If a debt which was to paid from the common property becomes due after the dissolution of the marriage and after the partition of the property, each spouse shall be liable in proportion to his share.
2) If the debt concerns one of the spouses, only such spouse shall pay it.

After the payment of matured debts, the third and the last step is partition of common property. Art. 90 provides that common property shall be divided equally between the spouses. This provision is the principle and exceptionally common property may not be partioned equally where the spouses agreed to that effect and where the court

awards compensation to one of the spouses as per Arts. 84 and 87. As a rule, partition shall be made in kind in such a way that each spouse receives some property from the common property. (Art. 91 (2)) In doing so, the utmost care shall be taken to give each spouse things which are most useful to him. (Art. 91 (3)). Where it is not possible to divide such common property equally under sub-article (1) of this article, the inequality of shares in kind shall be set off by the payment of sums of money. (Art. 91 (2)).

During partition of common property, if there is a certain property which is difficult or impossible to be divided and if the spouses do not agree as to who shall have that property in his share, such property shall be sold and the proceeds thereof shall be divided between them (Art. 92 (1)). If the spouses do not agree on the condition of sale and if one of them so requires, the sale shall be made by auction (Art. 91 (2).

Exercise

1. What are causes of dissolution of marriage?
2. Can spouses dissolve their marriage (say, by physically destroying their certificate of marriage), without following any additional procedure? Why/ why not?
3. W/o Manasbosh and Ato Biset consummated their three years old love affair by concluding marriage before the concerned department in the Addis Ababa City Cunicipality on Tir 15, 1990 E.C. And since then they have liked a joyful life. As of 1992, however, the peaceful relations that existed between these couples began to experience rows. In due course, the conflict between them reached a point of no return and W/o Manasbosh decided to leave the common abode and accordingly she began to like alone in the apartment she rented from the rented house

administration agency. In the mean time, neither Manasbish nor Biset initiated a divorce proceeding.

Fortunately, W/o Manasbosh was soon approached by Ato Sebsbe from Dire Dawa and she was ok to conclude marriage with him and live together. Accordingly, the person in charge of birth and marriage registration unit of the Dire Dawa Municipality, who was not aware of the previous marriage of W/ro Manasbosh pronounced them united in marriage and issued to them a marriage certificate on Meskerem 10, 1993. W/o Manasbosh was also fortunate to secure in the same year 225,000 birr from Ediget Behibiret Iqub for which she was paying from her monthly salary since Nehassie 1991 E.C. She did not spared time to take land by lease form the Addis Ababa city Administration and build a G + 1 house on the southern outskirts of Addis Ababa Unfortunately, on Tahisas 3, 1997 W/o Manasbosh died due to a fatal car accident.

In the ensuing affair for the partition of property Ato Biset, Ato sebsibe and the heirs at law of the late W/o Manasbosh have claimed the G + 1 house built by W/o Manasbosh on the Southern out skirt of Addis Ababa. If you were one of the

presiding judges of the court that has jurisdiction to see the case, how would you resolve the row among the three parties?

4. What is the difference and similarity between divorce by mutual consent and divorce by petition?
5. Explain Art 88 of the RFC in your own words.

CHAPTER SIX

PROOF OF MARRIAGE

In many situations, the existence or non existence of marriage becomes a cause of dispute. Often you find one party claiming the existence of marriage while the other denies the existence of such a

marriage. The party who alleges that there is marriage is expected to prove its existence. Under this chapter, we will study those admissible evidences to prove the existence of marriage. Thus, at the end of this chapter, the student is expected to:

- → Enumerate the mechanisms by which a marriage is proved;
- → Know that certificate of marriage is the primary evidence to be adduced to prove the existence of marriage;
- → Define as to what is meant by possession of status.

In cases arising from marriage such as action to exercise or enjoy the civil effects of marriage or an action for the dissolution of marriage by divorce etc, the claimant must, first of all, proof the fact of the existence of marriage by showing the celebration of the marriage whose effects he is claiming or whose dissolution he is requesting. Therefore, proof of marriage, in such cases, plays an important role, since a claimant, who is unable to establish the existence of the marriage by the modes and the manner required by the law, he can not derive any legal consequence from the alleged marriage.

However, this is only the consequence of the general rule of evidence that a party who alleges something in court must prove, by appropriate evidence, such allegations, and also the result of the absence of a presumption in cases of marriage that the alleged marriage exists and the persons are married which would have relieved the claimant of such burden of proof. To put in short, a person who alleges the existence of marriage shall proof it. Marriage can be proved either by adducing a certificate of marriage, or in default of it, by proving possession of status.

6.1. Certificate of Marriage

Certificate of marriage is the primary and the key evidence to proof marriage. According to Art 94 of the RFC, 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.

Marriage certificate is a written document drawn up by the officer of civil status in accordance with the provisions of Arts. 28 30. We have also said that marriage certificate and contract of marriage are entirely two different documents in nature, purpose and content. Contract of marriage within the meaning of the law is concluded with a view to regulate the personal and pecuniary relation ship of the spouses in accordance with the provisions of Arts. 42 48 and this contract has nothing to do with proof of marriage. Because it may not show the fact of the celebration of the marriage, for the spouses may conclude such contracts even prior to entering in to marriage as provided under Art. 42(1) of the RFC. While certificates of marriage are drawn up with the sole purpose of serving as a permanent evidence of the facts contained therein and it has nothing to do with the regulation of the pecuniary and personal relations of the spouses.

The certificate of marriage, inter alia indicates the form of marriage, i.e., under which form out of the three forms of marriage the celebration was carried out. (Art. 30) In other words, the certificate of marriage proves the type of the celebration of marriage. Where the marriage is celebrated before an officer of civil status, certificate of marriage is a document issued by the officer of civil status pursuant to Art. 25 (6) on the date of celebration of marriage. Since failure to issue certificate of marriage at the time of celebration of marriage is not sanctioned as indicated under Art. 39, it is possible to say that it may be issued after the celebration of marriage as per Art. 28.

Where the marriage is celebrated either in accordance with religion or custom, marriage certificate shall be issued is by the officer of civil status after it records the celebration of marriage in accordance with Art. 28. Marriage shall be registered regardless of the form of celebration. And as soon as the marriage is registered, the spouses shall be given certificate of marriage.

6.2. Possession of Status

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. Alternatively, they may have lost the register of the marriage. In these cases, it is possible to prove marriage by producing any kind of evidence, which shows the existence of possession of status of the spouses. To that effect, Art. 95 of the RFC provides that when it is difficult to prove marriage by producing the certificate of marriage due to the fact that the marriage has not been registered or such register has been lost, it shall be proved by the possession of status of spouses.

The question that must be raised here is, what is mean by possession of status? Persuant to Art. 96, a man and a woman are deemed to have the possession of status of spouses when they mutually consider themselves and live as spouses and when they are considered and treated as such by their family and the community. Thus, to prove marriage by possession of status, parties are expected to prove the following facts:

1. The two persons are behaving as being married; and
2. The two persons are considered by their families and community living as married couple.

Hence, any evidence adduced to prove marriage according to Art. 96 should show the fact that the two persons mutually consider themselves and live as spouses. Here we may note that unilateral consideration of the status is not enough. The consideration of the status must be from both sides. The evidence produced must also show that the families of the spouses and the community consider and treat them as married couples.

Some lawyers argue that Art. 96 shall be interpreted as impliedly stipulating "proving celebration of marriage" in addition to the expressly stated facts therein, that is, when the spouse (s) intend to prove marriage by possession of status, the evidences must also show that marriage has been celebrated.

The justification for this view is, according to the proponents, that the possession of status of spouses is distinguished from the possession of status of persons living in an irregular union by the fact that in case of the former the parties have actually celebrated their marriage, while in the latter the parties have never entered into marriage.

They also argue that in the absence of this additional fact to be proved by witnesses or other evidences, possession of status would lead us to holding that there is a marriage while the parties have never concluded one and the vice versa. Some of our courts also argue that a marriage is deemed concluded only where the parties have celebrated the marriage in either of the three forms, and a party who wants to prove marriage by possession of status of spouses must show by the evidences that the marriage is actually celebrated and showing the mere fact of living together as husband and wife is not sufficient.

Note that these problems are not only the problems of the Revised Family Code; they were also problems of the Civil Code. However, having appreciated this problem under the Civil Code, the supreme court had made a directive (Directive No. July 5, 1989; Ethiopian Supreme Court on Proof of Marriage) by virtue of its power under proclamation No. 9/1987.

The Directive had made it clear that proof of marriage is the act of proving the celebration of marriage, and there would not be any distinction on the modes of proof depending on the forms of the marriage. The petitioner who alleges the existence of marriage and wants to prove it by possession of status shall prove under which of the three forms of marriage has been celebrated.

The Directive further elaborates the fact that status should be used as a procedure to establish or conclude marriage. Therefore, care must be taken by the court not to create a marriage, which was in existence between the parties prior to the allegation.

Having all these justificatios in mind, this argument seems to be more tenable. There is also another line of argument, which states that since Art. 96 is clear, there is no need of interpretation and we should apply the law as it is. The advocates of this argument lay their foundation on the fact that when the legislature enacted the law it had taken into consideration the problems of getting eye witnesses who can testify the celebration of the marriage. The spouses may for various reasons change their place of residence where they had concluded their marriage, or they might have concluded their marriage long time ago or they might not have relatives, who know about the celebration. Due to these and other reasons, the spouses may not be able to get eye witnesses to prove the celebration of the

marriage. Therefore, they argue, it is enough for the petitioner to prove only the two facts under Art. 96.

To sum up, courts should take care in proving marriage by possession of status neither to establish the new marriage, which was already in existen, nor to take an irregular union as a marriage.

In addition to that we do not have to forget that proof of marriage by possession of status is an exception to the basic rule that marriage shall be proved by producing the certificate of marriage drawn by the officer of civil status. Therefore, it should be construed narrowly particularly for two reasons. First to avoid the danger of confusing other relations with the relation of marriage. Second not to defeat the whole purpose of registration of marriage.

At this juncture, the student should not lose sight of the fact that the Revised Family Code has made departure from the Civil Code on some points. For instance, regarding the mode of proof of marriage by possession of status, the two laws are different from each other. Under the Civil Code, four witnesses were required to prove marriage by possession of status (Art. 700 (1). However, the RFC makes a clear shift from the Civil Code when it comes to the kind of evidence and the number of witnesses required. Therefore, under the RFC one can prove possession of status not only by witnesses but also by any kind of evidence as long as it can prove the existence of such fact (Art. 96 cum 97) In addition to that, the number of witnesses required to prove possession of status is not restricted under the RFC and hence it can be proved by producing any number of witnesses.

Possession of status under the Civil Code can be contested only by producing four witnesses. (Art 700 (2)). However, producing any

kind of reliable evidence under the RFC may rebut the presumption of the existence of marriage by the possession of status (Art. 97 (2).

When we compare the two codes, with regard to the type and number of evidences, which shall be brought to prove marriage by possession of status, the RFC seems advanced than the Civil Code. Since the RFC makes it flexible as to the type and number of evidences, parties are entitled to bring any kind of evidences that are available to them and that can prove possession of status. As a result, under the RFC parties can be allowed to prove marriage not only by witnesses but also by any reliable documentary evidence as long as it can show the fact that the two persons mutually consider themselves and live as spouses, and their family and community consider and treat them as such contract of marriage can be cited as the best example of documentary evidence that can show the possession of status of a man and woman as married persons.

Under the Civil Code, proof of marriage by possession of status is possible only by producing four witnesses. Hence, the type of the evidence is restricted to be oral evidence and the number of witnesses to be four due to these facts, the Civil Code can be said to be rigid as compared to the RFC. It is not flexible so as to accommodate changing circumstances. At times, parties may not be able to produce oral evidences and with such number. Therefore, they will lose their case. In addition to that, when we compare the two codes from the perspective of costs, proving marriage by possession of status under the Civil Code is costy than under the RFC. Hearing of four witnesses and examining their words to give decision demands a large amount of energy and time for the judges under the Civil Code. However, under the RFC, as long as they can prove the existence of marriage by possession of status one, two or three witnesses or any documentary

evidences are sufficient. The cost, which is incurred by the parties to bring four witnesses, is also another problem under the Civil Code.

Where a party alleging the existence of marriage proves possession of status of spouses that the parties have lived as husband and wife recognizing and treating each other as such and also being so recognized and treated by their families and the community, the law presumes that they are actually married (Art. 97 (1) But such presumption only shifts burden of proof to the other party. And if the other party rebuts such presumption by producing any kind of reliable evidence, possession of status shall not prove marriage (Art. 97 (2).

Before closing our discussion under this chapter, let us see the position taken by the Tigrai Family Code with regard to proof of marriage. When we closely examine Art. 123 of this code, it took a different stand. Among other things, this code doesn□t include possession of status as a second modality of marriage. According to Art. 123 of this code, the mode of proof is categorized in to two proof of marriage for those marriages that are concluded before coming in to force of the Code and proof marriage for a marriage that has been celebrated after the enactment of the Code. If the marriage is concluded before coming in to force of the Tigrai Family Code, the judge shall apply rules of proof of marriage under the Civil Code. If, on the other hand, the marriage is celebrated after coming into force of the same the court shall apply Art. 123 (2) of the same. As indicated under Art. 123 (2) (a) of the same, the key evidence that must be adduced to proof marriage is record of marriage. However, if the record of marriage is lost due to a reason beyond the control of the parties, Art. 123 (2) (b) allows proof of marriage by producing three witnesses of the celebration of marriage or officer of civil status who registered that particular marriage.

Exercise

1. What is meant by possession of status?
2. Shall the court allow proof of marriage by possession of status in all cases where the marriage certificate is lost? Why/ why not?
3. Compare and contrast provisions of the Federal and Tigrai family codes relating to proof of marriage.
4. What is meant by proof of marriage under the revised family code? Is it to mean proving the celebration? Or is it to mean proving not celebration but the agreement between the parties to mutually consider and treat them selves to be husband and wife? State the reason for the position you selected.

CHAPTER SEVEN

IRREGULAR UNION

Dear student, as you may recall, our discussions in the preceding chapters are targed towards analyzing the leading legally recognized cohabitation namely marriage. As we shall study in this chapter the law also given recognition to another union commonly referred to as irregular union. This cohabitation is known by various names under various jurisdictions including common law marriage, defacto relationship, non marital relation ship, cohabitation and concubine. In this module, the term irregular union is preferred as is the case in our family codes. In general, the main concern of this chapter is addressing issues relating to irregular union.

Thus, at the end of this chapter, the student will be able to:

- → Define irregular union ;
- → Explain the justifications given to include irregular union under the RFC;
- → Compare and contrast marriage and irregular union;
- → List the effects of irregular union;
- → Identity the modality of proof of irregular union; and
- → Understand as to how irregular union may be terminated.

7.1. Definition

As pointed out earlier, the institution of irregular union has been recognized and accorded protection by the RFC. Under Art. 98 of the RFC, irregular union is defined as the state of fact which is created when a man and a woman live together as husband and wife without having concluded a valid marriage.

The most important elements under this definition are:

- → The man and the woman must live together as husband and wife.
- → The man and the woman have never concluded a valid marriage. As can be understood from the definition, irregular union is a union between a man and woman. Neither the union of a man and a man nor the union of a woman and a woman is considered as irregular union. Under the RFC, same sex cohabitation is not recognized.

More importantly, irregular union is created when the man and the woman live together as husband and wife. The parties to the union have to live together on a day –to- day basis sharing the same roof in the same house considering themselves as married.

As pointed here in above, living together is an important element in defining irregular union. The point that deserves consideration here is that for how long should the man and the woman like together so that one can safely say that there is an irregular union? Do the man and the woman live together for one month, three months or six months to produce an irregular union? The RFC doesnot answer this question unlike the law of other countries. In Spain for instance, the man and the woman shall live together for at least two years in order that a valid irregular union shall exsist.

Though the RFC is silent as to the duration of the cohabitation, it is believed that living together of a man and a woman for a very short period of time such as three weeks, a month, three months or six months does not produce an irregular union under the RFC. The living together of the man and the woman should last for a long time in such a way that it can give an impression to the community in which they live that the man and the woman have pledged themselves to live together as husband and wife. It is true that the existence of an irregular union is proved when the man and the woman behave as married people and when their families as well as the community in which the partners live consider them as married couple. (Art. 106 (2) Evidently, the community or their families do not arrive at the conclusion that the man and the woman like as husband and wife just because the couples lived together for a month or two. They need a long time to enterain the idea that the man and the woman are really living together as husband and wife. It is in consideration of their conduct or behavior through time that the community recognize the partners as married people. Therefore, under the RFC the living together of a man and woman for a very short period of time does not constitute irregular union. The parties have to live together for such reasonable time that creates an impression to the community as well as the families of the partners that they live as husband and wife.

Another important element in the definition is that irregular union is a state of fact created without concluding a valid marriage. This is to mean that the union is one that which is created without any celebration, solemnization and registration what so ever. It is a simple union of a man and a woman without under going the formalities required by the law in the case of lawful marriage.

For the existence of irregular union, the behavior of the man and the woman should be analogous to married couples though the parties need not represent themselves to third parties as being married. (Art. 99 (1) and (2). It means that the parties need not introduce themselves to their relatives or the community as having concluded a formal marriage; rather it is the latter who should consider the parties as being married from their conduct. However, the more fact that the parties keep up sexual relations between them even if repeatedly and notoriously does not by itself constitute irregular union (Art. 99 (3).

7.2. Why Do People Cohabit?

It is a matter of common knowledge that formal marriage is the instrument through which couples usually enter into a lifelong commitment of taking each other as husband and wife. However, this type of commitment may be entered in an informal way like an irregular union. But, why do people prefer irregular union to marriage? There are a number of reasons why couples choose to live as husband and wife without going through a legally recognized married ceremony.

People cohabit or opt to live in irregular union generally for the following reasons. Scarcity of resources and economic interdependence of individuals inclination of one of the parties not to share his property for the other, unexpected pregnancy which obliges the parties to live together for a prolonged period of time, tendency to isolate personal relationship of the parties from pecuniary relations particularly in developed nations where women are less economically dependent on men, suspicion by the parties as to the possibility of establishing a valid marriage acceptable to the society due to impediments such as race or religion, belief of parties that they are too aged to conclude marriage, financial constraint to celebrate

marriage which entails payment for bride price, presents and feasts. Sometimes also people may engage in irregular union thinking that they have concluded marriage while in fact they haven't mainly due to lack of knowledge to draw a distinction between the two.

The other important attraction of a non- marital union is that no costy legal procedures are required to terminate the relationship, and the financial consequences of divorce are absent. Termination of unmarried cohabitation of a man and a woman is extremely easier compared to the termination of a ceremonial marriage. The cohabitants may be by mutual consent or unilaterally end their relationship without resorting to divorce proceeding. It is also justifiable on some other economic reasons. For instance, the pension or other benefits that a widow may get would be terminated up on her remarriage. So, in order to avoid the termination of such benefits, she resorts to unmarried cohabitation.

7.3 Is It Justified to Recognize Irregular Union Under the RFC?

Irregular union was one of the controversial issues during discussions on the draft RFC in the various public discussion conducted in different for a. On the one hand, it has been argued that the law should not recognize the union because it undermines the institution of marriage which has a constitutional protection and hence recognizing it amounts to contravening the constitution. Moreover, since irregular union is condemned by religion, the law should not encourage such a practice. Instead, it should deny recognition to the union so as to reflect the traditional and religions values of the people. On the other hand, it has been argued that the constitution neither expressly recognized nor prohibited irregular union and hence

recognizing irregular union does not in any way contravene the constitutions. Neither does it reduces the sanctity of marriage as the law does not treat the two on equal footing. Moreover, though the practice might be against the cultural and religions norms of the society, a number of people in Ethiopia have long been engaged in such type of union and denying legal resignation to the union would adversely affect the interest of particularly women and children born out of such union.

It is the second line of argument which got the blessing of the Federal Legislature. The writer also believes that extending legal recognition to the union can not be against the Constitution. One point that needs due attention is that marriage is not a necessary precondition for having a family; and the Constitution extends legal recognition to the family irrespective of the manner in which it is formed. (Art. 34 (1) of the FDRCE constitution) and it is a brute fact that irregular union is one in such manner which gives rise to a family which deserves protection. Hence, the mere fact that the Constitution does not expressly refer to irregular union does not warrant the assertion that extending recognition to the union is unconstitutional though as a matter of policy the constitution seems to discourage the union.

Moreover, in spite of the cultural and religious condemnations, a number of people are engaging in this life style in the country owing particularly to financial constraints for bride price and celebration of betrothal and marriage while some also take the union as marriage as a result of failure to draw distinction between the legal effects of the two. It is inevitable that people in such union engage in different transactions, give birth to child and the like which inturn may lead to conflicts. The law should, therefore, respond to such conflicts. In fact, it has been held that since irrespective of whether recognized by the

law the people continue to live in such union. To deny it legal recognition is to deny the objective reality.

Particularly, extending legal recognition to irregular union is a quite appreciated from the view point of the interest of the woman and children born out of such union. Suppose that a man and a woman lived in an irregular union for a long time if the man ends the relationship denying the woman any share from the common property they both accumulated during their cohabitation, the woman seeks justice from the law and if the law refuses to recognize her relationship with the man, she does not get any remedy. This non-recognition by the law is a clear instance of a law that oppresses woman for it has favored the man by declining to give remedy to the woman. Therefore, the non recognition by the law is unconstitutional because article 35 (4) of the FFRE Constitution provided that [laws], customs and practices that oppress women are prohibited. In the above case, the law by declining to recognize the institution and denying the woman any remedy clearly oppresses the woman and hence unconstitutional. Besides, failure to recognize irregular union in the RFC is also against the constitutional right of children born out of such union to know their father. Because if the union is not recognized under the law, the main way of ascertaining paternity can not be applicable, thus, the child may remain fatherless.

By way of conclusion, it can be said that though it might not sound well to argue that the law should treat the institution of marriage and irregular in the same manner, it could be said that attaching certain effects to the union is a necessarily evil.

7.4. Effects of Irregular Union

Dear student, it has been discussed in our previous discussion that the law attaches some legal effects to irregular union though not as much as marriage. These legal effects that emanate from irregular union will be dealt with below.

7.4.1. Absence of Bond of Affinity

As has been seen in chapter one and two, a valid marriage creates a bond of affinity between the man and the relatives of the woman and the vice versa. As a result of this bond of affinity, marriage between persons related by affinity in the direct line, between a woman and the brother of her husband or between a man and the sister of his wife is forbidden. Moreover, other consequences that arise from bond of affinity such as the obligation to supply maintenance shall be effective between the affinal relatives.

Unlike marriage, an irregular union shall not create any bond of affinity between the man and the relatives of the woman, and between the woman and the relatives of the man (Art. 100 (1). From this it follows that all legal consequences that emanate from bond of affinity are not applicable to irregular union.

Even if irregular union shall not create bond of affinity, the provisions concerning impediments to marriage in case of affinity shall apply thereto (Art. 100 (2). It means that the woman can not marry the ascendant, descendants and the brother of the man with whom she has been engaged in such union; by the same token, the man may not marry the ascendants, descendants and sister of the woman with whom he has been engaged in such union (Art. 9 (2)).

But, it should be noted that there is a clear contradiction between Art. 100 sub article (1) and (2). On the one hand the law says that

irregular union may not create bond of affinity. On the other hand, it prohibits marriage between the man and the relatives of the woman and vice versa. Despite this contradiction, the prohibition is justified on policy considerations. The prohibition is justified so long as it is done in the interest of protecting and maintaining the good relations between relatives and also maintaining peace and order in society. One can imagine the attendant chaos if a man is allowed by the law to marry the sister of the woman with whom he had been previously engaged in irregular union leaving her aside and vice versa.

Even though it has not been specifically dealt with by the RFC, relatives by consanguinity can not engage in an irregular union for it amounts to the crime of in cest under Art. 654 of the FDRE Penal Code. As per Art. 654 of the Penal Code, performance of sexual act between blood relative whose marriage is prohibited by the law is punishable. If a man a woman who are related by consanguinity engage in an irregular union, it is a must that they perform sexual act for the union by its nature is a relationship analogous to marriage people who evidently keep up sexual relation between them. Therefore, since an irregular union involves sexual act between the partners, relatives by consanguinity can not engage in an irregular union for it is an offence punishable under Art 654 of the Penal Code.

7.4.2. Duty to Contribute the Common Expense

Couples in marriage are duty bound to contribute to the house hold expenses in proportion to their ability and respective means, (Art. 72). Similarly, the man and the woman engaged in irregular union are obliged to contribute to the common expense they may incur during

their union in proportion to their respective means. (Art. 101). This duty to contribute to the common expense is measured by their capabilities. If both the man and the woman have similar means, the common expense is shouldered equally by both parties. If, however, one of the parties is unemployed and without means, he/she is not required to contribute equally with the other. In this case, the duty impacts only on the other. Expenses incurred for the benefit of either of the parties are not considered as common expenses even if it is done during the union common expenses is one which is done for the interest of the partners in the union.

7.4.3 Community of Property

Under the Civil Code irregular union does not create community of property as between the parties thereto no matter how long the relationship lasts (Art. 712). The Code failed to attach the effect of community of property to the union because the institution is not long lasting as some say or more logically, because the legislature wanted to suppress the union for attaching this effect to the latter may attract a number of people to the union as opposed to marriage which is regulated by stringent provisions. Of course, even under the Civil Code, up on the termination of the union the man may be ordered to pay to the woman an indemnity corresponding to not more than six months maintenance (Art. 717 (2) This is done because since the relation doesnot create common property, it is to assist the woman who is believed to have been economically weak.

Unlike the Civil Code, the Revised Family Code of the Federal Government and Regions have made irregular union create community of property. For better understanding, read the following provisions from the RFC.

Article 102 – Community of Property

1) Without prejudice to agreements entered into between the man and the woman engaged in an irregular union concerning the administration of their property, property acquired during such relation shall be common property provided that the relation has lasted for not less than three years.
2) Unless provided to the contrary, properties they have during their cohabitation shall be considered to have been acquired within such relation.
3) The man and the woman engaged in an irregular union shall be jointly and severally liable for all debts incurred for their maintenance, or for the maintenance of their children born of such union

Article 103 – Effects of Community of Property.

Where community of property is crealed in accordance with sub – article (1) of article 102, matters pertaining to the administration of property, payment of debts, and liquidation of property shall be dealt with in accordance with the provisions of this code relating to liquidation of pecuniary relations of spouses. (Art. 85 – 93)

Thus under the RFC, irregular union has been made to give rise to community of property between the cohabiters provided that the relationship lasted for three years or more. A union lasting less than three years, therefore, does not create common property and the parties can terminate the union without any dispute relating to common property. The law singled three years for creation of common

property because it will be difficult to ascertain the very existence of irregular union unless the partness live at least for three years. In this connection, it should also be borne in mind that though common property is not created for failure to meet the three years requirement, there might be a possibility of formation of joint ownership.

Once it is proved that the parties lived together for three years in the relationship, the effect of common property applies retroactively and properties they acquired even in the first year of the relationship are considered to be common property (Art. 102 (2)). If one of the partners, however, proves to the contrary a certain property may not be considered as common property even if it is acquired during their cohabitation.

Creation of common property is one area where the law makes distinction between marriage and irregular union. Marriage gives rise to community of property as of the date of conclusion of the same. But irregular union requires at least three years for the creation of community of property. From such difference, it is possible to say that irregular union is a loose type of union when compared with marriage.

The Family Code of Tigrai took a different position with regard the time beyond which an irregular shall create common property. A sper Art. 130 of the same, property acquired during such relation shall be common property provided that the relation has lasted for not less than ten years. Therefore, if a man and a women have lived for less than ten years, community of property will not be created. If one of

the parties, however, proves that a property is acquired through joint effort, such property shall be partitioned equally on the basis of the evidence produced. Two justifications are given by the Regional Council as to why it opted for the minimum ten years requirement. Firstly, on the basis of the regions current situation, it takes a long time to acquire property. Secondly, it is aimed at discouraging irregular union and to cause the cohabitants change their relationship to marriage for fear that common property will not be created unless a minimum of ten years elapsed as of the formation of the relation.

Another point that needs discussion in connection with common property is common debts of a man and a woman engaged in irregular union. Like the case of marriage, the cohabitees may incur common debts. Within the meaning of Art. 102 (3), common debts are debts incurred for the maintenance of the cohabitees, or for the maintenance of their children born of such union. The same provision further provides that the cohabiters shall be jointly and severally liable to pay common debts. From the pertinent provisions of the civil code, it is possible to understand that the credit of joint and several debtrs have different options. That is he can demand payment either from the man or the woman individually or collectively. Thus if the creditor brings an action with a view to demanding payment from the man individually, the latter can not legally refuse payment. From the same provision, it is also understood that if the debt is incurred by a man or woman for his/her own personal affair, the other cohabiter will not be bound to pay such personal debt

The mode of payment of a debt indicated under Art. 102 (3) is applicable where the cohabitees did not live at least for three years. If the man and the woman engaged in an irregular union have lived for not less than three years, payment either common or personal debt

shall be governed by Art. 103, not be Art 102 (3). To that effect Art 103 provides that where community of property is created in accordance with sub-article (1) of Art 102, payment of debt shall be governed by the relevant provisions of marriage. Thus, creation of common property inturn has effect on payment of debts. The provisions of the RFC governing marriage having to do with payment of debt are art 70 and 71, (see chapter for better understanding)

The creation of common property under Art. 102 (1), in addition to payment of debts, has effect on administration and liquidation of property. In this regard, the RFC under Art. 103 provided that matters relating to the administration and liquidation as well as payment of debts incase of irregular union are to be governed in accordance with the provisions of the Code that deal with community of property and liquidation of pecuniary relations of spouses in marriage. With respect to this provision, the writer of the module would like to make it clear that the formulation of the English version creates confusion and suggests that it should be understood as explained above which is consistent with the Amharic version.

7.4.4. Filiations of Children

Notwithstanding the differences between marriage and irregular union that we have mentioned above, there are points of similarity. Art. 104 in showing one of their similarities provides that the filiations of children born of an irregular union shall be established in accordance with the provisions of the chapter of this law relating to filiations. That is, in as much as a child conceived or born in wedlock has the husband as father, a child conceived or born during an

irregular union has as father the man engaged in such union. This is done to protect the interest of the child born in the union and is not to treat the union on equal footing as marriage.

7.5. Termination of the Union

Though under both codes, the parties can terminate the union at any time with no pre condition unlike in case of marriage, the effect of terminating irregular union differs under the two codes. Under the Civil Code, if the man terminates the union, he is liable for paying an indemnity corresponding to the expense of maintenance of the woman for not more than three months, where as the woman is not required to pay same. The stand of the law is fairly clear; it presupposes the economic dependence of women on men which is generally true even to day. Under the RFC, however, neither party who terminates the union is liable to pay indemnity unless he/she commits fault a part from partitioning the common property, if any (Art. 105 (2). But neither the basis of assessment of the indemnity nor its extent has been indicated under the RFC (you may refer our discussion on Art. 84).

At this juncture, it must be borne in mind that unless fault of the party who terminates the union is proved, the other party is not entitled to payment of indemnity except the share of the common property within the meaning of Art. 102.

7.6. Proof of Irregular Union

It is said that there is not presumption that persons are married and hence a party asserting the existence of marriage is required to adduce proof to it. Similarly, a party desiring to draw legal consequences from an irregular union is also required to prove the fact of the existence of irregular union. Upon proof of the existence of such union, the law presumes that valid irregular union had been previously engaged and allows the legal effects that naturally flow from the union to become operative.

As we have seen in chapter six, the existence of marriage can be proved either by certificate of marriage or possession of status. But a man and a woman engaged in an irregular union cannot prove their relation by the help of marriage certificate for lack of celebration and registration. Thus, the only means of proof is possession of status. To that effect Art. 106 (1) provides that an irregular union may be proved by the possession of such status. And a man and a woman may have the possession of status of persons living in an irregular union when, a though they are not married, they behave as such, and when their families and the community consider them living as married couple (Art. 106 (2).

Thus, to prove an irregular union the following facts shall be proved:

1. The two persons are behaving as being married; and
2. The two persons are considered by their families and community living as married couple.

If one of the parties is capable of proving the existence of these two state of facts, the court shall presume that they live in an irregular union. (Art. 106 (3). Of course, this presumption may be rebutted by producing any kind of reliable proof. (Art. 106 (41).

Here, we have to make a distinction between proof of marriage and irregular union by possession of status. In proving marriage by possession of status, the two persons should mutually consider themselves as spouses. It is also argued that in case of marriage by possession of status, the evidence to be presented should show that the parties have concluded marriage in any one of the three forms. As we have discussed it previously, the cohabitees do not mutually consider them as spouses. They only behave as married couple and perform such acts, which are common among married people.

Therefore, the witnesses called upon and other evidences produced to prove marriage according to Art. 96 should know the fact that the two persons mutually consider themselves and live as spouses, and they also consider and treat these persons as spouses. However, in proving irregular union, the witnesses are expected to prove the fact that the two persons, though not married, behave like married persons.

As we have elaborately discussed, the two legally recognized union between a man and a woman are marriage and irregular union though they are not treated on equal footing. Other relations short of marriage and irregular such as boy friend girl friend relation are not given legal recognition. As a result, no legal effect is attached to them.

In connection with the point under consideration, Art. 107 (1) provides that relations established between a man and a woman out of wed lock or out of an irregular union shall have no juridical effect attached to them. Without prejudice to the provisions of this code relating to acknowledgement of paternity or adoption, children born out of such relationships shall have a juridical bond only with their mother. (Art. 107 (2) Art. 107 (2) shall be read in conjunction with

Arts. 143 – 145 which give, an additional means of ascertaining or establishing paternity in addition to acknowledgement and adoption).

Exercise

1. If the man cannot marry the sister of the woman with whom he is engaged in irregular union (the same is true for the woman), how do you think can that we say irregular union does not create bond of affinity?
2. Compare and contrast marriage and irregular union.
3. What do you think is the justification for incorporating the institution of irregular union under the RFC?
4. Ato Negede and W/ro Fikre did not conclude marriage as required by the law. However, they behave as husband and wife. And they are considered by their families and the community as married couple. After they have lived for two years in suchway their relationship is terminated upon the insistence of Ato Negede. On the discontinuance of the union.
    a. W/ro Fikre wants to bring a legal action claiming compensation for the damage she sustained as a result of

the termination of the union. Will she succeed? Why/why not?

b. W/ro Fikre requires partition of common property. Will her claim be acceptable by the court? Why/why not?
c. What the law stipulates with regard to the paternity of the child born out of such union?

5. What roles are played by provisions of the RFC devoted to irregular union in protecting the right of woman?
6. What is the difference between proof of marriage by possession of status and proof of irregular union by possession of status?

CHAPTER EIGHT

FILIATION

Legally speaking, filiation extends exclusively to the immediate relationship of father and mother with their child. Undoubtedly, ascertainment of filiations is essential for the father, mother or their children to avail oneself of the legal effects of filiations such as succession and maintenance.

At the end of this chapter, the distance learner is expected to:

- Know how maternal filiations is ascertained;
- Enumerate the modes of establishment of paternity;
- Explain as to how to resolve conflicts in regulating paternity;
- List evidences that can be produced to proof filiation; and

- Discuss when and how should an action to disown a child be instituted by a man.

8.1. Ascertainment of Paternity and Maternity

Before going deep into analysising ways by which maternity or paternity could be ascertained, the point worth mentioning is that, at least in principle, the legal rules concerning the ascertainment of paternity and maternity shall not be derogated by agreement (Art. 123). That is, rules under filiations are mandatory provisions. Therefore, people can not by their agreements set aside the provisions of this section unless and other wise it is authorized to do so. The law may authorize an agreement between two or more persons as to how they are going to regulate the paternity of the child (see Arts. 146 and 149).

In the absence of such authorization, no agreement can be made between persons to make a legal rule in effective. Agreement is prohibited in principle because if such agreement is allowed, a situation may arise whereby a child may not know his/her legal / biological father or mother. In ascertaining maternity or paternity by agreement, individuals may abuse their contractual right which inturn may affect the right of the child to know his/her parents.

8.1.1. Maternal Filiations

The maternal filiations is the basis for the whole consanguinal relationship. The relation ship of kinship by blood emanates from this very relationship. Moreover, if a child is to have a father, he must necessarily have a known mother. A child who does not have a known mother will not have a father either.

This basic formula is incorporated in all the means for the establishment of paternity. The presumption of paternity flows from maternity. (Art. 125 (1)). The establishment of the maternal filiations is a sin qua non also in acknowledgement. The efficacy of acknowledgment presupposes the acknowledgement of the mother to the effect that the declaration of the person is well founded (Art.136) Maternal filiations is not any less important in cases of establishment of paternity through judicial declaration (see Art. 143). The court declares a defendant to be the father of a child, for instance, if he raped or abducted the mother at the time when the child could possibly concerned. In such cases it is part of the definitional elements of rape or abduction that there exists a definite and known woman.

If maternity play roles mentioned here in above, how is maternity to be established? In this regard, Art 124 provides that maternal filiations is ascertained from the sole fact that the woman has given birth to the child. From this provision, it is clear that the establishment of maternal filiation requires no more than the ascertainment of the fact that the woman has given birth to a child. It is solely this fact the law recognizes for the establishment of maternal filiations. Thus, a woman who is not in a position of proving that she did give birth to a certain child will not be able to do it by acknowledgment. The impossibility to establish maternity by acknowledgment could be inferred from the provisions acknowledgment in that the whole provisions deal with acknowledgment by the father. More over, acknowledgement by its nature seems to be a valid method only for paternity. The need for the voluntary declaration of paternity rests on the objective problem of ascertaining ones actual biological father.

The question is as to what elements must be fulfilled to say that, there exists the fact of birth for the establishment of maternal filiation. The maternal filiation could be said to have been established if it is proved that (1) the alleged mother has given birth to a child when the child in question was born and (2) it is this particular child whom the mother has delivered to at that time. At this point, it should be borne in mind that these evidences are produced to establish maternity and not to proof maternal filiation. There is a difference between establishment and proof of maternal filiation. The establishment of maternity is the creation of the legal bond as a result of birth. Where as proof of maternal filiation, as the name indicates is a means by which a person purports to prove an already established filiation.

In connection with the establishment of maternity, it is worth considering the legal problems involved in artificial insemination called in vitro fertilization. Through this mechanism, it has now become possible to fertilize the ovum and sperm outside a the body and transplant the embryo into the uterus of a third party or the hostess who carries the child for the duration of pregnancy and then give birth to it. The resulting infant is said to be biologically the offspring of the woman who contributed the ovum and gestationally the offspring of the hostess who bore it. The question involved is who the legal mother of such child is taking into accountable Art. 124. Art. 124 considers as a mother the one that gave birth to the child. The issue therefore is which of the two woman has given birth to the child. Is it the one from whom the ovum was taken or the one of whom the child was delivered that the child could be said to have been from?

The RFC no where defines birth. Thus, in the absence of any clear definition of the term, we have to see as to what birth ordinary means.

Lexically birth means the emergence of a new individual from the body of some person. It constitutes the extrusion of the child from the mother□s womb whether in a natural way or by an operation like the caeserian section. Birth, thus, presupposes the carriage of the fetus in a womb for a longer or shorter period of time. It is an event which ordinarily follows pregnancy. We may accordingly say that in the RFC it is the one who bore the child (hostess) that may be considered to be the mother. The contributor of the ovum is not under the RFC considered to have given birth to a child in the absence of the fact of birth.

The agreement that may be made between the interested parties to consider the contributor of the ovum as the mother is an agreement in vain. The rules on the establishment of filiations are not subject to agreement unless there is an express provision authorizing such an agreement (Art. 123). There is no provision that permits an agreement in derogation to the provisions on the establishment of maternal filiation.

8.1.2. Paternal Filiation

Logically, paternity ought to result from the physical begetting of a child by a certain man. But there is a problem in the determination of biological paternity. It is not possible to identify the actual biological father of a child. Science has now come with innovations of blood typing scrutiny, but this has succeeded only in being an exclusionary test. Through this mechanism, it has now be come possible to know who the biological father is not, but it is not yet possible to sift out the actual biological father.

To avoid the problem in determining paternity, the law opted for enumerating all possible ways by which paternity may be known.

Accordingly, Art. 125 provides three ways by which paternity may be established as follows.

Article 125 – Paternal filiation

1) Paternal filiation results from the maternal filiation when a relation provided by the law has existed between the mother and a certain man at the time of conception or the birth of the child.
2) It may result from an acknowledgement of paternity made by the father of the child.
3) It may also result from a juridical declaration.
4) We shall discuss each of them separately.

8.1.2.1. Presumption of paternity

As we have mentioned above, the first mode of establishing paternity is legal presumption. That is, when a relation provided for by the law has existed between the mother and a certain man at the time of the conception or the birth of the child, paternal filiations springs from maternal filiation. Provisions of the RFC (Arts. 126 – 130) are the continuations of Art. 125 (1). Dear student, read these provisions as indicated here in under before rushing to the explanation.

Article 126 – Presumption of Paternity of the Husband

A child conceived or born in wedlock has husband as father.

Art. 127 – Generality of Presumption

1) A child shall be deemed to have been conceived in wedlock if he is born more than 180 days after the celebration of the marriage and within 300 days after its dissolution.

2) They shall also apply when the record of birth of the child does not indicate the husband as the father of the child or when it indicates that another man is the father of the child.
3) In such cases, the record of birth shall merely be corrected.

Article 128 – Duration of pregnancy

1) A child shall be deemed to have been conceived in wedlock if he is borne more than 180 days after the celebration of the marriage and within 300 days after its dissolution.
2) No proof to the contrary shall be admitted.

Article 129 – Absence of the Husband

The provisions of this code concerning presumption of paternity shall not apply to a child born 300 days after the day indicated, as the date of last news, in the judgement declaring the absence, of the person presumed by law as the father.

Article 130 – Irregular union

1) A child conceived or born during an irregular union has as father the man engaged in such union.
2) The provisions of articles 127 and 128 concerning the generality of presumptions and the duration of pregnancy shall apply to the presumption provided in this article.

From the cumulative reading of Arts. 126 and 130, it can be understood that a child conceived or born in wedlock or irregular union has the husband or the man engaged in such union respectively as a father. Thus, a child in order to be protected by the legal presumption must meet either of the two requirements. He must either be born or conceived in wedlock. Here in under is a separate discussion of these alternatives.

A) The first alternative for the operation of the presumption of paternity is that of being born in a legally recognized union (wedlock or irregular union). The Code under Art. 128 provides as to when a child is considered to have been conceived in wedlock but not as to that of being born in wedlock. But obviously this refers to the time within which the spouses were in the status of being married. This begins from the time of celebration and ends when the marriage is dissolved Ethiopian law of filiation therefore attributes paternity to the husband of the wife if the child is born from her within this period. A child born a day after the celebration of the marriage is equally the child of the mothers husband as a child born a day before its dissolution.

In order to apply the presumption of paternity, no more than birth after the celebration of marriage is required conception in wedlock is not essential to the presumption and there fore proof of pre-marital conception neither destroys nor weaken the presumption. Thus, a child does not need to be born after 180 days from the celebration of marriage in order to benefit from the presumption. The protection of children born within 180 days after the celebration of marriage seems to have been done on the ground that a person marries a pregnant woman, if it is he that impregnated her.

B. The second alternative for the operation of the presumption of paternity is that of being conceived in a legally recognized union. Particularly, if a child is not born in wedlock, the presumption of paternity could apply for him only if he is conceived in wedlock. Pursuant to Art. 128 (1), a child is deemed to have conceived in wedlock if he is born more than

180 days after the celebration of the marriage and within 300 day after its dissolution.

Art 128 (1) is actually a clarification on the duration of pregnancy and is not meant to deny the application of the presumption for children born before 180 days after its celebration. This provision simply defines the shortest and the longest period of pregnancy which may be use ful in case where paternity is to be ascertained by judicial declaration and in case of disowning. However, it does not in any way tell that children not conceived in wedlock would not be protected by the presumption of paternity. Thus, if the child is born within 180 days after celebration of the marriage, he will be protected by the presumption because he is born in wedlock.

A child born more than 180 days after the conclusion of marriage is as well conceived in wedlock. Such a child can invoke either of the two elements in his favour. The presumption of paternity based on conception is paramount important for those born after the dissolution of marriage. A child born after dissolution of marriage can not avail himself of the first element. The importance in wedlock comes in connection to such children. Amongst such children only the ones born in less than 300 days after dissolution will benefit from the presumption because they are deemed to have been conceived in wedlock. In this connection, one point that must be noted is that any evidence contrary to the legally stipulated duration of pregnancy is not admissible (Art. 128 (2)). That is, the period of pregnancy can not be rebutted saying that it is shorter or greater than the legally stipulated one.

The presumption of paternity laid down under Arts. 126 and 130 is general. This is elaborated by Art 127 which provides the application of the presumption what ever the manner in which the maternal

filiation of the child may have been established (proved, i.e Art. 154 – 162). The presumption is also applicable when the record of birth of the child does not indicate the husband as the father of the child or when it indicates that another man is the father of the child. In such case, the record of birth shall merely be corrected.

As has been mentioned, a child conceived or born in wedlock has the husband as a father. But what is the justification to presume the husband to be the father of the child?

There are strong reasons to justify the presumption of paternity of a child born or conceived in wedlock. This is justified on the duties of cohabitation and fidelity of spouses. More often than not a child born in marriage is the child of the husband. But the presumption, in our case, equally applies to irregular union. This does not, however, mean that the justification to such presumption is the same as that of marriage because even if marriage and irregular union are treated on equal footing with regard to filiation, there are a number of differences. Among other things, the law does not impose the duty of cohabitation and fidelity on a man and a woman engaged in an irregular union. Because of this the presumption of paternity for children born or conceived in irregular union is not based on the assumption of any duty of cohabitation or fidelity. If this is so, such presumption must be traced to other cause. The application of the presumption of paternity to irregular union is based on the probability that the child is begotten from the man in such union. To put in different words, the rationale behind the presumption is the assumption that the man in the union is most probably the impregnator of the woman.

The presumption of paternity is thus applicable for children born in wedlock or less than 300 days after dissolution except in case where the child is born 300 days after the day indicated, as the date of last news, in the judgment declaring the absence of the person presumed by law as the father. That is, even if the child is conceived or born in a legally recognized union, the husband may not be presumed as a father if the same is declared absent within the meaning of Art. 129.

If the child is born 300 days after the day indicated, as the date of the last news, in the judgment declaring the absence, of the person presumed by law as the father, he will not have the husband of the mother as a father, even though the child could possibly be conceived or born in wedlock. In discussing dissolution of marriage, we have said that declaration of absence is one case of dissolution. It is also said that on the date of declaration of absence of the husband, his marriage shall be automatically dissolved. On the other hand it has been provided that the child conceived or born in wedlock has the husband as a father. From the pertinent provision of the Civil Code, the declaration of absence could not be obtained unless a minimum of two years lapsed from the date when the person has disappeared and gave no news of himself. If we stick to Art. 126, the child born after a year and nine moths as of the date of disappearance of the husband will have the same as a father even if he was not around. But this can not be true biologically. If a husband who disappeared for at least two years is presumed to be as a husband, it is tantamount to say that the wife of the absentee was pregnant for two years. Specially, this does not go with the 300 days maximum period of pregnancy stipulated under Art. 128 (1). The last day on which the absentee may perform sexual intercourse with his wife is on the date of his disappearance. Therefore, if the child is born within 300 days as of the date of his disappearance, he will be presumed as a father. If the child is born

after the 300 days, the absentee can not be the father. This is what is indicated under Art. 129.

Before closing our discussion in relation to ascertainment of paternity by way of legal presumption, it must be noted that there might be a discrepancy between actual biological father and a legally presumed father. That is, a person who is not the biological father of a child may be presumed legally as a father. Such presumption is strong which may be rebutted only by an action of disowning. We will discuss this in the final section of this chapter.

8.1.2.2. Acknowledgement of Paternity

Acknowledgement is the second method for the establishment of paternity acknowledgement is important for children born or conceived out side of a legally recognized union. This voluntary declaration of paternity can not be used to establish paternal filiations if the child can benefit by the provisions on the presumption of paternity.

Acknowledgement is possible to use the words of the legislature when the father of the child is not determined by applying the provisions of the preceding articles. This seems to give acknowledgement of paternity a rather narrow scope. This refers to children neither conceived nor born in wedlock. If the father of the child is established by legal presumption acknowledgement is not allowed. This is to avoid the possibility of having two fathers for a child. To achieve the same purpose, the law under Art. 142 provides that where an acknowledgement of paternity has been made in regard to a child, no other acknowledgement of the child by another man shall be permitted unless the first acknowledgement has been annulled.

As have been said above, acknowledgement is possible for a child who doesn□t have a legally presumed father but what if the legally presumed father disowns the child as per Art. 167 and the following? Is acknowledgement of a disowned child prohibited under the RFC? The literal interpretation of Art. 131 seems to answer in positive. It seems to exclude children that were conceived or born in wedlock but were disowned. Apparently, disowned children seem to have been precluded from the voluntary declaration of paternity as the this provision refers only to those children who do not have a legally presumed father. However it is more tenable to argue that where a child is disowned, acknowledgement must be possible in as far as the law aims to avoid fatherlessness. A disowned, even if he originally had a presumed father, is now father less child. If another individual comes claiming paternity, he shall be wel comed.

Now it is clear that acknowledgement is the second way of ascertainment of paternity. Dear the distance learner, when do we say that a certain man acknowledges a given child? In responding to this question, Art. 132 provides that an acknowledgement is deemed to be made when a certain man made a declaration that he considers himself the father of a certain child merely conceived or born. Such voluntary declaration as a father shall be made in specified form so that it will produce the required legal effect. Read the following article from the RFC.

Article 133 □ (3) form

An acknowledgement of paternity results from the declaration made by a man before an officer of civil status or by a will he made in

writing or by a document attested by any competent authority that he is the father of the child.

As can be understood from this provision, acknowledgement may be made in either of the following three forms;

1. a declaration made by a man before on officer of civil status:
2. a will he made in writing ; or
3. a document attested by any competent authority that he it the father of the child.

Although both the Civil Code and the RFC provide for the form requirement there is difference between the two laws. To be more specific, the RFC has reduced the discretion of courts on the form of acknowledgement. That is, under the Civil Code acknowledgement of paternity shall be of no effect unless made in writing. Thus, the more fact that a man declares his intention to be the father of the child, even if made in the presence of what ever authority of individuals, does not amount to acknowledgement unless reduced to writing.

However, what sort of written form constitutes acknowledgement under the Civil Code is not fairly clear. Under the RFC on the other hand, Art. 133 explicitly states the various forms through which an acknowledgement is to be made. Contrary to the Civil Code, under the RFC, the fact of declaration of the man before officer of civil status that he is the father of the child amounts to acknowledgement seems to imply the possibility of oral acknowledgement. However, since such declaration, though not written by the man is reduced to writing by the said officer, it is not meant to enshrine oral acknowledgement. The rest elements clearly refers to the written form. Thus, under both codes, acknowledgement is effected in written form. However, the

RFC has at least reduced, if not eliminated, the ambiguity of the Civil Code which refer merely to written form. Because the RFC elaborates some of the components of written form as instrument of will and document attested by competent authority. This elaboration seems of minor significance when seen from out face. However, in view of the legal bond that acknowledgement creates between a man and the child and the consequent rights and obligations it creates such elaboration is of utmost importance.

What constitutes a document attested by a competent authority under Art. 133 of the RFC is, however, still less clear. The explanatory material of the RFC categorizes documents relating to employment contract and pension documents attested by competent authority though the list is not exhaustive. Owing to this open ended provision, federal courts are recognizing documents registered in the acts and documents office, insurance policy made by the alleged father in favor of the child etc as documents attested by competent authority.

Other than those mentioned above, other personal documents such as letters and correspondences written by the man, supplying maintainance to the child and introducing to the child for others as his own child do not constitute acknowledgement. But such situations, even if they are not sufficient to show acknowledgement may serve as a ground for judicial declaration of paternity.

Acknowledgement must be made personally by the father of the child even though he is a minor. (Art. 134 (1) Exceptionally, however, it may be made by way of representation but the mandate to make such adeclaration shall only be given by a special power of attorney approved by the court (Art. 134 (2) Incase of a judicially interdicted person, there are two options in that it may be made personally by a

person subject to judicial interdiction or in his name by a legal representative, with the permission of the court (Art. 134 (3)).

If the father of the child is dead or is not in a position of manifesting his will the acknowledgement of paternity may be made in his name, by one of his parents (Art. 139)

The efficacy of acknowledgement presupposes the admission by the mother of the child. To that effect, Art. 136 (1) provides that the acknowledgement of paternity shall be of no effect unless it has been acknowledged, to be well founded, by the mother of the child. In effect the mother is required to attest that such a man could possibly be the father of a child and a person could possibly be a father if he had sexual intercourse with the mother of the child at the time when the child could have possibly been conceived, i.e., between 300th and 180th days before the birth of the child.

If the mother of the child is dead or is not in aposition of manifesting her will, the acknowledgement of paternity may be accepted by the maternal grand father or grand mother of the child (Art. 136 (2)). In default of maternal grand parents, it may be accepted by another maternal ascendant or by the guardian of the judicially interdicted person (Art. 136 (3)).

With regard to the age of the child that will be acknowledged, the law does not enshrine any limitation .He may be a merely conceived, one a minor or a major acknowledgement of a merely conceived child or a minor shall be valid provided that it is accepted by the mother of the

child. Nevertheless, an acknowledgement of paternity shall be of no effect unless it has been accepted by the child himself when it is made after the latter has attained majority. (Art. 137) A child who has attained majority is a grown up child and he may not need some one who cares for him. Particularly, a man who did not participate in his upbringing upto now may acknowledge him for his own advantage. For instance, such man may claim maintenance from the child. The child who did not accept acknowledgement shouldn't be imposed of such an obligation.

Dear student, at this juncture, one point that deserves worth consideration is that the acceptance of acknowledgement by the mother or the major child must not necessarily be made either orally or in writing. As indicated under Art. 138, the acknowledgement of paternity shall be deemed to be accepted where the persons mentioned in Articles 136 (the mother, maternal grand father or mother, etc) and 137 (the major child) have not raised any protest against such acknowledgement with in one month after they came to know of it. That is, the silence of these individuals shall be taken as acceptance.

Art. 139 states that the acknowledgement of paternity may not be made after the death of the child unless the latter has left descendants. Why do you think the legislature prohibited the acknowledgement of dead child? Acknowledging a child will have legal consequences. For instance, the man who acknowledges a child makes himself responsible for the up bringing of the child. After attaining majority, the child may also be responsible for the

maintenance of the man, if need arrases. Acknowledging an already dead child will have no any significance for the dead child. If the law allows such acknowledgement, persons may try to unduly acknowledge dead children in pursuit of their own advantages (for example, to get benefits from the succession of the child). Acknowledgement of a dead child is possible only when the latter has left descendants. This is justifiable exception because the descendants of the dead child will benefit from the acknowledgement as the right of their deceased father shall be transferred to them.

Once an acknowledgement is made, the man who declared himself father of the child can not revoke his declaration. For more defails, read Art 140 of the RFC.

Article 40 □ Revocation

1) The acknowledgement of paternity may not be revoked.
2) A minor who has acknowledged a child may revoke such acknowledgement for so long as he is incapable and within one year following the cessation of his incapacity, unless his guardian consented to the acknowledgement.
3) This right of revocation may be exercised by the minor only. It may not be exercised by his legal representatives nor by his heirs.

Even if revocation of the acknowledgement of paternity is prohibited by law, a minor is allowed to revoke the acknowledgement he made. What do you think is the rationale of this exception? As it is generally known, a minor is incapable of performing juridical acts. Acknowledging a child is a juridical act. The minor, even if allowed by law to acknowledge a child, is inexperienced and may be put at a disventageous position as a result of his inexperience. So, the law

allows only a minor to revoke the acknowledgement made by him within a certain period of time.

Article 141 – Annulment

1) Acknowledgement of paternity may be annulled on the ground of divorce.
2) It may not be annulled on the ground of error or fraud unless it is decisively proved that the child could not have been conceived of the person who made acknowledgement.

As you can read from Art 141, the law allows annulment of the acknowledgement of paternity.

Dear student, what is the difference between revocation and annulment? Revocation is the personal declaration not to be bound by what one has committed himself. Annulment is a declaration made by the court of law when some one applies to the court to get the cancellation of his obligations. The court annuls or invalidates a certain obligation if such obligation is entered in an unlawful manner.

8.1.2.3. Judicial Declaration of Paternity

As indicated under Art. 125 (3), judicial declaration is the third way of ascertaining paternity. For paternity to be established by such modality, the following two conditions must be fulfilled commulatively:

1. If the child has no presumptive father, disowned by such father and not acknowledged.
2. Either one of the five conditions under Art. 143 are fulfilled. As indicated under Art 145, judicial declaration of paternity shall no be demanded or made except in specified under Art 143 of

this code. The grounds for judicial declaration of paternity are prescribed under Art 143 of the RFC as follows.

Article 143 – (1) Judicial declaration of paternity

where, after applying the preceding articles, the father of the child is not ascertained, a judicial declaration of paternity may be obtained under the following conditions:

a) in the case where the mother has been the victim of abduction or rape at the time of conception of the child;
b) in the case where, at the time of conception of the child, the mother has been the victim of seduction accompanied by abuse of authority, promise of marriage, or any other similar act of intentional deception;
c) in case where there exist letters or other documents written by the claimed father which unequivocally prove paternity;
d) in case where the claimed father and the mother of the child have lived together in continuous sexual relation, with out having a legally recognized relation, in the period regarded by law as the period of pregnancy;
e) in case where the person claimed to be the father of the child has participated in the maintenance, care and education of the child in the capacity of a father.

The RFC departed from the Civil Code with respect to grounds that entail judicial declaration of paternity. Under Art. 758 of the Civil Code, judicial declaration of paternity may be obtained where the mother of the child has been the victim of the abduction or rape at the time when the conception of the child is considered to have been taken place. The Code clearly prohibits the admissibility of action for judicial declaration of paternity on other grounds. Moreover, as indicated under Art. 759, it is only by the mother of the child or if she

is not in a position to manifest her will, by the guardian of the child that such case is instituted. The action can not be instituted two year after the birth of the child or after the sentence of a criminal court in relation to the abduction or rape. However, conviction for these crime is not a necessary condition for institution of an action for declaration of paternity for the purpose and standard of proof of the two actions are different.

On the other hand, the RFC has come up with additional grounds for judicial declaration of paternity. As mentioned hereinabove, apart from the case of rape or adduction, the law includes other grounds of declaration paternity. doing so, the RFC narrows the possibility of father less ness. Moreover, the RFC doesn□t enshrine a period of limitation within which an action for judicial declaration of paternity may be brought. Nor does it specify a person entitled to bring an action. In the absence of clear stipulation, one can possibly argue that the action for declaration of paternity may be brought at any time and by any interested person.

Now let us elaborate each ground for judicial declaration of paternity separately.

The first condition that is taken as a ground for the establishment of paternity by judicial declaration is where the mother has been the victim of abduction or rape at the time of conception of the child (Art 143 (a)) A court shall declare paternity if the plaintiff proves rape or abduction unless the defendant proves that he is not in fact the biological father of the child of the abducted or raped mother. There is no consensus among lawyers as to the type of evidence that shall be adduced to prove the act of abduction or rape. Some argue that the

only admissible evidence to declare paternity is the judgment of the court showing that the alleged defendant has committed the crime of abduction or rape. According to this position, criminal conviction is a precondition for the civil bench to declare that the accused is the father of the said child.

Others, on the other hand, argue that conviction for the crime of rape or abduction is not a necessary condition for institution of an action for declaration of paternity for the purpose and standard of proof of evidence of the two actions are different. What the plaintiff is required to prove is only the facts and not any more. If the facts are proved, it is argued that the plaintiff will not be required to adduce more evidence to show that the defendant did the acts in such a situation as to be criminally convicted. Thus, the court must declare the paternity after proof of the facts even if the defendant was acquitted by a criminal court for charge of the rape or abduction, as the case may be, of the same woman (e.g for reasons of irresponsibility). As said above the basis of the argument is the difference of purpose of the criminal and the civil proceedings.

The paternity action has as its purpose the ascertainment of paternity. The very aim justifies the exclusion of the defences or the responsibility requirements prescribed in the Penal Code. The issue under consideration is whether a person who had sexual intercourse with a woman under such circumstances as to make it rape or abduction could possibly be the father of a child and this is solved by the legislature in the affirmative. It is the failure of the legislature to define the terms in the RFC that forces us to resort to the penal code and not their criminal nature as such. It is further argued that the standard of proof for civil and criminal proceedings is different. A person who is acquitted under the criminal court may still be held

liable under the civil bench as the former requires a stringent beyond reasonable doubt standard of proof and the latter does not employ such standard.

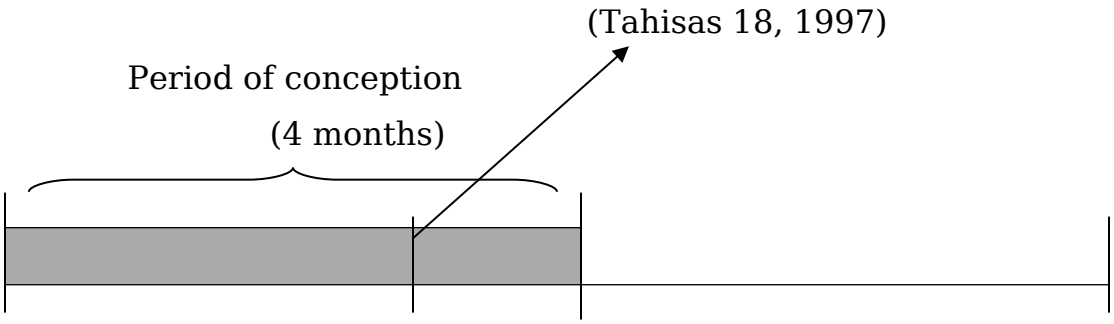
Another point that deserves consideration in relation to the first condition is that even if a man commits an act of rape or abduction, he may not be declared by the court to be the father of the child if such acts are done against a married woman because the child will have a legally presumed father within the meaning of Art. 126. Where the child has a father by way of legal presumption, judicial declaration of another paternity is prohibited under Art 143. However, if the presumed father denies this child, judicial declaration of paternity is possible.

The mere fact of proving that a certain woman is the victim of abduction or rape does not by it self sufficient to establish paternity by judicial declaration. Beyond this, the plaintiff has to show that the alleged accused has committed the act of rape or abduction at the time of conception of the child. That is, the time of conception of the child shall concide with the day on which an act of rape or abduction has been committed.

The question is, how could we calculate the time of conception? In the absence of clear answer under Art 143 (a), we may resort to Art 168 pursuant to Art 168, period of conception is the period between the 300^{th} and 180^{th} day before the birth of the child. Thus, it must be proved that the man has abducted or raped the woman within 300^{th} and 180^{th} day before the birth of the child.

For instance, let us assume that the child is born on Hamle 10, 1997 E.C. In this example, the 180th and 300th days preceding the birth of the child are Tir 10, 1997 E.C. and Meskerem 10, 1997 E.C. If the plaintiff proves that an act of rape is committed on Tahisas 18, 1997 E.C, his/her claim will be acceptable because this date is between the 300th and 180th date preceding the birth of the child. Look at the following diagram to have a better understanding.

The date on which an act of rape is committed



Meskerem 10, 1997 Tir 10, 1997 the 180th date
Hamle 10, 1997
The 300th date preceding birth preceding birth date of birth of the

Child

Seduction of the mother accompanied by abuse of authority, promise of marriage or any other similar act of intentional deception is a second ground for judicial declaration of paternity under Art. 143 (b). Websters Dictionary define, seduction as the act of persuading or enticing in to partnership in sexual inter course. A mere seduction does not suffice for declaration of paternity. In stead, the seduction must be accompanied by those acts mentioned here in above.

However, what constitutes the acts accompanying seduction is still ambiguous to some extent. For instance, what constitutes authority

and abuse of authority? It seems that the man need not be a top official to be an authority. It suffices if there is hierarchy of authority between him and the mother of the child which may among other things, emanate from employment contract. Even seduction by a person whom the woman owes reverential fear could fall under this category in as long as the action for judicial declaration is to search for father of the child.

The act of seduction could also be accompanied by promise to marry. If the woman can adduce evidence to this effect, a mere such promise suffices for the purpose of judicial declaration of paternity. The Code, however, is not exhaustive on this point as it employs the phrase "any other similar act of intentional deception." This phrase may lead to a conclusion that all acts accompanying seduction should be out of deceit. Nonetheless, the mental element for the purpose of judicial declaration of paternity seems to be of little or no significance. Because, whether the seduction is committed by deceiving the woman or by declaring the true intention, say conclusion of marriage, the law is interested in searching the man by whom the child is conceived. Thus, the law gives wider room for judicial declaration of paternity on ground of seduction.

Under Art 143 (c), letters or other documents written by the claimed father, which unequivocally proves paternity, could also be the ground for judicial declaration of paternity. However, what should the nature and content of these documents be so as to warrant declaration of paternity? It could be held that such letters and documents need not contain express declaration of the man that the child is his. It is not also necessary that the letters are directly addressed to the mother. What is important for the purpose of this provision is that these letters and other documents should show the relationship of the

mother and the father or of him and the child which leads to a conclusion that the child is fathered by such man.

The other situation figuring out under Art. 143 (d) of the RFC for judicial declaration of paternity is where the claimed father and the mother of the child have lived together in a continuous sexual relation in the period regarded by law as the period of pregnancy with out having a legally recognized relationship. Therefore, if it is proved that the parties have had continuous sexual relation, it warrants judicial declaration of paternity. However, the mere fact that the parties had such relation does not warrant the assumption that the man fathers the child born. Rather, the sexual relation should be within the period regarded by law as a period of pregnancy. As has been explained under Art 143 (a), the child is said to have been born from such continuous sexual relation if the child is born 180 days after the commencement of the relation and 300 days after its termination.

The question, however, is for how long should the parties live in such type of relationship so that it amounts to □continuous sexual relationship□? In view of the fact that conception is a matter of seconds or minutes, it appears that the period should not necessarily be counted in terms of months, weeks or days for that matter. However, since the law aims at identifying the biological father of the child, the continuity element is important. If, however, the woman can conclusively prove that she didn□t have sexual intercourse with any other person within such period, living in a sexual relationship of even days suffices for the purpose of Art 143 (a) of the RFC.

Finally, participation in the maintenance, care and education of the child by the alleged father may be a ground for judicial declaration of paternity. Since maintenance includes care and education, reference to "care" and "education" in the presence of maintenance is at most for emphasis purpose. At times it may happen that the alleged father contributes for the maintenance of the child but declines to acknowledge the child either because he believes that the child is his and hence there is no further procedure required to father the child in the eyes of the law or for fear of consequences of establishing paternity which, among other things, gives rise to the right of inhentance and the possible opposition by his wife, if any. However, since in any action or proceeding the interest of the child should prevail, courts make a reasonable inference from the act of the man as to whether he fathers the child.

It may be asked, should the man cover the whole maintenance expense of the child so as to hold him father of the child? He should not, because from the wording of the provision it self "participation in the maintenance of the child" does not necessarily mean covering the whole maintenance expense of the child. The legislature employed the term "participation" to avoid the possible narrow interpretation that may be given to maintaining the child.

Another point worth noting here is that a mere participation in the maintenance of the child should not be regarded as implying that the child is fathered by such man. That is, every participation in the maintenance of the child by benevolent man out of affection to the mother does not warrant the assumption that he is the father of the child. Instead, it is necessary that the person participated in the maintenance of the child is in the capacity of the father. Generally, if

the woman could prove the existence of any one or all of the grounds mentioned earlier, judicial declaration of paternity may be obtained.

The code while broadening the grounds for judicial declaration of paternity with a view to protect the interest of the child also protects the alleged father from undue litigation of paternity. Thus, even if the grounds mentioned earlier exist, declaration of paternity shall not be made on the grounds mentioned under Art. 144. To this effect, this article provides tht an action brought for judicial declaration of paternity, based on the provisions of the preceding articles shall be of no effect under the following conditions:

a) In case where the mother of the child has sexual relations with another man in the period regarded by law as the period of pregnancy unless it is proved by medical or other reliable evidence that such man is not the father of the child.

The onus of proving the existence of any of the conditions mentioned earlier rests on the woman. Then it is up to the alleged father to prove that the woman had sexual relationship with another man. But, should the court absolve such man from fathering the child for the mere fact that the mother had sexual relation with another man also? What is the fate of paternal filiations of the child in such cases? In as long as the objective of the action is to search for the father of the child, if the alleged father avails himself of the defenses provided earlier, it should be interpreted as shifting the burden of proof that he is the father of the child. In such cases, both or all men should be parties to the suit and one who is proved to be sterile or can not give birth would be out of the suit. If both or all could give birth to a child, DNA test might be used to identify the biological father of the child though the technology is far from the accessibility of most people.

b) In case where the claimed person could not be the father of the child for he was absent or has been a victim of accident during the period regarded by law as the period of pregnancy.
c) In case where the person claimed to be the father of the child decisively proves by blood examination or other reliable medical evidence that he could not be the father of the child.

8.2. Legal Conflicts in Regulating Paternity

Since establishment of paternity by legal presumption is operative where the child is either conceived or born in wedlock or irregular union, as the case may be, it may give rise to the possibility of attributing one child to two or more fathers. Before considering how this could happen, it is important to note that the problem of attributing the same child to different fathers can come about only in relation to one mode of establishment of paternity. The wording of Art. 146 is some how misleading. It runs as "when on applying the preceding articles, a child must be attributed to several fathers " (emphasis added) This seems to indicate the possibility of conflict of paternity by application of one or more modes of establishment of paternity as, for example, a child having a father by presumption of paternity and by acknowledgement at the same time. The regulation of paternity is applicable only when a child is attributed to two or more persons by the presumption of paternity. This could be understood from the nature of the modes of establishment of paternity.

The nature of the application of the modes of establishment of paternity itself excludes the possibility of one child having two fathers by different modes of establishing paternity. The three modes are mutually exclusive. Either of the three operates to the exclusion of the other two. Thus, if a child has his mother's husband as a father, he

can not have another father either through acknowledgement or judicial declaration. Similarly, a child can not have a father by judicial declaration, if he has father either by operation of law or by acknowledgement. Therefore, there is no possibility where a child can have two fathers by operation of the two modes of establishing paternity in different hierarchies. Neither can a child have two fathers by acknowledgement, or judicial declaration of paternity. A child can not be validly acknowledged by more than one person at the same time (Art. 142) Nor could the court declare two persons to be the father of the child.

The conflict arises when the mother has a relation provided by law with two or more persons and the child could simultaneously be attributed to the person in each relation. The attribution can take either of the following three forms.

1. The child could be attributed to each relationship because he is born within such relation ships, or
2. The attribution could be because of his conception in both relationships; or
3. The child can be attributed to each relationship because he is born in one relation and conceived in the other.

The first one presupposes a simultaneously existing legally provided unions at the time of birth of the child. This could happen if the mother was married to two persons or had marriage and irregular union at the same time.

A child could be attributed to more than one person in the second way if he was conceived where the mother had more than one legally provided unions without any one living with her at the time of birth. This may arise in either of two situations. First, the mother can have

two or more unions simultaneously but they could be terminated before the child is born. Second the period of conception of a child can transcend two or more consecutive relations of his mother. The mother could have two consecutive marriage within the 300 days before the birth of the child, having no relation with any one at the time of birth.

The third situation arises when a child conceived in one union is born in another union. Thus, a child will have two fathers if he was born within 300 days after the dissolution of her first marriage. He will have the first husband as father because of conception in wedlock and the second one because of birth in wedlock. In fact, the law prescribes a period of widow hood under Art. 16 (1) of the RFC to avoid conflict of paternity. But the problem is that even if the widow observed the 180 day period of widow hood after the dissolution of the former marriage, this by it self doesn□t totally exclude conflicts in establishing paternity.

Under the existing rules on the law of filiations, a child could possibly be attributed to more than one father in spite of the observance of the period of widowhood. It is enough for the conflict of paternity to arise if the child is born in less than 300 days after dissolution of the first union but at any time after the beginning of the second union. Assume a woman remarries on the 190th day after the dissolution of her first marriage and gave birth to a child on the 30th day after the conclusion of the second marriage. Is there no a conflict of paternity in such cases in spite of the observance of the period of widowhood? There obviously does. The child will have the first husband as a father by conception and the second one by birth.

Though the rule on the period of widowhood was introduced to avoid confusion of paternity, it in actual fact failed to achieve its end. It was laid down perhaps under the assumption that only children born more than 180 days after the beginning of the union would be attributed to the man therein. This condition for its operation, however, is not enshrined by the provisions of paternity. In so far as the law considers the child born less than 181 days after the beginning of union to be the child of the person in such union, observance of the period of widowhood as such does not wholly a void the possible conflicts of paternity unless the period of widowhood is 300 days' as is the case in France. If the 300 days period of widow hood is respected, there is no possibility for the conflict of paternity to arise, for this conforms with the maximum period of pregnancy, i.e. 300 days indicated under Art 128 (1) of the RFC.

The conflict of paternity arising in either of the aforementioned three situations has two possible solutions.

The first solution is agreement between or among the presumed fathers. In this regard Art. 146 of the RFC provides that when a child must be attributed to several father, a regulation of paternity may be made by agreement between the persons to whom the paternity of the child is thus attributed by the law. So, the persons to whom paternity of the same child is attributed may contractually agree to cancel the paternity of either of them to the benefit of the other. Such an agreement shall be attested by three witnesses and approved by the court. (Art. 147 (1)). And except in case of force majeure, the mother of the child shall be heard in person (Art 147 (2)).

If the legally presumed fathers fail to regulate the conflict of paternity, the law takes over. The first question that comes to one□s

mind in this connection is as regards the point in time after which the presumed fathers are considered to have failed to regulate the conflict of paternity. There is no time limit after which the fathers are precluded from regulating the conflict of paternity. They can conclude the agreement at any time. This is not meant however, to carry through the dual paternity of the child till the parents make the agreement. Therefore, the writer of the module is of the opinion that the presumption is applicable starting from the birth of the child till the fathers regulate the matter by agreement. This will ensure that the child will not have more than one father at any point in time.

Thus failing regulation of paternity, the following two presumptions, pointed out under Art, 148, shall be applied successfully, where appropriate:

a) the child shall be attributed to the husband of the mother in preference to the man who have an irregular union with the mother;
b) the child shall be attributed to the husband of the man with whom the mother is living at the time of the birth, in preference to the husband or the man with whom she was living at the time of the conception.

The first presumption purports to solve the conflict of paternity if the mother had a marriage and irregular union at the same time. It prefers the husband to the man in irregular union even if the mother was living with the latter at the time of the birth of the child. But the law doesn't give us a solution where the mother has conceived or born the child while she concluded two marriages or engaged in two irregular unions at the same time. Discuss.

The second presumption will apply only if the conflict can not get a solution under the first presumption. The term "successfully" under Art 148 makes both presumptions mutually exclusive. Had it not been for it, there could have existed situations where both presumptions compete to governing the same conflict. This is the case, for example, if we take a child born when the mother was in an irregular union with "A" but before the 300th day after dissolution of his mothers first marriage to "B". The first presumption prefers the husband. Thus the child will have B as a father. The reverse will be true if we apply the second presumption. Thus the child will have A as a father in preference to B. The mutually exclusive nature of the presumption has avoided such undesirable results. Now the child will have A as a father because it is the second presumption that is given priority. Therefore, the second presumption is applicable where the mother terminated her first legally recognized union and engage in another thereafter. That is, the two unions unlike case of presumption one, do not exist at the same time. The husband or the man with whom the mother is living at the time of birth is preferred as a father to the husband or the man with whom she was living at the time of the conception. This is done to secure the interest of the child and maintain the sustainability of the second union.

8.3. Assignment of Paternity by Agreement

Assignment of paternity is a means by which the person to whom the child is attributed by the law (in accordance with Arts. 126 – 130) agrees to assign his paternity under specified conditions. It is an agreement by which one legal father (the presumed father) transfers his paternity to another person who has had no juridical bond with the

child before the agreement (probable father). Such transfer of right of paternity is allowed when the legal presumption leads to a manifestly odd conclusion when viewed in light of biological reality. Thus, the purpose of the agreement is not to determine who amongst two or more legal fathers should be the sole father to the exclusion of the others. Though assignment of paternity is found under the section of conflict of paternity, it is not in reality a mechanism for solving conflict of paternity in the strict sense. The child is attributed to one father but such a father agrees to give up his paternity in favour of a third person who declares to be the father but is not legally the father of the child.

As envisaged under Art. 149, assignment of paternity is possible only in the following two situations:

1) where the child is born within 210 days from the conclusion of the marriage or the commencement of the irregular union, the husband or the man who is living with the woman may, by agreement, assign the paternity of the child to another person who declares that he is the father of the child.
2) Where the child is born more than 210 days after the dissolution of the marriage or the cessation of the irregular union, the husband or the man who lived with the mother shall have the right provided in the preceding sub-section.

As to why the law took the 210 days as point of reference, closely examine the following examples.

If we take a child born on the 208th day after the beginning of the union, it is deemed to have been conceived at least on the 28th after it began and utmost the 91th day before its commencement, the probability of conception outside of union to within the union is almost

3:1. The probability of conception outside the union goes on becoming higher as the date of birth is nearer to the beginning of the union till it reaches the 180th where the probability of conception within wedlock is nill. A child born within 180 days after the beginning of the union is conceived out side it though it will have a father by operation of the presumptions because he was born therein. This is the reason why the presumed father is allowed to assign his paternity under Art. 149 (1).

Like wise, the law allows the assignment of paternity for children born more than 210 days after the end of the union taking the possibility that the child could have been conceived after the end of the union. The force of the presumption extends up to the 299th day after the end of the union. But a child born after 210 days from the end could have possibly been conceived after the end of such union. Thus, if we take a child born on the 280th day after the dissolution of a marriage, its statutory period of gestation covers 99 days after the dissolution of marriage but only 19 days before dissolution. Taking in to account the longest period of pregnancy (299 days) and the shortest one (180 days) it is highly probable for this child to be conceived within these 99 days after dissolution when compared with the 19 days before the termination of the union.

Therefore the assignment of paternity is the possible way where by the father short of the facts sufficient for disowning a child he thinks is born from another man, assigns his paternal status to the person declaring to be the father, who is not in a position of affecting acknowledgement because the child has a valid paternal filiation by presumption of paternity.

Such agreement on the assignment of paternity shall be attested by three witnesses and approved by the court. (Art. 150 (1)). Moreover, the mother of the child shall be heard in person (Art. 150 (2)).

Assignment of paternity by agreement can not be concluded by representation. It must be done by the interested parties themselves where they have attained the age of majority and are not judicially interdicted (Art. 151 (1)). A mandate to conclude it may only be given by a special power of attorney approved by the court (Art 151 (2)).

Once entered, the agreement on the assignment of paternity shall not be revoked (Art. 152). It may, however, be annulled on the ground of violence (Art 153 (1)). Nevertheless, it may not be annulled on the ground of error or fraud unless it is decisively proved that the child could not have been conceived of the person who has declared to be the father (Art. 153 (2)).

8.4. Proof of Filiation

Dear student, our preceding discussions were targeted towards analyzing the way maternal and paternal filiation could be established. In this section, we shall study as to how an already established filiations can be proved. Of course, a person is required to proof filiations when the same is challenged.

Proof of filiations is important to acquire rights and to impose obligations arising from filiations; such as the right to succession and the obligation to supply maintenance, etc. If proof of filiations is a condition to exercise rights and to shoulder obligation emanating from a certain father child or mother child relationship, how could it be proved?

Under the RFC, we have three ways of proving filiation.
These are:

1. Record of birth
2. Possession of status
3. Action to claim filiation

8.4.1. Record of Birth

The record of birth is the primary document to be adduced to prove filiation. To that effect, Art. 154 of the RFC provides that both the paternal and maternal filiations of a person are proved by his record of birth.

What kind of document is referred to as record of birth?
This is a document issued by an officer of civil status following registration of birth as per Art. 99 of the Civil Code. According to the same article, record of birth shall indicate: the day, month and year of the birth; the sex of the child; the first name; which are given to him; the names, first names, dates and places of birth of his father and mother; where appropriate, the names, first names, date and place of birth of the person making the declaration. Since such document, interalia, consists the names of the father and mother of the child, it is a preferable document to prove filiation. Currently, there is no office of civil status in Ethiopia and temporarily, record of birth is issued by municipalities.

Can a child conceived or born outside of a legally recognized union use record of birth to prove who his/her father is? A child born out side marriage or outside irregular union can not have a record of birth

that indicates some man as his father, unless such man acknowledges the child or judicially declared to be the father of the child.

8.4.2. Possession of Status

As indicated under Art 155, in default of a certificate of birth, filiation is proved by the possession of status of child. But the question is, under what circumstances can we speak of the record of birth defaulting? The term "in default" under Art 155 shall be interpreted so as to include the non-issuance of record of birth at all or an already issued record of birth has been lost for various reasons.

When do we say that a child has possession of status? As per Art 156, a person has the possession of status of child when he is treated by the community as being the child of such man or woman. So, what is required to produce is witnesses who testify the fact that he is treated by the community as being the child of such man or woman. Since Art. 156 doesn't expressly put a certain number of witnesses, one can say that possession of status can be proved even by producing three or two witnesses provided that they testify the facts under Art. 156.

Where a person interested to prove filiation has proved the facts stated under Art 156 the court shall take presumption that the child is born of such man or woman. (Art. 157 (1)) such presumption, however, may be rebutted by providing that the child could not be born of such man or woman. (Art 157 (2)).

8.4.3. Action to Claim Filiation

When it is not possible to proof filiation by record of birth or possession of status, it could be proved by an action to claim filiation. For more details, read the following provision.

Article 158 ： Action to claim filiation

1. In default of possession of status of child, filiations may be proved by witnesses or by any other evidence.
2. The action to claim filiation may not be instituted except with the permission of the court.
3. Such permission shall not be granted unless there are presumptions or indications resulting from concrete facts enabling the court to grant permission.

As you may understand from the contents of Art 158, action to claim filiation can not be instituted by the will of the child alone. The court must allow some one to institute an action to claim filiation.

Dear the distance learner, why do you think the law require the permission by the court to institute an action to claim filiation? In case of action to claim filiation, filiation could be proved by witnesses or by any other evidence. Therefore, if such an action is allowed without any scrutiny by the court, people may abuse this rule and may introduce false evidence.

As is indicated under Art. 158 (3), the court shall grant its permission to the person who intends to institute an action to claim filiations only after examining the existence of circumstantial evidence resulting from facts which are constant and sufficiently serious to enable it to grant the permission. Such circumstantial evidence could be a great resemblance between the child and the alleged mother or fathers. Here it should be noted that permission to institute an action to claim filiations is not the end of the game. The person allowed to do so shall produce evidences to convince the court that he is the child of the mother or father he claims.

In giving permission to institute an action to claim filiation, courts shall take utmost care. Specifically, no permission to institute the action to claim filiation shall be granted where the person whose filiations is to be established has already another filiation resulting from his birth certificate and corroborated by possession of status in conformity with such certificate.

The action to claim filiation may be instituted by the child, by his guardian or by his heirs (Art. 160 (1)). It may also be instituted by those who claim to be the father or mother of the child (Art. 160 (2)). The person who claims to be the father or mother of the child is allowed to institute an action on his/her behalf, not by representing the child.

As to the time within an action may be instituted, Art 161 (1) provides that the child may institute the action to claim filiations at any time during his life. The parents or guardians of a child may, however, institute it only during the minority of the child. (Art. 161 (2)). Moreover, the heirs may not institute it unless the child died before the age of twenty years and within one year after his death (Art. 161 (5)). The right of the child to institute an action to claim filiations is the right that affects his very personality. Thus, the right can be exercised by the child until the time of his death. To put in different words, such right will not be barred by period of limitation but other individuals are allowed to institute an action to claim filiations so long as the child is a minor. Therefore after the attainment of majority, this is a matter to be decided by the child himself.

The last point worth mentioning is the person against whom an action to claim filiations shall be instituted. Read the following provision from the RFC in this regard.

Article 162 – Person Against Whom Action Instituted

1) Where the action to claim filiation is instituted by the mother, it shall be made against the child.
2) In other cases, it shall be instituted against the mother or her heirs.

8.5. Contestation of Filiation and Disowning

Dear student, as you may recall, our preceding discussions were targeted towards two general points; namely, as to how to establish maternity and paternity and the modalities of proof of an already established filiation. In this section, we shall study the possibility of contesting an already establish maternal or paternal filiation. Both the maternal as well as the paternal filiation of the child may be contested. The maternal filiations is contested by the contestation of filiations and the paternal filiations is contested by disowning. Here in under is provided a separate treatment of both of them.

8.5.1. Contestation of Filiations

As enshrined under Art 163, the maternal filiations of the child may be contested at any time by interested person. That is to say, the right to contest the maternal filiation is not reserved to any specified persons as is the case in contestation of paternal filiation. Neither does there exist a period of limitation within which the action to contest the status must be instituted. Thus, the action may be brought by the mother, the father, the child or any other person that can show interest and it can be done at any time.

Therefore, the only valid limitation is that the action to contest filiation may not be instituted except with the permission of the court (Art. 164 (1)). But why the law requires permission of the court to institute the action to claim filiation? We can cite the following two reasons.

1. On the basis of an action to contest filiations, the court may deny that the said woman is not the mother of the child. If this is so, it may also render the child father less. Because, as we have seen, maternal filiation is the base for paternal filiation. Thus, if the child is denied his maternity, it gives rise to denial of paternity particularly where the child is born or conceived out of a legally recognized relationship. To avoid the arbitrary occurrence of fatherlessness, the scrutiny by the court is undoubtly important.
2. This kind of action is brought to cancel an already established filiation. If such an action is allowed to be instituted without the permission of the court, individuals in bad faith would be given an opportunity to disturb stable mother child relationship.

As has been discussed above, the action to contest filiation may not be instituted except with the prior authorization of the court. Dear distance learner! on what ground do you think the court would grant permission to institute an action to contest the maternal filiation? On the basis of the a *contrari* reading of Art. 164 (2), such permission shall be granted where there are presumptions or indications resulting from concrete facts enabling the court to grant permission. To state it other wise, the court permits some body to institute an action to contest the maternal filiation only where there are indications resulting from concrete facts that enable the court to presume a certain woman is not the mother of a certain (child). These indications could be at the time of birth of the child, the woman may

not be available at the place of the birth of the child. Or the woman could not be the mother of the child due to infertility, etc.

Once the person is allowed to institute an action to contest maternal filiation, he shall produce witnesses to obtain court declaration. In general, he has to prove that either of the elements necessary for the establishment of maternal filiation are missing. Thus the person instituted an action has to show to the court either 1) that the woman was not confined at the time when the child was born and / or 2) even if the woman was confined at the time when the child was born, the child whom, she delivered is not the one whose status is in question. Therefore, the fact that the court allows to institute an action to contest maternal filiation is not sufficient by itself to efface all doubt and convince the court. The proof thus commenced may be completed by the hearing of witnesses.

The court, under Art. 164 (2) has wide discretion for granting the action having regard to the facts presented by the petitioner. But the court can by no means give permission for the institution of the action if the child whose status is contested has a filiation resulting from the record of birth and is corroborated by a possession of status corresponding with such record of birth (Art. 165) What justifies the prohibition is the circumstance that these two conditions taken together make the truth of the fact as probable as possible.

Finally, the action to contest filiation shall be instituted against the person whose filiation is contested or against his heirs. (Art. 166 (1). The mother and, where necessary, the father of the child shall be joined as parties in the proceedings (Art. 166 (2).

8.5.2. Disowning

Seeing the relevant provisions pertaining to disowning we can define disowning as an action by which the husband or the man in irregular union tries to disclaim the presumption of paternity established against him, in circumstances in which he can not be the father. In short, disowning is the means by which a paternal filiation is contested.

As we have seen under Art. 126 and Art. 130, a child conceived or born in wedlock or irregular union has the husband or the man engaged in irregular union as presumed father. Such presumptive father shall rebut this presumption by an action to disown. To that effect, Art. 167 provides that the paternal filiation of a child may be contested only by means of an action to disown. An action to disown is relevant when paternity is established by way of legal presumption. Where paternity is established by acknowledgement or judicial declaration of the court, the court may not allow an action to disown to be brought. As has been explicitly provided under Art. 140, (1), once a person voluntarily accepts a child as his own, the acknowledgement of paternity may not be revoked. Moreover, a judicial declared father who fails to raise the defenses under Art. 144 shall not be allowed to rebut his paternity.

There are two grounds, for the man who is attributed paternity, to disown a child These are:

1. No sexual intercourse with the mother
2. When paternity is impossible

As mentioned here in above, one of the grounds to disown a child is the non-existence of relation with the mother. In this respect, Art 168 provides that the person to whom the law attributes the paternity of a child may disown such child by proving decisively that he could not have had sexual inter course with the mother during the period between the 300th and 180th day before the birth of the child. The 120 days period i.e, the period between the 300th and 180th preceding his birth is the possible period considered by law that the child can be the fruit of intercourse between the presumptive father and the mother. Since presumption of paternity operates in favor of children conceived or born in wedlock or in an irregular union, it is possible that the presumptive father produces evidence that indicate the non-existence of sexual relation with the mother within the period that is to be presumed as period of conception so that he can disown. The presumptive father may show the non-existence of sexual intercourse within the period of pregnancy by adducing evidences to the effect that he was imprisoned, confined to hospital or mental institution, mobilized to the war front and so on. He may also show that he is impotent, i.e, he is unable to have sexual intercourse.

In addition to examples mentioned above, the spouses shall be deemed to have had no sexual intercourse with another during the time when they actually lived separately following a petition for divorce made by one of them or in consequence of an agreement concluded between them (Art. 169 (1). Of course, proof to the contrary by any means is admissible (Art. 169 (2)).

Even if the presumptive father and mother do have sexual relation with the period in which the child must have been conceived, there is still a second ground to disown a child. To disown a child on this ground, it suffices to show the impossibility of paternity. Thus, the

person to whom the law attributes the paternity of a child may disown such child by proving decisively that it is absolutely impossible that he could be the father of the child (Art. 170).

As opposed to the first ground, the action to disown based on the second ground may not be instituted except with the permission of the court (Art. 171). The scrutiny of the court is required to narrow the possibility of fatherlessness. The court gives its permission when there are presumptions or serious indications resulting from sufficient and reliable facts enabling the court to accept the action (Art. 171 (2). The presumptions and serious indications are those indicated under Art 172.

Article 172 □ (3) Presumptions and Serious Indications

1. The presumptions and serious indications may consist of physical characteristics of the child recognized by science to be incompatible with those of the father.
2. They may also result from the fact that the woman has concealed the birth of the child or her pregnancy to the man under circumstance which are opt to create doubts as regards his paternity.

One instance where the law recognizes as a presumption and serious circumstantial evidence for the purpose of granting permission of action, as provided under Art. 172 (1), is where there exists a physical incompatibility between the biological characteristics of the father with the child as recognized by science. Examples of physical characteristics of the child incompatible with those of the father could be:

- if a white child with blonde hair and blue eyes is born of Ethiopia parents; or

- if the blood test of the child gives a negative result.

Art 172 (2) considers the mother's concealment of birth or of mere pregnancy of the child as a second serious and circumstantial evidence where the concealment of the birth or the pregnancy tends to create doubts as to the paternity of the presumptive father. When the mother conceals the birth of the child or of her pregnancy from the presumptive father, there is a strong presumption that she had sexual relation with another person and also that the child is not that of the husband or that of the man in an irregular union with her. This fact alone will create a doubt as regards his paternity. Because there is no reason for the mother to conceal the birth of the child or of pregnancy form the presumptive father.

The adultery of the mother or her admission that the child has another father are not sufficient, by themselves, to constitute serious circumstantial evidence. (Art. 173). However the commission of adultery or the admission of the mother if followed by other corroborating facts which can put the paternity of the presumptive father in question, the court will allow the latter to institute action to disown. For example, if the mother's adultery is corroborated by the fact that the presumed father uses contraception or the conditions under Art. 172, this can be considered as a presumption and serious circumstantial evidence to grant permission.

Are we to say that the above discussed circumstances are the only ones to grant permission of the court? There is no provision expressly excluding other grounds than the expressly given ones. In the absence of provision which demands the exclusive interpretation, we can consider the grounds we have dealt with as illustrative. Even the wording of Art. 172 (1) when it says "the presumptions and serious

indications may consists of ” seems to be illustrative. As a result, other evidences so long as they put the paternity of the presumptive father in doubt can be taken a serious and circumstantial evidence for the court to grant permission. An example of this kind could be the presumptive father s sterility.

At this juncture, it must be noted that admission of action does not necessarily complete the action. It is only after admission that the presumptive father will be allowed to adduce proof of his being not the father of the child. In this mode of disowning, as Art. 170 requires, the presumptive father must decisively show that he is not the father of the child in the particular case. If he is expected to show decisively his being not the father, mere doubt as regards his paternity won t suffice to complete the action. Therefore, after admission of action, he has to show without doubt that he is not the father. In short, must of the grounds that entitle the presumptive father institute action to disown only create doubt as to the paternity of the presumptive father. But when these facts or grounds are supported by other evidence which indicate that the presumptive father is not father, a form of certainty will be arrived and the presumptive father will be allowed to disown the child based on Art. 170. For example, the exclusionary blood typing mechanisms are in some jurisdictions taken to be conclusive to disown a child. So after admission, the presumptive father must convince the court without a reasonable doubt as he is not the father by any evidence at his disposal.

Since disowning is strictly personal to the presumptive father, only the person to whom the paternity of the child is attributed by legal presumption may institute an action to disown. (Art. 174 (1)). No action to this effect may be made by the mother or by a man who claims the paternity of child or by the public presocutor or by the

child himself. (Art 174 (2)). An action to disown may, however, with the permission of the court, be instituted by the judicially interdicted person himself. (Art. 175 (1) The action may, with the same permission, be instituted in the name of the interdicted person by his gubidian. (Art. 175 (2)).

More over, where the person to whom the paternity of the child is attributed by law dies or becomes incapacitated within the time fixed by law for instituting the action to disown, one of his descendants, in his stead, may institute an action to disown. (Art. 177 (1)). In default of descendants, the right to disown may be exercised by his father, or mother, or in their default, by one of his ascendants (Art 177 (2)). In default of ascendants, it may be exercised by one of his brothers or sisters, to the exclusion of any other heir or representative.

Needless to say, it is the interest of all concerned that an action for disowning shall be brought without delay. With this understanding the law prescribes a period of limitation within which an action for disowning shall be brought. Pursuant to Art. 176 (1), an action to disown shall be instituted by the man to whom the paternity of the child is attributed by law within 180 days after following the day he knew or he should have known the birth of the child. So, if the presumptive father was around at the time of birth of a child, he shall bring an action within six months as of the date of birth of the child. If, on the other hand, the presumptive father came to know the birth of the child some times after the birth of the child for he was not around at the time of birth, the 6 months period shall be calculated as of the date of his knowledge.

Dear student, what do you think is the difference between Art 792 (1) of the Civil Code and 176 (1) of the RFC? Which article takes a better

position in reconciling the interest of the child and the presumptive father?

Where, on the other hand, the maternal filiation is established by an action to claim a status, the action to disown shall be instituted within 180 days from the judgment deciding on the action to claim a status having become final. (Art. 176 (2). This is because to establish paternity, maternal filiation shall first be established because a person shall be presumed as a father when he engages in a legally recognized union with the mother. Thus, without establishing maternity, the father of the child will not be known. But once maternity is proved by an action to claim filiation, it is possible to institute an action of disowning provided that it is made within six months from the judgment deciding on the action to claim a status having become final.

Once all the procedural requirements of the law are met the presumptive father will be allowed to disown the child if he establishes the facts necessary to sustain the action to disown. There is, however, one instance in which case suit for disowning will not be permitted even if the procedural as well as the substantive requirements of the law are met. This instance is Art. 178 which provides disowning shall not be allowed where it is proved that the child has been conceived by means of artificial insemination with the written consent of the husband."

There are two commonly used types of artificial insemination These are:

1. Artificial insemination with the husband's semen, commonly termed as AIH (Artificial Insemination Husband). This method is usually applied when the presumptive father is impotent or unable to engage in sexual act.
2. Artificial insemination with the semen of a third party donor, commonly termed as AID (Artificial Insemination Donor). This method is performed probably due to the presumptive father's sterility. Although a strile is able to engage in sexual act he can not impregnate a woman.

Article 178 is particularly referring to the AID types because in the first situation (AIH) the husband can not disown the child for there would be a compatibility between the presumption and the biological fact. The father will not be in a position to decisively prove the absolute impossibility of his paternity.

Thus when AID is applied the semen used is the semen of third party donor. In this case, it may arise a question of paternity. Art. 178 resolves this issue by attributing the paternity of this child conceived as a result of artificial insemination to the presumptive father who has consented in a written form for the carrying out of this insemination.

Before winding up the discussion of this chapter, it is important to point out as to who shall be the defendant in the suit instituted for disowning. In responding to this issue, Art. 179 (1) provides that the action to disown shall be instituted against the child or, where he is dead, against his heirs. Besides, the mother of the child shall be joined in the suit, (Art. 179 (2)) where the child is minor, he shall be

represented by a tutor ad hoc appointed by the court for this purpose (Art. 179 (3)).

Exercise

1. Why do you think the law has required the admission of the acknowledgement by the mother of the child? Why do you say so?
2. From three modes of establishment of paternity, which one (s) is/are easier for the child to get a legal father? Why do you say so?
3. If the child is born just on the 160th day from the arrival of "A" (mind you "A" stayed 315 days at the war front). Can "A" disown the child? Why / why not?
4. W/o Manasbosh and Ato Biset consummated their three years old love affair by concluding a valid marriage on Tir 15, 1990 E.C. And since then they have lived a joyful life. As of 1992, however, W/o Manasbosh began to live separately in Diredawa with out passing divorce proceedings.

   Fortunately, W/o Manasbosh was soon approached by Ato Sebisibe in Dire Dawa. After a long negotiating, they concluded their marriage on Mskerem 10, 1993. On Megabit 15, 1993 W/o Manasbosh gave birth to twins, named Mikurab and Mastewal. In this hypothetical case, who is the father of the twins, Mikurab and Mastewal under the law? (Ato Biset or Ato Sebsibe) Why?

5. What conditions must be fulfilled for judicial declaration of paternity?
6. Enumerate the three ways by which filiation may be proved?
7. What is the similarity or difference between contestation of filiation and disowning?
8. Alemayehu is a young civil servant living in Bahir Dar, Kebele 13. On Tir 18, 1996 E.C he concluded a valid marriage with Amsale in accordance with the marriage celebration rule of Ethiopian Orthodox Church. Amsale gave birth to a child on Nehasie 30, 1996. Can Alemayehu agree to assign the paternity of this child? Why/why not?
9. A child conceived or born in wedlock has the husband as father. But this rule doesn't work to the husband whose absence has been declared by court. Why?

CHAPTER NINE

ADOPTION

Under the Civil Code and the Revised Family Codes, there are three sources of family relationship. The first one is consanguinal relationship which essentially originates from blood tie. Secondly, we have affinal relationship that springs from marriage. The third source of family relationship that we shall deeply consider under this chapter is adoption. Thus, the main focus of this chapter is addressing issues relating to the third source of family relationship, namely, adoption.

To put the objectives of this unit in a nut shell, a student who successfully studies this chapter will be able to:

- Define adoption;
- Explain the purpose of the institution of adoption;

- Enumerate essential elements that the adoption agreement shall satisfy;
- Discuss the legal consequences of adoption; and
- Distinguish grounds on the basis of which adoption agreement can be revoked.

9.1. Definition and Purpose of Adoption

There seems to be a general agreement concerning the definition of adoption. When we refer to the various definitions given by different legal scholars, there are common features which underlie the concept of adoption. That is a, fictious creation of blood relationship between persons who are not so related. To explain using different words, it is a means by which a child is assimilated to the families of the adopter, and that it is a juridical act by which a permanent artificial parent child relationship is created.

In our Civil Code, too, adoption is an artificial bond created by a contract between the adopter and the adopted child (Art. 796 (1)). With slight modification, the Revised Family Code under Art. 180 defines adoption as an agreement by which a person and a child create artificial filiation. It is an agreement which confers legal status of parent and child on a person and a child who are no so related.

Regarding the purpose of adoption, it has served many proposes depending up on the socio-economic condition of a society. In earlier times, adoption was employed to secure to the adopter support in his old age, or to provide him with an heir, or to prevent the extinction of his race, or to perpetuate the performance of the family cults. It also served to give sons to house holds which have daughters only, or daughters to households which have son. In some societies, its purpose was to fill up vacancies caused by death so that the person

adopted shall take the deceased person s place; to confer honour and cement friendhip; to bring profit to the adoptive or natural parent, or both; to recruit the ranks of a failing genes to tribe; and to avert ill luck or to rick evil spirits.

The purposes it served were so many that one can not possibly list them all. It may however, generally be said that the principal purpose of adoption in early societies was to benefit the adopter and was not viewed as an alternative means to the welfare of the adoptee.

The purposes adoption used to serve changed, however, with the natural and man made happenings which struck the world at large. The first half of the 20th century witnessed mass displacement of people and many orphane children. With this social changes and ramification of scientific knowledge of child development, adoption began to be viewed as instrument of protection of the orphan, the destitute and fugitive. It has since then be come a truly family institution and rescued many orphaned and abandoned children.

9.2. Essential Conditions of Adoption

In the preceding section, we have seen the purpose and definition of adoption. In this section, we shall consider common essential elements which the adopter and the adoptee must satisfy for the validity of the agreement of adoption.

9.2.1. The Requirement of Consent

Dear distance learner! from your introduction to law course, you may recall that consent is one of the prerequisites of juridical acts. Adoption, being a juridical act, shall be formed only up on the consent (agreement) of the persons involved therein. To that effect Art. 180 of

the RFC provides that adoptive filiation may be created by an agreement between a person and a child. This Article may lead you to believe that the parties to the agreement of adoption are the adoptive parent and the adoptive child. How ever, as provided under Art. 190, parties to the contract of adoption are the adoptive parent and the guardian of the child. Art. 180 simply shows that an adoptive filiation shall be created between the adoptive parent and the child as a result of an agreement of adoption.

Where the adopter is married, an agreement of adoption may not be made unless the two spouses conjointly adopt the child (Art. 186). From this, it is clear that a valid adoption shall be formed if and only if the married spouses give their joint consent sustainable at law. If the consent of one of the spouses is lacking, the adoption shall be of no effect. It may happen, for example, that the wife wants to adopt a child. The effect of adoption is, as discussed below, that the child shall be related to the adopter and her relatives. The husband, on the other hand, although he is willing and able to take care of the child in the most comfortable manner does not like to be adoptive father and the effects of adoption. Is his willingness and approval of the adoption by his spouse of a child satisfy Art. 186 (1)? The answer is definitely no. Mere approval of the adoption is not sufficient. He shall also be an adopter of the child.

As an exception to the principle laid down under Art. 186 (1), an adoption agreement made by one spouse without the other shall be valid in the following two situations. The first exception is operative where a person adopts the child of his or her spouse (Art. 186 (2)). Let us take an example for more understanding, Ato Mesfin and W/ro Genet are husband and wife. Ayalew is a child of Ato Mesfin whom he had before the marriage. If W/o Genet wants to adopt Ayalew, the

agreement shall be valid without the involvement of Ato Mesfin as a party to the agreement. This is because there already exists consanguinal relation between Ato Mesfin and his child Ayalew. Also where one spouse is not in a position to manifest his will, adoption agreement made by the other spouse shall be valid (Art. 186 (3)).

As has been discussed above, the adopter is one party to adoption agreement. The other party to the agreement is the guardian of the adopted child (Art. 190). Since the adopted child is required to be a minor, he shall be represented by his guardian for a minor can not perform juridical act including adoption. As you may have learnt from your law of persons course, the father and the mother of the child are joint guardians of their minor children, during their marriage. Therefore, if the child's father and mother are alive and known, the agreement of adoption will be made between the adoptive parent on the one hand and the father and mother of the child on the other. Some times, the child may have a guardian different from his father or mother. In such a case also the father and mother of the child are required to give their consent to the adoption agreement, although they are not party to the agreement. Art. 191 will give you more information on this point.

Article 191 – Consent of Parents of the Adopted Child

1) Both the father and the mother of the adopted child must give their consent to the adoption where they are alive and known.
2) Where one of them is dead; absent, unknown or incapable to manifest his will, the other parent shall give his consent.
3) Notwithstanding the provisions of sub – art (1) of this article, where one of the parents is not willing to give his

consent and the child is ten and above years of age, the court may approve the adoption upon hearing the opinion of the other parent and of the child.

4) Where the child has no ascendant capable of giving his consent, the court may approve the adoption agreement taking into account the interest of the child.

The aim of the law in taking the position under Art. 191 (1) is fairly clear. Adoption is an agreement whereby the parents of the child and the adopter agree to create artificial parent child relationship between the adopted child and the adopter. As the agreement of adoption requires the natural parents to surrender all parental rights and duties they have over the child, it follows that the adoption may only be valid where the natural patents, having full knowledge of the consequences, have given their free and full consent. The parents should not be deprived of the right to their child society, services, and earnings with out their consent.

Nevertheless, although the law protects the interest of the natural parents in adoption proceedings, there are circumstances where their consent may be dispensed with. The court may, for example, approve the adoption agreement where the natural parents are not alive or unknown and where the child has no an ascendant capable of giving his consent (Art. 191 (1) cum. (4). Sub-article 3 of Art 191 provides also that where one of the parents is not willing to give his/her consent and the child is ten and above years of age, the court may approve the adoption upon hearing the opinion of the other parent and of the child. This sub-article is justified where the parent has unreasonably suspended his/her consent. Its application is, however, doubtful where the refusing parent is capable, in every aspect, of upbringing his child. There is no reason to deprive him of his/her

parental rights and duties in so far as the child is safe with the refusing parent.

In other jurisdictions, there are also other circumstances which enable the courts to dispense with the consent of natural parents. For instance, consent of the natural parents is not required where they forfeit their parental rights by their neglect of the child or by their misconduct towards their child. Whether similar conclusion may be arrived at in the Revised Family Code is questionable. Art 191 (1) merely says that in so far as the father and the mother of the child are alive and known their consent must be obtained. Sub-article 3 and 4 which seem to be exceptions to sub-article 1 do not entertain such situation. Perhaps the court may, in pursuit of the principle of the best interest of the child, dispense the consent of the natural parent and approve the adoption.

What has been considered in the preceding discussions is a kind of adoption that will be concluded between the parents of the child and the adopter. In addition to this, the Revised Family Code under Art. 192 (1) expressly stipulates that government or private orphanages may give any child under their custody to adopters. But this provision is not clear as to whose consent shall be given where the child to be adopted is in the orphanage. It simply says that orphanages may give any child under their custody to adopters. In relation to the requirement of consent, the question of guardianship may arise. Art. 190 stipulates that the agreement of adoption may be made between the adopter and the guardian of the child. In default of person who are deemed by law to be guardians of an orphan as per Art. 227 of the RFC, how can we apply Art 190 Vis -a-Vis article 192? Can we say that the orphanage is the guardian of the orphaned child? It seems that unless entrusted by court to function as guardian, the orphanage can

not be considered as such and enters, on the child's behalf, in to the agreement of adoption with the adopter. It may, however, be argued that the orphanage has, by virtue of article 192 (1), got the capacity to enter into adoption agreement on behalf of the orphaned child under its custody.

Although government or private orphanages are legally allowed to conclude agreement of adoption on behalf the orphaned child, they are duty bound, before giving the child for adoption, to provide sufficient information to the government organ having authority to follow up the well being of children as to the identity of the child, how the orphanage received him, and about the personal, social and economic position of the adopter (Art 192 (2). Currently, the government organ that has the power to follow up the well being of children is Ministry of Labour and Social Affair.

While under the Civil Code and other family codes of the country, adoptive filiation is created by an agreement between a person and a child, the Oromia Family Code has come up with a peculiar feature of adoption in that it may also be created by custom of the people. Adoption (Godifacha) has long been practiced among the Oromos. Reference to custom is perhaps to give recognition to the ceremonial nature of adoption which the two parties, the adopter and the family of the adopted child undertake. Customarily, a pregnant woman may go to a certain family and declare her intention to the effect that the child born is theirs and such family extends the best care to the mother; and the child born is considered to have been adopted by the former. So, the Code aims at incorporating such type of adoption. Reference to custom, however, seems of little significance when seen in light of the fact that adoption, whether created by custom of the

people or by an agreement, shall be of no effect unless it is approved by the court.

9.2.2. Who may Adopt?

9.2.2.1. Age of the Adopter

Under the Civil Code, any person of age (18 years old) may adopt; and where adoption is made by spouses, it suffices if either of them be of age (Art 797). Under the Revised Family Code, on the other hand, any person whose age is not less than twenty five years may adopt; and the same logic as in the Civil Code holds true for adoption by married persons. That is, it suffices if one of the supposes attained the full age of twenty five years. (Art. 194).

At this juncture, one can not fail to inquire why the legislature raised the age of the adopter to twenty five years. The increase in age could be justified in three ways. The first reason for pitching the age limit may be the best interest of the child. The legislature debate shows that a person below the age of twenty five years is not fully competent to bear the responsibilities adoption agreement creates; that he is not materially, socially, and mentally ready to rear a child. If the reason for raising the age limit of the adopter is the adopters uneasiness or incompetence to bear the responsibilities of nurturing the child, one may doubt its validity. Because, firtly, there are certainly many people who are competent and capable to raise a child and infact successfully exercising parental rights and duties though they are below twenty five years of age. Of course, when one allude to the objective social condition prevalent in our country the reason given by the legislature may be, to some extent, plausible. True there are many adult persons who still depend on their parents for shelter, food and other things. But this should not in any way lead us to a

sweeping generalization that a person below the age of twenty five years is not in a position to promote the welfare and best interest of the child. Secondly, the reason that led the legislature to raise the minimum age limit to twenty five is inconsistent with the basic principle underlying the minimum age requirement set for concluding marriage. The rational behind article 7 of the Revised Family Code is that a person who attains the full age of eighteen years shall be deemed to be capable to bear the stress and responsibilities that may result from marriage. One such responsibility is, though it may not be immediate and necessary, to raise and rear children begotten from the marriage. We, thus, can say that married persons below twenty five are deemed to be competent and able to raise and up bring their natural children. If we say that they are so able to nurture their natural children, there should not be any special reason to say that they are unable to raise adopted child.

Thus, raising the minimum age limit of the adopter, in the opinion of the writer of this module, can not be justified on the ground that a person below the age of twenty five is not fully competent to bear the responsibilities which adoption agreement create. This doesn't, however, mean that such increment of the minimum age limit of the adopter is with out any reason. We have two additional reasons.

The second reason is forwarded as follows. In the context of Ethiopia, the principal reason for resorting to adoption is lack of children from wedlock though this may not be the case when considered in terms of the best interest of the child. Hence, as the minimum marriageable age is 18 years for both sexes, allowing people to adopt at 18 may affect the rational decision of the spouses. That is, they may get despaired within few months of their marriage and resort to adoption without identifying the cause for infertility especially in the country

side where medical examination is less available. If they by a dint of chance give birth after the adoption, it would be unlikely that they extend to the adopted child the same love and affection they used to extend before the birth of the natural child which in turn adversely affects the interest of the adopted child. Third, since adoption is designed to create ties of relationship analogous to those which spring from filiation in the direct line, it would be logical to hold that the adopter to be of a certain number of years older than the person who according to the law becomes his child.

The other point that should be noticed in relation to the age of the adopter is the maximum age. Sometimes an adopter may be too old to properly care for the child. As the law is concerned with the minimum age limit it should do so with the maximum age. But the law doesnot say anything about this. It seems that the courts will determine the maximum age of the adopter having regarding to the circumstances of the case.

9.2.2.2. Mental and Physical Capacity of the Adopter

The Revised Family Code has nowhere expressly stated the requirement of mental and physical capacity of the adopter. But from the close reading of the provisions dealing with adoption, we can say that they are implicitly set as requirements. Art. 194 (3) (C) requires the court to take into consideration the capacity of the adopter to raise and take care of the child. Capacity of the adopter should be determined in light of the mental, physical and financial condition of the adopter.

Thus, the court should, before approving the adoption agreement, make sure that the adopter is of sound mind; that he is not insane, judicially and legally interdicted.

9.2.2.3. Adoption between Blood Relatives

Can a person adopt his grand child, his nephew or niece or other relatives? Nowhere in the Revised Family Code or the Civil Code has this been answered. One may argue that the concept of adoption presupposes transplanting a child to a family to whom he does not belong. This can be inferred from the definition we have given here in above which say "it is an artificial creation of blood relationship between persons who are not so related." (Emphasis supplied).

Nevertheless, as the principle underlying the concept of adoption is the welfare and best interest of the child, and where the proposed adoption between relatives promotes this principle, the existence of a natural bond between the adopter and the adoptee should not be taken as a vice. Of course, where the court having regard to the circumstances of the case thinks that the adoption is against the interest and welfare of the child, it may disapprove it in accordance with its power vested under Art. 194.

9.2.2.4. Nationality of the Adopter

The Revised Family Code expressly stated that a foreign national may adopt a child so long as other essential conditions of adoption are fulfilled. This shows that the law does not make distinction between Ethiopians and foreigners with regard to being an adopter. But this does not mean that a special precaution is not made when the adopter is a foreigner. The law is much more strict in the adoption agreement, when the adopter is not an Ethiopian and such adopter intends to take the child abroad. (Read Art. 193).

Article 193 – Where the Adopter is a Foreigner

1) Where the adopter is a foreigner, the court may not approve the adoption unless an authority empowered to follow the well being of children, after collecting and analyzing relevant information about the personal, social and economic position of the adopter, gives its opinion that the agreement is beneficial to the child.
2) Not with standing the provisions of sub art (1) of this article, where the court thinks that the agreement is not beneficial to the child, it may disregard the opinion of the authority and reject the agreement.
3) Where the court finds that the information provided by the concerned authority is insufficient it may order the authority to conduct further investigation and submit additional information. It may also order individuals or organizations to provide any relevant information in their possession or to give testimony.

Now, let us see whether the Revised Family Code under Art. 193 puts sufficient safeguards to the adopted where the adopter is a foreigner. From various conventions or inter-country adoptions, we can identify at least three requirements that should be met before approving adoption by a foreigner. First, the foreign adopter should present evidences given from the competent authorities of the country that he is eligible and suited to adopt a child, that his personal, social and economic position is enabling to raise a child in a truely family situation. Secondly, it should be made clear that the child will be authorized and permitted to enter and reside permanently in the country where the adopter is a national or resident. And thirdly, we should make sure that the adoption approved by our courts shall be recognized and given effect by the adopter s state. Recognition may be as to the legal parent- child relation ship between the child and the

adoptive parent; as to the personal authority of the adoptive parent for the child.

Art. 193 (1) (3) and Art 194 (3) (e) require that sufficient information should be provided by a competent authority before the court approves the adoption. Currently, the authority following the well being of children is the Ministry of Labour and Social Affair. The Ministry is now handling the issue of adoption of an Ethiopian child by a foreigner in accordance with the procedures set out for this purpose in a Guideline on Alternative Child Care Programmes, (2001).

Thus, in accordance with the guideline a foreign applicant is eligible for adoption if he/she is:

- able to produce a document certifying that the applicants state law is consistent with the legal requirements of Ethiopian adoption;
- at least, twenty five years of age;
- able to produce a document from a competent and specified governmental body certifying that he/she has an income that is sufficient to raise the child;
- Free of any incurable and/or contagious disease and mental health problem.
- Free from any criminal activities;
- able to produce a marriage certificate if the applicant is married; and able to produce a document certified by a relevant governmental body, indicating the consent of the applicants spouse to adopt the child.

We can, therefore, say that the requirements set by the Ministry of Labour and Social Affairs concerning inter country adoptions are

compatible with the requirements which the various international conventions set.

9.2.3. Who May be Adopted?

When we look at our laws; that is the Civil Code and the Tigrai Regional Family Law on the one hand, and the Revised Family Code on the other, we may come up with different answers to the question posed in the title.

The Civil Code and the Tigrai Family Code have not expressly stated that it is only minors who can be adopted. In support of this argument, Art. 802 of the Civil Code may be cited. In this article, it is stated that the "contract of adoption shall be made between the adopter and the adopted child, if the latter is more than fifteen years of age." (Emphasis added). It seems that even an adult can be adopted. At least, there is no express limitation imposed by the law.

At this juncture, one can not help asking why should the law in the first place permit an adult to be adopted? Many reasons may be forwarded. One such reason may be the case of the child who has been raised by foster parents who, due to one reason or another, failed to adopt him before he attained majority. The second reason is presented by the case of a parent who remarries after the death of a former spouse and whose new spouse wishes to adopt the adult children of the earlier marriage. Another reason is the case of children with mental or physical incapacity who did not get adoptive parents while they were minors but now they are proposed.

Even if the above reasons are invoked not to limit the maximum age of the adoptee, the Federal and the Amhara Family codes come up with the principle that only minors are to be adopted. In this regard, Art.

185 of the RFC says that a person who is less than eighteen years of age and under guardianship can be adopted. This position is justified by the fact that the main purpose of adoption is to extend due care and protection to a minor child. More over, unless the maximum age of adoptee is restricted, his age may exceed the age of the adopter in which case a sense of normal father /mother child relationship will be lost.

Thus, a person who is less than eighteen years of age may be adopted. But a close reading of Art. 185 reveals that this requirement shall be accompanied by another requirement; that is, the person shall be under guardianship. This shows that even if a person is less than eighteen years of age, he may not be adopted if he is not under guardianship or if he is emancipated. In principle, any person who is less than eighteen years of age shall be under a guardian. And a person shall be emancipated where he attains the full age of 18. Exceptionally, however, a person may be emancipated or be out of guardianship administration even if he doesn't attain the full age of 18. This person can not be adopted because he fails to meet the second criteria indicated under Art. 185. There are two situations whereby a person who does not attained the age of 18 may be emancipated. Read the following articles from the Revised Family Code.

Article 311 Marriage

> Where a minor is married in accordance with Art. 7 (2) of this code, he shall be emancipated by the sole fact of such marriage.

Article 312 Explicit Emancipation

1) Where a minor has attained the age of fourteen years, his guardian or his tutor or any interested person may apply to the court for his emancipation.
2) The court may decide to emancipate the minor after considering his conditions, the reasons applied for, and where it finds that the emancipation is in the best interest of the minor.

Finally, in relation to the age of the adoptee, one point is worth mentioning. That is, the minimum age of the adoptee. The law has not fixed the minimum age of the adoptee. A minor at any age may be adopted. The law has even gone further and permit adoption of a merely conceived child subject to the mother□s right of unilateral revocation within six months following the birth of the child. (Art. 187).

9.2.4. Impossibility of Adoption by Several Persons

No child may be adopted by several persons unless these are two spouses. (Art. 189 (1)). Had the law permitted adoption of the same child by several persons, it would have opened a room for conflict of paternity between the adopters. But in case where such conflict may not arise, a child may be adopted by more than one person. Particularly, in case of death of the adopter, a new adoption is permitted. (Art. 189 (2)). Besides, where a child has been adopted by two spouses and one of such spouses dies, the child may be adopted by the new spouse of the survivor (Arts. 189 (3)). Although the law fails to expressly provide, a child may be adopted by another person where a former adoption is revoked as per Art. 195 □ 196.

9.2.5. Approval of the Court

In other ordinary juridical acts, approval of the agreement by the court is not essential condition of validity. They shall be valid so long as the parties thereto agree and the agreement is concluded in conformity with the mandatory provisions of the law. But when we come to adoption; the fact that the requirements of age, consent and others are fulfilled may not mean that the adoption agreement is valid. An agreement of adoption shall be of no effect unless it is approved by the court (Art. 194 (1)). The court shall, in approving adoption, be guided by the principle of the "best interest of the child" which lies at the foundation of the institution of adoption (Art. 194 (2).

Courts are, however, faced with difficult task of determining what constitutes the "best interest of the child." The law has nowhere defined the term. This principle, being incapable of precise definition, its meaning and application greatly differs depending up on the value of the decision maker. Thus, in the absence of precise definition, courts can determine whether the adoption is in the best interest of the child or not based on their appreciation of the adopter's personal, economic, social condition, and other circumstances.

The consideration to be made in determining the best interest of the child are many. But the difference in religion of the adopter and the child is one which attracts attention in adoption proceedings. Should religious belief be considered as an element constituting the best interest of the child? No doubt, like the economic and social welfare of the child, his spiritual welfare should be given a paramount importance. The question is, however, how can courts accomplish this task? Shall it be determined having regard to the consent of the adoptee, if he is of age and his parents? Discuss.

Without prejudice to the general guidelines located under, Arts. 192, 193 and 194 (2) which the court shall verify before approving the agreement of adoption, the same shall take the following in to consideration before such approval (Art. 194 (3)):

a) the opinion of the child about the adoption;
b) the opinion of the guardian or tutor of the child if he has not previously given his consent;
c) the capability of the adopter to raise and take care of the child;
d) where the adopter is a foreigner, the absence of access to raise the child in Ethiopia;
e) the availability of information which will enable the court to know that the adopter will handle the adopted child as his own child and will not abuse him.

9.3. Effect of Adoption

Once an adoption agreement is concluded in accordance with the requirements of the law discussed above, it shall produce legal effects. For the purpose of this discussion, we can see legal effects of adoption under two headings; namely, general effect of adoption and specific effects of adoption.

9.3.1. General Effects of Adoption

In relation to effect of adoption, there are two methods of adoption which need consideration. They are complete adoption and incomplete adoption. In the complete adoption the adopted child shall be fully assimilated to the adoptive families and acquires the status of a child without any reservation. The adoption is so complete that it serves all the relationship the adopted child has towards his natural parents. The child loses his right of inheritance and support from his natural parents and relatives. By the same token, the natural parents

lose their right of inheritance and other rights resulting from the bond.

On the other hand, incomplete adoption, although the adopted child acquires the status of a child in the adoptive family, the bond between the adopted child and his/her natural family remains intact. The child retains his right of inheritance from his/her natural parents and kins and vice versa.

Our law of adoption recognizes the incomplete adoption. The adopted child shall, for all purposes, deemed to be child of the adopter (Art. 181). Except with respect to the ascendants or collaterals of the adopter who have expressly opposed the adoption, the adopted child shall be legally related to all members of the adopter□s family. (Art. 182). This does not mean, however, that the adoption shall sever all links between the adopted child and his family of origin. The adopted child shall retain his bond with the family of origin. (Art 183 (1)). The spouse and descendants of the adopted child will also be related to the natural family of the adoptee, (Art. 183 (2)). Of course, where a choice has to be made between the family of adoption and the family of origin, the family of adoption shall prevail (Art. 183 (3)). Hence, although preference is given to the adoptive parents, adoption in our law does not have the effect of totally extinguishing all the rights and obligations of the adopted person in respect of his natural family and vice versa.

9.3.2. Specific Effects of Adoption

Having discussed the general effect of adoption, let us now turn to specific effects it may create on the adopted child, adoptive parents and his families.

9.3.2.1. Status of the Adoptive Parent and the Adopted child

Adoption confers a legal status of parent and child up on adopting parents and adoptive children with the legal rights and duties flowing from the relation of a natural parent and child.

The effect of adoption concerning the name of the adopted child has been expressly governed by the Civil Code. Art. 41 of the Civil Code states that the adopted child shall take the name of the adopter. This results from the divestiture of the natural parent□s right to the adoptive parents.

Also, the domicile of the adopted child becomes that of the adoptive parent. Art. 190 of the Civil Code states that the natural child of a person who is a minor shall have the domicile of his guardian, who is in most cases the parent. By the same token, the adopted child who is deemed, to all intents and purposes to be the child of the adopter, shall take the latter□s domicile.

9.3.2.2. Rights and Duties of the Adoptive Parent and the Adopted Child

Adoption transfers the natural parents right of exclusive custody over the child to the adoptive parent. After adoption, the adoptive parent will have custody of the child, the right to control its education, the duty of obedience owing by the child, and all other rights flowing from the natural parent □ child relationship.

The adoptive parent shall, as of the adoption, assume the primary duty of support of the child. The adoptive parent is duty bound to

maintain the child and accord the same human treatment as if he were a natural parent.

The adopted child, too, has the same rights and duties a natural child has to wards his natural parent. He has the right to be cared, educated, maintained and deserves the same treatment the adoptive parent gives to his natural child. He also owes to the adopting parent duties which he would otherwise owe to his natural parent.

9.3.2.3. Effect of Adoption on the Right of Inheritance

As discussed earier, the adopted child shall for all purposes be considered to be the child of the adopter. From this it follows that the adopted child has a right of inheritance for the adoptive parent and vice versa. But since adoption in our law doesn't totally sever the natural relationship of the adopted child and the family of origin, issues revolving around the inheritance will inevitably arise.

9.3.2.3.1. Inheritance from the Adopted Child

When the adopted child dies intestate without leaving descendants but leaving his natural parents and adoptive parents, upon whom shall his estate devolve must be answered in light of Art. 181, 182, and 183 of the Revised Family Code and Art. 836 (2), 843 of the Civil Code.

Art. 843 of the Civil Code states that where the deceased is not survived by descendants, his father and mother shall be called to his succession. But where the deceased is an adopted child there are two parents, viz, the adoptive father and mother and the natural father and mother. Up on whom should the estate of the adopted child devolve must be answered in light of Art. 183 (3). The article says that "where ever, a choice has to be made between the family of adoption

and the family of origin, the family of adoption shall prevail.” We can thus safely say that although the natural parents have still right of inheritance from the deceased, their claim shall not have priority to the adoptive parents.

A question may, however, arise where the adopted child is not survived by the adoptive parents but by his natural parents. The competing claimants in this situation are the heirs and next of kin of the already deceased adoptive parents and the natural parents of the adopted deceased child. Is the right of the natural parents still subordinate to the rights of the heirs of the deceased adoptive parents? The answer to the question again lies in Art. 183 (3). But this article is far from clear. It says the “family of adoption” shall be preferred to the “family of origin.” The problem is the meaning the legislature intended to attach to the word “family”. In chapter one, when we define the term “family”, we have said that, although its definition is not expressly provided in the Code, the commutative reading of provisions dealing with relation reveal that family is understood in its narrower sense. As defined by Planie, narrowly, family connotes a group of persons related by blood, marriage and adoption. Thus, even under the narrower definition, the term family is broad enough so as to include descendants and ascendants of the adoptive parents. This shows that the phrase family of adoption includes the adoptive parents and their blood relatives. Where the adopted parents of the deceased adopted child dies, they will be represented for instance by their descendents to succeed the estate of the adopted child. From this one can possibly argue that the right of the natural parents is still subordinate to the rights of the heirs of the adoptive parents. The natural parents can not claim the estate of their deceased child unless the estate is to devolve up on the state.

9.3.2.3.2. Inheritance by the Adopted Child

Our analysis revealed that adoption in our law does not totally extinguish the rights and obligations the adopted child has towards his natural parents. This in effect implies that the adopted child is, in a legal sense, the child of both the adoptive and natural parents, and hence, he is not deprived of his right of inheritance from the adoptive parents.

The adopted child□s right of inheritance from the ascendants or collaterals of the adoptive parents, is however, dependent up on the latter□s consent to the adoption. The law preserves their right of opposition to the adoption under Art. 182. Thus, in the absence of express and valid opposition of adoption, the adopted child has a right to inherit the ascendants and collaterals of his adoptive parents.

The last point worth considering is the possibility of inheritance through the adopted child; that is, by representation. Where the adopted child dies during the life of the adopting parent leaving descendants, whether such descendants are entitled to inherit from the estate of the adoptive parents by way of representation is not answered in the Revised Family Code. The Civil Code is very clear with this regard. Art. 796 (2) provides that bonds of consanguinity or affinity resulting from adoption as regards the relations between the adopter and the family of the adopted child and between the adopted child and the family of the adopter are set forth in title IV chapter 1 of the Civil Code. This implies that adoption creates consanguinal and affinal relationship between the descendants and spouse of the adopted child and the adopter.

As far as the Revised Family Code is concerned, it is arguable whether, in the absence of clear provision, the descendants and spouse of the adopted child are related with the adoptive parent by consanguinity and affinity respectively. It may, however, be said that as the purpose of adoption is to create an artificial filiation which takes after the natural bond of relationship, the descendants and spouse of the adopted child shall be related as if they were related to the natural parents of the adopted child.

9.4. Revocation of Adoption

Under the Civil Code, adoption once made may not be revoked for any reason. This provision seems to protect the adoptive family from fraudulent and arbitrary action of the family of origin. That is, where the adoptive parents opted for adoption particularly for financial reason (constraint) to up keep the child, they may later on change their mind after the problem is curbed. However, it is very much doubtful whether the stand of the Civil Code on this point accommodates the best interest of the child.

We have earlier seen that the working principle in adoption proceedings is the best interest of the child. Any decision concerning adoption should be based on the findings revealing the sustainability of the adopter in up bringing the adopted child. It goes with out saying that the same principle should operate after the adoption begins to have effect. In other words, where adoption fails to achieve its purpose, the best interest of the child requires the adoption be revoked or terminated.

The positive material facts gathered in respect of the personal, economic and social condition of the adopter which led the approval

of the adoption may later turn otherwise and jeopardize the well-being of the child. It may also be discovered that the consent of the natural parents, who were otherwise capable of raising their child, was obtained under duress or fraud. In such cases, a legal regime which purports to operate in the best interest of the child should devise a mechanism to neutralize the adverse effect of adoption on the child.

It is, thus, logical that an adoption should be revoked where it is against the best interest of the child. The problem is, however, what should be the reasons that lead the revocation of adoption. We may approach this problem from two perspectives. The first one is from the point of view of the natural parents right to request revocation due to, for example, change of physical or financial condition or lack of free and full consent to the adoption. The second way of approaching the problem is as to whether the adopter is handling the child properly or not.

Sometimes when the physical or financial condition of the natural parents are improved since the adoption they may apply to the court that the adoption be revoked. Whether this could be a ground to revoke adoption is not open to debate. In so far as their consent was given freely and truly the improvement in their family situation should not justify the revocation of adoption. Nevertheless, the situation may be different where their consent was obtained under duress or fraud. No doubt the natural parents should give their consent with out any influence. They may only be deprived of their consent with out any influence. They may only be deprived of their parental right, society of their child and their right to claim maintenance when, knowing the consequences of adoption, they give their consent. It seems then that consent obtained under duress or fraud should be a ground to revoke adoption.

One should, however, ask as to whether adoption may be revoked on the ground of fraud or duress where the child is comfortably placed and successfully assimilated in the adoptive parents. Well, we have now faced with choosing between the inalienable parental rights and the welfare and interest of the child. Which one should we give priority? The answer should, according to the writer's opinion, depend on the current financial and other family condition of the natural parents. Where the position of the natural parents afford the child, the same family milieu as the adopted child is now enjoying in his adoptive family, the adoption should be revoked on the ground of lack of free and true consent and hence, natural parent-child relationship shall resume. Otherwise the welfare and best interest of the child should prevail over the natural parents' right.

The other reason that may give rise to the revocation of adoption is the adopter's failure to take care of and up bring the child. Adoption may be revoked where the adopter failed to live up the minimum standards expected to raise a child or neglected his/her parental duties.

As mentioned earier, among our laws, the Civil Code surprisingly made adoption irrevocable for any reason. It totally avoids the possibility of rescinding adoption no matter how harsh the new family situation may be to the child. This puts the Code's principle behind adoption in to question. Some of the provisions of the Code dealing with adoption depicts that the best interest of the child should be a primary consideration in approving agreement of adoption. Noone

knows, however, why such principle does not extend to the post adoption situation of the child.

Where as, the Revised Family Code has permitted revocation of adoption in few exceptional situation although in principle it is forbidden (Art. 195). Art. 195 (2) provides that the court may revoke the adoption where the adopter instead of looking after the adopted child as his own child, handles him as a slave, or in conditions resembling slavery, or makes him engage in immoral acts for his gain, or handles him in any other manner that is detrimental to his future. This seems to aim at giving effect to the constitutional provision on the rights of the child and the obligation the country assumed under the convention on the rights of the child. The Code has, without prejudice to the generality of Art. 195 (2), however, over ruled other grounds of revocation of adoption we have discussed earier.

The last issue that should be raised in relation to revocation is the persons entitled to petition for revocation and the effect of revocation. The adopted child, the government organ authorized to follow the well-being of children, or any other interested person, may petition to the court for revoking the adoption (Art. 196 (1)). Where a petition is made to it by the aforementioned persons, the court shall, before summoning the adopter to appear before it determine whether the grounds for the petition are real and sufficient to warrant revocation. (Art. 19 (2)).

The revocation of adoption brings all the effect of adoption to an end. That means the rights and obligations of the adopted and the adoptive parents towards each other shall be extinguished.

Exercise

1. Assume that □A□, the husband, adopted a child before he married □B□. Now □B□ does not want to be the mother of the child who was adopted by her husband. What kind of relationship will there be between □B□ and the child? Why do you say so?
2. Consider that □A□ and □B□ are husband and wife. They had 10 children of their own. In addition to these natural children, they decided to adopt another child. Do you think the court would approve the adoption? Why or why not?
3. If a child is found abandoned and it is not known who the mother and the father are, who do you think will act as the guardian of the child if someone wants to adopt the child? Explain why you say so?
4. Why do you think the legislature lays down rule of irrevocability of adoption?
5. Why do you think is the law so strict in the adoption agreement of the child when the adopter is a foreigner.
6. Ato □X□ seriously seeks for a shepherd since there is nobody to look after his sheep for all his children are in school. He got a child to adopt from his neighbours to look after his sheep. If you are a judge, do you approve this adoption agreement? Why or why not?

CHAPTER TEN

OBLIGATION TO SUPPLY MAINTENANCE

Dear distance learner, this last chapter of the module can be taken as the continuation of chapter one of the same. As discussed in chapter one, one of the legal obligations whichemanate from family relationship is the obligation to supply maintenance. Under this chapter, we will raise and discuss issues relating to this obligation.

Generally, a student who successfully complete the study of this unit will be able to:

- Define the subject matter of obligation to supply maintenance;
- Enumerate the persons between whom the obligation exists;
- List conditions that must be fulfilled for the obligation to exist;
- State the reasons why a person loses his right to be maintained; and
- Elaborate as to how the obligation shall be executed.

10.1 Subject Matter of the Obligation

The obligation to supply maintenance is an obligation that exists between relatives where one of them is in need and not in a state of earning his livelihood by his work. In spite of the fact that family law restricts the existence of this obligation between specific relatives, broadly speaking, the obligation may arise from agreement, will or law. For example, in case of contract of donation, where the donor is in need, the donee is duty bound to supply maintenance (Art. 2458 C.C). Besides, in case of succession, the testator, in his will, may order

his heirs or legatees to provide a certain service from the property they recieived for one or more persons. (Art. 820 C.C) An obligation to supply maintenance can be included therein. Moreover Art. 2558 of the Civil Code provides that where the worker loses half or more of his capacity to work because of employment injury or disease, the employer shall supply maintenance to minor children of the worker. In rules of extra contractual liability, the tort feasor may be obliged to supply maintenance to the spouse and descendants of a person who died as a result of a mortal accident (Art. 2095 C.C). Although all the aforementioned ones are situations where by an obligation to supply maintenance may arise, our discussion will be restricted to the obligation to supply maintenance that exists between relatives as included in the Revised Family Code.

Art. 197 of the RFC, a provision providing for the extent of the obligation to supply maintenance, states as follows.

Article 197 Subject Matter of the Obligation

The person bound to supply maintenance under Article 198 of this code shall

supply to his creditor the means to feed, lodge, clothe, and to care for his health

and education, as the case may be, in a descent manner having regard to social

conditions and local custom.

Two points must be borne in mind. Firstly, the person who is obliged to supply maintenance is duty bound to providehis creditor with things that are necessary for the livelihood of the creditor including the means to feed, lodge, clothe and to care for his health and education. Since education became one of the basic needs in modern

life, it is included in maintenance. This is one area of departure from the Civil Code. From the reading of the preceding article, it is possible to say that the debtor (the one who is obliged to supply maintenance) is not bound to supply to the creditor things that would facilitate luxurious life. In addition to the basic needs of the creditor, the person who is bound to supply maintenance shall pay the funeral expenses of such person. (Art. 213 (1)). The person who has incurred such expenses may claim repayment from the debtor for maintenance. (Art 213 (2)).

Secondly, the extent of the obligation to supply maintenance shall be determined having regard to social conditions and local custom of the area in which the creditor lives. The application of these criteria may bring about variation in the type and amount of maintenance. The creditor who lives in the countryside may not claim to be given expensive clothes that are worn by fashion conscious young people of big cities. Art. 202 (2) is to the point in this regard. It provides that the amount of maintenance allowance shall also be fixed by taking in to consideration the needs of the person claiming it and the means of the person liable there to.

10.2. Persons Between whom the Obligation Exists

In chapter one and the introductory part of this chapter, it has been said that the obligation to provide maintenance exists between relatives. But this must be understood with due care to avoid unwarranted conclusion. That is, the obligations is not uniformly applicable to all relatives. Art. 198, taking into consideration the proximity of their relation, lists out persons between whom such obligation exists.

Article 198 Persons Between Whom the Obligation Exists

1) Without prejudice to the provisions of article 49 (1), an obligation to supply maintenance exists between ascendants and descendants, and between persons related by affinity in the direct line.
2) An obligation to supply maintenance likewise exists between brothers and sisters.

Sub-article (1) reveals that the obligation exists between consanguinal relatives in the direct line. Thus a person is under obligation to supply maintenance to all his direct relatives such as his father, mother, children, grand children, grand parents and great grand parents. In the collateral line, however, the obligation exists between brothers and sisters. Therefore, no person may be obliged to supply maintenance to his uncles, aunts, nephews, nieces and other collateral relatives. When we come to affinal relation, the obligation exists between all affinal relatives in the direct line. Thus a person is legally bound to supply maintenance to all ascendants and descendants of his/her spouse. The obligation will not totally arise between affinal relatives in the collateral line.

Dear student! what does the phrase without prejudice to the provisions of Article 49 (1) “under Art 198 (1) indicate? Art. 49 (1) mandatorily provides that the spouses owe each other respect, support and assistance. Since the spouses are legally required to support and assist each other, one of them must be obliged to supply maintenance to the other spouse where he/she is in need. For example, while divorce proceeding is pending the court, under Art. 82 (5), is expected to give appropriate order regarding the maintenance of the spouses. To put in short, the obligation to supply maintenance, in addition to relatives, exists between spouses as long as the marriage is not dissolved.

Despite the fact that the obligation to supply maintenance exists between relatives within the meaning of Art 198, the Code has envisaged exception with regard to relation created by agreement of adoption. As you may recall in chapter nine, the adopted child has two families; viz, family of adoption and family of origin. If we stick only to Art. 198, the adopted child may, as he wishes demand maintenance either from his family of origin or family of adoption. But when we read Art. 198 in conjunction with Art. 212 (1), such right is restricted. That is, the adopted child, his spouse and his descendants may not claim maintenance from the family of origin of the adopted child unless the adoptive family is not in a position to supply maintenance. This is because since the parental right of the family of origin is transferred to the adoptive family, the latter shall be responsible to supply maintenance to the adopted child. The relationship between the adopted child and the family of origin will not be totally terminated. Consequently, the family of origin shall be held liable to supply maintenance to the adopted child where the adoptive family fails to do so.

When we see the matter from the view point of the obligation of the adopted child, it is similar to the foregoing situation. That is, the adopted child shall not be bound to supply maintenance to the ascendants of the family of origin unless the latter can not claim maintenance from another member of the family. (Art. 212 (2)).

10.3. Possibility of Losing the Right to Claim Maintenance

Dear student, in the foregoing section, we have studied that the obligation to supply maintenance exists between certain group of

relatives. The existence of such relation will not, however, necessarily imply the existence of the obligation. There are times that the creditor would lose his right to claim for maintenance.

As shown under Art. 199, the obligation to supply maintenance shall not subsist between relatives by affinity unless the marriage which created the affinity is dissolved by death. The a contrari reading of this article discloses that the right to craim maintenance shall be lost between relatives by affinity where the marriage which created the affinity is dissolved by divorce, declaration of absence by the court and non-observance of minimum marriage conditions. Concerning the point at hand, Art. 199 of the RFC has departed from Art 809 of the C.C. Under the Civil Code, the obligation to supply maintenance between affinal relatives shall be lost only where the marriage which created the affinity is dissolved by divorce. Under the Revised Family Code, however, dissolution of marriage either because of declaration of absence by the court or non-fulfillment of essential requirements of marriage are taken as additional reasons to terminate the obligation to supply maintenance that prevails between affinal relatives. Dear student, how could you account for such difference?

In addition to above stated reasons, the creditor shall lose his right for maintenance where he has committed or attempted to commit criminal act on the life or property of the debtor, or of ascendants or descendants, or of the spouse of the latter. (Art. 200). Let us elaborate Art. 200 by way of example. The person who has the right to claim maintenance from you may lose his right if he kills you, your spouse, your ascendant or your descendant. The same will happen if he attempts to kill (e.g he shoots and misses) you, your spouse, your

ascendant or your descendants. Such person also loses his right of maintenance if he, for example, burns down your house, or poisons your father's cattle, or steels your son's money. The same will also happen if he simply attempts one of these crimes, without completing them. In general, Art. 200 included a limitation against a creditor who in bad faith commits or attempts to commit a crime against the debtor, his/her spouse and relatives. In law of succession, too, a person who commits similar action is regarded as unworthy to succeed the property of the deceased.

10.4. Conditions for the Existence of the Obligation and Its Execution

Basically, the right to claim maintenance emanates from a legal relationship between the claimant (creditor) and the person bound to supply maintenance (debtor) within the meaning of Art. 198. Nevertheless, it should be noted that not between all relatives under Art. 198 does the right and obligation exist. The right and obligation of maintenance may not therefore necessarily follow from the existence of a legal relationship between persons. This shows that the right does not co-extend to a any relationship although the latter is the basis of the former.

Therefore, to identity persons who qualify for the right, it seems essential to consider additional essential conditions for the obligation to exist. We can classify the conditions for the existence of the right of maintenance into two those attributable to the economic condition of

the creditor. (Art. 201) and those attributable to the economic position of the debtor. (Art. 202 (2)).

In connection with conditions attributable to the creditor, Art. 201 of the RFC provides that the obligation to supply maintenance shall not exist unless the person who claims its fulfillment is in need and not in a state of earning his livelihood by his work. For a person to claim maintenance, two requirements are attached under this article. Firstly, the person must be in need. That is, his basic needs such as food, cloth, shelter, etc are not fulfilled. Secondly, the person who claims maintenance is not in a state of earning his livelihood by his work.

But the phrase "not in a state of earning his livelihood by his work" in Art. 201 may raise a question; is it an actual incapacity to be engaged in whatever activity contemplated or does it also include potential inability to work and help oneself? By actual incapability it may mean the failure of a potentially productive and self – helping individual in being engaged in any income earning activity for reasons attributable not to his working ability but due to some other objective social and economic conditions. If the reference is of actual earning incapacity the benefit of maintenance will be limited only to those who are absolutely incompetent for work due to old age, minority etc. Such persons can not be engage in a gainful activity and help themselves and hence need maintenance. If the interpretation is widened so as to refer to both actual and potential ability to work, the probability of the existence of the obligation will increase as the group of beneficiaries may increase numerically. A boy of 21 is capable enough to work and help himself in all aspect. But for some objective reason, he may be living idle and expectant of assistance. A degree holder who does not have any kind of job is with full potential of working capacity.

However, in view of poor job opportunity, he may be in a state of situation where he needs the means of subsistence from others.

Whether the debtor is able first to support himself represents an essential condition for the existence of the obligation of maintenance. He is not required to provide his creditor with the means of subsistence at the expense of making himself destitute. The claim should not threaten the economic or material well being of the debtor. Hence, for a creditor have a viable of maintenance against his debtor, the latter must be economically better off.

Coming to the mode of payment of maintenance, we have two types. Firstly, the obligation to supply maintenance shall, as a rule, be fulfilled by means of maintenance allowance paid by the debtor to the creditor for maintenance. (Art. 202 (1)). The amount of such allowance shall be fixed by taking into consideration the needs of the person claiming it and the means of the person liable thereto (Art. 202 (2). It shall to the extent possible, be paid at a place convenient to the creditor (Art. 204). As indicated under Art. 203, the decision which fixed the amount of maintenance allowance or residence of the creditor for maintenance may be reviewed at any time upon the demand of the debtor or of the creditor.

As the maintenance allowance is believed to be extremely necessary for the survival of the creditor, it cannot be attached nor can it be assigned. For example, such person may be a debtor of another person. His creditor cannot attach the maintenance allowance. Also the creditor of this person cannot ask the maintenance allowance be assigned to him. Example, assume that X, a son pays maintenance allowance to his father Y. Y takes some money in loan from his friend Z to drink alcohol. Z can not ask X to assign the

maintenance allowance that is to be paid to "Y". Also "Z" can not attach the maintenance allowance paid to "Y".

This rule has an exception in the above example, assume that "Z" supplied "Y" things that are necessary for the livelihood of "Y". (For instance he supplied "Y" with food, or gave him medicine or gave money to pay house rent, etc.) In this case, "Z" has the right to require the assignment or attachment of the allowance that is going to be paid to "Y" (See Art. 205).

Article 205 Arrears (1) May Not be Assigned or Attached

1) The arrears of a maintenance allowance may not be assigned or attached.
2) Not withstanding the provisions of sub-article (1) of this article, they may, even before they fall due, be assigned in favour of institutions of assistance which provided for the needs of the beneficiary of the allowance.
3) The provisions of sub-article (1) of this article shall not apply regarding persons who have supplied to the beneficiary of the allowance what was necessary for his subsistence.

Another point worth considering is the fact that arrears of maintenance cannot be accumulated. To that effect Art. 206 provides that all arrears which have not been received or claimed within three months from their falling due shall cease to be due unless the creditor proves that such arrears were necessary for his subsistence. The law hold this position because if the creditor fails to take arrears of maintenance within three months from their falling due; the assumption is that the creditor is not in need of maintenance.

The second mode of fulfillment of the obligation to supply maintenance is by taking the creditor to the debtor's home. As we have seen above, the debtor should discharge his obligation of maintenance by providing the creditor with money. Yet when it is appropriate, he may also supply the creditor with necessities like food, shelter, clothe, etc in kind. In this respect, the law it self has made a clear exception in Art. 207 which supports the possibility of fulfilling the obligation through material provision. When the creditor holds that such a mode of fulfillment of the obligation will not be detrimental to the interest of the claimant, it may allow the debtor his creditor to his house and provide him with food, lodging etc. (Art. 207 (1) (2). Nevertheless, the debtor for maintenance may never be compelled to take his house the person entitled to claim maintenance (Art. 207 (3)).

Before concluding the discussion in this sub section, let us raise one important question. That is, can a creditor claim a lump sum payment when maintenance is to be paid in terms of money? Though the law does not have a ready made answer to the question posed, it can be argued in the negative. Which means, maintenance allowance shall be paid periodically. This is because if the payment of maintenance allowance is effected in lump sum, the creditor after finishing the money may be exposed to problem. This argument is also supported by Art. 206 which prohibits accumulation of arrears of maintenance allowance. Besides the debtor and the creditor cannot validly agree because all maintenance provisions are mandatory that can not be set a sided (Art. 214).

10.5. Plurality of Debtors

A person may be related to more than one individual either consanguinally or affinally. As a result, this individual is legally

entitled to demand maintenance from those persons with whom he is related. Where several persons are liable to supply maintenance to a creditor of maintenance, the latter may claim maintenance from any one of such persons. (Art. 208). Art 208 gives the creditor of maintenance in that he can claim the maintenance from any debtor whom he thinks is in a better financial position without due regard to the degree of relationship. In view of the fact that maintenance claim is urgent in nature, enabling the creditor to demand a creditor of his choice seems to be persuasive.

Where several persons are liable to pay maintenance, the debtors who have paid the allowance shall have recourse against those who have not paid their shares. (Art. 209 (1). Where a dispute arises between the debtor who paid the maintenance and other relatives of the debtor who have not paid their shares, the court may condemn the latter to repay the whole or part of the allowance, taking into account their means and their degree of relationship by consanguinity or by affinity with the person claiming maintenance. (Art. 209 (2)).

Even a distant relative may be obliged to pay the maintenance by the mere fact that he is in a better positioned relative to other debtors. But in order to decide a relative up on whom the ultimate burden rests, there is an order of precedence that we have to adher. Read Art. 210 RFC).

Article 210 □ (3) Order of Debtors

The persons who are liable to supply maintenance under Article 198 of this code shall finally bear their liability in the following order:

a) in the first place, the spouse;
b) in the second place, the descendants, according to their degree;

c) in the third place, the ascendants, according to their degree;
d) in the fourth place, the brothers and sisters;
e) in the fifth place, the descendants by affinity, according to their degree;
f) in the sixth place, ascendants by affinity, according to their degree.

Here, it must be borne in mind that the debtors for maintenance may validly agree, as regards their reciprocal relations that maintenance shall be supplied to their common creditor by one of them (Art. 211 (1)). If the creditor for maintenance has adhered to such agreement, he may not make a claim against the other debtors to obtain maintenance unless he has a serious reason for not respecting such agreement (Art. 211 (2)).

Exercises

1. If your brother needs some money to pass the night in night club with famous singers and dancers, can he claim the money from you under the title of the obligation to supply maintenance? Why or why not?
2. According to Art. 199 RFC , if a marriage is dissolved by divorce, the husband would not be obliged to supply maintenance to the ascendants and descendants of his ex-wife, nor would the ascendants and descendants of such lady be

obliged to her ex-husband. The same is true for the wife. Why do you think has the legistature included such a rule in the law?

3. Who is a person in need of maintenance and not in a state of earning his livelihood by his work within the meaning of Art. 201?
4. Is there any possibility for the adopted child to claim maintenance from his family of origin?