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Report of the Working Group on the Allocation of Decision Making

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REPORT OF THE WORKING GROUP ON THE ALLOCATION OF DECISION MAKING

INTRODUCTION

The Working Group on the Allocation of Decision Making¹ addressed the issues of *who* should make decisions in legal proceedings when the client is a child. The Group's recommendations considered the child's development and abilities, the substantive legal issues involved, and the types of legal action involved (class-action lawsuits and appeals). The Working Group began by looking at who decides whether and when a child should have an attorney, what factors into this decision, and the reasons for and against appointing an attorney for the child. Other issues addressed by the Group include who should decide whether the child is impaired, and who should make decisions with an unimpaired child client, with a preverbal client, and a verbal but impaired child client. The Group also discussed allocation of decision making in children's class-action lawsuits and appeals.

The Working Group's topic, the allocation of decision making, overlapped significantly with the topics on which other Working Groups focused (e.g., determining the best interest of the child; determining a child's capacity to make decisions; interviewing and counseling). As a result, other Working Groups presented similar, if not identical, recommendations to the Conference as this Working Group. This Working Group's recommendations were thus frequently subsumed by other Working Group's recommendations.

I. ALLOCATION OF THE DECISION OF WHETHER AND WHEN A CHILD SHOULD HAVE AN ATTORNEY

The Working Group identified a number of potential people and institutions who might decide whether a child should have an attorney in a court case. These include:

- (1) The legislature (which can pass statutes requiring, permitting, or prohibiting attorneys for children);
- (2) Judges (who in the absence of a statute or a constitutional mandate or prohibition have discretion to appoint attorneys for children);
- (3) The parties (when they agree that the child should or should not have an attorney);
- (4) The child; or

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- (5) The child's parent(s) (either of whom might retain an attorney for the child). Of course, if the Constitution so requires, a judge has no choice but to appoint counsel for a child.² The Working Group did not recommend that any of the previously listed people or institutions dictate when and whether the child should have an attorney appointed.

Next, the Working Group examined the types of legal issues where an attorney might represent a child. These include, but are not limited to:

- (1) Family law cases (custody, visitation, child support, and parentage);
- (2) Delinquency;
- (3) Child welfare/termination of parental rights;
- (4) Adoption;
- (5) Guardianship;
- (6) Status offender cases;
- (7) Mental health and health care issues;
- (8) School issues, including special education and suspension/expulsion cases;
- (9) Supplemental security income;
- (10) Emancipation;
- (11) Domestic violence cases;
- (12) Criminal matters where children are witnesses;
- (13) Other civil proceedings such as probate; and
- (14) Tort cases.

The Group identified the following questions, which weigh into the decision of whether to appoint an attorney for a child: Is the attorney constitutionally or legislatively required? Does the judicial officer have discretion to appoint an attorney for the child? Can the parents or child find an attorney who will not cost the state money? If the parents retain an attorney, does an actual or potential conflict arise between the child and parent? Do circumstances exist where a child should not have legal representation, even if the attorney costs the state nothing? Does the child have an identical interest with another party? Does the child have liberty interests at stake in the case? Does the case involve the state as a decision maker? If the case involves a child whose life will be affected by the outcome of the case, should an independent voice represent the child (and should that voice be an attorney)?

The Group discussed the Massachusetts model, under which the legislature decided that children have a right to counsel in specified cases in which the state is a party. Massachusetts law requires the appointment of an attorney for a child in child welfare, delinquency,

2. *In re Gault*, 387 U.S. 1 (1967).

status offender, mental health commitment, and custody cases in which the state is a party. The statutory scheme does not require the appointment of attorneys for children in private custody, child support, denial of state health care benefits, or educational cases, such as suspension/expulsion or special education cases.

The Working Group next tackled the reasons for or against appointing attorneys for children because those reasons will determine, in great part, whether the decision maker will appoint an attorney for the child at all. The Working Group identified the following reasons as possibly influencing the question of whether to appoint an attorney for a child:³

- (1) To maximize the probability that a competent child's view will be zealously and competently articulated;
- (2) To ensure that the court will come to the correct outcome under the substantive law;
- (3) To advance the substantive law as it affects children;
- (4) To promote the dignity of the child whose interest is before the court, both symbolically and practically;
- (5) To enhance the integrity of the legal system;
- (6) To minimize the risk of harm to the child that flows from contact with the legal system (known as the "jurogenic effect");
- (7) To ensure that the best result is reached for this child's interest following independent presentation of this child's real needs and specific interest in this case;
- (8) To redress the imbalance of power; and
- (9) To strengthen the likelihood that the result reached is what the child wants.

The appointing authority's willingness to order independent representation for a child depends on the importance that it attaches to each factor. For example, the decision maker who gives great importance to maximizing the probability that the child's desired outcome results, to ensuring that the child's expressed opinion is zealously represented, or to promoting the dignity of youth, will likely appoint an attorney for every child before it. If, however, the decision maker appoints the child's attorney in order to reach a correct outcome regarding the substantive law, then if the child has an interest identical to that of another party, the decision maker will not see value in appointing an attorney for that child.

The Working Group identified the following reasons why a decision maker may *not* want the appointment of an attorney for a child:⁴

3. Inclusion of items on the list does not imply endorsement by the members of the Group.

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- (1) To ensure that the judiciary does not abdicate to the child's attorney the systemic or judicial function of determining the child's best interests;
- (2) To protect the child from having to articulate a burdensome and potentially harmful view in custody, visitation, child welfare, or termination of parental rights cases;
- (3) To avoid empowering a randomly chosen lawyer who may not know the child to speak for that child;
- (4) To avoid the unnecessary expense resulting from duplicative tasks, because other parties will articulate all views;
- (5) To avoid the disproportionate expense of legal representation because scarce financial resources would be better spent on social services for the child;
- (6) To ensure that the outcome of the case will be based on substantive law, because the appointment of an attorney for the child makes it more likely that the outcome will be based on the child's wishes even if that view conflicts with the substantive law;
- (7) To foster settlement, which might be hampered by the addition of another represented party;
- (8) To allow a less expensive and better prepared professional to represent the child, such as an alternative dispute resolution mediator, a nonlawyer guardian *ad litem*, or a Court Appointed Special Advocate;
- (9) To avoid role confusion resulting from failure to develop criteria delineating the attorney role.

The Working Group made the following recommendations regarding allocation of decision making on whether and when to appoint attorneys for a child:

- (1) The law should be changed to guarantee representation to children in child welfare cases, as is presently the case in delinquency cases.
- (2) The law should be changed to include the presumption that all children in delinquency cases are unimpaired and are therefore entitled to direct the attorney in the representation to the same extent as an adult client.
- (3) Children should not be able to waive their right to an attorney in delinquency proceedings.

The Working Group recommended further study on the issue of appointing counsel for children in domestic relations cases involving custody or visitation disputes. Some members of the Group expressed concern that overworked and understaffed courts might appoint counsel for children in custody cases in order to abdicate their decision-making responsibilities in custody and visitation matters. The child's attorney becomes the unqualified "tie breaker" in these cases. Some

Group members also raised the problem of courts' assigning attorneys improper responsibilities, such as filing a pretrial investigation report in domestic relations cases.

The Group debated the question of whether attorneys should represent children in domestic relations cases at all. A distinct minority believed that to allow children to appear by counsel in custody disputes is improper because the judge should not decide custody based on the child's preference. The majority of Group members expressed the view that a child who is a real party in interest should be able to appear by counsel.

The Working Group recommended that courts should not automatically order appointment of counsel for the child in every domestic relations case. The court should consider appointing counsel for the child in domestic relations cases in which:

- (1) Both parties request counsel for the child.
- (2) One party requests counsel for the child and the court agrees in light of all the facts.
- (3) The child requests an attorney and the court agrees (after a careful inquiry to ensure that the parent is not behind the request).
- (4) Particular facts suggest the need for an attorney for the child (e.g., allegations of abuse/neglect, a very complex case, the possibility that neither parent should receive custody, or the risk that the parents will suppress relevant facts).
- (5) The child independently retains counsel with his own money or on a pro bono basis after a court inquiry confirms that the child's action was truly independent.

II. DECISIONS REGARDING CHILD'S IMPAIRMENT

The participants next discussed the issue of who decides whether the child is impaired. The Group agreed that a court-appointed attorney with background and training in child development should decide whether the child is sufficiently able to set the goals of the litigation and direct the representation. The attorney should have the ability to consult with experts as needed. The Working Group recommended practice guidelines stating that the attorney must decide whether the child is impaired, based upon consideration of the issues discussed below.

The Working Group next tackled the issue of determining when a child is impaired. The Group members recommended that practice guidelines and possibly statutory provisions should be revised to reflect a policy that disfavors treating a child as impaired in the first instance, and disfavors deciding a child has subsequently become impaired. The Working Group debated but did not resolve the issues of

whether the legal community should adopt a presumption in nondelinquency cases that the child client is unimpaired.

The Working Group specifically recommended that practice guidelines should state that a child's decision with which the lawyer disagrees does not mean the child is impaired. If the child has made a reasoned choice, even if the attorney or other adults might disagree with the choice, the attorney nonetheless is bound by the child's choice. The Working Group gave an example of a child who chooses not to undergo a cancer treatment with a fifty percent success rate because he wishes to avoid the chemotherapy's side effects. The Working Group strongly believed that the child's view should be articulated. The Working Group referred back to one reason identified for appointing an attorney for a child—"maximizing the probability that a competent child's view will be zealously and competently articulated."

The Group participants also recommended that practice guidelines require an attorney to meet an extremely high threshold for concluding that a previously unimpaired child is now impaired. Only when an immediate danger threatens the child's life should an attorney exercise discretion, which may abrogate the traditional advocacy role, and treat the previously unimpaired child as impaired. Statutes and practice guidelines may require an attorney to request the appointment of a guardian *ad litem* (GAL) under such circumstances. The Group discussed the example of a fifteen-year-old who has been hustling on the street for survival for the past three years. The child is not HIV positive and consults an attorney for assistance in getting into a drug program. The attorney locates a wonderful program but the youth refuses to enroll. The attorney might have been able to physically stop the child from returning to the street, but must respect the child's decision even though the decision may lead to the child becoming HIV positive.

The Working Group also considered the example of a fourteen-year-old girl who wants guardianship with her grandparents because they are the only stable home she has known. She was in foster care for four years, then spent three years living with her mother in shelters, with friends, and in apartments. Her mother opposes the guardianship on the grounds that she was sexually abused by her father (the girl's grandfather) at the age of sixteen. The mother had never previously alleged that her father sexually abused her. After the attorney discusses the situation with the girl, she indicates that she wants to pursue the guardianship. The Working Group agreed, in accordance with the recommendations stated above, that in both those cases the attorney should not presume that the child is impaired and should argue the child's view unless some other fact leads the attorney to believe that the child is impaired.

III. ALLOCATION OF DECISION MAKING FOR THE UNIMPAIRED CHILD

The Working Group next addressed the allocation of decision making with unimpaired child clients. The participants recommended that further study should be undertaken, examining the desirability of a change in the Model Rules clarifying that unimpaired children should set the goals of the legal representation and direct the attorney. The Working Group further recommended an amendment to the Model Rules clarifying that unimpaired children decide when the attorney may disclose confidential information. The attorney for an unimpaired child has the same duty to counsel the child client as any other unimpaired client. The Working Group discussed the difficult case of an unimpaired child who wants to return to a sexually abusive father. Under the suggested revision to the Model Rules, the attorney would counsel the child and recommend that the child not go back if her father still represents a threat, but allow the client to make the ultimate decision. If the client decides, after the attorney's advice, that she nonetheless wants to return home, the attorney must either advocate the client's wishes or withdraw.

The Working Group examined an attorney's ethical obligations if an unimpaired child client becomes impaired. Participants recommended a policy change that would require the attorney to reveal the problem to the court and ask for the appointment of a GAL. The attorney would only have recourse to the court when the child has become truly impaired (e.g., as a result of brain damage, trauma, or serious mental illness). The attorney would continue to represent the child, maintain client confidentiality, and advocate zealously. The Group rejected the possibility of the attorney becoming the client's GAL, because that would require the attorney to reveal or use client confidences obtained from a competent client and might destroy the child's trust in her attorney.

The Working Group also considered the functions of a GAL. Participants generally agreed that a GAL's duties have historically lacked clear definition. Additionally, the functions of GALs vary widely from state to state. Federal Rule of Civil Procedure 17⁵ permits the appointment of a nonattorney familiar with the child as a GAL. The GAL's duty is to direct the child's counsel on behalf of the child in federal litigation. Courts historically have appointed GALs to perform fairly ministerial functions in order to allow an incompetent person to take part in litigation.

Group members discussed at great length cases where the court appoints an attorney as both attorney and GAL for a competent child. The Working Group considered and rejected a call for the amendment of state statutes that currently allow an attorney to be appointed as

5. Fed. R. Civ. P. 17.

both GAL and attorney for an unimpaired child. The rationale for the rejection was to allow an opportunity for the study of the financial implications of such a change. The Working Group recommended for further discussion and ultimate incorporation into an ethical rule a prohibition against an attorney serving as both attorney and GAL for an unimpaired child. For an attorney to switch roles from attorney to GAL in the midst of the legal representation would therefore constitute unethical conduct. The Conference adopted this recommendation.

The Working Group agreed that, when dealing with unimpaired children, courts should never appoint a GAL, but rather should appoint an attorney. In discussing this recommendation, the Working Group examined the difficult situation that arises when an unimpaired child does not want to direct her counsel. Members concluded that if the child is truly unimpaired then the child's decision not to direct the attorney implicates the client counseling function, and does not present a reason to change the lawyer's role. Although the Working Group expressed concern that this child may not trust the lawyer or may have emotional reasons for preferring not to take sides, it nonetheless concluded that if the child truly does not want to participate in the representation, the attorney should seek permission to withdraw rather than assume the role of a GAL.

The Working Group also formulated an interim proposal for attorneys appointed in this dual attorney/GAL role until the ethical rules are amended. The Group recommended a practice guideline providing that in dual attorney/GAL appointments the attorney role must always take precedence over the GAL role. The Conference adopted this recommendation.

IV. ALLOCATION OF DECISION MAKING FOR THE PREVERBAL CHILD

This section addresses the question of who should direct the representation when the client lacks decision-making capacity. The Working Group reached agreement on a number of issues concerning allocation of decision making for a preverbal child. First, all members agreed that the attorney cannot delegate decision making to the client, as in the traditional attorney-client relationship, because the client cannot determine and express the goals of the litigation. Alternatively, the attorney could act as a GAL, which normally results in the allocation of all the decisions to the attorney. This approach presents the problem of nonaccountability: The child's GAL is not accountable to anyone because the client cannot formulate or express a position. The role and functions of a GAL, however, require many of the duties, skills, and obligations of an attorney. The Group agreed that a unilateral decision regarding what is in the child's best interest in the absence of a thorough investigation is illegitimate. The Group wor-

ried that the GAL would make a premature and largely subjective decision about the child's best interest. The Working Group recommended a practice guideline that would prohibit an attorney from serving the dual function of GAL and attorney in the representation of a preverbal child.

The Working Group also recommended that the attorney for the preverbal child perform explicit and specifically-defined tasks. The justification for this position is that many lawyers who represent children do so part time, and if they can perform fewer, more familiar tasks they are more likely to be able to perform them well. The Group agreed that the tasks a preverbal child's attorney must perform include:⁶

- (1) To investigate all relevant facts, parties, and people;
- (2) To subpoena all documents;
- (3) To retain experts as needed;
- (4) To observe the child in the caretaker's setting and formulate optional plans;
- (5) To advocate zealously for the legal rights of the child including safety, *visitation*, and *sibling contact*;
- (6) To advocate vigorously to protect the child's basic needs including medical and mental health services, housing, education, nourishment, and strong agency case planning and implementation;
- (7) To ensure that the case proceeds promptly;
- (8) To shield the child from jurogenic harm (e.g., multiple interviews, multiple hearings, and delays);
- (9) To advocate for continuity of care ("permanency planning");
- (10) *To ensure contact with significant adults and siblings;*
- (11) *To challenge the basis for experts and agency conclusions in order to ensure accuracy;*
- (12) *To ensure that all relevant and materials facts are put before the court;* and
- (13) To meet with parents' and agency's lawyers, understand their positions, and try to talk with the parents⁷ themselves and other involved parties such as therapists, doctors, and caretakers.

6. The members who took the first view mentioned below would qualify the italicized portions with the statement that these tasks will be performed when consistent with the position taken and goals pursued on behalf of the child.

7. Of course, this presumes that the parents are unrepresented or that the parents' attorney has consented to direct communication. See, e.g., Model Rules of Professional Conduct Rule 4.2 (1983) (stating that "a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so").

The Working Group held two views about who should direct the representation for the preverbal child, in addition to the concerns previously addressed. One view, which more closely endorses the traditional attorney/advocate role, requires the attorney to undertake a factual investigation, consult with experts and community service providers, take depositions, and cross-examine the parties. The resulting information will assist the attorney in formulating an informed position relative to the child's interests, needs, and legal rights as they relate to the particular issues presented. The attorney would then advocate for the position that best accommodates the child's interests, needs, and rights. Some Group members expressed concern that this position injects systemic bias and allows the attorney to usurp the role of the judge. Another concern is the lack of accountability for the attorney. All participants agreed that the court must determine the outcome and may not shirk its responsibility by relying too extensively on the attorney for the child.

The competing view, which a distinct minority of the group members endorsed, is that the attorney for the preverbal child must act as the neutral officer of the court, investigator, or fact finder. In this role, the attorney provides the court as the ultimate decision maker with all facts relevant to an independent determination of the child's best interest, including facts that may contradict each other, without drawing a conclusion from those facts. Thus, the court remains the sole decision maker. The attorney for the preverbal child will, however, actively investigate the surrounding facts, protect the child, and advance the case. Group members expressed concern about the impossibility of true neutrality, and worried that the attorney's perspective would color the decision about what evidence to present, and how to present it, as well as the determination of what facts are relevant. The attorney would be performing a "discretionary advocacy" function, without acknowledging the advocacy component. Another concern was that the child would lack a representative with undivided loyalty; parents and agency attorneys will advance their own agendas. Some members expressed the concerns that no attorney/advocate could resist the temptation to decide what the judge must determine, or fail to claim any special wisdom about the best outcome for a preverbal child.

The Working Group discussed an example of a seven-month-old baby with multiple unexplained fractures. The mother claims that the baby was never out of her care and that the baby's injuries resulted from the hospital personnel's administration of CPR. The baby had been with relatives for six months. The attorney retained an independent expert to examine the baby and submit a report to her; she also presented evidence and assessed the demeanor and conduct of the parents in both interviews and depositions. She weighed the evidence and reached a position. She presented evidence, cross-ex-

amined witnesses, and argued based upon that position. The Group discussed what would happen in this case if the attorney for the child had spoken with two experts who disagreed about how the child had been harmed. Under the neutral officer model, the attorney would have an obligation to report both experts' opinions; under the advocate model, the attorney might not have the same obligation.

The Working Group discussed a possible compromise, involving the presentation of a position on behalf of the child coupled with a reminder to the judge that she has the responsibility of making the final decision according to applicable law. This compromise, however, was not acceptable to those Group members who believed the evidence should be presented by a neutral fact-finding attorney.

V. ALLOCATION OF DECISION MAKING FOR THE VERBAL BUT IMPAIRED CHILD

The Working Group experienced the greatest difficulty in determining the allocation of decision making for verbal but impaired children. The Group agreed that unless the child is "unimpaired" as to all critical decisions in the case, the attorney cannot leave all decisions up to the client as a traditional attorney would. The participants also agreed that the child might be unimpaired as to some types of decisions and impaired as to other decisions within one case. An attorney for a verbal but impaired child must solicit input from the child insofar as the child can give meaningful input. The weight given to a child's expressed opinion falls on a "sliding scale," to be determined by the attorney, in consultation with experts as needed, following consideration of the child's abilities and the types of decisions at issue. In the case where the resulting weight is 100%, the attorney must advocate for the child's expressed position. Both the child and the attorney will be decision makers in this situation.

The Group tried to address how the attorney should explain her role to the verbal but impaired child. One view held that the attorney must tell the child that she cannot promise to do everything that the child wants, but she can promise to listen to the child's views and carry out the child's wishes when she thinks the child is able to make that particular decision. For example, a verbal but impaired child might have a strong opinion about being placed with an aunt instead of a grandparent. Even if the attorney thinks that the child would be better off with her grandparent, the child's opinion would obligate the attorney to argue in favor of placement with her aunt if the attorney determines that the child was unimpaired as to that decision.

Competing views existed about confidentiality obligations of the attorney for an impaired but verbal child. A distinct minority of the group believed that the attorney may ultimately divulge information received from the impaired but verbal child without the child's consent if (a) she cannot persuade the child to give consent when the

attorney is acting as attorney/counselor; or (b) she discovers the information disclosed by the child in another independent manner; or (c) she cannot protect the child from immediate, serious harm without divulging the information to the court. All Group members agreed that if the attorney adopts this view, she must tell the child at the outset and regularly throughout the representation that she may divulge information that the child gives her without the child's consent.

The majority believed that the attorney of a verbal but impaired child must maintain confidentiality (in the absence of an imminent threat to the child's life) unless she obtains the child's consent to divulge this information to the court. This position places great value on trust and openness between the verbal but impaired child and her attorney.

The Working Group discussed the example of a five-year-old who tells the attorney that he wants to go home. The attorney believes that the child should not go home. The child tells the attorney that he was beaten at home but he wants the attorney to keep the beating a secret. One issue is whether the attorney can find some other way to bring this information into the case. For example, can the attorney subpoena the teacher to see if the teacher has information about the beating that might be given to the child welfare agency? Is this a betrayal of the child's trust? What if the attorney cannot find other evidence? Under the majority view, the attorney cannot report the information unless the child faces an imminent threat to his life. Under the minority view, the attorney could disclose the information if some lower threshold of prospective harm to the child's safety or well-being has been met.

A Group member brought up the case of a fourteen-year-old foster child who told her foster mother that her attorney had revealed a confidence she had told him when she was eight. The child reported that she never again trusted the lawyer. She understood the difference between a lawyer and a GAL and expected the lawyer to keep her confidences. The Conference subsumed this issue within Parts II and VI of the Recommendations.⁸

VI. ALLOCATION OF DECISION MAKING IN CHILDREN'S CLASS-ACTION LAWSUITS

The Working Group discussed the special problems related to making decisions in class-action lawsuits in which attorneys represent a class of children. A special problem in the representation of children in these involves the role of guardians *ad litem* (adults who must bring the lawsuit on behalf of the children).

8. *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev. 1301 (1996) (parts II, VI).

The Working Group developed the following recommendations, which the Conference recommended for further study. The lawyer for a class of children has a duty of candor to the clients and to the court. The lawyer must inform clients of her obligation to pursue the best outcome for the class as a whole, and may take some actions that do not advance the best interest of some individual class members. The lawyer is acting both as attorney and super-GAL. The lawyer is actually making the decisions, rather than acting on instructions from the client.

The Group recommended an amendment to the ethical rules to clarify that the lawyer for a class of children has a duty to communicate and consult with as many differently situated class members as possible. The lawyer also has a duty to listen to and consult with as many adults (potential surrogates) as possible, but may not be controlled by them.

The Working Group recommended an amendment to the ethical rules to clarify that the lawyer for children in class action cases has a duty to try to discover potential conflicts, to disclose to the class potential conflicts of interest within the class, to try to resolve the conflicts, and to request separate counsel to represent irreconcilable conflicting interests.

VII. ALLOCATION OF DECISION MAKING IN APPEALS AND POST-DISPOSITIONAL LEGAL ACTIONS

The Working Group recommended the following practice guidelines for attorneys representing children in appeals and dispositional actions. Attorneys for unimpaired children must follow their child client's instructions (after counseling) regarding the decision to appeal. Attorneys for impaired children must investigate both positive and negative potential effects of appeals and post-dispositional action, including delay and uncertainty, as factors in deciding whether to appeal.

