

# THE MODERN FAMILY COURT JUDGE

KNOWLEDGE, QUALITIES & SKILLS FOR SUCCESS



# THE MODERN FAMILY COURT JUDGE: KNOWLEDGE, QUALITIES & SKILLS FOR SUCCESS

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IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system. We are a “think tank” that goes one step further—we are practical and solution-oriented. Our mission is to forge innovative solutions to problems in our system in collaboration with the best minds in the country. By leveraging a unique blend of empirical and legal research, innovative solutions, broad-based collaboration, communications, and ongoing measurement in strategically selected, high-impact areas, IAALS is empowering others with the knowledge, models, and will to advance a more accessible, efficient, and accountable American legal system.

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The mission of the *Honoring Families Initiative* is to develop and promulgate evidence-informed processes and options for families involved in divorce, separation or parental responsibility cases that promote better outcomes for children and that provide greater accessibility, efficiency, and fairness for all parties, including those without counsel.

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## PREFACE

A key role of the family court judge<sup>1</sup> is to help our nation's families reorganize after separation or divorce, and that is a heavy responsibility. Divorce, separation, and parental responsibility cases "focus on some of the most intimate, emotional, and all-encompassing aspects of parties' personal lives," and the "volume and scope of family law cases exacerbate the difficulty of their resolution."<sup>2</sup> These cases can comprise a significant portion of a jurisdiction's total caseload, in some states over half.<sup>3</sup> Furthermore, for many people, the only time they come into contact with the courts is through a divorce or separation proceeding.

IAALS, the Institute for the Advancement of the American Legal System at the University of Denver,<sup>4</sup> offers this position paper to draw attention to the complex knowledge, skills, and qualities needed by today's family court judges. Developed as part of the IAALS *Honoring Families Initiative* (HFI) and in partnership with a diverse working group of the HFI Advisory Committee,<sup>5</sup> this paper describes the special nature of a family court judge and highlights how critically important it is to have a highly skilled and dedicated judicial officer making decisions that forever impact America's families.

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<sup>1</sup> In this position paper, we are focusing specifically on divorce and separation, and parental responsibility cases. We recognize, however, the interconnected nature of these case types with related matters such as guardianship, juvenile delinquency, dependency, truancy, paternity, child support, child abuse and neglect, and civil protection orders.

<sup>2</sup> Barbara A. Babb, *Guest Editorial Notes*, 40 FAM. CT. REV. 413, 413 (2002).

<sup>3</sup> Barbara A. Babb, *Reevaluating Where We Stand: A Comprehensive Survey of America's Family Justice Systems*, 46 FAM. CT. REV. 230, 230 (2008).

<sup>4</sup> IAALS, the Institute for the Advancement of the American Legal System, is a national, independent research center at the University of Denver dedicated to facilitating continuous improvement and advancing excellence in the American legal system by making it more accessible, efficient, and accountable through research, collaboration, and innovative solutions. *Honoring Families* is an IAALS initiative that seeks to develop and promulgate evidence-informed processes and options for families involved in divorce, separation or parental responsibility cases that promote better outcomes for children and that provide greater accessibility, efficiency, and fairness for all parties, including those without counsel. To learn more about IAALS and its initiatives, please visit <http://iaals.du.edu>.

<sup>5</sup> Working Group members include HFI Advisory Committee members Roberta S. Batley, Barbara A. Babb, Hon. Janice M. Rosa (Ret.), and Melinda Taylor, in addition to Maureen Sheeran and Eryn Jane Branch from the National Council of Juvenile and Family Court Judges and Katheryn L. Yetter from the National Judicial College.

## I. A CRUCIAL JUDICIAL ASSIGNMENT

Some judges consider family court service as a ‘pots and pans’ rotation, and a far less gratifying or esteemed judicial position<sup>6</sup>:

Instead of being the highest priority of the judicial system, family courts seem to be their lowest rung, where judges are paid less, support facilities are nonexistent, and new judges are sent for a kind of mandatory service obligation before finding their way into presiding over more prestigious contract disputes or auto accident cases.<sup>7</sup>

The unspoken hierarchy among judicial positions, placing family court judges at the bottom, is echoed among family law practitioners.<sup>8</sup> That proposition, however, could not be further from the truth.

All case types present distinct challenges and implicate certain knowledge, skills, and qualities. Family court matters, however, are unique.<sup>9</sup> In family law cases, a judge can face ancillary issues involving bankruptcy law, estate planning, contract law, tax law, military law, immigration law, general civil law, and criminal law. Commenting recently on the changes in family law over the last fifty years, Judge Karen S. Adam and Stacey N. Brady suggest that “the single most important change for judges [is] the need to know so much more about so many things in order to make informed family law decisions.”<sup>10</sup> The breadth of potential legal issues encountered today in family cases suggests that the traditional notion of ‘complex litigation’ should be redefined to include these case types.

To navigate parties’ cases adequately and coordinate related issues, a family court judge’s knowledge must extend well beyond traditional state family law statutes and cases. Divorce, separation, and parental responsibility cases<sup>11</sup> often present complicated emotional and non-legal issues, requiring a family court judge to have familiarity with theories and research in disciplines such as social work, psychology, and dispute resolution. Recent efforts by the Family Law Education Reform (FLER) Project have highlighted the interdisciplinary nature of family law today and the profound importance this new reality has for practitioners and for the judges who preside over family law cases.

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<sup>6</sup> For example, a 2004 national survey of dependency court judges measured respondents’ views on whether judicial colleagues held family court judges in high esteem. The survey revealed that, of those judges with dockets of 75 percent or more abuse and neglect cases, 61 percent perceived that the legal community held them in low to moderate esteem. Just over one-fourth of judges believed their state Supreme Court viewed their position in high esteem, and only 18 percent felt the public held their position in very high esteem. *Children & Family Research Center*, U. OF ILL., CHAMPAIGN-URBANA SCH. OF SOC. WORK, *View from the Bench: Obstacles to Safety & Permanency for Children in Foster Care* (2004), available at [http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster\\_care\\_reform/fosteringresults070104pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/fosteringresults070104pdf).

<sup>7</sup> Andrew Schepard, *Law Schools and Family Court Reform*, 40 FAM. CT. REV. 460, 460 (2002).

<sup>8</sup> See J. Kim Wright, *In Praise of Family Lawyers*, LINKEDIN (June 20, 2014), <https://www.linkedin.com/today/post/article/20140620204940-2466013-in-praise-of-family-lawyers>.

<sup>9</sup> See, e.g., Hon. Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge’s Perspective*, 9 U.C. DAVIS J. JUV. L. & POL’Y 57, 77-80 (2005) (describing the unique character of family law in terms of its integrative relationship issues and distributive property issues).

<sup>10</sup> Karen S. Adam & Stacey N. Brady, *Fifty Years of Judging in Family Law: The Cleavers Have Left the Building*, 51 FAM. CT. REV. 28, 28 (2013).

<sup>11</sup> Often referred to in statute or usage as custody and visitation cases.

The FLER Project notes that “[f]ailure to appreciate the roles of the dispute resolution and mental health professionals who work with the family courts is a serious error,” as is not understanding the assumptions that guide these practitioners.<sup>12</sup> Today’s family court judge encounters a myriad of non-legal professionals, including custody evaluators, mediators, parenting educators, parenting coordinators, psychologists, and others who play an integral role in the divorce and separation process. The need to be familiar with these professionals and the theories and prevailing protocols on which they rely in making their assessments has become even more important today as fewer and fewer litigants in family court have attorneys.

Moreover, the role—and perspective—of the family court judge is different from his or her counterparts’ on the civil or criminal bench. In describing child custody cases, Hofstra University Professor Andrew Schepard notes:

In most civil cases, courts reconstruct a past event . . . and then assess blame or damage for that event. In a child custody case, in contrast, a court reconstructs past events concerning family relationships for the purpose of making a prediction about the future . . . . That prediction is not made to assess blame or damage but to make an educated guess about what will happen to the child if the court orders one custody arrangement or the other.<sup>13</sup>

Family court judges, therefore, have much more of a problem-solving role than most of their judicial colleagues. In performing this role, the family court judge must leverage any number of services available within or outside the courthouse and coordinate with interdisciplinary professionals to ensure that services are adequately delivered. Indeed, “[i]n many jurisdictions, today’s family court judge is more than an adjudicator. In addition, he or she may oversee a multidisciplinary group of service providers all engaged with the children and families whose cases are before the court.”<sup>14</sup>

Finally, the litigants with whom family court judges interact are different from those in other case types by virtue of their relationship to the case:

All parties have a personal investment in any court action. In domestic matters, personal attachments are frequently deeper, more emotionally and psychologically driven, and inherently evoke core self-identity issues. . . . When these characteristics are added to potentially complex legal issues, long lasting consequences, personal unfamiliarity with judicial processes, and economic uncertainty, these cases are particularly difficult.<sup>15</sup>

Unlike in other case types, the relationship between or among family court litigants is not over when the case ends. Usually, it continues for life as they co-parent their children. The importance of this factor cannot be underestimated. Judicial decisions in a family court case can have life-long impact, either positive or negative.

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<sup>12</sup> Mary E. O’Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524, 534 (2006).

<sup>13</sup> ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 3 (2004).

<sup>14</sup> Andrew Schepard & Peter Salem, *Foreword to the Special Issue on the Family Law Education Reform Project*, 44 FAM. CT. REV. 513, 516 (2006).

<sup>15</sup> N.M. JUDICIAL EDUC. CTR., NEW MEXICO FAMILY LAW MANUAL: TOPICS IN FAMILY LAW FOR THE NEW MEXICO JUDICIARY 2 (2011), available at <http://jec.unm.edu/manuals-resources/manuals/Family%20Law%20Manual%2001-11%20-%20FINAL.pdf/view>.



Additionally, family issues have ramifications on society more broadly, as “[t]he welfare of the entire community—especially its children—is impacted by how the members of the reorganized family relate to each other.”<sup>16</sup>

## II. PROBLEM SOLVER AND ADJUDICATOR

Because of the complex, multidimensional nature of their cases, family court judges must possess additional knowledge, skills, and qualities not required by their colleagues who handle other case types. Many family court judges intuitively understand what these are, but, generally speaking, they have not been widely articulated. In an effort to do so, IAALS convened a diverse working group that was representative of the practitioner, judicial, academic, educator, and administrator perspectives.<sup>17</sup> We began with our compendium of the desired attributes of individual judges set forth in *Cornerstones of State Judicial Selection*,<sup>18</sup> which the IAALS *Quality Judges Initiative* developed in coordination with a broad group of stakeholders. The working group then tailored that list to correspond to what an effective family court judge should know, do, think, and feel in order to best serve in the dual role of problem solver and adjudicator.

**Rules, Statutes, and Case Law:** In *Cornerstones*, with regard to the desired attributes of individual judges, IAALS notes that, “[a]s a minimum qualification, judges should be well-versed in the subject matter of, and rules of procedure for, the types of cases that come into their courtroom.”<sup>19</sup> For a family court judge, in addition to family law, this includes other areas of substantive law, for example, criminal, civil, immigration, bankruptcy, and tax law. Understanding substantive law remains at the core of the judicial role, but as family law becomes more interdisciplinary, the scope of this relevant material is expanding beyond the traditionally state-based set of laws. Federal legislation and uniform acts governing or informing the court’s responsibilities with respect to child support, child custody, jurisdiction, domestic violence, tax and retirement benefit programs, and other issues are now part of the universe of relevant legal material.

**Evidence:** The evidentiary rules governing family cases are a key piece of the substantive law that family court judges must master. With the notable presence of self-represented litigants in today’s family court, however, evidentiary challenges are taking a new form. Family court judges dealing with a case involving one or more self-represented litigants must be able to elicit evidence necessary to secure justice without creating an appearance of impropriety or bias either for or against the self-represented litigant.

**Ethics:** Family court judges now occupy a non-traditional role, which can present unique ethical issues on and off the bench: “The scope of the ethical landscape is arguably more vast for a juvenile and family court judge than any

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<sup>16</sup> E.g., Rebecca Love Kourlis et al., *IAALS’ Honoring Families Initiative: Courts and Communities Helping Families in Transition Arising from Separation or Divorce*, 51 FAM. CT. REV. 351, 355 (2013).

<sup>17</sup> See *supra* note 5 and accompanying text for membership.

<sup>18</sup> CORNERSTONES OF STATE JUDICIAL SELECTION was published under the aegis of the IAALS *Quality Judges Initiative* and contains desired attributes of both individual judges and court systems. The Roundtable participants who contributed to this publication included representatives from the plaintiff and defense bars, citizens involved in judicial nominating and evaluating processes, representatives from the legislative, executive, and judicial branches, members of the business community, and non-profit leaders. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CORNERSTONES OF STATE JUDICIAL SELECTION: LAYING THE FOUNDATION FOR QUALITY COURT SYSTEMS AND JUDGES 4 (2012), available at <http://iaals.du.edu/initiatives/quality-judges-initiative/recommended-models/cornerstones-of-state-judicial-selection> [hereinafter CORNERSTONES].

<sup>19</sup> *Id.* at 3.

other judicial officer adjudicating any other type of case.”<sup>20</sup> Family court judges must be prepared for the ethical challenges that arise from managing cases involving families and children.

**Trauma-Informed Decision Making:** Divorce can be a traumatic experience for adults,<sup>21</sup> and research shows a connection between parental conflict and increased risk of emotional, behavioral, and psychological problems in children.<sup>22</sup> New evidence-based practices emerging from the juvenile justice system suggest that courts and judges must understand the role of traumatic exposure, in order to better interact with victims of trauma and to determine appropriate processes and intervention strategies.<sup>23</sup> Courts that do not practice trauma-informed decision making may inadvertently increase the level of trauma that families experience.

**Awareness of Forensic Trauma:** Just as a family court judge must appreciate the effects of trauma on litigant behavior, she or he must also be aware of the potential for court processes and procedures to inflict additional trauma on families. There is often a disconnect between the culture of families and the culture of courts. Forcing families through the court’s processes can have a detrimental impact on litigants. It is important, therefore, for judges to be aware of and sensitive to the experience of litigants moving through the family court system. A family court judge should have an expansive view of the relief available, in order to maximize the effectiveness of available processes while also ensuring that “families are not enmeshed in interventions they do not need.”<sup>24</sup>

**Child Development and Family Dynamics:** Family court judges make decisions relating to parental responsibility that have long-term impact on children and parents. In order to do so effectively and confidently, an understanding of child development and family dynamics is critical. Additionally, education law can be either ignored or invoked by family court litigants, with education decisions having profound lifetime effects for children. While judges can and do rely on assessments of custody evaluators and other mental health professionals,<sup>25</sup> final determinations ultimately rest with the judge. Understanding the psychological theories and frameworks on which these professionals make their assessments can better enable a judge to assess the weight and value of the various assessments presented.

**Domestic Violence:** Domestic violence, sexual assault, and coercive control are complicated and nuanced. Domestic violence can impact every facet of the divorce and separation process, with devastating consequences if a case involving domestic violence is not handled appropriately. The impact on children who witness domestic violence

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<sup>20</sup> Janice M. Rosa, *Book Review: Leonard Edwards’ The Role of the Juvenile Court Judge: Practice and Ethics*, 52 FAM. CT. REV. 704, 704 (2014) (reviewing LEONARD EDWARDS, CAL. JUDGES ASS’N, THE ROLE OF THE JUVENILE COURT JUDGE: PRACTICE AND ETHICS (2012)).

<sup>21</sup> See Mark Banschick, *The Traumatic Divorce: 6 Ways to Heal*, THE HUFFINGTON POST (Feb. 8, 2013, 12:10 PM), [http://www.huffingtonpost.com/mark-banschick-md/the-traumatic-divorce-6-w\\_b\\_2593381.html](http://www.huffingtonpost.com/mark-banschick-md/the-traumatic-divorce-6-w_b_2593381.html).

<sup>22</sup> ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION 205-15 (1994).

<sup>23</sup> See Kristine Buffington et al., NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES, TEN THINGS EVERY JUVENILE COURT JUDGE SHOULD KNOW ABOUT TRAUMA AND DELINQUENCY (2010), available at [http://www.ncjfcj.org/sites/default/files/trauma%20bulletin\\_1.pdf](http://www.ncjfcj.org/sites/default/files/trauma%20bulletin_1.pdf); *Trauma Informed System of Care*, NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES, <http://www.ncjfcj.org/our-work/trauma-informed-system-care> (last visited Aug. 30, 2014).

<sup>24</sup> SCHEPARD, *supra* note 13, at 5.

<sup>25</sup> Robert F. Kelly & Sarah H. Ramsey, *Child Custody Evaluations: The Need for Systems-Level Outcome Assessments*, 47 FAM. CT. REV. 286, 287 (2009) (noting that “[m]any reasonable, but anecdotal, reports indicate that judges find custody cases to be difficult and frustrating and that they turn to mental health professionals for assistance. A judge faced with a difficult case may highly value a custody evaluation, especially if the judge believes that the custody evaluation is scientifically grounded.” (citations omitted)).

can be powerful both in terms of immediate emotional harm and future behavior.<sup>26</sup> A family court judge must be able to identify domestic violence, understand its nature, and appreciate how it relates to parenting and other issues, so that he or she can rule accordingly. This also entails understanding that coercive control and power imbalance between spouses can present without accompanying physical acts. Family court judges must broadly understand the implications that domestic violence can have on various intervention strategies and court processes, as well as the effects on the safety of friends, relatives, and the community at large. Finally, family court judges must expect that experts called in on a case will possess a similar competent working knowledge of domestic violence dynamics.

**Child Maltreatment:** Like domestic violence, child maltreatment substantially impacts the appropriate handling of a family case. Understanding the short-term and long-term consequences of child maltreatment is essential for determining appropriate intervention strategies. A family court judge must also appreciate the potential interplay between child maltreatment and domestic violence. When making decisions with respect to parental responsibilities, family court judges must consider a family’s complete history, even where related cases are not consolidated with the particular issue before the judge.

**Substance Abuse and Addiction:** Substance abuse and addiction may be particularly prevalent in divorce or separation and parental responsibility cases where litigants are dealing with concurrent and uncoordinated legal disputes in other courts or on separate dockets.<sup>27</sup> Family court judges must understand these human challenges, the manner in which they present in child, adolescent, and adult family members, and how they impact appropriate intervention strategies and case processing.

**Mental Health:** Mental health issues appear to be “the driving issue in the majority of cases in family court today.”<sup>28</sup> According to Bill Eddy, a family law attorney and mental health professional, “the majority of families appearing in family court today have a mental health problem presenting as a legal problem.”<sup>29</sup> Underlying mental health issues can be exacerbated by the emotional stress of divorce, and also can be a trigger for substance abuse and addiction. Although these sorts of issues are largely irrelevant to the handling of traditional civil cases, they are very important factors in family cases. Judges must be able to recognize patterns of behavior and understand how to best structure their courtrooms and manage their communications with individuals who have mental health issues.<sup>30</sup> Furthermore, judges should appreciate how mental health issues present differently in children and adults.

**Cultural Competence:** A family court judge must be sensitive and attentive to issues of class, race, age, citizenship, marital status, and gender, which operate at varying levels in any case type—some explicit, some implicit.<sup>31</sup> For instance, the traditional notion of what constitutes a family is in flux. As the numbers of never-married parents, LGBT (lesbian, gay, bisexual, and transgender) parents, blended families, and single-parent families increase, judges need to be familiar with the unique challenges and opportunities presented by this changing dynamic.

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<sup>26</sup> See Child Welfare Information Gateway, *Impact of Domestic Violence on Children*, U.S. DEP’T OF HEALTH & HUMAN SERVS., [https://www.childwelfare.gov/pubs/factsheets/domestic\\_violence/impact.cfm](https://www.childwelfare.gov/pubs/factsheets/domestic_violence/impact.cfm) (last visited Aug. 30, 2014).

<sup>27</sup> Substance abuse and addiction can be significant factors in child abuse and neglect cases, domestic violence cases, and delinquency cases. Barbara Babb et al., *Guest Editors’ Introduction to Special Issue on Substance Abuse and Addiction in Family Courts*, 47 FAM. CT. REV. 204 (2009) (referencing the results of a survey of Maryland circuit court judges and masters suggesting alcohol and drug abuse played a substantial role in abuse and neglect cases, domestic violence cases, and delinquency cases).

<sup>28</sup> BILL EDDY, *THE FUTURE OF FAMILY COURT: STRUCTURE, SKILLS AND LESS STRESS* 77 (2012) (suggesting that a majority of high-conflict disputes involve one or more family members with a mental health problem).

<sup>29</sup> *Id.* at 5.

<sup>30</sup> See *id.* at 77-81.

<sup>31</sup> For example, these factors impact access to services, ability to communicate, treatment by the courts, etc. See O’Connell & DiFonzo, *supra* note 12, at 535-36.

**Understanding One’s Own Biases:** In recent decades, implicit bias has become much better understood, as has its implications both on how litigants experience the judicial process and on how judges experience litigants. Shaped and influenced by one’s personal experiences, cultural stereotypes, and attitudes about oneself, implicit biases can jeopardize fairness in any case type.<sup>32</sup> Recognizing that these biases can exist and understanding strategies for addressing them are important for family court judges who encounter an incredibly diverse range of litigants. Furthermore, in order to ensure that one’s understanding of family and divorce is not wholly based on personal experience, “[p]rofessionals working with divorcing families need to be aware of the wealth of research on the topic that may, or may not, coincide with our previous notions of divorce.”<sup>33</sup>

**Financial Matters:** Financial issues are implicated in every divorce and separation, and parental responsibility case, and judicial decisions can significantly impact a family’s finances. In these cases, “[d]epending on the family’s financial situation, a judge must have a basic understanding of accounting principles to determine child support and spousal maintenance and to apportion marital property.”<sup>34</sup> The financial components of many cases, however, are more complicated, and may require an understanding of ERISA,<sup>35</sup> capital gains tax, COBRA, and other financial issues.<sup>36</sup>

**Resources Available in the Community for Families:** Families transitioning through separation and divorce are often struggling with more than the legal disputes underpinning their case. A family’s legal issues may be accompanied by, or have been precipitated by, financial, emotional, and psychological issues, for which no statutory remedy or resolution exists in the law. The court has a responsibility, however, to provide appropriate referrals to therapeutic and problem-solving resources that are available in the community.<sup>37</sup>

**Intervention Strategies and Processes, with an Emphasis on Knowing the Standards for Each:** Just as a judge must be aware of the resources available for families in the community, so too must a family court judge have an understanding of the numerous intervention strategies available through the legal process, such as mediation, custody evaluation, parenting coordinating, or family conferencing. Not every intervention strategy is effective or appropriate for every family, and it is imperative that a judge understand, know the standards for, and appreciate the costs and benefits of each.<sup>38</sup> A failure to do so can put vulnerable individuals at risk, needlessly increase legal fees and court costs, exacerbate existing hostility between litigants, or impede a healthy post-divorce reorganization.

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<sup>32</sup> In recent years, the National Center for State Courts has undertaken significant work in the area of implicit bias, including the development of educational resources for courts. See PAMELA M. CASEY ET AL., NAT’L CTR. FOR STATE CTS., HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION (2012), available at [http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB\\_report\\_033012.ashx](http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx).

<sup>33</sup> Amy G. Applegate et al., *Training and Transforming Students Through Interdisciplinary Education: The Intersection of Law and Psychology*, 47 FAM. CT. REV. 468, 474 (2009).

<sup>34</sup> Adam & Brady, *supra* note 10, at 28.

<sup>35</sup> Employee Retirement Income Security Act, 29 U.S.C. § 1001-1461 (1974).

<sup>36</sup> O’Connell & DiFonzo, *supra* note 12, at 538.

<sup>37</sup> In some jurisdictions, services are available through court-annexed programs. With declining court budgets, however, these are often the first to be cut. See Kourlis et al., *supra* note 16, at 355. Furthermore, many families benefit from services of a longer-term nature than courts are able to provide.

<sup>38</sup> See Peter Salem & Billie Lee Dunford-Jackson, *Beyond Politics and Positions: A Call for Collaboration Between Family Court and Domestic Violence Professionals*, 46 FAM. CT. REV. 437 (2008). The Association of Family and Conciliation Courts (AFCC) has promulgated practice guidelines and standards for various intervention strategies, including: child protection mediation, parenting coordination, child custody evaluation, and family and divorce mediation. *Practice Guidelines and Standards*, ASS’N OF FAM. AND CONCILIATION CTS., <http://www.afccnet.org/ResourceCenter/PracticeGuidelinesandStandards> (last visited Aug. 30, 2014). The National Council of Juvenile and Family Court Judges is also active in generating practice standards. E.g., SUSAN SCHECHTER & JEFFREY L. EDLESON, NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES, EFFECTIVE INTERVENTION IN DOMESTIC

**Clarity and Brevity in Oral and Written Communications:** Communications from a judge, whether made verbally or through a written order or ruling, should be clear and straightforward. The law has its own language which is vastly different from that of families who come before the court. Litigants and attorneys should “readily understand what the next steps are in the case, what is expected of them, and (if applicable) what reasoning led the judge to her decision.”<sup>39</sup> These communication skills are increasingly important in family cases, where large percentages of family court litigants are self-represented.

**Listening Skills:** Procedural fairness literature has coalesced on the notion that having a voice is an important indicator of how litigants perceive the fairness of the court process. Procedural fairness pioneers Tom Tyler, Judge Kevin Burke, and Judge Steve Leben, among others, have acknowledged that “[h]aving an opportunity to voice their perspective has a positive effect upon people’s experience with the legal system irrespective of their outcome.”<sup>40</sup> This effect is only achieved, however, if litigants “feel that the authority sincerely considered their arguments before making their decision.”<sup>41</sup>

**Decisiveness:** A hallmark of being a judicial officer is providing a definitive resolution to the legal issues presented. Describing the “agony of decision,” former Illinois Supreme Court Justice Walter V. Schaefer remarked: “[t]here is no comfortable middle ground that can serve as a place of refuge; decision must go one way or the other.”<sup>42</sup> From a different vantage point, this notion can be couched in terms of ‘courage’: “At times, judges may be required to make difficult and unpopular decisions. In light of increasing public attention paid to the outcomes of particular cases, especially at the appellate court level, it is imperative that judges be courageous in deciding cases in accordance with their understanding of the law.”<sup>43</sup>

**Timeliness:** Delay in any kind of legal action can leave litigants in uncertain situations and potentially add to costs. In family cases, “delays in final resolution increase anxiety and uncertainty at a time when parents and children need stability to reorganize their lives.”<sup>44</sup> Judges should resolve issues before them as quickly as is feasible and appropriate.<sup>45</sup> Individual judge caseload management techniques and court-wide differentiated case management systems can foster timeliness and efficiency.

**Dispute Resolution Techniques:** Litigation is no longer the only dispute resolution process available to family court litigants. Mediation, collaborative law, cooperative law, and other dispute resolution techniques are growing in popularity and accessibility. While these non-litigation processes occur wholly outside of the courtroom, it is nevertheless important for judges to understand them—both from a procedural standpoint and in terms of the costs and benefits to the litigants.

**Humility and Thoughtfulness:** Family cases involve sensitive issues and litigant emotions can run high. In these situations, it is especially important that judges appreciate the vulnerable state in which litigants appear before the

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VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE (1999), *available at* <https://www.childwelfare.gov/pubs/otherpubs/ncjfcj.pdf>.

<sup>39</sup> CORNERSTONES, *supra* note 18, at 4.

<sup>40</sup> Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 30 (2007), *available at* <http://www.proceduralfairness.org/Theory-and-Research/~media/Microsites/Files/procedural-fairness/Tyler.ashx>; *see also* Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 12-13 (2007), *available at* <http://www.proceduralfairness.org/~media/Microsites/Files/procedural-fairness/CR44-1-2.ashx>.

<sup>41</sup> Tyler, *supra* note 40, at 30.

<sup>42</sup> Walter V. Schaefer, *Good Judges, Better Judges, Best Judges*, 44 J. AM. JUD. SOC’Y 22, 24 (1960).

<sup>43</sup> CORNERSTONES, *supra* note 18, at 4.

<sup>44</sup> Kourlis et al., *supra* note 16, at 356.

<sup>45</sup> *See also* CORNERSTONES, *supra* note 18, at 4.

court. *Cornerstones* attributes note that “[j]udges should approach each case with an awareness of the fact that their decisions may affect a party’s personal liberty, relationships, finances, and/or reputation.”<sup>46</sup> In family court, “judges make decisions that will forever affect the family involved.”<sup>47</sup>

**Respectfulness and Courtesy:** The *Cornerstones* attributes call for judges to be at all times respectful of counsel, parties, witnesses, and others present in the courtroom. *Cornerstones* acknowledges that “[f]or many people, appearing in court raises feelings of nervousness and apprehension,”<sup>48</sup> which is especially true in family cases where many litigants are already emotionally vulnerable. Tom Tyler notes that “[r]espect matters at all stages . . . . It includes both treating people well, that is, with courtesy and politeness, and showing respect for people’s rights.”<sup>49</sup>

**Stress Management:** Family court judges, like criminal court judges, may be susceptible to secondary traumatic stress stemming from the nature of the cases that come before them.<sup>50</sup> The workload and weight of the decisions that must be made can lead to occupational burnout, and many judges are concerned about safety both in and out of the courtroom.<sup>51</sup> Often, judges focus on managing litigants’ stress and emotions, but it is essential that a judge not overlook internal stress management.

**Administrative Capacity:** *Cornerstones* notes that the behind-the-scenes administrative aspects of a judge’s responsibilities are highly important, in that “[d]iligence in performing administrative duties benefits the parties by reducing the time, costs, and stress associated with being in the justice system.”<sup>52</sup> Given the reality that many of today’s family court litigants are without legal representation, ensuring efficiencies in the management of cases is increasingly important. Judicial leadership in communication with other judges and court staff also can have positive implications on court administration.

**Judicial Leadership On the Bench:** Judicial leadership can make a significant impact on courts, litigants, and society more broadly. This is especially true when courts are dealing with vulnerable litigants, such as children and families. Leadership in court translates, among other things, to ensuring timeliness, selecting appropriate intervention strategies and alternative dispute resolution techniques based on the needs of families, and bringing new and effective processes and procedures to the court.

**Judicial Leadership Off the Bench:** Judges should be leaders in their community as well.<sup>53</sup> According to the *Cornerstones* attributes, “[j]udges should be contributing members of their communities and should take an active

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<sup>46</sup> *Id.* at 4.

<sup>47</sup> Adam & Brady, *supra* note 10, at 32.

<sup>48</sup> CORNERSTONES, *supra* note 18, at 4.

<sup>49</sup> Tyler, *supra* note 40, at 30.

<sup>50</sup> See Jared Chamberlain & Monica K. Miller, *Evidence of Secondary Traumatic Stress, Safety Concerns, and Burnout Among a Homogeneous Group of Judges in a Single Jurisdiction*, 37 J. AM. ACAD. PSYCHIATRY LAW 214, 215-21 (2009); Peter G. Jaffe et al., *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice*, 54 JUV. & FAM. CT. J. 1 (2003). The National Center for State Courts has a Resource Guide on judicial stress, in recognition of the fact that “[a]ctive judges are likely to face numerous work-related experiences (e.g., traumatic cases) that affect performance of their occupational duties.” *Judicial Stress: Resource Guide*, NAT’L CTR. FOR STATE CTS., <http://www.ncsc.org/Topics/Judicial-Officers/Judicial-Stress/Resource-Guide.aspx> (last visited Aug. 30, 2014). This citation also doesn’t look right.

<sup>51</sup> Safety concerns are shared by many family court judges, given the high tension and emotional state in which many family court litigants enter—and leave—the courtroom. See Chamberlain & Miller, *supra* note 50, at 215-21.

<sup>52</sup> CORNERSTONES, *supra* note 18, at 5.

<sup>53</sup> The National Council for Juvenile and Family Court Judges developed a national judicial leadership curriculum “designed to create a more sophisticated approach to off-the-bench judicial leadership and effective systems reform.” *Judicial Leadership Off the Bench*, NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES, <http://www.ncjfcj.org/judicial-leadership-bench> (last visited Aug. 30, 2014); see also *Judicial Leadership and*

role in promoting the values and goals of the judicial system.”<sup>54</sup> For the family court judge, this includes bringing members of the community and judiciary together, to discuss and map out better processes for children and families transitioning through separation and divorce. Judges can do much off the bench to demystify the courts and the court process.

**Commitment to the Family Court Bench:** Regardless of how a judge arrives on the family bench, he or she must be dedicated to the role. A judge must be empowered with an understanding of how important the family court is in the lives of a community’s families, and an appreciation for the truly unique role of the family court judge. When families are before the court, there is no one in their lives who is more important or who has more power over them. A judge must understand that role, and handle it with care.

### III. FOSTERING A QUALIFIED FAMILY COURT BENCH THROUGH JUDICIAL EDUCATION

For the most part, family court judges reach the bench through election or appointment and without any prerequisite experience handling family law cases. Although many skills developed in the practice of law translate to the bench, the role of judge has been, and continues to be, recognized as significantly different in nature and responsibility from that of attorney.<sup>55</sup> Judicial education, therefore, plays an indispensable role in fostering highly skilled and dedicated family court judges. Without adequate specialized judicial education, at best a family court judge gains expertise over time, through hands-on experience or self-education; at worst, outcomes, families, and communities are negatively impacted.

Existing comprehensive judicial education programs for family court judges must be applauded.<sup>56</sup> Since 1937, the National Council of Juvenile and Family Court Judges has supported family courts and family court judges across the country through cutting-edge training, wide-ranging technical assistance, research, and unique advanced training. Similarly, the National Judicial College has long recognized the need for holistic and interdisciplinary training for family court judges, serving as a resource for state courts for over fifty years. It also bears mentioning that some state courts are keeping pace with these national leaders, for example, California’s Center for Judiciary Education and Research, which empowers judges of all types, including family court judges, with an impressive

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*Improving Child Protection Outcomes*, NAT’L CTR. FOR STATE CTS., <http://www.ncsc.org/Services-and-Experts/Areas-of-expertise/Children-and-Families/Child-Protection-Outcomes.aspx> (last visited Aug. 30, 2014); Leonard Edwards, *Judicial Leadership in the Juvenile Court*, NAT’L COUNCIL ON CRIME & DELINQ. (Nov. 4, 2013), <http://nccdglobal.org/blog/judicial-leadership-in-the-juvenile-court>.

<sup>54</sup> CORNERSTONES, *supra* note 18, at 5.

<sup>55</sup> PIERO CALAMANDREI, EULOGY OF JUDGES 17 (John Clarke Adams & C. Abbott Phillips, Jr. trans., Lawbook Exchange ed. 2011) (“A judge is a lawyer mellowed and purified by age, a man from whom the years have taken the illusions, exaggerations, prejudices, and perhaps even the impulsive generosity of youth. The judge is what remains after there have been removed from the lawyer all those exterior virtues which the crowd admires.”); *see* Ernest C. Friesen, Jr., *The Judicial Seminar: Foundation for Judicial Education*, 46 J. AM. JUD. SOC’Y 28, 28 (1962) (noting that “any observer of a judge’s functions would agree that the techniques and attitudes of the judge are often quite different from the techniques and attitudes of the attorney.”); *see also* ABA Standing Comm. on Judicial Independence, Recommendation 113 (2009) (reporting out on a Symposium on Pre-Judicial Education convened by the ABA Standing Committee on Judicial Independence Study Group on Pre-Judicial Education, at which Symposium participants reached consensus on the notion that “judging is a distinct discipline of the legal profession that required an appreciation of unique knowledge, skills and abilities”).

<sup>56</sup> A more detailed list of the national and regional resources available to family court judges is included in Appendix B.

range of educational, training, and mentoring resources, delivered through a variety of formats.<sup>57</sup> The Ohio Supreme Court recently convened a comprehensive, statewide domestic relations summit, through which family court judges from across the state came together to discuss current practices and challenges, with a view towards hands-on implementation of promising practices.<sup>58</sup>

It is fair to say that many educators are meeting the evolving educational needs of family court judges—recognizing the increased importance of non-judicial actors, current social science data, evolving family dynamics, and new developments in psychological constructs—but some have been constrained by sharp cuts in dollars for judicial education of any sort.<sup>59</sup> Through this position paper, the IAALS *Honoring Families Initiative* hopes to spark increased discussion on the education and training that must be made available to family court judges, in order to empower them to best serve our nation’s families. A sample curriculum is attached as Appendix A that may serve as a model upon which states and other educational institutions can expand.

We recognize that some of the skills and qualities that this paper addresses are personality factors, and some are grounded in substantive knowledge and training. We acknowledge that, for example, humility is not a subject in a curriculum, but we suggest that through appropriate judicial education it can be emphasized, acknowledged, and valued. Stating that certain qualities are important encourages judges to value them.

#### IV. PRIORITIZING OUR FAMILIES BY REPRIORITIZING FAMILY COURTS

The family court judge is unlike his or her counterparts. As problem solvers and adjudicators, these judges make decisions that forever affect families. Given the impact that a family court judge will have on the lives of children and families, it is of fundamental importance to have the best qualified judges serving on the family court bench. Implicit in this conversation is a necessary reprioritizing of the family court itself, so that those within and outside the judiciary appreciate the importance of family court judges and recognize their impact on both the lives of families and society more broadly. Family court is not a ‘pots and pans’ rotation. It is a rotation into people’s lives, and an opportunity to positively shape outcomes that will affect children and families forever.

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<sup>57</sup> *Center for Judiciary Education and Research*, CAL. JUD. COUNCIL ADMIN. OFF. OF THE CTS., <http://www2.courtinfo.ca.gov/cjer/index.htm>.

<sup>58</sup> The *Ohio Domestic Relations Summit: Maximizing Resources, Minimizing Conflict for Children and Families* convened on April 23-25, 2014. A comprehensive publicly available bibliography was compiled for Summit participants, including resources on: leadership, child-centered decision-making, caseload management, domestic violence, mediation, rural courts, time standards, technology and case management systems, and self-represented litigants. DOMESTIC RELATIONS SUMMIT 2014 RESOURCES, <http://www.drsummit.ohio.gov/resources/default.asp> (last visited Aug. 30, 2014).

<sup>59</sup> Anecdotal evidence suggests that judicial education tailored to the needs of family court judges is lacking in some states. In late 2013, IAALS administered a short and informal survey of the National Association of State Judicial Educators membership, with the goal of gaining a better understanding of how states are educating family court judges. The number of respondents was small and no conclusions could be drawn with respect to the perceived adequacy of state judicial education programming for family court judges. The survey did illustrate, however, that state efforts to educate family court judges differ widely by state. It also appears that some states have integrated interdisciplinary, social science content into their educational programming to a greater degree than others. Memorandum from Natalie Anne Knowlton to the IAALS *Honoring Families Initiative* Advisory Committee (Feb. 24, 2014) (on file with authors).



## APPENDIX A

### SAMPLE TOPICS FOR INCLUSION IN JUDICIAL EDUCATION CURRICULUM FOR FAMILY COURT JUDGES<sup>60</sup>

1. The role of today's family court judge
2. Divorce, annulment, and separation procedures
3. Allocation of parental responsibilities, including information and research on: safety-based parenting plans; high-conflict families; GALs and custody evaluators; child development; and relocation and modifications
4. Child support
5. Spousal support
6. Paternity
7. Evidentiary issues in family law cases
8. Unique ethical challenges presented by family law cases
9. Domestic violence
10. Child maltreatment
11. Property division, including business valuation
12. Tax and other financial considerations in divorce
13. Case management
14. Adoption
15. Guardianships and conservatorships
16. Complying with Indian Child Welfare statutes
17. Managing and interacting with self-represented litigants
18. Court-ordered mediation and parenting classes
19. Court-annexed and community resources

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<sup>60</sup> This list of potential topics to be included in judicial education programming for family court judges is not intended to be framed as a recommendation. Rather, it is a sampling of issues that may change over time and from jurisdiction to jurisdiction.

20. Courtroom safety and judicial security
21. Listening skills for family court judges
22. Child development
23. Mental health and addiction
24. Impact of divorce on children
25. Leadership training

## APPENDIX B

### NATIONAL RESOURCES ON JUDICIAL EDUCATION FOR THE FAMILY COURT

American Bar Association: The ABA is one of the world's largest voluntary professional organizations, committed to improving the legal profession, eliminating and enhancing diversity, and advancing the rule of law. To learn more, visit <http://www.americanbar.org/aba.html>.

Association of Family and Conciliation Courts: AFCC is the premier interdisciplinary and international association of professionals dedicated to the resolution of family conflict. AFCC members are the leading practitioners, researchers, teachers and policymakers in the family court arena. AFCC plays a leadership role and collaborates with leading organizations on major reform initiatives and training in family law and domestic relations practice and policy. To learn more, visit <http://www.afccnet.org>.

Battered Women's Justice Project: BWJP is a nationally recognized partnership and collaboration between the Domestic Abuse Intervention Programs (formerly Minnesota Program Development, Inc.) and the National Clearinghouse for the Defense of Battered Women. The BWJP offers training, technical assistance, and consultation on the most promising practices of the criminal and civil justice systems in addressing domestic violence. To learn more, visit <http://www.bwjp.org>.

JERITT at Michigan State University: Since 1989, JERITT has collected monthly judicial branch education programming information from state and national providers. It regularly surveys the field, identifying the structure and function of judicial branch education from which best practices can be identified. JERITT also researches issues and trends in judicial branch education and other applicable continuing professional education fields so that individual judicial branch educators can benefit from the advancements and experiences of other professionals while enhancing their knowledge, skills, and abilities. To learn more, visit <http://jeritt.msu.edu>.

National Center for State Courts: The NCSC is an independent, nonprofit court improvement organization, whose efforts are directed by collaborative work with the Conference of Chief Justices, the Conference of State Court Administrators, and other associations of judicial leaders. All of NCSC's services—research, information services, education, consulting—are focused on helping courts plan, make decisions, and implement improvements that save time and money, while ensuring judicial administration that supports fair and impartial decision making. To learn more, visit <http://www.ncsc.org>.

National Council of Juvenile and Family Court Judges: The NCJFCJ is one of the largest and oldest judicial membership organizations in the nation, serving an estimated 30,000 professionals in the juvenile and family justice system, including judges, referees, commissioners, court masters and administrators, social and mental health workers, police, and probation officers. The NCJFCJ resources include cutting-edge training, wide-ranging technical assistance, research to assist family courts, and unique advanced training programs for judges and other court professionals offered in conjunction with the University of Nevada, Reno and the National Judicial College. To learn more, visit <http://www.ncjfcj.org>.

National Judicial College: The NJC is a national leader in judicial education, working with the judiciary to improve productivity, challenge current perceptions of justice, and inspire judges to achieve judicial excellence. The NJC offers an average of 90 courses/programs annually with more than 4,000 judges attending from all 50 states, U.S. territories and more than 150 countries. To learn more, visit <http://www.judges.org/index.html>.

National Judicial Institute on Domestic Violence: The NJIDV is a dynamic partnership among the U.S. Department of Justice, Office on Violence Against Women, Futures Without Violence and the National Council of Juvenile and Family Court Judges. Since 1999, the NJIDV has provided highly interactive, skills-based domestic violence workshops for judges and judicial officers nationwide. To learn more, visit <https://www.njidv.org>.

Sayra and Neil Meyerhoff Center for Families, Children and the Courts: The CFCC at the University of Baltimore is committed to ensuring that the practice of family law in Maryland, nationally, and around the world improves the lives of families and the health of communities. The CFCC trains judges and court staff in the core competencies of a problem-solving, therapeutic, and holistic family justice system. To learn more, visit <http://law.ubalt.edu/centers/cfcc>.