CONVENORS COMMENTARY

CLOSING THE GAP WITHOUT GETTING TO YES:
STAYING WITH THE SHARED PARENTING DEBATE*

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This issue of *Family Court Review* (FCR) is an outgrowth of the Association of Family and Conciliation Courts (AFCC) Think Tank, *Closing the Gap: Research, Practice, Policy, and Shared Parenting*. The think tank, which we co-chaired, was an interdisciplinary gathering of thirty-two family law practitioners, policy makers, social scientists, and legal scholars convened in January 2013. It represents AFCC’s best effort to continue an important and often controversial discussion about research, practice, policy, and shared parenting. In fact, it is more of a combination of two conversations about inextricably linked topics. The first is about policy and practice regarding longstanding debates concerning parenting time and decision making, also referred to as joint/sole custody, legal custody, or physical custody to name just of few of many existing labels. The second conversation, the role of social science research in family law policy and practice, appears to have become more dynamic lately.

Historically, and perhaps more so in recent years, these conversations have generated significant conflict within the family law community. Our backgrounds as mediators help us to view such conflicts as natural and potentially productive. We acknowledge that AFCC has, in some ways, played a role in the development of this friction. Moving forward, we hope to help facilitate discussions that lead to greater clarity about the issues, about where key disagreements lie, and that promote the sharing of positive and open communication about the challenges that we, as a professional community, confront. While unanimity about these issues may be a laudable goal, it is not presently realistic given the state of the research and ongoing advocacy. Nonetheless, there is much to be accomplished short of having everyone in agreement.

THE CONFLICT: A BRIEF BACKGROUND

For several decades, AFCC has been at the center of, and at times challenged by, both of these discussions. Although AFCC does not typically make policy statements, it has historically been characterized (probably accurately so) as having members who by and large support—and many who have been on the vanguard of promoting—shared parenting time and decision making. For example, the early writings of Dr. Isolina Ricci, author of the popular shared parenting treatise *Mom’s House, Dad’s House*, appeared in the *Conciliation Courts Review* (now *Family Court Review*) in 1974. Since then, numerous articles have been published that advocate for shared, cooperative co-parenting after separation and divorce. The roster of AFCC Board members, conference presenters, and journal authors over the years is a veritable “Who’s Who” of professionals who have developed and supported mediation programs, co-parenting classes, and the movement toward shared parenting time and decision making.

As shared parenting appeared to become widely accepted among the AFCC community, challenging issues such as domestic violence, alienated children, and high-conflict families have entered into

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the mix and threatened the harmonious adoption of a silver-bullet solution. Indeed, in past years, some AFCC conferences were picketed both by advocates for battered women, who were concerned about mediation and what they believed to be AFCC’s penchant for shared parenting, and by advocates for fathers’ rights, who called for fairer treatment of fathers in family courts. To better inform its membership, AFCC has worked, with varying degrees of success, to create opportunities for a wide range of voices (at times, contrasting) to be heard through programs and publications. As AFCC has grown to nearly 5,000 members, we have achieved greater success at bringing critics into the organization. To some extent, this has brought the various perspectives, as well as the conflicting opinions, in-house.

Social science research has also been at the heart of AFCC’s journal and conferences ever since a small study of “non-appearance cases” was published in the second issue of the publication then known as California Conciliation Courts Quarterly in 1963. Over the last fifty years, many of the leading researchers in our field have published in the AFCC journal and/or have regularly presented at conferences both examining and, at times, strenuously debating the impact of various aspects of divorce and separation on children. Research on alienation, overnights and young children, domestic violence and the efficacy of mediation, parent education, and child custody evaluations (to name just a few topics) have provided fertile ground for debate. In 2005, AFCC convened a conference plenary session on perspectives on family law and social science research, which was followed by a series of FCR articles.

THE EMERGENCE OF THE PRESENT CONFLICT

The conversation about research, practice, policy, and shared parenting has been thought provoking and difficult at the same time, although, as noted above, AFCC members have generally appeared to come down on the side of shared parenting time and decision making. The discussion was given a spark in 2011 and 2012 when a special issue of FCR and AFCC’s Forty-Ninth Annual Conference in Chicago focused on attachment and family law. Of particular concern to some AFCC members were several articles and presentations by attachment theorists that suggested a more traditional approach to parenting time, including restricting overnights with the nonresidential parent for children through age three. AFCC and FCR were criticized for allowing one side of a controversial issue to be represented in FCR without counterpoint in the same issue and for highlighting that same perspective in a plenary session without an alternative view during the same session.

Hindsight is 20/20 and in retrospect, we would have made adjustments in order to create the best possible discussions. To be candid, we did not anticipate the passion that this issue would incite. But it was also illuminating to hear responses, both individually and through program evaluation, indicating how important some members felt it was that FCR and AFCC had given voice to the more traditional point of view. These comments did not come from those new to AFCC or from the outside, but from longstanding AFCC researchers and practitioners, many of whom generally support shared parenting time and decision making. However, they expressed the sentiment that, for some time, the pendulum has swung too far in favor of a message that they believe has resulted in many instances in an almost indiscriminate splitting of parenting time, irrespective of age; developmental needs of the child; and level of conflict, hostility, and even violence between parents.

The conflict at the Chicago conference was palpable at times (both behind the scenes and subsequently through e-mails and listservs) exposing divisions within the organization that were unlike anything we have ever experienced, resembling some of the earlier tussles with victims’ and fathers’ rights advocates. This should not have surprised us as it did. In the past decade, AFCC has tripled in membership from 1,600 to nearly 5,000 members. We are now a more diverse body of professionals. With the addition of so many new voices comes new perspectives. This wider range of opinions is consistent with the stated AFCC organizational value of learning through inquiry, discussion, and debate. After all, the greater the number of perspectives there are, the more to debate!

Unfortunately, we believe that the AFCC value of collaboration and respect among professions and disciplines succumbed at some level to this particular debate. This is largely due to the
interdisciplinary and highly politicized nature of the shared parenting (and especially the overnights and young children) debate taking place in family courts and legislatures around the world. This is characterized by either a staunch refusal to accept, or an enthusiastic embrace of, various social science findings that support distinct points of view and is consistent with Dr. Janet Johnston’s analysis of the challenges of integrating social science into practice and policy in the family law arena:

Problems with appropriate use of social science data derive, in part from the multidisciplinary nature of the family court context and its allied professionals. . . [who] come with different backgrounds. . . [and] have learned to think differently and to communicate in their own language and professional jargon. Governed by their own logic and their own body of ethics, these diverse professionals are in pursuit of relevant facts (data) in order to ensure that the family court will arrive at wise and just decisions for their client—whether a parent, child, or family as a whole. . . The distortions and misuse of social science data in family law matters also derive, in part, from the highly political nature of the substantive issues raised in this field—ones that fuel the gender wars between men and women, mothers and fathers.11

In particular, the challenges of integrating research and legal policy should be underscored here. As an interdisciplinary association, AFCC addresses issues related to various professionals’ language and cultures on an ongoing basis. Beyond that, however, the tentative and iterative nature of developing scientific knowledge is a difficult fit for legal frameworks such as statutes, case law, and court rules as well as constitutional values of the law.

In addition to the challenges related to the use of social science data by practitioners, policy makers, and advocates, some of whom use research findings selectively to support their position for any number of reasons, the research literature itself is, at times, viewed as suspect. Studies, and the researchers who conduct them, may be quickly branded (and thus dismissed or embraced) as supporting either mothers or fathers. Many of these researchers—along with policy makers, practitioners, and advocates—contend that their focus is on what is best for children. There is, however, sufficient consistency to the patterns in the literature that one colleague, researcher Dr. Irwin Sandler, commented, “I know what the results will be when I see the names of the authors.”12

It is beyond the scope of this commentary and of our expertise to address the methodological complexities that allow for multiple interpretations and representations of the same studies and, frankly, confound and frustrate so many practitioners and policy makers. But it seems clear that the very science we hope will inform effective policy and practice, and some of the researchers themselves, have become political footballs. This has played out with behaviors categorized by Johnston, which she notes have been used to “... destroy the standing of research data and researchers whose data they don’t like.”13 These include: (1) The Strawman, (2) Cherry Picking, (3) Leading Authority Declarations, (4) Scholarly Rumors, (5) Character Assassination, (6) Boycott the Researcher, and (7) Stalking and Hit Lists.

We are by no means suggesting that this is the behavior of a majority of professionals, and certainly not of most AFCC members. But we believe it is problematic where it does exist and that some researchers and professionals, upon reviewing Johnston’s descriptions of the above categories, will recognize the described behaviors. In an environment in which most seem to at least agree that more and better research is needed, this has a potentially chilling effect.

AN OPPORTUNITY TO MAKE THE CONFLICT PRODUCTIVE

We believe that conflict such as this creates an opportunity. As a result of the discord that emerged from the overnights and young children and shared parenting controversies, AFCC decided to confront the challenge by bringing the parties to the table, or at least as many as we could fit. Additionally, AFCC, in conjunction with FCR, further expanded the number of voices in the discussion when FCR immediately accepted for publication four articles as counterpoints to the July 2011 issue. These articles, along with a rejoinder, were published in July 2012, one month after the Chicago conference.
In this context, we then convened a think tank of practitioners, policy makers, social science researchers, and legal scholars representing a wide range of perspectives, intentionally including some who were vociferous critics of one another. The articulated goals of the meeting were:

- Convene leading stakeholders with diverse backgrounds and interests to collaborate on the often divisive issue of parenting time after separation and divorce;
- Examine barriers to use of research in family law practice and policy in the context of the shared parenting controversy;
- Raise awareness of the research–practice gap in family law;
- Identify pathways to better inform practitioners and policy makers about how to identify and use high-quality social science research; and
- Through case study, explore how to overcome barriers to widespread, appropriate, and effective use of research in practice and policy in family law.

We did not anticipate a “grand bargain,” to use political parlance, and none was achieved, although several very important points of consensus are reported in Marsha Kline Pruett and J. Herbie DiFonzo’s final report in this volume. The tone was respectful, some important strides were made, and it became clear that three days was insufficient time to cover the waterfront. Those looking for bold sweeping reform initiatives will be disappointed. While we would have been pleased with a complete consensus, the result was more modest but every bit as important. The think tank was able to: (1) bring experts of differing perspectives and disciplines into the same room to plant the seeds of a process for working together; (2) focus on common interests, identifying areas of consensus and clarifying areas of difference; (3) discuss, in broad strokes, the social science literature in the hope that that users of research might to some extent be able to count on objective criteria and be spared the challenge of selecting between competing research findings and interpretations; (4) advance the overall discussion, creating gains for the field.

**BRINGING MULTIPLE PERSPECTIVES INTO THE SAME ROOM**

We believe that the first steps, even if baby steps, have been taken in laying the foundation for a better, broader, and longer-term discussion, one that has become difficult and, at times, personal. There was very real value in simply bringing colleagues into the same room, enabling participants to speak to, and hear directly from, one another rather than communicating through writing, e-mails, listservs, or the “he said, she said” of the professional grapevine. There were important opportunities for some participants to dispel what they believed to be misperceptions about their perspectives, be it about their supporting parenting time presumptions, limits on overnights for infants and toddlers, or parenting time when there is high conflict or are allegations of intimate partner violence. Out of the think tank came opportunities for direct communication and some new writing and presenting partnerships, facilitating a melding of competing perspectives that we hope will encourage new ways of looking at old disagreements, model behavior, and shape the field for the better. While these process issues are not identified in the final report, they are important elements in advancing the conversation.

**COMMON INTERESTS**

Think tank participants also attempted to focus on common interests rather than polarized positions (e.g., the role of attachment or parenting time presumptions) that have characterized the shared parenting controversy. Such positions are typically framed in terms of what is best for children, and focusing on interests can be a daunting task. We believe, however, that an overriding and genuine shared interest among participants at the think tank was the long-term well-being of children of separation and divorce, and this was a focus throughout. Furthermore, participants clearly agreed on
critical interests such as involvement of both parents; safety for children and victims of intimate partner violence; and postseparation stability, in particular for infants and toddlers. But even these well-intentioned interests can be defined in mutually exclusive ways. For example, one think tank participant discussed the merits of a step-up parenting plan for a young child and expressed concern about introducing instability with a parenting schedule that includes substantial time in two homes. A colleague offered another perspective: that instability would be introduced not by a child living in two homes, but rather by eliminating consistent contact with one of the parents.

In many ways this exchange represented the broader debate over shared parenting time and the gender divisions it provokes. One person placed a greater value on the stability that spending most of the time in one home would provide a young child and, by default, was willing to risk some damage to the relationship with the nonresidential parent. The other person placed a premium on the stability that a consistent relationship with the nonresidential parent offered and was willing to risk the potential impact of overnights and time away from the parent who was the primary caretaker. While the parents in this example have not been identified by gender, our experience is that many professionals and more laypeople continue to assign the role of primary caretaker to mothers and nonresidential parent to fathers, allowing for exceptions. This example also highlights the real-life dilemmas that practitioners face when balancing risks in one area (e.g., attachment to one parent) against risks in another (e.g., meaningful quality time with another parent), especially in the face of competing research findings.

Thus, while focusing on interests did not resolve the issues, it helped identify areas of agreement while also exposing important differences in values and perspectives in the professional community and the research literature.

**RESEARCH AS OBJECTIVE CRITERIA**

Those who work directly with clients and those in policy-making roles long for objective information or criteria to better inform our policies and practices. Social science research, by definition, is intended to be objective. Multiple factors, for example, the scientific method and blind peer-reviewed publications, are intended to ensure a lack of bias in published research findings. Of course, as everyone in the family law community knows, when it comes to social science, objectivity is subjective. Although we entered the think tank with the naïve hope that social science would serve as objective criteria and that we might agree on what research does and does not tell us, that did not prove feasible without getting deep into the weeds. There was discussion of generally accepted, albeit broad, research findings. There was agreement on the importance of research, but also on its limits. Much of this is reflected in the final report. Everyone agreed that “good” research supports work in important ways, but that on its own social science provides an insufficient basis to fully and effectively inform policy and practice.

**ADVANCING THE DISCUSSION**

Entering the process, we were relatively confident that there would be no resolution per se of the substantive differences that separated some of the participants. We did not expect a change in longstanding and competing views, whether framed as perspectives, opinions, or ideologies. Thus, we did not achieve a neatly wrapped package with a single and consistent message to policy makers and practitioners. We believe, however, that very real mutual gains were made in moving the conversation about shared parenting forward.

- The final report reflects much of the state of thinking in the field, which, while not representing a bold consensus, is of value to practitioners and policy makers interested in an accurate and comprehensive perspective. It is an invaluable starting point from which the conversation will continue.
• Many participants in the think tank who have not known each other and some who have disagreed have partnered to write together for this issue of FCR, integrating perspectives and creating new ideas. The conversation is further expanded by commentaries on the final report by colleagues with divergent perspectives, who did not participate in the think tank.
• This year’s AFCC Annual Conference, which will be held in Toronto in May 2014, will further expand the conversation with sessions examining how practitioners and policy makers can understand and make effective use of the research.
• Further opportunities for writing and presenting will be made available in future years, adding new voices and perspectives to the conversations.

Thus, the gains made on behalf of the field are a beginning, not a startling revelation. The power and excitement of AFCC has perhaps set a standard that such bold statements are an important part of the organization’s reach. Indeed they are, but they are not the only way we can move the field forward. We believe that the think tank outputs represent important markers in a discussion yet to come.

CONCLUSION

Those familiar with the classic negotiation book Getting to Yes[14] may recognize the section above as mirroring Fisher and Ury’s original method: (1) Separate the People from the Problem; (2) Focus on Interests, Not Positions; (3) Insist on Using Objective Criteria; and (4) Invent Options for Mutual Gain. In retrospect, perhaps we should reframe the proposition from Getting to Yes to the more recent work of think tank facilitator Dr. Bernard Mayer. In his book, Staying with Conflict,[15] Mayer suggests that to address enduring conflicts we will need to move past the notion of a speedy resolution and help people prepare to engage with an issue over time.

As we continue to engage with this particular issue it is not at all clear that social science will provide the definitive answer to the parenting puzzles that our colleagues face on a daily basis, and it certainly will not happen soon. At AFCC we will continue to marshal resources, the most effective of which are our members, toward our mission: improving the lives of children and families through the resolution of family conflict. While we understand the role of advocacy, it is our belief that an inclusive approach that solicits participation from representatives of as many perspectives as possible will have a more positive impact on our field and, more importantly, the children and families we serve. We invite everyone with this goal in common to join us and contribute to the discussion.

We thank Think Tank Co-Reporters Professors Marsha Kline Pruett and Herbie DiFonzo; Facilitator Dr. Bernard Mayer, Steering Committee members Loretta Frederick, Esq., Judge Ramona Gonzalez, Professor Stacey Platt, and Dr. Kyle Pruett; and all of the Think Tank participants.

NOTES

* The impetus for Closing the Gap: Research, Practice, Policy, and Shared Parenting was funding for participation in the William T. Grant Foundation Distinguished Fellows Program. We thank the William T. Grant Foundation for supporting AFCC’s efforts in improving the use of quality research in practice and policy.
1. For convenience we use the term “shared parenting” to refer to both parenting time and decision making and “shared parenting time” and “shared decision making” for these individual elements respectively.
2. The AFCC Board of Directors generally does not make organizational policy statements other than approval of AFCC practice guidelines and standards. Rather, AFCC attempts to facilitate discussion and present multiple positions to allow members to gain from all perspectives.
4. They include Hugh McIsaac, Ann Milne, Isolina Ricci, Jay Folberg, Elizabeth Hickey, Andrew Schepard.
5. For example, presenters have included those who focus on domestic violence issues (Barbara Hart, Peter Jaffe, Richard Gelles, John Hamel, and Loretta Frederick), on fatherhood issues (Wade Horn, Edward Kruk, and Linda Neilson), and who offer different perspectives on the alienation debate (William Bernet, Amy Baker, Richard Warshak, and Janet Johnston).

7. They include Judith Wallerstein, Janet Johnston, Joan B. Kelly, Constance Ahrons, Robert Emery, Michael Lamb, Paul Amato, Sanford Braver, Irwin Sandler, Marsha Kline Pruett and Jennifer McIntosh.


10. The AFCC organizational values are: (1) Collaboration and respect among professions and disciplines; (2) Learning through inquiry, discussion and debate; (3) Innovation in addressing the needs of families and children in conflict; (4) Empowering families to resolve conflict and make decisions about their future.


12. Personal communication with Irwin Sandler, February 2013. Quoted with permission.


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