THE ADOLESCENT MENTAL HEALTH CRISIS: A CASE STUDY IN FAMILY COURT PLANNING

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I. INTRODUCTION: THE CRISIS OF ADOLESCENT MENTAL HEALTH AND THE FAMILY COURT

Imagine that you are the chief family court judge of your state. Your job description includes administration of the family courts in different counties which include urban and rural communities.

Cases arising from parental divorce and separation are a major portion of the dockets of your family courts.[1] Seventy-two percent of the parties in divorce and separation cases are not represented by counsel.[2]

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1. *FastStats - Marriage and Divorce*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/nchs/fastats/marriage-divorce.htm [https://perma.cc/FAJ5-87EJ] (Apr. 24, 2023). The divorce rate is 2.5 per 1,000 population. *Id.* About 4.5 million domestic relations cases were filed in state courts in 2016. NAT'L CTR. FOR STATE CTS., FAMILY JUSTICE INITIATIVE: THE LANDSCAPE OF DOMESTIC RELATIONS CASES IN STATE COURTS 3 (2018) [hereinafter NAT'L CTR. FOR STATE CTS., FAMILY JUSTICE INITIATIVE], https://www.ncsc.org/__data/assets/pdf_file/0018/18522/fji-landscape-report.pdf [https://perma.cc/Z9HV-2DP3].

2. NAT'L CTR. FOR STATE CTS., FAMILY JUSTICE INITIATIVE, *supra* note 1, at ii. The percentage of self-represented litigants varies from jurisdiction to jurisdiction. *See* NAT'L CTR. FOR STATE CTS., CIVIL JUSTICE INITIATIVE: LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iv (2020), https://www.ncsc.org/__data/assets/pdf_file/0018/18522/fji-landscape-report.pdf

Currently, court rules require education and mediation for separating and divorcing parents.[3] Parent education, provided by education professionals, focuses on informing parents about how to responsibly manage their conflicts with each other to shield their children from them.[4] Mediation consists of designating a neutral facilitator to encourage agreement between parents.[5] The mediator is chosen by the parties, and, if they cannot agree, the court from a panel of trained mediators with different professions of origin (some are lawyers, some are mental health professionals).

Recently, you have become increasingly aware of what respected organizations have called a mental health crisis for children—especially adolescents—that is exacerbated by parental conflict surrounding separation and divorce.[6] A recent article in the *Family Court Review* entitled *The Kids Are Not Alright* summarized these findings:

> In 2021, the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry and the Children's Hospital Association banded together to declare "a national state of emergency" in children's mental health. The Centers for Disease Control and Prevention (CDCP) recently released results of the latest data from the Youth Risk Behavior Survey, summarizing trends in adolescent mental health between 2011 and 2021. Over this ten-year period, 22% of

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[https://perma.cc/ZV4P-HNWA]. The figure chosen is the average of a national sample of state court dockets.

3. *See generally* Melissa Schmitz, *Does My State Require Me to Participate in Divorce Mediation?*, HELLO DIVORCE (July 18, 2023), https://hellodivorce.com/divorce-mediation/does-my-state-require-divorce-mediation [https://perma.cc/5Z29-XSHS] (explaining which states require mediation before divorce). Any listing of mediation as a requirement needs caveats. In some states, mediation is not required statewide and instead is required only in certain counties or individual courts. In others, mediation may be optional. Some states where mediation is often required before divorce are: Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. States that offer mediation but do not require it include: Alaska, Colorado, the District of Columbia, Hawaii, Massachusetts, Mississippi, New Mexico, North Dakota, Pennsylvania, Virginia, and Washington. *Id.*

4. Peter Salem et al., *Taking Stock of Parent Education in the Family Courts: Envisioning a Public Health Approach*, 51 FAM. CT. REV. 131, 134-37 (2013); Andrew Schepard, *War and P.E.A.C.E.: A Preliminary Report and a Model Statute on an Interdisciplinary Educational Program for Divorcing and Separating Parents*, 27 MICH. J.L. REFORM 131, 163-64 (1993); *see* JoAnne Pedro-Carroll et al., *Assisting Children Through Transition: Helping Parents Protect Their Children from the Toxic Effects of Ongoing Conflict in the Aftermath of Divorce*, 39 FAM. CT. REV. 377, 385-92 (2001).

5. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34-36 (1982); BARBARA LANDAU ET AL., FAMILY MEDIATION HANDBOOK 20 (Paul Truster et al. eds., 1987).

6. Marsha Kline Pruett & Amy E. Wilson, *Introduction: The Kids Are Not Alright: Addressing Adolescent Mental Health in Family Law*, 61 FAM. CT. REV. 466, 468-70 (2023).

> students reported seriously considering suicide. Roughly 42% of teens (more than 1 in 3) reported experiencing persistent feelings of sadness and hopelessness, defined as "feeling so sad or hopeless almost every day for two weeks or more in a row that the student stopped doing their usual activities . . . ."[7]

Intensity of conflict between parents associated with separation and divorce increases the level of risk to children's mental health. "Families in the process of separation and divorce are widely understood to be vulnerable to stress, anxiety and depression, as adjusting to the many changes brought about by divorce can be an arduous process."[8] There are, of course, other factors besides parental separation and divorce, such as the closing of in-person schooling during the COVID-19 pandemic, which contribute to the increase in mental health concerns for adolescents.[9] But parental conflict arising from separation and divorce seems to be a key contributing factor to adolescent mental health risks.

Internal family court sources confirm these national findings. The family court judges report that cases raising serious mental health concerns for adolescents (e.g., a precipitous drop in academic engagement, depression, suicide attempts, sexual acting out) increasingly appear on their separation and divorce dockets. The judges also report they do not have adequate expertise or resources to cope with these concerns.[10] They do not, for example, have enough qualified mental health evaluators to serve as experts in cases where adolescent mental health is at risk. The result is serious delays in case processing or inadequate reports to the court because they do not address this problem. Nor, given their crowded dockets, do they have the capability to monitor an adolescent's progress and recovery from mental illness, such as depression and suicidal thoughts, or drug use. The mediators provide similar reports about adolescents in the families they work with; the parent educators report increasing numbers of parents asking questions about and seeking referrals for mental health services for their children.

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7. *Id.* at 466 (citations omitted).

8. *Id.*

9. *See* Lu Ma et al., *Prevalence of Mental Health Problems Among Children and Adolescents During the COVID-19 Pandemic: A Systematic Review and Meta-Analysis*, 293 J. AFFECTIVE DISORDERS 78, 86 (2021).

10. *See* Alyna T. Chien et al., *Difficulty Obtaining Behavioral Health Services for Children: A National Survey of Multiphysician Practices*, 20 ANNALS FAM. MED. 42, 43-48 (2022). There is no specific study of the number of custody evaluators who are experts in adolescent mental health available in family court cases. The hypothetical that there is not enough is an extrapolation to the family court context from the well-known fact there is a general shortage of adequate providers of mental health treatment for adolescents. *See id.* at 43. It is also based on statements that numerous judges have made to the author.

You believe it is critical for the family courts to effectively address the mental health crisis for adolescents in cases on the separation and divorce docket. You also wonder whether the family court has a role to play in educating the broader public about the problems separation and divorce-related parental conflict creates for adolescents. You are also worried about the fiscal implications of trying to staff the courts with mental health experts to address the crisis in adolescent mental health. Where to begin?

II. PLANNING FOR FAMILY DISPUTE RESOLUTION: AN OVERVIEW OF THIS ARTICLE

This article argues that the most appropriate place to begin to address the adolescent mental health crisis in the family court docket is to include the problem in an ongoing robust planning process for the development of Family Dispute Resolution ("FDR") for separating and divorcing families. This article is an overview of why and how family courts should develop the planning process and how it might help formulate strategies to address the mental health crisis for adolescents. Its central thesis is that it is time for courts and stakeholders to move FDR—broadly defined—beyond proof of concept as a useful adjunct to the litigation system to the central focus of a coordinated public health-oriented dispute resolution system. All separating and divorcing families should have access to quality and appropriate FDR services.

The adolescent mental health crisis potentially identifies a serious and pervasive service gap for separating and divorcing families in court. Many of the services that already exist (e.g., mediation, parent education, parenting evaluations) need an infusion of resources and expertise to deal with it. New services may also need to be created. The family court needs a plan to respond to the problem. It cannot simply lurch from one crisis to another. The family court needs the support of stakeholders in the system (such as mental health associations and children's advocacy groups) to harness the expertise and political support needed to respond effectively to the need for additional adolescent mental health services. And the stakeholders need the help of the court to respond effectively to the needs of their constituencies. This mutual exchange of expertise and support is the essence of the planning process which this article describes and advocates for.

Part III of this article defines FDR and contrasts it to dispute resolution by litigation. It argues that both have their place as part of a multifaceted dispute resolution system for separating and divorcing families.

But Part III then discusses the decades of experience that establish that FDR is a valuable resource for separating and divorcing families from the courts and, in many instances, suits their dispute resolution needs better than litigation. The virtues of FDR make it a worthy base for future development of FDR processes to better serve the needs of parents and children. FDR can bring mental health expertise to the challenges facing parents and children. It can facilitate family self-determination and conserve the family's emotional and economic resources, and therefore may enable parents to better address their children's well-being than a traditional litigation process. FDR conserves judicial resources by shifting family disputes that should not be resolved in a courtroom toward dispute resolution processes better suited to that family's needs for collaboration and problem-solving. Thus, many jurisdictions prioritize and incentivize the use of FDR processes over litigation.

Part IV describes the challenges that remain before FDR can assume a central role in the development of the dispute resolution process for separating and divorcing families. What a Canadian Supreme Court-sponsored report labeled an "Implementation Gap" stands in the way of universal access to FDR for separating and divorcing families that want it.[11] The Canadian report identifies two reasons for the Implementation Gap: (1) limited resources and (2) "the culture of the justice system and its incomplete embrace of non-adversarial or consensual dispute resolution processes."[12] Many families do not use FDR processes voluntarily, probably because they are not aware of the possibilities and benefits the different forms of FDR presents. Others fear the consequences of losing legal rights in an unfamiliar and less formal forum.

There are ways to address the Implementation Gap. They include measures to expand the voluntary use of FDR and development of a coherent identity for FDR rather than its individual programs. But achieving these goals requires systematic planning and implementation of change. The adolescent mental health crisis provides an opportunity for this effort.

Then, in Part V, this article describes a planning process for FDR based on a model of community planning for public health. It first briefly discusses sources of authority for a court to create a planning process,

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11. FAM. JUST. WORKING GRP. OF THE ACTION COMM. ON ACCESS TO JUST. IN CIV. & FAM. MATTERS, MEANINGFUL CHANGE FOR FAMILY JUSTICE: BEYOND WISE WORDS 3 (2013), https://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf [https://perma.cc/TW4H-3LZC].

12. *Id.*

including court rules and legislation. However authorized, the planning process requires judicial leadership in moving family courts that address separation and divorce toward becoming problem-solving courts. It requires a plan for stakeholder involvement and data collection and evaluation.

Part VI sets expectations of what FDR planning can accomplish by briefly describing exemplary planning processes conducted at different levels of government—national, state, and local.

This article concludes by sketching out how an FDR planning process might help the family court begin to address the problem of the mental health crisis for adolescents in cases of separation and divorce on the court's docket and in the community.

III. THE STATE OF FDR

Outside observers might be surprised to learn about the advanced state of FDR in modern family courts. Twenty-first-century family courts have incorporated myriad processes, programs, and services to assist parents in managing separation and divorce-related conflict. FDR encompasses an increasingly diverse and robust menu of preventative (parenting education);[13] collaborative (e.g., mediation[14] and collaborative law);[15] and evaluative (arbitration)[16] options. The FDR spectrum also includes several hybrid processes—e.g., parenting coordination,[17] early neutral evaluation,[18] and evaluative mediation[19]—that integrate prevention and collaboration with some combination of therapeutic, information-gathering, or evaluative strategies.

The common unifying goal of these disparate processes is to assist disputing parties in resolving differences via problem-solving negotiations and settlement, without resorting to litigation. The myriad

13. Salem et al., *supra* note 4, at 139.

14. FORREST S. MOSTEN, THE COMPLETE GUIDE TO MEDIATION: THE CUTTING-EDGE APPROACH TO FAMILY LAW PRACTICE 17 (1997).

15. FORREST S. MOSTEN & ADAM B. CORDOVER, BUILDING A SUCCESSFUL COLLABORATIVE FAMILY LAW PRACTICE 7 (2018).

16. CAROLYN MORAN ZACK, FAMILY LAW ARBITRATION: PRACTICE, PROCEDURE, AND FORMS 8-11 (2020).

17. *AFCC Parenting Coordination Task Force (2017-2019)*, ASS'N OF FAM. & CONCILIATION CTS., https://www.afccnet.org/Resource-Center/Center-for-Excellence-in-Family-Court-Practice/afcc-parenting-coordination-task-force-2017-2019 [https://perma.cc/ZP76-QJ2Y] (last visited Feb. 21, 2024).

18. Jordan Leigh Santeramo, Note, *Early Neutral Evaluation in Divorce Cases*, 23 FAM. CT. REV. 321, 325 (2004).

19. Dorothy J. Della Noce, *Evaluative Mediation: In Search of Practice Competencies*, 27 CONFLICT RESOL. Q. 193, 194 (2009).

processes available give planners for the future of FDR in a community much to choose from in planning for the future.

Why plan for the future of FDR? Litigation is beyond the emotional and economic capacity of most separating and divorcing parents and children—it costs too much, takes too long, and is too emotionally fraught for most parenting disputes.[20] Nonetheless, litigation is an indispensable dispute resolution option for some subset of cases. Court orders must be available to parents who are not, broadly speaking, rational actors—e.g., they are mentally ill, or addicted to drugs or alcohol. Court orders may be necessary to protect the safety of parents or children, compel compliance with obligations, and prevent fraud, and as an impasse breaker to resolve issues that the parents cannot resolve themselves. These functions require enforceable judicial orders generated by litigation procedures that meet standards of due process.

But dispute resolution through litigation tends to exacerbate conflict and is contrary to children's emotional needs for stability and to remain neutral between warring parents.[21] Litigation does little to support positive parenting as positions taken in court tend to emphasize the deficiencies of each parent rather than their strengths. Litigation-generated court orders are also hard to change as children's needs change. Courts are not appropriate arbitrators to decide whether a child should engage in an after-school gymnastics class or a new diet.[22] Those tasks should be for parents, even divorced or separated ones, working through their disputes with help from FDR to focus on their children's well-being and problem-solving.

A. FDR Promotes Positive Parental Support for Children in Conflict

The FDR community can be proud of what it has accomplished to date. It has demonstrated creativity and flexibility in devising processes to serve the needs of parents and children. Decades of research and experience establish that FDR benefits separating and divorcing parents, their children, the judiciary, and the community.

Part of the reason is that the conflict generated by litigation is at odds with children's needs for emotional stability while their lives are being reorganized by separation and divorce. Children of separation and divorce are at an increased risk for myriad emotional, behavioral, and

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20. *See* Rebecca Love Kourlis et al., *IAALS' Honoring Families Initiative: Courts and Communities Helping Families in Transition Arising from Separation and Divorce*, 51 FAM. CT. REV. 351, 354 (2013).

21. *See id.*

22. Miller v. Smith, 989 A.2d 537, 538-39 (Vt. 2009) (stating that a family court cannot police the child's recreational activities with non-custodial parent during visitation periods).

psychological problems; poorer academic performance; and higher rates of drug abuse, mental illness, and subsequent legal difficulties.[23] This research sends a clear message that the harms of ongoing parental conflict are a public health problem, and promoting the positive effects of parental cooperation through FDR is an effective way of addressing it.[24]

The level of conflict between parents is a critical factor in children's adjustment to separation and divorce. Reducing parental conflict enhances both parents' competence in parenting and their ability to look beyond their conflict to work together for the benefit of their children.[25]

FDR can reduce or prevent the instability and conflict that divorce and separation engender for many children by encouraging parents to see their common interests and keeping them focused on their children's needs. Furthermore, early management of conflict, if sustained, may be more likely to prevent future parental conflict. While FDR is not always successful in facilitating parental agreement, it sends an important message to parents and the community about their responsibilities to children and may ultimately appeal to better angels of parents' nature.

B. Parents Value FDR

Most parents view FDR in a very positive light. For example, parents who participated in comprehensive FDR services delivered by the interdisciplinary Center for Out-of-Court Divorce rated their experience as "highly favorable" with respect to its impact on their children (eighty-two percent), themselves (eighty-five percent), and their families (eighty-seven percent).[26] Parents' highest ratings were "based on their perceptions that the participation in Center services kept their children's interests protected, maintained concern for their children, and resulted in fewer co-parenting problems."[27]

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23. Paul R. Amato, *Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis*, 15 J. FAM. PSYCH. 355, 365 (2001); Alan Reifman et al., *Children of Divorce in the 1990s: A Meta-Analysis*, J. DIVORCE & REMARRIAGE, 2001, at 27, 32.

24. *See* Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice, and Shared Parenting*, 52 FAM. CT. REV. 152, 160 (2014); E. Mark Cummings et al., *Prospective Relations Between Family Conflict and Adolescent Maladjustment: Security in the Family System as a Mediating Process*, 43 J. ABNORMAL CHILD PSYCH. 503, 511, 513 (2015).

25. Helen T. Brantley et al., *Guidelines for the Practice of Parenting Coordination*, 67 J. AM. PSYCH. ASS'N 63, 64, 69-70 (2012); Melissa L. Sturge-Apple et al., *Interparental Violence, Maternal Emotional Unavailability and Children's Cortisol Functioning in Family Contexts*, 48 DEV. PSYCH. 237, 245-46 (2012).

26. *See* Andrew Schepard et al., *If We Build It, They Might Come: Bridging the Implementation Gap Between ADR Services and Separating and Divorcing Families*, 24 HARV. NEGOT. L. REV. 25, 54 (2018).

27. *Id.*

These outcomes are consistent with evaluations of other FDR processes, such as parent education programs and mediation. In their evaluation of parent education programs, parents—including those who are compelled to attend—overwhelmingly report they learn valuable new information, skills, and attitudes that help their children adjust to divorce and separation.[28] Evaluations of parent education programs in California conclude that "some cases settle simply by parents attending the program, and for those cases that do not resolve, the parties are in a much better position to take advantage of mediation after completing the parenting program."[29]

Parents in both private and court-connected mediation rate their mediation experience highly and view it as fair and helpful even when a settlement is not reached.[30] Similarly, as the Canadian Task Force quoted earlier noted, parents respond positively to FDR services—they are "widely experienced as 'user friendly' and participants tend to report high rates of satisfaction."[31] A cautionary note is warranted that satisfaction ratings for services do not necessarily equate to positive behavioral change. Many parents appreciate the attention and focus of an FDR process but ultimately may not change problematic co-parenting behaviors.

C. FDR Conserves Judicial Resources

FDR promotes efficient use of limited court and judicial resources. As discussed previously, litigation will always be needed as an option for some cases but is too expensive emotionally and economically for most. FDR allows judges to focus on cases that really need judicial intervention rather than those that can benefit from an FDR process. FDR diverts cases from a judge's docket, and the settlements that result reduce the taxpayers' expenses of divorce and separation-related litigation.[32]

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28. *See* Salem et al., *supra* note 4, at 136; Schepard, *supra* note 4, at 163-64; *see also* Pedro-Carroll et al., *supra* note 4, at 385-87.

29. Leonard Edwards, *Comments on the Miller Commission Report: A California Perspective*, 27 PACE L. REV. 627, 669 (2007).

30. *See id.* at 651-53; Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, 22 CONFLICT RESOL. Q. 3, 14 (2004); ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 62-63 (2004).

31. FAM. JUST. WORKING GRP. OF THE ACTION COMM. ON ACCESS TO JUST. IN CIV. & FAM. MATTERS, *supra* note 11, at 3.

32. Kourlis et al., *supra* note 20, at 354-56.

D. FDR Promotes Access to Justice

Family law litigants are suffering from an access to justice crisis that effectively shuts the door on legal representation for the poor and lower middle class, who constitute the great majority of self-represented divorcing and separating parents.[33] Lack of legal representation due to inability to pay legal fees erodes public confidence in the legal system and reinforces the belief that the wealthy are more likely to prevail in court.[34]

FDR helps to address access to justice challenges for litigants. The sad reality is that it is not feasible for the state to provide a lawyer to every divorcing or separating individual who cannot afford one. The poor have no constitutional right to representation in divorce cases, and the available funds for legal aid do not meet the need even for very low-income families.[35] Despite commendable efforts in the legal community to increase pro bono representation and civil legal aid, there will never be enough resources to assign free lawyers to every family litigant who needs one.[36]

FDR can fill some of the access to justice gap by providing legal information (as opposed to legal representation or legal advice) to self-represented parents. For example, a mediator who is a lawyer can provide legal information from a single neutral source to both parents about the general nature of a state's law governing divorce.[37] The mediator cannot, however, tell the parents how the governing law applies to them. The mediator can also give the parents the option to consult with separate lawyers, perhaps using unbundled (task-specific) legal services[38] to obtain advice and protect their separate interests if they wish. In some jurisdictions, lawyer-mediators draft marital settlement agreements.[39]

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33. Schepard et al., *supra* note 26, at 38-39.

34. Logan Cornett & Natalie Anne Knowlton, *Public Perspectives on Trust and Confidence in the Courts*, INST. FOR ADVANCEMENT AM. LEGAL SYS. (June 29, 2020), https://iaals.du.edu/publications/public-perspectives-trust-and-confidence-courts [https://perma.cc/59FA-N4L8].

35. *In re* Smiley, 330 N.E.2d 53, 55-57 (N.Y. 1975).

36. *See* COMM'N ON THE FUTURE OF LEGAL SERVS., AM. BAR ASS'N, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 11-12 (2016), https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/2016-fls-final-report.pdf [https://perma.cc/9H9G-H8RT]; *see also* James D. Abrams & Ann Hancock, *The Justice Gap and Pro Bono Legal*, COM. & BUS. LITIG., Winter 2017, at 22, 23-24.

37. MODEL STANDARDS OF PRAC. FOR FAM. & DIVORCE MEDIATION, STANDARD II (2012).

38. MOSTEN, *supra* note 14, at 376, 387.

39. Calvin Lee, *May Mediators Draft Settlement Agreements?*, 54 FAM. CT. REV. 501, 510 (2016).

Legal information that participants receive in FDR likely helps them make more informed decisions than if they are self-represented and not participating in FDR. It can also help them reach agreement without the time and expenses of outlay for attorneys in the litigation process. While FDR is not a substitute for representation by a lawyer who provides individualized legal advice and counsel, it at least orients parents to the governing legal framework and helps them make more informed decisions. Although it is not the same as legal representation, which is, regretfully, a privilege reserved for the relatively affluent, it is better than no legal information or services at all.

E. FDR Is Increasingly Accepted by the Legal Community

Lawyers and judges are the public's gatekeepers for the legal system. As Professor Leonard Riskin wrote in a seminal essay published in 1982: "The future of mediation in this country rests heavily upon the attitudes and involvement of the legal profession,"[40] an observation that is applicable to FDR generally. It is no secret that the introduction of FDR generated skepticism and opposition from many segments of the legal community out of economic self-interest and fear that FDR violated due process norms.[41]

These attitudes have evolved. Over time, judges and lawyers who have been exposed to FDR have become supporters of its use in appropriate cases, particularly when children are involved in a dispute.[42] Also, many lawyers have become FDR providers based on changes in lawyer ethics rules to allow them to serve as a third-party neutral.[43] Virtually every law school now includes FDR courses in its curriculum; alternative dispute resolution is also likely to be a topic for the NextGen bar examination which will debut in the near future.[44]

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40. Riskin, *supra* note 5, at 41.

41. Debra Berman & James Alfini, *Lawyer Colonization of Family Mediation: Consequences and Implications*, 95 MARQ. L. REV. 887, 895 (2012).

42. *See* Andrew Schepard, Kramer vs. Kramer *Revisited: A Comment on* the Miller Commission Report *and the Obligation of Divorce Lawyers for Parents to Discuss Alternative Dispute Resolution with Their Clients*, 27 PACE L. REV. 677, 682-83 (2007); Schepard et al., *supra* note 26, at 42-43.

43. *See* Schepard et al., *supra* note 26, at 43, 63-64.

44. Hemanth C. Gundavaram, *Reimagining the Bar Exam to Include Dispute Resolution: New Ways to Test Competency*, AM. BAR ASS'N (Sept. 19, 2022), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2022/september/reimagining-the-bar-exam-to-include-dispute-resolution [https://perma.cc/PDD4-YUAN].

IV. FDR'S CHALLENGES GOING FORWARD

FDR has benefited parents, children, and the public. The goal of the twenty-first-century FDR system should be to make those benefits better known, more widely available, and more effective in serving the best interests of children. All divorcing and separating parents should have access to appropriate, affordable, and quality FDR services. FDR, however, has serious Implementation Gap challenges to meet before this goal can be accomplished.

A. Voluntary Engagement in FDR Needs to Be Expanded

Parents' voluntary use of FDR lags behind the positive responses of parents to FDR once they have participated in it. Divorcing and separating families may not use FDR widely because it is not available in their communities, or they are not familiar with it, cannot afford it, or are reluctant to participate in it for fear of losing protection for their legal rights. Some parents may not use FDR for fear that it will waste their time and money, believing that settlement with an antagonistic ex-spouse is not possible. Some parents may fear that stepping away from direct lawyer representation will leave them more vulnerable to exploitation. Some may fear for their physical safety if they engage in FDR processes with a former partner when there is a history of intimate partner violence. Many express their skepticism about a system that relies on both parents' cooperation, honesty, and open sharing of resources, due to repeated experiences of being manipulated or undermined. They may distrust the other parent for reasons such as substance use problems, hostility, competitiveness, etc. And parents from diverse communities may have needs and fears that middle-class service providers may not understand. FDR use may be especially low in minority communities where distrust of the legal system is high.[45]

There is very little research on litigant consciousness of FDR for dispute resolution, but that which does exist suggests that they are not aware of its value.[46] With the exception of mandated court-connected services—admittedly, a substantial exception—one can speculate that FDR may be voluntarily utilized more by parents with resources (educational, literacy, financial, job flexibility, network of referrals) since finding the services may be difficult; they can be expensive; understanding what they entail can be a challenge; and participating in them may

45. *See* Jane C. Murphy & Jana B. Singer, *Moving Family Dispute Resolution from the Court System to the Community*, 75 MD. L. REV. ENDNOTES 9, 12 (2016).

46. Schepard et al., *supra* note 26, at 60.

require a leap of faith into the unknown. However, as mediation and parent education mandates in many jurisdictions demonstrate, parents who thought they would not benefit from the service found it to be useful and highly satisfactory, even when they participated only because they were required to do so.[47]

B. FDR Needs a Coherent Identity

FDR is an example of a whole being greater than the sum of its parts[48]—it functions better and differently as a whole, filling in gaps that are not evident by the separate components when they are considered in isolation from each other. Thinking piecemeal instead of systemically about FDR is a mistake that leads to service underutilization, financial waste, and unnecessary hardship to families.

Courts, policymakers, and stakeholders tend to think of FDR as separate programs and processes rather than as a coherent system. FDR's substantial progress has largely emerged from the ground up, in piecemeal fashion, on a service-by-service (and often jurisdiction-by-jurisdiction) basis rather than as a deliberate public policy or overarching strategy. Policymakers and program organizers view FDR processes such as mediation, parent education, and parenting coordination as separate entities rather than as a collective, integrated community response to the challenges families face arising from separation and divorce. Other less-known and used FDR hybrid processes, such as early neutral evaluation or mediation-arbitration, are often erroneously excluded from consideration when thinking about what programs could meet the needs of types of families (e.g., those involved in high levels of conflict and repetitive litigation despite initial parent education and mediation).

Moreover, it is not unusual for similar processes to be called by different names, for different jurisdictions to have different training and educational requirements for FDR providers, or for programs and processes to have different funding streams and payment mechanisms. In some communities, for example, mediation, parenting coordination, and collaborative law may be provided on a fee-for-service basis by private practitioners and parent education for a small fee by a nonprofit

47. Edwards, *supra* note 29, at 652 ("Mediation resolves contested cases much more quickly than the traditional legal process, and has more positive outcomes over longer periods of time for families. Evaluations also indicate that clients were satisfied with the mediation process.").

48. This phrase is attributed to Aristotle. ARISTOTLE, ARISTOTLE'S METAPHYSICS 152 (W.D. Ross ed., 1924); *see Who Said "The Whole Is Greater Than the Sum of the Parts?,"* SE SCHOLAR (June 6, 2019), https://se-scholar.com/se-blog/2017/6/23/who-said-the-whole-is-greater-than-the-sum-of-the-parts [https://perma.cc/PDD4-YUAN].

agency.[49] In others, mediation and parent education might be provided for free or at a low cost by a court-based agency.[50] While this diverse system has its advantages, it can also cause confusion among the public and potential stakeholders about the possibilities of creating new programs and utilizing old ones.

V. CREATING A PLANNING PROCESS

A robust planning process is a powerful way for a family court system to build on the success of FDR and develop solutions to the Implementation Gap. It also helps the court plan for new challenges, such as the adolescent mental health crisis, because a process for addressing the challenge does not have to be created from scratch.

A. Authority

A court system can informally create an FDR planning process on its own initiative. It can also codify its process in a court rule.[51]

Legislation can also encourage courts to develop a planning process. States might draw on a federal legislative model to inspire FDR planning.[52] In 1990, Congress passed the Civil Justice Reform Act ("the CJRA").[53] The CJRA required federal judicial districts to submit an alternative dispute resolution plan to the Judicial Conference of the United States. To assist in the preparation of the plans, the CJRA required each district to appoint a local advisory committee of attorneys, judges, corporate executives, academics, and community leaders.[54]

Congress did not require uniformity but rather required each district court to "devise and implement its own alternative dispute resolution program by local rule . . . to encourage and promote the use of alternative dispute resolution in its district."[55] Congress did not specify which alternative dispute resolution programs it wanted every district to adopt, hoping to encourage experimentation and diversity.[56] The result of the planning process each district engaged in was a wide and healthy array of alternative dispute resolution programs in different districts.

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49. *See* Murphy & Singer, *supra* note 45, at 13-14.

50. *See* Schmitz, *supra* note 3.

51. *See, e.g.*, OKLA. STAT. ANN. tit. 43, § 107.3 B(1)–(2) (West 2019).

52. *See, e.g.*, W. VA. CODE § 48-9-208(b) (2022).

53. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, §§ 101–06, 104 Stat. 5089, 5089–98.

54. *Id.* § 103(a).

55. 28 U.S.C. § 651(b).

56. John Maull, *ADR in the Federal Courts: Would Uniformity Be Better?*, 34 DUQ. L. REV. 245, 257-58 (1996).

B. Problem-Solving Judging and Judicial Leadership

However authorized, a sustainable and effective planning process requires sustained judicial leadership. The court has the prestige and influence to bring community stakeholders together to work collaboratively for the betterment of divorcing and separating families.

Judges are rarely thought of as innovators in judicial administration; rather, their job is to impartially decide the cases that come before them. The traditional judge's role was famously captured by Chief Justice John Roberts, who said at his confirmation hearing: "[I]t's my job to call balls and strikes and not to pitch or bat."[57] Chief Justice Roberts used the umpire analogy to highlight that judges must be above partisanship, keep order, only resolve problems that come before them and not reach out for new ones, and seek objectivity and neutrality in disputes which courts adjudicate.

There is, however, an alternative judicial philosophy that has taken root particularly in family courts—problem-solving courts organized and presided over by problem-solving-oriented judges. The late Chief Judge Judith S. Kaye of New York described the judiciary's leadership role[58] in creating change that benefits families and children in an address to the National Council of Juvenile and Family Court Judges:

> Judicial leadership is key for championing change to ensure that children and families are better, not worse, off for being in the courts. That may not sound like a remarkable discovery—of course we all want to make things better for children and families in the courts. But what I'm talking about goes to the very conception of the judge's role in the process.[59]

Problem-solving judging reframes traditional notions of a judge's role by focusing on the potentially positive intervention the courts can make in the lives of the people who come before it. As described on the New York State Court System's website:

> Problem-solving courts look to the underlying issues that bring people into the court system, and employ innovative approaches to address

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57. *Roberts: 'My Job Is to Call Balls and Strikes and Not to Pitch or Bat,'* CNN (Sept. 12, 2005, 4:58 PM), https://www.cnn.com/2005/POLITICS/09/12/roberts.statement/ [https://perma.cc/QU23-YJ74].

58. *See* Andrew Schepard, *Judith S. Kaye: A Chief Judge for Families and Children*, 55 FAM. L.Q. 239, 254 (2022).

59. Judith S. Kaye, *Strategies and Need for Systems Change: Improving Court Practice for the Millennium*, 38 FAM. & CONCILIATION CTS. REV. 159, 162 (2000); *see also* Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125, 129-30 (2004).

> those issues. Through intensive judicial monitoring, coordination with outside services, treatment where appropriate, the removal of barriers between courts and increased communication with stakeholders, these courts are able to change the way our system manages cases and responds to individuals, families and communities.[60]

The problem-solving judge can also draw on a baseball analogy—the general manager of a team. A general manager is responsible for the overall operation of the team. He or she analyzes operations, decides how to allocate the team budget, negotiates contracts, and makes trades that benefit the organization and its fans. The team general manager supports player development but also disciplines players and team personnel who violate team or league policy or otherwise need to be held accountable.

The problem-solving family court judge is the general manager of the case team for the families that come before the court. He or she supervises the parties and the professional team that supports them. The judge and the team gather resources in the community that might benefit the families and children and decide how those resources should be used to have a positive effect in individual cases. He or she manages individual cases to provide services to address the underlying problems that the family faces and ensures the parties participate in them.

Problem-solving judges also operate on a systems level. They plan and implement change in how affiliated services for the benefit of the children and families are delivered to cases on the docket. They make agreements for mutual aid with community agencies. They keep a constant eye out for how they can better deliver positive results for the parents and children who come before the court system.

Problem-solving courts have developed in a wide variety of subjects—drug abuse, mental illness, adoption, child protection. Many of them deeply affect families and children. As of September 2019, there are more than 3,100 problem-solving courts in the United States.[61] Problem-solving judging has gained wide acceptance in the legal and judicial communities and has been endorsed by the Conference of Chief Justices and Conference of State Court Administrators.[62]

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60. *Problem Solving Courts*, N.Y. STATE UNIFIED CT. SYS., http://ww2.nycourts.gov/COURTS/problem_solving/index.shtml [https://perma.cc/ZAA2-WY94] (last visited Feb. 21, 2024).

61. Paul A. Haskins, *Problem-Solving Courts: Fighting Crime by Treating the Offender*, NAT'L INST. OF JUST. (Sept. 26, 2019), https://nij.ojp.gov/topics/articles/problem-solving-courts-fighting-crime-treating-offender [https://perma.cc/R38V-UZC5].

62. *In Support of Problem-Solving Courts*, CONF. CHIEF JUSTS. & CONF. OF STATE CT. ADM'RS (Aug. 3, 2000), https://ccj.ncsc.org/__data/assets/pdf_file/0017/23462/08032000-in-support-of-problem-solving-courts.pdf [https://perma.cc/JJ4G-QEGL].

Comprehensive and sustained planning to address the problems of families and children takes comprehensive and sustained effort by problem-solving-oriented judges to lead the process. How many judges have the aptitude and passion for problem-solving work is an open question. But we have hope that more and more will do so and thus better the lives of the families that come before them.

C. An FDR Planning Process

Systematic planning for the future is an important feature of government (including court systems) and nonprofit and for-profit organizations. There are thus many possible labels to place on the planning process—for example, Dispute System Design[63] or Strategic Planning, or Strength, Weakness, Opportunity, and Threat ("SWOT") Analysis.[64] Whatever the name, the goal of the planning process is for policymakers and stakeholders to build support for FDR; assess what FDR services families currently have access to; and develop an integrated plan to refine, expand, and create access to them. That is the challenge the mental health crisis for adolescents poses to the family court planning system.

One way to illustrate what an FDR planning process might achieve and how it might be organized is by analogizing it to an established community-based planning process in public health: Mobilizing for Action Through Planning and Partnership ("MAPP").[65] The comparison between planning for public health and planning for FDR is appropriate. The adolescent mental health crisis is a major challenge to the public health of children, as are the challenges that separation and divorce more generally present to the community.[66]

1. Expected Benefits and Outcomes of the Planning Process

Applying experience with MAPP to FDR leads to reasonable speculation that an FDR planning process could result in the following benefits:

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63. Lisa Blomgren Amsler et al., *Christina Merchant and the State of Dispute System Design*, 33 CONFLICT RESOL. Q. S7, S13 (2015).

64. Will Kenton, *SWOT Analysis: How to with Table and Example*, INVESTOPEDIA, https://www.investopedia.com/terms/s/swot.asp [https://perma.cc/4KYH-QYR3] (June 19, 2023).

65. *Mobilizing for Action Through Planning and Partnerships (MAPP)*, NAT'L ASS'N CNTY. & CITY HEALTH OFFS., https://www.naccho.org/programs/public-health-infrastructure/performance-improvement/community-health-assessment/mapp [https://perma.cc/P972-XZFN] (last visited Feb. 21, 2024).

66. Salem et al., *supra* note 4, at 138-39; *see* Andrew Schepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective*, 32 FAM. L.Q. 95, 105-06 (1998).

- measurable improvements in the quality of and access to FDR services for families and children experiencing separation and divorce in the community;
- improved quality of family life post-separation and divorce;
- increased visibility of FDR within the community;
- community advocates for FDR and the judicial system;
- capacity to anticipate and manage change affecting FDR services;
- efficient integration and utilization of court and community (public and private sectors) services and resources; and
- stronger FDR infrastructure and leadership.

Stakeholders (e.g., mental health associations, bar associations, community agencies, domestic violence advocates, children's advocates, FDR professional organizations) that partner with the court system in the FDR planning process can expect to gain:

- increased recognition within the community and among peers;
- access to accurate and current data;
- improved focus on priorities;
- reduced duplication of services within a community;
- increased collaboration on projects and activities; and
- increased financial resources—data collected in a planning process have been used to acquire grants and government funding.

2. Organizing an FDR Planning Process

The nature and structure of the FDR planning process will inevitably vary across jurisdictions. In the U.S., development and application of family law statutes and doctrine is generally a state—not a federal—responsibility.[67] State family court systems to which FDR is often attached vary greatly in structure, priorities, and resources. Within states, family court systems, and thus FDR, are often locally administered and therefore may vary, county by county, court by court. The FDR planning process must be adjusted accordingly.

Despite jurisdictional differences, it is possible to outline the phases of a planning process for FDR, again by analogy to MAPP, that each jurisdiction can adapt to its own unique needs. Each phase has concrete goals to measure progress and ensure accountability of the planners.

67. Haaland v. Brackeen, 599 U.S. 255, 276 (2023) ("Domestic relations have traditionally been governed by state law . . . ."); ROBERT E. OLIPHANT & NANCY VER STEEGH, WORK OF THE FAMILY LAWYER 21 (5th ed. 2020) ("It is generally accurate to say that family law remains primarily the province of state law.").

Court systems and communities can adapt the phases to their individual circumstances.

i. Phase 1: Stakeholder and Partnership Development

In the first phase, the court system identifies who should be involved in the planning process and how the partnership will approach and organize the process.[68] Stakeholders should generally include the people and organizations knowledgeable about and affected by FDR. These stakeholders might include judges, lawyers, private and agency-based dispute resolution professionals, law and mental health professionals, medical associations, academics, social scientists, court administrators, domestic violence advocates, child advocates, fatherhood advocacy groups, self-represented and lawyer-represented litigants, and members of the public.

The size and composition of the planning committee will vary by community size, history, and goals. The most critical factors in the selection of individual members of the planning committee are that they come from different disciplines and have an open-minded commitment to shaping the legal process to benefit families and children. Everyone involved with the planning process should be able to commit the time necessary to participate effectively. They should agree with the vision and core values of the planning process. They should also indicate that they are willing to support new but well-thought-out solutions to existing challenges. One would bet that the problem will not be identifying stakeholder participants; rather, the problem will be keeping those invited to participate to a reasonable number.

ii. Phase 2: Vision[69]

The goal of this phase is for stakeholders to develop a shared statement of values and broad vision for FDR services in a community. The reason to do so is to help ensure that the planning committee evaluates proposals it considers by consistent criteria.

There are many possible values and goals for a vision statement. They vary in breadth and specificity. They might include: meeting the mental health needs of children who experience their parents' separation and divorce; referring families to appropriate community resources; reducing conflict and repetitive motions in court over children; increasing

68. *Section 13. MAPP: Mobilizing for Acton through Planning and Partnerships*, CMTY. TOOL BOX, https://ctb.ku.edu/en/table-of-contents/overview/models-for-community-health-and-development/mapp/main [https://perma.cc/K4SL-RNPS] (last visited Feb. 21, 2024).

69. *Id.*

compliance with parenting obligations such as parenting time and child support; increasing parents' ability to access FDR; maximizing self-determination for parties that participate in FDR; ensuring safety for vulnerable members of the community, such as survivors of domestic violence and child abuse; matching the needs of disputing parties with the most appropriate FDR process; collaborating between the court system and community-based service providers; incorporating technological innovation into the development of FDR programs; instituting continuing education for professionals; and continuing research and development of best practices.

All of these goals are important to achieve. Vision statements are, however, generally best if they are short and can be translated into goals and objectives with concrete activities and measurable outcomes or signposts of progress. The tendency to overload them with vague platitudes and unrealizable outcomes should be resisted. Vision statements can be amended over time as old challenges recede and new ones emerge.

iii. Phase 3: Assessments[70]

The assessment phase seeks answers to questions raised by the vision phase to develop a comprehensive picture of FDR in a community using both qualitative and quantitative methods. Several MAPP assessments are particularly relevant to a community-based FDR assessment.

The Community Themes and Strengths Assessment provides qualitative information on how communities perceive FDR programs. This process involves interviews of FDR users; service providers in court- and community-based agencies; adjunctive supports in community services (e.g., therapists and educators); judges; court staff; lawyers; and mediators.

The *Community Status Assessment* gathers quantitative data that helps plan and evaluate current FDR programs and services. A wide variety of data, depending on research capacity and need identified in the planning process, can be collected, including: (1) the number of separation and divorce-related cases; (2) the nature of disputes (e.g., parenting time or child support); (3) demographic data of participants including socioeconomic status and income levels; (4) prevalence of mental illness, drug abuse, or any other major concern in the case load (this assessment may be particularly helpful to address the adolescent mental health crisis as part of the planning process); (5) how families are

70. *Id.*

referred to FDR; (6) participant conflict levels (perhaps measured by repetitive litigation rates or self-reporting); (7) the number and sources of referrals; (8) the number of completed program elements (e.g., mediations, parent education, and custody evaluations); (9) settlement rates (both overall measures and process-by-process measures); (10) time to disposition of FDR versus traditional court models; and (11) resource costs and savings of FDR (e.g., money saved by diverting disputes to FDR). The list of potential outcomes is limitless, scaffolded by focus, financial and volunteer support, expertise, and time pressures.

The *Systems Assessment* analyzes how well partnerships involved in working with separating and divorcing parents complement and collaborate with each other. Questions to be addressed might include: Are courts and agencies referring appropriate parents to FDR and to each other? What information do they provide to each other to accompany referrals, and is it consistent? Are there appropriate agencies/professionals to refer parents who do not elect FDR processes for settling their disputes? And so on.

The *Forces of Change Assessment* is like a SWOT assessment and analyzes the positive and negative external forces that impact the promotion and protection of FDR in a community. Factors like the effect of the COVID-19 pandemic on how and when FDR gets used (e.g., online versus in-person parent education and mediation) would be analyzed in the *Forces of Changes Assessment*. So would the adolescent mental health crisis. Budget cuts for court-based FDR may be on the horizon, as might an influx of divorce cases, or domestic violence-related disputes. If an influx of immigrants into a community is projected, the family court should plan for it.

Qualitative and quantitative assessments like those suggested here take time and cost resources. The choice of what information to gather should be strategic; "what are we likely to learn from gathering this information that will benefit the planning process?" is a question that should be at the forefront of the planning committee's thinking in formulating a research agenda. Students in local graduate schools of psychology, social work, and public policy are often looking for suitable thesis projects for which assessments required by the planning process are ideal candidates.

iv. Phase 4: Strategic Issues[71]

This phase uses the information gathered from the assessments to determine the strategic issues a community must address to reach its vision for FDR. For example, assume that after assessment, the planners believe mediation benefits separating and divorcing parents and their children. The planners review data showing that parents do not utilize available providers to the extent expected. Data also indicates that some parents do not know or understand what mediation is, and still others fear that they will lose legal rights by participating in mediation. The question that planners then face in this phase is what strategy to use to achieve their goal. What are their available means? A public education campaign, parent education programs, a requirement that lawyers discuss mediation with clients, a local rule mandating mediation orientation, developing resources in different languages, demonstrating judicial support for the FDR process, and endorsements of FDR by community opinion leaders are just some of the possible approaches to increasing usage of mediation.

v. Phase 5: Goals and Strategies[72]

This phase involves specifying goals and measurable objectives for each of the strategic issues identified in the previous phase. The planners might, for example, establish a goal of universal participation by parents in parent education programs of a particular type and length. In this stage the planners would develop a strategy for meeting that goal, such as establishing a local court rule mandating parent participation, or the selection of a nonprofit agency to coordinate or directly deliver education services throughout the jurisdiction or both. Planners might also specify measures (e.g., referrals to mediation or number of disputes processed) by which to assess how effectively the strategy is being implemented.

vi. Phase 6: Action[73]

This phase requires implementation and evaluation of a community's FDR plan. Implementation requires a staffing plan, which may consist of hires and volunteers. A time for startup (typically about six months) is then used in a process evaluation to reconsider what is working or not, what can be refined, what should be discontinued, and the

71. *Id.*
72. *Id.*
73. *Id.*

services provided. The evaluation should begin concurrently with implementation. The start date and plans for a new educational program would, for example, be announced to the community after outreach to a local university occurs and an evaluator is secured. Evaluation is costly, so beginning with a staged plan that increases in complexity may be needed if funding is not available at the start-up phase. Many stakeholders will be interested in being part of the evaluation and find the process fascinating. This involvement solidifies community buy-in and adds gravitas to any approach to funders.

VI. FDR PLANNING: NATIONAL, STATE, AND LOCAL EXAMPLES

Skeptics might ask whether engaging in a complex planning process is a valuable investment of resources in a time of budget shortages and overworked judicial and administrative personnel. Will it result in significant improvements to the way families experiencing separation and divorce are treated in court?

Separation and divorce are a source of great challenges to the parents, children, and court systems in a community. Conditions like the mental health crisis facing adolescents only complicate a complex problem further. Planning is a long-term investment in the continuing improvement of a family court's ability to meet the needs of families and children. It can lay the groundwork for significant change. Brief descriptions of planning examples by national, state, and local government illustrate the successes that comprehensive planning can achieve.

A. National: The Australian Family Relationship Centres

Australia developed a national network of government-supported Family Relationship Centres ("FRCs") to provide information, counseling services, advice, and mediation for parenting disputes.[74] Their rollout was the result of significant consultation and planning by the Centres and the government.

The FRCs are a community/public/private partnership—community centers enabled by federal legislation and publicly funded but privately operated. They offer a range of services, including counseling and education (both legal and mental health-oriented) depending upon location

74. AUSTL. GOV'T ATT'Y-GEN.'S DEP'T, OPERATIONAL FRAMEWORK FOR FAMILY RELATIONSHIP CENTRES 16, 18 (2019), https://www.ag.gov.au/sites/default/files/2020-03/Operational-Framework-for-Family-Relationship-Centres.pdf [https://perma.cc/Y58X-VEWF].

and need, but the primary service is free mediation (for a limited number of hours) for families.[75]

The FRCs are housed away from the courthouse to help participants distinguish what happens there from what happens in the courtroom. Families that use FRC services need not have filed for divorce, they need not be married, and they need not have filed papers in court; they can be grandparents as well as parents. If parties want to pursue court action, Australia mandates (with exceptions for certain classes of cases such as those involving child abuse or domestic violence) that a parent provide a written certificate from a registered FDR provider that the parents tried mediation before the court action is commenced.[76]

According to Professor Patrick Parkinson, between 2005 to 2010, services provided by FRCs resulted in a thirty-two-percent reduction in court filings in cases about children.[77] Parkinson also concludes that FRCs have provided services to people who otherwise may not have been able to afford an attorney or counseling services.[78] The overall satisfaction rating for people who went to an FRC was seventy percent,[79] which is particularly noteworthy because many of these parents have mental health, addiction, or high-conflict issues prevalent in their relationships. These problems tend to undermine client satisfaction with and success of programs and interventions.

B. State: Oregon Statewide Family Law Advisory Committee

The Oregon Statewide Family Law Advisory Committee ("SFLAC")[80] is a fifteen-to-eighteen-member panel of judges, trial court

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75. CATHERINE CARUANA & ROBYN PARKER, EMBEDDING RESEARCH IN PRACTICE: RESEARCH WITHIN FAMILY RELATIONSHIP CENTRES IN AUSTRALIA 3, 11 (2009), https://aifs.gov.au/resources/policy-and-practice-papers/embedding-research-practice-research-within-family#background [https://perma.cc/Y58X-VEWF].

76. *Family Dispute Resolution*, AUSTL. GOV'T ATT'Y-GEN.'S DEP'T, https://www.ag.gov.au/families-and-marriage/families/family-dispute-resolution [https://perma.cc/JQH3-H45R] (last visited Feb. 21, 2024).

77. Patrick Parkinson, *The Idea of Family Relationship Centres in Australia*, 51 FAM. CT. REV. 195, 208 (2013).

78. *Id.* at 209.

79. *See* Lawrie Moloney et al., *Evaluating the Work of Australia's Family Relationship Centres: Evidence from the First 5 Years*, 51 FAM. CT. REV. 234, 243 (2013); Parkinson, *supra* note 77, at 198.

80. The description and history of SFLAC that follows is drawn from material found on the SFLAC entry on the Oregon Judicial Department website. *Oregon Statewide Family Law Advisory Committee (SFLAC) Recommendations for Oregon Courts: Information for Parents Sharing Custody or Parenting Time of Children During the COVID-19 Pandemic*, STATE FAM. L. ADVISORY COMM., https://www.courts.oregon.gov/programs/family/sflac/pages/default.aspx [https://perma.cc/AKB5-2ZVD] (last visited Feb. 21, 2024). Information about its current operations and projects can be found in the STATEWIDE FAM. L. ADVISORY COMM. REP. (2023).

administrators, mediators, evaluators, attorneys, family court service providers, and representatives from various state agencies. It was created as a mechanism for the state judiciary to engage in long-term planning to meet the needs of family court litigants.[81] The Chief Justice of the Oregon Supreme Court appoints SFLAC members to advise the State Court Administrator on family law issues in the courts. The planning takes place on a state and local level and is generated by collaborative envisioning of dispute resolution for separation and divorce. Since its creation, SFLAC has been a key factor in "[f]oster[ing] the development of enhanced services to families involved in proceedings before the court."[82]

SFLAC's work is carried on by focused subcommittees addressing topics like parenting involvement, domestic violence, mediation services, education, data, and a "futures" subcommittee. SFLAC sponsors an annual conference and is in regular communication with the state legislature. Through these mechanisms SFLAC has facilitated continuous development of FDR services for separating and divorcing families as well as responses to new challenges. Some recent outcomes of SFLAC planning which may not be traditionally considered FDR include:

- The Informal Domestic Relations Trial ("IDRT"), a process designed for unrepresented litigants which allows parties to choose a format where they speak directly to the judge with no direct or cross-examination (the judge does the questioning). Non-party witnesses are limited to experts, traditional rules of evidence are waived, and all exhibits offered by the parties are admitted. IDRT cases are docketed promptly, and decisions are usually rendered on the day of the hearing.[83]
- Recommending changes to family court procedures necessitated by the COVID-19 pandemic, including treating remote access hearings as an opportunity to improve access to justice and use new procedures. SFLAC also recommended that remote access be the default setting for most family law legal proceedings

81. OR. REV. STAT. § 3.436(1) (2001) (stating that the Chief Justice of the Oregon Supreme Court may appoint SFLAC to help the State Court Administrator "identify[] family law issues that need to be addressed in the future").

82. OR. REV. STAT. § 3.438(4)(a)(D) (1997).

83. William J. Howe III & Jeffrey E. Hall, *Oregon's Informal Domestic Relations Trial: A New Tool to Efficiently and Fairly Manage Family Court Trials*, 55 FAM. CT. REV. 70, 73-74 (2017).

going forward and that court rules and training procedures be adapted to this new platform.[84]

C. Local: Hampshire County Court, Massachusetts

The Family Resolutions Specialty Court ("FRSC") draws on social science research to offer a novel legal process at the local level.[85] Established in the Massachusetts Hampshire County Judicial District, FRSC derived its program emphasis from empirical data showing the utility and efficacy of Australia's Less Adversarial Trial[86] and the Institute for the Advancement of the American Legal System's ("IAALS") Center for Out-of-Court Divorce.[87]

FRSC focuses on four tenets: self-expression/self-determination; communication; informality; and a focus on needs, not rights.[88] By providing an efficient and child-focused service, the program aims to serve all communities of parents, including but not limited to the harder-to-reach group of unmarried, low-income, and less educated parents who utilize the family court system.

The FRSC advisory committee draws on local strengths: professionals from nonprofit agencies, government, higher education, courts, private law, dispute resolution, and mental health work side by side. This committee created a broad-based buy-in, including volunteer roles across the community, making the project sustainable despite limited community resources.

An interdisciplinary team is appointed as specialized support to serve the family during the process of separation and divorce. The family is guided through the process—which includes a combination of mediation, community resource referrals, case conferences, and team meetings—all of which emphasize the needs of their children, the importance of collaboration, and co-parenting. While the judge maintains ultimate decision-making authority, the judge is also involved throughout the process in ways that support the values and tenets of the specialty court.

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84. Memorandum from the Statewide Fam. L. Advisory Comm. to C.J. Martha Walters et al. 1-5 (Sept. 1, 2020) (on file with the author).

85. *See Family Resolutions Specialty Court*, COMMONWEALTH OF MASS., https://www.mass.gov/info-details/family-resolutions-specialty-court [https://perma.cc/CMB9-ZT8J] (last visited Feb. 21, 2024).

86. *See* Jennifer E. McIntosh et al., *Evidence of a Different Nature: The Child-Responsive and Less Adversarial Initiatives of the Family Court of Australia*, 46 FAM. CT. REV. 125, 127 (2008).

87. *See* Schepard et al., *supra* note 26, at 29.

88. COMMONWEALTH OF MASS., FAMILY RESOLUTIONS SPECIALTY COURT: JUST THE BASICS 1 (2021), https://www.mass.gov/doc/family-resolutions-specialty-court-just-the-basics/download [https://perma.cc/2NSH-4G6Z].

VII. CONCLUSION: FAMILY COURT PLANNING FOR THE ADOLESCENT MENTAL HEALTH CRISIS IN SEPARATION AND DIVORCE

A brief sketch of how a planning process can help the family court better meet the mental health needs of adolescents from separating and divorcing families—the problem that began this article—is an appropriate way to conclude it. The process might unfold as follows.

A. Phase 1: Stakeholder and Partnership Development

If the court has not already created a planning committee, the adolescent mental health crisis would be a good opportunity to do so. Assume, however, that the court has previously created a planning committee consisting of stakeholders including judges, mediators, parent educators, lawyers, academics, child advocates, and leaders of the local mental health and physical health medical communities. There has been a meeting to review what the family court's FDR services are and how they might be improved.

The Chief Judge has now asked the planning committee to put improvements in the treatment of adolescents with mental health concerns at the top of the planning committee's agenda. The planning committee then added a representative of the local board of education, as schools are a primary source of mental health treatment and referrals for adolescents.

B. Phase 2: Vision

The Chief Judge did not provide great specificity of objectives for the adolescent mental health initiative he or she asks the planning committee to consider. It is up to the planning committee to define the objectives and methods of the initiative. The objectives in the vision statement should be able to lead to potentially measurable outcomes. Potential objectives might include:

- The court—including mediators, educators, and parenting evaluators—should be able to incorporate expertise in adolescent mental health in separation and divorce cases raising those concerns.
- Parents of adolescents experiencing conflict due to separation and divorce should be educated about potential mental health concerns that may result and how to address them.
- The court should have appropriate referral sources for adolescent mental health services for cases presenting such issues.
- The court should be seen by the public as part of a community network of services available to help meet the mental health

needs of adolescents in appropriate circumstances, especially when parents are in serious conflict.

C. Phase 3: Assessments

The planning committee will formulate a plan to gather qualitative and quantitative data relevant to the mental health crisis facing adolescents in separation and divorce cases. Some measures might focus on the impact of the problem on the court's docket. The planning committee might conduct research, for example, on how many cases on the court's separation and divorce docket (including those in mediation) involve serious adolescent mental health concerns (e.g., threats of suicide, drug use, shoplifting, or precipitous educational decline) and what is being done to address them (e.g., mediation, parenting evaluation, treatment referrals, follow-up of treatment effectiveness). Are there particular groups of adolescents (e.g., members of minority groups, LGBTQ+) raising mental health concerns who appear most frequently on the court's docket?

On the qualitative side, planners can conduct interviews with judges, lawyers, lawyers for children, parenting evaluators, mediators, parent educators, school officials, mental health association leaders, other community leaders, and others about how well the court is responding to the mental health needs of adolescents and what improvements can be made. All evaluation research must, of course, be conducted in a manner consistent with the court's guidelines for maintaining confidentiality of case information.

The planning committee can identify community resources for adolescent mental health that judges, mediators, and parent educators could refer affected adolescents to. It can assess how well the court is linked to the hospitals and clinics in the schools and community and how those links might be improved.

The planning committee can also survey what other family courts are doing to address adolescent mental health issues on their dockets by sending members to observe those courts and attending conferences where they describe their operations.

D. Phases 4, 5, and 6: Strategic Issues, Goals and Strategies, and Implementation

The planning committee is likely to conclude that the separation and divorce docket needs an infusion of expertise and resources to better address adolescent mental health needs. The planning committee will "brainstorm" ideas about how to achieve that goal and then test their

feasibility for implementation. What ideas are feasible and which are priorities for implementation will depend on a wide variety of factors specific to the court and community, including what services already exist and available funding for new ones (which is always hard to come by).

Ideas to consider might include:

- Organizing continuing education programs by experts on adolescent mental health and the impact of separation and divorce for family court judges, mediators, court evaluators, and parent educators.
- Sponsoring educational programs for other family court system stakeholders—lawyers, mental health professionals, lawyers for children, and parenting evaluators.
- Assigning cases involving adolescent mental health issues to specially trained judges, evaluators, and mediators.
- Creating a "problem-solving court" for separation and divorce cases raising adolescent mental health concerns.
- Developing protocols for when adolescents should be involved in the dispute resolution process, including being interviewed by a judge or a parenting evaluator and participating in FDR.
- Incorporating a segment on the risks to adolescent mental health of parental conflict in the required parent education program for separating and divorcing parents.
- Planning a public service information campaign on the problem of adolescent mental health and separation and divorce and the role of the family court in addressing the problem.
- Creating information-gathering and sharing protocols for adolescents whose mental health is an issue in separation and divorce cases (e.g., determining when and how courts should get information from the adolescent's physical health physician or mental health counselor, and how reporting back to the court on the adolescent's progress should occur).[89]
- Creating a youth advisory committee to the family court to provide input on how best to address the adolescent mental health crisis (and any other important subject).

The planning committee should evaluate these proposals and others for consistency with the vision statement, operational feasibility,

89. *See* Lyn R. Greenberg et al., *Managing Children's and Adolescents' Medical Complaints Amid Parent Conflict: Strategies and Tools for Professionals*, 61 FAM. CT. REV. 522, 528-29 (2023).

duplication of services from other resources, and cost. A critical point is that there is no single silver bullet to alleviate the crisis in adolescent mental health or the pain of separation and divorce for children that families bring to the family court. Nor can a planning committee make the funds needed to implement its recommendations appear.

But what a planning committee can do, however, is create an agenda for positive change and influential supporters for it. The planning committee's deliberations may result in new partnerships between the court and stakeholders. Stakeholders may, for example, support increased budget requests by the court to the legislature for adolescent mental health programs. Or stakeholders may support grant requests to key funders for similar purposes.

Earlier, this article analogized family court judges with a problem-solving orientation toward cases and judicial administration to the general manager of a baseball team. It concludes by invoking a saying attributed to one of the greatest general managers of all times. Branch Rickey, the general manager of the Brooklyn Dodgers who signed Jackie Robinson and built the first minor league farm system, once famously said: "Luck is the residue of design."[90] The family court is more likely to seize opportunities to better serve the public and address challenges if it has a well-designed FDR planning process. Addressing the adolescent mental health crisis fits the planning process well. It results in the court having a plan for collaborative progress toward goals that benefit separating and divorcing families, and a platform to incorporate new concerns into established programs and to create new programs that fit the needs of parents, children, courts, and the community.

90. Scott Turman, *Luck Is the Residue of Design*, SCOTT TURMAN (Apr. 13, 2020, 2:47 PM), https://scottturman.com/luck-is-the-residue-of-design [https://perma.cc/83S9-2YPB].