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Report of the Working Group on Determining the Child's Capacity to Make Decisions

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REPORT OF THE WORKING GROUP ON DETERMINING THE CHILD'S CAPACITY TO MAKE DECISIONS

INTRODUCTION

Peter Margulies's article, *The Lawyer As Caregiver: Child Client's Competence in Context*, and Discussion Leader James Bell's outline of issues, which was distributed prior to the Conference, guided this Working Group's discussion. Group members included public interest lawyers, family law practitioners, a law professor, a forensic psychiatrist, a clinical social worker, and representatives from two American Bar Associations programs.

The Working Group¹ sought to identify a set of factors to be considered by lawyers when determining a child client's capacity. Also, the Working Group agreed that once the lawyer determined that a child lacked capacity, then the lawyer should be guided by the findings of the Working Group on the Allocation of Decision Making.

The discussion below outlines the Working Group's recommendations and the corresponding commentary addresses the reasoning involved in establishing the recommendations.

PREAMBLE

As with adults, a lawyer has an ethical obligation to advocate the position of a child unless independent evidence exists that the child is unable to express a reasoned choice about issues that are relevant to the particular purpose for which the lawyer is representing the child. Where such evidence exists, the lawyer must engage in additional fact-finding to determine whether the child has, or may develop, the capacity to direct the lawyer's action in the particular context.

Commentary

The Working Group thought it important to identify a set of principles that would guide lawyers working with children regarding the determination of their clients' capacity to make decisions. The Preamble sets out these principles.

The Group agreed that as a starting point of a capacity analysis, the lawyer must presume the child client's capacity. Otherwise, any guidelines risk becoming a test that child clients must pass before they can obtain the same form of representation that is available to adults.

1. Discussion Leader: James Bell. Recorder: Nora Quinn. Author: Peter Margulies. Participants: Hon. Gloria Dabiri, Anthony DeMarco, Linda Elrod, Dr. Stephen Herman, James Morales, Charles Sabatino, Dr. Ludwig Salgo, Dr. Virginia Strand, and Timothy Walker.

The question of capacity should not arise unless the lawyer has some reason to believe that the client does not have capacity. The ability of the child to express a preference constitutes a threshold requirement for determining capacity. Once that threshold is passed, the child is presumed to have capacity.

I. USING AGE TO DETERMINE CHILD CAPACITY

- A. *Neither chronological age by itself nor legal condition is determinative of capacity.*
- B. *A lawyer representing a child should decide whether the child client has the capacity to express a position. The lawyer also has a responsibility to recognize, facilitate, and maximize the child's capacity.*
- C. *In making the decision regarding capacity, the lawyer should seek guidance from appropriate professionals and others including family members, probation services, school officials, clergy, and other concerned parties.*
- D. *The weight given to the factors in the determination of capacity may vary depending on the issue and on the nature of the proceeding.*

Commentary

The Group had lengthy discussions about the use of age to determine capacity. The Working Group rejected an absolutist approach to capacity at a certain age because it did not take into account individual factors and the consequences of any given decision for which capacity was being determined.

Two points of view surfaced during deliberations. One point of view held that age is one factor to be considered, if for no other reason than to provide an orientation point for evaluating capacity. Similarly, this viewpoint expressed a concern that the lack of any age cut-off would lead to the ridiculous result of considering a one-month-old child to have capacity.

The alternative point of view rejected those positions as arbitrary and limiting, and asserted that chronological age as a factor offered a poor proxy for maturity or developmental age. The Working Group found it impossible to imagine a setting in which a ten-year-old child and a twelve-year-old child with the same background, emotional maturity, developmental ability, and education should be treated differently when determining their capacity simply because one was two years older.

Ultimately the Working Group agreed that such distinctions could be avoided by the use of other more client-specific considerations that would rebut such a presumption. The contextual approach for determining capacity described in Peter Margulies's article was compelling

because it recognized the fluidity of the determination. A client who has the capacity to make a decision with short-term consequences and minor risks might not have the capacity to make a more significant, long-term, life-threatening decision.

Working Group members also worried that, if the legal community did not consider age a powerful indicator of capacity, adolescents would lose some of the empowerment they have gained over the last few years. The Working Group does not intend the decision to reject age as a specific indicator of capacity to make it more difficult for adolescents or older children to be found to have capacity.

II. PROVIDING APPROPRIATE TRAINING FOR LAWYERS WHO REPRESENT CHILDREN

E. Training is imperative for lawyers who represent children in order to determine capacity. Appropriate training minimally includes being familiar with child development and basic skills involved in interviewing children.

Commentary

Appropriate training will be necessary to maximize a lawyer's ability to use these guidelines. Such training would include child development, interviewing techniques, psychology, and sociology. Ideally, lawyers and mental health professionals would jointly offer training for lawyers who represent children.

The guidelines may encourage lawyers to solicit additional information and in some cases a lawyer may wish to seek the assistance of a mental health professional or social worker in determining the abilities of the child as they relate to capacity. Lawyers must recognize, however, that mental health professionals should not determine capacity because this term constitutes a legal construct and involves making a legal determination.

Nonetheless, as the dialogue concerning capacity of child clients progresses, the legal community must continue to include other disciplines, as much for their insight regarding the art and science of lawyering as for their expertise in their own areas.

III. FACT-FINDING PHASE

Commentary on Fact-Finding Phase

When capacity becomes an issue, the lawyer should consider the following factors for assessing capacity. Much of this analysis should regularly occur in the normal lawyering process. Most importantly, the factors provided here should not become a test that a client must pass.

The lawyer should use these factors as a guide when making a decision about capacity. The Working Group intends these factors to help a lawyer evaluate his or her own prejudices and misconceptions about a client as well as to illuminate the client's situation and how that context may effect the client's decision-making ability. The second part of our recommendations addresses how the determination of capacity should be made.

A. Developmental Stage of the Child Client

- 1. Cognitive Ability**
- 2. Socialization**
- 3. Emotional Growth**

Commentary

These factors may serve a function similar to the use of chronological age, yet are superior because they evaluate the child's maturity and development in a more accurate and in depth manner than a simple chronological designation.

B. Medical Status (Present)

- 1. Mental**
- 2. Physical**

Commentary

The mental and physical health of any client obviously comprises an important factor in determining capacity. The existence of drug abuse, alcoholism, or organic brain disease can affect decision-making ability. Similarly, nutrition, hyperactivity, attention deficit disorder, or a physical disability may affect a child's perception of the consequences of a specific decision and must be considered in determining the ability of the child client to make a specific decision.

That is not to say that a physically disabled client does not possess decision-making capacity, or even that she must prove her capacity. The physical and mental status of these clients simply presents one factor of which a lawyer should be aware when independent evidence of a child's inability to express a reasoned choice has caused the lawyer to question the capacity of a child client.

Knowledge of a physical or mental disability may help a lawyer to understand the reasoning of a child client, or may alert the lawyer to an additional need to facilitate the child client's communication. This presents an instance when a lawyer may actually help the child develop capacity by accommodating the child's specific needs.

C. Personal History

- 1. Life Experience (Individual Experience)**
- 2. Family Background**

3. Medical History

Commentary

The factors in this section allow a lawyer to consider the extent to which a child's background affects capacity. A child who comes from a background where families do not expect children to express preferences may require additional communication with the lawyer before the lawyer can determine whether the child has a reasoned preference. Certain factors in a child's medical history may complicate the ability to express such a preference, again suggesting that the lawyer must very carefully consider all available means of establishing communication.

IV. DETERMINATION PHASE

Commentary

The Determination Phase comprises the second level of analysis to be conducted after a lawyer has become familiar with the child client by considering the factors set forth in the Fact-Finding Phase. A lawyer approaching this phase must exercise caution to separate any possible disagreement the lawyer may have with the child's decision from a determination that the child lacks capacity because of the decision made by the child.

Admittedly, the lawyer may find this an extremely difficult distinction to make. Because of the nearly irresistible instinct to use the substance of the decision as a test of the capacity of the client, the Working Group chose to focus the Determination Phase of the capacity inquiry on the decision-making process. An essential component of this phase requires the lawyer to separate out the evaluation of the client's ability to make a decision from the lawyer's evaluation of the decision itself. In saying this, the Working Group recognizes that times will exist when a client's decision is an indication that the client lacks capacity. Nonetheless, that evaluation must be based on the factors set forth and not simply on a disagreement with the client's preference.

Lawyers must exercise extreme caution to ensure they do not deny the child client a forum for having her voice heard through representation. The ultimate decision about the wisdom of a choice will be made by the judge. The lawyer considering capacity must be careful not to use the capacity determination to usurp the decision-making function of the judge.

A. Expression of a Relevant Position

1. Ability to Communicate with Lawyer
2. Ability to Articulate Reasons

Commentary

These factors constitute the threshold for determining if a client possesses capacity. A client who cannot express a relevant preference cannot be said to be making a reasoned choice. This factor relates to the presumption of capacity contained in the Preamble for extremely young children. The factor is more fully developed when the lawyer considers whether the child can articulate reasons. The mere possession of an unexplained preference is not enough.

Whether the lawyer considers the articulated reasons for the preference reasonable must be determined in light of the factors set forth in the Fact-Finding Phase. What the lawyer may consider to be a perfectly reasonable preference for a child in one social circumstance may be completely unreasonable and unsupported for a child from a different setting. The trap the lawyer must avoid is evaluating the client's decision based on what would be the lawyer's preference in the same situation.

Instead, the lawyer must determine whether the child has shown the ability to express a relevant position and to articulate a reason to support that position, in light of that child's background and experiences. The lawyer may feel free to point out the ramifications of the child's decision, just as she would with an adult client who was making an imprudent decision. But the lawyer should not decide that the client lacks capacity simply because that lawyer feels the client is exercising poor judgement.

B. Individual Decision-Making Process

1. Influence - Coercion - Exploitation
2. Conformity
3. Variability and Consistency

Commentary

The question of how a child arrived at a decision raises a vital question for the lawyer considering capacity and goes to the heart of whether a child has capacity. Just as an adult's capacity to make a decision may be affected by undue influence and pressure from a variety of sources, so too may a child's. A lawyer who is considering capacity must determine whether the expressed preference of the child client stems from familial or societal pressures or if it reflects a reasoned decision.

A lawyer should consider whether this decision conforms with previous decisions and choices the child has made. A child who has always excelled in school and consistently sought additional educational opportunities may be experiencing some coercion if she now wishes to drop out of school and ride the rails with mom. Whether the child changes her mind frequently or is consistent in the expression of a

preference provides another important indicator of the independence of a decision.

C. Ability To Understand Consequences

1. Risk of Harm

2. Finality of Decision

Commentary

These factors provide the key to determining which decisions a client is capable of making. Indeed, a child may demonstrate capacity to make one decision yet lack the capacity to make another. The lawyer should intensify her level of scrutiny of the child's decision as the risk of harm and the duration of the decision's effect on the child's life increase.

The Working Group was unable to define a standard for when a decision would bring about consequence so extreme that no child would have capacity. Indeed, occasions will arise when a child can articulate well-reasoned bases for a rational decision that will result in death. Thus, the Working Group was unwilling to endorse a standard that would deny capacity to children who make life-threatening choices. Instead, the lawyer should focus on the child's ability to articulate a well-reasoned, independent choice, with a true understanding of the consequences involved. This process presents an opportunity for the lawyer actually to help the child develop capacity by making sure that the child has actually thought through the long-range consequences of the decision.

CLOSING COMMENTS

The Working Group emphasizes that it does not intend these guidelines to create a burdensome or cumbersome process for lawyers representing children. In the average case, the Fact-Finding Phase will take place in the routine course of representing the child, and the Determination Phase will not occur unless independent evidence raises a question concerning a child's capacity.

