Abstract: The Sword In The Stone

All minors have the right to legal representation. The competent minor is also entitled to instruct a lawyer as advocate. Whether a minor is competent to instruct counsel is not for the court or an expert but the lawyer to determine. Different ways to determine this competence have been suggested, but any test must be practical and within the skill of a lawyer to administer. A recent case provides a workable test. Once a lawyer determines a client competent to provide instructions, ethics require zealous advocacy of the minor's wishes.

The Sword In the Stone: A Practical Test of A Minor's Competence to Instruct Counsel

In the Arthur legend the adolescent future King draws a sword from a stone. By this miraculous act he proves his maturity and competence to be King. Unfortunately, for the solicitor contemplating acting for a minor, competence does not magically manifest itself.

Yet converging medical, ethical and legal recognition that competent minors require legal representation has placed a heavy burden on the lawyer. Having a right to be represented, is the young person competent to instruct?

The situation often arises in urgent circumstances.

Duty counsel interviews a 14 year old teenager charged with a criminal offense pursuant to the Youth Criminal Justice Act.[1] The minor wants to plead guilty.

A lawyer is called to an emergency hearing under a Child Welfare statute. A 15-year old claiming mature minor status is refusing medical treatment in a potentially life threatening situation.

Counsel is appointed to represent a 12 year old in a contested divorce situation. The client wants to live with one of the parents.

In each case, how does counsel determine the minor is competent to give instructions?

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[1] *Youth Criminal Justice Act* S.C. 2002, c.1

Legal Capacity v. Legal Competence

The age of majority varies across Canada between 18 and 19 years of age.[2] Minors lack legal capacity at common law to contract without it being voidable. They are incapable of retaining a solicitor[3] (unless it could be considered "necessaries"[4]) or to directly instruct counsel.[5]

The principle of minor incapacity is ancient. While in the middle ages the notion of childhood "did not exist",[6] the age of 21 was significant as the age at which a landowner was compelled to knight service.[7] In early days, an infant could sue in tort *per se*.[8] By the 18th century, according to Blackstone, the law was:

> "An infant cannot be sued but under the protection, and joining the name, of his guardian; for he is to defend him against all attacks as well by law as

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[2]*Age of Majority Acts see*: R.S.A.2000, c.A-6; C.C.S.M.c.A7; R.S.O.1990, c.A-7; R.S.P.E.I.1988, c.A-8; R.S.S.1978, c.A-6; R.S.N.B.1973, c.A-4; S.N.L.1995, c.A-4.2; R.S.N.W.T.1988, c.A-2; R.S.N.S.1989, c.4; R.S.Y.2002, c.2

[3]*Eastwood v Kenyon* (1840), 11 Ad. & E. 438,113 E.R. 482; *Statute of Frauds*, R.S.O.1990, c.S.19

[4]B. Dickens "Children's and Adolescents' Consent to Medical Treatment" paper presented at The Cdn. Institute (Nov.19&20, 1992)

[5]See for example: *Rules of Civil Procedure,* R.R.O.1990, Reg.194 s.1.03, 7.04

[6]R. Bessner, "The Voice of the Child In Divorce, Custody and Access Proceedings"(Dept. Of Justice Canada Family, Children and Youth Sec. 2002-FCY-1E)at 1.1, online: http://www.justice.gc.ca/en/ps/pad/reports/2002-fcy-1e.pdf

[7]A.K.R. Kiralfy, *Potters Historical Introduction to English Law* 4d ed. (London: Sweet & Maxwell Limited, 1958)at 639.

[8]*Gray v Jefferies* (1587) Cro.Eliz. 55; Ibid at 640.

otherwise."[9]

That is the same position under the Rules of Civil Procedure of all Canadian jurisdictions.[10] As a result, even in mature minor cases, a litigation guardian is appointed.[11]

Whether directly or through a litigation guardian, the minor has a right to be represented. Under the U.N. Convention on the Rights of the Child, Canada accepted that:

> "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law"[12]

and in criminal cases:

> "to have legal or other appropriate assistance in the preparation and presentation

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[9]W. Blackstone, *Commentaries on the Law of England* Lewis ed. Vol. 1 (Philadelphia: Rees Welsh & Co. 1897)at 452.

[10]Supra ftn 5; see also G.D. Watson, *Canadian Civil Procedure* 2d ed. (Toronto: Butterworths 1977) at 5-69.

[11]See for example: *Walker (Litigation Guardian of) v. Region 2 Hospital Corp*., 4 R.F.L. (4th)321, 1994 CarswellNB 24 (N.B.C.A); *Kennett Estate v. Manitoba (Attorney General)*, 42 R.F.L. (4th) 27, 1998 CarswellMan 348 (Man.C.A.); *B.H. v. Alberta (Director of Child Welfare)*2002 ABQB 898; *Children's Aid Society of Metropolitan Toronto v. H.(S.),*[1996]O.J.No.2578; *Director of Child, Family and Community Service for the Province of British Columbia v. Sarah Jessica Bahris (Litigation Guardian of*) dated 2006 06 30 Ontario Court of Appeal #C43619

[12]United Nations Convention on the Rights of the Child, General Assembly Resolution 44/25 of November 20 1989 Article 12.2

of his defence".[13]

The national law in Canada is governed by case law and provincial or federal statutes.[14] While the law recognizes the right to representation, counsel acting as advocate for the child has only recently been accepted. In 23 states of the United States a child's attorney is obligated to advocate the child's views.[15]

The "paternalistic approach"[16] of appointing counsel for a minor but preventing the advocating of the minor's instructions is gradually disappearing. Viewing children as incompetent to contract, marry or consent to medical treatment began as a protection for them. Adults may intuitively believe minors incapable of instructing counsel. Is that correct?

It has long been recognized that for specific purposes (ie., medical consent) some minors are competent, although lacking legal capacity. They have the status of mature minor:

> "In Canada, the common law recognizes the doctrine of a mature minor, namely, one who is capable of understanding the nature and consequences of the proposed treatment. Accordingly, a minor, if mature, does have the legal capacity to consent to his or her own medical treatment. . . no parental consent is required."[17]

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[13]Ibid Criminal cases see section 40.2. b(ii)

[14]Supra ftn 1 at s. 25

[15]J. Peters, "U.S. Jurisdiction Summary Chart", Representing Children Worldwide (2006)Yale Law School, online: http://www.law.yale.edu/rcw/index.htm

[16]R. Hartman, "Adolescent Decisional Autonomy for Medical Care: Physician Perceptions and Practises" (2001) 8 U. Chi. L. Sch. Roundtable 87

[17]Supra ftn. 11 *Walker* at 333

This is also the law of many states of the United States:

> "Although the age of majority in Illinois is 18, that age is not an impenetrable barrier that magically precludes a minor from exercising certain rights normally associated with adulthood. Numerous exceptions are found in this jurisdiction and others which treat minors as adults under specific circumstances".[18]

There are also emancipated minors. For example, an underage soldier in wartime may prepare a will; the Succession Law Reform Act imputes testamentary capacity.[19] This and other recognized exceptions are not the subject of this article.

The mature minor lacks legal capacity due to age but possesses legal capacity due to maturity. It is more accurate to say he/she is legally competent.

We use these terms interchangeably (as does Hoffman).[20] Perhaps we should not. In law "capacity" (from the Latin *capacitas*)[21] means "legal qualification".[22] "Competent" in law

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[18] *Re EG* 133 Ill.2d 98, 549 N.E.2d 322 (1989); see also *re W.M.* 823 S.W.2d 128 (Mo.Ct.App.1992); *re Rena* 705 N.E.2d 1155 (Mass. Ct. App. 1999); *re Swan*, 569 A.2d 1202 (Me. 1990); *Belcher v. Charleston Area Med. Ctr.,* 422 S.E.2d 827, 835-838(W.Va. 1992); *re Rosebush*, 491 N.W.2d 633,636 & n.4 (Mich. Ct. App. 1992)

[19] *Succession Law Reform Act* R.S.O. 1990 c.S.26 at s.5

[20] B. Hoffman, *The Law of Consent to Treatment in Ontario* 2d ed. (Toronto: Butterworths 1997)at 1.

[21] J. Traupman, *The New Collegiate Latin & English Dictionary* (Philadelphia: Bantam Books 1966)at 34.

[22] H. Black, *Blacks Law Dictionary* 5d ed. (Minnesota: West Publishing Co. 1979)at 188.

(from the Latin *competoere*[23]) means "duly qualified, answering all requirements. . . having sufficient ability or authority".[24] Legal capacity is based on a legal standard (i.e. age of majority), while legal competence is founded upon an individual's ability and may be demonstrated irrespective of age.

To illustrate, suppose government designates an "official" one litre container. It has capacity to hold one litre and is also competent to do so. If it has a hole, it still has capacity but no longer competence. On the other hand an "unofficial" container is competent to hold a litre even if not designated "official". The container lacks legal capacity but is competent.

An adult testator of age possesses legal capacity but may lack competence. A mature minor may, on the other hand, be competent without legal capacity.

Surprisingly, considering the frequency with which counsel act for minors, there is a dearth of research or professional direction on how to determine competence of minors.

Governments have attempted to operationally define "capacity":

> "the ability to understand information relevant to making a decision and appreciate the reasonably foreseeable consequences of a decision or lack of decision."[25]

However, such guidelines do not specifically address when capacity is acquired but rather

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[23]Supra ftn 21 at 51 "to coincide, to come together, meet, to be adequate, be suitable".

[24]Supra ftn 22 at 257

[25]Capacity Assessment Office "Guidelines for Conducting Assessments of Capacity" (2005) Ontario Ministry of the Attorney General at 1.1, online: http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-05/guide-0505.pdf

if an adult of uncertain competence still has capacity. The operational definition raises more questions than it answers when applied to minors. This may result from a lack of knowledge regarding the ability of minors to make decisions:

> "The effort to achieve a more comprehensive picture of the way adolescents make choices also can enhance our understanding of adolescent reasoning and capacity for understanding. . . knowledge is relatively skeletal in this realm as well."[26]

Psychologist/lawyer Landau (referring to medical consent) recognized:

> "there still is no agreement on the age of consent and there appears to be little effort to see that the age adopted is in keeping with the cognitive capacity of the child. . . developmental studies of intellectual, cognitive, social and moral development have not addressed themselves specifically to legal matters. It is to be hoped that, in future, co-operative research projects will offer the empirical basis necessary for matching the child's legal rights and obligations with his or her developmental capacity."[27]

Even proponents of the few suggested legal tests of competence recognize the lack of basic research is an impediment:

> "the need remains for empirical research directly relevant to the lawyer-child relationship in the context of legal decision making processes. For this

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[26]E. Scott, "Judgment and Reasoning in Adolescent Decision Making" (1992) Vol.37, Villanova Law Review at 1660

[27]B. Landau, "Barriers to Consent to Treatment: The Rights of Minors in the Provision of Mental Health Services" (1979) Vol.2 Can.J.Fam.L. at 262

reason, any proposal at this juncture must, of necessity, be tentative."[28]

There has been little progress in the intervening twenty years. Empirical research does not exist to fix a criteria for the metamorphosis from minor to mature minor. In spite of this, experts are confident that legal barriers to minors are out-moded, as no research supports such barriers. Professor Hartman observes:

> "Remarkably, the legal presumption of decisional incapacity for adolescent patients rests on scant scientific and social evidence. Developmental research suggests that adolescents are decisionally capable, at least beyond the level presently presumed by law.
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> . . .
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> "There is evidence from different types of measures suggesting that adolescents possess a level of decisional ability comparable to young adults, based on criteria used for adult capacity assessments, although more research is necessary before definitive statements may be made. For example, Lois Weithorn and Susan Campbell found adolescents fourteen years and older comparable to young adults in health care decision making. Bruce Ambuel and Julian Rappaport found the same age group similar to young adults for pregnancy decision making. The present study found that adolescent patients are believed and treated by physicians as decisionally capable, suggesting that chronological age markers are not necessarily reliable indicators of decisional capacity".[29]

Lawyers can benefit from the increasing acceptance of adolescent medical decision making

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[28]J. Leon, "Recent Developments in Legal Representation of Children: A Growing Concern with Consent to Capacity"(1978) Vol.1 Can.J.Fam.L. at 432 see ftn 290

[29]Supra ftn 16 at 89, 127

and the research that is available in that field:

> "children, especially adolescents, are remarkably similar to adults in both the choices they make and their decision-making process. Minors fifteen years old and older make decisions regarding waiver of rights or consent to medical treatment in generally the same way that adults do. Children as young as nine or ten in some situations will choose outcomes congruent with adults', although their reasoning process differs more from that of adults....these research results lend support to the long established 'mature minor' rule".[30]

There is still a need for research into legally specific competence, particularly in youth criminal proceedings. Young people are often pressured to instruct counsel to enter into plea agreements that can have significant effect on their future. Frequently, the minor is ordered by a parent to plead guilty or accept extra judicial sanctions. The lawyer may be at odds with the minor's guardians. The need for research in this area is underscored by Grisso, who recognizes the

> "need to proceed with more extensive research on youths' capacities as defendants is urgent, if we are to assist the law in assuring that adolescents who are tried in criminal courts are prepared to assist counsel and to make decisions in their defense."[31]

Understanding that minors need representation has caused a reconsideration of the role of the lawyer for the child over the last thirty years. This parallels the acceptance by physicians specializing in pediatrics that:

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[30]J. Costello, "'If I Can Say Yes, Why Can't I Say No?' Adolescents at Risk and the Right to Give or Withhold Consent to Health Care" *Child, Parent, & State Law and Policy Reader* (Philadelphia: Temple University Press 1994) at 490.

[31]Supra ftn 16 at 132

> "The assumption that children lack the capacity to decide for themselves does not apply in the case of many adolescents."[32]

Minors differ in development. The circumstances of the lawyer's engagement may vary. Counsel bring their personal ethics to the table. Often the situation is rushed. The lawyer may consider determining competence too bewildering to address. Although determining competence is complicated, it does not absolve the lawyer of his/her duty. As with the physician, so with the lawyer:

> "'Playing it safe' is a pretense under which physicians may allow themselves to escape from assessment difficulties and from thinking through the ethical dilemma involved in deciding whether to declare someone capable or incapable."[33]

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[32]C. Zawistowski, "Ethical Problems in Pediatric Critical Care: Consent" (2003) Vol.31 No.5(Suppl.) Crit. Care Med. at 410

[33]Supra ftn 20 at 71

What Is the Appropriate Role of Counsel for a Minor?

The types of child representation in Canada have been documented by Bessner. She describes three models of representation: amicus curiae, litigation guardian and advocate. Of the three, only advocacy requires the assessment of capacity to instruct counsel.[34]

A fourth category, not addressed by Bessner, is the lawyer involved in a test case. There is a paradox in such representation. An adult in a test case has some choice over the agenda, but "children do not in fact exercise substantial control over the organizations that claim to represent their interest".[35] While this paper does not address this form of lawsuit, lawyers should carefully consider the unique ethical issues raised therein.

In amicus curiae and litigation guardian roles, the lawyer's duty is to protect due process rights of the minor. In either, the lawyer has "no obligation to ascertain the wishes of the child nor to present these wishes to the court". The litigation guardian may even "disregard a child's instructions if counsel is of the opinion that these instructions are not in the child's best interests".[36]

When does a lawyer reject the amicus curiae or litigation guardian model and become an advocate? In *Re. W*, Abella, J. suggested the threshold:

> "The child may be unable to instruct counsel. Or the child may be, as in this case, ambivalent about her wishes. Or the child may be too young. Although there should be no minimum age below which a children's wishes should be ignored - so long as the child is old enough to express them they should be

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[34] Supra ftn 6

[35] R. Mnookin, *In the Interest of Children Advocacy, Law Reform, and Public Policy* (New York: W.H. Freeman & Company 1985)at 54.

[36] Supra ftn 6 at 22

> considered - I feel that where a child does not or cannot express wishes, the role of the child's lawyer should be to protect the client/child's best interests. In the absence of clear instructions, protecting the client's interests can clearly involve presenting the lawyer's perception of what would best protect the child's interests."[37]

Counsel for the minor are lawyers and not social workers.[38] They offend their ethics as lawyers if they adduce evidence themselves or worse, assume

> "a contrary position in their presentation of the case if they have concluded that the child's wishes are not in his or her best interests. Professional ethics would not permit a lawyer to do likewise if he or she were acting for an adult client".[39]

This is what happened in *Strobridge.*[40] The trial judge ruled the lawyer for the Official Guardian was no different than any other counsel and was "not entitled to express his or her personal opinion on any issue, including the children's best interests". The Ontario

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[37]*Re W* (1980) 13 R.F.L. (2d) 381(Ont. Prov. Crt. - Fam.Div.),[1980]27 O.R. (2d)314

[38]F. Maczko, "Some Problems With Acting for Children"(1979)Vol.2 Can.J.Fam.L. at 292; see also Student Note "Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce" (1978) 87 Yale Law Journal 1126, 1138-1153 in which lawyers acting as advocates reported they had "clear conceptions of that role" while a non-advocate saw himself "as a social worker".

[39]Ibid Maczko at 285; see also *C.A.S. of Metropolitan Toronto v. Duke K. and Mary K.* (1989) 2 Ont. Fam. L.R. 111, A.C.W.S.(3d) 277 (Ont. Prov. Ct-Fam.Div.) "I have some concerns, as I have expressed before, about the idea of the child's lawyer (especially where the child is approaching 12 years of age) taking any position other than the traditional position of a lawyer taking instructions and acting pursuant to the stated wishes of the client."

[40]*Strobridge v. Strobridge* (1992) 10 O.R. (3d)540(Ont. Gen. Div.); *Official Guardian v. Strobridge* 1994 18 O.R. (3d)753(Ont.C.A.), [1994]O.J.No.1247(O.C.A.), 1994 CanLII875 (ON C.A.)

Court of Appeal agreed. They adopted an Alberta Court of Appeal decision:

> "It is to be borne in mind that the function of counsel in any Court is that of an advocate; he is there to plead his client's cause upon the record before the Court and he does not in any sense occupy the dual position of advocate and witness."[41]

The result was that the lawyer for the Official Guardian (now the Children's Lawyer) acted as advocate for three children aged 16, 13 and 9.

Strobridge has been widely applied in support of the ethical principal that a lawyer may not give evidence, although in family court there "may be circumstances where this rule is relaxed somewhat with the consent of counsel and the Court."[42]

It should not surprise us that judges in the adversarial system that is the foundation of common law are concerned when lawyers step from the bar to the witness box. Unless the legislature defines a different role for counsel for a child,

> "a judge deals with litigation and has been given the adversary model to use. He or she should not be expected to warp significantly the model without clear direction. Counsel should behave as counsel."[43]

What should the lawyer in *Strobridge* have done? Abella, J. in *Re W* said to act as the child's advocate:

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[41] *Cairns v. Cairns,* [1931] 3 W.W.R. 335 (Alta. C.A.) at 345

[42] *Baxter v Benoit* 2004 YKSC 60(CanLII)par. 24

[43]A. Mamo, "Child Representation" in J. McLeod, *Child Custody Law and Practice* (Scarborough: Carswell 1992)at 13-13.

> "means that the child's lawyer should present and implement a client's instructions to the best of his or her ability. And this, in turn, involves indicating to the court the child's concerns, wishes and opinions. It involves, further, presenting to the court accurate and complete evidence which is consistent with the child's position. And too, there is an obligation to ensure, in so far as this is possible given the age and circumstances of the child, that the opinions and wishes expressed by the child are freely given and without duress from any other party."[44]

(Re W was considered by the Law Society of Upper Canada in reviewing the professional duty of lawyers acting for minors.)[45]

In *Strobridge* the Court contemplated the rare case when counsel might directly communicate the views and preferences of the child if judge and parties agree. Veale, J. pointed out in *Baxter*[46] that in such a case if the child's lawyer expresses to the court the wishes of the child client, it is still open to parents to object. The court will then determine the child's wishes by proper evidence.

Was Veale, J. implying that a lawyer's decision to act as advocate pursuant to a child's instructions is reviewable by the court? This would raise a thorny issue. Counsel is an officer of the court and a barrister protected by the principle of the independence of the bar. The counsel's decision as to the competence of the client to instruct should not be challenged by a judge. To do otherwise would force counsel to breach solicitor/client privilege.

There are situations when the lawyer will decide not to act as advocate, but rather as

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[44]Supra ftn 37

[45]"The Legal Representation of Children"1981, May 15 Sub-committee Report Law Society of Upper Canada

[46]Supra ftn 42

amicus curiae or guardian. The Supreme Court of Canada in *Re Beson*[47] recognized that appointed counsel had "assessed his role as being to advance his client's best interests as he saw them to the court" and conducted his own inquiry. In the absence of existing guidelines, counsel determined in accepting his appointment by the Supreme Court he:

> "...would not act as an advocate pursuant to Christopher's instructions (as he would on an adult's behalf) unless satisfied Christopher was capable, inter alia, of: (1) Communicating voluntarily to counsel, instructions which were rational and reasonable; (2) Clearly and fully understanding counsel's advice; and (3) Appreciating the nature and legal significance for him, of judicial proceedings (including adjudications) in which Christopher had an interest."[48]

In *Beson* the child was 5 years old and likely incapable of instructing counsel. But what of the more mature young person? Who makes that decision? To a U.S. academic:

> "the duty for determining whether the child is competent and mature is on the court."[49]

One might respond that a child's lawyer likely knows more about the client than any other legal professional. In spite of that, for some

> "a court determination is preferable to the attorney's assessment of the child's competence to direct his case because a court determination is more

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[47]*Beson v. Director of Child Welfare* (NFLD.) 1982 CanLII 32 (S.C.C.), [1982]2 S.C.R. 716, (1982)142 D.L.R. (3d)20

[48]Ibid

[49]D. Bertz, review of R. Lyon, "Speaking for a Child: The Role of Independent Counsel for Minors"(1989) Vol. 7 Can.J.Fam.L. at 384

> likely be an accurate and unbiased assessment. Once the child-client has been judged mature enough to make his own decision in the matter, his attorney is then as bound to follow his wishes as she would be with any other client."[50]

Presumably, there would be an *in limine* hearing, only after which could the lawyer advocate for the child. Problems with such an approach are obvious. Who acts for the minor at the *in limine* hearing? What if the maturity of the minor is the substantive issue in the case (as in the medical consent of minor cases)? Is not the judge as likely to "base her determination of a child's competence on her personal biases" as is the lawyer?[51] Are we to turn a blind eye to the reality that in criminal and family law "most cases are settled out of Court and the matter of settlement is very much determined by the opinion of the Family Advocate, and not a Judge"?[52]

To determine capacity of minors to give medical consent, courts "continue to be drawn into the process of assessing the maturity of individual minors with or without established legislative criteria".[53] However, courts should not determine competence to instruct counsel. That was the view of Karswick, J. in *Re J.C.*:

> "Practically speaking, I am not sure that the court should assume the responsibility for directing counsel to represent the best interests or carry out the instructions of a child. To do this would require an intensive inquiry of the child's capacity to give rational instructions, to determine whether the

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[50]R. Lyon, "Speaking for a Child: The Role of Independent Counsel for Minors" (1987) Vol.75 California Law Review at 700

[51]Ibid

[52]Supra ftn 38 at 286

[53]N. Batterman, "Under Age: A Minor's Right to Consent to Health Care" (1994)10 Touro L. Rev.637 at 9

> child has been unduly influenced by a parent, relative or even counsel himself. To be able to express a judicious view on this issue, the Court might require psychiatric or other clinical assessment of the child's mental, social and emotional capacity and condition. Testimony might be required from witnesses concerning the voluntary nature of the child's instructions. Even then, it would be difficult, if not impossible in many cases, to come to a determination on whether the child's instructions should be advocated or the child's best interests . . . In the past, counsel has generally decided how he will discharge his duty to his client. Where the instructions of his client were unacceptable for professional or ethical reasons, counsel often would withdraw from the matter."[54]

The Quebec Court of Appeal in *M.F.*[55] took the same approach, citing *Strobridge* and *Re W.* In *M.F.* a ten year old "mature child, capable of expressing himself and capable of instructing counsel on his own behalf"[56] was represented by counsel. The mother moved to remove the child's counsel because the lawyer's "objective was to recommend the renewal of visits between the father and the child, in the interest of the child, rather than to listen to the wishes expressed by the child and to urge respect for his wishes."[57] The trial judge refused and mother appealed.

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[54]*Re J.C. and S.C.* (1980) 31 O.R. (2d) 53; in an earlier decision in the same case (*Re C.* (1980) 14 R.F.L. (2d) 21, [1980] O.J. No 1768) counsel was permitted to provide his personal view to the court, by which, Professor McLeod said in an annotation to the Reports on Family Law judgement, "The entire basis of the trust which underlies the solicitor/client relationship may be threatened". The Ontario Court of Appeal later clarified this issue in *Strobridge*, supra ftn 40; *Re J.C.* was specifically rejected by Bean, J. in *Catholic Children's Aid Society of Metropolitan Toronto v. C.M.* [1991] O.J. No. 2500 at 11, accepting as correct the Law Society of Upper Canada statement of the law, supra ftn 45

[55]*M.F. v. J.L.* (2002) CanLII 36783 (QC C.A.), [2002]R.J.Q.676 (C.A.), [2002] J.Q. no 480

[56]Ibid par.12

[57]Supra ftn 55 par. 15

The Court of Appeal, noting that every person has the right to an advocate,[58] considered the concept of representation. Regardless of the capacity of the litigant, it found representation without advocacy is insufficient:

> "I find it difficult to imagine how a person, adult or child, capable of expressing his wishes and capable of instructing an advocate, could be considered to be 'represented' or 'assisted' by one who was advocating the contrary of his wishes. Whatever the ultimate wisdom of an advocate making submissions based on his personal opinions rather than his client's wishes, it is not a practise likely to inspire much confidence in the attorney-client relationship. This, I believe, would be true in the case of a mature child as it would in the case of an adult. Under our justice system, it is the client's case that must be advanced and not the personal opinions of his advocate."[59]

In *M.F.* the child was "sufficiently mature to express himself", "capable of expressing his wishes", "sufficiently mature to express his wishes and instruct counsel", "capable de mandater", "pouvant s'exprimer et motiver ses desirs" and "mature and capable". In such a case, it concluded counsel has a duty to ascertain and advocate the express wishes of the child, just as for any other client.

Once counsel understands a competent minor is a client like any other, the duty to advocate will come easily. It may seem to the lawyer that the minor needs a friend more than a lawyer. This is erroneous thinking. The minor needs the special friend as described by Fried:

> "a lawyer is a friend in regard to the legal system. He is someone who enters into a personal relation with you-not an abstract relation as under the concept of justice.

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[58] *Charter of human rights and freedoms*, R.S.Q. c. C-12

[59] Supra ftn 55 par.28

> That means that like a friend he acts in your interests, not his own; or rather he adopts your interests as his own."[60]

In this role as special friend, the lawyer may come under attack by parties opposed to the minor's wishes. Not understanding the role of advocate, they may unfairly accuse counsel of undue influence or conflict of interest. That should not deter the advocate. Any issue that might be raised as to manipulation of a youth by third parties would be a matter for the trial judge.

The Ontario and Quebec Courts of Appeal have settled that the lawyer for a competent child is an advocate. That begs the question: how to determine if the minor is competent in the first place?

The Law Society of Upper Canada Committee concluded the decision remains with counsel:

> "Our profession has confronted this problem historically in many criminal cases in which infants have had the benefit of defence counsel. It is with a more mature child who can be said to have capacity to instruct his counsel that the problem arises. When there is concern that the child may be lacking in capacity to provide instructions, the appointment of a legal guardian may be necessary. If the child is mature and responsible enough to accept the consequences of his or her acts and decisions and understands fully the nature of the proceedings and can express a preference as to its resolution, the Committee tends to favour the traditional solicitor/client approach than the guardian-type of representation. Decisions as to the capacity of the child to properly instruct counsel must be determined by the individual lawyer in

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[60]C. Fried, "The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation"(1976)Vol.85 Yale L.J. at 1071

the particular circumstances."[61]

The Barreau du Quebec similarly recommended, as cited by the Quebec Court of Appeal in *M.F.*:

> "La nature du mandat de l'avocat de l'enfant capable de mandater. Le Comité considère que dans le cadre d'un mandat conventionnel, l'avocat doit assumer un rôle de conseiller et de procureur. L'avocat doit donc exécuter les instructions de son client, conformément au mandat qu'il a reçu de celui-ci, et quelle que soit son opinion sur l'intérêt de l'enfant. Dans un mandat de cette nature, l'avocat a le devoir de représenter les désirs de l'enfant capable de mandater...Il serait en effet incompatible avec ses règles professionnelles que l'avocat présente une position contraire au mandat de son client capable de mandater."[62]

In *Re W*, *Re J.C.*, *Strobridge, M.F.*[63] and in the conclusion of the Law Society Of Upper Canada and the Barreau du Quebec, the onus was placed squarely on the shoulders of the lawyer to determine competence. How have counsel fared in assessing competence?

In *Re A.Y.* a 15-year old suffering from a form of cancer refused blood transfusions, precipitating a child protection application. Counsel for A.Y. adduced evidence as to his wishes and maturity and commented on the record:

> "my position on behalf of the boy - I cannot speak for the parents - is that he has an understanding with his doctor, independent of his parents."[64]

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[61]Supra ftn 45

[62]Supra ftn 55 par.39 referring to Memoire sur la representation des enfants par avocat (Barreau du Quebec 1995)

[63]Supra ftns 37,54,40,55

[64] *A.Y. Re* (1993)111 Nfld. & P.E.I.R. 91(Nfld. S.C.)

The court did not question counsel's decision to advocate for the youth and he was declared a "mature minor". Presumably, A.Y. met the competency test the same counsel had applied in *Beson.*[65] Have other courts accepted that lawyers who apply similar tests may act as advocates?

In an earlier case, *Re K.*[66] a 12-year old girl was found as a fact to have "wisdom and maturity well beyond her years" and that treatment without her consent violated s.7 of the Canadian Charter of Rights and Freedoms. No objection was made to counsel advocating for the young person. Similarly in a later case, *Walker*[67], counsel determined he could act for the minor and the court appointed him without objection. Courts will respect a lawyer's decision that a client was competent to give instructions.

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[65]Supra ftn 47

[66]*Re L.D.K.; Children's Aid Society of Metropolitan Toronto v. K and K.*(1985) 48 R.F.L. (2d) 164(Ont.Prov.Ct.)

[67]Supra ftn 11; see also D. Pole "Trying to Put the Genie Back in the Lamp: U.C.) (Next friend of) v. Alberta (Director of Child Welfare)"(2003)Vol.34 (5th) R.F.L. at 196

How to Determine Competence

Bessner recommends Provincial Law Societies incorporate in their Codes of Ethics guidelines for representing children. This would assist the lawyer in discharging the professional duty to determine competence. She summarizes different ways lawyers approach the assessment process:

1. Determining if the client is rational. If the instructions were not rational the lawyer could refuse to act. It is a subjective test.

2. Pick an age. It would be lower than the age of majority with a rebuttable presumption (the position adopted by statute in Scotland after a law commission recognized the preexisting "law was out of touch with social and economic reality").[68]

3. Allow advocacy regardless of age or capacity, as long as the child can communicate.[69]

The proponents realize that there are flaws with each approach.

> "Age is not a legitimate predictor of the maturity of the child".[70]

> "Assessment by a lawyer of the 'rationality' of the child's instructions, is a

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[68]"Legal Capacity and Responsibility of Minors and Pupils" (Scot. Law Com. No.110)HMSO; *Age of Legal Capacity (Scotland) Act* 1991 (c.50)

[69]Supra ftn 6 at 27

[70]Ibid

'purely subjective and value-laden' endeavour".[71]

> "This slightly higher criterion [in the rational approach] requires that the assessor evaluate whether the person has rational or intellectual reasons for the decision. The test is quite strict and more people would be declared incapable . . . It neglects the personal, emotional or irrational reasons why a person might make a choice. In addition, some delusional persons would appear to be rational and would be declared capable using this standard."[72]

Advocating merely because a child can communicate trivializes representation: a child of 5 might communicate that she wants to live with her father because he is a friend of Mickey Mouse. Is that position to be advocated to a court?

As for the rational test, the lawyer is not expected to advocate delusional beliefs. However, because a decision is "idiosyncratic or eccentric"[73] does not necessarily mean it is delusional. For example, persons with unconventional religious beliefs might be quickly labelled delusional. A psychologist observed:

> "since religion is quite subjective, it is often very difficult to differentiate between the normal and the abnormal. . . . Though such individuals may be at odds with the larger community, as long as they continue to function positively in other spheres of their lives, little evidence can be mustered for their being psychotic per se."[74]

Physicians can make this mistake. Taking a scientific view may lead some to reject sincere

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[71] Ibid quoting A. Mamo

[72]Supra ftn 20 at 52

[73]Supra ftn 25 at II.5

[74]G. Lea, "Religion, Mental Health, and Clinical Issues"(Winter 1982) Vol. 21 No.4 Journal of Religion and Health at 343

non-delusional decisions of a minor. A few doctors have concluded such a minor to be "morally" wrong.[75] The constitutional view upholds personal liberty as the essence of all rights. This is the very freedom courts exist to protect. It is inconceivable how a court, once convinced a minor is mature, could reject a minor's right to personal autonomy. Most doctors agree.[76]

Taking the position that the doctor knows best ignores that in most situations, the minor has access to a broad spectrum of ideas, influence and information: "adolescents do not make decisions alone, but, rather, with the assistance of licensed professionals who provide information and advice."[77]

It is settled law the competent minor is entitled to an advocate, although, "[c]ontroversy remains as to the appropriate role of a lawyer whose client does not have the ability to instruct counsel".[78] In order to discharge the professional duty to determine competence the lawyer needs a test easily applicable in even urgent situations. Counsel must beware of assumptions based on age, personal bias or sole reliance on an expert assessment.

Rightly basing a "tentative" test on the need for empirical research, Leon suggests a child 12 or 13 and older always have a lawyer-advocate. A rebuttable presumption below that age could be overcome by a lawyer using "discretion and well-informed judgment"

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[75]J. Guichon, "Medical Emergencies in children of orthodox Jehovah's Witness families: Three recent legal cases, ethical issues and proposals for management" (Dec 2006)Vol.11 No.10 Paediatrics & Child at 655

[76]Supra ftns 32, 4, 20; see M. McCabe "Involving Children and Adolescents in Medical Decision Making: Developmental and Clinical Considerations" (1996)Vol.21 No.4 Journal of Pediatric Psychology 506 at 513

[77]T. Kuther, "Medical decision-making and minors: issues of consent and assent"(2003)Vol.38 Adolescence at 6

[78]Supra ftn 6 at 28

analogous to assessing testamentary capacity.[79]

It is accepted "scientific knowledge about adolescent decision-making is scant and policy must be devised in a context of empirical uncertainty."[80] Using age as criteria assumes everyone develops at the same rate and ignores the maturing effect of trying circumstances:

> "further research is unnecessary to establish that adolescents, at least in some respects, are closer in their capabilities to adults than to younger minors, or that individuals within a given age group vary greatly in their maturity and ability to perform different functions. Thus, crude rules that restrict and protect minors categorically and base access to legal privilege on age alone ignore the wide range of capabilities within the category."[81]

Age limits do not assist the lawyer representing a mature minor:

> "The difficulty arises with the group of children roughly between the ages of 5 and 12 years. Children in that age range can be very articulate and determined about what they want and it is difficult to propose a principle to guide lawyers in determining how much weight to attach to children's wishes when determining their best interests."[82]

Without generally accepted methods, sole reliance on a psychological assessment is problematic. Lawyers may be as good at assessing capacity as an expert. As research has established:

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[79]Supra ftn 28 at 433

[80]Supra ftn 26 at 1663

[81]Supra ftn 26 at 1664

[82]Supra ftn 38 at 286, see also ftn 45

> "The scientific evidence clearly suggests that clinicians fail to satisfy either legal standard for expertise. Clinicians frequently cannot agree on psychiatric diagnoses of current states, much less provide trustworthy answers to less familiar and more difficult forensic questions, which often demand projections backward or forward in time. Considerable research also shows that clinicians' judgmental accuracy does not surpass that of laypersons."[83]

Specific expertise in assessment of maturity is required. Professional designation without specialization is insufficient.[84] The Ontario Ministry of the Attorney General has tried to address this deficiency. It publishes guidelines and designates which professionals qualify (after completing an approved training course) as "capacity assessors".[85] Even then, handing over the entire assessment to someone else - regardless of their qualifications - is not professionally responsible. The principle of *delegata potestas non potest delegari* applies:

> "While the opinion of the other professionals may have been useful in informing his decision-making process and in establishing a more extensive record, the duty to make the capacity assessment here ultimately lay with [the solicitor] and was not, in practical terms, delegable."[86]

Obviously, a lawyer with the luxury of time and a budget to retain an expert to assess competence would find it useful. The lawyer has to be personally satisfied the young person is competent. If an expert is involved privilege issues may arise. Urgent circumstances may not permit formal assessment.

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[83]J. Ziskin, "The Expert Witness in Psychology and Psychiatry" (1988)Vol.2.4.1 No.4-861 Science at 34

[84]J. Goddard "Wills, powers of attorney and the elderly: a practitioner's perspective" (2007) Vol 6 Issue 1 LawPro at 11

[85]Supra ftn 25

[86]*Palahnuk v Palahnuk Estate,* (2006) CanLII 44262 ON.S.C. at par.71

Competence varies with the circumstances. Life-threatening situations may reveal latent maturity. A number of Canadian cases addressed these issues.[87] In each case despite differing expert opinion, the court ruled the minor competent.

Doctors frequently deal with competence in medical situations which never come to court. Some misunderstand the ethical issues and take a confused, paternalistic approach that gauges competence by the minor's agreement with the physician.[88] Such a reactionary approach is inappropriate given the "scant scientific and social evidence" for presumptions of decisional incapacity.[89] The lawyer is also personally responsible to determine competence. Neither the doctor nor the lawyer can reject a client's capacity because of a well-intentioned personal belief the minor is better off if not labelled a mature minor. As Brandeis, J. warned "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding."[90] Both professions must realize their personal biases concerning competence may not be valid:

> "A growing body of evidence suggests that many adolescents, contrary to societal and legal presumptions, can determine their own interests, demonstrate emotional stability, and make intelligent medical decisions."[91]

With reference to minors, competence to make specific decisions may be present without general legal capacity, the principle of "decisional capacity":

> "As a general matter, the law considers children incompetent and dependant,

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[87]Supra ftns 11, 66; Note that in *Re K*. the court lacked jurisdiction to declare L.D.K. was a "mature minor" but found she was "mature".

[88]Supra ftn 75

[89]Supra ftn 16

[90]*Olmstead v. United States*, 277 U.S. 438 (1928)

[91]Supra ftn 32 at S409

> regardless of their maturity, until the legal age of majority. A more useful designation for medical decision making is *decisional capacity*. An individual has the capacity to make decisions if he or she can understand the problem, the risks and benefits of alternatives, and can express a choice. Thus an adolescent may be legally incompetent but possess adequate decisional capacity."[92]

Decisional capacity (or "decisional ability"[93]) is comfortably similar to the common law approach that narrows capacity to the decision at hand. This was recognized by the English Court of Appeal in *Masterman-Lister:*

> "mental capacity required by the law is capacity in relation to the transaction which is to be effected".[94]

The court in *Masterman-Lister* found common ground in another situation often faced by solicitors, the aging testator preparing a Will. This could be appropriate in the mature minor situation:

> "the law should treat adolescents in the same way that it deals with adults of uncertain competence."[95]

A solicitor faced with a testator in circumstances of "uncertain competence" poses questions. These establish understanding of property or health matters. The solicitor

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[92]Ibid at S407

[93]Supra ftn 25 at II.1

[94]*Masterman-Lister v. Jewell and Home Counties Diaries and Masterman-Lister v. Brutton & Co.* [2002] EWCA Civ 1889, [2003]3 All E.R. 162 par. 56

[95]Supra ftn 26 at 1664, see also ftn 28

weighs coherence of instructions and might obtain an opinion from a qualified assessor.[96]

These duties have long been recognized by courts as within the professional compass of the solicitor:

> "This duty includes the obligation to inquire into and substantiate the testator's capacity to make a will."[97]

The Ontario Court of Appeal set out a 5-step test of testamentary capacity:

> "In order to have a sound disposing mind, a testator:
> - must understand the nature and effect of a will;
> - must recollect the nature and extent of his or her property;
> - must understand the extent of what he or she is giving under the will;
> - must remember the persons that he or she might be expected to benefit under his or her will; and
> - where applicable, must understand the nature of the claims that may be made by persons he or she is excluding from the will."[98]

If the prospective client fails the test, the court in *Hall* acknowledged the solicitor's remedy is to decline the retainer. This was also recognized as the recourse for a minor's lawyer in *Re J.C.*

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[96]Supra ftn 20 at 18 & 21 Hoffman describes some suspicions that trigger an inquiry and provides a useful table to assess capacity.

[97] *Hall v. Bennett Estate,* 2003 CanLII 7157 (ON C.A.)par 48, (2003), 64 O.R.(3d)191, [2003]O.J. No.1827 (C.A.)relying on the leading case *Banks v Goodfellow* (1870) L.R. 5 Q.B. 549 (C.A.) for the principle of the test of a "disposing mind"

[98]Ibid par. 14

The test of testamentary capacity was used to determine competence to instruct counsel in *Masterman-Lister*[99] "the most important decision so far in English law"[100] on this issue. The court set out the "factors the lower courts (and, by implication, legal advisors) should consider in determining the issue of incapacity".[101]

In *Masterman-Lister*, the plaintiff collided with a milk truck and was represented by solicitors who settled his case. Later unsatisfied, he attacked the settlement. If the plaintiff was incapable at the time, the settlement would have been nullified as it had not been approved by a court. The relevant statute did not define incapacity, so the trial judge relied on case law and medical references to craft a checklist for incapacity. On appeal, the Court accepted that this test also applies to determining competence to instruct counsel:

> "the test has to be applied in relation to the particular transaction (its nature and complexity) in respect of which the question whether a party has capacity falls to be decided. It is difficult to see why, in the absence of some statutory or regulatory provision which compels a contrary conclusion, the same approach should not be adopted in relation to the pursuit or defence of litigation."[102]

The test is similar to the centuries-old criteria for testamentary capacity:

> "First, the need for the claimant to have 'insight and understanding of the

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[99]Supra ftn 94

[100]D. Lush, "Masterman-Lister and the Capacity to Manage One's Property and Affairs" (2002) 3 Elder Law and Finance 73, online: http://www.braininjury.co.uk/pdfs/mastermanlister.pdf

[101]Disability Rights Commission, Secretary of State for Work & Pensions, United Kingdom "Does my client have capacity to instruct me to bring and conduct legal proceedings?" online: http://www.drc-gb.org/the_law/legal_commentary/does_my_client_have_capacity_t.aspx

[102]Supra ftn 94 par 61

> fact that she has a problem in respect of which she needs advice'. Second, the need to be able to instruct an appropriate adviser 'with sufficient clarity to enable him to understand the problem and advise her appropriately'. Third, the need 'to understand and make decisions based upon, or otherwise give effect to, such advice as she may receive'."[103]

This straightforward test is subjective. It is couched in terms familiar to solicitors and does not require the lawyer play psychologist. That is not to imply counsel for a minor should minimize the challenge inherent in this type of case. The lawyer must "acknowledge the complexity and uncertainty of this important role".[104] It is even suggested:

> "To deal with the complex issues involving the role of child's counsel, lawyers should receive continuing education and training, including input from other disciplines. Knowledge of childhood stages of development is essential for the lawyer who must assess the capacity of the child to instruct counsel and formulate a position accordingly."[105]

This asks too much of a busy practitioner. Even programs that are available do not permit lawyers to attend to qualify as "capacity assessors". At the least, any lawyer practising in this area should be familiar with the technical concepts of "understanding" and

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[103]Ibid par 77

[104]*Wicks v. Wicks* [1990] O.J. No. 2414 at 5

[105]S. Himel, "Representing Children" N. Bala, J. Hornick, R. Vogl, *Canadian Child Welfare Law Children, Families and the State* (Toronto: Thompson Educational Publishing Inc.1990)at 205. Supra ftn 43 see Mamo's comment at 13-12 that although the Ontario Children's Lawyer provides "some training to their counsel, this does not really guarantee the same level of skills as those formally trained in child care. The clinical training is noticeably absent in most cases except, perhaps, where a lawyer practises exclusively in children's law."

"appreciating".[106] What is still needed is a practical test, doable when taking instructions and without neglecting other professional duties when retained. That is exactly what an adapted *Masterman-Lister* test provides.

[106]Supra ftn 25 at 11.2-11.5; sample questions at Appendix 1 provide useful practical questions for the interview.

The Proposed Test

1. As with any privileged, confidential solicitor/client engagement:
    a) meet in private;
    b) keep detailed notes;
    c) formalize a written retainer, specifying consideration and source of funds.
2. Determine in the private interview if the client has:
    a) an understanding that they have a legal problem and need advice;
    b) the ability to explain the problem with sufficient clarity to enable the lawyer to understand and advise appropriately;
    c) the ability to understand and make decisions based upon the advice received; and
    d) the ability to understand the consequences of choosing one course of action over another and instruct the lawyer accordingly.
3. If circumstances permit, obtain an assessment from a qualified assessor.

Once retained, can the lawyer confidently proceed? What if the minor's wishes are not in accord with the lawyer's? What if they may result in a medical likelihood of harm? Should the lawyer act where a young person wants to plead guilty "just to get it over with"? None of these are proper concerns for the lawyer. The *Masterman-Lister* court answers:

> "The courts have ample powers to protect those who are vulnerable to exploitation from being exploited; it is unnecessary to deny them the opportunity to take their own decisions if they are not being exploited. It is not the task of the courts to prevent those who have the mental capacity to make rational decisions from making decisions which others may regard as

rash or irresponsible."[107]

It has been recognized that:

> "a capable individual can make unpopular, unwise or eccentric choices in the absence of incapacity. Capable but risky or even foolish decisions must be respected."[108]

The lawyer must not be confused by the indeterminate "best interests of the child" when representing competent minors. A mature minor is no longer a child. Regardless, "[b]est interests are not limited to best medical interests,"[109] and "best interests encompasses medical, emotional and all other welfare issues".[110]

The lawyer's professional duty to the mature minor is the same as to a competent adult: follow the client's lawful instructions. Negligently determining a minor competent would be a matter between lawyer and client, and if necessary, the appropriate governing body.

In a version of King Arthur's story, young Arthur's removal of the sword is challenged. He is obliged to return to the stone and draw the sword out again and again until those doubting his competence are satisfied. For the mature minor, the lawyer's application of the proposed test should eliminate any challenge to competence by a court or party. It reassures the lawyer the client's instructions can be followed. Justice for minors can only be achieved in our adversarial system if counsel discharge their professional duty to

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[107]Supra ftn 94 par 78

[108]Supra ftn 25

[109]*Re M.B.(Medical Treatment)*[1997] EWCA Civ 1361, 2 F.L.R. 426,439 (C.A. Civ. Div.)

[110]*Re A (Male Sterilisation)* [2000] 1 F.L.R. 549, 555, [2000]1 F.C.R.193(C.A. Civ.Div.)

determine the client's competence.[111]

[111]Daniel Gordon Pole, LL.B. of the Bar of Ontario. Please note the author was appointed by the court as litigation guardian in *Walker* and to represent the minor in *H(S)* supra ftn 11.