



## Enhancing Judicial Awareness of **RESILIENCE IN FAMILY COURT**

Some Initial Considerations

This is the second in a series of technical assistance briefs on resilience by the Resource Center on Domestic Violence: Child Protection and Custody (RCDV: CPC), a project of the National Council of Juvenile and Family Court Judges (NCJFCJ). The first brief focused on clarifying and refining the concept of resilience, provided an overview of the research on this important topic, and offered some initial considerations as courts attempt to reinforce resilience further in applicable cases. Much of the first brief focused on issues particularly relevant to child abuse and neglect proceedings, and that remains the case in this brief. However, this brief will also touch upon how the topic of resilience applies, to a limited extent, in some custody and divorce matters, and emphasize the importance of family court judges becoming even more aware of how courts are considering resilience or protective factors even though, in cases like custody and divorce, direct application of these factors may not be standard or may be quite different.

Consideration of resilience factors in a range of family court cases can be complicated. For example, while

a related child welfare or dependency case is not at all uncommon in custody and divorce matters, most custody/divorce cases, even those involving domestic violence (DV), do not have child welfare involvement. In custody/divorce cases in which child welfare is not involved, the court does not have the resources (e.g., caseworker, services) associated with dependency cases, cases that often present a range of complexities and additional trauma. These limitations and structural differences can affect whether and how a court approaches or considers the subject of resilience. In custody/divorce case settings, for example, it is unlikely that specific discussions with a child that pertain to that child's resilience factors will occur as typically, while the best interests of the child are the primary consideration, only the parents participate in the case.

### **Defining Resilience and Why It Is Important**

The first brief noted that resilience (or resiliency – the terms are often used interchangeably) has been defined in many ways across various settings, and it also

emphasized the growing recognition across courts of the importance of not only risk and safety factors and the impact of trauma experienced by children exposed to family violence and/or maltreatment, but also protective factors that can help young victims achieve better life trajectories and long-term well-being. The first brief identified a range of protective factors that promote resilience including individual factors, family factors, and community factors (Promising Futures, 2014). Readers are encouraged to review the first brief for more specific information in this regard (Resource Center on Domestic Violence: Child Protection and Custody, 2019).

While there continue to be shifting criteria and definitions of resilience in the research literature (Bartlett and Steber, 2019), there is probably more consistency and overlap in the concept of resilience than there are notable differences. As such, it is not the intent of this second technical assistance brief to suggest a universal definition of resilience, other than to reaffirm the protective factors described by Promising Futures (2014), acknowledge the general overlap in resilience criteria, and recognize that resilience research has also emphasized the importance of considering a more ecological and culturally sensitive definition. For example:

*“In the context of exposure to significant adversity, resilience is both the capacity of individuals to navigate their way to the psychological, social, cultural, and physical resources that sustain their well-being, and their capacity individually and collectively to negotiate for these resources to be provided in culturally meaningful ways” (Ungar, 2008, 2011).*

## The Link Between Trauma and Resilience

In many important ways, the issue of trauma is inextricably linked to resilience, and the broad recognition of the adverse impacts of childhood trauma has led to a growing number of “trauma-informed” courts (Rice & Meinster, 2019). These courts have recognized the need to address trauma more directly and in a more structured manner in their proceedings and in the court environment.

What is not so evident or prevalent across the country, however, is a more routine or structured approach to considering child and youth resilience in court practices. Although many courts and their stakeholders recognize the importance of protective factors or strength-based approaches, these practices can be somewhat haphazard when they do occur. This brief posits that all family court judicial officers should at least be aware of resilience factors and how different components of family courts handle such issues.

## The Importance of Early Resilience Screening and Assessment

When a child abuse and neglect (or dependency) case is opened, it is imperative that the court and/or its partners adequately screen and assess the case for risk, safety, trauma, and resilience factors. This initial process most often involves safety screening for and assessment of risks faced by alleged victims. The risks and safety concerns faced by child victims



in cases involving allegations of child maltreatment and domestic violence have been well-documented in the research (U.S. Department of Health & Human Services, n.d.). However, while the early screening and assessment of risk and safety is well documented in such matters, early screening and assessment of children for resilience factors are not as common. Furthermore, often no screening for risk/safety or resilience takes place in custody or divorce cases, unless an allegation of domestic violence or child maltreatment is made. Sometimes, risk/safety (e.g., for DV) screening will happen before mediation or other alternative dispute resolution (ADR) methods are used in such cases, but not in every jurisdiction.



While dependency cases tend to have a sequence of multiple hearings (e.g., from the preliminary protective or initial hearing through permanency stages), custody/divorce cases

generally do not have this sequence. Instead, it is more common for custody/divorce matters to be settled through ADR (e.g., mediation or other options).<sup>1</sup> Also, in custody/divorce cases without a related abuse/neglect proceeding, the range of services available to child and families is usually much more limited. As noted above, rather than having the child at the center of the court case, the court's focus is on the parents and the characteristics the parents present that lead the court to make custody decisions. While the court's focus in custody/divorce cases centers on the parents,

<sup>1</sup> ADR often occurs in dependency proceedings as well, though the number of court hearings in abuse/neglect cases generally exceeds the number of hearings in custody/divorce cases.

the court must also consider the child's best interests as prime considerations, especially if there is known domestic violence. Approximately three-fourths of the states have rebuttable presumptions against joint or primary custody to a perpetrator of domestic violence, but in practice application of the presumption and consideration of any rebuttal evidence is complex and outcomes vary. Furthermore, custody/divorce cases tend to be substantially more adversarial than dependency matters. In dependency cases there is much greater focus on non-adversarial approaches in and out of the courtroom to achieve timely permanency for children (Gatowski, 2016). All of these factors do not lessen the relevance of resilience factors in these cases—in fact, to the contrary—but they must be handled differently than in dependency cases.

Thus, courts may wish to consider adopting policies that incorporate some mention of resilience early in the case, as appropriate. For example, the topic could perhaps be included during screening or orientation at the ADR stage, or the court could address it at an early hearing. Materials available for self-represented litigants or in parenting classes that many jurisdictions require could cover resilience factors. At the least, judges and other practitioners (e.g., ADR providers, evaluative professionals, attorneys, etc.) in divorce/custody cases should be aware of resilience and protective factors that may be relevant to consider in determining the parenting arrangement that promotes safety and serves the child's best interests. The need for consideration of resilience is especially important in cases with domestic violence, but simply the fact of a divorce is an Adverse Childhood Experience, and thus resilience would be relevant in any case (Centers for Disease Control and Prevention, 2019).

## Initial Examples of Resilience Practices and Tools That Judges Should Be Aware of

### *Resilience considerations are not just for older children.*

In the NCJFCJ's review of the resilience literature, one aspect that became apparent was that many of the practices and research centered on resilience focus on older children and youth. But, resilience is also an important factor for young children. The ZERO TO THREE National Infant-Toddler Court Program (ITCP) represents one evidence-based approach reflecting how courts consider resilience in abuse and neglect cases.<sup>2</sup> The ZERO TO THREE National Infant-Toddler Court Program and its support for the Safe Babies Court Team Approach (SBCT) connects babies and their families with the support and services they need, including those tied to resilience factors, to ensure healthy development and lasting permanency (Zero to Three, n.d.). Once again, while the focus on ZERO TO THREE has been in the dependency arena, judicial officers handling other family court matters should be aware of this model which includes resources that describe successful early childhood home visitation approaches, developmental screening, and other tools (U.S. Department of Health and Human Services, 2015).



### *Courts can play an important role in tracking resilience factors and impacts.*

In reviewing the literature, one challenge faced by researchers has been to define resilience clearly or operationally in ways that are measurable. This is important for family courts, particularly dependency courts, because without clearly defined indicators or measures it is difficult if not impossible to discern whether or not an increased focus on resilience contributes to or produces positive impacts. One jurisdiction, Washington State, has taken very specific steps to address this challenge in abuse and neglect cases.

In 2018, the Washington State Department of Children, Youth & Families (DCYF) made a concerted commitment “to the goals of supporting children, youth, and families in achieving better outcomes in the areas of resilience, education, and health.” As part of this effort, the agency produced a working version of proposed goal areas and measures including those specific to child and youth resilience. These resilience goal areas include:

- Children and Youth Are Supported by Healthy Relationships with Adults.
- Parents and Caregivers Are Supported to Meet the Needs of Children and Youth.
- Families Are Economically Secure.
- Maltreatment and Out-of-Home Care.
- Youth and Young Adult Transitions. (Washington State Department of Children, Youth & Families, 2018).

On the Washington State DCYF website, resilience goals are augmented by specific illustrations of how the resilience factors and related impacts will be measured. While these are examples specific to a child

<sup>2</sup> This program is funded by the U.S. Department of Health and Human Services and operated in partnership with the American Bar Association Center on Children and the Law; The Center for the Study of Social Policy; the NCJFCJ; and an independent evaluation team at RTI International.



welfare agency, their applicability to dependency courts, and perhaps other family court departments, deserves further exploration particularly as it applies to judicial awareness of resilience and the appropriate leadership role of the judge.<sup>3</sup> Even though most custody/divorce cases and related statutory schemes operate from the premise that the child's safety and well-being are not in jeopardy with either parent, once again domestic violence is far from rare and affects child safety and well-being, and there are cases that overlap with child abuse/neglect matters. As such, it seems reasonable that, at minimum, all family court judges should at least be aware of how their courts (and/or child welfare agency) are tracking resilience factors.

If further improving resilience considerations and related practices that promote safety are priorities in a court, a lead or presiding juvenile and family court judge should consider working closely with the local child welfare agency or collaborative body, and perhaps other interested partners (e.g., ADR professionals, domestic violence program personnel, evaluative professionals, private family law bar, and others) to develop a set of resilience goals akin to Washington State's attempt, if they have not already done so. They should also actively and appropriately support efforts to track the impacts of court and other stakeholder practices on case performance indicators and outcomes.



### ***Courts can discuss resilience more routinely and in a more structured fashion.***

Bench cards for judges are useful tools for judges for a variety of case types including those found in:

- The NCJFCJ's *Enhanced resource guidelines: Improving court practices in child abuse and neglect cases* (Gatowski, Miller, Rubin, Escher, & Maze, 2016), and
- The National Child Traumatic Stress Network's *NCTSN Bench Card for the Trauma-Informed Judge* (National Child Traumatic Stress Network, 2013).<sup>4</sup>

The *NCTSN Bench Card*, for example, encourages judges to:

***“Please discuss the child’s existing strengths and coping approaches that can be reinforced to assist in the recovery or rehabilitation process. Strengths might include perseverance, patience, assertiveness, organization, creativity, and empathy, but coping might take distorted forms. Consider how the child’s inherent strengths might have been converted into ‘survival strategies’ that present as non-cooperative or even antisocial behaviors that have brought this child to the attention of the Court”*** (National Child Traumatic Stress Network, 2013, p. 3).

<sup>3</sup> Recently, the California Center for Families, Children, & the Courts partnered with the University of California, Los Angeles (UCLA) to conduct a study of the Succeeding Through Achievement and Resilience (STAR) Court, a juvenile collaborative court program focused on providing services to commercially sexually exploited children (CSEC) or youth at risk of exploitation (Judicial Council of California, 2020).

<sup>4</sup> In custody cases, another useful bench card is the NCJFCJ's *A Judicial Guide to Child Safety in Custody Cases* (National Council of Juvenile and Family Court Judges, 2008). While this guide does not mention resilience, there are a number of items in the guide's checklist that are consistent with resilience factors.

Many juvenile court judges that operate in a trauma-informed setting already are aware of tools like the *NCTSN Bench Card* and related trauma-informed practices. For those who may not be familiar with it, the *NCTSN Bench Card* offers simple guidance for the court to discuss resilience considerations in appropriate contexts. At minimum, it seems advisable that all family court judges should be aware of this tool and its content (as well as the broader concepts behind trauma-informed courts), even though child attendance and participation at custody/divorce proceedings may be the exception rather than the rule.

While the *NCTSN Bench Card* is very important and useful, it seems that it could be further enhanced with more specific resilience content, perhaps in the form of a resilience bench card that, not only focuses the court on protective factors and strengths of a child or youth, but also can help a court consider interventions and services that are specifically targeted to resilience factors in child welfare matters and/or help the court consider appropriate provisions to include in a final custody order to protect and promote resilience factors. A resilience bench card of this type could be drafted, for example, to reflect key aspects of the protective factors that promote resilience as described by Promising Futures (2014) and other applicable areas. The key objective here would be to provide useful guidance to judicial officers to expand their in-court discussions of resilience factors in ways that tangibly help prompt even greater emphasis on child-centered and strength-based case planning of the kind that is particularly evident in dependency cases. A useful resilience bench card would also recognize the different resilience characteristics of younger children and adolescents.

The NCJFCJ will offer a draft resilience bench card and examples of accepted provisions to include in a final custody order to protect and promote resilience factors in the next technical assistance brief in this series. The NCJFCJ will also provide a draft resilience checklist that can be used by courts to self-assess their performance related to resilience issues. In the meantime, courts, particularly dependency departments, are encouraged to review the sources cited in this brief to augment their current resilience practices and perhaps even begin to draft local resilience bench cards and/or resilience checklists in ways that help inform the court and productively expand resilience discussions to meet local needs.

## Concluding Remarks

This is the second in a series of technical assistance briefs on resilience by the RCDV: CPC, a project of the NCJFCJ. This brief focuses on information and steps family courts should consider in their efforts to strengthen consideration and discussion of resilience factors in appropriate cases. It emphasizes that while the issues and topics covered here are particularly relevant to dependency courts, it is also important for other family court departments at least to be aware of how resilience-related practices are evolving in other (and sometimes overlapping) branches of their court. It is hoped that this brief contributes to ongoing court efforts to expand and improve resilience considerations in applicable cases and provides some initial examples and relevant information for judicial officers handling other family court matters, particularly those involving custody and divorce, that may not typically include child participation in their proceedings.



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The National Council of Juvenile and Family Court Judges houses The National Resource Center on Domestic Violence: Child Protection and Custody. The Resource Center is devoted to helping domestic violence survivors and professionals such as judges, attorneys, social workers, and domestic violence advocates who work with survivors in the child protection and custody systems. In addition to providing training and technical assistance, the Resource Center also conducts research and evaluation projects focused on the intersection of domestic violence and child protection or child custody. Contact us by telephone at (800) 527-3223 or by email at [fvdinfo@ncjfcj.org](mailto:fvdinfo@ncjfcj.org).



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