

REPORT OF THE WORKING GROUP ON THE ROLE OF AGE AND STAGE OF DEVELOPMENT*

The Group entitled "Ages and Stages of Development" had an appropriately wide-ranging discussion over the two days of the Conference. A nearly unlimited number of topics suggest themselves when considering the effects that children's different ages and developmental stages might have on a lawyer's representation. Moreover, once the salient topics are isolated, an analysis in terms of children's chronological ages or of their stages of development may lead to very different results for each topic. In fact, the Group's most vigorous discussion turned on that very distinction.

A. *Age of Capability*

Issue: Should the child/client's age or stage of development determine whether the client is presumed to be capable of directing their attorney? If so, what are the criteria and who decides if they are met?

Group Recommendation: A statutory presumptive age test should be adopted in child welfare/dependency cases whereby:

- Attorneys should presumptively function as client-directed attorneys for children age seven and above.
- Attorneys in dependency cases representing children *younger than seven* should:
 - Practice in a manner consistent with the principles set forth in the *Fordham Recommendations*;¹
 - Give due consideration to the view of the child in determining what position to advocate, and present to the court the views of the child;

Conference Recommendation: There was not consensus on a presumptive age, but there seemed to be some support for including the following language: "Based on our experience, we would be surprised if lawyers faithful to these principles did not routinely treat children at least seven years of age as capable of directing their attorneys."

Discussion: Our Group tackled this subject early on and returned to it several times. One of the core concerns of children's law has always been how to define the attorney-client relationship given that some clients are too young to speak, much less meaningfully understand the legal proceedings or the attorney's role.

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¹ *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1308-12 (1996) (discussion on preverbal and impaired children);

Thus, trying to define a single role for lawyers in dependency cases representing children of all ages and all capacities is an impossible task. The ABA, the NACC, and the *Fordham Conference* adopted policies that are largely in agreement with each other and arguably lean toward a strong presumption of a client-directed relationship whenever possible. However, no state has adopted these standards on a universal basis. State by state approaches has resulted in confusion as well as greatly divergent approaches to the role of children's counsel.

Given general agreement with the *Fordham/ABA/NACC* principles in our Group, we had an interesting discussion about how to draw the policy lines so that the most attorneys would have a clear understanding of their role and hopefully so would their client. As it turned out, another Group (the "Role of Best Interests group") was weighing these same issues and came up with a different result.

The main questions we explored in some depth were:

- Should the determination of whether the client is capable of directing his or her attorney be based on a presumptive chronological age or whether he or she has reached some milestone(s) of development? Who should make that determination?
- What is the role of the attorney for those clients who are determined not capable of directing their attorney? Should an attorney be appointed at all?

In the course of our discussion of whether there should be an age test or developmental test, it became clear that much of the debate would focus on the discretion implied by the developmental test. Proponents of a presumptive age argued that the primary danger of a developmental test is that someone, presumably either the client's attorney or the judge, must decide whether the test has been met. Setting a chronological age at which the client's competence to direct the attorney is presumed considerably reduces the cases in which individual decisions must be made about the role of the attorney.

We had much discussion about the danger of placing substantial discretion in either the attorney or a judge to make a subjective determination of the child's competence to direct their attorney. The fear was expressed that if the child and attorney disagreed about the best course of action, the attorney could too easily conclude that their client was too immature to make that decision. Thus, even if the developmental bar was deliberately set high in order to give more children client-directed counsel, the subjective nature of any developmental test might have the opposite result. The majority of our Group members therefore concluded that a presumptive age test was preferable.

We did not reach this decision easily and, at the beginning of the discussion, the majority was probably against the concept of setting a chronological age. Although we never reached unanimity, most of us felt that the most important result of providing legal representation is empowering the client. Some of us who began by arguing against an age test became persuaded by the argument that an age test might result in a greater empowerment of children in the attorney-client relationship.

The question then naturally presented is what is the presumptive age? The Group seriously considered a wide range of possibilities. Some advocated setting a high age, focusing on older teenagers, on the ground that they are most

able to have a “normal” attorney-client relationship and the available resources for attorneys (for example, to maintain reasonable caseloads) will always be limited. One member of the Group provocatively proposed that perhaps only seventeen or eighteen year-olds should be routinely appointed attorneys. The discussion also included considerations of ages set by many states for allowing older children to make certain medical decisions privately and by recent studies related to children’s competence in the criminal and delinquency context.

Others argued for setting the age as low as four years old. By that age, most children are verbal and may express some preference to the attorney on one or more relevant issues. Obviously, the communication skills demanded of the client-directed attorney in working with a range of clients from preschool to teenager are enormous. Also, some Group members noted, client-directed lawyering can be a “hard sell” to legislatures and the public, particularly for younger children.

The Group ultimately settled on seven as the proposed presumptive age. Any specific number will be an arbitrary choice to some extent. Moreover, the idea of a presumptive age still leaves room for discretion in close cases. Seven is currently (and historically) the minimum age at which a person can be held criminally liable in most states.

What about the children who are below age seven or are deemed not to be mature enough to be appointed client-directed counsel? Our Group had a serious discussion over whether such children should have attorneys at all. Arguments for that position included the lack of attorneys’ training and experience in evaluating “best interests” (or whatever other standard is used for determining the position to advocate), the danger of personal bias entering into the attorney’s position, and, again, the need to maintain reasonable caseloads in the face of limited resources. The provocative argument was even made that, since many children’s attorneys are so deficient and/or overloaded, a policy that limits the number of attorneys appointed for children might reduce the overall harm done to children through bad attorney practice.

Proponents of attorneys for the younger children argued that part of the attorney’s job is to act as a watchdog on the system and hold it accountable. As one member put it, “when the stakes are high,” it is even more important that a lawyer for the child monitor the process through independent fact-finding and zealous advocacy. The point was made by several in the Group that the child’s attorney, even for a young client, was the only person in the courtroom with a duty of loyalty only to the child.

In the end, the Group felt that the discussion of the role of the attorney for the young child had already occurred over many years and in many different forums. We agreed that the guidelines issued in the *Fordham Conference* still provided a good template for regulating the practice of lawyers for children not deemed ready to direct their attorney and avoiding some of the pitfalls described above.

B. Juvenile Court Jurisdiction

Issue: What policies regarding delinquency and criminal court jurisdiction are developmentally appropriate?

Group Recommendations:

- Juvenile court delinquency jurisdiction should be invoked at an age no younger than twelve at the time of the offense.
- No youth shall be tried as an adult for any crime committed prior to his or her eighteenth birthday.
- Raising the maximum age for juvenile court delinquency jurisdiction should be further studied.
- Trying youth in adult criminal courts should be eliminated or minimized. However, if state law provides for adult court jurisdiction the decision on whether to try a youth as an adult should be decided only by judges, in a manner consistent with the ABA/IJA standards on juvenile justice.
- No youth should be sentenced to a term of life in prison for any crime committed prior to his or her eighteenth birthday.

Conference Recommendations: No changes

Discussion: There was broad consensus in our Group over this set of recommendations in the juvenile justice field. Much concern was expressed over the increasing tendency to try children as adults based on more types of criminal acts and at lower ages. Many states have also streamlined the process by allowing prosecutors to file directly into the adult court instead of having the juvenile court judge decide after a hearing.

Children as young as nine have been reportedly tried in adult court despite an increasing body of literature suggesting that many children do not reach a legal level of competency to stand trial until age fifteen or later. Rather than propose an age for adult court jurisdiction, the Group decided to express its general disapproval of subjecting children to adult criminal jurisdiction. If the state nevertheless adopts a system for trying children as adults, only a judge should make the final decision after a hearing to determine if the child can be appropriately treated juvenile court.

The discussion about the minimum age for delinquency jurisdiction arose out of many of the same concerns as the adult criminal jurisdiction issue. Most states do not have a specified minimum age for delinquency jurisdiction. Of those that do, the age may be as low as six. Yet, the recent literature on children's competence implicates their ability to understand their actions, the proceedings and to assist in their own defense. Many in the Group felt that younger children and their families should be dealt with in dependency court or in the community rather than in the juvenile delinquency system.

The Group briefly considered that, on the other hand, consideration should perhaps be given to *raising* the maximum age at which juvenile court jurisdiction is allowed. Again, studies of competency are beginning to indicate that a significant proportion of young adults should not be held accountable in the adult criminal justice system and would more appropriately be dealt with in juvenile court. We agreed, however, that this issue should be tabled for further study.

C. Child Development Training

Issue: Many judges, lawyers, lawmakers and social service providers are poorly informed about child development and how it bears on decisions made

in the child welfare, juvenile justice and domestic relations systems and lack the skills to make and engage children in the decision-making process.

Group Recommendations: Any lawyer or judge involved in child welfare, juvenile justice or domestic relations cases should be required to participate in formal training on child and adolescent development and family systems theory before taking any such cases.

- All court based or ordered evaluations shall be conducted by qualified professionals.
- Law Schools should include interdisciplinary education as part of their curriculum.

Conference Recommendations: No changes

Discussion: The Group did not spend a lot of time discussing these recommendations and felt that they would likely not be controversial among children's law "insiders," such as the symposium participants. However, the Group felt that they were principles that should be expressed and expanded upon and that they may not be as obvious to others considering policy in children's law, such as legislators.

D. Enhancing Youth Participation in Dependency and Juvenile Justice Proceedings.

Issue: When should children be present in court and how should they participate in the proceedings when they come to court?

Group Recommendations:

- Establish and promote policies and practices that would advance the objective of ensuring that children are present in all dependency proceedings. In particular, ensure that efforts are made to include children in their own proceedings unless the child chooses not to participate or the court finds that presence in court would be detrimental the child.
- In all juvenile proceedings, attorneys should ensure that their child clients are informed, supported and empowered to be an engaged participant.
- Attorneys should engage in system change to create child-centered and child-friendly court processes and organizational structures. In the conduct of individual cases, attorneys should engage in practices that ensure the child client is able to understand the court proceeding, including avoidance of the use of legal jargon, explaining the process and individual decisions both prior to and during court, and encouraging the court to actively engage the child in the court proceeding.
- Attorneys should engage in system change to promote the development of organizations that support the engagement of youth in the juvenile justice and dependency processes both in individual cases as well as on a systemic level.
- Judges should receive training that will allow them to appropriately engage children as full participants in juvenile court proceedings and attorneys should receive training to promote these practices.
- Attorneys should seek to identify and engage those with whom the child is connected and who can support the child's ability to participate in the juvenile court process.

Conference Recommendations: Consider whether participation issues apply to other areas aside from delinquency and dependency. A specific suggestion was submitted to add at least "other family custody cases."

Discussion: There was not any major controversy in this area. The Group generally supported efforts to meaningfully include children as participants in the court process. The analysis differed somewhat, depending on the nature of the proceedings.

For example, some members observed that dependency proceedings and the child welfare system in general do not tend to be inclusive of child participants. However, the quality of decision-making may be enhanced, not simply by the child's having legal representation, but also by children's direct participation and input into the process. The child's participation enhances his or her view of the integrity of process, ability to accept and come to terms with decisions that were made, and may increase stability in all areas of his/her life. The child's participation and presence in court assures that the judge and other participants have a human face to associate with the decision-making and increases the likelihood that child well-being concerns will be considered through the process. This last point argues for even the youngest children appearing in court.

Although the Group did not spend much time defining specific elements, it is of course important that the court facilities and all personnel create as child-friendly and family-friendly an environment as possible.

In the juvenile justice context, while children are routinely included in the proceedings, enhanced efforts need to be made to ensure child is informed, engaged and supported in a way that ensures the child will be a full participant in the process. Attorneys, judges and probation officers, among others, must take the time and care to explain the proceedings in a manner that is respectful and understandable to the child.

While the issue arose of whether the principle of child inclusion also would apply in private custody actions, the Group did not spend much time on the topic or come to any conclusions. One member thought that the family law context might lead to a different result because, in most instances, the parties to the dispute are two parents who are legally presumed to be competent.

E. Juvenile Proceedings Delays

Issue: How should policies regarding continuances and other delays take account of children's development and well-being?

Group Recommendations:

- Delays for the administrative convenience of courts, lawyers and agencies should be eliminated. In all child welfare and juvenile justice cases that are appealed, the appellate decision shall be issued within two months.
- It is an obligation of children's attorneys to object to destructive delays and put on the record the harm to the child and family caused by the delay.
- Judges should be educated on the harms to children and families caused by delays in judicial decision-making.
- Record keeping mechanisms should be instituted to track the number and reasons for continuances and the duration of trial court proceedings and appeals.

Conference Recommendations: No changes

Discussion: There was little debate within the Group over the value of minimizing delays in legal proceedings to children's and families' well-being. There was also broad agreement that delays often plague juvenile and family

proceedings. The importance of understanding a child's sense of time and incorporating that understanding into policy and practice has been advocated consistently in the literature on children's law. In particular, routine, significant delays in trial and appellate proceedings based on administrative convenience should be addressed on a policy level. Unnecessary delay often impairs healthy child development and family functioning.

F. Extension of Jurisdiction in Child Welfare Cases

Issue: Should dependency court jurisdiction and child welfare services be extended into young adulthood? If so, under what conditions?

Group Recommendations:

- State and federal law should allow foster youth to remain in care at their request until age twenty-one. The juvenile court shall continue to have jurisdiction over their case. The youth shall continue to have the right to counsel.
- If youths choose to leave care anytime after their eighteenth birthday, they should have the right to return to dependency care anytime before age twenty-one. In that event, the juvenile court case shall be reopened and the youth again shall have a right to counsel.
- These rights should not be conditioned on a youth being in school or in treatment.
- Lawyers for children should have the skills necessary to represent this population. In particular, these lawyers should be knowledgeable of the youth's rights to education, housing, health care, and employment.²

Conference Recommendations: No changes

Discussion: Youth in the child welfare system are often dropped from the system or choose to leave it at age eighteen, even though they may lack adequate education, housing, or support systems. Much attention has been focused recently on the difficulties youth have in transitioning out of foster care, especially when they "age out" rather than exit to a permanent home.

Our Group supported policies that would allow foster youth to remain in care and receive services until at least age twenty-one. In addition, youth who chose to leave the system would have a "right of return" until age twenty-one under which they would be able to reopen the dependency case, receive services, and again receive appointed counsel in the juvenile court.

G. Representation Beyond Dependency and Juvenile Justice Proceedings

Issue: How broad should the scope of representation be defined for court appointed counsel for children in dependency and delinquency cases?

Group Recommendations:

- Counsel for children, *with client consent*, should assume a broader role in the representation of their child clients, not limiting representation to the courtroom or the original petition.
- Within the juvenile justice context, attorneys should provide representation for the child clients, such that they will identify all legal needs of the child through all stages of the case, including post-disposition, and ensure the child receives appropriate, quality representation. Court rules and models of practice should be crafted to support this recommendation.

² For additional discussion of this recommendation, see *Report of the Working Group on Representing Children as Members of Communities*, 6 NEV. L.J. 670 (2006).

- Attorneys for children should engage in age- and developmentally-appropriate holistic representation that includes consideration of the needs of the child that extend beyond the presenting legal proceedings, including but not limited to mental health, education, health, and other aspects of child well-being, and should ensure that any identified needs are appropriately met.
- Attorneys should have adequate training, caseloads, access to interdisciplinary staff, and appropriate compensation to enable them to provide holistic representation.

Conference Recommendations: No changes

Discussion: The Group strongly believes in a holistic model of lawyering for children. Juvenile courts and the agencies supervising children's placements and case plans are responsible for meeting a broad range of children's and families' needs. Therefore, children's attorneys must meet the challenge of understanding and advocating for a broad range of services for their clients. The Group wished to emphasize, however, that the lawyer's assistance must still be consistent with all ethical mandates, including the client's knowledge and consent.

The notion of representation outside the scope of the immediate proceeding is less prevalent in the delinquency arena. The Group consequently decided to include specific recommendations directed at counsel in juvenile justice cases. We hope that a trend toward holistic representation develops in delinquency policy and practice.

Note: The remaining recommendations from our Group arguably fall less directly under the subject "Ages and Stages of Development." However, the topics fell naturally out of our discussions of representing children and we wanted to be sure they were captured somewhere in the proposed recommendations of the symposium.

H. Quality Representation for Parents

Issue: How is representation for children in dependency cases ("in families" as the symposium title directs) affected, if at all, by the representation afforded to other parties, especially parents?

Group Recommendations: There should be increased training and resources to promote high quality representation for parents. All parents should be provided high quality legal counsel.

- There should be further study of whether appointed counsel should be encouraged or required to provide representation to both parents and children (in separate cases) and, if so, whether there should be an exception for specialized law offices.

Conference Recommendations: No changes

Discussion: Our Group believes that the system for attorney representation in dependency cases must be seen as a whole. Parent representation in child welfare cases is vital to the rights of the child and affects the role of the child's attorney. All parties must be afforded competent legal counsel in a well-functioning court system.

We recognized that there are few analogs for parents' counsel to the activity that has focused on representation of children, such as the *Fordham Conference* and the *UNLV Conference*. There is no independent membership

organization, like the National Association of Counsel for Children (“NACC”) for parents’ attorneys. We felt that in many jurisdictions obtaining high quality representation for parents is an even more pressing systemic need than improving children’s representation.

Some in the Group advocated for guidelines or rules that would require attorneys to represent both parents and children, although not in the same case, of course. This would give parents’ and children’s attorneys a common understanding of available resources for families and deepen the appreciation for family dynamics and their clients’ treatment in the system.

We did not reach consensus on this point, however, especially with regard to those offices that have been created and funded specifically to specialize in the representation of one party, such as children’s law offices and some law school clinical programs.

I. Lawyering for Families in the Community

Issues:

1. How can lawyers help families before they become involved in the juvenile dependency or delinquency courts? Is there a role for attorneys in prevention of court involvement?
2. Weak, reactive counsel for parents in child welfare systems are the “norm”; children’s interest in staying in their families and out of the child welfare system are disserved as a result. Families have a need for a range of supportive accessible services to function successfully.

Group Recommendations: The costs and benefits of returning to some form of neighborhood legal service office models should be explored and the following should be considered:

- Lawyers should be accessible, community-based and close to other community resources.
- Lawyers should be generalists and prepared to assist in solving a range of problems identified by families.
- Lawyers should collaborate with other disciplines and community resources.
- The lawyer’s role should include community education on rights and avenues of advocacy.

Conference Recommendations: No changes

Discussion: More than twenty-five years ago, the predominant model of federally funded legal aid offices was neighborhood offices. Legal assistance was one of the community supports for families that could assist them in solving problems before law enforcement or other government agencies (such as child welfare) intervened authoritatively. Our Group discussed the possible benefits of comprehensive family lawyering within the context of an office in the community and connected with other community resources. We believe that accessibility to that type of legal service could benefit children, families and society and should be evaluated.

J. Dual Jurisdiction

Issue: Youth often appear in both the child welfare and juvenile justice systems at the same time. Should the same attorney represent the child in both arenas?

Group Recommendations:

- Jurisdictions should permit lawyers to represent youth in more than one system. There should be no prohibitions on concurrent or dual representation, particularly for public defenders and legal services agencies.
- Lawyers who represent children in more than one system should have access to interdisciplinary support, and have the skills to represent children in more than one system.
- Lawyers should either provide continuity of representation across systems, or develop a close working relationship with counsel for the child in the other system. Training, compensation, and caseload should be accommodated so this recommendation can be implemented.

Conference Recommendations: No changes

Discussion: In many jurisdictions, when children are subject to both the dependency and delinquency sides of the juvenile court, attorneys are limited to representing youth in only one of those systems. Consistent with the discussion of holistic lawyering above, our Group recommends that the same attorney represent the child in both aspects of the case whenever possible. Such dual representation may not, however, be possible when state law defines the attorney-client relationship differently for those types of cases. For example, if the law requires the lawyer to represent the child's "best interests" regardless of the child's wishes but the attorney's role in delinquency cases was client directed, the conflict in roles would likely prevent the dual representation recommended by the Group.

This recommendation obviously raises significant issues of training, caseload and professional support, all of which must be adequately provided to enable the attorney to provide competent representation in multiple types of cases.

K. Data and Evaluation of Courts

Issue: Evaluating whether courts and agencies are meeting timelines designed to account for children's and families' needs for speedy resolution requires access to relevant data. Many jurisdictions are currently unable to generate such data.

Group Recommendation: Case management and tracking systems are required to monitor timelines of juvenile dockets and track the movement of children through the juvenile dependency and delinquency systems.

Conference Recommendations: No changes

Discussion: Our Group's final two recommendations met with no debate in the Group and admittedly do not fall squarely within the scope of the Group's title. We nevertheless felt strongly that we should create a "placeholder" for them and make sure that they were covered in the final symposium recommendations.

Many courts lack adequate case management systems that can generate the data necessary to evaluate juvenile and family court processes. Historically, juvenile and family courts are often the last to receive technological and other upgrades and the may not be consulted regarding the specific needs of their cases.

L. Financing of Child Welfare Services

Issue: Current financing of child welfare encourages overuse of foster care and provides few resources for prevention and early intervention.

Group Recommendation: Congress should implement the federal financing recommendations of the Pew Commission on Children in Foster Care, thereby resulting in more flexible funding for services to assist families and reduce the number of families entering the dependency and juvenile justice systems.

Conference Recommendations: No changes

Discussion: Consistent with our recommendation to consider funding of community legal services and other resources that might prevent the need for court involvement; we agree with the Pew Commission that Congress should implement flexible funding policies in child welfare to achieve prevention goals.