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BY OVERNIGHT MAIL AND EMAIL
Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on Assessing the Competency of Child Witnesses Report
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

Re: ***Comments on Assessing the Competency of Child Witnesses Supreme Court Committee Report & Recommendations***

Dear Judge Grant,

The New Jersey Office of the Public Defender, Office of the Law Guardian (OLG) represents children in litigation brought under Titles Nine and Thirty by the New Jersey Division of Child Protection and Permanency (DCPP). These cases are commonly referred to as the Children-in-Court (CIC) dockets. New Jersey's judiciary has led the transformation of our CIC practice to be family-driven. It has done this in part by encouraging the active engagement of the parents and children served by the CIC courts. The OLG is concerned that the protocol proposed by the Supreme Court's Joint Committee on Assessing the Competency of Child Witnesses (Protocol) will thwart the evolution of the CIC dockets by reducing meaningful participation of children in CIC cases. Thus, the OLG opposes adoption of the Protocol, generally and specifically for use in CIC cases. If the Supreme Court adopts the Protocol, the OLG requests that this Court consider modifying it as described below.

I. By Requiring All Children To Demonstrate Their Competency Before Testifying, The Protocol Dilutes The Presumption That All Persons Are Competent

The OLG's overarching concern with the Protocol is that it modifies the competency principles of our laws for children, without scientific evidence or data to support the change. Under the Protocol, child witnesses become a distinct class of witnesses, subject to different rules than adult witnesses, based only on their age.

In our courts, all persons are presumed competent.[1] Minority is insufficient to rebut this presumption.[2] A witness will only be disqualified if (a) a judge finds that the proposed witness is incapable of expression concerning the matters so as to be understood by the judge and jury, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth, or (c) except as otherwise provided by the rules or the law.[3] In general, a witness's commitment to tell the truth, through oath or affirmation, is sufficient to satisfy Rules 601 and 603, which are read in tandem.[4] Contrary to this principle, the Protocol mandates that *all* children demonstrate their competency before committing to tell the truth. Minority is the determining factor as to whether the Protocol applies, and within the Protocol, which method of questioning is used. This is an inversion of the process prescribed by our laws and conflicts with our longstanding precepts as to competency for truthfulness.

Of great concern for the OLG, the expert psychologists retained by the Committee concur that the ability of a child to correctly answer competency questions does not correlate to the child's ability to disclose and recount their experiences accurately.[5] Dr. Thomas D. Lyons, PhD opines that "[s]tatements by children who cannot demonstrate their truth-telling competency may nevertheless be reliable, both because children who understand their duty to tell the truth may not be able to articulate their understanding, and because understanding of the truth and lies does not predict greater accuracy."[6] As Dr. Jodi A. Quas, PhD notes, "[i]t seems to me that the latter is much more important and relevant to a legal case than basic competency capabilities." Dr. Quas goes so far as to recommend the Committee "think very critically about whether requiring formal competency assessments for children is necessary to achieve the Court's ultimate goal of pursuing justice."[7] Dr. Gail Goodman, PhD suggests that a more justifiable approach is to permit children to testify without a competence test and then let the fact-finder determine the weight given to the child's testimony, similar to the procedure used for adult witnesses. Dr. Goodman also explains that very young children can "identify and produce true statements even if they cannot define the concept of a lie" as required by a competency evaluation.[8]

Grounded in the detailed research and commentary provided by these experts, the OLG suggests that, as with adults, a child witness's basic competency – the ability to perceive, remember and communicate -- should continue to be presumed. Before testifying, a child witness should be required to commit to tell the truth, whether by oath, affirmation, or alternative statement tailored to the specific witness before the court. Competency should only be evaluated if the court deems it necessary based on an offer of proof and findings that there is a compelling reason for the court to undertake a competency colloquy.

This process maintains the purview of the trial judge as the gatekeeper responsible for

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1 N.J.R.E. 601.
2 State in the Interest of R.R., 79 N.J. 97, 108 (1979); State v. R.W., 104 N.J. 14, 19 (1986).
3 N.J.R.E. 601.
4 State v. G.C., 188 N.J. 118 (2006).
5 Report at 15.
6 Report at 16.
7 Report at 59-60.
8 Report at 68.

balancing the truth-seeking function of the proceeding while protecting the rights of all parties before the court. As written, the Protocol does not require that the questioning of a child's competency be accompanied by an offer of proof, motion, or other factual or legal support. The Protocol eliminates the court's discretion to determine whether the competency challenge is well-founded - requiring a competency colloquy - or speculative. The court has no discretion to bar competency challenges lodged as a delay tactic, or to harass or intimidate a child. By removing the trial court's discretion to tailor competency decisions to the individual witnesses and parties before it, and eliminating the requirement that competency colloquies be grounded in a factual basis, the Protocol mandates a departure for child witnesses from basic protections provided to witnesses in our courts. Of equal moment, the Protocol may have a chilling effect on the willingness of child witnesses to testify in cases where the child testimony may be the only evidence to support the case.

A review of the competency statutes for child witnesses in other jurisdictions is informative. The laws of several state jurisdictions expressly provide that child victims of assault, sexual assault or abuse shall be competent to testify, leaving the weight of the evidence and the credibility of the witness to the court's discretion.[9] As implied by Rule 601, the federal legislation applicable to child victims and witnesses specifically provides that a child is presumed competent.[10] The federal statute requires a written motion and offer of proof of incompetency before the court may conduct a competency colloquy of the child witness. And then, only if the court determines, on the record, that compelling reasons exist. The law is explicit: a child's age alone is not a compelling reason. Although not formulaic, the guidance built into these procedures ensures that minority alone is not used as a basis for barring relevant, child testimony necessary for the court to reach a just result while specifying a process for evaluating the competency of a child witness in appropriate circumstances.

II. Use of the Protocol May Undermine the Commitment of New Jersey's Legislature and Judiciary to Increased Youth Engagement in CIC Cases

New Jersey is a national leader in its approach to child welfare cases. The title "Children-In-Court" reinforces the judiciary's commitment to involving children in court proceedings.[11] In 2014, the Children in Court Improvement Committee collaborated with several national organizations to pilot a program which aimed to bring all children to court for their permanency hearings.[12] The program was extended to all vicinages in 2015, and continues today by

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9 See e.g. Ala Code § 15-25-3(e) (2010); Conn. Gen. Stat. § 54-86h(2011); Utah Code Ann. § 76-5-410 (2010).

10 18 U.S.C.S. 3509.

11 Claire Chiamulera, Giving Youth A Voice In Court In New Jersey, Child Law Practice Today, November 1, 2015 (published by the American Bar Association Center on Children in the Law).

12 New Jersey partnered with the National Child Welfare Resource Center on Legal & Judicial Issues, and the American Bar Association Bar Youth Empowerment Project-Casey Family Programs to establish the pilot program and collect data about its impact. New Jersey Youth Participation in Court Protocol: Pilot Project, Year 1 2014 Executive Summary (available at Youth Participation in Court: Protocol Pilot Project (americanbar.org) (last retrieved 3/12/2021).

administrative order of the courts.[13] Before the judiciary implemented the program, New Jersey's laws requiring youth be noticed and encouraged to participate in their permanency hearings were often overlooked. Now it is common for children to attend their permanency hearings. New Jersey's leadership in implementing the youth in court model has been recognized by other states who have consulted with New Jersey's judiciary in establishing similar programs.[14]

The OLG is concerned that use of the Protocol in CIC cases will constrain movement towards more collaborative and family-focused courtrooms and child welfare practice. Although distinct statutory schemes, Titles Nine and Thirty are driven by the public policy of our State that the safety of children shall be of paramount concern and the best interests of children shall be a primary consideration.[15] To meet that end, our laws and the practice in the Family Part encourages meaningful participation and engagement of all parties – children, parents and DCPP representatives - throughout the CIC court process.[16] This facilitates a courtroom environment that is more collaborative and family-driven than adversarial in many cases.

In CIC cases, as parties to the litigation, children are encouraged to attend and participate.[17] Judges consider the wishes of a child-party in reaching decisions.[18] At a minimum, CIC cases are reviewed by the court for a status conference at three-month intervals. It is not uncommon for a child to testify multiple times during the course of a CIC litigation that may span several years. In addition to more traditional child abuse and neglect and termination of parental rights trials, children may testify at a variety of hearings about their past, current and future circumstances, including hearings to determine custody, visitation, placement, appropriate services, and permanency outcomes. As a result, judges often develop a rapport and familiarity with child-parties that is unique to CIC courtrooms. As this Court has recognized, this familiarity leads to the Family Part's special expertise to make decisions in this sphere.[19]

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13 Admin. Dir. #15-18 regarding the CIC Youth Involvement and Engagement in Court Program.

14 Claire Chiamulera, Implementing A Child-In-Court Protocol In Berrion County Michigan, Child Law Practice Today, February 25, 2021 (published by the American Bar Association Center on Children in the Law).

15 N.J.S.A. 9:6-8.8; N.J.S.A. 30:4C-1.

16 N.J.S.A. 9:6B-4; N.J.S.A. 30:4C-59; N.J.S.A. 30:4C-61; N.J.S.A. 9:3-49. Engaging children in the court process is seen as a best practice by national organizations working on court improvement efforts including the American Bar Association, the National Council of Juvenile & Family Court Judges, the National Association of Counsel for Children (NACC), and the Pew Commission. See Whitney Barnes, E., Khoury, A., Kelly, K., Seen, Heard, and Engaged: Children in Dependency Court Hearings, 5 - 7, National Council of Juvenile and Family Court Judges (2012). Available at, www.ncjfcj.org/sites/default/files/CIC_FINAL.pdf ()

17 N.J.S.A. 9:6B-4; N.J.S.A. 9:3-49; N.J.S.A. 30:4C-59; N.J.S.A. 30:4C-61.

18 N.J.S.A. 9:6B-4; N.J.S.A. 30:4C-59; N.J.S.A. 30:4C-61; N.J.S.A. 9:3-49. See e.g. New Jersey Div. of Child Prot. & Perm. v. E.P., 196 N.J. 88 (2008).

19 Cesare v. Cesare, 154 N.J. 394 (1998); E.P., at 104; New Jersey Div. of Youth & Family Servs. v. R.L., 388 N.J. Super 81, 88 (App. Div. 2006).

The OLG appreciates that the Committee may have intended to preserve youth participation and engagement in CIC matters by including Footnote 2 in the Report. The footnote refers to "non-testimonial" communications children have in a variety of case-related contexts.[20] Youth engagement in CIC cases may be non-testimonial, such as an interview with the judge or attendance at case conferences, but children may also provide testimony as to significant issues that impact their daily and future lives. It is the position of the OLG that the testimony of youth in a variety of contexts is essential to efficient and just adjudication of CIC cases, and that testimony of children should not be limited to abuse and neglect and termination of parental rights trials.

The OLG suggests that the Protocol may undermine a child's statutory right to express his or her views in Titles Nine and Thirty proceedings, and, as written, it is impractical given the nature of child involvement in CIC cases. First, if competency is raised as per the Protocol, a child who testifies multiple times will be presented with the same pictures or questions each time. Second, a child may be discouraged from testifying, or even attending court proceedings, when faced with the competency threshold each time, or after the first time. This may have the unintended consequence of further traumatizing children who have experienced past trauma, through their involvement with our judicial system. Finally, use of the Protocol may lead to a more adversarial proceeding, which is counterproductive to a family-driven court system.

There is a tension between the Protocol and the principle that favors inclusion of all information to assist the court in satisfying the governing standard that all decisions be made in the best interests of the child before it.[21] Titles Nine and Thirty overtly provide that out-of-court statements by children are admissible, however, if uncorroborated they may not serve as the basis for an abuse and neglect determination or termination of parental rights judgment.[22] Reading the statutes and the Protocol together, a child's uncorroborated, out-of-court statement may be the basis for a court's permanency plan or best interest determination, but the declarant child would have to demonstrate competency before making the same statement to the court. Similarly, a child's statement with corroboration could support a judge's finding, but the child would have to demonstrate competency for the court to observe the child's demeanor firsthand. In this situation, the Protocol would hinder the court from reviewing the best evidence available to support its decisions.

In recent years, child welfare practice has evolved to recognize trauma as a catalyst for many of the social service needs of the families served by DCPP.[23] The OLG supports this initiative, as a majority of children touched by the child welfare system have been exposed to trauma. There is potential for the Protocol to increase the adversarial nature of CIC proceedings that could undercut the shift to a more trauma-informed practice. In addition, the specific questions in the Protocol that require a child witness to demonstrate an understanding that punishment will

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20 Report at 6.
21 In Re C.R., 364 N.J. Super. 263 (App. Div. 2003) (information from all relevant sources pertaining to a child's best interests shall be admitted).
22 N.J.S.A. 9:6-8.46; N.J.S.A. 30:4c-15.1(a).
23 Executive Summary, 2015 DCF Self-Assessment of DCPP Trauma Based Approach (available at https://www.nj.gov/dcf/Executive%20Summary.pdf, last retrieved March 13, 2021).

result from lying to the court before testifying may trigger a trauma response for the child witness, contrary to the child's best interests. This is unnecessary as the experts agree that eliminating the threat of punishment does not impinge on the court's ability to determine the child's credibility.[24] Accordingly, the OLG opposes implementation of the Protocol on the basis that it is not trauma-informed.

The OLG urges the Court not to implement the Protocol in CIC cases. A more practical approach in CIC cases, where judges serve as the arbiter of evidentiary decisions and the ultimate factfinder, is to continue to treat child and adult witnesses alike. Upon a commitment to tell the truth, through an oath, affirmation or alternative method, the court should permit children to testify, subject to the court's discretion as to the weight and credibility of the testimony. This approach is supported by Dr. Lyon's opinion that "children's apparent competency to testify is not a test of their reliability."[25] The OLG believes this approach better serves the goals of the CIC dockets to uncover all evidence necessary to make decisions that are in a child's best interests.[26]

III. If Adopted, The Protocol Should Be Modified To Align With Evidence-Based Practices Proven To Encourage Reliable Testimony For Child Witnesses And To Prevent Its Use For Speculative Competency Challenges

If this Court adopts the Protocol, the OLG requests the Court consider modifying it to prevent abuse of the procedure to chill a child's willingness to testify. Competency challenges to the testimony of a child witness should be well-founded and specific, and presented to the court by written motion. It should be within the court's discretion to determine whether compelling reasons exist to engage in a competency colloquy.

In addition, the Protocol should be revised to incorporate measures designed to put at ease a reluctant child-witness, traumatized by the underlying event and further traumatized when called upon to recount that event in the courtroom. Using best practices for encouraging reliable and credible child testimony referenced by Dr. Lyon, Dr. Goodman and Dr. Quas serves the court's ultimate goal of seeking the truth.[27] The Protocol should be modified to require that child witnesses are questioned in a child-friendly environment by a supportive interviewer. The interviewer should be required to develop a rapport with the child before asking the competency questions. In CIC matters, the child's law guardian, as counsel for the child, should be permitted to administer the questioning. These conditions should be options left to the court's discretion.

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24 Report at 16.
25 Report at 20.
26 N.J.R.E. 611.
27 Report at 16, 58-59 and 60; State v. T.E., 342 N.J. Super. 14 (2001).

The OLG appreciates the opportunity to provide comments to the Court and stands ready to assist if further review is needed. We applaud the Court's efforts to protect our state's most vulnerable citizens, but request that our concerns are taken into consideration as the Court proceeds further.

Respectfully submitted,

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