



Promoting Well-Being in Domestic Relations Court

Building Understanding Series

National Judicial Task Force
to Examine State Courts' Response to Mental Illness





FOREWORD

Understanding Series

Divorce, the legal dissolution of a relationship, or child custody-related litigation is one of life's most stressful events, especially when abuse or domestic violence is an element. The process itself can induce trauma not just in the children and parties, but also in judges and court staff, who deal with these situations daily. It is common that participants experience a range of mental health conditions during the litigation process, some of which may be situational or temporary, but many of which may already be present and may be exacerbated by the process. In such cases the court should take the responsibility for helping all involved to move through the process as comfortably, calmly, and expeditiously as possible.

Experience has shown that judges need better, deeper understanding of the various elements that impact the well-being of individuals and families, as well as themselves and their staffs, to be most effective at dealing with such cases. This "Understanding Series" is an effort to give judges and staff the knowledge and tools that will make their work in domestic relations cases more fulfilling and less stressful while improving family well-being in such cases.

The series represents the work of the Promoting Well-Being in Domestic Relations Court Committee, a collaboration between the Cady Initiative for Family Justice Reform and the National Judicial Task Force to Examine State Courts' Response to Mental Illness, formed to:

Promote the well-being of families, including implementation of trauma-responsive practices for families and staff, throughout the life of their case and as the primary desired case outcome.¹

¹ Conference of Chief Justices and Conference of State Court Administrators, "Resolution 4: In Support of a Call to Action to Redesign Justice Processes for Families," recommendation 6, 2020. Retrieved from https://ccj.ncsc.org/_data/assets/pdf_file/0023/51197/Resolution-4-In-Support-of-a-Call-to-Action-to-Redesign-Justice-Processes-for-Families.pdf.

The committee comprises a multidisciplinary, expert panel of judges, social workers, behavioral health specialists, researchers, attorneys, anti-domestic-violence advocates, and court administrators.

The goal of this series is to advance judges' and staff's knowledge and to set forth best practice approaches to helping judges and staff recognize and address most effectively the trauma, mental health conditions, and domestic violence evident in the cases before them. Organizations such as the [National Council of Juvenile and Family Court Judges](#), the [National Center on Domestic Violence, Trauma and Mental Health](#), the [National Child Traumatic Stress Network](#) and others have studied trauma extensively.

The Understanding Series is not a comprehensive treatise but a point of entry. Each chapter addresses an aspect of the knowledge that judges should acquire to perform at their best when dealing with such cases. The chapters also contain resource links where readers can deepen their understanding and application of various concepts or techniques.

Chapters

- [Chapter 1: Understanding Well-Being in Domestic Relations Court](#)
- [Chapter 2: Understanding Trauma, Its Impacts, and How to Create a Trauma-Responsive Court](#)
- [Chapter 3: Understanding the Spectrum of Mental Health Conditions](#)
- [Chapter 4: Understanding the Impact of Mental Health Conditions on Parenting Capacity](#)
- [Chapter 5: Mitigating the Risk of Children's Adverse Experiences During and Following Divorce](#)
- [Chapter 6: Understanding the Benefits of Early Case Intervention](#)

Professionals Involved

Systems change at the intersection of domestic relations, domestic violence, and behavioral health requires the input of professionals from various disciplines. We are grateful to the partners of the Cady Initiative for Family Justice Reform for contributing their knowledge in this area, and their recommendations for its success: the Institute for the Advancement of the American Legal System (IIALS), the National Council of Juvenile and Family Court Judges (NCJFCJ), and the Association of Family and Conciliation Courts (AFCC).

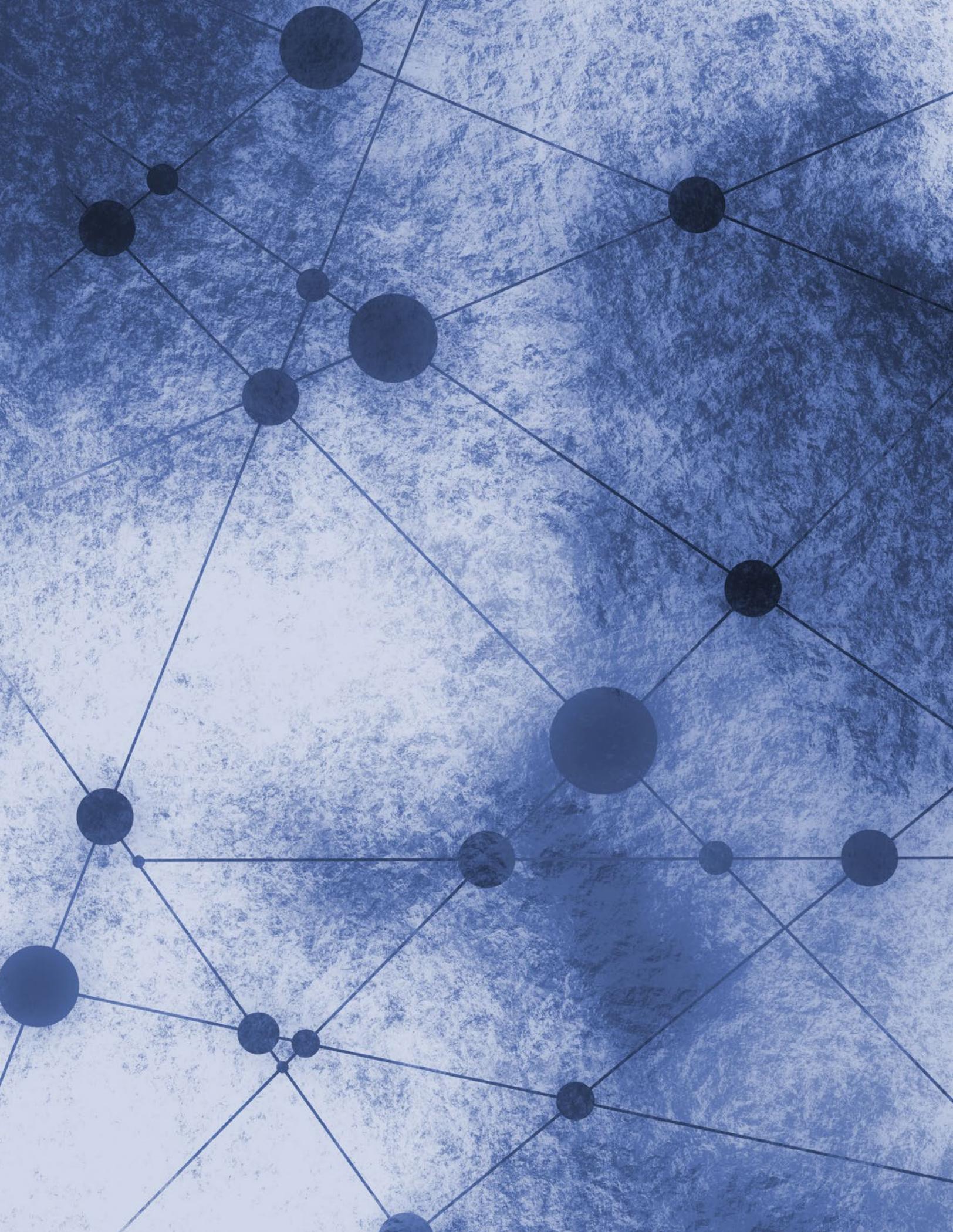
The Understanding Series would not be possible but for the contributions of these professionals:

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CHAPTER 1

KEY POINTS *from Chapter 1*

- 1 Encountering people with mental health conditions or who have experienced trauma is not uncommon for those in the court system.
- 2 Understanding those conditions or circumstances is of paramount importance for the administration of justice.
- 3 Exposure to trauma can be debilitating, but a change by judges and court staff in how that exposure to trauma is addressed can be empowering.

CHAPTER 1

Understanding Well-Being in Domestic Relations Court

One in five persons have experienced a mental health condition, ranging from anxiety to a diagnosis of serious mental illness. At some point during their lives, nearly half of the adults in the United States will experience a mental health challenge, which includes depression, anxiety, post-traumatic stress, substance use disorder, bipolar disorder, or psychotic episodes. While there is growing recognition of the prevalence of mental health conditions, stigma still attaches to them, and many individuals do not have access to professional help that could be of benefit.

Judges and court staff often feel uncomfortable when faced with a court participant who may have a mental health condition or may have experienced trauma or may be uncertain as to the best approach when working with such an individual. A basic understanding of the concepts, issues, and vocabulary can improve their comfort levels or enhance effectiveness. This chapter identifies stressors in domestic relations cases, presents considerations to work effectively with parties, and makes suggestions for taking care of court staff and peers in the process. Judges or staff unfamiliar with the impacts of trauma, mental health conditions, or domestic abuse may have questions such as these:

Domestic relations cases are a small portion of my workload (or, I'm only on this assignment for two years) and I rely on attorneys and parties to bring issues before me. Why do I need more in-depth knowledge of such these concepts?

The Domestic Relations assignment may be the most challenging calendar assignment that a judge faces. Research shows that the rate of trauma and mental health conditions

is high among participants in Domestic Relations Court.¹ Judges and court staff are generally under-equipped or under-informed as to how to deal effectively and helpfully with such circumstances. But the judge remains responsible for the effective, fair, and efficient disposition of the case, and for safeguarding the well-being of the family. So, an understanding of the impact of mental health conditions and trauma on domestic relations matters will significantly assist a judge and staff in such work.

Judges with an understanding of mental health conditions and available services, as well as the dynamics of intimate partner violence and its impacts on those who experience trauma, will interact more effectively with affected litigants and will manage the legal process better, while also safeguarding the well-being of the individuals before the court. Judges are not psychologists, nor should they endeavor to establish diagnoses or provide for parties' treatment without an assessment by a qualified provider. However, the ability to identify the signs of trauma and mental health conditions is a critical skill. With it comes opportunities to engage in early and effective judicial intervention and reduce escalation of conflicts,² which benefits children and families.

“Trauma” seems to have become a fashionable buzzword these days. I’m not even sure what it means.

The American Psychological Association gives a description of trauma in its “2017 Clinical Practice Guideline for the Treatment of PTSD”:

Trauma refers to events or experiences that are shocking and overwhelming, typically involving major threat to the physical, emotional, or psychological safety and well-being of the individual victim(s) and loved ones and friends (as well as to others). Its original occurrence is usually sudden and unexpected and it may be a one-time event. In some cases, after the first incident, it may recur on either a short-term or intermittent basis or it may occur on a regular or prolonged basis to the point of becoming continuous and chronic.

The Substance Abuse and Mental Health Services Administration (SAMHSA) describes *trauma* as follows:

Individual trauma results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening

1 M. Idstad et al., “Mental Distress Predicts Divorce over 16 Years: The HUNT Study,” *BMC Public Health* 15 (2015); doi:10.1186/s12889-015-1662-0.

2 S. L. Braver et al., “A Randomized Comparative Effectiveness Trial of Two Court-Connected Programs for High-Conflict Families,” *Family Court Review* 54 (2016): 349-63; doi:10.1111/fcre.12225.

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and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being.

Building on previous sources, such as those above, the Child Welfare and Juvenile Justice subcommittees of the national Mental Health Task Force have developed a description of trauma that is of more practical use to judges:



It results from exposure to an incident or series of events that is emotionally disturbing or life-threatening with lasting adverse effects on the individual's functioning and well-being—mental, physical, social, emotional, or spiritual. Trauma can include a direct encounter with such an event(s), or it can involve witnessing the endangerment or suffering of another living being. A key condition that makes these events traumatic is that they can overwhelm a person's capacity to cope, and elicit intense feelings such as fear, terror, helplessness, hopelessness, and despair. Traumatic events include: emotional, physical, and sexual abuse; neglect; physical assaults; witnessing family, school, or community violence; war; racism and other forms of discrimination; bullying; acts of terrorism; fires; serious accidents; serious injuries; intrusive or painful medical procedures; loss of loved ones; abandonment; and separation.

As can be seen from the above, many individuals and organizations have added to the concept of trauma and its many dimensions. Chapter 2 of this document offers a fuller explanation of trauma and includes additional links and references for the reader's use.

We all have stress in our lives, often daily. Why is an exploration of the stressors in domestic relations cases of special importance?

At the heart of a domestic relations matter of any type is the breakdown of a personal relationship. Other than the loss of a loved one, there may be no more stressful event in one's life. Some research shows that such stress may induce trauma in one or more of the participants,³ and the dissolution process itself can induce trauma. Research also shows that the incidence of mental health conditions is higher than average among persons involved in domestic relations disputes (including support enforcement actions)

³ M. C. Chung et al., "Coping with "Post-Traumatic Stress Symptoms Following Relationship Dissolution," *Stress and Health* 19 (2003): 27-36; doi:10.1002/smi.956.

or domestic violence.⁴ Being able to understand their experience places the court in a far better position to address their circumstances, to ensure fairness, and to protect the best interests of children.

Nearly half of all children in the United States are born to unmarried mothers.⁵ Therefore, not to be forgotten are children and single parents who have never experienced a traditional family unit. Research has found this population is at risk of having more traumatic events with long-term consequences than traditional families.⁶

In a large number of cases, those parents' engagement with the court will come about only to address child support issues. Therefore, courts should consider developing unmarried parenting guides for those parents in recognition of the fact that their issue before the court is child support but their personal experience may be one filled with trauma.

What are some simple steps I could take to improve the way court processes are perceived by the litigants, especially those who are unrepresented?

Litigants' perceptions of court proceedings are often distorted by their limited viewpoints as they move from step to step without a comprehensive understanding of the entire process. Providing litigants with information, perhaps in pamphlet form, about the whole process should improve those perceptions. Moreover, at each court appearance, ensuring that litigants understand the next step in the process will improve their understanding.

The judicial system, as is true with other complex systems, has its own jargon—names, terminology, acronyms, and the like—that judges, staff, and attorneys adopt and use quite readily. Judges can reduce the confusion that a court's special language creates in litigants by using plain English to the extent possible and explaining terminology when its use is unavoidable. It never hurts to ask the participant, "Do you understand?," or "What is your understanding?," or "Is there anything else you would like to have explained to you?"

Self-represented litigants (SRLs), who in many jurisdictions constitute a large percentage of the parties to domestic relations matters, put more burden on judges and staff for making the process understandable. When trying to facilitate SRLs' understanding of

4 C. Humphreys, "Mental Health and Domestic Violence: 'I Call it Symptoms of Abuse.'" *British Journal of Social Work* 33 (2003): 209-26; doi:10.1093/bjsw/33.2.209.

5 Center for Disease Control and Prevention/National Center for Health Statistics.

6 M. Carlson et al., "What We Know About Unmarried Parents: Implications for Building Strong Families Program," report no. 3, Mathematic Policy Research, Inc.

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the process to make them more effective participants, judges and their staffs have to walk a fine line between giving legal information and giving legal advice. Fortunately, most jurisdictions provide guidance on that subject that must be kept in mind when trying to improve SRLs' perceptions. When legal advice is warranted, judges or staff should offer litigants alternative sources for free or inexpensive legal advice.

How can lawyers and other community partners contribute to better handling of challenging cases?

For the court to be most effective in its dual roles of safeguarding the well-being of families while moving issues or cases to resolution, other stakeholders, especially attorneys, legal services agencies, and behavioral health services providers, need an understanding of the concepts and needs that we address in this document. Judges should enlist counsel, as officers of the court, in the effort to make the entire process more readily understandable to the participants. Further, as judges and their staffs become trauma-informed, they need to encourage attorneys to develop a deeper understanding of the effects of both trauma and mental health conditions on their clients.

The concept of building a trauma-informed community is beginning to take hold across the country. Chapter 3 of this series addresses that concept more fully.

How do I shield myself and my staff from the impact of being exposed to traumatic events or traumatized people (people who have been traumatized)?

It is clear that the nature of the cases and issues that come before the court on a domestic relations calendar expose judges and court staff to the risk of experiencing trauma. Exposure to trauma experienced by others is unavoidable and can impact those exposed in ways similar to those who have suffered direct trauma. Judges and court staff often see or hear evidence that details horrible events suffered by those who come before the court or interact with people who have suffered great trauma. As an illustration, suppose that during a hearing, significant evidence of domestic violence and child abuse is presented. The nature of the evidence is quite distressing, so much so that having viewed or heard the evidence, it becomes a trauma-inducing event for the judge or court staff. There is actually a term for the impact of being exposed to such traumatic life events experienced by others—Secondary or Vicarious Trauma. For judges and court staff, exposure to trauma experienced by others is likely unavoidable and can impact those exposed in ways that are similar to those who have suffered direct trauma.

But judicial officers and court staff can equip themselves to reduce the impact of such exposure to trauma by adjusting how they process information and view their roles in the lives of those who have been traumatized. It begins with a few understandings:

- By nature, judges and court staff have the desire to serve those who come before the court;
- The trauma others experience cannot be undone by a judge or court staff;
- Judges and court staff are able to assist those who have been traumatized, whether through judicial action or appropriate support; and
- Focusing on how a judge or member of court staff can help someone who has experienced direct trauma is empowering in that it allows the court the opportunity to make a beneficial contribution to the lives of those who are suffering.

By concentrating on how one can assist another in this fashion, rather than on how one is impacted by being exposed to the trauma experienced by others, judges and court staff can make a difference in parties' lives and that outcome not only minimizes the secondary/vicarious trauma but also becomes a fulfilling and meaningful experience. This overall understanding and simple change in perception can replace the impact of being exposed to secondary trauma. Rather than suffering the burdens of having to bear witness to the traumas suffered by others, judges and court staff can recognize the privilege of being in a position to assist those who are suffering.

In the context of secondary trauma, it is important for judges to maintain awareness of their own mental and physical health. Partly because of the judge's role, it is not unusual for a judge to maintain a protective shell of dispassionate stalwartness within which the judge may not recognize their own secondary trauma. A judge who needs help or has trouble identifying that need within themselves should seek help from a professional or from a peer support group.⁷ Then the judge should take whatever steps are needed to ensure the judge's health is maintained or improved. Judges should also accept the responsibility of reaching out to their peers who may be unaware of their own trauma.

In similar fashion, a judge can be most helpful to staff by becoming aware of their mental and physical health and then taking steps to help them. This requires the judge to develop or hone skills of observing, understanding, sympathizing, and encouraging staff

⁷ Maricopa County (Phoenix) Superior Court has such a peer support program, which allows judicial officers to assist their peers who are impacted by the challenges of serving in this role. Contact the Human Resources Office at JudicialBranchHR@JBAZMC.maricopa.gov for additional information.

to seek treatment, often through an Employee Assistance Program, for any secondary trauma they are experiencing.

The best that each judge can offer while serving on the bench is to bring their humanity to the courtroom. Unfortunately, repeated exposure to traumatic events can cause a judge to become overly self-protective, building an invisible impenetrable wall that shields the judge from the impact of trauma exposure. The cost to this approach is that a judge slowly begins to lose the humanity they offer to those who appear before the court. Judges must accept that the work they do can be painful, but the solution is not to wall oneself off from the pain, but to allow the pain to empower the judge to remain humane in the dealings with litigants and to focus on how the judge can improve the lives of those who come before the court.

Concluding Thoughts

While the questions above offer a short overview of some of the key issues, there are other special considerations that need highlighting:

- One of the impacts of COVID-19 has been the introduction of virtual hearings in nearly every jurisdiction across the country. Preliminary research is showing that participants in such proceedings view them positively, due to a number of factors, and that many courts intend to continue such methods in at least some types of proceedings. One “cost” to relying upon virtual appearances is that it limits direct contact between the judge and those who appear. This may hinder the court’s ability to identify those who have experienced or are experiencing mental health conditions or the impact of trauma. This not only might lead to misinterpretation of behaviors, but also limit the court’s ability to effectively assist those individuals. There is more detail on this topic in chapter 4.
- COVID-19 also brought greater national recognition of stressors and their impact on personal functioning. The disruptions, social, economic, and otherwise, will have long-reaching impacts on court functionaries and parties alike.
- Judges always need to be mindful that any decisions they make should be informed by a holistic perspective that accounts for the wide range of issues that drive human relationships.
- When a judge takes on a domestic relations calendar, it does not take long to learn that the judge’s involvement rarely ends with a decree or final order. Post-judgment disputes, especially where children are involved, can span years. Therefore, at each encounter, judges should look beyond the issue before the court and make every effort to work with the parents to secure longer-term resolution of issues.

CHAPTER 2

KEY POINTS *from Chapter 2*

- 1 Everyone experiences trauma.
- 2 The impact of having experienced trauma may manifest in a wide variety of responses and behaviors that should be considered contextually.
- 3 Trauma can change the brain, impact cognitive functioning and emotional responses, and influence behavior.
- 4 Having to engage in court processes can be traumatic in itself, and may compound the effects of other trauma.
- 5 For courts to address persons coming to court fairly, the court must become a “trauma-informed court.”

CHAPTER 2

Understanding Trauma, its Impacts, and How to Create a Trauma-Responsive Court

Recognizing Trauma and Its Impacts

Everyone experiences trauma over the course of their lives. Trauma can include a direct encounter with a dangerous or threatening event, or it can involve witnessing the endangerment or suffering of another living being. Traumatic events include emotional, physical, and sexual abuse; neglect; physical assaults; witnessing family, school, or community violence; war; racism; discrimination, bullying; acts of terrorism; fires; serious accidents; serious injuries; intrusive or painful medical procedures; loss of loved ones; abandonment; and separation. Traumatic events can overwhelm a person's capacity to cope and elicit intense feelings such as fear, terror, helplessness, hopelessness, and despair. Experiencing prolonged interpersonal trauma, particularly in childhood, can also affect people's feelings about themselves, other people, and the world, including their ability to trust and their ability to regulate emotions.



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To provide guidance to courts working with parties who have experienced trauma, the National Council of Juvenile and Family Court Judges created [Assessing Trauma for Juvenile and Family Courts](#),¹ which provides these key definitions:

Table 1: Key Definitions	
Term	Definition
Acute Trauma	A single traumatic event that is limited in time. An earthquake, dog bite, or motor vehicle accident are all examples of acute trauma.
Chronic Trauma	Chronic trauma may refer to multiple and varied traumatic events such as a child who is exposed to domestic violence at home, is involved in a serious car accident, and then becomes a victim of community violence. It may also refer to longstanding trauma such as physical abuse of war.
Complex Trauma	Complex trauma is a term used to describe both exposure to chronic trauma—usually by adults entrusted with the child’s care, such as parents or caregivers—and the immediate and long-term impact of such exposure on the child.
Hypervigilance	Abnormally increased arousal, responsiveness to stimuli, and scanning of the environment for threats that can develop after exposure to dangerous and life-threatening events.
Resiliency	A pattern of positive adaptation in the context of past or present adversity.
Traumatic Reminders	A traumatic reminder is any person, situation, sensation, feeling, or thing that reminds a child of a traumatic event. When faced with these reminders, a child may re-experience the intense and disturbing feelings tied to the original trauma.
<i>Note:</i> From “Ten Things Every Juvenile Court Judge Should Know about Trauma and Delinquency,” by K. Buffington, C.B. Dierkhising, and S.C. March, 2010, <i>Juvenile and Family Court Journal</i> , 61(3), p. 16. Copyright 2010 by the National Council of Juvenile and Family Court Judges. Reprinted with permission.	

¹ E. Stoffel, A. Korthase, and M. Gueller, *Assessing Trauma for Juvenile and Family Court Judges: From Development to Implementation, 2013-2017* (Reno, NV: National Council of Juvenile and Family Court Judges, 2019).

The U.S. Department of Veterans Affairs also speaks to Post-Traumatic Stress Disorder: “It’s normal to have upsetting memories, feel on edge, or have trouble sleeping after a traumatic event. At first, it may be hard to do daily activities you are used to doing, like go to work, go to school, or spend time with people you care about. If it’s been longer than a few months and thoughts and feelings from the trauma are upsetting you or causing problems in your life, it may lead to symptoms of traumatic stress, or post-traumatic stress disorder (PTSD).”

PTSD is pervasive and deeply affecting. Some people develop PTSD after experiencing or witnessing a life-threatening event, like combat, a natural disaster, a car accident, or sexual assault. Studies have consistently found higher rates of PTSD among survivors of domestic violence.

A CDC study found that 80% of women who experience rape, stalking, or domestic violence by an intimate partner experience significant short- or long-term effects including PTSD.² Survivors of domestic violence in court may continue to experience ongoing danger, coercion, and custody-related threats, which can exacerbate traumatic impacts.

Just as sources of trauma vary, so will a person’s experience of trauma. Understanding the ways people can be affected by trauma can lead to better interactions between the court and persons served. As stated by the National Council of Juvenile and Family Court Judges; “**a trauma-informed court recognizes the pervasiveness and impact of trauma on both court personnel and the people who come before the court/litigants and court personnel and institutes practices to mitigate those effects and reduce further retraumatization.**”

Coming to court is traumatic in and of itself for many parties because the stakes are often so high. Further, for most people, court is an unknown environment, with its own language. A trauma-informed court considers how trauma may be impacting the presenting parties and factors that into interactions with parties. For example, is there something about the court process that is traumatic/traumatizing that could be mitigated? Is a person responding or behaving in ways that are interfering with their legal case, that need to be understood? Or is trauma, and its effects, specifically being raised in a legal case and need to be factored in?

Simply stated, a trauma-responsive court provides an atmosphere of dignity, respect, transparency, and safety. This includes supporting people who have experienced trauma to feel empowered and engaged in court proceedings, as well as awareness of situations where responses to trauma may be evoked, such as participation in a contested court hearing or custody evaluation.

This chapter focuses on the practical challenges that domestic relations courts often face in working with parties who have experienced trauma and offers practical suggestions to improve engagement.

² M. C. Black et al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report* (Atlanta: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 2011).

How Trauma Can Impact the Ways People Present in Court

Those who have experienced trauma may present patterns of behaviors that are a function of the trauma but could lead a court to misread the behavior or misinterpret the relief required.

Trauma may impact how parties are perceived by judges and court staff. Trauma responses may be misinterpreted as dishonesty, denial, or resistance. Trauma symptoms can affect a person's ability to retell their stories and engage in the legal process. If a person has been abused, recounting the abuse can cause a person to re-experience the abuse, interfering with their ability to communicate or stay emotionally present. Because trauma affects memory, it may impact one's ability to recount details in a linear fashion. For example, if a party has a flashback (i.e., relives the experience of abuse as if it were happening in the present) and is unable to describe what happened clearly, they may not be viewed as credible. For people who have experienced trauma at the hands of someone they had previously trusted or someone in a position of authority, the betrayal of trust may make it difficult to trust in the fairness of court proceedings or the intentions of court personnel. Being aware of why people may have reasons not to view us as trustworthy can help us to not take those responses personally and allow us to respond more helpfully and effectively.

The National Child Traumatic Stress Network and the Trauma-Informed Community Network have each identified examples of how trauma can manifest, whether in the courtroom or in the life of the traumatized person, such as:

- Highly anxious demeanor
- Hypervigilance
- Inappropriate smiling or laughter
- Extreme passivity
- Non-responsiveness to simple questions
- Unexpected reactions/overactions (anger, hostility)
- Distractibility (jittering, fidgeting, difficulty focusing)
- Difficulty regulating emotions
- Avoidance of people/places/situations
- Difficulty sleeping
- Substance Use Disorder
- Difficulty coping with change or unanticipated circumstance

Fight, Flight, or Freeze

Parents in court may show responses to past traumatic events that are triggered by being in the presence of the person who has harmed them or their child or just from having to think and talk about those experiences. The fight, flight, or freeze response refers to involuntary physiological changes that happen in the body and mind when a person feels threatened: a person may feel extremely alert, agitated, confrontational, or like they need to leave a room or location. While the person who is “frozen” is extremely alert, they are also unable to move or take action against the danger.³ This response exists to keep people safe, preparing them to face, escape, or hide from danger. However, people can experience this response whether the danger is real or not, which can lead to these responses becoming/being activated in situations where it is not necessary. Dissociation (disconnection between a person’s thoughts, memories, feelings, actions, or sense of who they are) is also a common response to trauma: a way of psychologically distancing when real escape is not possible. In court, this may appear as disinterest or lack of engagement, when it is in fact, an involuntary protective response. In situations of domestic violence where the trauma is ongoing, fight, flight, freeze, and dissociation may be responses to ongoing danger, threats, and coercive control. Courts can work effectively with parties who may be experiencing a range of impacts by building a more trauma-informed court.

Required Elements in Building a Trauma-Informed Court

Judicial Leadership

Creating a trauma-informed court begins with judicial leadership. Judges are adept and successful in convening and facilitating the necessary court personnel and stakeholders to begin the discussion and education about the complexity of trauma. “Judges can facilitate this open exchange of perspectives to increase stakeholder engagement in creating a trauma-informed court, develop a shared vision of how to serve youth, children [and adults/individuals] better, and allay fears that being trauma-informed is just a passing fad that won’t be sustainable or lead to valuable, long-term system transformation.”⁴

³ M. West, M., “What Is the Fight, Flight, or Freeze Response?” *Medical News Today* (July 28, 2021). Retrieved from <https://www.medicalnewstoday.com/articles/fight-flight-or-freeze-response>.

⁴ Stoffel, Korthase, and Gueller, *supra* note 1.

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Trauma Team

Judges should convene the trauma team. Development of a trauma team is necessary to develop, implement and support trauma-informed practices within the court. Ideally, the Trauma Team represents the stakeholders in the community and can help identify needs and meet them. The trauma team is also responsible for promoting and supporting trauma-informed practices and recognizing trauma responses in adults, youth, and families, as well as in court staff and others involved in the court system. The trauma team is responsible for fully integrating knowledge about trauma into the court's policies, procedures, and practices with a goal of actively avoiding and resisting re-traumatization.

Developing a Shared Understanding of Trauma

In creating a trauma-informed-court it is important to have a shared understanding and definition of trauma. Each court and its stakeholders should collaboratively work to define trauma based on their shared understanding and in response to their own community. Some communities will have shared traumatic experiences, as with a shooting, or some may have more concentrated populations that have experienced trauma, such as those located near military installations. To provide one example, the Fairfax Juvenile and Domestic Relations District Court, Fairfax, Virginia defines trauma as “the emotional response that occurs when a person’s capacity to cope is overwhelmed by a negative event, series of events, or set of circumstances.” By naming the trauma experienced, it will be more clear to the court and the community when someone is experiencing traumatic effects.

Education and Training on Trauma for All Court Personnel

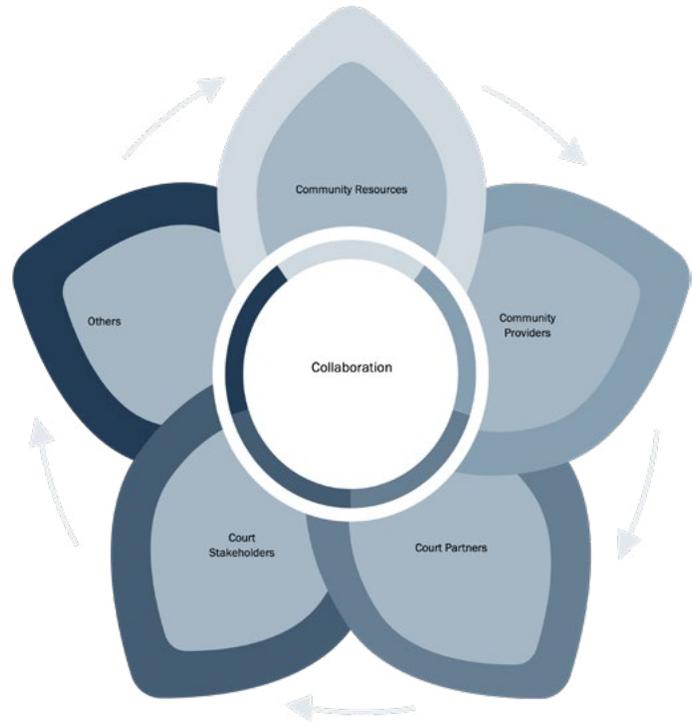
All court personnel, including judges, prosecutors, clerks, security officers, probations officers, intake officers, court administrators, and detention/correctional officers, must include in-house education and training on trauma within their training curriculum. Front-line workers should be trained in emotional regulation and be given information to connect clients with referrals and resources for trauma services. Staff should be provided with trauma-informed supports and training education with the goal of empowering them to build their own resiliency to best meet the needs of their trauma-impacted clients and to maintain work/life balance. Safe supportive opportunities to talk about what they are experiencing, and to share strategies for addressing concerns and feelings that arise, are also important.

Trauma training should be included in orientation and mandatory for all newly hired staff. Ongoing and updated training and collaboration with court stakeholders should be held regularly. Ongoing training and education will help court personnel recognize the signs of trauma in

litigants, adults, youth, and families involved in the court system, as well as within themselves, to resist re-traumatization.⁵

Collaboration Across Systems to Enhance Continuity of Care

The process of creating a trauma-informed court involves the greater community. The Trauma Team identified above must work across systems to enhance community response and continuity of care. Collaborative partners should include social services, school, behavioral health, law enforcement, health care and substance use treatment/recovery support, domestic violence programs, vocational education and resources, corrections, mentors, faith-based organizations, and other community resources and providers. The court's partners and stakeholders, including attorneys, prosecutors, defense attorneys, guardians *ad litem*, advocates, court-appointed special advocates, and other court volunteers, must have regular and ongoing basic trauma education and training.



Family Justice Principle 10, “Identify and Strengthen Community Partnerships,”⁶ refers to this from the Alaska’s Justice for All campaign:

Expanding access to justice requires innovation and moving past the idea that an attorney or a courtroom is the best or only solution for [citizens]. Partnering across legal, social services, medical and information providers to address the array of justice needs that people face may be the key to the early detection, diagnosis and intervention necessary to empower [citizens] to solve their problems before they find themselves in the legal system.⁷

⁵ National Child Traumatic Stress Network, “Trauma-Informed Policies and Procedures: Essential Elements” (n.d.).

⁶ Family Justice Initiative, *Principles for Family Justice Reform* (Williamsburg, VA: National Center for State Courts, 2019).

⁷ Alaska Court System, Justice for All (n.d.). Retrieved from <https://courts.alaska.gov/jfa/index.htm>.

Avoid Re-Traumatizing Parties

Safeguards should be put in place to ensure that parties are not re-traumatized by the need for multiple retellings of their traumatic experiences and history.⁸ Courts have access to a wealth of information regarding parties such as screenings and assessment. By being aware of the assessments that are kept and by whom, and by establishing a formal protocol, stakeholders can know the conditions under which the information can be shared.

Judges and staff should inquire of parties whether there are court conditions that are traumatic for them or inhibit their full participation and discuss mitigation strategies. To provide one example: when parties are ordered to mediation, the Nebraska Office of Dispute Resolution conducts an evidence-based screening to consider if a party has experienced trauma or domestic violence to schedule appropriate, specialized services to protect parties and the process.

Promoting a Positive Atmosphere in Court—Trauma Audits

Trauma Audit protocols are available to view the court through a trauma lens. Doing so will enable the court to decide what physical improvements can be made to improve safety and persons' ability to engage in proceedings.

Per the Substance Abuse and Mental Health Services Administration (SAMHSA), another essential component of a trauma-informed court begins with judicial interactions and treating individuals who come before the court with dignity and respect. Not only are these concepts core to procedural justice, but they will promote a sense of safety, personal agency, and connectedness among parties and court personnel alike.² Court professionals, particularly judicial officers, should engage in specific behaviors when engaging with litigants in the courtroom to reduce their stress and help them feel safe. These include speaking directly to parties by name, treating everyone in the courtroom with respect, and giving parties an opportunity to be heard.

The Office of Victims of Crime recommends the following in designing trauma-informed court space:

- **Encourage Suggestions [from the Trauma Team] and Other Court Stakeholders.** Encourage parties to cases, attorneys, and guardians ad litem to make specific requests for any possible and reasonable adjustment to the proceedings. This might

⁸ C. B. Dierkhising, S. Ko, and J. H. Goldman, *Trauma-Informed Juvenile Justice Roundtable: Current Issues and Directions in Creating Trauma Informed Juvenile Justice Systems* (Los Angeles and Durham, NC: National Center for Child Traumatic Stress, 2013).

include preventing an abusive party from trying to intimidate their partner during the court proceedings.

- **Step Down and Leave the Judge’s Robe at the Bench.** “The intimidation factor perceived by pro se parties and children in a courtroom when interacting with an authority figure (dressed differently and seated in an elevated location) can invoke trauma triggers or otherwise discourage interaction.” The court can consider arranging seating to be more conducive to interaction, such as a semicircle. On a limited basis, if no one’s personal safety is compromised, a judicial officer may sit on the same level as parties. Leaving the judge’s robe on the bench is another option to encourage interaction.
- **Adjust the Lighting in the Courtroom.** Often courtrooms have multiple lighting options, and decreasing the lighting may feel more comfortable to individuals who are light sensitive or have certain sensory limitations. For others, dimming the lights could be potentially triggering. Cultivating awareness of impacts on parties and being open to accommodations is an effective practice.
- **Provide Simple Conveniences Like a Box of Tissues or a Bowl of Snacks.** These small amenities send a message to help parties feel at ease.

Resources

- [ACEs \(Adverse Childhood Experiences\)](#)
- [International Society for Traumatic Stress Studies— STRESS \(Structured Trauma-Related Experiences and Symptoms Screener\)](#)
- [International Society for Traumatic Stress Studies—Childhood Attachment and Relational Trauma Screen \(CARTS\)](#)
- [Trauma for the Juvenile Judge](#)
- [Vicarious Trauma in Child Welfare and Juvenile Justice Systems](#)
- [National Center for State Courts Behavioral Health eLearning Series](#)
- [National Council of Juvenile and Family Court Judges: Assessing Trauma for Juvenile and Family Courts](#)
- [Conference of State Court Administrators: Courts Need to Enhance Access to Justice in Rural America](#)

CHAPTER 3

KEY POINTS *from Chapter 3*

- 1 Our responses to people with mental health conditions should not be based on stigma.
- 2 Mental health diagnoses reflect a constellation of symptoms that a person may be experiencing, not their parenting or other capacities.
- 3 Mental health conditions must be viewed in the full context of the circumstances, including the party's and family's strengths, how they are impacted by the mental health condition, and their efforts to address any impacts this may have on their children or parenting. participation in treatment, and/or access to other supports.
- 4 In working with families where mental health conditions are at issue, the judge must also consider whether a person's mental health condition is impacting their ability to fully participate in their legal case or court proceedings, and if so, what can help to mitigate those effects.
- 5 When encountering/working with a person who is experiencing mental health symptoms that are impacting their ability to participate in court proceedings, there are approaches that can better serve/best serve the needs of the parties and proceedings before the court.

CHAPTER 3

Understanding the Spectrum of Mental Health Conditions and How to Respond to Them

This chapter provides an overview of the broad spectrum of mental health conditions so that judges and staff may better understand how to work effectively with individuals and families experiencing situational or ongoing mental health symptoms or conditions.

We begin the chapter with caveats:

- **People who experience mental health conditions are regularly stigmatized in society - more so than people with physical health conditions.** We too often rely on labels that carry inappropriate/inaccurate assumptions and behavioral connotations and do not reflect the/a person's capacities, strengths, and abilities. Judges and court staff must resist this societal tendency. How a person experiences a given mental health condition varies widely, and the diagnosis itself does not tell you how a given person is being impacted.
- When judges and staff learn that participants in the litigation before them may be impacted by a mental health condition, they may inappropriately focus on diagnoses to guide next steps. This tendency is even stronger when children are involved, out of an inclination to protect. **Relying on diagnoses to guide decision making in such cases will likely result in decisions that are more harmful than helpful to the individuals and their circumstances.** Judges should instead consider the persons involved, family strengths, participation in treatment, and/or access to other healing modalities and supports.

A Broad Spectrum of Mental Health Conditions

One in five adults in the United States will experience a mental health condition in any given year. Almost half of all adults living in the United States will experience a mental health challenge at some point during their lifetime. As with all health conditions, mental health issues can be situational, temporary, or chronic and most do not rise to the level of “serious mental illness.” Understanding mental health symptoms and conditions in context can be particularly helpful to judges when a person is not able to engage in their court proceedings in a meaningful way and/or presents in a way that may be perplexing and distressing. It is also helpful when the mental health of one party is raised in a family court case and judges need to sort out what that means and what implications it has for parenting-time decisions, a topic treated in greater detail in [Chapter 4: Understanding the Impact of Mental Health Conditions on Parenting Capacity](#).

Below are some of accompanying behaviors or interactions that might be observed during litigation. This is not intended to be an exhaustive list, nor is it intended to diagnose conditions. To meet criteria for a diagnosis, people need to experience a certain number of symptoms over a defined period of time and to have been impacted in multiple domains. People with the same diagnosis can have very different constellations of symptoms and many symptoms cut across diagnostic categories. How people are impacted also varies widely and can change over time.

Table 1. Behaviors or Interactions Observed During Litigation

Anxiety Disorders		<ul style="list-style-type: none"> • Worry excessively about everyday things • Have a hard time relaxing and concentrating and may have physical symptoms • Appear fidgety, restless, tense, and nervous
Mood Disorders	Manic Episode	<ul style="list-style-type: none"> • Have racing thoughts, rapid speech, and have many plans/projects • Sleep little, and may have an increased appetite and chemical usage (substance use), decreased need for sleep, increased energy, elevated mood. • May appear irritable, grandiose, or paranoid
	Depressive Episode	<ul style="list-style-type: none"> • Think negative thoughts about themselves, others, and their circumstances • Feel sad and hopeless and lack interest in and energy for their usual activities • Appear lethargic, unable to concentrate
	Bipolar Disorder	<ul style="list-style-type: none"> • Mood Disorder that includes at least one manic or hypomanic episode and often includes episodes of depression • May have elements of both manic and depressive disorders

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Post-Traumatic Stress Disorder (PTSD)	<ul style="list-style-type: none">• Have intrusive thoughts and memories about the trauma(s)• Feel anxious, numb, unable to concentrate• Appear hypervigilant and avoidant of trauma reminders
Psychotic Disorders	<ul style="list-style-type: none">• Thinking may show some loss of contact with external reality• Feel frightened, suspicious, uneasy around others• Appear withdrawn, unable to answer questions logically
Substance Use Disorders	<ul style="list-style-type: none">• Pattern of use negatively affects judgment, work, school, and/or relationships• Feel blamed, regretful, and verbalize desire to change; May also feel shame• Likely to have repeated episodes of substance use until actively in recovery• May experience substance use coercion in the context of intimate partner violence; for example, a person may be coerced into using by an abusive partner, prevented from accessing treatment and achieving their recovery goals and then discredited with friends, family, helping professionals, and the courts
Personality Disorders	<ul style="list-style-type: none">• Show patterns that differ significantly from what is expected in how they:<ul style="list-style-type: none">○ Think about themselves and others○ Respond emotionally○ Relate to others○ Control or don't control their behavior

Treatment and Medication

What is helpful to parties varies. Medication alone or in combination with therapy can be effective.

For those whose treatment recommendations include prescribed medication, that treatment approach can be highly effective in dealing with the common symptoms associated with the disorder, as long as it is accessible, affordable, and the person's choice. Understanding the effects of the medication prescribed, as well as the dosage, requires explanation by practitioners. The National Institute of Mental Health (NIMH) provides a useful list of medications.

There are many reasons why a person may not choose medication, even if it is recommended. Not all diagnosed conditions benefit from psychiatric medication. In fact, periodic or ongoing therapy may be the preferred course of treatment. For some, other healing modalities, activities, connections, and/or peer support may be what is most helpful.

In making decisions where a person's mental health condition is a factor in their legal case (e.g., custody/visitation), consideration should be given to the party's efforts to address their mental health symptoms, such as their effort to obtain medication and to take it as prescribed, participate in therapy, and/or take other steps to manage the impact of their mental health symptoms on others. Some mental health conditions respond well to medications but identifying the appropriate medication and the effective dosage can take months of working with a doctor. For example, a party with severe depression may or may not manage well on medication or they may benefit from additional support or therapeutic techniques to enable better management of their condition. If parties appear not to be taking medications, find out why. Medications often have unpleasant side effects that result in some individuals not taking them as prescribed. Prescriptions can be very expensive, and individuals may struggle to pay for them. Additionally, some individuals may seek out non-Western or culturally specific modalities of treatment to address mental health concerns. There are peer-based approaches and self-management tools (e.g., WRAP™) developed to support people who aren't able to tolerate medication.

Intimate Partner Violence Considerations

Victimization by an intimate partner greatly increases a person's risk for developing a range of mental health conditions, including depression, anxiety, PTSD, eating disorders, chronic pain, insomnia, substance use disorders, psychotic episodes, and suicide attempts. Further, coercive controlling behavior or threats or commissions of domestic violence can be used to exacerbate a diagnosed mental health issue.

Figure 1.
Victimization and Increase
of Mental Health Conditions



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People who abuse their partners use mental health and/or substance use issues against their partners. A 2014 study by the National DV Hotline and the Center on Domestic Violence, Trauma and Mental Health identified these behaviors:

Undermine Mental Health: Attempt to convince others that partner is unstable/mentally ill; gaslighting; blaming the abuse on partner's mental health.

Treatment Interference: Attempt to control the treatment provider's perceptions; prevent a partner from accessing or engaging in treatment; sabotage a partner's recovery efforts.

Control of Medications: Prevent from taking, force to take (wrong dose/overdose), steal medications.

Threats to Report or Discredit: Use mental health to influence custody or obtain protective order.¹

Figure 2.
Domestic Violence
and Undermining
Treatment

Note. Infographic by the National Center on Domestic Violence, Trauma & Mental Health, (<http://www.nationalcenterdvtraumamh.org/>).



¹ C. Warshaw et al., "Mental Health and Substance Use Coercion Surveys: Report from the National Center on Domestic Violence, Trauma and Mental Health and the National Domestic Violence Hotline," National Center on Domestic Violence, Trauma and Mental Health, March 2014. Retrieved from http://www.nationalcenterdvtraumamh.org/wp-content/uploads/2014/10/NCDVTMH_NDVH_MHSUCoercionSurveyReport_2014-2.pdf

Judges observing or learning about these behaviors should recognize them as elements of the power and control wheel² and an attempt by an abuser to discredit, sabotage, threaten, and exercise dominance over their partner. The chart below illuminates possible conditions and causes.

Figure 3. Mental Health and Substance Use Coercion: Things to Keep in Mind

Mental Health and Substance Use Coercion: Things to Keep in Mind	
A Survivor May	An Abuser May
<ul style="list-style-type: none">Be unable to comply with treatment requirementsHave difficulty keeping appointmentsFace barriers due to stigma/inflexible expectationsRelapse due to stress, trauma, threats, coercionBe reluctant to seek assistance or contact policeBe coerced into engaging in illegal activities	<ul style="list-style-type: none">Try to manipulate your perceptions; Make false allegationsPrevent partner from participating in treatment; deliberately sabotage recovery effortsCoerce partner to use so they will screen positiveUse MH/SU to undermine partner's credibility, obtain a PO, or access clinical recordsCoerce partner to use or overmedicate, then videotape or put into withdrawal causing them to miss appointmentsCoerce partner into committing a crime and calling LE or probation officer

² Domestic Abuse Intervention Programs, "Understanding the Power and Control Wheel" (n.d.). Retrieved from <https://www.theduluthmodel.org/wheels/understanding-power-control-wheel/>.

Assessing whether domestic violence or intimate partner violence (IPV) is present is of paramount importance. When IPV is known or is a concern, any mental health challenges experienced by a survivor must be considered in the context of ongoing threats, danger, and coercive control. Fear of violence, fear of custody loss, trauma, and emotional distress experienced by the survivor may exacerbate mental health challenges.

Responding to Emotional Distress and Crisis

Judicial officers and staff may experience parties in a distressed or heightened emotional state. Under stress, a person’s interaction with the court may be other than expected. The following provides considerations for how a person may present in court.

Table 2. Considerations for How a Person May Present in Court

If a person appears this could mean . . .
. . . withdrawn, shutdown, non-responsive they are afraid, tired, do not trust the process, are depressed, experiencing dissociation, are dealing with a traumatic brain injury or intimate partner violence.
. . . to be responding inappropriately or not responding to the questions asked they are overwhelmed in a court setting, they are dissociating, experiencing psychotic symptoms . . .
. . . agitated	. . . they are experiencing PTSD-related hypervigilance/hyperarousal, or emotional dysregulation related to trauma . . .
. . . to be talking very fast and not making sense	. . . they are afraid, anxious, experiencing acute manic/psychotic state, or taking a stimulant

When parties are experiencing emotional distress during court proceedings or are behaving in ways that are preventing them from participating in their legal case and/or may be distressing to others, judicial officers and staff can help mitigate distress. Here are best practices for working with families, as well as techniques for working with parties experiencing anxious states of being:³

- Avoid using court jargon or specialized terms.
- Express genuine interest in the person's experience and concerns.
- Speak more slowly with a caring, non-patronizing tone.
- Avoid arguing and raising your voice.
- Pause if necessary. Consider taking a break or offer to return another day if someone is not understanding or is unwilling to engage further.
- Recognize when emotions are getting heightened.
- Seek other services and support systems if needed.
- Work with the attorney or support person present.
- Facilitate seeking help or support for the individual, if concerns exist about the person being a danger to self or others.
- Work with a carefully selected, and agreed upon, support person present.
- Offer other space solutions, if possible. For example, having a hearing in a meeting room with regular table and chairs to reduce distress.
- The court can be an unknown and stressful environment. Are there non-adversarial or alternative dispute resolution options available?

3 National Center for State Courts (2021) Mediation and mental health best practices handbook. National Center for State Courts. <https://cdm16501.contentdm.oclc.org/digital/collection/adr/id/68>.

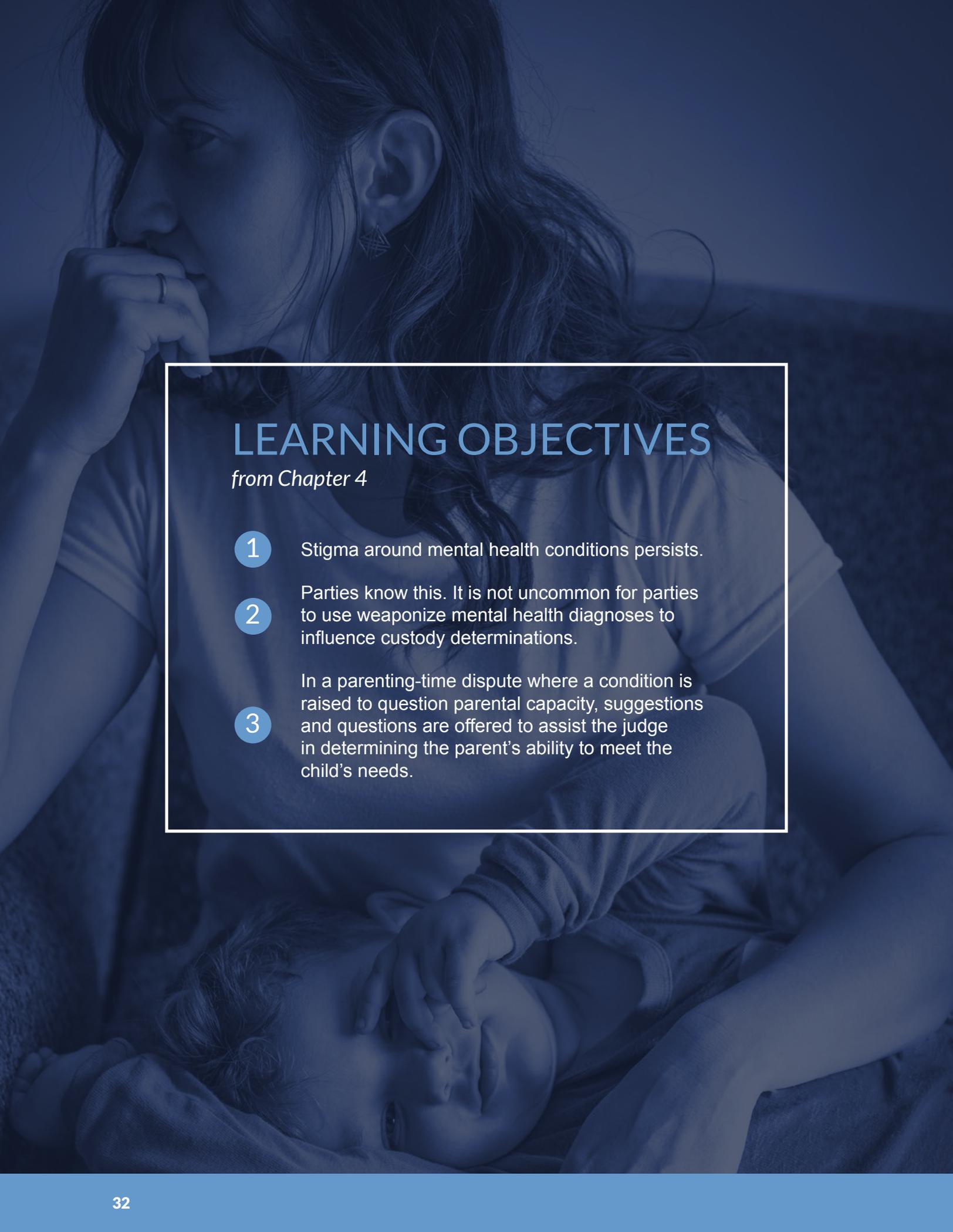
Get Support from the Mental Health Community

This chapter provides only an introduction to complex issues in working with individuals and families experiencing situational or ongoing mental health conditions. It is an emerging promising practice that courts work to create effective court-behavioral health partnerships. It is far more common that communities have limited mental health services. In the face of lacking services, it is common for judges to email colleagues to seek out needed services like where to conduct a psychological assessment or where to find inpatient treatment. Where possible, courts should endeavor to create community resource lists of service providers and take steps to broaden service array and to ensure that referrals are made to providers and evaluators who are culturally responsive and both domestic violence and trauma informed. This should include identifying resources that could advise them regarding appropriate orders.

Additional information and training on the topics mentioned above are available at [National Center on Domestic Violence, Trauma and Mental Health](#).



CHAPTER 4



LEARNING OBJECTIVES

from Chapter 4

- 1 Stigma around mental health conditions persists.
- 2 Parties know this. It is not uncommon for parties to use weaponize mental health diagnoses to influence custody determinations.
- 3 In a parenting-time dispute where a condition is raised to question parental capacity, suggestions and questions are offered to assist the judge in determining the parent's ability to meet the child's needs.

CHAPTER 4

Understanding the Impact of Mental Health Conditions on Parenting Capacity

The Destigmatization of Mental Health Conditions and Diagnoses

Decisions made in family law cases are challenging, especially when judges are left to make decisions based on information that is incomplete or disputed. One such issue arises from the intersection between mental health and parenting capacity. This chapter highlights the importance of using a person-centered approach instead of a pathologizing approach that views or characterizes mental health conditions as psychologically abnormal. It emphasizes the need to look at a diagnosis as just the first step in assessing child safety and well-being in a parent's care.

Stigma around mental health continues to exist and may even provoke unconscious bias. The term "mentally ill" conjures pejorative perceptions. Judges are better served to use the phrase "having a mental health condition." Understanding stigma around mental health conditions, and how it impacts decisions on parenting capacity will ensure that mental health diagnoses do not drive decisions about a parent's ability to meet a child's needs. It is far more effective that judges examine patterns of behavior, the impact of treatment, including medication, and child safety issues.

The Parenting Capacity vs. Diagnosis Disconnect

Judges and court staff must understand that the mere presence of a mental health condition should never dictate how the case resolves. The current litigation approach in most circumstances is heavily reliant on diagnoses to guide next steps, due to the inclination to act in a protective capacity toward children. In litigious cases, it is far too common for one party to try to leverage the other's mental health diagnosis in parenting-time disputes.

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The notion that the capacity of a parent to assess and address a child's best interests is limited by the presence of a condition or diagnosis, is a fallacy. Reducing the court's reliance on labels is a preferred approach in understanding mental health conditions and the effects of trauma on litigants. Having a mental health condition does not mean that parents are not doing what they need to do for a child. Accordingly, judges should look more closely at what the condition or diagnosis means regarding the parent's plan for child safety and well-being.

Intersection of Mental Health and Domestic Violence

Clearly, domestic abuse negatively affects parenting and jeopardizes the safety of the child. When looking at the intersection of mental health and domestic violence, judges should first consider the victim's trauma (Chapter 3) and the coercive behavior of the abuser (including control, intimidation, and dominance). Judges should also be aware that many perpetrators of domestic violence or abuse raise the mental health conditions of the other parent as a legal strategy or in an attempt to dominate their partner. A 2014 report by the National Center on Trauma, Domestic Violence and Mental Health reported frequent use of reporting of a party's medications or treatment to influence court custody determinations.

As a result of the abuse they have experienced, a victim can appear hypervigilant about their children's safety. It is important for practitioners to evaluate the root cause for the hypervigilance

and avoid confusing hyper-vigilance with alienating behaviors. In court, especially in the presence of the alleged abuser, a victim may respond in ways that reflect the fear and trauma they are experiencing, due to the abuse itself, and/or due to direct intimidation by their abusive partner and fear of retaliation, as well as custody-related threats. Responses to fear and trauma can range from seeming disconnection or lack of affect or very intense affect, as well as memory gaps and can prevent a survivor/victim from providing a coherent narrative and clear explanations of their responses and behaviors.

In addition to securing training on the impacts and effects of domestic violence, courts should consider alternatives to in-person hearings and having victim advocates readily available to provide support and/or reduce stimuli that may provoke a stress response.

Pattern of Behaviors vs. Diagnosis

To separate a mental health condition or diagnosis from its consequences for parenting, judges should consider patterns of behavior as well. Examining behaviors allows judges to identify activity that is not safe for the well-being of a child, while reducing the weight of labels that may influence decisions on parenting capacity. For more on this, see **Chapter 3: Understanding the Spectrum of Mental Health Conditions**.

Judges should look more closely at parenting assessments, preferably by trained professionals, and the fit between the child's needs and the parent's ability to meet those needs. When a parenting assessment is not available, the judge should look at information provided by the parents, the child, if appropriate (see **Chapter 5**), and reliable collateral sources.

Judges should ensure that assessments of mental health conditions and parental capacity are done by neutral, preferably court-employed, professionals who are knowledgeable about trauma and domestic violence. When such assessments are proffered by counsel or parties, judges should exercise extreme care in considering such information.

Making Parenting-Time Decisions

A closer look should be given to what effect, if any, the mental health condition has on parenting. The judge should determine:

- Does the party acknowledge the condition?
- Is the party taking steps to ensure that their mental health condition does not negatively impact their parenting or their children?
- Does the parent have a safety plan for the child that identifies supports if the parent becomes de-stabilized?
- Is there a support person or family member who may serve as a resource in times of stress or crisis?
- Is the co-parent weaponizing or exacerbating the mental health condition?

In a family law dispute where a mental health condition is raised to question parental capacity, the judge should direct questions about the parent's ability to meet the child's needs to the treatment provider. If the provider is unwilling to comment on parenting capacity, a separate assessment may be needed. The chart below captures the typical questions that should be asked by a provider during an assessment.

Table 1. Typical Questions by a Provider During an Assessment

<p>Understanding the Diagnosis</p>	<ul style="list-style-type: none"> • Was a mental health condition diagnosed? When? By whom? • What is the parent’s specific diagnosis? • What symptoms and/or behaviors were identified/observed that support the diagnosis? • What is the current level of severity of symptoms or behaviors observed? • What is the mental health history of the individual, i.e., previous treatment or hospitalizations? • What is the common prognosis for an individual with this condition? • What are the common treatments for individuals with this condition? • Is this condition situational or chronic?
<p>Asking about Treatment</p>	<ul style="list-style-type: none"> • Is there a treatment plan? What are the current goals of treatment? Is the treatment plan feasible and acceptable to the individual? Is an abusive partner trying to sabotage the treatment plan? • In what treatment activities is the individual currently engaged? • What is the individual’s level of engagement in and commitment to treatment? As evidenced by...? (<i>Ask about specific behavioral indicators</i>) • What is the individual’s progress to date on treatment goals? As evidenced by...? (<i>Ask about specific behavioral change</i>) • Has the parent been prescribed with any medication? Is the parent taking medication as prescribed? If not, are there reasons why they aren’t taking medications as prescribed? What would be a helpful alternative? (Transportation, childcare, affording meds and MD visits, abusive partner preventing them from taking meds as prescribed?)
<p>Safety & Risk</p>	<ul style="list-style-type: none"> • Does the individual pose a risk of harm to themselves or to others? • What specific risk factors are present or absent to support the risk status? • What is the risk for relapse/decompensation/recurrence? • What factors mitigate risk for the individual? (<i>Ask about safety/relapse prevention plan.</i>) • What is their support system and are they using it? How so? What is the plan to use their supports?

<p>Parenting Implications</p>	<ul style="list-style-type: none"> • What is your general understanding of how this diagnosis might affect an individual's capacity to parent? • How might the parent's diagnosis effect their ability to co-parent? • Is the individual able to meet the basic needs of children? <ul style="list-style-type: none"> • Safety and protection • Food and shelter • How able is the parent in managing relational aspects of parenting? <ul style="list-style-type: none"> • Attachment and warmth • Attunement and responsiveness • Emotional support and nurturance • Predictable and reliable responses • Modeling prosocial behaviors—such as distress tolerance, positive coping skills, healthy relationships, etc. • How able is the parent in handling executive aspects of parenting? <ul style="list-style-type: none"> • Manage child behavior • Establish routine and structure • Manage logistics of childcare—school, medical appointments, activities, etc. • Maintain engagement with the outside world
<p>Parenting Observations</p>	<ul style="list-style-type: none"> • Have you directly observed the individual with their child(ren)? Have you directly observed them while engaged in parenting activities? • Are you aware of any impacts of the individual's mental health condition on the children? <ul style="list-style-type: none"> • Parent self-report? • Direct observation? • Report of professional treating the children? • Are you aware of any specific risk to the children from the individual? From others? • Do you have any specific treatment recommendations related to parenting?
<p>Understanding the Child</p>	<ul style="list-style-type: none"> • What is the child's age and current level of developmental functioning? • What is the child's current level of functioning at school, at home, in the community? • What strengths and protective factors are present in the child? • In what supportive relationships and activities is the child involved?

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<p>Experience of Parent's Mental Condition</p>	<ul style="list-style-type: none"> • What is the child's direct experience of the parent's mental health condition? • How has the child been impacted directly or indirectly by the parent's mental health condition? • Has the child's immediate safety been directly impacted by the parent's mental health condition? • What is the child's current level of knowledge, awareness and understanding of the parent's mental health condition? • What coping strategies has the child employed to deal with the parent's mental health condition? • Has the child had excessive responsibility to care for themselves, the parent or siblings?
<p>Direct Observation</p>	<ul style="list-style-type: none"> • Have you directly observed the child with the parent who has a mental health condition? • Have you directly observed the child with the other parent? • What did you note about the parent's (or parents') ability to demonstrate the following? <ul style="list-style-type: none"> ○ Attachment and warmth ○ Attunement and responsiveness ○ Emotional support and nurturance ○ Predictable and reliable responses ○ Modeling of prosocial behaviors—such as distress tolerance, positive coping skills, healthy relationships, etc. ○ Manage child behavior, establish routine and structure ○ Manage logistics of childcare—school, medical appointments, activities, etc. ○ Maintain engagement with the outside world • What did you specifically note about the child's emotional and behavioral response to the parent(s)? • What is your assessment of the of the child's overall attachment to the parent(s)?
<p>Going Forward</p>	<ul style="list-style-type: none"> • What do you believe the child needs from the parent with the mental health condition in the following areas? <ul style="list-style-type: none"> ○ Basic needs, protection, and safety ○ Dealing with the parent's mental illness ○ General parenting capacity • What do you believe the other parent can do to support the child's relationship with the parent who has a mental health condition?

If a person's mental health condition is impacting their parenting, consideration should be given to the parent's efforts to protect their children. For example, is the parent able to care for their children regardless of any mental health condition? If not, how does their mental health condition impact their parenting ability? What are they doing to manage any symptoms that may be affecting their children? What supports would they need? Is an abusive partner actively undermining their mental health, interfering with treatment, controlling their medication, and undermining their parenting? If so, what steps could be taken to protect the non-abusive parent and their children?

When appropriate, seek cooperation between parents so that the non-diagnosed parent can be a resource instead of a hostile informant. Additional attention should be given into assessing what the other parent is going to do to be a resource in times of destabilization. In cases of abuse or violence allegations, it is not appropriate to engage/include the non-diagnosed parent as a resource.

In conclusion, judges should use caution when issues regarding mental health conditions, trauma, and abuse are raised in the course of litigation. They need a deeper understanding of the impacts of those things than what is provided by typical societal stigmas or labels applied in such circumstances. A mental health condition or trauma may or may not be sufficient to limit a parent's access to a child. Because the issues are complex, whenever possible, a judge should use the services of a trained professional with knowledge of trauma and domestic violence to provide the assessments that are needed to evaluate the parenting capacity of a parent with a mental health condition.



CHAPTER 5

KEY POINTS *from Chapter 5*

- Parental separation and divorce have the potential to negatively impact children if they are not buffered from the negative consequences of family breakdown.
- 1 Contrastingly, several factors contribute to children's positive adjustment, including protecting them from conflict, creating parenting plans that meet their needs, and ensuring their voices are heard in an appropriate fashion.
 - 2 Children should be protected from becoming too directly enmeshed in their parents' custody litigation.
- The wishes of a child are frequently a statutory factor in determining best interests and ensuring that the "child's voice" is heard can further their best interests, particularly when the child is of sufficient age and maturity to form independent preferences.
- 3
 - 4 Employing the best methods to secure a child's preference is critical in protecting their best interests.
- A carefully constructed child interview process can assist in limiting the direct exposure of children to the parental conflict while preserving the due process rights of the parents.
- 5
 - 6 Access to all information considered by a judge, including what a child may express as a preference, must be afforded to the parties to preserve their due process rights.

CHAPTER 5

Mitigating the Risk of Children's Adverse Experiences During and Following Divorce

Divorce, parental separation, or disruption to the family has been characterized as an adverse childhood experience (ACE).¹ While prominent ACE studies have typically included divorce as one of the types of adverse experiences (included in household dysfunction, see Figure 1), divorce need not automatically be considered an ACE.

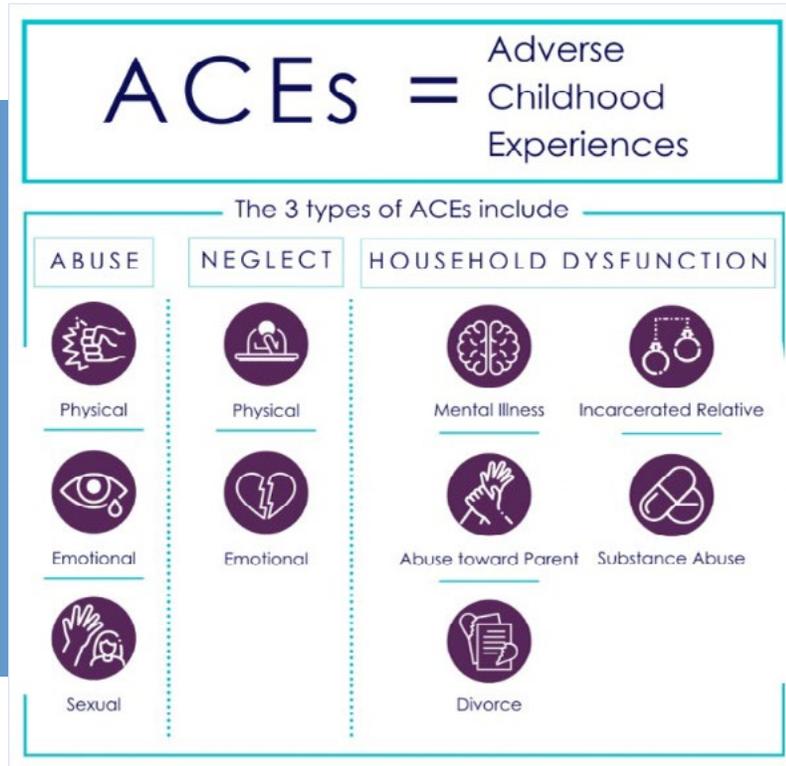
The circumstances, context, and experiences leading up to and during a divorce will have an impact on whether a child experiences the divorce problematically or adjusts to the new circumstance successfully. There are opportunities for the court and stakeholders in the process to protect children from the negative consequences of parental conflict. This can be achieved by providing the necessary structure and support to the family, fostering the child's sense of safety and empowerment as they engage with the legal process, and, when appropriate, providing the child with the opportunity to freely share their experiences.

By implementing approaches to mitigate the risk to the child in family court matters, judges can positively impact the child's short- and long-term adjustment and overall well-being. This chapter outlines various strategies that can be employed for this purpose.

¹ V. J. Felitti et al., "Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study," *American Journal of Preventive Medicine* 14 (1998): 245-58.

Figure 1.
The 3 Types
of ACEs

Note. This image depicts three types of ACEs. From 3 types of ACEs, by RIKTR, (<https://riktr.com/wp-content/uploads/2021/02/3-Types-of-ACEs-768x768.png>).



Children Exposed to Interparental Conflict

Most separating or divorcing couples are able to quickly work through initial feelings of anger, disappointment, and loss and are able to re-establish healthy relationships with their ex-partners and their children. Approximately 40% of separating parents will experience heightened levels of conflict with their ex-partners for a period of time after the separation and, of these conflictual parents, 10% will remain in high conflict despite the passage of time.

The definition of high conflict typically includes ongoing litigation, higher levels of animosity toward the other parent, and ongoing involvement of professionals to help resolve the conflict. In these cases, parents are typically unable to successfully disengage from one another, which can be indicative of pre-existing individual and family dysfunction (e.g., mental health issues, unresolved trauma, abuse) and can be inflamed by circumstances of the family breakdown (e.g., feelings of betrayal, violence).

Being placed in the middle of these conflicts can cause the child to experience anxiety, distress, and loyalty conflicts between the parents. It may also impact the parent-child relationship, which can lead to the formation of alliances as the child struggles with feelings of being caught in the middle of the parents' dispute. Being exposed to this parental conflict is an ACE that should be safeguarded against as it is a stronger predictor of how children cope after separation than the actual event of separation. Exposure to parental conflict can almost double the problems related to children's coping and adjustment compared to a low-conflict experience.

Children's Mental Health and Well-Being Following Separation and Divorce

Children of divorce are at greater risk of having lower self-esteem, difficulties adjusting to school, lower relationship satisfaction with their peers, and higher rates of depression, to name a few. Research suggests that the negative adjustment of children following separation has been associated with increased risk of physical injuries, disease, hospitalization, health-risk behaviors (drugs, tobacco, and alcohol abuse, sleep disturbances, obesity, early engagement in sexual activity and adolescent pregnancy). These risks increase significantly when children are exposed to parental conflict.

Helping Children Adjust Post Separation and Divorce

Parents may expose their children to conflict when there are no clear rules or structure within their parenting plans which, in turn, can create boundary ambiguity or unrealistic schedules that need ongoing negotiation even though the parents are unable to communicate. A well-crafted parenting plan/court order is needed to limit high conflict and should address typical conflict points, such as:

- Transporting the child between homes
- Exchanging the child for visits
- Sharing information about the children
- Scheduling for telephone access, including who can (and cannot) call and the times of these calls
- Making plans for attending the child's school functions

- Making plans for parents' involvement and watching the child participate in extracurricular activities
- Making plans for the transfer of the child's clothes, belongings, and schoolbooks
- Making rules about haircuts, earrings, and other changes to the child's appearance while with either parent
- Making plans for special occasions such as birthdays, religious holidays, and summer schedule

Children's Voices in the Courts

The United Nations addressed the importance of considering the views of a child as part of the "Convention on the Rights of the Child" adopted by General Assembly resolution in November 1989. The Convention provides that a "child who is capable of forming his or her own views [has] the right to express those views freely in all matters" (Article 12). It is important, however, to recognize that there is a difference between a child having the right to be heard versus how much weight should be given to the wishes of a child.

Children's Wishes in Family Courts

In almost all jurisdictions, the child's wishes is one of many factors to be considered.² In some jurisdictions, the consideration of an older child's wishes is even greater.³ Notwithstanding the law of any state, the evidence as to the wishes of the child is to be considered by the court. Yet there are significant implications to child and family well-being if each child were allowed to appear in court during contested custody proceedings to ensure that the child's preference is heard and considered.

Weight Given to the Wishes of a Child

In almost all jurisdictions, the amount of weight to be given to admissible evidence is left to the discretion of the trial judge. But there are some underlying principles in exercising that discretion.

2 For example, see Arizona Revised Statute 25-403(A)(4), which includes among 11 delineated factors consideration of the wishes of a child if the child is "of suitable age ad maturity."

3 For example, see Georgia Code Section 19-9-3(5), which provides that a child who is 14 or older has the right to "select" which parent that child would live with.

Across jurisdictional lines, it is accepted that as the child becomes older and more mature, added weight should be given to the stated preferences of the child. But such thinking ignores many commonly held beliefs about teenagers. One, they are generally more interested in their friends than in their parents. As such, their preferences will gravitate toward the parent who allows them greater access to their friends. Second, they are at a time in their normal development where they will seek independence. This may cause them to express a preference that favors the least restrictive household. Third, they are less likely to accept abiding by rules, therefore more likely to opt for the household where they are held less accountable. For these reasons and others, the adage that “as children are older and more mature, their wishes should be given deference” must be guardedly applied.

Negative Consequences of Children’s Participation in the Courts

It is generally understood and accepted that it is contrary to a child’s best interests for that child to be drawn into the custody dispute of the parents. When a child engages directly in custody litigation, such as through direct testimony or judicial interview, the child may lack the perspective to understand that his or her input is only one data point among many for determining custody. The child may come to believe that he or she is responsible for the outcome and the resulting emotions by the parent against whom the child’s wishes were expressed. Alternatively, if the court rules contrary to the expressed wishes of the child, the child may mistakenly feel marginalized and conclude that his or her wishes have been ignored.

The parent against whom the child conveyed contrary wishes may blame the child for the outcome, thereby harming the future parent-child relationship. Further, a child may state wishes in favor of a parent that the child feels the need to protect, where the child assumes responsibility for the future emotional or physical well-being of the perceived “weaker” of the two parents. This creates an environment of “parentification,” a process under which there is a role reversal where the child feels obliged to take on the role of parent.

It is not uncommon for a child to express to a parent that the child wants to remain with that parent, only then to express the same preference to the other parent. Here, it must not be concluded that the child is being dishonest, or that one parent is misstating the wishes of the child. It is quite possible for the child to express the opposite wishes to each parent with that expression being more about the child’s love for the parent to whom the child is communicating rather than the preference of the child between the parents.

Finally, a child's preferences may be fluid and the child's stated wishes often change over time for a variety of reasons. The longer the time that passes between securing the wishes of the child and conducting a hearing on custody-related issues, the greater the risk that the previously stated wishes may have changed or are less germane.

Triaging Children's Participation in the Courts

Recognizing these and many other risks that a child may be exposed to if directly engaged in the custody litigation, it is incumbent upon the judge to assess whether and how the child's stated wishes should be secured. For this, the first step is to determine whether the wishes of the child are disputed between the parents. This is best assessed in the simplest fashion: Ask the parents. They may agree on what the child would express.

If the parents convey opposing preferences attributed to the child, the second step would be to question the parents. Can they explain the conflicting preferences? Do they account for it as a true evidentiary conflict or are the differences explained in other ways that would not require the court to address the issue directly with the child? Finally, the court may provide the parties with the option of each providing an offer of proof as to what each believes the child would express and the basis for that conclusion. If the parties agree to proceed in this fashion, the court may consider their offers of proof as evidence, thereby negating the need for further engagement of the child.

The Child Voice—Due Process Conflict

If the assessment process reveals that information must be obtained from the child, there are a variety of means by which the child's preference can be secured. This can range from direct testimony, to an *in camera* interview of the child conducted by the judge without the presence of the parents or counsel, to a child interview conducted by a third party neutral who reports to the court, to appointment of a professional to represent the wishes of the child in court, or merely to having the child write a letter to the court.

Having the child testify in the courtroom in the presence of the parents presents the greatest risk for a negative outcome for the child. But it is the best method for protecting the due process rights of each parent by allowing them to know and answer to evidence that is being considered by the court as to the child's wishes. Conversely, a *confidential* child interview, whether conducted by the judge or a third-party professional, where what the child expresses is revealed only to the judge and kept from the parents and their counsel, would have the lowest risk of a

Promoting Well-Being in Domestic Relations Court

negative outcome for the child but could fail in protecting the due process rights of the parents. After all, neither parent would be informed as to what the child expressed, thereby preventing them from fully presenting their cases and precluding any challenge to the basis upon which the child may have expressed a preference.

While no procedure fully addresses the potentially competing interests in child voice versus due process, there are means by which the child's voice can be preserved while not running afoul of the due process rights of the parents. This is through what has been commonly referred to as the "child interview."

The Child Interview: The Who, How, and What of the Process

1. The court should have professionals in behavioral health assigned the responsibility for interviewing children to secure their stated wishes.
2. If the only option is for the judge to conduct the child interview, even if in chambers without the parties present, the interview should be on the record, and the judge should have a neutral third party present during the interview.
3. No matter the setting for the child interview, the parameters should be stated at the outset. This must include a clear understanding with the parties and with the child at the start of the interview about whether what is said in the interview will be confidential.
4. The judge should adjust the language used to account for the child's developmental and cognitive levels, even for children within the same family.
5. The judge should consider the input from the child in the context of the child's functioning as well as conflict-related issues. Information gleaned may change depending upon who accompanied the child for the interview. Children should be interviewed individually and not with other children present. It is recommended that parents or other caretakers of the child not be present during the interview as they may otherwise influence the child's statements.
6. The judge should consider the child's state of mind. It is a common fallacy of parents that children never lie or will not be influenced by other factors. A child caught in the middle of parental conflict may attempt to be fair to both parents through their expressed wishes; assume a caretaker role for one of the parents and express wishes consistent with that protective role; or respond in favor of the parent who offers the greatest rewards for them.

Adapted from the *Handbook on Questioning Children: A Linguistic Perspective* by Anne Graffam Walker, PhD

Observing Children’s Distress During Court Involvement

Children who appear before the court may display adjustment problems. In the article “Seeing What’s Underneath,”⁴ an understanding of behaviors in context with the child’s age and level of traumatic experiences better equips courts in addressing those adolescents. Here are some examples of common behaviors that may be observed in domestic relations courts and responses:

Table 1. Common Behaviors in Domestic Relations Courts

Behavior Observed	How Does That Make Me Feel	What May be Underneath
<ul style="list-style-type: none"> Negative body language Crossed arms Rolling eyes Refusal to sit/stand/make eye contact 	Disrespectful	<ul style="list-style-type: none"> Stress Nervous Embarrassed Fear Sense of unfairness Inability to express feelings
<ul style="list-style-type: none"> Defiance Mouthing off Talking back 	Insulted	<ul style="list-style-type: none"> Lack of language skills to express feelings/skillset to express disagreement Difficulty expressing emotion especially in front of peers/other people in the courtroom
<ul style="list-style-type: none"> Disruptive or distracting behavior 	Angry	<ul style="list-style-type: none"> Trauma impacts a youth’s ability to control impulses or perceive risks, meaning they may be unable rather than unwilling to meet adults’ expectation for their behavior
<ul style="list-style-type: none"> Disassociation 	Frustrated	<ul style="list-style-type: none"> Youth who have experienced trauma may have learned to use compliance or defiance as survival mechanism
<ul style="list-style-type: none"> Emotional outbursts 	Irritated	<ul style="list-style-type: none"> Youth are particularly sensitive to issues of fairness and respect and have yet to master tempering their emotions, controlling their emotions, and regulating their behavior
<ul style="list-style-type: none"> Inability to show remorse 	Hurt	<ul style="list-style-type: none"> Youth who have experienced trauma may struggle to convey contrition and remorse shortly after an arrest or adjudication
<ul style="list-style-type: none"> Laughing Scoffing Sucking teeth 	Disrespected	<ul style="list-style-type: none"> Youth who experienced trauma and other developmental features of adolescence brain such as peer influence and teenage bravado, or simple immaturity may further inhibit expressions of grief/remorse

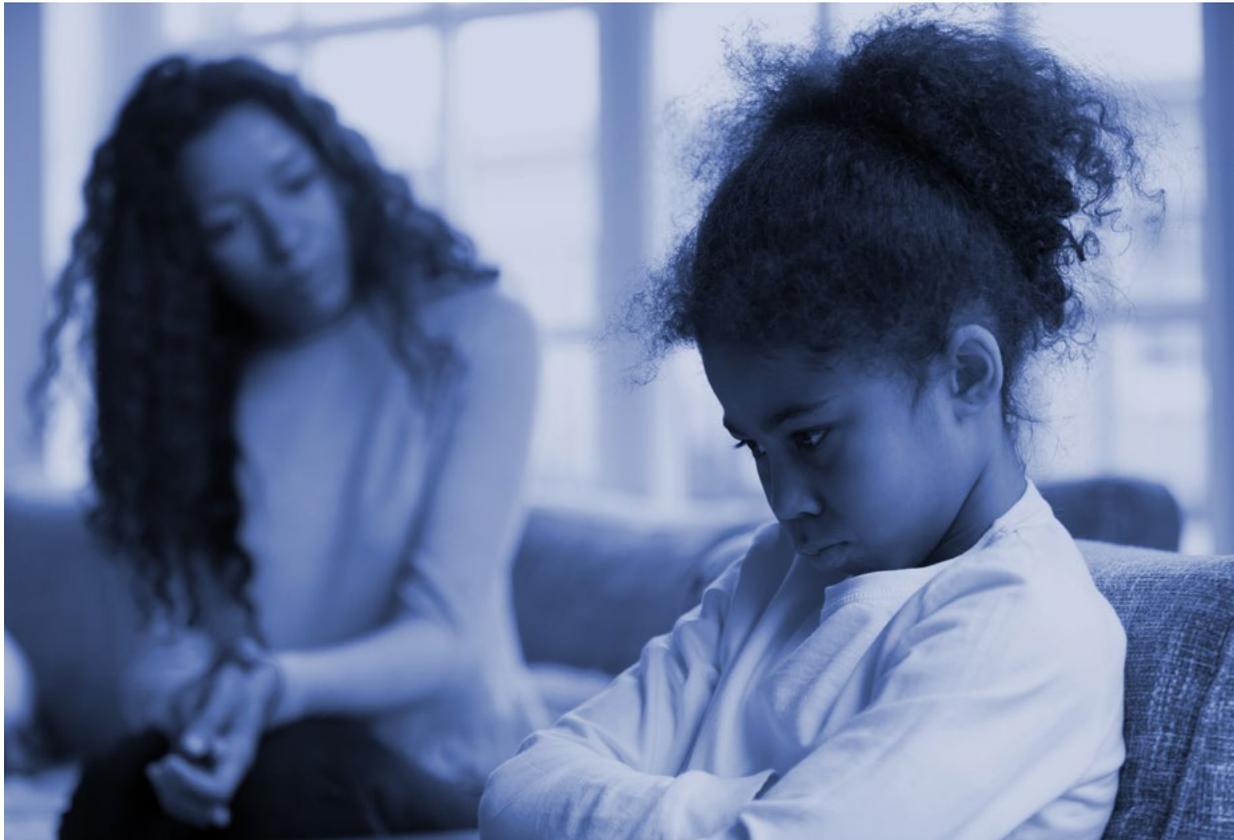
⁴ Fair and Just Prosecution (FJP), Juvenile Justice Initiative, Georgetown Law, National Juvenile Defender Center (NJDC), and National Council of Juvenile and Family Court Judges, “Seeing What’s Underneath: A Resource for Understanding Behavior and Using Language in Juvenile Court,” 2021. Retrieved from <https://www.ncjfcj.org/wp-content/uploads/2021/04/Seeing-Whats-Underneath-A-Resource-for-Understanding-Behavior-Using-Language-in-Juvenile-Court.pdf>.

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Observed behaviors, particularly those encountered in court, are assessed through the lens of the judge or court personnel and not in the context of the life experiences of the individual exhibiting the behavior. Understanding the link between behaviors and underlying distress that may drive behaviors is critical in ensuring fairness and in appropriately addressing or responding to those behaviors.

Closing Summary

A best-interest determination can only be made through a case-by-case analysis. And part of that analysis, particularly for older children, requires the court to consider the views of the child. The court is therefore tasked with securing that information in a manner that least impacts the child while ensuring that the information is reliable for the purposes in which it is being considered.



CHAPTER 6

KEY POINTS *from Chapter 6*

- 1 Cases in which a participant has a mental health condition or has experienced trauma or abuse might benefit from special attention to case processing.
- 2 Early screening of new case filings for their unique characteristics has been shown to be very effective for both individual justice and overall caseload management.
- 3 Systematic screening, or triage, is typically used to place cases on simplified processing pathways, identifying those that require early judicial intervention.
- 4 Case triage should include looking for indicators of mental health conditions, trauma, or abuse.

CHAPTER 6

Understanding the Benefits of Early Case Intervention

This Chapter describes how screening or triage and early intervention assist courts with managing family law cases more effectively. Early case management is of particular importance for cases in which the parties have children or are engaged in high conflict or where domestic violence, trauma, mental health conditions or substance use disorder are present. A lengthy court process with periods of inactivity generally exacerbates these issues. Early court intervention in these complex cases can lead to better outcomes for families and can allow judges to devote appropriate attention and resources to them.

At its core, early intervention offers many benefits for the court, for parties, and for the children. Arguably, it is foundational to the concept of “individual justice in individual cases.” While individual judges may structure case events in a way that reflects that maxim, many courts rely on a less proactive approach, where proceedings are scheduled only as issues are raised by the parties. This chapter presents practical tips for implementing systematic triaging that can assist with court time and resource management and can help families timely to resolve their cases, while tailoring management and interventions to the challenges faced by the participants.

Systematic and Consistent Triage Helps Courts and Families

Early identification of complex or challenging cases increases the opportunities for effective case management in individual cases and for a judge’s entire caseload. These cases can span years, consuming party, attorney, and court resources, and exhausting everyone involved.

Promoting Well-Being in Domestic Relations Court

However, research shows that in many cases conflict can be reduced by effective judicial intervention. Too often, judges are unaware of the difficult circumstances or issues involved in a case, intervening only after significant problems have been encountered, to the detriment of the parties and their children. Having the opportunity to set expectations and schedules early can reduce problems later, and can result in better outcomes for children who will experience less parental conflict.¹

Both objective and anecdotal evidence suggests that the longer a family is in turmoil and conflict, the worse the outcomes for children. Traditionally, courts have relied upon lawyers or other professionals to bring highly conflictual cases to the judge's attention. Self-represented litigants (SRLs), whose numbers are increasing, often do not know how to trigger court intervention, thereby imbedding delay and risking exacerbation of issues. In either case, the traditional approach is reactive rather than proactive.

Many cases do not need heightened judicial attention or involvement. Triage can help a court identify those cases that might benefit from more robust judicial intervention. The goal should be to provide the right services to the right families at the right time. This approach is especially important in cases that involve children, not only pre- and post-decree, but also in administrative child support matters. Judges should bear in mind that, to a child, a month is a very long time and a domestic relations matter that takes a year seems like it will never end.

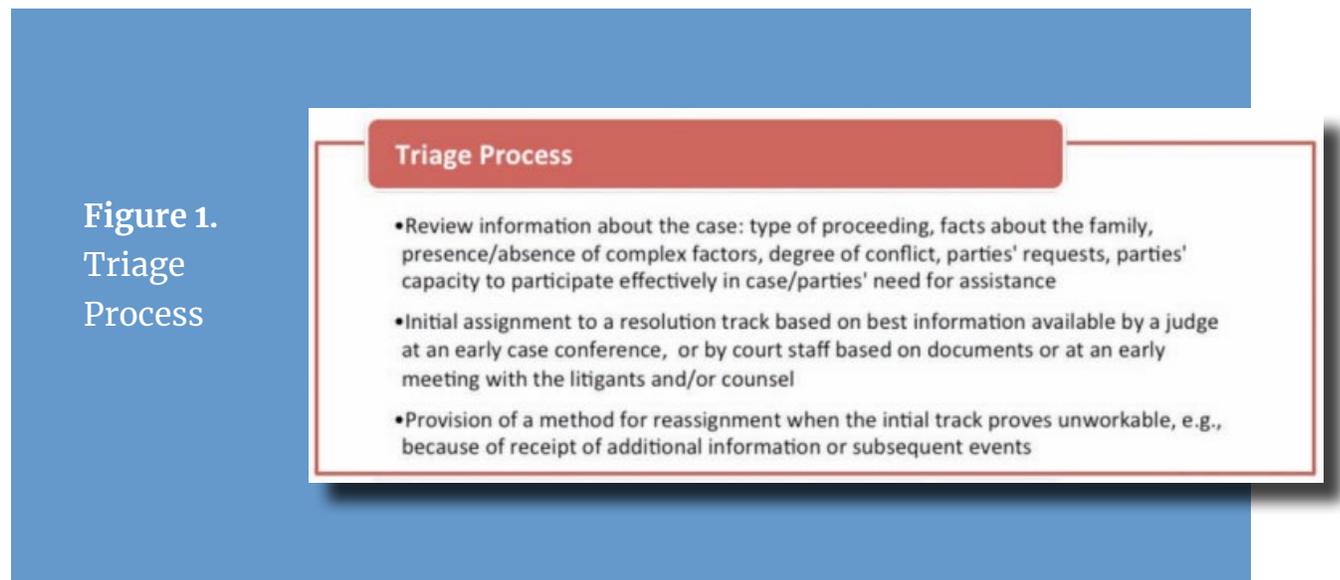
Shall we design and operate our case management approach under the assumption that cases will easily resolve or that cases will require significant judicial intervention? Either assumption is rife with potential problems. If one assumes that cases will require only occasional judicial attention, complex and challenging cases may not be identified early enough for interventions to be effective. Designing processes with the most difficult cases in mind creates hurdles and barriers for the families in cases that do not need them, increasing their costs and frustration, and unnecessarily draining court resources. Cases that are truly "uncontested" or present with minimal issues should be identified for streamlined resolution. For the court, speedy resolution frees up docket space for more labor-intensive matters. Litigants and lawyers will experience increased satisfaction by reducing the cost and effort required to resolve the average case.

¹ M. Saini, and R. Birnbaum, "Unraveling the Label of 'High Conflict': What Factors Really Count in Divorce and Separated Families," *Journal of the Ontario Association of Children's Aid Societies* 51, no. 1 (2007): 14-20.

Triage Improves Judicial Efficiency and Effectiveness

Systematic triage requires screening based on case characteristics that can identify conflict, complexity, and/or risk. The process should also include looking for indications of mental health conditions, trauma, and abuse. Much of the screening can take place based solely on information available through court records, the petition, and response. The totality of factors points to an appropriate pathway for processing each case. This screening can be performed by trained court professionals or self-help personnel who are aware of how to seek information appropriately without ever engaging in undue inquiries about a person's psychiatric disability. A national *Automating Family Justice Triage* effort is underway to develop case management system specifications that can assist court personnel.² Note that when courts conduct supplemental screening or assessment beyond what is in the case file or court record, the court must inform the parties beforehand, so they have an opportunity to object to disclosure. If Intimate Partner Violence (IPV) is a factor, parties should be directed to an advocate before completing the screening.

Figure 1, taken from *A Model Process for Family Justice Pathways* (2018), provides a description of the case triage process.

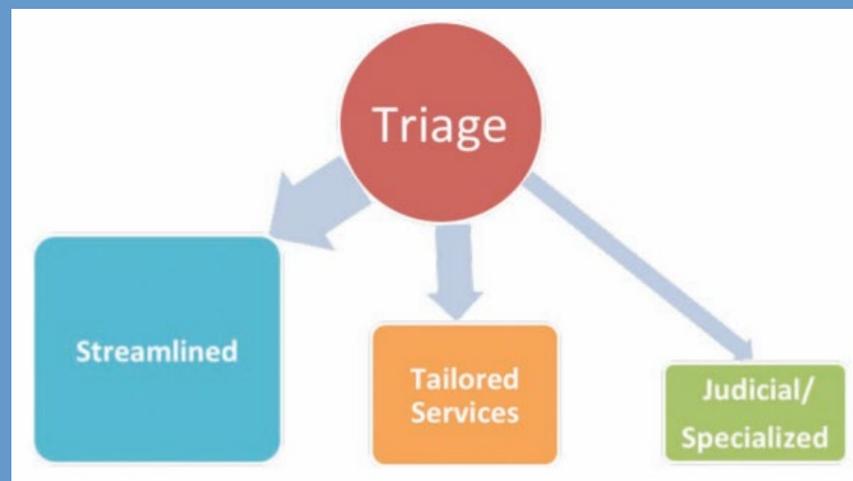


² For more information on *Automating Family Justice Triage*, see www.ncsc.org/Cady.

Most cases (65-80%) are low or no conflict and need little or no intervention.³ Other cases require substantially more attention. While some families will stabilize after an acute reaction period, others will not, requiring a more intensive response.⁴ Identifying issues at the outset and right sizing the level of attention per case contributes significantly to judicial effectiveness and improves outcomes for children and families.

Triage Pathways

Figure 2.
Triage
Pathways



The **Streamlined Pathway**, which will apply in a large percentage of cases, is for those where a lower level of judicial decision making is needed. Examples include cases where the parties seek an order approving a stipulated result, default proceedings, cases involving limited issues, post-decree modifications of support, or minor parenting-time issues. These matters could be set on summary or other expedited dockets or simply calendared for remote check-ins, or referred to self-help services (if available). These simple settings can be very helpful for self-represented litigants and for managing the court’s calendar to avoid future backlogs.

³ “Courts can resolve 80% of their contested divorce and custody cases between self-represented parties in just one hearing with a special calendar that employs a problem-solving approach, triage, a simplified process, and early intervention.” S. Marz, “Faster and as Satisfying: An Evaluation of Alaska’s Early Resolution Triage Program,” *Family Court Review* 57 (2019): 478.

⁴ The [Landscape of Domestic Relations Cases in State Courts](#) (2017) indicated that most cases filed could be resolved with minimal court involvement.

The **Judicial/Specialized Pathway** is for more complex and challenging cases, including those where there are allegations of intimate partner violence, emotional abuse, mental health concerns, substance use disorder, and child abuse or neglect, or if protective orders are in place. These cases should be referred to a judge's calendar (Judicial/Specialized) to receive prompt attention and case management.⁵ Specialized Pathway cases may require accelerated or emergency hearings depending on the issues presented. However, this pathway focuses on early engagement between the parties and the court, and not just accelerated litigation. The specialized track case gives the judge a chance to consider earlier referrals to victim advocates, domestic case managers, substance abuse programs, mental health evaluators, parent coordinators, custody evaluators, guardians ad litem and other experienced professionals or applicable programs. Another critical element that must be employed for cases that are assigned this pathway is for the assigned judge to remain engaged in the case. Regular or periodic status conferences or review hearings should be scheduled for the period through case resolution or trial.

The **Tailored Services Pathway** is applied for the remaining cases, cases in which the summary or abbreviated court engagement under the Streamlined Pathway do not apply or the risk factors under the Judicial/Specialized Pathway are not present. For the most part, cases falling into the Tailored Services Pathway would likely be managed in the jurisdiction's traditional fashion.⁶ The tailored path will vary from place to place depending upon the available services in the community and customary practice in each jurisdiction. The extent of judicial engagement and involvement of other professionals or programs are determined based upon the nature of the contested issues presented. In some jurisdictions, attorneys have been enlisted to provide support to SRLs in the Tailored Pathway by providing ad hoc legal assistance or serving as Special Masters or Mediators.⁷

5 K. Poitras et al., "Family Dispute Resolution: Characteristics of Cases Resolved by Trial," *Children and Youth Services Review* 123, article no. 105832 (2021): 1-7. Retrieved from <https://doi.org/10.1016/j.chilyouth.2020.105832>.

6 The Pareto Principle applies to family court as much as it does to economics; 20% of the cases take up 80% of the court's attention. See Joseph M. Juran (1904-2008), "The Non-Pareto Principle; Mea Culpa," Archives of Juran Institute, 1974. Reprinted at [The-Non-Pareto-Principle-1974.pdf \(juran.com\)](#).

7 Family Justice Initiative, *A Model Process for Family Justice Initiative Pathways* (Williamsburg, VA: National Center for State Courts, 2019). Retrieved from https://www.ncsc.org/_data/assets/pdf_file/0016/19114/family_justice_initiative_pathways_final.pdf.

How Much Work is This? How to Triage Despite Staffing Constraints?

The triage process must be designed around a jurisdiction's available resources. But even when those resources are quite limited, it is possible to create processes that require minimal time. Alaska's Early Resolution Process, conducted by legally trained staff, provides an example. Using a form with screening criteria, judicial staff can screen a case in five minutes on average. Another option is to have both parties complete questionnaires or fillable forms that supply the information to properly triage the case.⁸

Designated court staff can become the gatekeepers for determining the pathway to be applied to the case. Once the pathway is initially determined, it must be understood that over time a different approach may be required. Pathway assignment must therefore be flexible and adjusted based on new information or changed circumstances. This requires some type of monitoring or periodic reassessment as cases proceed through the process.

Examples of Pathway Driven Approaches

Many jurisdictions have self-service or self-help centers for self-represented litigants. Where available, staff should be trained to identify high-conflict or complex and challenging case markers and be able to recommend appropriate referrals for the parties or to court administration. They can also be trained in ways to respect each party's privacy and prevent unnecessary inquiries prohibited by the Americans with Disabilities Act. This facilitates the goal of creating appropriate early intervention opportunities.

Some courts have paraprofessionals, such as case managers, who identify the issues and help parties reach agreements.⁹ To the extent issues remain unresolved, the case managers schedule the case for further proceedings before the assigned judge and provide the assigned judge with an itemization of the contested issues. These can be particularly effective when both parties are self-represented.

⁸ When used, these documents should not be part of the continuing record to encourage candor and to protect privacy.

⁹ In Maricopa County, Arizona, family court administration identifies early in the proceedings cases where there has been both a petition and a formal response but neither party is represented by counsel. For those matters, the parties are ordered to appear at an Early Resolution Conference, which is conducted by a law-trained professional employed by the court. The conference involves issue identification, mediation, drafting of settlement agreements when reached, and identification of contested issues that the court will need to address.

There is also a judge-driven approach available for cases in which both parties are represented by counsel.¹⁰ Upon the respondent/defendant filing a formal response to the petition/complaint, the assigned judge schedules a telephonic or virtual “Preliminary Case Management Conference.” No formal pleadings are required to be filed in advance of the conference, which is conducted on the record but is informal in nature. Its purpose is to determine the issues that are contested or any case-specific challenges that may be present and then create a comprehensive case management plan. That plan may involve appointment or selection of experts, referrals for services, or a timetable for completion of tasks. Some courts may want to establish procedures for triage and case management regardless of the filing of a formal reply. Many cases involving self-represented litigants have a dispute, but a reply is not filed. This is especially true when a motion to modify existing orders is filed. This proactive, court-driven approach can reduce delay and ensure that issues are addressed before they become intractable.

Partnering with the Family Law Bar

Traditionally, the local family law bar has not been involved in case management system design and implementation. Engaging the bar in the process may yield unexpected support. Since the triage process is factually driven, the attorneys can assist the court in identifying facts that help determine the most appropriate case management pathway. Importantly, early case management ensures that there is a cohesive and unified approach among the parties, their attorneys, the court, and other engaged professionals to address the issues that may come before the court.

Special Considerations for Intimate Partner Violence

Cases that may involve IPV must receive closer judicial attention and oversight. When allegations of abuse are present, there is a higher risk that violence may occur.¹¹ It is important to create an environment where parties are safe, and feel safe, to disclose and to seek out and receive services. As stated above, if judges request additional information of parties, parties need to know if the information could be made available to the other party.

10 This approach is employed by individual judicial divisions in Maricopa County, Arizona.

11 One of the best predictors of the reoccurrence of child maltreatment is whether Child Protective Services has visited the family.

Promoting Well-Being in Domestic Relations Court

Judges should become familiar with various approaches that have been developed for addressing cases where Intimate Partner Violence may exist. An example is **SAFeR**, which was developed by the Battered Women's Justice Project. SAFeR is an approach to decision making in IPV-related family law matters. It consists of four parts: (1) **screening** for IPV; (2) **assessing** the full nature and context of IPV; (3) **focusing on the effects** of IPV; and (4) **responding** to IPV in all recommendations, decisions, and interventions.

Other Pertinent Factors

Courts may choose to screen for other factors that might indicate the need for more robust judicial intervention. These factors might include:

- The need for treatment plans distinct from the parenting plan where there are mental health or substance abuse issues that warrant them.
- The existence of expired or current protection or restraining orders, dependency proceedings, or similar state interventions with the family.
- A parent's or child's incarceration.
- Pending criminal charges against a parent or child.
- Pending civil lawsuits that impact the family dynamic.
- Allegations of fault (where that ground exists).
- Pending or recent bankruptcy.
- The existence of a resist/refuse dynamic relating to a child who opposes spending time with a parent.

Note: The triaging process is not to be confused with fact-finding as the employment of appropriate case pathways focuses on the characteristics (cited above) of the case, not on whether allegations have yet been proven.

Conclusion

Implementing an early triage process followed by assigning cases to an appropriate pathway that is responsive to the issues of the case will lead to more effective interventions for families in need and will better target resources to appropriate cases. Families where mental health conditions, trauma, or abuse are (or have been) present can often benefit in significant ways from effective triage.



Promoting Well-Being in Domestic Relations Court

Building Understanding Series

KEY POINTS FROM CHAPTERS 1-6

CHAPTER 1

Understanding Well-Being in Domestic Relations Court

1. Encountering people with mental health conditions or who have experienced trauma is not uncommon for those in the court system.
2. Understanding those conditions or circumstances is of paramount importance for the administration of justice.
3. Exposure to trauma can be debilitating, but a change by judges and court staff in how that exposure to trauma is addressed can be empowering.

CHAPTER 2

Understanding Trauma, Its Impacts, and How to Create a Trauma- Responsive Court

1. Everyone experiences trauma.
2. The impact of having experienced trauma may manifest in a wide variety of responses and behaviors that should be considered contextually.
3. Trauma can change the brain, impact cognitive functioning and emotional responses, and influence behavior.
4. Having to engage in court processes can be traumatic in itself, and may compound the effects of other trauma.
5. For courts to address persons coming to court fairly, the court must become a “trauma-informed court.”

CHAPTER 3

Understanding the Spectrum of Mental Health Conditions

1. Our responses to people with mental health conditions should not be based on stigma.
2. Mental health diagnoses reflect a constellation of symptoms that a person may be experiencing, not their parenting or other capacities.
3. Mental health conditions must be viewed in the full context of the circumstances, including the party’s and family’s strengths, how they are impacted by the mental health condition, and their efforts to address any impacts this may have on their children or parenting. participation in treatment, and/or access to other supports.
4. In working with families where mental health conditions are at issue, the judge must also consider whether a person’s mental health condition is impacting their ability to fully participate in their legal case or court proceedings, and if so, what can help to mitigate those effects.
5. When encountering/working with a person who is experiencing mental health symptoms that are impacting their ability to participate in court proceedings, there are approaches that can better serve/best serve the needs of the parties and proceedings before the court.

CHAPTER 4

Understanding the Impact of Mental Health Conditions on Parenting Capacity

1. Stigma around mental health conditions persists.
2. Parties know this. It is not uncommon for parties to use weaponize mental health diagnoses to influence custody determinations.
3. In a parenting-time dispute where a condition is raised to question parental capacity, suggestions and questions are offered to assist the judge in determining the parent's ability to meet the child's needs.

CHAPTER 5

Mitigating the Risk of Children's Adverse Experiences During and Following Divorce

1. Parental separation and divorce have the potential to negatively impact children if they are not buffered from the negative consequences of family breakdown. Contrastingly, several factors contribute to children's positive adjustment, including protecting them from conflict, creating parenting plans that meet their needs, and ensuring their voices are heard in an appropriate fashion.
2. Children should be protected from becoming too directly enmeshed in their parents' custody litigation.
3. The wishes of a child are frequently a statutory factor in determining best interests and ensuring that the "child's voice" is heard can further their best interests, particularly when the child is of sufficient age and maturity to form independent preferences.
4. Employing the best methods to secure a child's preference is critical in protecting their best interests.
5. A carefully constructed child interview process can assist in limiting the direct exposure of children to the parental conflict while preserving the due process rights of the parents.
6. Access to all information considered by a judge, including what a child may express as a preference, must be afforded to the parties to preserve their due process rights.

CHAPTER 6

Understanding the Benefits of Early Case Intervention

1. Cases in which a participant has a mental health condition or has experienced trauma or abuse might benefit from special attention to case processing.
2. Early screening of new case filings for their unique characteristics has been shown to be very effective for both individual justice and overall caseload management.
3. Systematic screening, or triage, is typically used to place cases on simplified processing pathways, identifying those that require early judicial intervention.
4. Case triage should include looking for indicators of mental health conditions, trauma, or abuse.







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