THE CHALLENGES OF FAMILY COURT SERVICE REFORM

Peter Salem

Reforming family courts and court services remains a continuing and pervasive challenge, as described in the White Paper developed by the Institute for the Advancement of the American Legal System's Honoring Families Initiative. This commentary explores challenges to reforming court services and concludes that significant funding is needed to achieve long-term, effective, and overarching change. The commentary also examines the proposition of community–court partnerships and suggests that (1) each community must tailor its program based on its needs and resources and (2) specific operational elements of a court services program, rather than its location, lead to effective service delivery.

Key Points for the Family Court Community:

- Sufficient funding of family court services is critical to effective service delivery.
- Although insufficient funding may not eliminate services, it may change the fundamental nature of the dispute resolution process.
- Services should be tailored based on the needs and resources of the community.

Keywords: *Court Reform*; *Family Court Resources*; *and Family Court Services*.

Upon reading the White Paper of the Institute for the Advancement of the American Legal System's Honoring Families Initiative on the court and separating and divorcing families (Kourlis, Taylor, Schepard, & Pruett, 2013), I was alternately depressed and gratified. I became disheartened as the authors identified a litany of concerns for parents and children who are users of family courts and family court service (FCS) agencies, for multidisciplinary professionals who work in the field, for the broader justice system and for society at large. These include: an increase in separation and divorce; an influx of cases; an increasing number of self-represented litigants; substantive law creating more discretion and contention; economic, behavioral, emotional, and educational risks to children associated with separation and divorce; the impact of continuing conflict between separated parents; and the financial costs to both parents and business productivity of separation and divorce.

My spirits were then lifted as the White Paper identified several "problem-solving-promoting processes" designed to address the above concerns and that have achieved some level of success. It is particularly gratifying for me, as executive director of the Association of Family and Conciliation Courts (AFCC), that the development of these processes are generally traceable to agencies and colleagues who have been AFCC stalwarts and leaders over the last half-century. For instance, child custody mediation, which evolved from conciliation counseling (Folberg, 1974) and began in FCS agencies in California, Wisconsin, and Minnesota (Ricci, 2004), was first piloted in 1973 in the same Los Angeles Conciliation Court that founded AFCC 10 years earlier (Thoennes, Salem, & Pearson, 1995). Divorce education programs, which began in Kansas in the late 1970s and early 1980s, spread rapidly throughout North America in the 1980s and 1990s, with AFCC and its members serving as catalysts for program development, dissemination, and institutionalization (Salem, Sandler, & Wolchick, 2013). Early neutral evaluation for parenting disputes was developed by AFCC members at Hennepin County (Minneapolis, MN) FCS (Pearson et al., 2006), then introduced in Colorado at a training conducted by our Minnesota colleagues for the AFCC Colorado Chapter. Finally, an AFCC consulting team collaborated with AFCC members in the Connecticut Court Support Serviced Division to design, implement, and evaluate a differentiated case management system that helped spur

Correspondence: psalem@afccnet.org

FAMILY COURT REVIEW, Vol. 52 No. 4, October 2014 670–677

widespread interest in triaging court services (Salem, Kulak, & Deutsch, 2007; Pruett & Durrell, 2009). These changes helped influence private-sector dispute resolution processes (e.g., parenting coordination, collaborative law, and cooperative law) that emerged in parallel fashion through the leadership of AFCC members. Moreover, the practice of law has evolved, as today's lawyers are converging traditional litigation skills with consensus building and problem-solving skills (Macfarlane, 2008).

The contemporary family law landscape is thus dramatically different today than thirty years ago. Nonetheless, family courts and FCS agencies continue to struggle to meet the diverse and ever-evolving needs of users and overcome the challenges noted above. The White Paper emphasizes the priority of funding and providing core functions such as protection for victims, fact finding where necessary, and enforcement of orders. It also suggests some ideas for reform, including simplified trial procedures, administrative processing of uncontested divorces, and community-based mental health and dispute resolution services. This commentary will focus on two areas: (1) overarching challenges to reform and (2) the notion that dispute resolution and related services, frequently offered by court-connected or affiliated agencies, might be better based in the community than the court.

THE CHALLENGES OF CHANGE

If family courts and related services have changed so significantly, why do so many challenges persist? The United States is not alone in having made great strides while simultaneously and persistently being called upon to implement more dramatic system change. Canada's Family Justice Working Group (FJWG) (2013) of the Action Committee on Access to Justice in Family and Civil Matters cites precisely the same situation. Noting numerous previous family law reform working groups and reports resulting in similar recommendations, the FJWG points to the "implementation gap" as ". . .the gap between the strongly worded recommendations of past family reports and the failure of the justice system to fully implement them" (FJWG, 2013, p. 3). The FJWG identifies two barriers to change: limited resources for the family justice system and a culture that has not fully embraced nonadversarial dispute resolution processes.

THE RESOURCE ISSUE

Family courts and FCS agencies have endured financial challenges for at least two decades, but the Great Recession of 2008 seems to have generated greater tolerance for political attacks on government programs and for eviscerating services in ways once thought unimaginable. In Los Angeles County, for example, there were substantial cuts to FCS personnel, eliminating virtually all but mandated services while eight courts were closed and public court hours were reduced. In calling for community-based services, the White Paper accurately notes that FCS agencies are often among the first to have budgets cut. Indeed, the fat has long been trimmed and today's cuts are to the bone. This mirrors the situation in public education, although there we have a consensus that educating our children well (if not *how* we do so) is a national priority. Our unpleasant reality is that domestic relations issues (i.e., separation, divorce and parenting time disputes) are generally a low priority. Canada's FJWG reports, "Despite the pervasiveness of family justice problems, the general public, media and politicians are far more engaged with criminal law matters. . . and [this] often translates into funding support for criminal justice as a priority over family law" (FJWG, 2013, p. 3), to say nothing of the court resources used in costly private civil/commercial matters. The situation is arguably worse in the United States. Canada's government more generously funds social services (e.g., health care, paid parental leave) as well as its justice system as evidenced, if in no other way, by the publicly funded FJWG and Action Committee reports, which were commissioned by the Supreme Court of Canada.

Furthermore, in the United States, domestic relations takes a backseat where funding is concerned to related family matters such as intimate partner violence (IPV), child abuse and neglect, and child

support collections. Those seeking financial support—whether for research, program development, administration, training, or resource development—decry the lack of available funding for domestic relations–related initiatives. AFCC itself functions with relatively insignificant and sporadic foundation or government support (none currently) due to our unwillingness to compromise our focus on children of separation and divorce. Even our colleagues at the National Council of Juvenile and Family Court Judges, who routinely procure major federal grants for their excellent work in IPV and child dependency, acknowledge the same barriers with funding domestic relations projects.

Notwithstanding the overlapping population, and without minimizing the impact of separation and divorce on children, it is understood that IPV, child abuse and neglect, and child support collections generally present society with more pressing concerns. However, the lack of funding for domestic relations courts, services, and related initiatives creates barriers not only to day-to-day operations of family justice systems, but to meaningful change for even the most thoughtful and creative reformers. In California, the Elkins Family Law Task Force acknowledged the challenges:

> Because we recognize that the courts are unlikely to receive significant additional resources any time soon, many of our recommendations call for using existing court resources differently, implementing policies that are already in place, or phasing in proposals over time to reduce reliance on new funds (Center for Children, Families and the Courts, California Administrative Office of the Court, 2010, p. 15).

Nonetheless, the Task Force reported, ". . . others may require new funding *some of it substantial*" (Center for Children, Families and the Courts, California Administrative Office of the Court, 2010, p. 15, emphasis added).

The White Paper stresses, "Courts *must* continue to offer protection for victims, disputed fact-finding where necessary, and enforcement of orders. They also *must* receive adequate resources to perform these functions efficiently and fairly" (Kourlis et al., 2013, p. 368). These sentiments are hardly controversial, but in some courts core functions have been cut. Until and unless this situation is rectified, reform or improvement of services that currently rely on meaningful government or foundation support will remain a daunting prospect.

DISPUTE RESOLUTION CULTURE

Canada's FJWG argues that, while there has been great progress, the culture of truly consensual dispute resolution has not been fully embraced by those in the justice system, creating a second barrier to change. A true cultural shift would emphasize the primacy of dispute resolution processes over adversarial proceedings and would focus on the consensual and relational over the evaluative nature of these processes. Such a paradigm shift appears intended by the implementation of Australia's Family Relationship Centers, community-based agencies that focus on strengthening family relationships, helping families stay together, and assisting families through separation (while not allowing lawyers to participate); it is noteworthy that there has been limited use of the first two services (Kelly, 2013).

There is little question that no such shift has occurred in the United States. We should, however, acknowledge the progress that has taken place since the 1970s along with the remarkable ability of family court professionals to adapt existing processes and develop new ones to keep pace with the rapid changes and new challenges separating and divorcing families face. The default for many (but not all) divorcing families remains the court, and change in institutions as unwieldy as the legal system is slow by nature. There has nonetheless been a steady and perceptible shift in attitudes about dispute resolution among the bench, the bar, and the public from the days when the legal community vigorously opposed alternative dispute resolution. We have witnessed: (1) the widespread development and implementation of myriad public- and private-sector dispute resolution processes; (2) law, graduate, and undergraduate dispute resolution curricula, programs, and clinics; (3) statutes produced by the Uniform Laws Commission (e.g., Uniform Mediation Act, Uniform Collaborative Law Act); (4) an abundance of international, national, state, and local dispute resolution organizations;

(5) mediation advocacy competition for law students; (6) peer mediation programs for school-aged children; and (7) a significant body of research literature. There was even the airing of *Fairly Legal,* a long-awaited television show about mediation. That the program was cancelled after two rather unceremonious seasons, while there remains no shortage of popular law-based series, may epitomize our uphill climb with respect to dispute resolution and the public consciousness. That said, many legal dramas now incorporate (if not accurately) dispute resolution procedures.

The extent to which dispute resolution can fully emerge from the shadow of the law is unclear, as legal professionals have legitimate interests, business and otherwise, in being engaged in the process. Berman and Alfini (2012) write about lawyer colonization of mediation, quoting dispute resolution pioneer Bernie Mayer: "The law profession first resisted mediation and then co-opted it." Furthermore, not everyone sees a paradigm shift as optimal. Writing about the practice of law, Macfarlane suggests that, rather than a paradigm shift, we should look to *convergence*, that is, ". . . mutual influence and cross-fertilization, whereby the old informs the new and the new builds on the old" (2008, p. 20). I believe this may be an apt analogy for today's family dispute resolution field.

The White Paper expresses the realistic concern that a program under the auspices of the court may be evaluated based on agreements and thus become settlement driven. Indeed, some judges and administrators have created policies that allow mediators to share information from the mediation with the court, absent an agreement, and California has long offered recommending mediation, although the neutrals are now referred to as child custody counselors. These practices, however, are not necessarily a result of being court connected per se. They are just as likely a response to a need for greater efficiencies in the system, often due to funding cuts. Indeed, FCS agencies that once afforded parents multiple confidential and interest-based mediation sessions are now restricted to as little as one session (in some programs 1 hour) of mediation or have implemented a recommending model, neither of which supports a truly consensual approach. Thus, many courts and FCS agencies that prioritize truly consensual dispute resolution processes have been forced, when push comes to shove (i.e., funds are cut), to do whatever it takes to deliver services to the growing number of family court users. That can result in an evaluative, settlement-focused process.

According to Berman and Aflini (2012), the evaluative nature and settlement focus of some FCS agencies is shared by lawyers who conduct mediation: ". . . lawyer colonization of the mediation field is likely to result in a less distinctive dispute resolution alternative and a lessened adherence to mediation's core values, particularly party self-determination" (p. 923). It would thus seem that our dispute resolution culture is clearly influenced by those in the legal system. Of course, not all lawyers are evaluative mediators and not all court programs are settlement driven. I suggest that many lawyers may be influenced by their profession of origin and perhaps by their interest in studying and practicing law in the first place. But for FCS agencies it is equally likely that a lack of resources, leading to a need for efficiency, most heavily influences the nature of the process. Indeed, the culture of a program and the nature of its services may be inextricably tied to its budget. Thus, *any* program, whether based in the court, community, or elsewhere, may be susceptible to this fate.

POLITICS AND IDEOLOGY

A third challenge to reform, not raised by the FJWG report, is political/ideological issues related to family courts and services. I have written on this elsewhere (Salem & Dunford-Jackson, 2008; Salem, 2009; Salem & Shienvold, 2014) and will not repeat myself here. It is important to state that interest groups supporting or opposing specific processes or constituents can play an important role in raising awareness and collaborating to add value to reform efforts. Taken to extremes, however, they can create unproductive conflict and barriers to meaningful change.

ORGANIZING SERVICE DELIVERY

Notwithstanding the challenges involved in creating meaningful family justice system reform, we must be vigilant in our ongoing efforts to preserve and improve the family court and related services

that AFCC members have developed over the last half-century. The White Paper proposes consideration of a community-based solution using the Australian Family Relationship Centers (FRCs) as an example and asks, "how are we going to structure a partnership between courts and communities that is designed to provide families with what they need while recognizing the realities of budget demands?" (Kourlis et al., 2013, p. 369). This section briefly examines that question, while acknowledging my personal bias toward court-based FCS agencies based on my background as director of an FCS agency followed by two decades with AFCC. Given that bias, I interviewed five colleagues, each of whom oversees service delivery in a different context, to learn their perspectives and better inform this commentary.[1]

LOCATION, LOCATION, LOCATION?

We have a tendency to refer to court-related services as "court based" and "community based," the unspoken message often being that there are two distinct types of services, one more influenced by the courts and the law, the other more focused on family relationships. However, the real estate maxim, "location, location, location" may not be apropos when looking at the reality of contemporary service providers as the distinction between court and community can be rather blurry. Nonetheless, it is a useful starting point from which to consider the advantages and disadvantages of each model.

There is a case to be made for services that are based primarily in the community from both a symbolic and practical perspective. Community-based agencies located away from the court are more likely to be perceived as "helping" agencies, which may mitigate the anxiety laypersons may feel as they pass through metal detectors into the courthouse, often anticipating a confrontation. Community-based agencies may be flexible with respect to where they are located and can be user friendly, providing evening and weekend services. Agencies based in the court often have limited operating hours and client access may be restricted to times when security measures are present. Community-based agencies potentially offer greater efficiency and more programmatic and operational flexibility as they operate free of the bureaucracy and, at times, cumbersome decision-making processes of government entities. Community-based agencies that contract for services can access a wider range of providers with more diverse skills than those possessed by FCS agency staff. Furthermore, one colleague said that her agency is motivated to continuously excel, knowing that there will be ongoing competition for the next government contract. We might infer (although it was not stated) that where there is job security, motivation may not be as pressing.

There are also benefits to a court connection. The same security measures and court-like atmosphere that can provoke anxiety also provide protection that typically does not exist in a community-based agency. IPV is not infrequent between separating and divorcing parents and often goes unreported. Separation is considered the most dangerous time for an IPV victim, so safety and security are important considerations. Many FCS agency staffs have computer access to related court records (e.g., restraining orders, child welfare files) offering additional protective measures. A courthouse location may confer legitimacy, respect, and authority on FCS agencies, which may result in greater use of services by those who would otherwise resist going to "counseling"[2] at a community-based agency. A permanent court staff is more familiar to the bench and the bar and in some cases the community and offers predictability of service. Salaries, benefits, and retirement plans for government employees are generally stable, perhaps resulting in greater continuity and often more experienced staff. Proximity to the court also has its advantages. Being in the same facility can facilitate formal and informal relationships between the FCS agency, the bench, and court administration, enabling participation in developing court rules and administrative policies that can support effective service delivery. There are also more opportunities, both formal and informal, for judges, lawyers, and administrators to interact with and become comfortable with the service providers and the programs, creating support for the program and leading to more client use. Thus, the independence that in some ways is advantageous for community-based agencies may also be detrimental as they are less integrated into the world of the gatekeepers to the services.

ALL FAMILY LAW IS LOCAL:[3] ONE SIZE DOES NOT FIT ALL

The reality is that court services are not necessarily based exclusively in the court or community. In contrast to the Australian experience, the United States is far from unified in its approach to family law or the delivery of services. Australian FRCs may be a model for reform within a given community; however, they also benefit from enabling federal legislation and significant government funding. Conversely, the United States has a patchwork of legislation, court rules, funding levels, legal cultures, and beliefs about the role of the judge and the family justice system that vary from state to state, and sometimes judge to judge within a given court. Most jurisdictions tailor their services based on the needs and resources of their own community, especially given that funding is often lacking. For example, the colleagues that I interviewed provide a range of service delivery models and options, including: (1) a traditional FCS agency serving a metropolitan area with a population of one million, offering mediation with multiple sessions, counseling, parent education, child interviews, custody evaluation, and parenting coordination (for the indigent), but with its offices located outside of the courthouse; (2) a Midwestern county of 34,000, in which the judge procured grant funding of $20,000 to support contract mediation services offered by community lawyers in their offices and which provides $8,000 of taxpayer support for a contracted parent education program; (3) a private agency in a large Canadian city that contracts with the government to provide family law information and referral services, mediation (again, conducted primarily by lawyers), and parent information programs, offering services both in and out of the court; and (4) a Wyoming nonprofit agency that provides mediation (again, primarily by lawyers) to three judicial districts and parent education statewide, combining grant funds with a fee-for-service model. A fifth colleague, whose statewide court agency supports dispute resolution programs in more than eighty counties, said that each county designs its own program, typically with limited resources. This has resulted in mediation being conducted by magistrates, court administrators, and other court staff (who have been trained to do so) and in one county a judicial triage program.

The service providers interviewed for this commentary employ multiple delivery models and partnerships, few of which seem to fit the mold of a traditional court or community agency. Services based in the community include lawyers providing mediation in private offices (which Berman and Alfini [2012] argue leads to a more evaluative process), while court-based programs provide counseling and mediation services funded by the court, but located offsite. However, each colleague was able to identify critical program elements that facilitate effective service delivery. These include, but are not limited to, a reputation for being a helping agency, safety and security, flexibility and adaptability, convenience, agency participation in the developing and implementing policies, relationships with gatekeepers, motivation to excel, a well-trained and experienced staff, a positive standing in the community, and sufficient funding. I suggest that these and related elements are critical to the success of any community, as it identifies the most effective delivery model.

FORM FOLLOWS FUNDING

As stated above, the culture of a program and the nature of its services can be inextricably tied to its budget. Australia's FRCs operate with significant government funding. In the United States, that funding does not appear to be forthcoming and we must look ahead with that in mind. Venerable community mediation pioneer Albie Davis adapted the phrase "form follows function" to "form follows *funding*" when assessing Massachusetts community mediation programs in the mid-1980s, amidst concerns that these programs were taking on the characteristics of the very courts that provided funding for an alternative to litigation. In the family courts, the phrase might be adapted, once more, to "form follows *lack of* funding." For years, many FCS agencies provided an array of services comparable to community agencies. The FCS agency referenced in this article once provided free counseling services, regardless of whether there was a file; however, these services are no longer funded. Nonetheless, the agency continues to offer multiple mediation sessions, counseling, parent education, and other services. Other agencies have not been so fortunate and have cut back on all but

mandated services. Still others have reengineered, contracted, and triaged services. Court programs clearly are vulnerable to cuts as are community-based agencies, but in some ways court programs may be more resilient. It can be easier to simply discontinue a community program than to disassemble an FCS agency staffed by civil servants. It is therefore important that each community take stock of its resources and leverage them in a way that best meets its needs.

CONCLUSION

There are numerous models of service delivery, including court based, community based, hybrids, and partnerships. Some communities use supervised volunteers, interns, and students to provide services to help fill the funding gap. Other creative service delivery options have been identified above. We should not fool ourselves into believing that family courts and FCS agencies can simply rearrange or cut their way to better services any more than consistent reductions in funding for education or human services improves programs in those arenas. Notwithstanding the challenges ahead, this is an exciting time for those involved in family court reform. Services for separating and divorcing parents and their children look very different today than thirty years ago. In part, the lack of funding has forced us to take a step back to reexamine long-held assumptions and develop creative and effective alternatives. We must continue this process, ever mindful that sufficient funding is critical to truly effective reform.

NOTES

1. Thanks to Grace Hawkins, Family Center of the Conciliation Courts, Pima County, AZ; Hon. William C. Fee, Steuben County, IN; Hilary Linton, Mediate393, Toronto, Canada; Jacqueline Hagerott, Dispute Resolution Section, The Supreme Court of Ohio; Cori Erickson, Center for Dispute Solutions, Cheyenne, WY.

2. In my experience as a court mediator, many clients were unfamiliar with mediation and mistakenly believed they were being mandated to attend counseling sessions, which they resisted.

3. This paraphrase of Tip O'Neil's "All politics are local" was coined by former AFCC President Hon. Hugh Starnes.

REFERENCES

Berman, D., & Alfini, J. (2012). Lawyer colonization of family mediation: Consequences and implications. *Marquette Law Review, 95*, 887–925.

Center for Children, Families, and the Courts, California Administrative Office of the Court. (2010). *Elkins family law task force: Final report and recommendations.* Retrieved February 12, 2014 from http://www.courts.ca.gov/documents/elkins-finalreport.pdf

Family Justice Working Group. (2013). *Meaningful change for family justice: Beyond wise words*. Toronto, Canada: Action Committee on Access to Justice in Family and Civil Matters.

Folberg, J. (1974). Facilitating agreement: The role of counseling in the courts. *Conciliation Courts Review, 12*(2), 17–20.

Kelly, J. (2013). Getting it right for families in Australia: Commentary on the April 2013 special issue on family relationship centres. *Family Court Review, 51*, 278–285.

Kourlis, R., Taylor, M., Schepard, A., & Pruett, M. (2013). IAALS' Honoring Families Initiative: Court and communities helping families in transition arising from separation or divorce. *Family Court Review*, *51*, 351–376.

Macfarlane, J. (2008). *The new lawyer*. Vancouver, Canada: University of British Columbia Press.

Pearson, Y., Bankovics, G., Baumann, M., Darcy, N., DeVries, S., Goetz, J., et al. (2006). Early neutral evaluations: Applications to custody and parenting time cases program development and implementation in Hennepin County, Minnesota. *Family Court Review, 44*, 672–682.

Pruett, M., & Durrell, M. (2009). Family civil intake screen services evaluation: Final outcomes report. Unpublished manuscript. Retrived February 12, 2014 from http://www.afccnet.org/ResourceCenter/CenterforExcellenceinFamilyCourtPractice/ctl/ViewCommittee/CommitteeID/16/mid/495

Ricci, I. (2004). Court-based mandatory mediation: Special considerations. In J. Folberg, A. Milne, & P. Salem (Eds.), *Family and divorce mediation: Models, techniques and applications* (pp. 397–419). New York: Guilford.

Thoennes, N., Salem, P., & Pearson, J. (1995). Mediation and domestic violence: Current policies and practices. *Family and Conciliation Courts Review, 33*, 6–29.

Salem, P. (2009). The emergence of triage in family court services: The beginning of the end of mandatory mediation? *Family Court Review, 47*, 371–388.

Salem, P., & Dunford-Jackson, B. (2008). Beyond politics and positions: A call for collaboration between domestic violence and family court professionals. *Family Court Review, 46*, 437–453.

Salem, P., & Shienvold, A. (2014). Closing the gap without getting to yes: Staying with the shared parenting debate. *Family Court Review*, *52*, 145–150.

Salem, P., Kulak, D., & Deutsch, R. (2007). Triaging family court services: The Connecticut Judicial Branch's family civil intake screen. *Pace Law Review, 27*, 741–783.

Salem, P., Sandler, I., & Wolchick, S. (2013). Taking stock of parent education in the family courts: Envisioning a public health approach. *Family Court Review, 51*, 131–148.

Peter Salem has served as executive director of the Association of Family and Conciliation Courts since 2002 and was associate director from 1994 to 2002. He is a member of the Institute for the Advancement of the American Legal System's Honoring Families Initiative Advisory Committee. He was a William T. Grant Foundation Distinguished Fellow from 2009 to 2012 and worked with the Prevention Research Center at Arizona State University with a goal of helping bridge the gap between research, policy, and practice. He served as director and mediator with Rock County Wisconsin Mediation and Family Court Services from 1989 to 1994 and taught mediation at Marquette University School of Law from 1998 to 2008. He earned his M.A. in media and communication management from Emerson College in Boston and B.A. in political science from McGill University.