

Family Drug Treatment Courts:

A Place for Judicial Activism?

by the Honorable Angela Edwards Roberts

Socrates asserted four traits belonging to a judge: to hear courteously, to answer wisely, to consider soberly and to decide impartially.¹ The tug-of-war between judicial restraint and judicial activism was probably not part of Socrates's thinking, but has become a political concern over recent decades. In the midst of hot-button politics, however, family court judges nationwide have been responding to the nature and number of cases overwhelming their dockets. Chief Justice Judith S. Kaye of New York described in *Newsweek* exploding caseloads fueled by drug abuse, domestic violence and family dysfunction: "The flood of cases (into the courts) shows no sign of letting up. We can either bail faster or look for new ways to stem the tide."² Chief Justice Leah Ward Sears of Georgia wrote about it in the *Washington Post*: "Fragmented families are flooding our court dockets....For judges they rep-

resent a difficult workload....For children, they are a tragedy."³

This onslaught of family dysfunction has dramatically changed the role of the family court judge, and, more than ever, Socrates's observation must be heeded. Like our colleagues in other states, Virginia's Juvenile and Domestic Relations District Court (J&DR) judges are responding to this deluge by assuming judicial roles and trying approaches that may appear unorthodox, even activist, in nature. One of these is the family drug treatment court (FDTC).

The objective of this article is to inform lawyers and judges about these new courts and to encourage judges to be involved in this innovation. This article asserts that family drug treatment courts allow for collaborative intervention with-

out breach of judicial ethics when a team of professionals, led by the J&DR court judge, works collaboratively to help families effectively deal with substance abuse.

Further Identifying the Problem

With the passage of the federal Adoption and Safe Families Act of 1997 (ASFA) (Public Law 105-89), Congress mandated that children in the foster care system have a permanent placement within twelve months of entering the system.⁴ For parents who were substance abusers, this presented a particular challenge. Assuming they wanted addiction treatment, waiting lists were long, court dockets were crowded, and the likelihood of relapse could easily place them outside the twelve-month time frame. Could a law whose intent was to place children in loving, permanent homes rather than allowing them to languish in the foster care

system for years have the unintended effect of separating families that might reasonably be reunited?

Fearing this reality and searching for a solution to the problem, child welfare proponents borrowed principles from adult drug courts started in 1989, and applied the principles to create FDTs.

These courts are a juvenile or family court docket of which selected abuse, neglect, and dependency cases are identified where parental substance abuse is a primary factor. Judges, attorneys, child protection services, and treatment and other social and public health personnel unite with the goal of providing safe, nurturing, and permanent homes for children while simultaneously providing parents the necessary support and services to become drug and alcohol abstinent.⁵

These courts are civil in nature and have a sense of urgency to rehabilitate participants within the mandated time frame. The ultimate sanction for failure is not incarceration as in adult drug court, but loss of parental rights. Because alcohol and drug abuse have been identified as the cause of seven out of ten child abuse and neglect cases, the need for these courts is critical.⁶

In 2004, the Conference of Chief Justices and the Conference of State Court Administrators adopted a national joint resolution committing all fifty state chief justices and state court administrators to “take steps, nationally and locally, to expand and better integrate the principles and methods of well-functioning drug courts into ongoing court operations.”⁷

Family Drug Treatment Courts in Virginia

Virginia established its first drug treatment court in 1995 as a result of the judiciary’s efforts to find more effective methods to handle the escalating number of drug offenders on Virginia’s court dockets. This reflected the philosophy that more effective handling of drug treatment for addicts would result in higher recovery rates and reduced criminal behavior.⁸ Initially starting with one adult

drug treatment court, today the number of operational drug treatment court programs in the state has grown to twenty-nine. There are sixteen adult felony courts, one adult driving-under-the-influence drug treatment court, eight juvenile drug treatment courts and four family drug treatment courts. These four FDTs are currently making a difference in Alexandria, Charlottesville/Albemarle County, Newport News and Richmond.

Virginia has strong judicial, legislative and executive support for the continuation and expansion of drug treatment courts. Because these programs represent the most successful and cost-effective approach to dealing with drug-addicted offenders, advocates continue to seek permanent and stable sources of funding.⁹ Chief Justice Leroy R. Hassell Sr. commented in his address to the Virginia Drug Court Association, September 30, 2005:

As I review the preliminary data, as I receive letters from graduates of drug courts, as I interact with participants in drug court programs and listen to their life stories, as I see families reunited, marriages restored, and jobless, unproductive people who were once, through their own fault albeit, existing in a cycle of despair, as I observe these people being transformed into productive, taxpaying citizens, I conclude that, yes, drug courts work. I conclude that, yes, drug courts are needed.¹⁰

Indeed, this thinking is consistent with that of Thomas Jefferson, who stated, “The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government.”¹¹ If alcoholism and drug addiction are accepted as treatable and preventable diseases, states should address them through a public health strategy with the goal of long-term recovery.¹²

How Family Drug Treatment Courts Operate

Common practices and key components adopted by the National Association of Drug Court Professionals are essential to

Defining Drug Courts: The Key Components

1. Drug courts integrate alcohol and other drug treatment services with justice system case processing.
2. Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants’ due process rights.
3. Eligible participants are identified early and promptly placed in the drug court program.
4. Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.
5. Abstinence is monitored by frequent alcohol and other drug testing.
6. A coordinated strategy governs drug court responses to participants’ compliance.
7. Ongoing judicial interaction with each drug court participant is essential.
8. Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.
9. Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations.
10. Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness.

(NADCP, 1997).

every drug court.¹³ (See sidebar.) These include requiring early case screening and assessment; prompt referral and access to a continuum of treatment and rehabilitation services; a coordinated strategy to govern responses to participants’ compliance; partnerships with public agencies, treatment providers, attorneys, community-based organizations and others; and regular and active judicial supervision.¹⁴

FDTs normally use a team approach to handle cases. Judge, attorney, social worker, substance abuse/mental health worker, court appointed special advocates and others are all a part of the team of professionals that provide support needed to deal with addiction. The court convenes on a weekly basis. The team of professionals keeps participants accountable by ordering various evaluations, urine screens, Alcoholics Anonymous or Narcotics Anonymous meetings, job searches or whatever else the court may

deem appropriate. Inpatient services and detoxification programs are often absolutely necessary.

In some cases, children of recovering parents are removed from their homes. In other cases, children are able to remain with a parent or guardian. As long as a participant is in the FDTC, he or she gets credit for working toward reunification, with the incentive being a desire to not lose custody of his or her children. Therefore, the time period may extend beyond the twelve-month ASFA-mandated period. The key is to provide community resources along with the accountability the law requires.

If a community determines that family drug treatment court would be a welcomed alternative to traditional procedures but the number of participants who would take advantage of such an opportunity is small, a regular J&DR docket could feasibly handle the cases with an intensive team approach. Clearly though, larger numbers of waiting participants who could encourage judges and family law practitioners to check into starting one in their community. For further information on Virginia drug treatment courts, please visit www.courts.state.va.us/dtc/home.html.

Judicial Ethics

The key to the success of any drug court rests on the professional role of the judge as leader in the drug court process. The role of the judge changes from the traditional passive one to a more active one. "No longer are courts and judges uniformly shying away from these issues because they may entail 'social work.' Instead many judges are becoming knowledgeable about substance abuse causes, symptoms, behaviors and treatments, as well as issues relating to recovery, relapse, and family dysfunctions."¹⁵ As drug courts are becoming more accepted in the legal community, the issue of the proper ethical role of judges in the process continues to be debated. "In all judicial proceedings, the judge bears the ultimate responsibility for ensuring that the parties receive a fair hearing in a dignified forum."¹⁶ Each of Judicial Canons 1 through 5 raises unique ethical

concerns for the drug court judge. I will only focus on four of the most common.

As noted previously, a coordinated strategy governs court responses to compliance. This strategy used by all drug courts involves "staffing," in which members of the drug court team meet in advance of the participant's hearing to discuss the participant's progress in treatment and to reach consensus about rewards and sanctions. As a judge becomes part of this collaborative decision-making team that includes treatment providers, court personnel and attorneys, the judge's involvement may appear to undermine perceptions of judicial independence and impartiality. Canon 1(A) states:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.¹⁷

It is submitted that the collaborative decision-making process, however, does not violate the judge's duty of independent judgment so long as the final decisions remain with the judge. The judge may not delegate this final decision making to other members of the drug court team.¹⁸

All drug courts require the judge's personal engagement with each participant throughout the drug court experience. This dynamic is crucial to the successful completion of treatment and other program requirements. The ethical concern here is that of avoiding the appearance of impropriety. The judge's personal engagement must not conflict with the judge's position as a detached arbiter who is blind to the parties before the court.¹⁹ Canon 2(A) states:

A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.²⁰

The Code requires impartiality, not disengagement. A judge can show concern about a participant's progress in recovery, yet can also extend the same quality of engagement and concern to all participants to avoid the appearance of impropriety.²¹ If the judge maintains an active, supervising relationship throughout treatment, the likelihood increases that a participant will remain in treatment and improve the chances for reaching sobriety and family reunification.

All drug courts should forge partnerships among drug courts, public agencies and community-based organizations to generate local support and enhance drug court program effectiveness. Ethical concerns are raised when the independence or impartiality of the judiciary comes into question. As long as the focus of collaborative work in this area is to educate about drug court practices and procedures, there should be no ethical problems. Caution should be taken when partnering with law enforcement so as to not appear to be acting as an instrument of law enforcement. Where court-community partnerships cooperate in the exchange of information, ethical concerns should be minimal or nonexistent. Community organizations that educate the court about available resources merely serve to aid the court's disposition of cases. Partnerships should never include discussion of specific cases that are pending in the court, nor should they cast any doubt on the judge's capacity to act impartially.²²

Finally, certain concerns about impartiality and dignity may arise from a judge's conduct both inside and outside of the courtroom in drug courts. Praising, hugging and clapping for participants are inconsistent with normal courtroom behavior, but quite common in drug courts. Likewise, judges attending social gatherings (like a picnic) with parties before the court is not customary, but is common in drug courts. Canon 3(B) states:

A judge shall require order and decorum in proceedings before the judge.²³

Realizing that a drug court's goal is to actively promote the successful treatment of participants rather than to mediate a dispute between two litigants, a judge may participate in these activities to promote the objectives of the drug court. The judge must, however, remain impartial and dignified and treat all participants equally; not discuss or transact business with participants outside of the courtroom; keep outside gatherings open to all participants; and never be alone with a single participant.²⁴

The Benefits of Family Drug Treatment Courts

Family drug treatment courts have been shown to benefit families, courts and the community. They shorten a child's time in foster care by identifying substance abuse issues early and starting treatment. Also, because of the individualized case plan and the drug court team's close monitoring, the participant is more likely to succeed. If the participant fails the program, there is usually no question that reasonable efforts to rehabilitate have been provided and the case can move toward permanency. Because the time in foster care is shortened, communities save money. Family drug courts can serve as an effective preventive intervention for addicted parents by preventing babies from being born to a substance-abusing mother.²⁵

Socrates's wisdom is alive in Virginia's FDTCS as the J&DR judge utilizes a team of community-based professionals to hear courteously, answer wisely, consider soberly, and decide impartially in an area of life and law where solutions are very difficult to harness. Rather than being a model of judicial restraint, family drug courts represent judicial activism to confront the onslaught of family dysfunction

brought on by drug abuse. Virginia's J&DR judges are responding to the nature and number of cases overwhelming family court dockets, and the family drug treatment courts are making a difference in the lives of Virginia's children and their families. ☺

Endnotes:

- 1 Quoted in Wright, *Courtroom Decorum and the Trial Process*, 51 JUDICATURE 378, 382 (1068).
- 2 Hon. Anthony J. Sciolino, *The Changing Role of the Family Court Judge: New Ways of Stemming the Tide*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 395 (2005), quoting Chief Justice Kaye from a NEWSWEEK 1999 article.
- 3 Hon. Leah Ward Sears, *A Case for Strengthening Marriage*, THE WASHINGTON POST, Oct. 30, 2006, at A17.
- 4 *Applying Drug Court Concepts in the Juvenile and Family Court Environments: A Primer for Judges* (June 1998) at 16 [hereinafter PRIMER].
- 5 *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the US*, Bureau of Justice Assistance (BJA), National Drug Court Institute (NDCI)(May 2005), at 12 [hereinafter Report Card].
- 6 National Center on Addiction and Substance Abuse at Columbia University, New York, NY (1999). *No safe haven: Children of substance abusing parents*.
- 7 Report Card, *supra* note 5, at 9. See also *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. (Jan. 1999).
- 8 Virginia Drug Treatment Courts Program (VDTCP) Web site at www.courts.state.va.us/dtc/home.html
- 9 For further discussion of policies to improve the ways states organize and deliver alcohol and drug prevention and treatment see "Blueprint for the States: Findings and Recommendations of a National Policy Panel. Join Together." 2006 (hereinafter Blueprints) at www.jointogether.org.
- 10 VDTCP, *supra* note 8.
- 11 Quoted in *Therapeutic Jurisprudence*, *supra* note 7 at 439.
- 12 "Blueprint," *supra* note 9 at 8.
- 13 *Defining Drug Courts: The Key Components* (National Association of Drug Court Programs, 1997)
- 14 See Report Card, *supra* note 5 at 10. 10 Key Components.
- 15 Primer, *supra* note 4, at 6. See also Pamela M. Casey and David B. Rottman, Problem-solving

Courts: Models and Trends, paper presented to the National Center for State Courts (NCSC) July 8, 2003.

- 16 *Ethical Considerations for Judges and Attorneys in Drug Court*, National Drug Court Institute (May 2001) at 1.
- 17 Rules of the Virginia Supreme Court of Virginia, Part Six, Section III, Canons of Judicial Conduct for the State of Virginia. Canon 1 (A) (hereinafter Canons)
- 18 Ethical Considerations, *supra* note 15 at 3.
- 19 Ethical Considerations, *supra* note 15 at 5.
- 20 Canon 2(A), *supra* note 16.
- 21 Ethical Considerations, *supra* note 15 at 5.
- 22 Ethical Considerations, *supra* note 15 at 5.
- 23 Canon 3, *supra* note 16.
- 24 Ethical Considerations, *supra* note 15, at 8.
- 25 The Honorable Leonard Edwards, *Judicial Perspectives on Family Drug Treatment Courts*, 56 JUVENILE & FAM. CT. J. 3 (Summer 2005).

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