UNIVERSITY OF KWAZULU-NATAL, PIETERMARITZBURG

EXAMINATIONS: NOVEMBER 2011

SUBJECT, COURSE AND CODE: LEGAL DIVERSITY (LAWS3LD)

DURATION: 3 HOURS + 15 minutes reading time  TOTAL MARKS: 60

External Examiner: Professor IP Maithufi
Internal examiner: Ms M Mamashela

STUDENTS ARE REQUESTED, IN THEIR OWN INTEREST, TO WRITE LEGIBLY.

PLEASE NOTE: This paper consists of (10) pages. Please see that you have all the pages.

INSTRUCTIONS:

1. Answer THREE questions.

2. Tick the appropriate answer.

3. Multiple choice questions must be answered on the question paper. Other questions must be answered in the answer book provided.

4. You must hand in both this question sheet and the answer book at the end of the examination.

STUDENT NO: ______________________

SIGNATURE: ______________________
Question 1 (20 marks)

Ntombenhle and Nxabulela lived together for 25 years; they were not married. Two children were born of the relationship, Thamsanqa a boy (20 years old) and Makhosazana, a girl (16 years old). Nxabulela bought land at Kwa Machibisa, a ‘township’ 10 kilometers out of Pietermaritzburg. He and his partner contributed towards the construction of a four-roomed house on the land. Nxabulela died last year and was survived by his partner and the children.

Soon after Nxabulela’s death, his brother Mahlalela invoked the provisions of Section 23 of the Black Administration Act 38 of 1927 which deals with succession to and administration of deceased estates of black persons and Regulation 2 of the Regulations in respect of the Administration and Distribution of the Estates of Deceased Blacks, published under Government Gazette No 10601 dated 7 February, 1987. He claimed that he was the intestate heir of his deceased brother by virtue of Zulu customary law and was entitled to inherit his land and house. He asserted that since Thamsanqa and Makhosazana were unmarried, they were minors under customary law and claimed their guardianship and custody.

(i) In light of section 9 of the Constitution (the equality clause), is Mahlalela’s interpretation of the law correct? (10)

(ii) Is Ntombenhle entitled to any portion of the estate? (10)

Discuss. Support your answers with relevant case law.
Question 2 (20 marks)

2.1 Which of the following statements are correct?

i. In the case of Fosi v Road Accident Fund and another, 2008 (3) SA 560 the plaintiff, the wife of the deceased sued the Road Accident Fund for support for herself and her children.

ii. The first defendant’s defence was that under customary law, a husband did not owe the plaintiff, his wife a duty of support. That duty fell on the deceased’s father, the plaintiff’s father-in-law.

iii. The court observed that the plaintiff’s income was sufficient and adequate to sustain her and give her dignity she deserved; consequently, she did not need support from the estate of the deceased husband.

(a) Statement i only
(b) Statement ii only
(c) Statement iii only
(d) Statement i, ii and iii
(e) None of the above (2)

2.2 Which of the following statements are correct?

i In the case of Hassam v Jacobs NO and others 2008 JOL 22098; 2009 (5) SA 572 (CC) the deceased, Ebrahim Hassam, was married to two wives, one according to Muslim private law rites and the other according to civil law.

ii. In the same case the applicant instituted proceedings in which she asked the court to declare that she was, in terms of the Intestate Succession Act 81, 1987 ‘a spouse’ of the deceased as well as his ‘survivor’ in terms of the Maintenance of Surviving Spouses Act 27, 1990.

iii. In the same case, the court held that only the third respondent, Miriam Hassam was the ‘spouse’ and ‘survivor’ of the deceased.
2.3 Which of the following statements are incorrect?

In the case of Gumede v President of Rep of SA & others 2009 (3) SA 152 CC

The High Court declared the following legislative provisions that regulate the proprietary consequences of a customary marriage as being inconsistent with the Constitution and invalid:

i. Section 6(1) of the Recognition of Customary Marriages Act (RCMA which provides that the proprietary consequences of a customary marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.

ii. The inclusion of the words “entered into after the commencement of this Act” in section 7(2) of the RCMA provides that a customary marriage entered into after the commencement of the RCMA is a marriage in community of property subject to a number of exceptions which are not, for present purposes, relevant.

iii. Section 22 of the KwaZulu Act on the Code of Zulu Law (KwaZulu Act) provides that the family head is the owner of and has control over all family property in the family home.

   a) Statement i only
   b) Statement ii only
   c) Statement iii only
   d) Statement i, and iii
   e) None of the above (2)
2.4 Which of the following statements are incorrect?

i. In the case of **Bhe v Magistrate, Khayelitsha & others 2005 (1) SA (CC) 580**, the father of the deceased was appointed a representative and sole heir of the deceased’s estate in accordance with s 23 of the Black Administration Act 38 of 1927.

ii. In the same case the court held that the deceased’s partner was entitled to inherit the whole estate and both children of the deceased could not inherit their father’s estate because they were born out of wedlock.

iii **In Shibi v Sithole and others**, Ms Shibi was in terms of s 23 of the Black Administration Act 38, 1927 precluded from inheriting from her deceased brother’s intestate estate, a customary rule that the court confirmed.

(a) Statement i only
(b) Statement ii only
(c) Statement iii only
(d) Statement i, ii and iii
(e) None of the above  

2.5 Which of the following statements are correct?

i. A marriage in traditional customary law was a creation of a lifelong bond between the bride and the groom only; their respective families did not take any part in the marriage negotiations and celebrations.

ii. A marriage in other cultures for instance, African and Islam is potentially polygynous in that a woman may contract a second or third marriage during the subsistence of the first one.

iii. A woman who is married out of community of property excluding the husband’s marital power does not have full legal capacity.

(a) Statement i only
(b) Statement ii only
(c) Statement i and ii only
(d) Statement i, ii and iii
(e) None of the above  

2.6 Write a short note on the Common Fund in the Joint Hindu family. In the note, you must define it; who owns it; who must contribute to it and how much? Who does it belong to and how is it shared on the death of a member. Is a non-contributing member of the family entitled to any share of the fund? Does such a fund exist in African customary law or its equivalent? (10)

Question 3 (20 marks)

Sipho impregnated Thandiwe in June 1995 whereupon his father and uncle went to her home to acknowledge the delict and paid 6 head of cattle for seduction damages. Sipho’s representatives were received warmly by Thandiwe’s family. Thandiwe gave birth to a baby boy in February 1996. Subsequently, both families agreed that the ‘children’ marry. A further agreement was reached on the amount of ilobolo to be transferred from Sipho’s family to Thandiwe’s though none was transferred at the time. After these negotiations Sipho and Thandiwe lived together as husband and wife. Thandiwe gave birth to another child, Nozipho.

In 2000 Thandiwe heard that Sipho had married a woman by the name of Belina in 1990, according to customary rites, and was not divorced from her. In a rage, Thandiwe left Sipho and went back to her home taking both children. She has come to you for legal advice. She would like you to answer the following questions.

a) What were the old/traditional requirements for the formation of a valid customary marriage? Cite a relevant case. (5)

b) Did The Recognition of Customary Marriages Act (RCMA) 120, 1998 change them? Explain. (5)

c) The RCMA prescribes a procedure that a man who wishes to marry a second wife must follow. Write a short note on the procedure. (5)

d) What is the legal status of her marriage to Sipho? Discuss. (5)
Question 4 (20 marks)

4.1 Which of the following statements are incorrect?

i. In the case of Zulu v Zulu 2008 (4) SA 12, the applicant alleged that her marriage to the deceased was not bigamous and was in community of property; she applied for an order awarding her a one half share of the deceased’s estate.

ii. In the same case, the court observed that where a couple was married in community of property, they could, during the subsistence of the marriage and by agreement, divide the estate in such a way that their assets become separate property of the individual spouse.

iii. The court further held that the essential elements of a universal partnership were: that each of the partners brought something into the partnership; that the business would be carried on for the joint benefit of both parties; that the object would be to make profit and that the contract between the parties was legitimate.

(a) Statement i only
(b) Statement ii only
(c) Statement iii only
(d) None of the above
(e) Statement i and ii

4.2 Which of the following statements are correct?

i. In Amod v Multilateral Motor Vehicle Accident Fund 1999 (4) SA 1319, the plaintiff sued the defendant for the dependant’s action. She had to prove that the deceased had a duty to support her; the duty was legally enforceable and that her right to support was worthy of protection by the law.
ii. In the same case, the widow’s dependant’s action failed because according to the judge, the widow’s marriage to the deceased was not recognised by law.

ii. The same case held that *Ismail v Ismail 1983 (1) SA 1006 (A)* was still law in South Africa as there was no statute recognizing marriages contracted according to Muslim private law rites.

   (a) Statement i only
   (b) Statement ii only
   (c) Statement iii only
   (d) None of the above
   (e) Statement i and ii

4.3 Which of the following statements are correct?

In the case of *Gumede v President of Rep of SA & others 2009 (3) SA 152 CC*, Moseneke DCJ observed that:

i. In our pre-colonial past, marriage was always a bond between families and not between individual spouses. Whilst the two parties to the marriage were not unimportant, their marriage relationship had a collective or communal substance.

ii. He noted that the Recognition of Customary Marriages Act, 120 of 1998 is inspired by the dignity and equality rights that the Constitution entrenches and the normative value systems it establishes. It is also necessitated by our country’s international treaty obligations, which require member states to do away with all laws and practices that discriminate against women.

iii. Furthermore, the adaptation of customary law serves a number of important constitutional purposes. Firstly, this process would ensure that customary law, like statutory law or the common law, is brought into harmony with our supreme law and its values, and brought in line with international human rights standards. Secondly, the adaptation would salvage and free customary law from its stunted and deprived past. And lastly, it would fulfil and reaffirm the historically plural character of our legal system, which now sits under the umbrella of one controlling law – the Constitution.
4.4 Which of the following statements are correct?

i. In the case of Zondi v President of the RSA 2000 (2) SA 392, the applicant Ntombizetha Zondi and the fifth respondent Violet Dlalisa were the legitimate children of the deceaseds, Simon Ngidi and Beauty Ngidi.

ii. In the same case, the court explained that the principle of primogeniture meant that illegitimate children could not inherit from their biological parents.

iii. The court further pointed out that the fact that the illegitimate children of a man married in community of property were entitled to inherit from his estate and those of a man married out of community of property could not was grossly discriminatory.

(a) Statement i only
(b) Statement ii only
(c) Statement iii only
(d) None of the above
(e) Statement i and ii
(f) All the above (2)

4.5 What is the difference between dowry and bridewealth? Discuss. (4)

4.6 How does the definition of the inquisitorial procedure differ from the definition of the accusatorial procedure? (8)
Question 5 (20 marks)

Shariff Mahomed, a Muslim man is married to one wife, Fatima. They have two children: a son; Jabbie aged 20 and daughter Ayesha 14 years old. Mahomed runs a very successful business and is very rich. He owns and administers the family business. Fatima works in the family business although she does not get a monthly salary. She has access to the money generated in the business and uses it to buy household necessaries and whatever she and the children need.

Mohamed is killed in a car accident. The family agrees that Jabbie steps into his father’s shoes to run and manage the business. Fatima thinks that as she has been involved in running the business from its inception, she should take over its management. Besides, Jabbie does not have business acumen and she suspects the business will soon be bankrupt under his management. Fatima is also of the view that if she is not allowed to manage the business she should get her share of the estate and maintenance. She has come to you for legal advice and would like to get answers to the following questions.

(a) Is she legally entitled to a half share of the estate/joint community? Cite relevant case law. (10)
(b) Is she entitled to maintenance from her deceased husband’s estate? (5)
(c) Are the children Jabbie and Ayesha entitled to any portion of the estate? (5)

Question 6 (20 marks)

i. State and discuss five advantages of the Traditional Courts. (10)

ii. Do you agree with all the criticisms leveled against the Traditional Courts in the Discussion Paper 82 Project 90 on The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Functions of Traditional Leaders May, 1999? Discuss. (10)