Legal Aspects of Palliative Care

WORKSHOP TRAINING

– STUDENT GUIDE –

3rd edition

HPCA care & support
Hospice Palliative Care Association of South Africa

OPEN SOCIETY FOUNDATION
FOR SOUTH AFRICA

Legal aspects of Palliative Care

WORKSHOP TRAINING –STUDENT GUIDE

Introduction

In 2012, a second edition of the HPCA manual, *Legal Aspects of Palliative Care*, was published. Following this, workshop trainings started in 2013 in Western Cape and later in Gauteng.

The aim of the manual and subsequent training is to highlight the need of hospice clients and families to access legal information and assistance at times and to create awareness of legal pain as one possible aspect of total pain in the context of illness. Legal pain refers to a client's worries about legal matters which have not been attended to.

The training is offered for palliative care staff and legal practitioners, and can also benefit the staff of other organisations working with families, children, the elderly, the marginalised, and staff in hospitals and clinics.

In order to equip staff to meet this need, specific training is offered. Very often, social workers and social auxiliary workers will be the ones providing this service; in other situations it will be professional and staff nurses who are the first to recognise the need for legal information and assistance.

We have been fortunate in having support from Legal Aid during workshops,with a lawyer from a branch closest to the venue attending each session and hope to have continued support from this important legal body.

The team offering the workshop comprises the co-ordinator, employed for legal matters at HPCA, a university law lecturer and a trainer in palliative care. See summarised CVs of the three co-facilitators at the end of this guide.

Thank you for attending this workshop and so demonstrating your interest in providing the best possible service to those in their time of need.

We also thank our funder for supporting this work.

Throughout this Guide, LM stands for Law Manual, *Legal Aspects of Palliative Care* 2012 and the page number is given. Eg, LM:3.
LG stands for the Learner Guide. Eg. LG:12 (page 12 in this Guide.)

Legal Aspects of Palliative Care 2012 can be found online at:
www.hpca.co.za/category/law-manual.html

Aim of the Workshop To develop, in an ethical framework, knowledge of those legal aspects which could benefit clients and their families

Objectives By the end of the training, students will have some understanding of legal knowledge and of how to use the law, which they can share for the benefit of their clients. Students will be prepared to offer aspects of the training to other staff at their places of work, whilst liaising with HPCA representatives. Students who run their own sessions in the post-training period, should invite Legal Aid practitioners to participate in sessions where possible.

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Day 1

Introduction to the Training:

Hospice staff work collectively to resolve problems, up until now the missing link has been legal expertise. This training is an opportunity to rectify this for the benefit of patients and families.

By the end of this training your legal awareness will have increased, but you also will have new contacts in a number of services, including legal services. Don't miss out on the networking opportunity this training session offers! Get together in the breaks and in the evening, swop contact details and perhaps make plans to meet in the future.

The training is participative and students are encouraged to share relevant work experience.

9.20–9.40 Icebreaker Exercise:

International Law, the South African Constitution, Palliative Care and Ethics 20 min
The following exercise is both for learning and for meeting each other.

Space for your own notes (on the Icebreaker or anything else)

By the end of this exercise each group will be holding cards with the same right, but each right exists in a different sphere/category (ie the same right under international law, SA Constitution, and in palliative care). One group will be holding children's rights in these categories, and the last group will be holding cards that explain limitations on rights across the 3 categories.

Students are referred to LM:3. Students may notice the table below includes the additional items of children's rights & limitations on rights; these items were not included when *Legal Aspects of Palliative Care* was published in 2012.

ANSWER TO THE ICEBREAKER EXERCISE

Green – International Law	**Red – The SA Constitution**	**Blue – Palliative Care**
Right to life (UDHR)	Right to life (Section 11)	Calls for recognition of patient's rights, including the patient's right to **Quality of life** and recognition of the whole person
The right to be free from **torture** (UDHR)	Right to freedom & security of person including the right **not to be tortured** and **not to be treated** or punished in a cruel, inhuman or degrading way. (Section 12)	Calls for patient's right to access palliative care and pain control
No one shall be subject to cruel, inhuman or degrading **treatment** (UDHR)		Alleviation of human suffering
The right to be free from **slavery or servitude**	Everyone has inherent **dignity** and the right to have their dignity respected and protected (Section 10)	Palliative care respects the **dignity of patients & family** members regardless of stage of illness or any other consideration.
UN Convention on the Rights of the **Child**	Every **child** has the right to … (a) … (b) … (c) Basic nutrition, shelter, basic health care and social services (Section 28)	Calls for the **child's right to palliative care** (active total care of the child's body, mind and spirit) and calls on health providers to evaluate & alleviate a child's physical, psychological and social distress.
Rights under International Law are not absolute	Rights in the Constitution are not absolute, and **may be limited** generally if the limitation is reasonable & justifiable (Section 36)	Access to palliative care is **limited** by the extent of the service, by capacity and by territory.

10.15 - 10.20:

The facilitator introduces the topic of Access to Care, linking it with human rights and ethics. Students are asked to read the case study below, which is found on page 72 of the law manual.

Case Study **LM: 72**

I went to see a patient in a township; he was referred to me by a concerned neighbour. He had a small shack between two low cost houses.

He was lying on a mattress outside in the sun. He lived with his mother, who was an informal trader – selling sweets outside a local school. She left a cup of water and a plate of porridge, covered with a plate, in the shack for him. When I arrived it was about 10.00 and the food and water were untouched.

He tried to sit up to greet me, but was groaning with pain and grimacing. I told him to lie down. After a chat, I learned that he had been a long-distance driver and had contracted HIV. He learned of this 11 months before, but had never attended a clinic or hospital.

He complained of diarrhoea, and severe abdominal pain and headaches. On clinical examination, he was emaciated, dehydrated, and his abdomen was swollen and tender to touch. He was unable to walk without assistance. He said he waited for his neighbour if he needed to go to the toilet, although I noticed that the mattress was soiled. His voice was strained and he battled to talk. He had Panado tablets from the clinic, which his mother had obtained for him; which were not helping.

Without intervention and ARV medication, it was clear to me that this man would die. The most difficult thing to witness was the extreme pain he seemed to experience. Advice was given to the neighbour regarding hygiene and managing the diarrhoea. Nutritional advice was also given to improve his physical condition; his mother appeared to care for him, and tried her best to keep him comfortable in her absence. What he needed urgently was pain control and admission to hospital, because it was also urgent that he start on ARVs.

I had to travel back to the office to consult a doctor telephonically for a script for pain medication. The doctor was unavailable. The next day, when I spoke to the doctor, he was unwilling to supply anything stronger than Brufen, without seeing the patient, and was unwilling to travel to the patient's home.

I travelled out to the patient again, arming him with a referral letter to the government hospital. I also gave him travel money from hospice.

The following week, at the home visit, the patient was not there. The neighbour came out to greet me. The patient had passed away on the week-end. He had not been able to make the trip to the hospital; they had tried taking him to the taxi rank in a wheelbarrow, but he cried with every bump, so much so that they carried him home even before reaching the rank. The neighbour had been with the patient and his mother throughout the last two days.

She said he groaned a lot and didn't want anyone to touch him because his whole body hurt so badly. In the last few hours, he became still and unresponsive (possibly a coma), and then had taken a deep breath and died. I knew that had I had morphine syrup, I would have been able to relieve him of some if not most of his pain. The agony he and his mother and neighbour went through are unimaginable, and could have been prevented if only I could have given him something stronger for his pain. I felt hopeless and deeply saddened by this case. I have seen a number of cases similar to this, and every time I wonder, am I really helping at all?

You can use this space to copy answers from the flipchart or to make your own additional notes.

10.45 – 11.10 TEA

11.10 – 11.55 Feedback from the Groups on the Access to Care questions

11.55 – 12.00 Discussion about Patient Support Groups and Networking (see LM: 98-99)

Space for your own notes

12.00 – 13.00 Children and the Law

What if the person in the Access to Care case study had been a child?

Space for your own notes

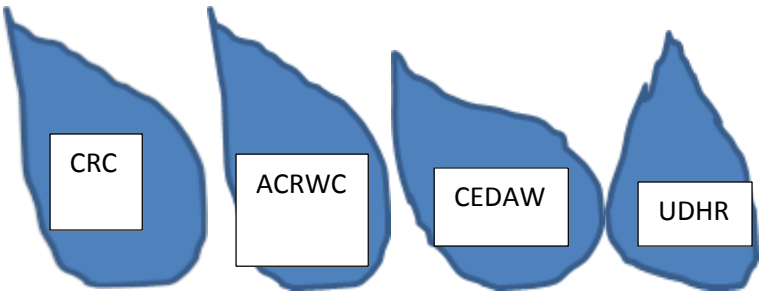
12.25 – 12.30

Linking Children's Rights which are protected at international level and in South African Law

The facilitator introduces the concept of a link between children's rights which are protected at international level and in South African law.

The facilitator puts up coloured paper shaped as raindrops and explains that each rain/teardrop is an international instrument (convention/treaty) protecting the child. Asks students if they know names of any international instruments protecting children.

The facilitator will draw raindrops for the different international rights to look like this…



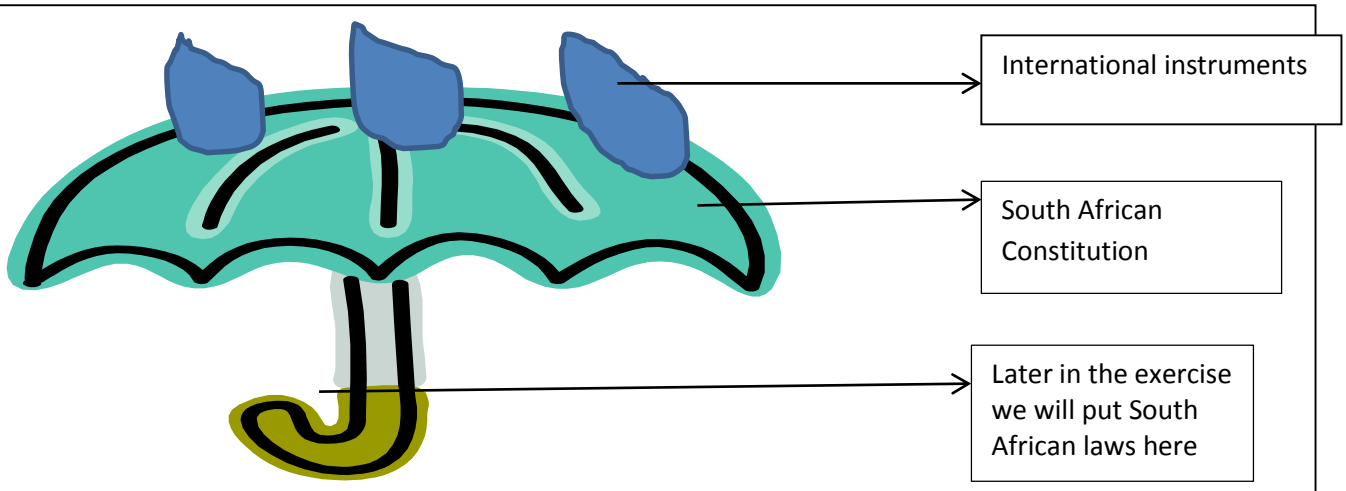
Facilitator will explain acronyms e.g.

UNCRC:	United Nations Convention on Rights of the Child 1990
ACRWC:	African Charter on Rights and Welfare of Child 2000
CEDAW:	Convention on the Elimination of Discrimination against Women
UDHR:	Universal Declaration of Human Rights

Below the raindrops will be an umbrella.

Students can use this space to draw their own umbrella, raindrops or write additional notes

The completed diagram will look like this . ..



The umbrella represents the South African Constitution.
The Constitution is the highest law in South Africa and all other law, international and South African legislation has to comply with the Constitution.

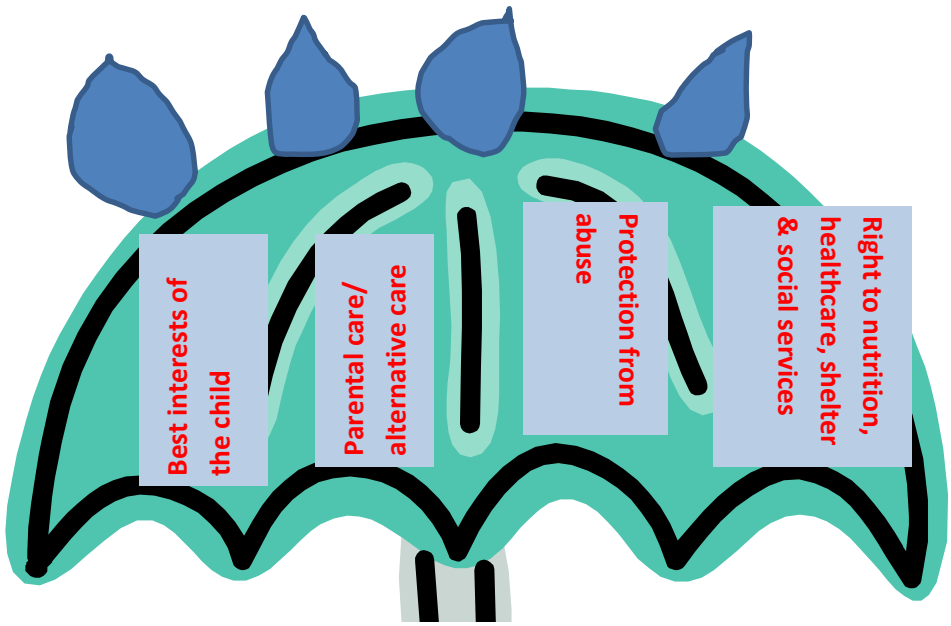
How does the Constitution link with international law and national law?

The CRC (an international instrument) has foundational values of: survival, protection, development, participation. The yardstick or measure of these values is the best interests of the child. This is fundamental to the CRC. Government and everyone *has* to comply with the best interests of the child. The Constitution reflects the same values of the CRC in Section 28. Section 28 states that in every case, the best interests of the child should be considered.

The facilitator writes the themes from Section 28 (best interests, parental care, protection from abuse, right to nutrition, health care, shelter & social services) vertically down each spine/segment of the umbrella as shown on the next diagram.

Space for your own notes

Step 3 – completing the diagram – What goes under the umbrella to protect children?



Facilitator asks:
What South African law under the Constitution protects children?

Under the umbrella are laws such as:

- Children's Act 2005 as amended
- Children's Amendment Act 2007
- Child Justice Act 2008
- Domestic Violence Act 1998
- Sexual Offences Act 2009
- case law (court judgements/legal precedent)
- common law (Common law is mainly the Roman-Dutch law that came to the Cape. When an issue is not governed by legislation, common law usually applies.www.justice.gov.za/policy/african%20charter/afr-charter02.html)

So when the drawing is finished it will have the following information in this order:

Raindrops above the umbrella to represent CRC, CEDAW, UNHR, ACRWC.

The umbrella represents the S.A. Constitution – with words written down the spine/segments of the umbrella to represent Section 28 of the Constitution (S28 includes best interests, parental care, protection from abuse & right to healthcare, basic nutrition, social services & shelter)

Under the umbrella (the Constitution) are legal acts protecting children, such as:

- Children's Act 2005
- Children's Amendment Act 2007
- Child Justice Act 2008
- Domestic Violence Act 1998, Sexual Offences Act 2009
- Case law
- Common law

In all situations, the 'best interests of the child' is the legal consideration. The best interests of the child is found in the Constitution and all other legislation protecting children.

The diagram is now complete and the next stage of discussion centres on one particular law under the umbrella - **the Children's Act.**

Step 4 – Discussion of key themes from **Children's Act**

Facilitator asks: What does Children's Act 2005 say about children?

- Protection
- Care
- Contact
- Best interests
- Guardianship

12:30 – 12:45

What does the Children's Act say?

Students are given copies of Extracts from the Children's Act of 2005 together with explanations of each extract. The new language of the Act changes 'custody and access' to 'care and contact.' Facilitator reads aloud the extracts and the explanations of 'guardianship' and 'abuse'.

The facilitator explains that children are *doubly* vulnerable in terms of their rights being exercised and in having access to resources. They depend on adults to access what they need. If the adults cannot get access, then children are doubly vulnerable i.e. if the adult is poor the child will inherit that poverty.

See also LM:109 – 110.

EXPLANATIONS & EXTRACTS from The Children's Act 38 of 2005

EXPLANATION of 'Best Interests of the Child'

Section 9 says that, in all matters concerning the care, protection and well-being of a child, "the standard that the child's best interest is of paramount importance, must be applied". This means that the child's best interest is the most important factor when making decisions about any protection, prevention and early intervention services provided to the child and his or her family.

Factors to consider when deciding on the child's best interests

Section 7 contains a long list of the factors to consider when deciding on the "**best interests** of the child". The following factors are summarised as most pertinent for child and youth care workers:

(a) the nature of the personal relationships with the parents, family or care-givers;
(b) the attitude of the parents, or any specific parent, towards the child;
(c) the capacity of the parents, or of any other care-giver, to provide for the needs of the child;
(d) the likely effect on the child of any change in the child's circumstances, including any separation;
(e) the practical difficulty and expense of a child having contact with the parents; and whether that difficulty or expense will substantially affect the child's right to maintain contact with the parents on a regular basis;
(f) the need for the child to remain in the care of the parent/s or extended family; and to maintain a connection with his or her family, extended family, culture or tradition;
(g) the child's age, maturity and stage of development; gender; background; relevant characteristic;
(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;
(i)-(j) any disability or chronic illness that a child may have;
(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
(l) the need to protect the child from any physical or psychological harm, or even exposing the child to harmful behaviour towards another person.

EXTRACT FROM THE CHILDREN'S ACT:
'abuse' in relation to a child, means any form of harm or ill-treatment deliberately inflicted on a child and includes:
(a) assaulting a child or inflicting any other form of deliberate injury to a child;
(b) sexually abusing a child or allowing a child to be sexually abused;
(c) bullying by another child;
(d) a labour practice that exploits a child; or
(e) exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally;

'care' in relation to a child, includes, where appropriate-

(a) Within available means, providing the child with-
(i) a suitable place to live;
(ii) living conditions that are conducive to the child's health, well-being and development; and
(iii) the necessary financial support;
(b) safeguarding and promoting the well-being of the child;
(c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;
(d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
(e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development;
(f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development;
(g) guiding the behaviour of the child in a humane manner;
(h) maintaining a sound relationship with the child;
(i) accommodating any special needs that the child may have; and
(j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child;

Explanation of CARE:

Section 1 provides a list of what falls within the scope of the responsibility and right to care for a child, but the essence of care is respecting and promoting a child's rights; protecting him or her from abuse; maintaining a sound relationship with the child; providing a home and an environment in which the child can develop and flourish.

'contact' in relation to a child, means-

(a) maintaining a personal relationship with the child; and
(b) if the child lives with someone else-
  (i) communication on a regular basis with the chid in person, including-
    (aa) visiting the child; or
    (bb) being visited by the child; or
  (ii) communication on a regular basis with the child in any other manner, including-
    (aa) through the post; or
    (bb) by telephone or any other form of electronic communication;

Explanation of CONTACT

In relation to a child, 'contact' means "maintaining a personal relationship with the child", communicating regularly and visiting the child if they live with someone else.

18. Parental responsibilities and rights

(2) The parental responsibilities and rights a person may have in respect of a child, include the responsibility and right-

(a) to care for the child;
(b) to maintain contact with the child;
(c) to act as guardian of the child; and
(d) to contribute to the maintenance of the child.

(3) a parent or other person who **acts as guardian** of a child must-

(a) administer and safeguard the child's property and property interests;
(b) assist or represent the child in administrative, contractual and other legal matters; or
(c) give or refuse any consent required by law in respect of the child, including-

(i) consent to the child's marriage;
(ii) consent to the child's adoption;
(iii) consent to the child's departure or removal from the republic;
(iv) consent to the child's application for a passport; and
(v) consent to the alienation or encumbrance of any immovable property of the child.

27. Assignment of guardianship and care

(1) (a) A parent who is the sole guardian of a child may appoint a fit and proper person as guardian of the child in the event of the death of the parent.
(b) A parent who has the sole care of a child may appoint a fit and proper person to be vested with *care* of the child in the event of the death of a parent.

(2) An appointment in terms of subsection (1) must be contacted in a will made by the parent.

(3) A person appointed in terms of subsection (1) acquires guardianship or care, as the case may be, in respect of a child-
(a) After the death of the parent; and
(b) Upon the person's express or implied acceptance of the appointment.

(4) If two or more persons are appointed as guardians or to be vested with the care of the child, any one or more or all of them may accept the appointment except if the appointment provides otherwise.

Neglect

Neglect in relation to a child means "a failure in the exercise of parental responsibilities to provide for the basic physical, intellectual, emotional or social needs" of the child.

Explanations and extracts on pages 22 – 24 above were sourced from The Children's Institute at: http://www.ci.org.za/depts/ci/pubs/pdf/resources/general/2011/ca_guide_cycw_2011.pdf

Space for your own notes

Every time you put your umbrella up
It's in the best interests of the child –
to cover the child's head not yours!

12.45 – 13.00 Children and the Law (3 case studies)

The next 3 cases tell us how the Constitution and the Children's Act have been interpreted in reality.

You can also find these 3 case studies in the law manual:

Grootboom is discussed on page LM:17,
the *Centre for Child Law* on LM:147,
And the Bennie case study is found on LM:120.

CASE STUDY 1 - The *Grootboom* case

Susan and Xolani lived with their two small children (aged 2 and a half and four) in a squatter camp in Wallacedean, outside Cape Town. Every winter their house and their neighbours' homes were flooded. Ten years before they had put their names on the Low Cost Housing List but had heard nothing. When the winter rains arrived, they decided to move to a nearby area that was empty and had better drainage.

But 'Mr Harrison' owned the land that Susan and Xolani moved to, and when he saw them on his land he grew very angry. Then on a very cold day in winter Susan and Xolani and the two children were woken by the police banging on their door. They were told to leave and their home and possessions were destroyed and burnt.

The family could not move back to the informal settlement, as their places were now filled by others so they went to a nearby sports field for shelter. The family were desperate and needed legal help. Susan walked through to a local NGO that told her where to find an attorney who would help the family.

This case then went to Court and it was decided that even though we have the right of access to shelter, parents have the responsibility of taking care of their children before the State steps in.

The Court said that the family had been waiting for years and the State was taking a long time to build homes for everyone, in the meantime those in immediate emergency situation needed assistance from government. The Court ordered the State to provide Susan and Xolani with building materials.

Names have been changed for obvious reasons.

Government of Republic of SA & Others v Grootboom & Others 2000
www.lrc.org.za/judgements-texts/judgements/item/government-of-rsa-others-v-grootboom-others-cc
www.escr-net.org/usr_doc/wesson_-_Grootboom_and_Beyond.pdf

CASE STUDY 2 – *Centre for Child Law v Minister of Home Affairs* 2005

Brenda, Lebo and Tsuki were 3 small children from Zimbabwe living in an informal settlement with their parents. One day in February 2004 they went to a new sweetshop, but got lost. Some officials came and forced them onto a truck and took them to a camp where other adults were being kept prisoner (Lindela Repatriation Centre). Brenda and Lebo were scared and Tsuki was crying. They heard they were going to be put on a train and taken to another country. Once in the new country, they would be left at a police station there.

Brenda and Lebo were very upset, and Tsuki was frightened and calling for her mother. The adults in the camp tried to look after them and the other children there. After many days of nothing to do, they heard child lawyers went to Court and told a judge that Home Affairs officials wanted to send the children out of South Africa. The Court refused to let this happen to the children, and they were moved to a camp specially for children (Dyambu Youth Centre). The Court in Krugersdorp decided to hold a Children's Court Enquiry but the judge at this special court thought South African law did not apply to foreign children (from Zimbabwe), and refused to look at the problem. Later a higher court ordered the judge to investigate, but delays were caused because social workers who were supposed to write a report for the court, didn't do this.

By this time Brenda, Lebo and Tsuki were terribly homesick, they had been held in the camps for eight long months. Other children at the camp were there because they were accused of crimes and were awaiting trial, but Brenda, Lebo and Tsuki had done nothing wrong. Finally in September 2004, the child lawyers managed to get a new judge (AnneMarie de Vos) to look at the children's situation.

Qu: In the meantime, while Tsuki was at the camp, she got TB. She could not access medical help or medication, what would you do? Students to discuss this question briefly, before continuing to read the judgement below.

The court said as the upper guardian of all children in South Africa, they are responsible for the protection of the children. Government officials had been apathetic (uninterested) and had failed to act in line with South Africa's Constitution, statutory law (legislation) and their own stated policy and were in breach of international law. The Department of Social Development had to bring the children to the Children's Court within 15 days, and must stop the transfer of children to Lindela.

Lawyers for Human Rights-Pretoria Law Clinic/Centre for Child Law acted for the children.
Names of the children have been changed.

Qu: Foreign children now fall under the Children's Act 2005 – what do you think this means for foreign children under this new law?

CASE STUDY 3 – BENNY

At three years old, Benny was referred from hospital to a hospice children's in-patient unit. His diagnosis was HIV-related disease, severe malnutrition, hearing loss from untreated and frequent ear infections, and he was unable to speak or eat solid foods. He was also severely developmentally delayed.

An orphan, Benny was cared for by his maternal grandmother, who was employed as a domestic worker and living in a shack in an informal settlement. Grandmother received a foster-care grant but did not visit the child, despite frequent attempts by the hospice community nurse to get her to do so.

Benny stayed in the in-patient unit for 15 months and developed a strong relationship with a hospice volunteer, who was able to get the child to eat solid foods and to obey simple instructions, and who expressed a desire to foster Benny. The volunteer also bought all Benny's clothes and toys and took him out for a day each week.

Despite her offer to foster the child, the Department of Social Development felt it was in Benny's best interests to remain with his grandmother. The hospice insisted that the grandmother receive training in giving ART (Anti-retroviral Therapy) before Benny's return to her, and expressed concern both verbally and in writing to the Director of DSD that Benny would again be neglected.

Qu: What do you think of this decision? (taking the context of this case into consideration)

On follow-up of Benny, it was found that his grandmother had left him alone in the shack, had not taken him for his follow-up visit to the ART clinic and had not been giving Benny his ART. This was immediately reported to the DSD, who proved slow to respond. The hospice and the volunteer continued to make frequent visits to Benny to ensure that he had clothes and food, as well as a bed to sleep on, and took him for ART follow-up.

Benny is now living with his caring volunteer, but the legal guardianship remains with his grandmother, who continues to receive the foster-care grant.

13.00 – 13.30 LUNCH

13.30 – 14.15 Group Work. Questions on the 3 scenarios 45 mins

Student's own notes

14.15 – 14.45 **30 mins**

Feedback:

- Two of the case studies show how the Constitution and the Children's Act have been interpreted by the courts.
- The *Grootboom* case (LM:17) is about the right of access to shelter/housing.
- The *Centre for Child Law v the Minister of Home Affairs*, 2005 (LM:147) is about the rights of foreign children found in South Africa and government's duty of care to foreign unaccompanied children.
- The hospice case study (Benny) (LM:120), is about a child's right to health care.

Space for your own notes here:

14.45 – 15.00 **15 mins**

The facilitator unpacks various sections in the Children's Act of 2005 and expands on 'care', 'contact', and 'guardianship'. Students turn again to page G:14-16.

The term, 'child abuse' is defined at the start of the Children's Act. The term is explained on G:14 and the difference between 'child abuse, neglect and 'domestic violence' can be explained in these terms:

- Child abuse specifically applies to a child below 18 and includes emotional, sexual, physical abuse.
- Domestic violence can involve a child, a relative, abuse within relationships, and covers a wide range of abuse including stalking.
- Neglect in relation to a child means: "a failure in the exercise of parental responsibilities to provide for the basic physical, intellectual, emotional or social needs" of the child.

Student's own notes

15.00 – 15.30 **Inheritance: Intestate Succession Puzzle** **30 mins**

Physical Activity.

The facilitator asks audience to use the Worksheet on the next page of this Guide.

Facilitator appoints members of the group to represent a fictitious family (The Khosa and the Gumede family) and gives an envelope of 'money' to the father of the group, Mr Khosa. He is a wealthy businessman, who then dies. Facilitator asks who inherits? Then surviving family members, one by one, also die and the students are asked again: who inherits?

Students are required to write their answers on the worksheet on the next page here (LG:23).

After completing this activity, refer to the bullet points on page LG:24 under the heading: Dying without a Will - Intestate Succession.
(LM*:* Ch. 12:185-186)

WORKSHEET: THE KHOSA EXERCISE

`Who will inherit when there is no Will?'

This is a physical exercise. You will need:
10 people, a table and chairs or several chairs for the Khosa and Gumede family to sit on.

The scene: Meet the Khosa and Gumede family.

- There is Mr Khosa and Mrs Jane Khosa.
- They have 2 children: Harry and Sally.
- Mrs Jane Khosa's parents: Mr and Mrs. Gideon Gumede are alive and well.
- Mrs Khosa: has an older brother called John Gumede.

- Mrs Khosa's grandparents on her father's side are: Ma Gumede and Pa Gumede. They have two children.
- Mrs Khosa's father Gideon and his sister Akhona.

You are going to roleplay three different scenarios:

Scenario A
Mr Khosa was a high-powered businessman. Because of stress and a bad diet Mr Khosa's heart had been causing him problems but he refused to slow down, despite his doctor's warnings. One day after a very stressful meeting Mr Khosa suddenly felt short of breath and very ill. Before anyone could do anything he fell to the floor and died from a heart attack. Mr Khosa was always too busy to draw up a will so he died intestate.

1) *Who DO YOU THINK will inherit from Mr Khosa?* ……
2) *What is the legal answer to this question?* …….

Scenario B
Mrs Khosa and her children lived together for many years after Mr Khosa's death. Both children had left home to pursue their own careers. Unfortunately over a period of 10 years Mrs Khosa lost both her children to HIV/AIDS. Her mother Mrs Gumede had also died at the age of 70 years and her grandfather Pa Gumede died at the age of 90years. Mrs Khosa passed away in her sleep one night after a long battle with cancer.

1) *Who do you think will inherit from Mrs Khosa?* ……
2) *What is the legal answer to this question?* …….

Scenario C
Mrs Khosa and her children lived together for many years after Mr Khosa's death. Both children had left home to pursue their own careers. Unfortunately over a period of 10 years Mrs Khosa lost both her children to HIV/AIDS. Both her parents Mr and Mrs Gideon Gumede had also passed away a few years ago. Mrs Khosa's brother John had died in an accident on the way home from his work and her grandfather Pa Gumede died at the age of 90years. Mrs Khosa passed away in her sleep one night after a long battle with cancer. (continue on next page)

1. *Who <u>do you think</u> will inherit from Mrs Khosa?.....*
2. *What is the legal answer to this question? ……*

Dying without a will: Intestate Succession **LM: 185**

The <u>Intestate Succession Act of 1987</u> explained:

- If you are married but you have **no children**, then your surviving spouse will inherit everything.

- If you have **children but no spouse**, then your children will inherit equally.

- If you have **a spouse and children**, then the children and your spouse will inherit equally, depending on how much money you have left after following a formula set down in law: remember that children means all children, including illegitimate children – children born outside a legal marriage.

  The surviving spouse will receive the same share as the children or R125,000.00, whichever is the most, and the children will share the rest. **Note:** *This means that if you have no will, your spouse will get all the money if you only have R125 000 or less.*

- If you have **no spouse or children**, the estate will be equally divided between your parents.

- If you have **no spouse, no children and no parents**, your estate will be equally divided between your brothers and sisters.

- If you have **no spouse, no children, no parents and no brothers and sisters**, then your estate will be equally divided between the blood relatives who are closest to you.

- If you have no spouse, no children, no parents, no brothers and sisters and no relatives, your estate will go to the state.

Space for student's own notes on how inheritance is passed when there is no will.

15.30 – 16.30 Writing your will

The process of making a will and the formalities are explained (LM: 180-181):

- When preparing a Will onwards
- Property and marital regimes (see LM: 181 side column)
- How to write your own Will

Students are asked to write their own will as homework. If they already have a will and do not want to share the contents, students can make a fictitious Will, observing all formalities.

Wills should be handed in on arrival, the following day.

DAY 2

8.30 – 8.40 INTRODUCTION to DAY 2

Students hand in their wills to the facilitator who shares with Legal Aid staff if available.
The facilitator refers students to the bullet points and example of a will on the next pages here (and in LM Ch 12: 181-184).

- Give your full name with your identity number and address.
- Say what your marital status is (single, married, divorced or widowed), and if married, state your marital regime. Give the name and identity number of your spouse.
- Write down that this is your last will and testament and that you revoke (cancel) all other wills that you have made before this one.
- Name someone you trust to take on the administration of your will (carrying out your wishes) – as an executor. You should ask the person first before naming them as your executor in the will. If you do not select someone, or if the Master thinks that the person you have chosen will not be able to do the administration properly, then the Master may select someone for you.
- You must also say that the executor does not have to pay any money when she/he accepts the position of executor. This is called an 'exemption from paying security.'
- Make it clear how you want your property to be dealt with. Write down who will inherit each of your possessions. Give details such as their full names, addresses and whether they are male or female, married or unmarried.
- Always think of your minor children. If you have minor children, you need to think of someone you trust who can act as their guardian. This person must be able and willing to be their guardian. If it is possible, an expert such as a bank manager, an accountant or a lawyer should be consulted when there are minor children.
- When you are finished, write the date and sign the will in full, in front of the two witnesses – you must sign the will as closely as possible to the last line of writing in the will. This is to stop anyone from adding anything on to your will.
- Both witnesses must sign, in full, after your signature on the last page

NB **A person cannot inherit if she/he signs as a witness. This is to stop people from committing fraud or the court thinking that they may have committed a fraud.**

Unless your will includes an 'exemption from paying security', the Master will normally require the Executor to submit a bond of security. This is because the Executor is responsible for your assets. If you appoint your parent, your child or your spouse as your Executor, they do not have to submit a bond of security.

Remember that despite your wishes in your will, the decision to request a bond of security is at the Master's discretion.

Example of a simple will **LM:184**

LAST WILL AND TESTAMENT OF Kase Mdu (ID number)

of 25 Malibongwe Drive, Randburg, Johannesburg.

1. I hereby cancel all wills made by me before this time.

2. I appoint as executor of my estate my sister, Suni Sunn, of 10 Moss Street, Burgersfort. I do not want my executor to pay any security.

3. I leave R5000.00 to my friend, Sbu Khosa, of 9 First Avenue, Malvern, Johannesburg

4. I leave my car to my daughter, Akhona Mnisi, of 201 Green Street, Acornhoek, Limpopo Province.

5. I leave the rest of my property to my wife, Agnes Mdu, with whom I have a customary law marriage which is registered in terms of Section 4(1) of Act 120 of 1998, and if she does not survive me, I leave the rest of my estate to my brother, Gideon Mdu.

6. Should my wife die before me, I would like to appoint my brother, Gideon Mdu, as the guardian of my minor son, Mpho Mdu.

7. I would like that, on my death, any of my organs to be used for purposes of transplant to help another living person. I direct that my executor may have the authority to decide in this matter.

8. I would like to be cremated.

Signed by Kase Mdu on this day of 29th October 2006 as the testator of this will in the presence of two witnesses.

Testator _____

Witness 1. _____

Witness 2. _____

8.40 – 9.00 Role Play, Mr. Daniels LM: 197

Students are invited to participate in roleplay.'Mr. Daniels', LM: 197.

Mr. Daniels, an elderly man, was in a hospice in-patient unit. He was terminally ill, bed-ridden and had little energy.

His nephew and wife had taken him into their home when it was apparent that he had nowhere else to go. He had been divorced for years and said he had lost contact with his children.

The nephew requested legal assistance so that Mr. Daniels could draw up a will. Although weak, he was mentally lucid.

The nephew was present at the bedside with the lawyer during the process of establishing his uncle's wishes. Mr. Daniels had a sum of money in a savings account which he had intended to leave to his children, but now felt he would like to leave to his nephew.

The will was drawn up and duly signed, but the lawyer felt uncomfortable with the conversation, which was led by the nephew. The lawyer was also concerned that the will could be contested by Mr. Daniels' children after his death.

9.00 - 9.15

Discussion and Feedback from the group.

The pressure in this situation was that this very ill person was close to death, so that there was some urgency when he wanted to make a Will. This caused stress to the palliative care staff and to the lawyer.

This is a simple fun role-play but demonstrates that where possible, people should be encouraged to make wills earlier in the illness process.

Facilitator asks students to think about the following situation:
If you haven't told your loved ones where you keep your ID, your will, think about the effect on them, when you leave your affairs in a mess, and they can't find your ID and can't arrange your burial.

Unfortunately, people are often referred to palliative care at a late stage of illness. And the patient's worry about their affairs affects their ability to enjoy quality palliative care services.

Facilitator asks the class to bear in mind the ethical themes on the 4 charts and asks the class to consider, on a scale of 0-10 where the lawyer would rank on an ethical ranking of this issue.

Student's own notes

9.15 – 9.45 Winding up an Estate

Mr. Daniels has now passed away and the family has asked for information about the process of winding up an estate.

Students turn to the Worksheet Exercise on the next page and LM: 190 'Winding Up an Estate - Fill in the missing Steps' which outlines steps to be followed by an Executor.

Students fill in blanks of the step by step process.

Winding up an Estate – Executor's Duties – a step by step process

LM:189-190 & 221

Step 1

PROCESS	QUESTIONS
Mr Daniels' nominated Executor needs to meet with the family. In the family meeting the Executor: - reads the Will (if there is one). - Checks that all heirs and/or beneficiaries are present at this meeting. They will discuss: • any debts • any money owed to the estate • any policies or bonds • etc	**Qu1. What if there is debt and heirs?** . . . . …. . . . . **Qu2. What if an executor wants to be paid up front to carry out Executor duties? What happens? Discuss.** . . . . …. . . . .

Step 2

At the family meeting, the Executor collects the following information and documents: - identity documents - . . . - . . . - . . .	**Qu3. What documents are needed by Master <u>from</u> the family?** (these are handed to Executor) Fill in the dots.

Step 3

At the Master's Office the Executor will collect the following forms:

…..

……

… . .

… . .

… . .

… . .

Step 4

Appointing the Executor (Executor in the Will or through the Master)	***Qu 4. What form <u>from</u> the Master will be needed for this appointment? . . . . . .*** ***Qu 5. Must the Executor follow the Will or the beneficiaries' wishes?*** . . . . .

Step 5

Actions taken by the Executor are: - Valuation - Notice in the paper - Opens a bank account - Deposits the money	***Qu 6. Does the Executor open the bank account in his own name?*** ***. . . . .*** ***. . . . .*** ***. . . . .***

Step 6

Liquidation and Distribution Account	***Qu 7. What is the L&D Account?*** ***. . . . . .*** ***Qu 8. What happens if the Executor exaggerates the value of the assets?*** (The Executor will normally charge 3.5% of the value of the estate). . . . .

Step 7

Liquidate the Estate • Executor contacts beneficiaries • Debts subtracted and paid • Death duties paid • Final Account to Master to lie for inspection	***Qu 9. What if the debt is more than the amount of inheritance?*** ***. . . . . .*** ***. . . . . .*** ***. . . . . .***

Step 8

Qu 10. What is the final part of the process? (Fill in the gaps below)

- . . .
- . . .
- . . .

9.45 – 10.15 Feedback from students

Questions are:

- At what stage in the winding up of the estate, can children contest the will?

Answer:

……
……..

- What happens to Mr Daniels' debts when he is very ill?
- What can a person do to avoid debt problems (insurance)

Students learn that beneficiaries (often the family) who experience problems with an Executor, can go to the Office of the Master of the High Court to complain.

Cautionary note: Do not sign as surety for someone's debt or agree to act as Executor unless you understand what this means. Ask someone what it means & if you can't get an answer don't sign. (signing as surety allows the creditor to claim the debt from you, agreeing to be Executor means you normally have to provide security/money to the value of the estate).

10.30 – 10.50 WORKING TEA BREAK

10.50 -11.00 The impact of bereavement on the legal professional

(*LM:202-204,208)*

Students discuss with the facilitators:

- any experiences of the impact of a very sick or dying client on a legal professional
- How the symptoms affect the lawyer (eg breathlessness; falling asleep often because energy levels are low; whispered voice which may be difficult to hear; not easily able to sign any document; family members in tears).
- Bereavement of family members due to inherit after death – the widow may burst into tears, the widow/widower can't concentrate, may forget an appointment; can't find necessary documents.

The facilitator asks: How can psycho-social staff who are dealing with this situation, help the lawyer?

Space for your own notes:

11.00 – 11.20 GOAL-SETTING, and using legal knowledge gained at the training in work context

Students think how they will use this training in their work.
To look at how to implement this training to benefit:

- other staff members
- Patients and families, clients

Students write down their suggestions into their own Goal-Setting Plan on the next page. Students will also need this information for their *Post-Training Questionnaire*

Space for your notes here

Name…….

Organisation ……

Date Dec 2014

GOAL – SETTING PLAN

11.20 – 11.30 Commitment – sharing your goal-setting plan with the class

Students are asked to share their plan of action with the whole group.

Students or facilitator might suggest further action after the training:

- students do an audit of resources available in their own locality and to start a 'little black book' of phone numbers with description of each person's role.
- To consider developing a standard form for reporting issues including legal issues.
- To remember as you return to work, to start noting down legal issues that you want to report back on to the facilitators during follow-up.

Facilitator concludes this section by explaining that the students' plans become a goal-setting contract with facilitators that can be followed up with students in the post-training period concerning achievement of goals.

11.30 – 12.00 Summary of the training – Ethical Issues

The facilitator pulls the threads of the workshop together and draws out from students the ethical issues discussed previously. Issues are recorded on the flipchart by the facilitator.

Student's own notes on ethical issues

12.00 – 12.30

Students complete the Post-Course Questionnaire (PCQ).
Goal plans and PCQ are handed in to facilitators.

12.30 Closing

CVs of the Training Facilitators

Susan Nieuwmeyer:
Qualifications: MTh (Practical Theology)(Pastoral Therapy) UNISA 2003. B Soc Sc (Hons) (Clinical Practice) 1999 (UCT); Dip Social Work UNISA 1969.
BA Special Sociology (Leeds, UK) 1966. SRN. SCM.(England and Scotland)
Occupation: Consultant to HPCA. 21 years on the staff of a South African Hospice.
Professional trainings: Registered nurse; Registered Social Worker; Pastoral Therapist

Desia Colgan:
Qualifications: BProc (Natal) LLB, Med (Wits).
Occupation: Lecturer in Law, Family Law, Law of Succession, University of Witwatersrand. Guest lecturer on Policy Network Approach in P&DM (Wits). 19 years as Consultant Street Law Project coordinator.

Nicola GunnClark:
Qualifications: B Prim Ed (UCT) 1996 LLB (UNISA) 2014.
Occupation: HPCA Legal Project Co-ordinator/Paralegal Project Manager

HUMAN RIGHTS

The International Bill of Rights

The Universal Declaration of Human Rights (UDHR), together with two binding treaties:

- The International Covenant on Civil and Political Rights (ICCPR)
- The International Covenant on Economic, Social and Cultural Rights (ICESCR)

make up the International Bill of Rights.

What are Human Rights? **LM:12**

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." (Article 1 UDHR)

ETHICAL PRINCIPLES

Bio-ethics, also known as medical ethics, is the study and employment of moral values in medical science. This includes clinical care and clinical research.

Medical decision-making is guided by the four bio-ethical principles of:

- Respect for autonomy
- Beneficence
- Non-maleficence
- Justice

These 4 principles were described by T.I.Beauchamp and J.F. Childress. 2001. Principles of Biomedical Ethics (5th Ed), Oxford: University Press.

Respect for autonomy in health care **LM:21**

The doctor is required to provide full information in language and wording that the patient can understand. The mentally competent patient then makes decisions about his treatment. The Hospice Palliative Care Association (HPCA) recognises 'that the fundamental principle underlying all care practices is respect for the worth, dignity and human rights of every individual; and that respect for human dignity requires the recognition of patient rights, particularly the right to self-determination.' (HPCA Code of Ethics)

In some cultures, community autonomy may sometimes be more important to people than individual autonomy and important relatives may take decisions on the patient's behalf.

Beneficence and Non-maleficence **LM:26**

These two principles are sometimes considered together. The doctor and health-care staff are required to provide benefit to the patient, in terms of care and treatment.

They are to do no harm.

Justice **LM:27**

- Fair treatment
- Equal sharing of resources
- Treating people equally in relation to their needs, rights, ability to benefit or desire
- Equal access to health care