

# Adverse Childhood Experiences and COVID-19: Implications for Family Courts and Legal Professionals

by

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What are the implications for family lawyers and family justice courts of the growing body of research about childhood adversity, often summarized as adverse childhood experiences or ACEs, and their impacts on child development and adult health and well-being?<sup>1</sup> In a 2018 article in this journal, Dr. Heather Forkey incisively described the biological mechanisms that translate the experience of childhood abuse and neglect into delayed child development and health and behavioral issues for children and adults.<sup>2</sup> In other legal and social science literature, articles have probed the impact on children of potentially traumatic events like interpersonal violence and family dysfunction created by separation or divorce of parents, addiction, and mental health disorders.<sup>3</sup>

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<sup>1</sup> The texts and articles cited in this paper are a small selection of the available literature but are intended to provide readers with a foundation for further and more precise use in family matters. For the seminal article on ACEs, see Vincent J. Felitti et al., *Relationship of Child Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 AM. J. PREVENTIVE MED. 245 (1998).

<sup>2</sup> Heather C. Forkey, *Children Exposed to Abuse and Neglect: The Effects of Trauma on the Body and Brain*, 30 J. AM. ACAD. MATRIM. LAW. 307, 311 (2018).

<sup>3</sup> For a selection of the literature, see Namkee G. Choi, *Adverse Childhood Experiences and Suicide Attempts Among Those with Mental and Substance Use Disorders*, 69 CHILD ABUSE & NEGLECT 252 (2017); Allen R. De Jong, *Domestic Violence, Children, and Toxic Stress*, 22 WIDENER L. REV. 201 (2016); Renee DeBoard-Lucas et al., *Trauma-Informed, Evidence-Based Recommendations for Advocates Working with Children Exposed to Intimate Part-*

A key theme reflected in extensive research over the past twenty years is that toxic stress – sustained or chronic stress in the absence of strong and consistent adult and environmental support – can disrupt developing brain architecture and bodily systems.<sup>4</sup> Adverse events for children increase the likelihood of toxic stress and the potential for behavioral and learning problems, depression, schizophrenia, and attention deficit hyperactivity disorders (ADHD), as well as physical health conditions such as asthma.<sup>5</sup>

This article builds on these themes but addresses research unforeseen in 2016 and germane to this volume of the *Journal*: the COVID-19 pandemic and its impact on family law and family court systems.<sup>6</sup> Is COVID-19 (and its current and future variants) a new form of adversity as a result of the stressors it has induced for families and its impact on social and community support systems?<sup>7</sup> For example, what does it mean to the resiliencies

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*ner Violence*, 32 *CHILD L. PRAC.* 136 (2013); Ilma Jahic, et al., *Adverse Childhood Experiences and Forensic Typologies: Getting Specific About Trauma Among Institutionalized Youth*, 18 *INT'L J. ENVTL. RES. & PUB. HEALTH* 11307 (2021).

<sup>4</sup> NATIONAL SCIENTIFIC COUNCIL ON THE DEVELOPING CHILD, *Excessive Stress Disrupts the Architecture of the Developing Brain: Working Paper No. 3, Updated edition* (2005/2014), <https://developingchild.harvard.edu/resources/wp3/>.

<sup>5</sup> Gouqing Yang, et al., *The Effect and Mechanism of Adverse Childhood Experience on Suicide Ideation in Young Cancer Patients During Coronavirus Disease 2019 (COVID-19) Pandemic*, 13 *RISK MGMT. & HEALTHCARE POL'Y* 1293, 1294 (2020).

<sup>6</sup> See CHILDREN AND COVID-19: STATE DATA REPORT, A JOINT REPORT FROM THE AMERICAN ACADEMY OF PEDIATRICS AND THE CHILDREN'S HOSPITAL ASSOCIATION, SUMMARY OF PUBLICLY REPORTED DATA FROM 49 STATES, NYC, DC, PR, AND GU (Apr. 29, 2021), [https://downloads.aap.org/AAP/PDF/AAP and CHA - Children and COVID-19 State Data Report 9.30 FINAL.pdf](https://downloads.aap.org/AAP/PDF/AAP%20and%20CHA%20-%20Children%20and%20COVID-19%20State%20Data%20Report%209.30%20FINAL.pdf). (“As of September 30, nearly 5.9 million children have tested positive for COVID-19 since the onset of the pandemic. The number of new child COVID cases remains exceptionally high. Over 173,000 cases were added the past week, with nearly 850,000 child cases added over the past 4 weeks.”); Betty Pfefferbaum & Carol S. North, *Mental Health and the Covid-19 Pandemic*, 383 *NEW ENG. J. MED.* 510, 512 (2020) (“The Covid-19 pandemic has alarming implications for individual and collective health and emotional and social functioning.”).

<sup>7</sup> See Michelle A. McManus & Emma Ball, *COVID-19 Should Be Considered an Adverse Childhood Experience (ACE)*, 5 *J. COMMUNITY SAFETY &*

and risks to children of the loss of in-school days, food programs, guidance counseling, mental and nursing services, extracurricular opportunities, learning and behavioral disability programs, many social connections and networks, and other aspects of family supports that may buffer children from toxic stress?<sup>8</sup>

There is, however, another potential variable that warrants study in terms of children and ACEs. Did the shutting down of family courts<sup>9</sup> in the United States remove another buffer or shock absorber (as futurists argue)<sup>10</sup> and increase the risk that children, millions of whom have two or more homes and are subject to court orders, would lose needed protections?<sup>11</sup> What hap-

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WELL-BEING 164 (2020); Lee M. Sanders, *Is COVID-19 an Adverse Childhood Experience (ACE): Implications for Screening for Primary Care*, 222 J. PEDIATRICS 4 (2020).

<sup>8</sup> Eileen K. Fry-Bowers, *Children Are at Risk from COVID-19*, 53 J. PEDIATRIC NURSING A10 (2020) (“The unprecedented disruption to children’s education and subsequent move to remote learning amplifies existing disparities and inequities in the U.S. education system. While even ‘well off’ families may be challenged by homeschooling, low-income children and children of color are most disadvantaged.”).

<sup>9</sup> The argument as to the “good” or “bad” of the adversarial systems is beyond this paper. Also beyond the scope of the paper are the implications of COVID-19 to burnout and trauma for professionals working in primary care or schools to court systems. See Stacey Litam et al., *Stress and Resilience Among Professional Counselors During the COVID-19 Pandemic*, 99 J. COUNSELING & DEV. 384 (2021); Rebecca M. Stahl, *Responding Effectively to Trauma Manifestations in Child Welfare Cases*, 58 FAM. CT. REV. 920 (2020).

<sup>10</sup> In the famous book *Future Shock* (1984), Alvin Toffler “offered a futurist’s appraisal of war and peace, family and foe, social growth and cultural stress. Unlike a fortune teller who only needs the spirits in the room to make a prediction, a futurist by definition gathers contemporaneous scientific, economic, technological, philosophical, religious, and cultural data to formulate patterns from which to predict the “adaptive range” of a system: whether political, societal, or corporate.” See also Dana E. Prescott, *The Guardian ad Litem in Custody and Conflict Cases: Investigator, Champion, and Referee*, 22 U. ARK. LITTLE ROCK L. REV. 529, 530-31 (1999) (“Toffler admonishes us . . . to exercise care when embarking on a path that tries to predict ‘facts’ in a time of the ‘greatly accelerated rate of change in society.’”).

<sup>11</sup> COURT STATISTICS PROJECT, STATE COURT CASELOAD DIGEST: 2018 DATA, [https://www.courtstatistics.org/\\_data/assets/pdf\\_file/0014/40820/2018-Digest.pdf](https://www.courtstatistics.org/_data/assets/pdf_file/0014/40820/2018-Digest.pdf) 11 (2020) (“Domestic Relations (DR) cases account for a little more than 5.5 percent of all trial court cases nationally or about 12 percent of the non-Traffic caseload. DR includes divorce, civil protection orders (CPO), child support, custody, paternity, adoption, and other domestic issues. The Domestic

pens when deeply embedded institutional structures, like the courts in the United States, temporarily disappear and parents have to manage parenting plans and modifications themselves?

Beyond COVID and its social and health implications, this article expands the understanding of childhood adversity beyond abuse, neglect, and domestic violence by setting it in the context of the social determinants of health and positive childhood experiences, coping skills, and resilience. Increased understanding of childhood adversity and protections against its detrimental effects should inform family lawyers and courts – and through them, parents in litigation – about the impact of conflict and stress on children and potential ways to buffer that impact.<sup>12</sup> This article also focuses attention on trauma-informed legal practice as one response by legal professionals, including the effective employment of forensic experts offering an opinion on family dynamics and interventions.<sup>13</sup>

A deeper understanding of childhood adversity suggests a need to carefully consider how forensic mental health profession-

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Relations caseload peaked in 2010 at about 5.9 million cases, but by 2018 had declined by over 1.1 million cases.”).

<sup>12</sup> See *L.M.L. v. H.T.N.*, 68 N.Y.S.3d 379 n.6 (N.Y. Sup. Ct. 2017) (“Recent research by Kaiser Permanente and the Centers for Disease Control and Prevention (CDC) strongly implicates childhood traumas, or ‘adverse childhood experiences’ (ACEs), in the ten leading causes of death in the United States. ACEs include physical violence and neglect, sexual abuse, and emotional and psychological trauma. ACEs are associated with a staggering number of adult health risk behaviors, psychosocial and substance abuse problems, and diseases. History may well show that the discovery of the impact of ACEs on noninfectious causes of death was as powerful and revolutionary an insight as Louis Pasteur’s once controversial theory that germs cause infectious disease.”).

<sup>13</sup> See Christopher Edward Branson et al., *Trauma-Informed Juvenile Justice Systems: A Systematic Review of Definitions and Core Components*, 9 PSYCHOL. TRAUMA: THEORY, RES., PRAC., & POL’Y 635 (2017) (“The negative impact of trauma within juvenile justice goes beyond youth offenders. It is increasingly recognized that front-line justice system professionals are frequently exposed to traumatic stressors in the line of duty, including witnessing or experiencing violence and hearing details of trauma experienced by crime victims or youth offenders”); Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359, 369 (2015) (“Providing trauma-informed services requires all the staff of an organization to understand the effects of trauma on the people being served, so that all interactions with the organization reduce the possibility of retraumatization and are consistent with the process of recovery.”).

als, employed by lawyers, may include this body of research through testing and evaluation. An abstract understanding of ACEs is certainly a body of knowledge worth study by legal professionals. The greater challenge is accurately weaving that knowledge into the best interests' standards for child custody to inform judicial decision-making and legal practice. Clients do not live on a test sheet but in actual social environments subject to analysis and intervention.

COVID has highlighted, rather abruptly, an already existing cluster of challenges arising from childhood adversity for family systems and for judicial systems. This article provides an analytic framework for legal professionals grounded in the research concerning adverse childhood experiences. A more precise and deeper understanding of the household and contextual factors that create or buffer against toxic stress enables a more comprehensive approach to identifying and implementing interventions for children that are not "one-size-fits-all." This article also dispels some misunderstandings about ACEs that have developed as ACE trainings have expanded to a shorthand means for forensically or judicially explaining or mitigating behaviors.<sup>14</sup>

In Section I we describe and connect the two, largely independent lines of research about childhood adversity and its impacts – the seminal CDC-Kaiser Permanente study of ACEs<sup>15</sup> and the growing body of neuroscience research about toxic stress. Section II broadens the frame of reference from household sources of adversity to the wider social determinants that shape population health. Adversity must be balanced against positive experiences and protective factors that prevent or help remediate the effects of adversity, the subject of Section III which describes those positive experiences and their impact. Section IV briefly examines the COVID-19 pandemic as a source of adversity in the context of ACEs and the social determinants of

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<sup>14</sup> See *United States v. D.W.*, 198 F. Supp. 3d 18, 39 (E.D.N.Y. 2016) ("Dr. Krueger observed that defendant 'has an extreme history of adverse childhood experiences with his ACE [Adverse Childhood Experiences] score of 9 out of 10 being the highest I have encountered in my career.'"); *Joy B. v. Everett B.*, 451 P.3d 365, 369 (Alaska 2019) ("Hay evaluated Everett using a variety of testing techniques, including a 'Behavior Inventories' assessment, an Adverse Childhood Experiences Study questionnaire, and an Ontario Domestic Abuse Risk Assessment.").

<sup>15</sup> Felitti et al., *supra* note 1.

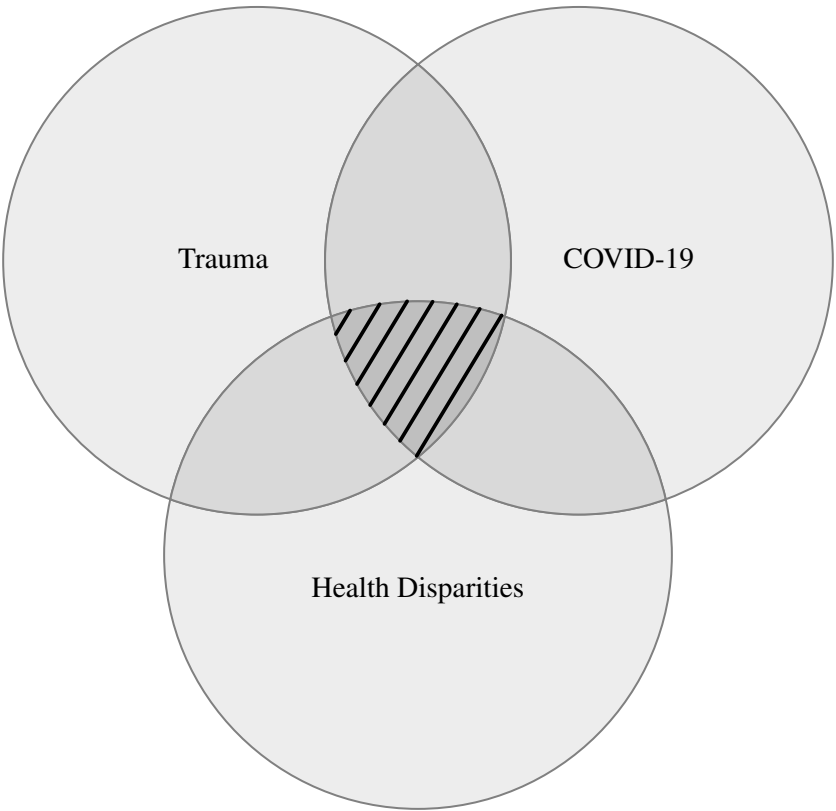
health. Section V reflects on the implications of the research about adverse and positive experiences and the broader social determinants for family lawyering and courts. In particular, it focuses on educating parents about the potential impacts their conflicts may have on their children and recognizing that clients themselves may have experienced toxic stress. Section VI concludes the article.

## **I. The Study of Childhood Adversity**

The study of childhood adversity has proceeded along two, almost independent paths. One is the seminal study of Adverse Childhood Experiences and the hundreds, if not thousands, of research articles it spawned internationally with a related line of research focusing on household chaos and its impact on children. The second has been the development of the biology and neuroscience of stress and the impact of toxic stress on child development and health over lifespans. Below is a Venn diagram which may be helpful for thinking about this analysis. The area of intersection below may be darker or lighter depending upon resilience and coping skills within the family system and the child, as well as external community resources such as housing, stable schools, and a safe neighborhood. What matters in practice is that these strengths and limitations are not static but always fall on a continuum that requires careful study and analysis and not a cookie cutter approach to this research. See Figure 1.<sup>16</sup>

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<sup>16</sup> This figure is from Stan Sonu et al., *The Intersection and Dynamics Between COVID-19, Health Disparities, and Adverse Childhood Experiences*, 14 *J. CHILD & ADOLESCENT TRAUMA* 1 (2021).



*A. The CDC-Kaiser Permanente Adverse Childhood Experiences Study*

This seminal research examined the relationship between retrospectively reported experiences of adversity up to the age of eighteen and a series of adult health issues.<sup>17</sup> The study population consisted of over 17,000 Kaiser-Permanente patients – largely white and middle class – who had agreed to participate and complete a survey. The researchers identified the nine most common adversities reported by their patients to compose an index or score that they labeled ACEs – Adverse Childhood Experiences. A tenth category especially important to family

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<sup>17</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, *About the CDC-Kaiser ACE Study* (2021), <https://www.cdc.gov/violenceprevention/aces/about.html>.

lawyers was added later – separation or divorce of parents. The CDC lists the ten adversities in the ACE score:

- emotional abuse
- physical abuse
- sexual abuse
- mother treated violently
- substance abuse in household
- mental illness in household
- emotional neglect
- physical neglect
- parental separation or divorce<sup>18</sup>

From responses to the patient survey, an ACE score was computed that counted the number of categories of adversity reported; thus, ACE scores range from 0 to 10. The research then linked the ACE score to the likelihood of a series of adult health issues including cancer, ischemic heart disease, chronic lung disease, obesity, and depression as well as behavioral health issues such as alcoholism and drug abuse.<sup>19</sup> Utilizing both self-reports of patients and their medical records, the researchers found that each health problem increased in likelihood with each increase in the ACE score. For example, the risk of ischemic heart disease was 2.2 times greater for adults with 4 or more ACEs than for those with none and the chance of chronic bronchitis or emphysema was 3.9 times greater.<sup>20</sup>

Since the first publication of the ACE research in 1998, hundreds of additional studies have employed the ACE index of childhood adversity, confirming the links between ACE scores and such later life outcomes as suicide,<sup>21</sup> depression,<sup>22</sup> sexual risk

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<sup>18</sup> *Id.*

<sup>19</sup> Felitti et al., *supra* note 1.

<sup>20</sup> *Id.* at 252.

<sup>21</sup> Esme Fuller-Thomson et al., *The Association Between Adverse Childhood Experiences (ACEs) and Suicide Attempts in a Population-Based Study*, 42 *CHILD CARE & HEALTH DEV.* 725 (2016); Martie P. Thompson et al., *Associations of Adverse Childhood Experiences and Suicidal Behaviors in Adulthood in a US Nationally Representative Sample*, 45 *CHILD CARE & HEALTH DEV.* 121 (2019).

<sup>22</sup> Robert F. Anda et al., *Adverse Childhood Experiences and Prescribed Psychotropic Medications in Adults*, 32 *AM. J. PREVENTIVE MED.* 389 (2007); Daniel P. Chapman et al., *Adverse Childhood Experiences and the Risk of Depressive Disorders in Adulthood*, 82 *J. AFFECTIVE DISORDERS* 217 (2004).



behaviors,<sup>23</sup> and alcohol and drug abuse,<sup>24</sup> as well as educational achievement and income.<sup>25</sup> To explain how childhood adversity caused adult illness and behavioral issues, Dr. Vincent Felitti and colleagues posited that individuals turn to smoking, drinking, drug use and/or overeating in order to deal with the anger, stress, and anxiety prompted by adversity.<sup>26</sup> Stress was a central psychological mechanism in this linkage, but, in their explanation, it operated through such behaviors to cause later health issues.

Even with its focus on families, a key missing source of household adversity did not make it into the CDC-Kaiser ACE measure – the degree to which regular routines and relative order exist in the household. When chaotic conditions occur in households – for example, lack of routines, unabating noise, overcrowding – toxic stress is more likely to develop.<sup>27</sup> Lack of consistency in caregivers or shifting work schedules that make routines more difficult to establish, for example, can help create household chaos. Such an environment reduces the opportunities for building stable, nurturing relationships. The presence of household chaos predicts diminished socioemotional develop-

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<sup>23</sup> Susan D. Hillis et al., *Adverse Childhood Experiences and Sexual Risk Behaviors in Women: A Retrospective Cohort Study*, 33 *FAM. PLAN. PERSP.* 206 (2001).

<sup>24</sup> Shanta R. Dube et al., *Adverse Childhood Experiences and the Association with Ever Using Alcohol and Initiating Alcohol Use During Adolescence*, 38 *J. ADOLESC. HEALTH* 444.E1 (2006); Michael D. Stein et al., *Adverse Childhood Experience Effects on Opioid Use Initiation, Injection Drug Use, and Overdose Among Persons with Opioid Use Disorder*, 179 *DRUG & ALCOHOL DEPENDENCE* 325 (2017); Tara W. Strine et al., *Associations Between Adverse Childhood Experiences, Psychological Distress, and Adult Alcohol Problems*, 36 *AM. J. HEALTH BEHAV.* 408, 408 (2012); Elizabeth A. Swedo et al., *Adolescent Opioid Misuse Attributable to Adverse Childhood Experiences*, 224 *J. PEDIATRICS* 102.E3. (2020).

<sup>25</sup> Marilyn Metzler et al., *Adverse Childhood Experiences and Life Opportunities: Shifting the Narrative*, 72 *CHILD & YOUTH SERVS. REV.* 141 (2017).

<sup>26</sup> Felitti et al, *supra* note 1, at 252-53.

<sup>27</sup> Patricia T. Garrett-Peters et al., *The Role of Household Chaos in Understanding Relations Between Early Poverty and Children's Academic Achievement*, 37 *EARLY CHILDHOOD RES. Q.* 16 (2016); Samantha Marsh, Rosie Dobson & Ralph Maddison, *The Relationship Between Household Chaos and Child, Parent, and Family Outcomes: A Systematic Scoping Review*, 20 *BMC PUB. HEALTH* 513 (2020).

ment and academic achievement.<sup>28</sup> It also relates to higher frequency of depression<sup>29</sup> and poorly developed self-regulatory skills.<sup>30</sup> Children living with cumulative risk of crowding, noise, and/or housing problems experienced higher levels of chronic stress, with the attendant emotional and biological consequences.<sup>31</sup>

A fundamental lesson from this research is that regular, predictable, and controllable household patterns provide stability for a child that can protect against the harmful effects of childhood adversities, including separation and divorce. It seems likely that some components of the CDC-Kaiser measure of adversity such as having a mentally ill, emotionally volatile, or substance abusing adult in the household operate partly by creating household instability. Similarly, separation and divorce could make for constantly shifting arrangements for child care and disrupt the sense of stability and security that children need.<sup>32</sup>

The focus on households of both the CDC-Kaiser measure of childhood adversity and the chaos research ignores adversity that comes from outside the household.<sup>33</sup> Alternative measures of childhood adversity include items that begin to take account of the larger context in which households and children live and, like

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<sup>28</sup> Kim T. Ferguson et al., *The Physical Environment and Child Development: An International Review*, 48 INT'L. J. PSYCHOL. 437 (2013).

<sup>29</sup> Brian P. Ackerman & Ellen D. Brown, *Physical and Psychosocial Turmoil in the Home and Cognitive Development*, in CHAOS AND ITS INFLUENCE ON CHILDREN'S DEVELOPMENT 35-48 (Gary W. Evans & Theodore D. Wachs ed., 2011).

<sup>30</sup> Christopher Holmes et al., *Structural Home Environment Effects on Developmental Trajectories of Self-Control and Adolescent Risk Taking*, 48 J. YOUTH & ADOLESCENCE 43 (2019).

<sup>31</sup> Gary W. Evans & Lyscha A. Marcynyszyn, *Environmental Justice, Cumulative Environmental Risk, and Health Among Low-and Middle-Income Children in Upstate New York*, 94 AM. J. PUB. HEALTH 1942 (2004).

<sup>32</sup> See LISA FISCHER-WOLOVICK, *TRAUMATIC DIVORCE AND SEPARATION: THE IMPACT OF DOMESTIC VIOLENCE AND SUBSTANCE ABUSE IN CUSTODY AND DIVORCE* (2018); Breanna Boppre & Cassandra Boyer, "The Traps Started During My Childhood": The Role of Substance Abuse in Women's Responses to Adverse Childhood Experiences (ACEs), 30 J. AGGRESSION, MALTREATMENT & TRAUMA 429 (2021).

<sup>33</sup> Craig A. McEwen & Scout F. Gregerson, *A Critical Assessment of the Adverse Childhood Experiences Study at 20 Years*, 56 AM. J. PREVENTIVE MED. 790, 791 (2019).

the research on household chaos, connect these conditions to children's health, development, and behavior. A widely used alternative measure of adverse childhood experiences appears in the National Survey of Children's Health (NSCH);<sup>34</sup> this ACE measure does not include questions about sexual or physical abuse but adds questions about economic insecurity, being treated unfairly because of one's race or ethnicity, and witnessing neighborhood violence. Unlike the CDC-Kaiser measure, this index of childhood adversity is not *retrospective*; rather it draws upon reports of parents about one of their children up to age eighteen. This research shows that children with higher numbers of adversities are more likely to experience chronic illnesses such as asthma and behavioral challenges such as lack of engagement at school.<sup>35</sup>

Although the NSCH measure provides a broader picture of childhood adversity, Jessica Dym Bartlett and Vanessa Sacks note that:

No ACEs lists or screening tools identify all childhood adversities, but those that do not include adversity related to social disadvantage are likely to overlook [or undercount] children in specific [income], racial or ethnic groups, who are disproportionately affected [by adversity].<sup>36</sup>

Understanding and reducing childhood adversity requires placing households and children's social development in a wider social context than is provided by ACEs.

## B. *The Neuroscience of Socioeconomic Status*

A second and almost wholly independent line of research by biologists and neuroscientists has evolved over the last twenty-five years with a focus on the developmental and health implications of differences in household resources – typically income

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<sup>34</sup> DATA RESOURCE CENTER FOR CHILD AND ADOLESCENT HEALTH, *The National Survey of Children's Health* (2021), <https://www.childhealthdata.org/learn-about-the-nsch/NSCH>.

<sup>35</sup> Christina D. Bethell et al., *Adverse Childhood Experiences: Assessing the Impact on Health and School Engagement and the Mitigating Role of Resilience*, 33 HEALTH AFF. 2106, 2109 (2014).

<sup>36</sup> Jessica Dym Bartlett & Vanessa Sacks, *Adverse Childhood Experiences Are Different from Trauma, and It's Important to Understand Why*, CHILD TRENDS (Apr. 10, 2019), <https://www.childtrends.org/blog/adverse-childhood-experiences-different-than-child-trauma-critical-to-understand-why>.

and/or educational level.<sup>37</sup> This research has mapped out the biological processes that lead to embodiment of an individual's social circumstances – that is, the reflections in body and brain structure and function of a person's life circumstances.<sup>38</sup> It is this research about toxic stress and its impact on the developing brain and body systems that Dr. Forkey explored in this Journal in 2018.<sup>39</sup>

In essence, this work traces the effects of stress<sup>40</sup> on the center of the brain that regulates both the autonomic nervous system (regulating heart rate, breathing, blood flow) and the neuroendocrine system. The experience of stress prompts the adrenal glands to produce cortisol which works with other hormones and biochemicals to adjust bodily processes such as immune function, heart and breathing rates and glucose release for metabolism.<sup>41</sup> When the stress ends, these bodily processes return to normal. However, toxic or chronic stress unmoderated by strong social support systems maintains the stress response and overloads and unbalances the body's systems – creating allostatic load.<sup>42</sup> This disrupts children's developing brain architecture which in turn affects other organ systems and leads to stress-management processes that establish relatively lower thresholds for responsiveness that can persist throughout life. This disruption increases the risk of stress-related disease and cognitive im-

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<sup>37</sup> W. Thomas Boyce et al., *Toward a New Biology of Social Adversity*, 109 *PROC. NAT'L ACAD. SCI.* 17143 (2012); Martha J. Farah, *The Neuroscience of Socioeconomic Status: Correlates, Causes, and Consequences*, 96 *NEURON* 56 (2017).

<sup>38</sup> Gary W. Evans et al., *How Poverty Gets Under the Skin: A Life Course Perspective*, in *THE OXFORD HANDBOOK OF POVERTY AND CHILD DEVELOPMENT* 13-36 (Valerie Maholmes & Rosalind B. King ed., 2012); Nancy Krieger, *Embodiment: A Conceptual Glossary for Epidemiology*, 59 *J. EPIDEMIOLOGY & COMMUNITY HEALTH* 350 (2005).

<sup>39</sup> Forkey, *supra* note 2, at 311.

<sup>40</sup> Bruce S. McEwen, *When Is Stress Good for You?*, *AEON* (July 11, 2017), <https://aeon.co/essays/how-stress-works-in-the-human-body-to-make-or-break-us>.

<sup>41</sup> Bruce S. McEwen, *Protective and Damaging Effects of Stress Mediators*, 338 *NEW ENG. J. MED.* 171 (1998).

<sup>42</sup> *Id.*

pairment well into the adult years.<sup>43</sup> Toxic stress can also change the production of proteins that change the way our genes act or are expressed, and these epigenetic changes can happen at any time in the life course and be transmitted across generations.<sup>44</sup>

The neuroscience of socioeconomic status (ES) and the biology of stress have clarified the mechanisms by which childhood adversity can be translated into behavioral and health issues, but they only begin to widen the framework for thinking about childhood adversity. The social determinants of health provide that larger frame of predictors for improving outcomes for children caught for years in parental conflict.

## II. The Social Determinants of Health

A year after the first report of the ACE study made it to print, Michael Marmot and Richard Wilkinson published a highly influential book on *The Social Determinants of Health*.<sup>45</sup> According to the World Health Organization, these social determinants are “the conditions in which people are born, grow, live, work, and age, and the wider set of forces and systems shaping the conditions of daily life.”<sup>46</sup> At the most general level, the social determinants are income, race/ethnicity, place of residence, and education. At a more finely tuned level, they include working conditions, and job security, access to housing and food and healthcare, and social inclusion.<sup>47</sup> These social determinants affect child development and lifelong health in part through their relationship to the probabilities of higher or lower levels of toxic stress. For example, the Whitehall Studies found first that the

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<sup>43</sup> Jack P. Shonkoff et al., *Neuroscience, Molecular Biology, and the Childhood Roots of Health Disparities: Building a New Framework for Health Promotion and Disease Prevention*, 301 JAMA 2252, 2256 (2009).

<sup>44</sup> Bruce S. McEwen et al., *Stress and Anxiety: Structural Plasticity and Epigenetic Regulation as a Consequence of Stress*, 62 NEUROPHARMACOLOGY 3 (2012); NATIONAL SCIENTIFIC COUNCIL ON THE DEVELOPING CHILD, *Early Experiences Can Alter Gene Expression and Affect Long-Term Development: Working Paper No. 10* (2010), <http://www.developingchild.net>.

<sup>45</sup> MICHAEL MARMOT & RICHARD WILKINSON, *SOCIAL DETERMINANTS OF HEALTH* (1999).

<sup>46</sup> *Social Determinants of Health*, WORLD HEALTH ORGANIZATION (2021), [https://www.who.int/health-topics/social-determinants-of-health#tab=tab\\_1](https://www.who.int/health-topics/social-determinants-of-health#tab=tab_1).

<sup>47</sup> *Id.*

lower the rank in the British civil service, the more rates of heart disease increased, and second that a major reason for that heightened risk was the low degree of control over one's work further down in civil service rank.<sup>48</sup> Decreased control over work increases the likelihood of toxic stress.

The social determinants also predict the likelihood of adverse childhood experiences. The data for minority children, or children suffering from poverty, is especially relevant when courts may employ implicit bias and continue the types of epistemic and structural injustices which increase risk to children whose parents are engaged with the courts. For example, data from the National Survey of Children's Health<sup>49</sup> indicate that Black children are 56% more likely than non-Hispanic White children to experience two or more ACEs. Children living in the households with the lowest income are almost three times more likely than children in the highest income group to have two or more ACEs.

Similar differentials exist for children from households where the adults have not completed high school compared to those where adults have finished college; the former are twice as likely to experience two or more ACEs than the latter.<sup>50</sup> The likelihood of adversity also varies across neighborhoods and geographic regions or zip codes.<sup>51</sup> For example, the percentage of children who experienced two or more of the adversities measured by the National Survey of Children's Health was 12% in New Jersey but 26% in Alaska and 28% in Oklahoma.<sup>52</sup>

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<sup>48</sup> Michael G Marmot et al., *Contribution of Job Control and Other Risk Factors to Social Variations in Coronary Heart Disease Incidence*, 350 LANCET 235, 238 (1997).

<sup>49</sup> DATA RESOURCE CENTER FOR CHILD AND ADOLESCENT HEALTH, THE NATIONAL SURVEY OF CHILDREN'S HEALTH (2021). Data extracted from the 2018-19 surveys by Craig McEwen using the interactive data search tool at <https://www.childhealthdata.org/browse/survey>.

<sup>50</sup> *Id.*

<sup>51</sup> For evidence of wide variation by county in social and economic conditions and measures of health, see COUNTY HEALTH RANKINGS, <https://www.countyhealthrankings.org/>.

<sup>52</sup> ANNIE E. CASEY FOUNDATION, *Kids Count Data Center*, <https://datacenter.kidscount.org/data/bar/9709-children-who-have-experienced-two-or-more-adverse-experiences?loc=1&loct=1#2/2-11/false/1648/any/18962>.

Recognition of the wide range of social forces in children's and adult lives that can create toxic stress prompts a reconsideration of the overuse of "trauma" to describe either the source of stress or the responses to it.<sup>53</sup> According to the Substance Abuse and Mental Health Services Administration (SAMHSA), "Individual trauma results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being."<sup>54</sup> Trauma is the response, not the adversity. Further, toxic stress-inducing social conditions such as early childhood poverty and ongoing racism or lack of control over work provide background conditions that people live with day-to-day but that, without sufficient social supports, can produce toxic stress, not a traumatic reaction.

The social determinants of health "determine" not at an individual level but rather at a population level. That is, they predict relative likelihood of many health outcomes in a population but are poor predictors of individual health outcomes because of the wide array of variations in life circumstances as well as differing genetic make-ups. The social determinants thus shape population health – "the health outcomes of a group of individuals, including the distribution of such outcomes within the group"<sup>55</sup> The larger frame of social determinants at a population level also helps predict life course trajectories, not just child development and adult health as if they were separate events disconnected from the environment or accumulated adversity.<sup>56</sup>

The CDC-Kaiser study of child adversity exemplifies research about population health. Dr. Robert Anda, one of the lead authors of that original research, stresses that fact and decries efforts to use ACE scores to predict individual health out-

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<sup>53</sup> Bartlett & Sacks, *supra* note 36.

<sup>54</sup> SAMHSA'S *Concept of Trauma and Guidance for a Trauma-Informed Approach*, SUBSTANCE ABUSE AND MENTAL HEALTH ADMINISTRATION (2014), [https://ncsacw.samhsa.gov/userfiles/files/SAMHSA\\_Trauma.pdf](https://ncsacw.samhsa.gov/userfiles/files/SAMHSA_Trauma.pdf).

<sup>55</sup> David Kindig & Greg Stoddart, *What Is Population Health?*, 93 AM. J. PUB. HEALTH 380, 380 (2003).

<sup>56</sup> Craig A. McEwen & Bruce S. McEwen, *Social Structure, Adversity, Toxic Stress, and Intergenerational Poverty: An Early Childhood Model*, 43 ANN. REV. SOC. 445, 461 (2017).

comes.<sup>57</sup> Instead, research related to the social determinants – including ACEs, however measured – turns attention to public health and social policy initiatives to address health disparities. When attention focuses instead on household ACEs alone, responses typically aim at support, treatment, and therapeutic work with individuals, issues addressed below for family lawyers working with clients to support families.

This attention to household ACEs, however, often distracts attention from primary prevention efforts. As Felitti and colleagues noted in their very first report of the ACE research, “Primary prevention of adverse childhood experiences has proven difficult and will ultimately require societal changes that improve the quality of family and household environments during childhood.”<sup>58</sup> The Healthy People initiative of the Office of Disease Prevention and Health Promotion takes this view as well: “Create social and physical environments that promote good health for all” is one of the four main goals for the 2020 decade.<sup>59</sup>

### **III. Positive Childhood Protections Against Adversity**

Many of the effects on brain and body of early childhood adversity may be repaired or prevented. The developing brain is particularly plastic, and positive and protective social experiences can prevent toxic stress or counteract its biological effects. Primary caregivers, teachers, counselors, teachers, mentors, ministers, and child-care staff are among the adults who provide the warm, continuing adult attention that can prevent stressful circumstances from becoming toxic.<sup>60</sup> Research in Wales, for example, established that children with four or more ACEs were 64%

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<sup>57</sup> Robert F. Anda, Laura E. Portman & David W. Brown, *Inside the Adverse Childhood Experience Score: Strengths, Limitations, and Misconceptions*, 59 AM J. PREVENTIVE MED. 293, 294 (2020).

<sup>58</sup> Felitti et al., *supra* note 1, at 255.

<sup>59</sup> *Social Determinants of Health*, OFFICE OF DISEASE PREVENTION AND HEALTH PROMOTION (2021), <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-of-health>.

<sup>60</sup> NATIONAL SCIENTIFIC COUNCIL ON THE DEVELOPING CHILD, *Supportive Relationships and Active Skill-Building Strengthen the Foundations of Resilience: Working Paper No. 13* (2015), <http://developingchild.harvard.edu/wp-content/uploads/2015/05/The-Science-of-Resilience.pdf>.



less likely to experience poor childhood health when they reported having supportive friends, the opportunity to put their abilities to work, and being connected to a trusted adult.<sup>61</sup> A study employing data from the National Survey of Children's Health found that the likelihood of developmental delay and socio-emotional deficits among children was diminished by the use of positive parenting practices.<sup>62</sup>

Positive childhood experiences are also socially determined. Their availability varies in the population in ways that parallel the uneven distribution of adversity. A study employing data from the National Survey of Children's Health found that "Children of minority race or ethnicity were less likely to have a mentor for advice or guidance, live in a safe neighborhood, or live in a supportive neighborhood, and less likely to experience three or more PCEs [Positive Childhood Experiences]."<sup>63</sup> A similar pattern holds for children from households with the lowest incomes who are much less likely to have the positive adult and community supports than children whose parents have incomes at or above 200% of the federal poverty level.<sup>64</sup> The children most vulnerable to adversity, thus, are also least likely to have access to the resources that create positive social support systems.

As lawyers work with clients to protect children from some of the potential consequences of parental conflict and separation, they are attempting to help clients build resilient systems of support for their children. Resilience in this sense is not simply or

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<sup>61</sup> Mark A. Bellis et al., *Adverse Childhood Experiences and Sources of Resilience: A Retrospective Study of Their Combined Relationships with Child Health and Educational Attendance*, 18 BMC PUB. HEALTH 792 (2018).

<sup>62</sup> Yui Yamaoka & David E Bard, *Positive Parenting Matters in the Face of Early Adversity*, 56 AM. J. PREVENTIVE MED. 530 (2019). These positive parenting practices included engaging children in storytelling and reading stories, singing and eating meals together, engaging them in play with children of the same age, and going on family outings.

<sup>63</sup> Elizabeth Crouch et al., *Racial/Ethnic Differences in Positive Childhood Experiences Across a National Sample*, 115 CHILD ABUSE & NEGLECT 105012, 7 (2021).

<sup>64</sup> DATA RESOURCE CENTER FOR CHILD AND ADOLESCENT HEALTH, *supra* note 49. Data extracted by Craig McEwen from the 2018-19 surveys using the interactive data search tool at <https://www.childhealthdata.org/browse/survey>.

mainly a quality of an individual child.<sup>65</sup> Although individual qualities matter, they are built and reinforced (or not) in systems of support in households and communities. The recent policy statement of the American Academy of Pediatrics (AAP) on “Preventing Childhood Toxic Stress: Partnering with Families and Communities to Promote Relational Health” adopts this view of resilience as a characteristic of systems, not only of individuals.<sup>66</sup> The bioecological frame utilized by the AAP recognizes that development takes place as children interact with both an immediate and a more distant social environment.<sup>67</sup> The Policy Statement asserts that “safe, stable, and nurturing relationships (SSNRs) . . . not only buffer childhood adversity when it occurs but also promote the capacities needed to be resilient in the future.”<sup>68</sup> The challenge for attorneys is to assist the parents they are working with to build systems of support for their children that extend beyond their evolving households.

#### **IV. COVID-19, ACEs and the Social Determinants of Health**

Early in the COVID-19 pandemic it became clear that many of the risk factors for child abuse and neglect would be exacer-

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<sup>65</sup> The view of resilience as largely a set of personal skills or qualities appears repeatedly in popular discourse. The widely touted book by Angela Duckworth, *GRIT: THE POWER OF PASSION AND PERSEVERANCE* (2016), represents this approach, as does the UNIVERSITY OF PENNSYLVANIA’S PENN RESILIENCE PROGRAM (<https://ppc.sas.upenn.edu/resilience-programs/resilience-skill-set>). Their training programs work on twenty-one skills that they summarize in six clusters:

- Self-Awareness
- Self-regulation
- Mental agility
- Strength of Character
- Connection – capacity to build strong relationships
- Optimism

<sup>66</sup> Andrew Garner et al., *Preventing Childhood Toxic Stress: Partnering with Families and Communities to Promote Relational Health*, 148 *PEDIATRICS* 1 (2021).

<sup>67</sup> Urie Bronfenbrenner & Gary W. Evans, *Developmental Science in the 21st Century: Emerging Questions, Theoretical Models, Research Designs and Empirical Findings*, 9 *SOC. DEV.* 115 (2000).

<sup>68</sup> Garner et al., *supra* note 66, at 1.

bated in the context of social isolation and increased economic insecurity<sup>69</sup> while the pandemic also reduced public protections against domestic violence and child abuse.<sup>70</sup> The pandemic increased socio-economic deprivation, one of the most important risk factors for ACEs, particularly child abuse and neglect.<sup>71</sup> A review of research about the impact of earlier pandemics on children points to worries about children's health and the social isolation tools used to control pandemics as contributing to parental stress and a higher likelihood for them to experience depression and anxiety disorders.<sup>72</sup> These in turn raise the chances of toxic stress for children and diminish access to positive parenting support for them.<sup>73</sup>

Not only are stressed parents less likely to be able to support children facing their own stresses of isolation from peers, but other adult supports for children are diminished as well, as contacts with grandparents, teachers, mentors, ministers, coaches and other important adult figures are reduced or cut off. School closures, suspensions of athletic seasons, and closing of churches to in-person worship helped stem the spread of COVID but also diminished community supports for children facing stressful circumstances.

The COVID-19 pandemic has also highlighted the social determinants of health. Rates of illness and death have varied con-

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<sup>69</sup> Ashley Abramson, *How COVID-19 May Increase Domestic Violence and Child Abuse*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Apr. 8, 2020) <https://www.apa.org/topics/covid-19/domestic-violence-child-abuse>; Christina M. Rodriguez et al., *The Perfect Storm: Hidden Risk of Child Maltreatment During the Covid-19 Pandemic*, 26 CHILD MALTREATMENT 139 (2021).

<sup>70</sup> Loc H. Nguyen, *Calculating the Impact of COVID-19 Pandemic on Child Abuse and Neglect in the U.S.*, 118 CHILD ABUSE & NEGLECT 105136 (2021).

<sup>71</sup> Peter Sidebotham & Jon Heron, *Child Maltreatment in the "Children of the Nineties": A Cohort Study Of Risk Factors*, 30 CHILD ABUSE & NEGLECT 496 (2006); *Child Abuse and Neglect: Risk Factors*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2021) <https://www.cdc.gov/violenceprevention/childabuseandneglect/riskprotectivefactors.html>.

<sup>72</sup> Liubiana Arantes de Araújo et al., *The Potential Impact of the COVID-19 Pandemic on Child Growth and Development: A Systematic Review*, 97 J. PEDIATRIA 369 (2021).

<sup>73</sup> Tali Raviv et al., *Caregiver Perceptions of Children's Psychological Well-being During the COVID-19 Pandemic*. 4 JAMA NETWORK OPEN e2111103 (2021).

siderably by county, with counties having higher populations of Blacks, Hispanics, and Native Americans experiencing higher rates.<sup>74</sup> Research documents greater likelihood of poverty, food insufficiency, parental job loss, and experience of school closures for Black and Latinx children than for white children.<sup>75</sup> Communities with fewer economic resources also have been hardest hit by COVID.<sup>76</sup>

The COVID-19 epidemic has certainly contributed to stressed households and childhood adversity and diminished positive supports for children's resilience in ways that are not yet fully understood. It has also highlighted the intersections of the social determinants of health, ACEs, and positive childhood experiences that have implications for family law practice during and after the pandemic.

## V. Family Lawyering in the Context of the Social Determinants and ACEs

What does all of this mean for family lawyers in practice? Clearly, the research about social determinants, ACEs, and toxic stress suggests the importance of recognizing the impact of adversity on clients' children and on the clients themselves.<sup>77</sup> For lawyers and courts this can mean engaging in "trauma-informed practices" and helping parents locate resources to build positive parenting, establish household order and build adult support systems outside the home. From a forensic perspective, it means

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<sup>74</sup> Laurel J. Samuel et al., *Race, Ethnicity, Poverty and the Social Determinants of the Coronavirus Divide: U.S. County-Level Disparities and Risk Factors*, 21 *BMC PUBLIC HEALTH* 11 (2021); see also Natalie Claypool & Arelis Moore do Peralta, *The Influence of Adverse Childhood Experiences (ACEs), Including the COVID-19 Pandemic, and Toxic Stress on Development and Health Outcomes of Latinx Children in the USA: A Review of the Literature*, 11 *INT. J. CHILD MALTREATMENT* 1 (2021); Sonu et al., *supra* note 16.

<sup>75</sup> Zachary Parolin, *What the COVID-19 Pandemic Reveals About Racial Differences in Child Welfare and Child Well-Being: An Introduction to the Special Issue*, 13 *RACE AND SOC. PROBS.* 1 (2021).

<sup>76</sup> Samuel et al., *supra* note 74.

<sup>77</sup> Jan Jeske & Mary Louise Klas, *Adverse Childhood Experiences: Implications for Family Law Practice and the Family Court System*, 50 *FAM. L.Q.* 123, 128 (2016).

sensitively recognizing that court itself may serve as a trigger and impair communication skills and elevate defensiveness.<sup>78</sup>

#### A. *Educating Clients About the Effects of Their Actions on Children*

Neuroscience research has found that the children most vulnerable to adversity are those in sensitive periods of brain development – roughly before the age of five – but there are other sensitive periods as well.<sup>79</sup> Parents in conflict may well deny that their kids – especially the youngest children – are affected. Not so. A newly emergent field of stress resonance research<sup>80</sup> reinforces the experience of mental health professionals with the finding that parental stress gets transmitted to children. This research explores evidence that people communicate stress non-verbally as well as verbally and that this communication is stronger when people are linked together emotionally.<sup>81</sup>

Experimental studies with mothers and infants showed, for example, that when mothers experienced a negative stressor, their infant children reflected their responses through the sympathetic nervous system (SNS) – with covariation in heart rates. This covariation increased over time when infants were in their mother's laps but dissipated when they were in a highchair.<sup>82</sup> Survey research summarized by the American Psychological Association found that 91% of children indicated that they were aware when their parents were stressed, although 69% of parents

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<sup>78</sup> *Trauma-informed Courts*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (2021), <https://www.ncjfcj.org/child-welfare-and-juvenile-law/trauma-informed-courts/>.

<sup>79</sup> Eric C. Dunn et al., *Sensitive Periods for the Effect of Childhood Adversity on DNA Methylation: Results from a Prospective, Longitudinal Study*, 85 *BIOLOGICAL PSYCHIATRY* 838 (2019); Kathryn L. Humphreys et al., *Evidence for a Sensitive Period in the Effects of Early Life Stress on Hippocampal Volume*, 22 *DEV. SCI.* e12775 (2019); Sandro Marini et al., *Adversity Exposure During Sensitive Periods Predicts Accelerated Epigenetic Aging in Children*, 113 *PSYCHONEUROENDOCRINOLOGY* 104484 (2020).

<sup>80</sup> Veronika Engert, Amy M. Ragsdale & Tania Singer, *Cortisol Stress Resonance in the Laboratory is Associated with Inter-Couple Diurnal Cortisol Covariation in Daily Life*, 98 *HORMONES & BEHAV.* 183 (2018).

<sup>81</sup> Sara F. Waters et al., *Affect Contagion Between Mothers and Infants: Examining Valence and Touch*, 146 *J. EXPERIMENTAL PSYCHOL.* 1043 (2017).

<sup>82</sup> *Id.*

believed their stress had little or no impact on their children.<sup>83</sup> Further, those children who recognized parental stress were more likely themselves to feel stressed.<sup>84</sup>

Among the effects that parents might see are issues related to their children's ability to control their emotions and behavior. Toxic stress can change the neural circuitry in the prefrontal cortex in ways that compromise an individual's capacity for emotional and behavioral self-regulation.<sup>85</sup> Self-regulation encompasses a variety of dimensions that include short-term memory, persistence, ability to delay gratification, attention, and capacity to use information to accomplish goals and solve problems.<sup>86</sup> Executive function is one major element of self-regulation. It involves planning; attention control; ability to sequence actions and thinking to achieve goals; capacity to transition from one activity to another and to utilize working memory to problem-solve and accomplish cognitive tasks.

Control of impulses and emotions is another major element of self-regulation.<sup>87</sup> The ability to control impulsivity and emotional expression and to restrain inappropriate behavior through cognitive processes has a significant effect on social adjustment and competence.<sup>88</sup> Children whose regulatory skills are weak often present challenges to adults and have poor relationships with peers.<sup>89</sup>

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<sup>83</sup> *2010 Stress in America*, AMERICAN PSYCHOLOGICAL ASSOCIATION, (2010), <https://www.apa.org/news/press/releases/stress/2010/key-findings>.

<sup>84</sup> *Id.*

<sup>85</sup> Bruce S. McEwen & John H. Morrison, *The Brain on Stress: Vulnerability and Plasticity of the Prefrontal Cortex over the Life Course*, 79 NEURON 16 (2012); Jack P. Shonkoff, *Leveraging the Biology of Adversity to Address the Roots of Disparities in Health and Development*, 109 PROC. NAT'L ACADEMY SCI. 17302 (2013).

<sup>86</sup> ANDREA BERGER, SELF-REGULATION: BRAIN, COGNITION, AND DEVELOPMENT (2012); Alexandre Ursache, Clancy Blair & C. Cybele Raver, *The Promotion of Self-Regulation as a Means of Enhancing School Readiness and Early Achievement in Children at Risk for School Failure*, 6 CHILD DEV. PERSP. 122 (2012).

<sup>87</sup> Ursache et al., *supra* note 86.

<sup>88</sup> BERGER, *supra* note 86.

<sup>89</sup> Nancy Eisenberg et al., *The Relations of Emotionality and Regulation to Preschoolers' Social Skills and Sociometric Status*, 64 CHILD DEV. 1418 (1993); Nancy Eisenberg et al., *Emotion-Related Self-Regulation and Its Relation to Children's Maladjustment*, 6 ANN. REV. CLINICAL PSYCHOL. 495 (2010).

By educating clients about the potential impacts of marital discord on their children, attorneys can open up discussions of potential adjustments in parenting behavior, establishing consistent routines in their homes and finding resources to support children outside the households.

*B. Recognizing that Clients May Have Experienced Adversity*

Family lawyers need to be attentive not only to the potential impacts of adversity on children but also on the parents with whom they are working. Greater awareness of the behavioral implications of childhood adversity can help attorneys avoid misattribution of client behavior.<sup>90</sup> As Gold notes, at times when a lawyer is judging the client's behavior:

negatively such as when the lawyer feels frustrated that the client did not show up for a scheduled meeting, or when the lawyer feels disrespected that the client yelled at them on the phone, when the client tells their story in an illogical or disjointed way, or when the lawyer feels annoyed that the client did not follow through on the lawyer's advice, the lawyer who is overtly aware of an expanded range of possible explanations for the client's behavior, including trauma, may feel less judgmental and engage with the client more patiently and respectfully.<sup>91</sup>

The principles of trauma-informed lawyering provide some guidance for attorneys working with clients who may have experienced toxic stress as children or who experience it as adults.

Gold argues that trauma-informed lawyering builds on models of client-centered practice.<sup>92</sup> This model highlights the questioning and listening skills that empower and show respect for clients and help them tell their story. A simplistic but useful overview of such a practice is to avoid thinking or asking, "What is

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<sup>90</sup> Sara E. Gold, *Trauma: What Lurks Beneath the Surface?*, 24 *CLINICAL L. REV.* 201, 233 (2018) (arguing for lawyers working with the urban poor to adopt a trauma-informed practice); see also Colin James, *Towards Trauma-Informed Legal Practice: A Review*, 27 *PSYCHIATRY, PSYCHOL. & L.* 275 (2020) (focusing on the problem of secondary trauma for lawyers who observe or learn of traumatic events through clients, witnesses and victims); Claudia Peña, *Trauma Abounds: A Case for Trauma-Informed Lawyering*, 26 *UCLA WOMEN'S L. REV.* 7, 8 (2019) (making the case for adopting trauma-informed practices in lawyering).

<sup>91</sup> Gold, *supra* note 90, at 232.

<sup>92</sup> DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).

wrong with them?” and instead try to understand: “What happened to them?”<sup>93</sup> Some client conduct may, indeed, be a consequence of earlier or on-going adversity and lawyers should have their antennae tuned to signals of that adversity and its toxic effects. To the degree possible, giving room for uninterrupted client storytelling after outlining what the lawyer hopes to learn is a key trauma-informed practice.<sup>94</sup> But, at the same time, it is important that attorneys recognize that their clients are more than whatever they may have experienced.<sup>95</sup> A key part of trauma-informed practice then is building on the assets that clients have and empowering them as much as possible by giving them voice and choice in the context of a feeling of safety.<sup>96</sup>

Further, transparency with the client about the legal process, case, options, and prospects as well as what the lawyer will be doing and when helps build and sustain needed trust and establish some degree of predictability.<sup>97</sup> Attorney commitments to deliver what they promise reinforce this trust. Finally, in meetings with clients, being attentive both to one’s own verbal and body language as well as those of clients can reduce unintended messages from the lawyer and open access to communication “between-the-lines” from the client.<sup>98</sup>

Referring clients to support services that can help them deal with the stress of separation and divorce as well as any earlier experiences of adversity may assist as well. Therapeutic interventions provided by professionals with experience in trauma-informed therapy and with an understanding of the legal system can also assist both children and adults. Dr. Forkey identified some of those methods for children.<sup>99</sup> Examples of therapeutic interventions for adults and children have been identified by SAMHSA as well and in other writings.<sup>100</sup>

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<sup>93</sup> Katz & Haldar, *supra* note 13, at 363.

<sup>94</sup> Gold, *supra* note 90, at 238.

<sup>95</sup> Kirsten Foot, *Toward Trauma-Informed Professional Practices: What Legal Advocates and Journalists Can Learn from Each Other and Survivors of Human Trafficking*, 36 GA. ST. U. L. REV. 1129, 1143 (2020).

<sup>96</sup> SAMHSA, *supra* note 54, at 11.

<sup>97</sup> Gold, *supra* note 90, at 234.

<sup>98</sup> *Id.* at 240.

<sup>99</sup> Forkey, *supra* note 2.

<sup>100</sup> Heather Larkin, Vincent J. Felitti & Robert F. Anda, *Social Work and Adverse Childhood Experiences Research: Implications for Practice and Health*



There is strong evidence, for example, that mindfulness interventions improve cognitive performance as well as health and well-being.<sup>101</sup> In particular, they have shown effectiveness in helping rebuild or strengthen self-regulation, including control of attention and control of emotions as well as helping overcome depression.<sup>102</sup> Mindfulness interventions include long or short versions of Mindfulness Based Stress Reduction courses and meditation supported by classes or the internet or smart phone. These latter are relatively inexpensive, convenient, and widely accessible. Children too, can benefit from mindfulness training.<sup>103</sup> Children can build executive function through a wide variety of activities ranging from computer games to martial arts that are repeated and increased in difficulty over time.<sup>104</sup>

High quality parenting programs can also support separated parents in thinking through how best to support their children during and after separation.<sup>105</sup> The Centers for Disease Control and Prevention have tips for positive parenting for children of

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*Policy*, 29 SOC. WORK PUB. HEALTH 1 (2014); Christopher Menschner & Alexandra Maul, *Key Ingredients for Successful Trauma-Informed Care Implementation*, SAMHSA (Apr. 2016), [https://www.samhsa.gov/sites/default/files/programs\\_campaigns/childrens\\_mental\\_health/atc-whitepaper-040616.pdf](https://www.samhsa.gov/sites/default/files/programs_campaigns/childrens_mental_health/atc-whitepaper-040616.pdf).

<sup>101</sup> Christina Bethell et al., *Adverse Childhood Experiences, Resilience and Mindfulness-Based Approaches: Common Denominator Issues for Children with Emotional, Mental, or Behavioral Problems*, 25 CHILD & ADOLESCENT PSYCHIATRIC CLINICS 139 (2016); Y. Y. Tan, et al., *The Neuroscience of Mindfulness Meditation*, 16 NAT'L. REV. NEUROSCIENCE 213 (2015); see also *Mindfulness Meditation*, AM. PSYCHOL. ASS'N, <https://www.apa.org/topics/mindfulness/meditation> (last visited Dec. 1, 2021).

<sup>102</sup> J. David Creswell, *Mindfulness Interventions*, 68 ANN. REV. PSYCHOL. 491 (2017).

<sup>103</sup> For example, Headspace has meditation and mindfulness resources for both adults and children. See HEADSPACE, <https://www.headspace.com/meditation> (last visited Feb. 10, 2022).

<sup>104</sup> Adele Diamond & Kathleen Lee, *Interventions Shown to Aid Executive Function Development in Children 4 to 12 Years Old*, 333 SCI. 959 (2011).

<sup>105</sup> The authors do not want there to be any confusion between trauma informed therapy, parent education, and evidence-informed social and clinical science with isolation camps in which children are reprogrammed without informed consent by those children or any independent ethics oversight for vulnerable populations exposed to isolation. See Jean Mercer, *Examining Parental Alienation Treatments: Problems of Principles and Practices*, 36 CHILD & ADOLESCENT SOC. WORK J. 351 (2019).

various ages.<sup>106</sup> A free phone app such as Vroom gives busy parents daily ideas about how to engage young children in positive ways.<sup>107</sup> Research documents the efficacy, for example, of The Triple-P Positive Parenting Program which has an on-line version available.<sup>108</sup> The ACT Raising Safe Kids Program developed by the American Psychological Association has shown promising results.<sup>109</sup> Strong evidence supports the value of carefully designed pre-school programs, including Early Head Start, for developing social and cognitive skills in supportive environments.<sup>110</sup>

## VI. Conclusion

One of the challenges of transferring social science or neuroscientific research to law practice or to courts is the tendency to make an acronym like ACEs or a label like “personality

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<sup>106</sup> The Centers for Disease Control and Prevention provides tips for positive parenting for children grouped into eight age groups. *See CDC Child Development: Positive Parenting*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/ncbddd/childdevelopment/positiveparenting/index.html> (last visited Dec. 1, 2021).

<sup>107</sup> *Hello Brain Builder*, VROOM, <https://www.vroom.org/> (last visited Mar. 8, 2022).

<sup>108</sup> Christoph Nowak & Nina Heinrichs, *A Comprehensive Meta-Analysis of Triple P-Positive Parenting Program Using Hierarchical Linear Modeling: Effectiveness and Moderating Variables*, 11 *CLINICAL CHILD & FAM. PSYCHOL. REV.* 114. (2008); Matthew R. Sanders, William Bor & Alina Morawska, *Maintenance of Treatment Gains: A Comparison of Enhanced, Standard and Self-Directed Triple P Positive Parenting Program*, 35 *J. ABNORMAL CHILD PSYCHOL.* 983 (2007). *But see* Matthew R. Sanders et al., *A Commentary on Evidenced-Based Parenting Programs: Redressing Misconceptions of the Empirical Support for Triple P*, 10 *BMC MED.* 145 (2012); Philip Wilson et al., *How Evidence-Based is an ‘Evidence-Based Parenting Program’? A PRISMA Systematic Review and Meta-Analysis of Triple P*, 10 *BMC MED.* 130 (2012).

<sup>109</sup> *ACT Program for Parents/Caregivers*, AMERICAN PSYCHOLOGICAL ASSOCIATION, <https://www.apa.org/act/> (last visited Dec. 1, 2021). *See also* Luciana Barbalho Pontes et al., *A Systematic Literature Review of the ACT Raising Safe Kids Parenting Program*, 28 *J. CHILD & FAM. STUD.* 3231 (2019).

<sup>110</sup> *Evidence Summary for the Abecedarian Project*, THE ABECEDARIAN PROJECT, <https://evidencebasedprograms.org/document/abecedarian-project-evidence-summary/> (last visited Dec. 1, 2021); *Perry School Project*, HIGH SCOPE, <https://highscope.org/perry-preschool-project/> (last visited Dec. 1, 2021); Diane Whitmore Schanzenbach & Lauren Bauer, *The Long-Term Impact of the Head Start Program*, BROOKINGS, <https://www.brookings.edu/research/the-long-term-impact-of-the-head-start-program/> (last visited Dec. 1, 2021).

disorder” a shorthand descriptor of very complex social dynamics and individual vulnerabilities and strengths. In many ways, this shorthand becomes a means to a heuristic or “rule of thumb” which, like those shortcuts that allow people to navigate an airport or street signs, permits forensic and clinical professionals to summarize and judges and lawyers to shrug shoulders about circumstances that cannot be changed.

However, the lesson of neuroscience research is that brain plasticity means that changes in relationships and resources can rebuild healthy brain architecture and alter life courses. And the lesson of research about protective factors and community supports for resilience is that rebuilding or creating supportive adult relationships can protect children from toxic stress. The question is whether or not legal professionals will direct their work toward helping create the institutional and individualized conditions for that rebuilding in the face of the reality of childhood adversity resulting from household and community conditions that today are exacerbated by COVID-19.

Legal professionals managing family conflict and weak family systems need to be attentive to the broader social implications of adversity for children and its significant social costs. A systematic study<sup>111</sup> of ACEs estimated the substantial annual health and financial burden for 28 European countries and pointed to the need to reduce or prevent childhood adversity:

The pandemic might have increased conditions conducive to ACEs in families and reduced resilience-building opportunities if affected children are isolated in traumatic home settings and cut off from sources of support. The pandemic has also disrupted and diverted resources away from many services and programmes that help prevent ACEs, such as parenting programmes, socioeconomic development programmes, and youth support services. There is a concern that the resump-

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<sup>111</sup> This form of data analysis can be very helpful to examining the efficacy of research in a particular area of social or medical science. By definition, a “systematic review collects all possible studies related to a given topic and design, and reviews and analyzes their results. During the systematic review process, the quality of studies is evaluated, and a statistical meta-analysis of the study results is conducted on the basis of their quality. A meta-analysis is a valid, objective, and scientific method of analyzing and combining different results. Usually, in order to obtain more reliable results, a meta-analysis is mainly conducted on randomized controlled trials (RCTs), which have a high level of evidence.” EunJin Ahn & Hyun Kang, *Introduction to Systematic Review and Meta-Analysis*, 71 KOREAN J. ANESTHESIOLOGY 103, 104 (2018).

tion of such services will be deprioritised in the drive to catch up on clinical treatment and rebuild economic opportunity. Further, individuals who have had ACEs might have been particularly affected by the pandemic because of their increased risk both of chronic conditions that increase susceptibility to severe COVID-19 symptoms (e.g., respiratory disease) and of broader health harms associated with the pandemic (e.g., poor mental health). The differential impact of the pandemic on individuals with and without ACEs is yet to be quantified. However, preventing ACEs should contribute to reducing the health-harming behaviours and health conditions that can increase a population's susceptibility to infection and thus potentially reduce health risks from future pandemics.<sup>112</sup>

Prevention of ACEs requires social and health policy initiatives that are beyond the capacity of courts and family law professionals in their practices. However, court officials and legal practitioners have crucial roles in improving the ways that courts work in protecting children and in strengthening support systems for individual families. Courts serve as gateways (and gatekeepers) for millions of families in the United States subject to child custody orders. They have the power to enforce and punish or reward, not just by denying or requiring services, but by terminating parental rights, modifying custody arrangements, and using their contempt powers, including civil incarceration, to enforce those court orders.<sup>113</sup>

The content of those court orders as well as their enforcement matters. Research about childhood adversity and protective factors should help shape their content so that they are attentive to diminishing adversity and stress and strengthening supports for building positive adult relationships for children. Understanding and patiently respecting compounded stressors and losses of housing, education-related services, medical and mental health care is critical today and for the foreseeable future. Adverse and positive childhood experiences are not to be seen in terms of

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<sup>112</sup> Karen Hughes et al., *Health and Financial Costs of Adverse Childhood Experiences in 28 European Countries: A Systematic Review and Meta-Analysis*, 6 LANCET PUB. HEALTH e848, e854 (2021).

<sup>113</sup> When discussing access to justice and the burdens of poverty and the authority of courts, the use of jail has had deeply rooted and negative outcomes to entire populations in the United States. See PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA (2019); Noah D. Zatz, *Get to Work or Go to Jail: State Violence and the Racialized Production of Precarious Work*, 45 LAW & SOC. INQUIRY 304 (2020).

static scorecards but rather as changeable circumstances that courts and legal practitioners can affect.

Individual practitioners can use the same research and broad awareness of the social contexts and personal histories of their clients. On the one hand, that can mean trauma-informed legal practice. On the other hand, it means helping clients understand the potential impact of their behaviors on their children and the opportunities to build positive and supportive relationships that can help their children resist toxic stress and live rich and productive lives. To achieve this will require much more than referrals to counseling. For example, learning about community resources for children that are available to families and directing clients to seek those services should be woven into the practice of family law. Too often, the lens of professionals is not the same as the capacities of clients.

The necessity for critical and careful reflection about ACEs, COVID, and positive and protective social relationships for children by legal and forensic professionals is underscored by the argument that knowledge can be converted into an answerable question. Indeed, the best scientific and research-based evidence can be applied to answer social and policy questions. However, such forms of evidence must be critically appraised for validity and usefulness and carefully integrated within a matrix of outcome expectations that give priority to client values. When good science guides policy and practice, the implementation and outcomes must be evaluated for their intended effects as well as potential unintended consequences.<sup>114</sup> In the aggregate, these elements may enhance the probability that judicial decisions and the work of family lawyers effectively serve the needs of children.

Merely tossing around acronyms or applying past research that does not accommodate evolving social and biological science may increase the likelihood of iterations of conflict and reduce the efficacy of targeted interventions. In reference to research concerning best practices related to risk screenings, Jamie Lee and colleagues aptly reasoned that in “medicine, child welfare,

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<sup>114</sup> See Melissa D. Grady, *The Missing Link: The Role of Social Work Schools and Evidence-Based Practice*, 7 J. EVIDENCE-BASED SOC. WORK 400 (2010); Dana E. Prescott, *Social Workers as “Experts” in the Family Court System: Is Evidence-Based Practice a Missing Link or Host-Created Knowledge?*, 10 J. EVIDENCE-BASED SOC. WORK 466 (2013).

and education, it can take as long as 17 years for evidence to translate into practice,” so it is not surprising that a family law system, and its professional parts, may take time to work through “practitioner and organizational barriers” to implementation.<sup>115</sup> The point here is that the rich body of research about childhood adversity and toxic stress, as well as protective factors and brain plasticity, can efficaciously inform the work of lawyers, guardians ad litem, judicial officers, forensic mental health professionals, clinicians, parent coordinators, and mediators serving families.

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<sup>115</sup> Jamie Lee et al., *Practicing Best Practice: A 10-Year Retrospective on Universal Risk Screening in a Mediation and Counseling Organization*, 59 *FAM. CT. REV.* 697, 706 (2021). For an insightful article on this point cited by the authors, see Bryan A. Sisk et al., *The “Ought-Is” Problem: An Implementation Science Framework for Translating Ethical Norms into Practice*, 20 *AM. J. BIOETHICS* 62 (2020).