

## ProBono.Org Durban's Appreciation Day 2018

By Shamika Dwarika



The Durban office of ProBono.Org hosted its third annual Appreciation Day on 20 April at Howard College, University of KwaZulu-Natal. The occasion is an opportunity for us to thank the attorneys who have given generously of their services on a pro bono basis, as well as expressing our gratitude to some of our partners. Several legal practitioners received

certificates for their outstanding pro bono work. Mr Ravin Jankhi, the storyteller MC, got into the spirit of the event and rendered his services on a pro bono basis. The event saw the Judge President of the KZN High Court, Judge Jappie, give a motivational keynote address. The main sponsor for this year's event was LexisNexis. ●

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# Mediation at ProBono.Org

By Swazi Malinga

**As part of our service to the community, we offer pro bono mediation.** We have a panel of qualified and dedicated mediators who are readily available to assist our clients. In the family law context, we offer mediation to parents of minor children, often parents who are not married to each other, who cannot decide on a workable co-parenting arrangement. A mediator tries to assist them to enter into an agreement that they are happy with and that will promote the best interests of their minor child. The parenting plan will deal with the care and contact of the child, which will include visitation schedules and primary residence, and in some instances the parents may even agree on the religion the child should follow. An important factor is that of maintenance, which is often an issue in dispute between parents. To clients getting divorced, we offer mediation of settlement agreements which will also incorporate a parenting plan. This allows the divorcing parents to decide and negotiate their own terms and conditions.

Mediation can be challenging because many people still believe that going to court is the best and only

way of resolving disputes. Some clients do not regard mediation as a legal process, do not take it seriously, and fail to turn up on the day of the mediation session. Our task therefore also entails creating awareness about the importance and benefits of mediation. We conduct workshops in communities to explain that mediation is much cheaper and has the ability to resolve disputes speedily, rather than engaging in lengthy and costly litigation. However, our problems don't end there, as we also face some degree of resistance from our colleagues in the legal profession, who may be representing the other party, and reject a suggestion of mediation as they fear losing out on their fees. We are pro mediation, as it provides a safe ground for the parties and all discussions that take place during the sessions are confidential and thus cannot be used in a court of law save for the final written agreement by the parties. We are mindful that not all disputes can be mediated, but feel that clients should be offered this option. If more legal practitioners encourage mediation, more clients and the community at large will take mediation seriously and regard it as an effective alternative dispute resolution. ●

# May ProBono.Org obtain legal representation for a child for litigation purposes without the consent of the parent/guardian or the court?



By Elsabe Steenhuisen

**In short, the answer is “yes”. The reasoning, with reference to case law, follows below.**

## **1. What does the Common Law state?**

The Common Law position is that children below the age of seven are infans and cannot act. A curator or a guardian has to act on behalf of the child. If children are over the age of seven, but under 18, they must be assisted either by a curator or their guardian. If the guardian is not available, the court must appoint a curator on motion proceedings.

## **2. Did the case law change this position?**

Yes, by a gradual process, which is still developing. In 2000, in the Christian Education South Africa case, the court held that in a case concerning children, their “actual experiences and opinions would not necessarily have been decisive, but they would have enriched the dialogue, and the factual and experiential foundations for the balancing exercise in this difficult matter would have been more secure.”

In 2003 in the Soller case the court appointed a legal representative for the child, to whom the child gave instructions directly and without assistance of a guardian or curator ad litem.

In 2008 the court in the Pillay case remarked that the need for the child’s voice to be heard is perhaps even more acute when it concerns children mature for their age, who should be increasingly taking responsibility for their own actions and beliefs.

In 2009 the Legal Aid Board acted for a 12 year old girl. The court ruled that the Board did not need to obtain consent of either the court or the child’s guardian to represent a child. This was confirmed further in 2011 by the Supreme Court of Appeal when the Board acted in the Four Children case, and in 2012 in the Brossy case.

## **3. What does the legislation require?**

The Child Justice Act merely requires “a parent/guardian/other suitable person” to assist child offenders who instruct their legal practitioners themselves. The Children’s Act allows representation of a child without a guardian. Some magistrates in the Children’s Courts require an application by the legal practitioner to allow the child to be represented.

The Divorce Act allows the court to appoint a legal practitioner to represent a child at the proceedings and may order the parties or any one of them to pay the costs of the representation.

Section 28(1)(h) of the Bill of Rights

provides that: “Every child has the right to have a legal practitioner assigned to the child by the state at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise occur”. In the Van Niekerk case in 2005 the Centre for Child Law was allowed to apply ex parte for the appointment of a legal representative in terms of s28(1)(h) for two girls, without their guardian’s consent. ProBono.Org agrees with the Centre for Child Law that this section does not preclude registered legal organisations to secure legal representation for children. Section 28(1)(h) does not give the state exclusive rights in this respect.

In conclusion, if any person (who qualifies in terms of the means test) approaches ProBono.Org for assistance, we will obtain representation without the guardian’s permission, and if necessary the legal practitioner will obtain the court’s permission to act on behalf of the child, because we interpret the current state of the law as not to limit a child’s right to legal representation.

We acknowledge Professor Ann Skelton of the Centre for Child Law, who dealt with this issue during a ProBono.Org breakfast on 18 October 2017, and thank her for the notes she made available for use by ProBono.Org. Full case references are available on request. ●

# Attorney Profiles

## Delia Jay

Durban attorney Delia Jay recently concluded a very interesting family law matter. When the client came to us at the pro bono desk, she had been



turned away by everyone and told there was nothing that anyone could do to help her get divorced. She needed to get divorced as she had a new partner with whom she had had a child. The client's husband was a Nigerian and he left South Africa 15 years ago. Despite client's efforts, he could not be located.

Delia contacted a tracing agent to do a search for the husband, but he could not be found. In the end, Delia had to make an application for substituted service to get an interim order on affidavit stating that she could advertise in Canada, where client had last received a phone call from her husband in 2002. The order was granted and **Delia personally raised the money to advertise in the Toronto Star, which was about R10 000 because of the poor exchange rate. (\$1000 Canadian dollars).** Delia advertised and the court finally agreed to set the matter down.

There were many delays, largely because dealing with the Durban Regional Magistrate's Court, trying to get documents issued and a court date granted were very challenging. At times Delia felt like she was on a lone crusade and wanted to give up. It was also time consuming, as being a sole practitioner she had to attend to everything herself, including indexing and paginating, and making sure her file didn't get lost. The magistrate eventually heard the matter on 10 April 2018 and granted the divorce. Delia feels a great deal of satisfaction in having finally achieved a happy result for the client so that she can move on with her life and her family.

## Chrysi Kripos

Chrysi Kripos is an attorney practising in her own firm in Johannesburg. She is a conveyancer who has been in practice for 34 years.



The ProBono.Org Deeds Office help desk opened its doors at the Deeds Office in Johannesburg in June 2017. Chrysi has been part of the help desk since then. Chrysi says that she loves helping people who cannot afford legal services and that attending the help desk is the highlight of her week.

Chrysi has assisted clients with property transfers, donations, correction of names in the title deed, transfers from deceased estates, drafting of wills as well as section 17, 45 and 93 registrations.

Chrysi gets really frustrated when she is unable to assist clients. She feels that the help desk needs more qualified attorneys to assist with clients' problems due to the number of people seeking help and that more days should be allocated in order to assist the indigent.

Some of the challenges include consulting with clients who coerce their elderly parents to make transfers in their favour. The consulting attorney has to ask the relevant questions in order to determine whether the transfer is in good faith and that the elderly parents are aware of the legal implications. Another challenge often encountered is the transfer of property from household permits to a title deed in terms of the Conversion of Certain Rights into Leasehold or Ownership Act. This has resulted in many clients seeking legal assistance at the help desk in order to reverse property transfers. Many of these transfers have divided families and it is unfortunate that many people still do not know about an Act that affects their lives so profoundly.

## Portia Tsele, our latest Johannesburg intern

We welcomed Portia to the team in May and she is working with the Housing, Refugee and Community Advice Office unit.



She has an LLB from UNISA and is working towards an LLM in Property Law with the same university. She began her journey with ProBono.Org as a volunteer. Her reason for studying law was to give her the opportunity to help people. Working at ProBono.Org as a legal intern extends the reach of her charitable nature and enables her to assist the vulnerable and indigent members of our society.

Outside of work she is a member of the Catholic Women's League and engages in their social welfare activities such as child adoption.

Portia hopes that her continued passion for assisting the marginalised and vulnerable in society helps her to make a meaningful contribution to the legal fraternity. ●

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