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REPORT OF THE WORKING GROUP ON DETERMINING THE BEST INTEREST OF THE CHILD

INTRODUCTION

The Working Group¹ focused on cases in which children lack capacity to direct representation. The Working Group stepped away from the “mouthpiece” versus “substituted judgment” debate, and looked at an array of issues associated with the client’s “best interest.” Jean Koh Peters’s article, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, which captured the Working Group’s belief that a consistent methodology in the way lawyers approach and resolve the best interest determination is necessary, aided participants in this inquiry.

The Working Group began with an exploration of nonchild welfare hypotheticals, and moved to examples of child welfare cases. Group members asked a number of questions that they hoped would shape the inquiry: What does “best interest” mean? Who makes the best interest determination? How is the determination made? When is it made? Why is it made?

Each of these questions presented complexities. For example, “when” and “why” often implicate the threshold question of whether a factfinder has jurisdiction. A court in a delinquency case would not reach a best interest question without first finding jurisdiction through proof of guilt beyond a reasonable doubt. Similarly, in abuse and neglect cases, the court does not have a right to reach the “best interest” question unless the state proves threshold grounds for intervention.

Although at the outset of the Working Group’s discussion, the “what does best interest mean” inquiry seemed central, ultimately the members felt incapable of answering the question in the abstract. Participants further believed that both the content of the answer, and the method for reaching it, depended on: (a) the legal context; (b) the facts of the case; and (c) the realistic options available for the child.

Although the Working Group recognized that a great deal of ambiguity complicates the representation of the impaired child client, the Working Group nonetheless believed strongly that the lawyer’s unfettered discretion to make any type of best interest recommendation during the course of representation must end. The Working Group aimed to develop a process of lawyering that would convey to the legal community the same degree of clarity about the role of the im-

1. Group leader and author: Robert Schwartz. Recorder: Deborah Glaser. Participants: Frank Cervone, Hon. Michael Corriero, Chris Dunn, Ellen Efron, Rose Firestein, Ann Haralambie, Daniella Levine, Jean Koh Peters, Jane Spinak, and Dr. Luis Zayas.

paired child client's lawyer that exists in delinquency cases (where every party to the process has a similar expectation of the manner in which a defense attorney should proceed in a case).

I. ISSUES RAISED

The Working Group began by discussing a hypothetical child custody dispute between parents. The Group brainstormed about whether legislatures should establish concrete standards for best interest determinations in the child custody context. Members asked whether "best interests" and "legal interests" advocacy differ, noting Martin Guggenheim's argument for adherence to legislatively established "legal interests" advocacy while representing the impaired child client.

The Working Group discussed the scope of the lawyer's appointment, i.e., whether and when a lawyer could depart from legislatively established definitions of best interest. Because a court properly determines the child's legal interests, when, if at all, may a lawyer permissibly consider or present evidence of "best interests" that may differ or lie outside the scope of "legal interests"?

The indeterminacy of this task led the Group to attempt to give substantive meaning to "best interest" by developing a methodology adaptable to the range of proceedings in which impaired children have lawyers. The process, the Working Group believed, should be governed by the contextual purpose for which a child has been given a lawyer.

In the Working Group's effort to establish boundaries for lawyers, the participants recognized nevertheless that multiple "correct" answers in a best interest inquiry may come into play. The Group also concluded that with impaired child clients, an ultimate decision maker charged with making the best interest determination will be involved, and that the lawyer's task might well require presenting one *or more* "correct" best interest options from which the decision maker would be able to choose.

II. DEVELOPING A PROCESS

The Working Group turned for guidance to Jean Koh Peters's article, *The Roles and Content of Best Interests in Child-Directed Lawyering for Children in Child Protective Proceedings*. The participants explored whether the methodology developed by Peters for child protection cases could be applied in other contexts. The Group decided to use that part of Peters's article that dealt with impaired child clients, recognizing that her work also addressed older children who can direct counsel.

The Group reviewed in detail Peters's closing recommendations,² beginning with the need for understanding and representing the child "in context." The lawyer should go through a winnowing process to determine the options *actually available* to further the child client's legal interests. Otherwise, the lawyer will begin the process with too many options that are unrealistic or inappropriate.

To explain this process, and to develop it further, the Working Group used a drawing. The process involved beginning with a universe of every possible option and all possible areas of lawyering discretion, which the Group represented as a large oval. The participants lopped off most of the oval to eliminate that which fell outside the legal scope of the case—for example, whether a child should live in another state with the noncustodial parent would be outside the inquiry of a special education hearing officer (and outside the best interest inquiry of a lawyer for the child in a special education case). In this way, the Group addressed concerns it shared with Martin Guggenheim regarding excessive lawyer discretion in determining children's best interests.

A discrete portion of the remainder of the oval might include options that are unrealistic and, therefore, inappropriate for the lawyer to present to the decision maker. For example, the relevant jurisdiction may lack specialized foster homes. For a lawyer to argue that a child be removed from a known setting and placed in a foster home that does not exist makes little sense, unless the lawyer is using the case in a law reform effort to establish such specialized care. Looking at it another way, before a lawyer makes an argument that a child be placed in foster care, the lawyer should know whether the available foster care can meet the child's needs. The lawyer might well pursue a solution that meets the child's specialized needs in the child's own home. At this point, the Working Group affirmed that the lawyer who begins this process must educate herself sufficiently to know how to implement this winnowing process, as well as how to obtain help from experts along the way.

Participants returned to the process of eliminating options and narrowing the best interest inquiry. Once the lawyer reduces the options to those that are realistic, she must measure them against the paradigm or paradigms that are appropriate for the context. Peters, for example, discusses the "psychological parent" and "family network" models for child welfare cases.³ The Working Group believed that lawyers should acquaint themselves with paradigms from other disciplines, which give meaning to legal standards embodied in the statutes. For instance, when a statute calls for the "least restrictive

2. See Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *Fordham L. Rev.* 1505, 1564-69 (1996).

3. See *id.* at 1537-53.

alternative," lawyers should understand the paradigm by which educational professionals determine restrictiveness. Using the drawing as a guide, participants lopped off that part of the oval for which no resources were available (if resources were an issue), to leave those resources that are available under law. (The struggle to develop a workable metaphor also led the participants to consider the image of the colander, which would sift and allow to pass through realistic options.)

To determine legal options, to measure them against paradigms, and to evaluate their feasibility, the lawyer must involve herself in a constant process of assessment. The Working Group members used a number of images to describe this nonlinear process. Many of these steps must be revisited in light of new information. The inquiry reflected a spiral quality—a return to the starting point and moving on—that can resemble themes in a symphony that are introduced and recur throughout the performance. Thus, a lawyer would make a preliminary determination of best interest, which the lawyer would revisit from time to time, sometimes with expert assistance. Participants sought to avoid a situation in which expert help would be required at every step. If one position emerges clearly as being in the child's best interest, the lawyer need not consult with experts. The Group recognized that a lawyer who is reasonably well-informed about the substance of her field should know the point at which expert help becomes necessary, and should then avail herself of such help.

Working Group members expressed different opinions about the requirement of experts. A large majority believed that, because lawyers themselves had sufficiently diminished capacity to represent children, consultation with experts was highly advisable, if not necessary. A minority worried that the parties should not be asked to pay for experts unnecessarily.

At the end of this sifting, spiral-like search for best interest, the lawyer may be left with more than one option. The Working Group felt that for the lawyer to choose one of those legitimate options to present to the decision maker would be *ultra vires*. Indeed, in order for this process itself to be legitimate, the lawyer should not *become* the decision maker, but must recognize that for the impaired client, presenting more than one option to the decision maker offers an ethically permissible result. The lawyer should also explain why she excluded other apparent options, and advocate against those options.

The Working Group developed this process for lawyers who represent impaired child clients. Participants felt, however, that the same process would serve guardians *ad litem* or others charged with making best interest recommendations to a decision maker as well.