

## STEMMING THE TIDE OF MISINFORMATION: INTERNATIONAL CONSENSUS ON SHARED PARENTING AND OVERNIGHTING

Richard A. Warshak, Ph.D.\*

### ABSTRACT

Warshak, with the review and endorsement of 110 researchers and practitioners, analyzed more than four decades of research and issued a peer-reviewed consensus report on parenting plans for young children. As intended, the report stemmed a tide of misinformation that was threatening to resurrect myths about child development and enshrine them in professional practice and family law. The list of endorsers and their professional accomplishments reflect the widespread acceptance of the consensus report's findings that favor shared parenting and overnighting for young children under normal circumstances. Two years after its publication, the conclusions and recommendations of the Warshak consensus report remain supported by science.

---

\* RICHARD A. WARSHAK, PH.D. is a Clinical Professor of Psychiatry at the University of Texas Southwestern Medical Center in Dallas, Texas, and a clinical, consulting, and research psychologist in private practice. He consults and testifies internationally in child custody proceedings. Through his studies on divorce and custody appearing in 14 books and more than 75 articles, Dr. Warshak has had a broad impact on family law. He studies the psychology of alienated children; children's involvement in custody disputes; and outcomes of divorce, child custody decisions, stepfamilies, relocations, and parenting plans for young children. Also he develops educational materials and interventions to help understand, prevent, and overcome damaged parent-child relationships. His website, [warshak.com](http://warshak.com), provides resources for family law attorneys and their clients. Dr. Warshak's latest book, *Divorce Poison: How to Protect Your Family from Bad-mouthing and Brainwashing*, is widely regarded as a classic, and is available in e-book, audiobook, and seven foreign editions. The video he co-produced, *Welcome Back, Pluto: Understanding, Preventing, and Overcoming Parental Alienation*, is used in every state in the U.S. and 26 foreign countries.

CORRESPONDENCE CONCERNING THIS ARTICLE, and requests for the report endorsed by an international consensus of experts, should be addressed to Dr. Warshak at [doc@warshak.com](mailto:doc@warshak.com)

© 2016 by Richard A. Warshak, Ph.D

## INTRODUCTION

### Main Issues

Judges and lawmakers hear competing versions from the mental health field about what type of parenting plans are best for very young children. Discussions of parenting time for young children who are raised by parents who live apart from each other generally address three main issues.

1. Should young children's time be concentrated predominantly under the care and supervision of one parent, or should their time be more evenly divided between parents?
2. Should young children under the age of four spend nights in each parent's home, or should they sleep in the same home every night?
3. Are the benefits to the child of involvement with both parents, or overnight care, diminished or erased if the parents disagree about the parenting plan, or if one or both parents feel great discomfort or hostility toward the other?

Differences of opinion regarding shared parenting time for children under the age of four years focus on the issue of whether giving children more time with their fathers, aimed at strengthening father-child relationships, risks harming mother-child relationships. The concern is that spending too much time away from the mother, or having overnights away from her, rather than increasing the odds that a child will have a high quality relationship with both parents, will result in the child having poor relationships with both parents.

### Background

Our society holds a curious double standard when it comes to encouraging hands-on shared parenting. For instance, we want dads involved with their infants and toddlers—diapering, feeding, bathing, putting to bed, soothing in the middle of the night, cuddling in the morning. But when parents separate, some people think that young children need to spend every night in one home, usually with mom, even when this means losing the care their dad has been giving them. Despite all strides in cracking gender barriers, many of us still think that it is primarily the mother's role to care for infants and toddlers, and that we jeopardize young children's wellbeing if we trust fathers to do the job.

Where does science stand on these issues? A body of research from the 1970s to the 1990s challenged stereotypes and prejudices that had governed child custody decisions throughout most of the 19<sup>th</sup> and 20<sup>th</sup> centuries. The results of social science studies throughout the United States converged to support the

position that most children needed and wanted more contact with their fathers after divorce than they were having.<sup>1</sup>

In 1994 a multidisciplinary group of experts, sponsored by the U.S. National Institute of Child Health and Human Development (NICHD), met to evaluate the empirical evidence regarding the ways in which children are affected by divorce and the impact of various custody arrangements. In 1997, eighteen experts from the NICHD group issued a consensus statement concluding:

Time distribution arrangements that ensure the involvement of both parents in important aspects of their children's everyday lives and routines—including bedtime and waking rituals, transitions to and from school, extracurricular and recreational activities—are likely to keep nonresidential parents playing psychologically important and central roles in the lives of their children. How this is accomplished must be flexibly tailored to the developmental needs, temperament, and changing individual circumstances of the children concerned.<sup>2</sup>

Over time, custody policy and decisions increasingly reflected the importance of frequent and continuing contact between children and both parents, including giving children more contact with their fathers. Nevertheless, professional opinions continued to favor the practice of denying infants and toddlers overnight contact with their fathers, even those children who had been accustomed to seeing their dads every day and experiencing his care at bedtime, in the middle of the

---

<sup>1</sup> See, e.g., SANFORD L. BRAVER & DIANE O'CONNELL, *DIVORCED DADS: SHATTERING THE MYTHS* (1998) (Arizona); CHARLENE E. DEPNER & JAMES H. BRAY, *NONRESIDENTIAL PARENTING: NEW VISTAS IN FAMILY LIVING* (1993) (Arizona); E. Mavis Hetherington, Martha Cox, & Roger Cox, *Effects of Divorce on Parents and Children*, in *NONTRADITIONAL FAMILIES: PARENTING AND CHILD DEVELOPMENT* 233 (Michael E. Lamb ed., 1982) (Virginia); E. MAVIS HETHERINGTON & JOHN KELLY, *FOR BETTER OR WORSE: DIVORCED RECONSIDERED* (2002) (Virginia); John W. Santock & Richard A. Warshak, *Father Custody and Social Development in Boys and Girls*, 34 J. SOC. ISSUES 112 (1979) (Texas); JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980) (California); RICHARD A. WARSHAK, *THE CUSTODY REVOLUTION* (1992) (Texas); Richard A. Warshak, *Father-Custody and Child Development: A Review and Analysis of Psychological Research*, 4 BEHAV. SCI. & L. 185 (1986) (Texas); Richard A. Warshak & John W. Santrock, *The Impact of Divorce in Father-Custody and Mother-Custody Homes: The Child's Perspective*, in *CHILD. & DIVORCE* 29, 38, 42–43 (Lawrence A. Kurdek ed. 1983) (Texas).

<sup>2</sup> Michael E. Lamb, Kathleen J. Sternberg, & Ross A. Thompson, *The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment*, 35 FAM. & CONCILIATION CTS. REV. 393, 400 (1997).

night, and in the morning.<sup>3</sup> I labeled presumptions against “overnighting” until children reach the age of four or five, *blanket restrictions*.

Between 2000 and 2002 a well-cited exchange of articles in *Family Court Review* addressed the wisdom of guidelines that restricted young children from sleeping in their fathers’ home. One group of authors supported flexible, individualized parenting plans rather than absolute rules favoring or prohibiting overnights.<sup>4</sup> Those authors recommended that decision makers consider the option of overnights with fathers for its potential benefits to the children’s developing stable and lifelong relationships with both parents. Those opposing this view conceded the need for some relaxation of blanket restrictions, but continued to emphasize the potential harm rather than potential benefits of overnights.<sup>5</sup> They proposed that overnights should be viewed with caution rather than prohibited or contraindicated on an a priori basis, thus accepting that in some cases overnights with their fathers might be in young children’s best interests.

In the aftermath of the 1997 consensus statement, subsequent articles on parenting plans for young children, and a growing body of research relevant to parenting plans, the importance of providing sufficient opportunities for children to develop and maintain high quality relationships with both parents became generally recognized as the accepted and settled science with respect to child custody issues.<sup>6</sup> The decade between 2001 and 2011 saw increasing acceptance of overnights for infants and toddlers among mental health professionals, courts, and parents. This remained the zeitgeist until 2011.

---

<sup>3</sup> Richard A. Warshak, *Blanket Restrictions: Overnight Contact Between Parents and Young Children*, 38 FAM. & CONCILIATION CTS. REV. 422 (2000) (giving examples of guidelines in the professional literature advocating restrictions against overnights).

<sup>4</sup> Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM. & CONCILIATION CTS. REV. 297 (2000); Michael E. Lamb & Joan B. Kelly, *Using the Empirical Literature to Guide the Development of Parenting Plans for Young Children: A Rejoinder to Solomon & Biringen*, 39 FAM. CT. REV. 365 (2001); Warshak, *supra* note 3; Richard A. Warshak, *Who Will Be There When I Cry In the Night? Revisiting Overnights—A Rejoinder to Biringen et al.*, 40 FAM. CT. REV. 208 (2002).

<sup>5</sup> Zeynep Biringen et al., *Commentary on “Blanket Restrictions: Overnight Contact Between Parents and Young Children”* 40 FAM. CT. REV. 204 (2002); Judith Solomon & Zeynep Biringen, *Another Look at the Developmental Research: Commentary on Kelly and Lamb’s “Child Development Research to Make Appropriate Custody and Access Decisions for Young Children”*, 39 FAM. CT. REV. 355 (2001).

<sup>6</sup> See, e.g., Gordon E. Finley & Seth J. Schwartz, *The Divided World of the Child: Divorce and Long-term Psychosocial Adjustment*, 48 FAM. CT. REV. 516 (2010); Seth J. Schwartz & Gordon E. Finley, *Troubled Ruminations About Parents: Conceptualization and Validation With Emerging Adults*, 88 J. COUNSELING & DEV. 80 (2010). See also, Marsha Kline Pruett, Rachel Ebling, & Glendessa Insabella, *Critical Aspects of Parenting Plans for Young Children: Interjecting Data Into the Debate About Overnights*, 42 FAM. CT. REV. 39, 55 (2004) (stating: “This initial glimpse suggests that, for the behavioral and emotional outcomes under study, the worry about implementing overnights and parenting plans with multiple caretakers for infants and toddlers is misplaced. . .”).

Controversy over the previous decade's accepted science with respect to overnights for young children reignited in 2011 when the Association for Family and Conciliation Courts (AFCC) gave a unique platform to Jennifer McIntosh via an invitation to guest edit a special issue of the *Family Court Review* (FCR) in which McIntosh listed herself as author of nine articles (eight of which were edited transcripts of interviews that McIntosh conducted with commentators). AFCC then invited McIntosh to deliver a plenary address at its annual conference in 2012.<sup>7</sup> McIntosh advocated that one parent should be designated the primary caregiver, discouraged joint physical custody for children under the age of four, and called for the resurrection of blanket restrictions unless overnights were necessary and helped the primary caregiver.<sup>8</sup> Subsequent articles criticized AFCC, FCR, and McIntosh for presenting a narrow perspective.<sup>9</sup> Joan Kelly

---

<sup>7</sup> See, e.g., Peter Salem & Arnold T. Shienvold, *Closing the Gap Without Getting to Yes: Staying with the Shared Parenting Debate*, 52 FAM. CT. REV. 145, 146 ("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.") See also Joan B. Kelly, *Paternal Involvement and Child and Adolescent Adjustment After Separation and Divorce: Current Research and Implications for Policy and Practice*, 2 INT'L. FAM. L., POL'Y & PRAC. 5, 10 (2014) ("These heated controversies in the United States and elsewhere in the last decade were exacerbated by a *Family Court Review* special issue on attachment (McIntosh, 2011), which focused on infant-mother attachment research and policy conclusions regarding overnights.").

<sup>8</sup> Jennifer E. McIntosh, *Guest Editor's Introduction to Special Issue on Attachment Theory, Separation, and Divorce: Forging Coherent Understandings for Family Law*, 49 FAM. CT. REV. 418, 424 (stating that McIntosh and the commentators she interviewed concurred strongly that "Overnight stays away from the primary caregiver in early infancy are generally best avoided, unless of benefit to the primary caregiver."). Also see Jennifer McIntosh, *Special Considerations for Infants and Toddlers in Separation/Divorce: Developmental Issues in the Family Law Context*, in *ENCYCLOPEDIA ON EARLY CHILDHOOD DEVELOPMENT* [online] 1, 4 (Robert E. Emery, topic ed., Richard E. Tremblay, Michel Boivin, Ray DeV. Peters eds., 2011), available at <http://www.child-encyclopedia.com/divorce-and-separation/according-experts/special-considerations-infants-and-toddlers>. (In a section titled "Implications for Parents, Services and Policy," McIntosh states: "In early infancy [defined by McIntosh as under 2 years old], overnight stays are contra-indicated, undertaken when necessary or helpful to the primary caregiver. . . .")

<sup>9</sup> See, e.g., Kelly, *supra* note 7, at 10. See also Michael E. Lamb, *A Wasted Opportunity to Engage with the Literature on the Implications of Attachment Research for Family Court Professionals*, 50 FAM. CT. REV. 481 (2012) (commenting on the restricted range of views in the issue of *Family Court Review* that McIntosh guest edited: "The resulting special issue contained a total of 11 articles—an introduction by McIntosh, two invited articles, and the edited transcripts of eight interviews by McIntosh with one or (in three cases) several commentators. Nine of the articles were 'authored' by the editor, and (remarkably) all 11 listed her as a corresponding author, underscoring the narrowness of the perspective offered to readers of the special issue.") See also Pamela S. Ludolph, *The Special Issue on Attachment: Overreaching Theory and Data*, 50 FAM CT. REV. 486, 493 (2012) (noting: "[T]he Special Issue, and particularly its summary [the one article in the

noted “the absence of any articles or consideration of infant-father attachments, and the limited and methodologically flawed research used to establish broad conclusions that substantial time with fathers and overnights after separation were detrimental.”<sup>10</sup>

## **CURRENT CONSENSUS OF SOCIAL SCIENTISTS ON PARENTING PLANS FOR YOUNG CHILDREN**

Practitioners and scholars in the field of child custody expressed concerns that this seeming reversal of a decade-long endorsement of shared parenting for preschool children was generating widespread confusion and uncertainty about where the scientific community stood on these issues. To give voice to those concerns, and in an effort to right a ship that was listing from a tide of misinformation, I spent two years reviewing the relevant scientific literature. Then I vetted my analyses by incorporating feedback from an international group of experts in the fields of attachment, early child development, parent-child relations, and divorce. The results appeared in *Social Science and Parenting Plans for Young Children: A Consensus Report* published in the American Psychological Association’s journal, *Psychology, Public Policy, and Law*, that is edited by Cambridge University Professor Michael Lamb, a prominent child development scholar.<sup>11</sup> The report was published with the endorsement of 110 of the world’s leading researchers and practitioners, several who contributed seminal studies cited in the report.

The first goal was to provide a balanced and accurate overview of settled, accepted research from the past 45 years relevant to parenting plans for children under the age of four whose parents lived apart. The second goal was to provide empirically informed guidelines for policy makers and for people involved in making custody decisions.

No support was found for the idea that children under four need or benefit from restrictions with parents who are loving and attentive. Warnings against infants and toddlers spending overnight time with each parent are inconsistent with what we know about the development of meaningful, positive parent-child relationships in the first few years of children’s lives. Babies and toddlers need

---

journal issue solely authored by McIntosh] overreaches the available research data, doing so by remarkable omissions and over-generalizations. The voluminous literature on the role of fathers in early childhood was barely touched upon. Monotropy was reified, despite its being an idea unsupported by empirical evidence. The serious attention many researchers have given to the attachment capabilities of both parents was virtually unmentioned. Serious losses of childhood were confounded with trivial ones.”).

<sup>10</sup> Kelly, *supra* note 7, at 10.

<sup>11</sup> Richard A. Warshak, with the endorsement of the researchers and practitioners listed in the Appendix, *Social Science and Parenting Plans for Young Children: A Consensus Report*, 20 PSYCHOL., PUB. POL’Y. & L. 46 (2014). This article, available to legal and mental health professionals on request from the author, lists in the Appendix the names and positions of the endorsers, and provides reference citations for all the studies included in the consensus report literature review and analysis. Others can purchase the article at <http://psycnet.apa.org/journals/law/20/1/46/>.

parents who respond consistently, affectionately, and sensitively to their needs. But infants and toddlers do not need, and most do not have, either parent's full-time, round-the-clock presence. Many married mothers work night shifts that keep them away from their infants and toddlers at night without damaging their children's secure attachment or their development. As a result, most mothers separated from the other parent should have no reason to worry about leaving their children in the care of the other parent.

To maximize infants' chances for a secure lifelong bond with both parents, public policy should encourage both parents to actively participate in daytime and overnight care of their young children. Scholars who study the benefits of children's relationships with both parents find no empirical support for the belief that mothers are more important than fathers in their infants' and toddlers' lives. In short, after their separation, both parents, in most circumstances, should seek to maximize the time they spend with their young children, including the sharing of overnight parenting time. This lays a strong foundation for parent-child relationships and allows children to enjoy the unique and overlapping contributions of each parent to the children's development and well-being.

## **ANALYTIC GAPS BETWEEN SCIENTIFIC EVIDENCE AND BLANKET RESTRICTIONS**

An extensive knowledge base, drawn from more than four decades of research directly relevant to this topic, informed the conclusions of the international consensus report. The consensus report refutes the claim that a scientific foundation exists for a general policy of limiting or discouraging young children's overnights with one parent when their parents live apart. Those who advocate such a policy often cite two studies to support their concerns about the risks of shared parenting and overnights for children under the age of four.

The first study was a 2010 report written by McIntosh, Smyth, and Kelaher, issued by the Attorney General's department in Australia, and copyrighted by a clinic founded by the study's first author.<sup>12</sup> The second study, by Tornello et al., was published in 2013.<sup>13</sup> The consensus report identified significant problems and limitations in both studies that should affect the admissibility and weight of

---

<sup>12</sup> Jennifer McIntosh, Bruce Smyth & Margaret Kelaher, *Parenting Arrangements Post-separation: Patterns and Developmental Outcomes, Part II. Relationships Between Overnight Care Patterns and Psycho-emotional Development in Infants and Young Children: Report to the Australian Government Attorney-General's Department*, in POST-SEPARATION PARENTING ARRANGEMENTS AND DEVELOPMENTAL OUTCOMES FOR INFANTS AND CHILDREN: COLLECTED REPORTS 85 (Jennifer McIntosh, Bruce Smyth, Margaret Kelaher, Yvonne Wells & Caroline Long eds., 2010), available at <https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyLawSystem/Documents/Postseparationparentingarrangementsanddevelopmentaloutcomesforinfantsandchildrencollectedreports.PDF>. The report is copyrighted by Family Transitions, a private clinic founded and directed by McIntosh.

<sup>13</sup> Samantha L. Tornello, Robert Emery, Jenna Rowen, Danile Potter, Bailey Ocker, and Yishan Xu, *Overnight Custody Arrangements, Attachment, and Adjustment Among Very Young Children*, 75 J. MARRIAGE & FAM. 871 (2013).



testimony that relies on these studies.<sup>14</sup> The U.S. Supreme Court in *General Electric Co. v. Joiner* noted: “[C]onclusions and methodology are not entirely distinct from one another. . . . A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”<sup>15</sup> The analytical gap metaphor offers a useful critique of some experts who have expressed opinions based on these two studies. Understanding several kinds of gaps in the testimony of these experts should inform trial examinations of the reports and testimony of these experts.<sup>16</sup>

### Gaps Between Research Participants and Custody Litigants

One obvious and wide gap between the findings from these two studies and expert witness testimony is the difference between the populations studied and typical custody litigants. The Australian study’s sample is not representative of parents who are going through a divorce because most of the parents in the study were never married to each other (90% for the sample of infants and 60% for toddlers), and 30% had never even lived together. Nothing is known about the behavior and relationships between the parents and children prior to the couples’ separations. Even if the study reached verifiable conclusions, the differences between Australian children of unmarried fathers who may or may not have had any pre-separation relationship with their children and American children whose married parents are divorcing and who are accustomed to their fathers’ care is too wide a gap to bridge. The consensus report affirmed that optimal parenting plans are different for children who have a pre-existing relationship with both parents and those who do not.

The second study similarly focused predominantly (85%) on children whose parents had never been married or lived together (30%). Tornello et al.’s sample was even less typical than the Australian sample of most parents who take a custody dispute to trial or who mediate a settlement with lawyers. The study’s data came from the Fragile Families sample of inner-city children born in impoverished circumstances: 62% of the age 1 sample lived below the poverty line, 60% of the parents were imprisoned before the children’s fifth birthdays, 85% were Black or Hispanic, 65% had parents who had nonmarital births from more than one partner in their teenage or young adult years, and nearly two-thirds had not completed high school.<sup>17</sup> In sum, even if the results from these two studies are trustworthy their relevance to U.S. custody disputes is slim.

---

<sup>14</sup> See *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

<sup>15</sup> *General Elect. Co. v. Joiner*, 522 U.S. 136, 146 (1997). See also JOHN A. ZERVOPOULOS, *CONFRONTING MENTAL HEALTH EVIDENCE* 8 (2<sup>nd</sup> ed. 2015) (Referencing *General Elect. Co. v. Joiner*, *supra*: “Courts may view opinions with analytical gaps that are too wide as unreliable and thus inadmissible.”)

<sup>16</sup> For a discussion of strategies to cross-examine mental health experts who rely on unwarranted inferences from unreliable data, see JOHN A. ZERVOPOULOS, *HOW TO EXAMINE MENTAL HEALTH EXPERTS* (2013).

<sup>17</sup> Sara McLanahan, *Fragile Families and Child Wellbeing Study Fact Sheet* (2013), available at <http://www.fragilefamilies.princeton.edu/documents/FragileFamiliesandChildWellbeingStudyFactSheet.pdf>.



## Gaps Between Methodology and Conclusions

In-depth analyses of the McIntosh et al. study, published in the consensus report and in other papers, reveal multiple problems in the study's measures, procedures, data analyses, and data reporting—problems that expose wide gaps between the study's methodology and conclusions and between the data reported and opinions based on the data. Two examples of analytic gaps that undermine the trustworthiness of the study's conclusions are found in one sentence from the synopsis: "Infants under two years of age living with a nonresident parent for only one or more nights a week were more irritable and were more watchful and wary of separation from their primary caregiver than those primarily in the care of one parent."<sup>18</sup> The first author subsequently described these negative outcomes as "a cluster of stress regulation problems."<sup>19</sup>

Only in the Appendix of the 169-page report can readers discover that the irritability score for babies with no overnights actually is slightly worse than the score for babies who spent one or more nights per week with their other parent.<sup>20</sup> Also, the mean irritability score for the frequent overnights and the infants in intact families was identical, and the mean irritability score for all groups was within the normal range. Since, for these researchers, the irritability scores generated such concern about "stress regulation" for overnighting infants, they should have expressed equal concern about infants being raised in intact, two-parent Australian homes.

Another problem with generalizing from the McIntosh et al. sample—other than the gap between the composition of the sample and most parents who are separating—is the study's tiny sample sizes. The result reported for irritability of infants with occasional overnights was based on a sample of 14 infants. Only 11 infants saw their fathers on a schedule that would fit standard definitions of shared parenting. The sample size for the group of 2- to 3-year-olds with frequent overnights ranged from 5–25 depending on the variable analyzed (e.g., 5 subjects for a rating of conflict with the child made by teachers and daycare attendants). An analysis based on five respondents is unlikely to provide meaningful data.<sup>21</sup>

The second analytic gap revealed in the sentence quoted from the synopsis is the discrepancy between a substandard measure and the conclusion based on the results from that measure. The synopsis concluded that the overnighting infants

---

<sup>18</sup> McIntosh et al., *supra* note 12, at 9.

<sup>19</sup> McIntosh, *Special Considerations*, *supra* note 9, at 3.

<sup>20</sup> McIntosh et al., *supra* note 12, at 166.

<sup>21</sup> Although the sample size in Tornello et al., *supra* note 13, is larger than previous studies, recently Emery and McIntosh, as coauthors, include in a list of limitations of the Tornello et al. study that it relied on "small subsample sizes for the attachment indicator." Bruce M. Smyth, Jennifer E. McIntosh, Robert E. Emery, & Shelby L. Higgs Howarth, *Shared-Time Parenting: Evaluating the Evidence of Risks and Benefits to Children*, in PARENTING PLAN EVALUATIONS (2<sup>ND</sup> ED.), in PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT (2<sup>ND</sup> ED.) 118, 133 (Leslie Drozd, Michael Saini & Nancy Olesen eds., 2016).

were more “watchful and wary of separation from the primary caregiver.”<sup>22</sup> The implication is that overnighting had somehow damaged the security of the babies’ relationships with their mothers. This conclusion, repeatedly cited to discourage overnights for children younger than two years of age, came from three questions that the researchers extracted from a standardized scale designed to measure young children’s cognitive development. The resulting non-standard measure is unreliable in the sense that it is untrustworthy as an index of what it purports to measure.<sup>23</sup>

Scientists take pains to ensure that the measures they use are properly calibrated so that the results can be trusted. Scales need to yield consistent results, known as the instrument’s *reliability*, and the instrument must measure what it is intended to measure, known as its *validity*. McIntosh and her team used scales with insufficient, if any, indications of reliability or validity. For instance, without adequate calibration a scale that lacks reliability can one day show a readout of ten pounds for a ten-pound package, and the next day show a readout of fifty pounds for the same ten-pound package. If the scale lacks validity, the scale can be off by five pounds even though it might reliably show the same incorrect weight every time you weigh the package.

A central concern with both the McIntosh et al. and the Tornello et al. studies is their use of sub-standard measures and reliance on results of those measures to draw unwarranted inferences. The Warshak consensus report observed that none of the four significant outcomes reported by McIntosh et al. were derived from measures that met basic scientific standards,<sup>24</sup> a point also noted by Nielsen in greater detail.<sup>25</sup>

McIntosh et al. concluded that a child under the age of two who spends more than three nights a month with dad is more likely to have “emotional regulation” problems reflected in the child’s “insistent visual monitoring” of the mother.<sup>26</sup> To measure this, the study asked each mother (only about four percent of the respondents were fathers) three questions: does your child sometimes or often try to get your attention, look to see if you are watching her or him at play, and try to get you to notice other objects?<sup>27</sup> There was no rating of “insistence.” The authors made the dubious assumption that because infants when anxious look at their mothers and try to get her attention, being anxious is the only reason infants look at their mothers, and that the more infants look at their mothers, the more anxious

---

<sup>22</sup> McIntosh et al., *supra* note 12, at 9.

<sup>23</sup> Daubert v. Merrell Dow Pharmaceuticals, *supra* note 14.

<sup>24</sup> Warshak et al., *supra* note 11, at 55. In addition to the problems with the visual monitoring scale, the reliability of the irritability scale falls in the “questionable” range; the persistence measure lacked any reported validity, reliability, or norms; and the scale of behavior problems with the mother, abridged from a standard measure, had no measure of reliability or validity for the new instrument.

<sup>25</sup> Linda Nielsen, *Woozles: Their Role in Custody Law Reform, Parenting Plans, and Family Court*, 20 PSYCHOL., PUB. POL’Y. & L. 164 (2014).

<sup>26</sup> Jennifer E. McIntosh, Bruce M. Smyth & Margaret A. Kelaher, *Responding to Concerns About a Study of Infant Overnight Care Postseparation, with Comments on Consensus: Reply to Warshak* (2014), 21 PSYCHOL., PUB. POL’Y. & L. 111, 116 (2015).

<sup>27</sup> Warshak et al., *supra* note 11, at 55, FN 1.

the infants must be. This error in logic is known as affirming the consequent. No one, including McIntosh et al., has ever shown that these three questions yield reliable information—would the answers be the same a week later? Nor have McIntosh et al. shown that the questions yield valid information having anything to do with a baby's emotional health, anxiety, ability to manage stress, or ability to regulate emotions. In fact, the three questions were extracted from a longer instrument that has been validated as a measure of how ready the child is to learn to talk. More frequently looking at the mother and trying to her attention indicates advanced cognitive development, not impaired emotional regulation as McIntosh et al. stated.<sup>28</sup>

Similarly, Tornello et al. assessed the child's attachment to the mother with a measure that had no established reliability or validity. The Warshak consensus report and other scholars have questioned the validity of the attachment measure and the meaning of findings based on the measure because the instrument was completed by mothers rather than by trained professional raters.<sup>29</sup> Other researchers using this same attachment measure have acknowledged that it lacks objectivity,<sup>30</sup> which is an important factor in determining the admissibility and weight of opinions based on this measure.

Tornello et al. acknowledged that their measure of attachment was questionable, but nevertheless reported that children who at age 1 had frequent overnights (1 to 5 overnights per week) were more likely than those with some overnights to be insecurely attached to their mothers at age 3. The press release issued by the lead investigators' university, while failing to mention the

---

<sup>28</sup> AMY M. WETHERBY & BARRY M. PRIZANT, *COMMUNICATION AND SYMBOLIC BEHAVIOR SCALES DEVELOPMENTAL PROFILE- PRELIMINARY NORMED EDITION* (2001).

<sup>29</sup> See Warshak et al., *supra* note 11, at 54. See also, e.g., Paul Millar & Edward Kruk, *Maternal Attachment, Paternal Overnight Contact, and Very Young Children's Adjustment: Comment on Tornello et al. (2013)*, 76 J. MARRIAGE & FAM. 232 (2014); Nielsen, *Woozles*, *supra* note 25, at 170; Marsha Kline Pruett, Carolyn P. Cowan, Philip A. Cowan, Lisa Pradham, Sarah Robins, & Kyle D. Pruett, *Supporting Father Involvement in the Context of Separation and Divorce*, in PARENTING PLAN EVALUATIONS (2<sup>ND</sup> ED.), *supra* note 21, at 85, 102; Marinus H. van IJzendoorn et al., *Assessing Attachment Security With the Attachment Q Sort: Meta-Analytic Evidence for the Validity of the Observer AQS*, 75 CHILD. DEV. 1188 (2004); Everett Waters, *Assessing Secure Base Behavior and Attachment Security Using the Q-sort Method*, Stony Brook University, State University of New York (2013), available at [http://www.psychology.sunysb.edu/attachment/measures/content/aqs\\_method.html](http://www.psychology.sunysb.edu/attachment/measures/content/aqs_method.html) 2013.

<sup>30</sup> Sangita Pudasainee-Kapri & Rachel Razza, *Attachment security among toddlers: The impacts of coparenting and father engagement*, Fragile Families Working Paper WP13-01-FF, pp. 29, 48, and 51 (2013), available at <http://crcw.princeton.edu/publications/publications.asp> (stating: [B]ecause the AQS is not an objective assessment of parent-child attachment, it is possible that the mothers' tendencies toward socially desirable responses may have resulted in higher levels of reported attachment security."). This may account for the fact that all the groups of children rated by their mothers in the Tornello et al. study had lower percents of insecure attachment than what would be expected for these children who were living in poverty with poorly educated mothers.

unreliability of the attachment measures, incorrectly claimed that infants who spent at least one night per week away from their mothers had more insecure attachments than babies who saw their fathers only during the day. In fact they did not.<sup>31</sup>

### Gaps Between Data and Interpretation

Even overlooking that Tornello et al. used a nonstandard attachment measure administered in a nonstandard manner, the results were ambiguous. Insecurity in the infants was more common among the frequent overnights, followed by the never overnights, followed by the occasional overnights. A similar, nonlinear pattern characterized the McIntosh et al. results.<sup>32</sup> Thus, as the Warshak consensus report and others have noted, frequency of overnights did not predict insecurity in either study.<sup>33</sup>

Interpreting the attachment findings is complicated by another fact that Tornello et al. did not report: More than half of the infants classified as frequent overnights lived predominantly with their fathers. But the data were reported and interpreted as if the mother was always the “resident” parent and the babies were overnights with a “nonresident” father. Thus the “resident” and “nonresident” parents were mislabeled. Without knowing more about why these babies were living with their fathers it would be a mistake to assume that frequent overnights in their fathers’ home caused the children’s insecure attachment to their mothers. The gap between the data and the conclusion is too wide to bridge. The mothers in this sample were drawn from a population of women who had higher rates of substance abuse, depression, and incarceration.<sup>34</sup> These factors and others, such as domestic violence, affect the quality of parent-child relationships. Even if the attachment measure had met scientific standards, these results should

---

<sup>31</sup> Fariss Samarrai (2013, July). Overnights Away From Home Affect Children’s Attachments, Study Shows. UVA Today News Release (July 18, 2013), *available at* <https://news.virginia.edu/content/overnights-away-home-affect-children-s-attachments-study-shows>. Also, there were no significant links between overnights between the ages of 1 and 3 and attachment.

<sup>32</sup> See William V. Fabricius, Karina R. Sokol, Priscilla Diaz & Sanford L. Braver, *Father–Child Relationship: The Missing Link Between Parenting Time and Children’s Mental and Physical Health*, in PARENTING PLAN EVALUATIONS (2<sup>ND</sup> ED.), *supra* note 21, at 74, 81 (“Ambiguous U-shaped patterns emerged in both studies, in which the ‘no overnights’ group did not differ from the ‘frequent overnights’ group (suggesting that frequent overnights were not harmful), but the ‘some overnights’ group showed fewer negative child outcomes than the ‘frequent’ group (suggesting they were). It is unclear how to interpret these U-shaped patterns. More clarity might have been achieved by not grouping all families into a few categories, but instead testing for linear relations between overnights and outcomes.”). Sokol, *infra* text accompanying note 59, conducted a test for linear relations in the Tornello et al. data and found no correlation in these data between the absolute number of overnights with father and insecurity with mother.

<sup>33</sup> See, e.g., Fabricius et al., *supra* note 32, at 81; Michael E. Lamb, *Critical Analysis of Research on Parenting Plans and Children’s Well-Being*, in PARENTING PLAN EVALUATIONS (2<sup>ND</sup> ED.), *supra* note 21, at 182.

<sup>34</sup> McLanahan, *supra* note 17.

not be relied upon in making decisions about parenting plans for most divorcing parents, especially for parents with the resources to take a custody dispute to trial or to hire lawyers to negotiate and mediate out-of-court settlements.

### **Additional Gaps Between Data and Opinions**

Policy makers, decision makers, and expert witnesses who rely on the data from these two studies to discourage overnight parenting plans for young children often fail to mention the results from these two studies that do not support this conclusion, in addition to the significant limitations discussed above that undermine their usefulness as a basis for custody decisions. For instance, one of the authors of the Tornello et al. study recently coauthored a chapter which provided this interpretation of their study's results: "Spending frequent overnights [with fathers] between the ages of 1 and 3 years did not predict attachment insecurity at age 3 but did predict positive behavior at 5 years of age."<sup>35</sup> Yet Tornello et al. cautioned that the link between overnights and positive behavior—derived from a standard, well established instrument with strong evidence for its reliability and validity and administered in the standard manner—could be due to chance. Tornello et al. did not mention this positive finding for overnights in the article's Abstract. Instead the authors placed more confidence in the finding linking overnights to attachment insecurity, despite having acknowledged the uncertain trustworthiness of the attachment measure.

Furthermore, experts who rely on these two studies should be aware that data were available only from one parent, not both. Yet reports of mothers and fathers about their children's wellbeing often vary significantly as previous research has demonstrated.

Given the wide gap between the circumstances and characteristics of the parents in these two studies and those of most separating parents (especially custody litigants), the gaps between the flawed measures and the conclusions drawn from those measures, and the gaps between the actual data and opinions proffered about the data, the Warshak consensus report agrees with other scholars<sup>36</sup> that these two studies provide no reliable basis to support custody

---

<sup>35</sup> Smyth et al., *supra* note 21, at 153.

<sup>36</sup> See, e.g., Judy Cashmore & Patrick Parkinson, *Parenting Arrangements for Young Children: Messages from Research*, 25 AUSTL. J. FAM. L. 236 (2011); Lamb, *supra* note 9; Pamela S. Ludolph & Milfred D. Dale, *Attachment in Child Custody: An Additive Factor, Not a Determinative One*, 46 FAM. L. Q. 1 (2012); Linda Nielsen, *Shared Residential Custody: A Recent Research Review (Part Two)*, 27 AM. J. FAM. L. 123 (2013); Linda Nielsen, *Parenting Plans for Infants, Toddlers, and Preschoolers: Research and Issues*, 55 J. DIV. & REMARRIAGE 315 (2014); Nielsen, *Woozles*, *supra* note 25; Patrick Parkinson & Judy Cashmore, *Parenting Arrangements for Young Children: A Reply to Smyth, McIntosh and Kelaher*, 25 AUSTL. J. FAM. L. 284 (2011); Richard A. Warshak, *Securing Children's Best Interests While Resisting the Lure of Simple Solutions*, 56 J. DIV. & REMARRIAGE 57 (2015).

policy, recommendations, or decisions that restrict overnight shared parenting for young children.<sup>37</sup>

## CONFLICT AND PARENTING PLANS

A common response to research that finds positive outcomes for children and parents in shared physical custody and overnighting arrangements is to challenge the relevance of that research for parents who litigate custody or display high levels of conflict when interacting with each other.<sup>38</sup> Some psychologists dismiss the positive outcomes found in these shared parenting studies as relevant only to those couples who voluntarily agree to share physical custody from the outset. Their hypothesis is that couples who settle out of court for shared physical custody begin with lower levels of conflict and that the same factors that play a role in their agreeing to share custody may also contribute to the positive outcomes for the children in these families.

This hypothesis lacks empirical support. The Stanford Child Custody study<sup>39</sup> found that children in joint physical custody (living at least one-third of the time with their fathers) compared with children in sole physical custody were most satisfied with the custody plan and showed the best long-term adjustments, even after controlling for factors that might predispose parents to select joint physical custody (such as education, income, and initial levels of parental hostility).<sup>40</sup> In fact in 80% of the joint physical custody families one or both parents initially did not want and did not agree to the arrangement.<sup>41</sup> Other studies found that parents with joint physical custody had no less conflict than those with sole physical custody.<sup>42</sup>

---

<sup>37</sup> For extensive evidence about the impact of the McIntosh et al. study on custody policy, recommendations, and decisions, see Linda Nielsen, *Pop Goes the Woozle: Being Misled by Research on Child Custody and Parenting Plans*, 56 J. DIV. & REMARRIAGE 595 (2015), and Nielsen, *supra* note 25.

<sup>38</sup> The consensus report cited a 2011 keynote address by Martindale as an example of support for this position, however in a personal communication Martindale clarified that in using the phrase “joint custody” he was referring to shared decision-making authority and not shared physical custody arrangements. Nevertheless, others have discounted the relevance of shared physical custody research for parents in conflict. See, e.g., Smyth et al., *supra* note 21, at 118.

<sup>39</sup> ELEANOR MACCOBY & ROBERT MNOOKIN, *DIVIDING THE CHILD* (1992).

<sup>40</sup> Eleanor E. Maccoby et al., *Postdivorce Roles of Mother and Fathers in the Lives of Their Children*, 7 J. FAM. PSYCHOL. 24, 34–35 (1993).

<sup>41</sup> William V. Fabricius, Karina R. Sokol, Priscilla Diaz & Sanford L. Braver, *Parenting Time, Parent Conflict, Parent–Child Relationships, and Children’s Physical Health*, in PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT 188, 200 (Kathryn Kuehnle & Leslie Drozd eds, 2012) (drawing on data from the Stanford Child Custody Study (data set now available at <http://www.socio.com/srch/summary/afda/fam25–27.htm>)).

<sup>42</sup> E.g., Marygold S. Melli & Patricia R. Brown, *Exploring a New Family Form—The Shared Time Family*, 22 INT’L J. L., POL’Y AND THE FAM. 231 (2008). For comprehensive reviews and analyses of the research literature on shared time arrangements and parental conflict, see Linda Nielsen, *Shared Residential Custody: A*



A meta-analysis of 33 studies also reported better emotional, behavioral, and academic functioning for children in joint physical custody compared to children in sole custody, regardless of the level of conflict between parents.<sup>43</sup> Studies that measured the amount of the father's parenting time found that more time with the father is not associated with poorer child outcomes in high-conflict families (with the exception of families where there is violence or abuse).<sup>44</sup> In a large-scale Australian study (not the one critiqued earlier), one to two years after separation, conflict was neither more nor less damaging for children in shared care-time arrangements than for children in other custody arrangements (with the exception of reports by mothers who had concerns about children's safety in the care of the father).<sup>45</sup> Rather than magnify harmful effects of parental conflict, several studies suggested that shared parenting may protect children from some of its negative consequences.<sup>46</sup>

One way in which shared parenting time can reduce children's exposure to tension-filled communications between parents is that spending longer periods of time with each parent reduces the number of transfers between parents. For instance, spending two hours with one parent and then returning to the other parent's home the same day means the child makes two transitions in one day. Simply extending the two-hour evening contact into an overnight reduces the transitions between homes to only one per day.

---

*Recent Research Review (Part One)*, 27 AM. J. FAM. L. 61 (2013) and Linda Nielsen, *The Conflict About Conflict: Re-examining the Research on Parental Conflict and Child Custody* (in preparation).

<sup>43</sup> Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16 J. FAM. PSYCHOL. 91, 99 (2002).

<sup>44</sup> Fabricius et al., *supra* note 41.

<sup>45</sup> Rae Kaspiw et al. Evaluation of the 2006 Family Law Reforms Melbourne: Australian Inst. Fam. Stud. (2009) available at <https://aifs.gov.au/sites/default/files/publication-documents/evaluationreport.pdf>.

<sup>46</sup> SANFORD L. BRAVER & DIANE O'CONNELL, *DIVORCED DADS: SHATTERING THE MYTHS* (1998); William V. Fabricius, Sanford L. Braver, Priscila Diaz & Clorinda E. Velez, *Custody and Parenting Time: Links to Family Relationships and Well-Being After Divorce*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 201 (Michael E. Lamb, ed., 5th ed. 2010); Fabricius et al., *supra* note 41; Marjorie Lindner Gunnoe & Sanford L. Braver, *The Effects of Joint Legal Custody on Mothers, Fathers, and Children Controlling for Factors that Predispose a Sole Material Versus Joint Legal Award*, 25 LAW & HUM. BEHAV. 25 (2001); Irwin Sandler, Jonathan Miles, Jeffrey Cookston, & Sanford Braver, *Effects of Father and Mother Parenting on Children's Mental Health in High- and Low-Conflict Divorces*, 46 FAM. CT. REV. 282 (2008). See also Irwin N. Sandler, Lorey A. Wheeler & Sanford L. Braver, *Relations of Parenting Quality, Interparental Conflict, and Overnights With Mental Health Problems of Children in Divorcing Families With High Legal Conflict*, 27 J. FAM. PSYCHOL. 915, 921 (2013) (noting that in their study of high conflict divorces, positive parenting by fathers was associated with children's better mental health when the children spent an average of approximately 12-21 overnights per month with their fathers, but not when the average number of overnights was 2.61 per month). It is important to note, however, that as with most research on the impact of divorcing parents' conflict on child adjustment Sandler et al. studied older children and not children younger than four years.



### Should Parental Conflict Trump Shared Parenting Time?

A policy of automatically restricting children's time with one of the parents when a couple is labeled as "high conflict" brings additional drawbacks and deprives children of the protective buffer of a nurturing relationship with one of their parents.<sup>47</sup> This policy sends parents the message that generating or sustaining conflict can be an effective strategy to override shared custody.<sup>48</sup> This discourages civil communication and cooperation, and may reduce children's time with the parent who is less angry, who does a better job of shielding the children from conflict, and who recognizes and supports the children's need for positive relationships with both parents.<sup>49</sup> Any policy that encourages the instigation and maintenance of conflict between parents by suggesting that such behavior might be rewarded with more parenting time puts the needs of the children second to the desires of whichever parent opposes sharing parenting time. Such a policy contradicts the best-interest standard whose primary purpose is to ensure that the child's welfare trumps parental entitlements.<sup>50</sup> A policy focused on children's best interests will decrease the risks of harm to them by discouraging rather than encouraging inter-parental conflict.<sup>51</sup>

---

<sup>47</sup> See Kelly, *supra* note 7, at 14 (citing ROBERT E. EMERY, *THE TRUTH ABOUT CHILDREN AND DIVORCE: DEALING WITH EMOTIONS SO YOU AND YOUR CHILDREN CAN THRIVE* (2004) "Some authors (e.g., Emery, 2004) have recommended that when the co-parental relationship is highly conflicted that children's time with one of the parents should be restricted as a way of reducing the impact of conflict on the children. Since mothers are most often the 'primary' parent and the fathers the non-resident parents, such a recommendation is likely to disproportionately reduce father-child time. It also ignores the reality that mothers are just as often impaired in their functioning and are as hostile as fathers, but nevertheless are designated the primary residential parent. Relying on more current research, others have argued that this broad policy recommendation will deny children adequate time with supportive, competent fathers. The Emery proposal does not differentiate the type of conflict, consider whether the child is exposed to the conflict, identify the parent primarily fueling the conflict, and consider the parenting skills and mental health of each parent. Moreover, such a recommendation ignores the fact that the majority of parents with high conflict after separation substantially diminish their conflict in the first and second year after final court orders (citations omitted)."

<sup>48</sup> See Joan B. Kelly, *Risk and Protective Factors Associated with Child and Adolescent Adjustment Following Separation and Divorce: Social Science Applications*, in PARENTING PLAN EVALUATIONS, *supra* note 41, at 49; Richard A. Warshak, *Parenting by the Clock: The Best Interests of the Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule,"* 41 U. BAL. L. REV. 83 (2011).

<sup>49</sup> See, e.g., Benjamin D. Garber, *Security by Association? Mapping Attachment Theory Onto Family Law Practice*, 50 FAM. CT. REV. 467 (2012). See also Kelly, *supra* note 7.

<sup>50</sup> Warshak, *supra* note 48, at 97

<sup>51</sup> See, e.g., Sanford L. Braver, *The Costs and Pitfalls of Individualizing Decisions and Incentivizing Conflict: A Comment on AFCC's Think Tank Report on Shared Parenting*, 52 FAM. CT. REV. 175, 178 (2014) (stating: "What policy will instead deincestivize conflict? One, for example, is eliminating the blanket opportunity for one parent to unilaterally veto shared custody.").

When considering the impact of parental conflict on the most beneficial parenting plans for children, it is important to recognize the heterogeneity of the dynamics of inter-parental conflict.<sup>52</sup> The label *high conflict couple* implies that both parents actively engage in conflict. Although this is true in some cases, in other cases the label is a misnomer because one parent may be a victim of the other parent's rage or attempts to marginalize the parent's role in raising the child.<sup>53</sup> In some cases the amount, intensity, and type of conflict resembles the level and type of disagreements over child-rearing decisions that occur normally between married or cohabiting parents who have different opinions about what is best for the child.

### **Recommendations to Reduce Children's Exposure to Parental Conflict**

Because of the consistency of findings that children are more likely to suffer worse outcomes when their parents use them as pawns or when they consistently witness, their parents' frequent, intense, and ongoing conflict,<sup>54</sup> the Warshak consensus report recommended the following:<sup>55</sup>

- When feasible, parents should be encouraged to create parenting plans through a collaborative, nonadversarial process, that increases the likelihood that both parents will be satisfied with the plan and can give it relatively unambivalent support.
- Interventions such as mediation and parenting coordination can help parents better manage conflict and reduce its negative impact on children.
- When considering the implications of conflict for custody dispositions, courts, operating under the best-interest standard, can hear evidence that goes beyond identifying the presence of conflict and sheds light on the dynamics of the conflict, the contributions of each party to it, and the quality of parenting.

---

<sup>52</sup> See Joan B. Kelly, *Parents with Enduring Child Disputes: Multiple Pathways to Enduring Disputes*, 9 J. FAM. STUD. 37 (2003); Kelly, *supra* note 7.

<sup>53</sup> See, e.g., Michael E. Friedman, *The So-Called High-Conflict Couple: A Closer Look*, 32 AM. J. FAM. THERAPY 107 (2004); Kelly (2003) *supra* note 52; Kelly, *supra* note 48; Joan B. Kelly & Robert E. Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives*, 52 FAM. CT. REV. 352, 353 (2003) (noting: "[I]t is not uncommon to find one enraged or defiant parent and a second parent who no longer harbors anger, has emotionally disengaged, and attempts to avoid or mute conflict that involves the child."); Warshak, *supra* note 36, at 70.

<sup>54</sup> See generally HETHERINGTON & KELLY, *supra* note 1); Kelly, *supra* note 48, at 59. See also Richard A. Warshak, *Ten Parental Alienation Fallacies That Compromise Decisions in Court and in Therapy*, 46 PROF. PSYCHOL.: RES. & PRAC. 235, 241-243 (2015); Richard A. Warshak, *Parental Alienation: Overview, Management, Intervention, and Practice Tips*, 28 J. AM. ACAD. MATRIM. LAW. 181 (2015).

<sup>55</sup> Warshak et al., *supra* note 11, at 57.

- Where tension and conflict accompany transfers of children from one home to the other, rather than reduce children's time with one parent as a response to concerns about parental conflict, consideration should be given to conducting transfers at neutral sites where both parents are not present at the same time.<sup>56</sup> For instance, the children can be dropped off at daycare by one parent and picked up by the other. This protects children from exposure to parental conflict.
- To the extent that conflict is generated by a father who opposes the mother's efforts to marginalize his participation in raising the young child, efforts should be made to educate the mother about the benefits to children of parenting plans that give more opportunities for the development and strengthening of father-child relationships and that keep fathers more involved.
- Both parents should be encouraged to understand the emotional difficulty that can attend being apart from a young child for extended time periods, difficulty that is multiplied when a parent's employment keeps him or her away from the child for most of the weekdays. Parents should be encouraged to provide regular feedback to each other about the young child's routines, behavior, and health, and to the extent possible assuage each other's concerns about the child's development when in the care of the other parent.

### **INTERNATIONAL EXPERT CONSENSUS RECOMMENDATIONS<sup>57</sup>**

The endorsers of the parenting plans consensus report, all accomplished researchers or practitioners, agree that the current state of the scientific literature supports the following conclusions and recommendations. This statement should provide strong direction for policy guidelines and decision-making.

1. Just as we encourage parents in intact families to share care of their children, we believe that the social science evidence on the development of healthy parent-child relationships, and the long-term benefits of healthy parent-child relationships, supports the view that shared parenting should be the norm for parenting plans for children of all ages, including very young children. We recognize that some parents and situations are unsuitable for shared parenting, such as those mentioned in point #7 below.
2. Young children's interests benefit when two adequate parents follow a parenting plan that provides their children with balanced

---

<sup>56</sup> Mary Main, Erik Hesse & Siegfried Hesse, *Attachment Theory and Research: Overview with Suggested Applications to Child Custody*, 49 FAM. CT. REV. 426, 447 (2011).

<sup>57</sup> Warshak et al., *supra* note 11, at 58-60.

and meaningful contact with each parent while avoiding a template that calls for a specific division of time imposed on all families.

3. In general the results of the studies reviewed in this document are favorable to parenting plans that more evenly balance young children's time between two homes. Child developmental theory and data show that babies normally form attachments to both parents and that a parent's absence for long periods of time jeopardizes the security of these attachments. Evidence regarding the amount of parenting time in intact families and regarding the impact of daycare demonstrates that spending half time with infants and toddlers is more than sufficient to support children's needs. Thus, to maximize children's chances of having good and secure relationships with each parent, we encourage both parents to maximize the time they spend with their children. Parents have no reason to worry if they share parenting time up to 50/50 when this is compatible with the logistics of each parent's schedule.
4. Research on children's overnights with fathers favors allowing children under four to be cared for at night by each parent rather than spending every night in the same home. We find the theoretical and practical considerations favoring overnights for most young children to be more compelling than concerns that overnights might jeopardize children's development. Practical considerations are relevant to consider when tailoring a parenting plan for young children to the circumstances of the parents.

Overnights create potential benefits related to the logistics of sharing parenting time. Parents of young children are more likely than parents of older children to be at an early stage in their career or employment at which they have less flexibility and control over their work schedules. Parenting schedules that offer the father and child 2-hr blocks of time together, two or three times per week, can unduly stress their contacts. Overnights help to reduce the tension associated with rushing to return the child, and thus potentially improve the quality and satisfaction of the contact both for the parent and child. Overnights allow the child to settle in to the father's home, which would be more familiar to the child who regularly spends the night in the home compared with one who has only one-hour segments in the home (allowing for transportation and preparation for the return trip). Spending the night allows the father to participate in a wider range of bonding activities, such as engaging in bedtime rituals and comforting the child in the event of nighttime awakenings. An additional advantage of overnights is that in the morning the father can return the child to the daycare; this avoids exposing the child to tensions associated with the parents' direct contact with each other.

Nonetheless, because of the relatively few studies currently available, the limitations of these studies, and the predominance of

results that indicate no direct benefit or drawback for overnights per se outside the context of other factors, we stop short of concluding that the current state of evidence supports a blanket policy or legal presumption regarding overnights. Because of the well-documented vulnerability of father-child relationships among never-married and divorced parents, and the studies that identify overnights as a protective factor associated with increased father commitment to child rearing and reduced incidence of father drop-out, and because no study demonstrates any net risk of overnights, decision makers should recognize that depriving young children of overnights with their fathers could compromise the quality of their developing relationship.

5. Parenting plans that provide children with contact no more than six days per month with a parent, and require the children to wait more than a week between contacts, tax the parent-child relationships. This type of limited access schedule risks compromising the foundation of the parent-child bond. It deprives children of the type of relationship and contact that most children want with both parents. The research supports the growing trend of statutory law and case law that encourages maximizing children's time with both parents. This may be even more important for young children in order to lay a strong foundation for their relationships with their fathers and to foster security in those relationships.
6. There is no evidence to support postponing the introduction of regular and frequent involvement, including overnights, of both parents with their babies and toddlers. Maintaining children's attachment relationships with each parent is an important consideration when developing parenting plans. The likelihood of maintaining these relationships is maximized by reducing the lengths of separations between children and each parent and by providing adequate parenting time for each parent. Such arrangements allow each parent to learn about the child's individual needs and to hone parenting skills most appropriate for each developmental period. The optimal frequency and duration of children's time with each parent will differ among children, depending on several factors such as their age and their parents' circumstances, motivations, and abilities to care for the children. Other important considerations include children's unique relationship histories with each parent and their experience of each parent's care and involvement. In each case where it is desirable to foster the parent-child relationship, the parenting plan needs to be sensitive to the child's needs, titrating the frequency, duration, and structure of contact.
7. Our recommendations apply in normal circumstances, for most children with most parents. The fact that some parents are negligent, abusive, or grossly deficient in their parenting—parents

whose children would need protection from them even in intact families—should not be used to deprive the majority of children who were being raised by two loving parents from continuing to have that care after their parents separate.

## AFTERMATH OF THE CONSENSUS REPORT

The list of endorsers and their stature and accomplishments reflect the field's general acceptance of the consensus report's findings as rooted in settled science from more than four decades of research directly relevant to this topic, including seminal studies by many of the endorsers. This research “provides a growing and sophisticated fund of knowledge about the needs of young children, the circumstances that best promote their optimal development, and the individual differences among children regarding their adaptability to different circumstances, stress, and change.”<sup>58</sup> The endorsements reflect agreement that the report's conclusions and recommendations are well grounded, generally accepted in the field, and expressed in measured language that is useful to decision makers.

### Recent Studies

After the Warshak consensus report was published, two new studies lent additional weight to the report's conclusions. Reanalyzing the data set used by Tornello et al., Sokol examined the correlation between the absolute number of overnights with father and the incidence of insecure attachments to mother. In her preliminary findings, Sokol found no correlation and concluded that overnights with father do not harm the mother-child relationship.<sup>59</sup>

Fabricius reported long-term benefits to college students who, in the first three years of life, spent overnights with their fathers after their parents separated.<sup>60</sup> These teenage and young adult children felt more important to their fathers than

---

<sup>58</sup> Warshak et al., *supra* note 11, at 46.

<sup>59</sup> Karina Sokol, Short-term Correlates of Overnight Parenting Time for Infants: The Current Literature and Re-analyses. Address at the Association of Family and Conciliation Courts Annual Conference (May 31, 2014). Sokol's study was presented at a professional conference and the results have not yet appeared in a peer-reviewed journal article. In using the absolute number of overnights, rather than categories of overnight frequency, Sokol avoided potential problems in Tornello et al.'s methodology which grouped together infants who spent one overnight per week with their fathers with those who lived primarily with their fathers (up to five nights per week). Tornello's group analyses apparently obscured differences in mother-custody versus father-custody families that affect the results. Note that the composition of the sample and the problems with the attachment measure reported by Tornello et al. (discussed *supra* text accompanying notes 17, 29, and 34) equally limit the conclusions that can be drawn from Sokol's study and its relevance to most separating parents.

<sup>60</sup> William Fabricius, New Findings on Relocation and Infant Overnights. Address at the Association of Family and Conciliation Courts—Texas Chapter Annual Conference (Jan. 23, 2015). Although Fabricius presented this study at two professional conferences, because data is still being collected, the results should be considered preliminary until they appear in a peer-reviewed journal article.

did those who had been deprived of overnights early in their lives. They had better relationships with their fathers at no cost to the quality of their relationships with their mothers. On the other hand, having fewer overnights with fathers during infancy was associated with more long-term harm to the father-child relationship. Also, there were no indications of any long-term stress-related health problems related to overnight parenting time for infants with their fathers.<sup>61</sup> The study concluded: “[I]nfant behaviors that have caused the concern about overnight parenting time are either temporary, or they do not signal the long-term effects that were feared.”<sup>62</sup> And, “Of much greater concern is the substantial detriment to the long-term father-child relationship associated with lack of overnight parenting time with fathers. . . .”<sup>63</sup> Overall the study concluded, “We see long-term risks to the father-child relationship in the absence of overnight parenting time during the first 3 years, but only benefits to both parents with the presence of overnight parenting time.”<sup>64</sup> And, “Maximizing parenting time protects children from harm to the father-child relationship, from harm to the mother-child relationship, and from harm due to parent conflict.”<sup>65</sup>

### Reactions to the Consensus Report

In addition to the 110 researchers and practitioners behind the consensus report, prominent social scientists, such as Joan Kelly, cited the report favorably in their presentations and literature reviews.<sup>66</sup> The paper has been translated into at least eighteen languages and has informed legislative deliberations throughout the U.S. and parliamentary deliberations in several countries including the United Kingdom, Canada, Israel, Finland, Romania, Croatia, and Sweden. Two years after its publication the consensus report continues to be one of the most downloaded papers from the journal’s website.

Michael Lamb summarized his understanding of the relevant literature in statements fully consistent with the conclusions reached by Warshak and the

---

<sup>61</sup> Responding to concerns raised by results reported by McIntosh et al., *supra* note 12 and by Tornello et al., *supra* note 13 Fabricius states, *supra* note 60, at 50, “The infant wheezing, and early communication bids to the mother [3-question visual monitoring scale], and self-reports by the mother of her infants’ attachment behaviors toward her are apparently not deserving of too much concern.”

<sup>62</sup> Fabricius, *supra* note 60, at 50.

<sup>63</sup> *Id.*, at 50.

<sup>64</sup> *Id.*, at 52.

<sup>65</sup> *Id.*, at 58.

<sup>66</sup> Joan B. Kelly, *supra* note 7, at 11 (referring to the consensus report’s “in-depth analysis of 16 shared parenting studies.”) Dr. Kelly, a prominent authority on divorce, also coauthored an earlier article on overnights with McIntosh. It is noteworthy that Kelly’s analysis of the literature, *supra*, at 9, agreed with Warshak et al., *supra* note 11, on the important issue of whether young children develop an attachment hierarchy in which mothers are predominant: “Consistent with other recent studies, there was no support for the primacy of the mother as an attachment figure in predicting future outcomes. Nor was there support for the belief that infants and toddlers have a gender bias in attachment formation or develop an attachment hierarchy in which mothers are consistently preferred.”



endorsers of the consensus report: “When both parents have established significant attachments and both have been actively involved in the child’s care, research suggests that overnight visits will consolidate attachments and child adjustment, not work against them.”<sup>67</sup> “Children whose parents were both highly involved before separation benefit from continued involvement with both parents. That involvement should include overnight contact with nonresident parents when there is a preseparation history of involvement.”<sup>68</sup>

It was anticipated that some colleagues would disagree with the consensus report opinions and recommendations. But in the two years since its publication, no article, including those by McIntosh et al., has explicitly identified any errors in the report or disputed any of its conclusions and recommendations. Confronted with the critiques of their studies, one might expect researchers either to show where the consensus report and other scholars’ critiques are mistaken or to modify their previous interpretations of their data and communicate their amended conclusions to colleagues and the general public.

McIntosh et al. have not yet acknowledged or addressed concerns about three of the four measures in their study. But after the consensus report was published, they conceded in one article that their 3-item visual monitoring scale has “relatively low” reliability and is a “weak link” in their study.<sup>69</sup> Otherwise, Smyth and McIntosh have ignored the critiques that their measures were untrustworthy.

To date, McIntosh et al. have not acknowledged that: 1) the results that raised their concern about overnights and young children’s ability to regulate stress rest on a flimsy foundation and do not stand up to scrutiny, 2) the substandard measures used in their study do not support trustworthy conclusions, and 3) the infants with frequent overnights looked no worse than those with no overnights. Instead, McIntosh et al. have continued to report that the infants in their study with weekly overnights had “higher levels of emotionally dysregulated behaviors”<sup>70</sup> and showed “a greater cluster of stress regulation problems compared with infants with fewer overnight stays,” and that “regardless of the context of their parents’ separation, more frequent overnight stays might be more challenging for emotional regulation processes in young children under 4 years of age than for children aged 4 years and over.”<sup>71</sup> These continued assertions of McIntosh et al. are the equivalent of reporting an object’s weight on a broken scale whose readout cannot be trusted, while concealing the fact that the scale is faulty.

In response to the consensus report and other critiques, McIntosh et al. have tried to bolster confidence in the “veracity and reliability” of their study’s findings, by repeatedly claiming that other studies, such as the one by Tornello et al., replicated their study.<sup>72</sup> This is incorrect. Tornello et al. used different

---

<sup>67</sup> Lamb, *supra* note 33, at 180.

<sup>68</sup> *Id.*, at 192.

<sup>69</sup> McIntosh et al., *supra* note 26, at 116.

<sup>70</sup> Smyth et al., *supra* note 21, at 153.

<sup>71</sup> McIntosh et al., *supra* note 26, at 113.

<sup>72</sup> McIntosh et al., *supra* note 26, at 113 (“One standard approach to assessing the veracity and reliability of findings is in their replication. Recently, Tornello and

measures with a different population in their study. Further, as previously noted, Sokol's preliminary analysis of the data in Tornello et al. found no correlation between overnights and insecure attachments in infants.<sup>73</sup> However, McIntosh et al., in a significant concession, noted that their findings "do not substantiate cautions against *any* overnight care in healthy family circumstances."<sup>74</sup> This acknowledgment is another sign that the consensus report is achieving its primary goal of stemming the tide of misinformation.

Pruett (who coauthored a 2014 article with McIntosh on overnights) et al. issued a statement very similar to that of McIntosh and her coauthors. Pruett et al. (2016) wrote that "results from these studies do not substantiate cautions against *any* overnight care or overnight care for *all* children during the first 3 years." They added, "Overall it is clear that these studies do not tell us enough to make policy recommendations against overnights; they leave us only with cautions about what to study in order to know more about how these types of transitions affect children in different situations differently."<sup>75</sup>

Despite these general statements, Pruett and McIntosh, writing with Kelly in 2014, nonetheless concluded that sufficient basis exists for certain cautions about overnights, noting that "the small group of relevant studies to date substantiates caution about high frequency overnight time schedules in the 0-3 year period, particularly when the child's security with a parent is unformed, *or parents cannot agree on how to share care of the child*."<sup>76</sup> But at the outset of their article, under the heading "Key Points for the Family Court Community," the authors narrow the criteria for cautions against high frequency overnights:

Cautions against overnight care during the first three years are not supported. The limited available research substantiates some caution about higher frequency overnight schedules with young children, particularly when the child's relationship with a second

---

colleagues conducted an investigation similar to ours, using a large U.S. sample of children. They replicated many of the Australian findings. Specifically, they found: . . . (b) 'frequent infant overnights were significantly related to attachment insecurity assessed at age 3'. . . ." (citations omitted)). Yet McIntosh et al., *id.*, at 112, state clearly that their study did not measure attachment ("Our study, however, was not a study of attachment." And, "We did not, and could not examine attachment, simply because attachment data were not part of the longitudinal dataset we employed, namely the Longitudinal Study of Australian Children.") *See also* Smyth et al., *supra* note 21, at 153 (referring to findings from McIntosh et al., *supra* note 12, and Tornello et al., *supra* note 13, as "replicated findings for infants" thus repeating the error of identifying outcomes from the two studies as "replicated findings" when in fact they are not.).

<sup>73</sup> Sokol, *supra* note 59.

<sup>74</sup> McIntosh et al., *supra* note 26, at 118.

<sup>75</sup> Pruett et al., *supra* note 29, at 97.

<sup>76</sup> Marsha Kline Pruett, Jennifer E. McIntosh, and Joan B. Kelly, *Parental Separation and Overnight Care of Young Children, Part I: Consensus Through Theoretical and Empirical Integration*, 52 FAM. CT. REV. 240, 250 (2014).

parent has not been established and/or parents are in frequent conflict *to which the child is exposed*.<sup>77</sup>

The last six words of the above statement make a significant difference. In practice, a blanket policy that cautions against overnights for a young child whose parents do not agree on custody discourages courts from ordering shared parenting and overnights in litigated cases. By contrast, a policy that discourages overnights only if the child is exposed to frequent conflict, means that courts need to consider the impact of conflict on the child, a practice recommended by the Warshak consensus report.<sup>78</sup> Because of the significant difference in the two statements by Pruett, McIntosh, and Kelly about conflict and overnights, it is not clear which position the authors intended to guide “the family court community.”

Perhaps the difference between the two recommendations in the same article reflects differences among the three coauthors. In her previous and subsequent work, Kelly argued against reducing the child’s time with the father or reducing the father’s caregiving for the child at bedtime, when the child awakes during the night, and in the morning. Instead Kelly promoted other solutions that reduce the child’s exposure to conflict.<sup>79</sup>

By contrast, McIntosh offers on her website a chart and profile (CODIT) to guide parents and professionals making overnight decisions.<sup>80</sup> Although not intended for use as a diagnostic instrument or as the sole basis for decisions this document asserts, “Even when all parenting conditions are met, high numbers of overnights (more than weekly) are not generally indicated for young infants 0-18 months subject to family law disputes.”<sup>81</sup> This guideline sets up a rebuttable presumption against more than one overnight per week for children younger than 18 months even with parents who consistently and sensitively meet the children’s needs.

---

<sup>77</sup> *Id.* at 240, emphasis added.

<sup>78</sup> Warshak et al., *supra* note 11, at 57.

<sup>79</sup> See, e.g., Kelly, *supra* note 7, at 15 (stating: “Rather than restricting appropriate father-child relationships, other interventions and remedies designed to reduce high conflict should be universally available and provided soon after separation.”). For a similar view see Nicole E. Mahrer, Irwin N. Sandler, Sharlene A. Wolchik, Emily B. Winslow, John A. Moran, & David Weinstock, *How Do Parenting Time and Interparental Conflict Affect the Relations of Quality of Parenting and Child Well-Being Following Divorce?*, in PARENTING PLAN EVALUATIONS (2<sup>ND</sup> ED.), *supra* note 21, at 63, 70 (2016) who, based on their understanding of the literature and on Sandler, Wheeler, & Braver’s study, *supra* note 46, state that “although high quality parenting does not negate the pathological effects of interparental conflict on children’s well-being, high quality parenting by either parent can be a protective factor when parents have moderate or greater levels of contact.” Mahrer et al. conclude, *supra* at 63, “Recommendations should not decrement parenting time of parents with good quality relationships or the potential for good quality relationships with their children because of a high level of interpersonal conflict between the parents.”

<sup>80</sup> This tool is called “Charting Overnight Decisions for Infants and Toddlers (CODIT)” and is available at <http://childrenbeyonddispute.com/resources-for-parents/>.

<sup>81</sup> *Id.*, at 4.

Although lacking a scientific foundation, this presumption in practice would give most mothers the power to deprive children of more than one overnight a week with their fathers for the first one-and-a-half years. To frustrate the father's desire to have a larger role in bedtime rituals and morning routines the mother need only register an objection, thus creating a custody dispute. The mother's preference prevails even if her motives are vindictive, even if her objection is capricious, and even if the father demonstrates superior parenting.

The CODIT includes subjective rating scales with no known reliability or validity. For instance, child adjustment is rated using criteria such as "excessive clinging on separation," "frequent crying," "aggressive behavior," and "low persistence in play & learning" with no anchors to distinguish between troubling behavior within normal limits and atypical behavior. Including such factors in a tool to guide overnight decisions reflects an assumption that troubling behaviors in an infant or toddler that persist more than two weeks are associated with—and can be eliminated by—restricting one parent's overnight contact with the child. The CODIT includes multiple factors that allow gatekeeping parents to use this tool to restrict their children's overnights with the other parent.

Two years after their coauthored article Pruett came out in favor of a position more in line with her previous coauthor Kelly. Writing without McIntosh, but with five other coauthors, Pruett significantly amended her statement about parental conflict:

The small group of relevant studies to date substantiates caution about *high-frequency* overnight time schedules in the 0– to 3–year period when the child's relationship with a parent is not established (e.g., parents never lived together and nonresidential parent spent little to no time with the baby), or when parents cannot agree on how to share care of the child *and their conflict interferes with the child's care*.<sup>82</sup> (second emphasis added).

These six authors are among the scholars who agree with the consensus report's conclusion that the mere presence of conflict between parents over how to share care of their child (i.e., a dispute over custody) is not a sufficient reason to be cautious about overnights. Instead, decision makers should attend to the nexus between the expressions of conflict and their impact on the child.

### **Misunderstandings of the Consensus Report**

Pruett et al. (2016) hold the same position as the Warshak consensus report about the importance of the coparenting relationship when considering decisions about shared parenting. Yet Pruett et al. left the appearance of disagreement when they mistakenly reported:

Warshak (2014) argues that children benefit from a more evenly balanced amount of time between parents, and that this should be

---

<sup>82</sup> Pruett et al., *supra* note 29, at 97

protected regardless of the co-parenting dynamic, since reducing one parent's time in the face of conflict favors the parent with more access as that parent can perpetuate conflict as an excuse not to share parenting. This may be true, but it ignores the needs of the infant or toddler from a child-centric perspective, if the shared parenting results in the child's consistent exposure to conflict.<sup>83</sup>

The consensus report offered no such generalization or rationale for shared parenting. And as explained earlier, because a blanket policy prioritizes parents' desires over children's needs, such a policy of reducing a child's time with a parent when the parents are in conflict is hardly "child-centric."<sup>84</sup> A blanket policy provides an incentive to a parent to escalate and involve children in conflict if the parent believes that initiating and sustaining conflict is a path to winning sole physical custody.<sup>85</sup> In many cases there are better ways to protect a child from consistent exposure to conflict than to disproportionately deprive the child of important time with a parent.<sup>86</sup>

Contrary to Pruett et al.'s (2016) assertion, the consensus report explicitly identified coparenting dynamics as one among several factors to consider in reaching a custody decision, a position that Warshak has consistently held in his publications during the past twenty-five years.<sup>87</sup> Naturally, shared parenting and overnighting are not for all families. On this point the consensus report is clear:

Some circumstances depart significantly from the norm and do not lend themselves to the same general recommendations that apply to the majority of parenting plan decisions. These circumstances include a history of intimate partner violence, a history or credible risk of neglect, physical abuse, sexual abuse, or psychological abuse toward a child, manifestations of restrictive gatekeeping such as persistent and unwarranted interference with parenting

---

<sup>83</sup> Pruett et al., *supra* note 29, at 96.

<sup>84</sup> *Supra* text accompanying notes 46-51.

<sup>85</sup> Braver, *supra* note 51, at 178.

<sup>86</sup> See, e.g., Kelly, *supra* note 7, at 15 (stating: "Rather than restricting appropriate father-child relationships, other interventions and remedies designed to reduce high conflict should be universally available and provided soon after separation."). Also see *supra* text accompanying note 55.

<sup>87</sup> See, e.g., Warshak, *supra* note 48 (supporting a multi-factored best-interest standard). See also, Warshak, *Parental Alienation*, *supra* note 54, at 218-222 (describing the rationale for courts to find it in children's best interests to reduce their time with a parent who denigrates the other parent to the child, encourages the child to reject the other parent, interferes with the court-ordering parenting plan, and in other ways acts as a restrictive gatekeeper). This position is consistent with Pruett's position on gatekeeping: William G. Austin, Linda Fieldstone, & Marsha Kline Pruett, *Bench Book for Assessing Parental Gatekeeping in Parenting Disputes: Understanding the Dynamics of Gate Closing and Opening for the Best Interests of Children*, 10 J. CHILD CUSTODY 1, 12 (2013) ("Limiting time with the parent exerting unjustified RG [restrictive gatekeeping] may be a consideration, especially when all else fails.).

time (Austin, Fieldstone, & Pruett, 2013; Pruett, Arthur, & Ebling, 2007; Pruett et al., 2012; Warshak et al., 2003), a history of child abduction, a child's special needs (e.g., cystic fibrosis or autism), and a significant geographical separation between the parents.<sup>88</sup>

Note that in stressing the importance of coparenting dynamics, the consensus report cited three of Pruett's articles. The report unambiguously and repeatedly acknowledged the importance of the coparenting relationship and specifically recommended that courts not only identify the presence of conflict, but also consider evidence that "sheds light on the *dynamics of the conflict*, the contributions of each party to it, and the quality of parenting."<sup>89</sup> And, "our recommendations apply to children who have a relationship with both parents. If a child has a relationship with one parent and no prior relationship with the other parent, or a peripheral, at best, relationship, different plans will serve the goal of building the relationship versus strengthening and maintaining an existing relationship."<sup>90</sup>

Pruett et al. (2016) also misunderstood why the consensus report opposed a blanket policy of allowing one parent to veto joint physical custody merely by claiming a conflicted relationship with the other parent. The consensus report's opposition to such a policy has nothing to do with a concern that it rewards the parent who has more contact with the children. The consensus report proposed that conflict between parents does not automatically eliminate the possibility that children can benefit from shared parenting. Warshak and the endorsers of the consensus report favor a policy that protects children by reducing a parent's motivation to initiate, sustain, and escalate conflict. Again, this has nothing to do with favoring one parent over the other. Indeed, there is no reason to assume that such a policy would favor the parent who perpetuates conflict. By statute a majority of states instruct courts to consider coparenting behavior (using various labels for the concept) as one factor in determining the custody arrangement that serves the children's best interests. The parent who perpetuates conflict may find that such behavior, rather than reducing the other parent's time with the children, has the opposite outcome.<sup>91</sup> Braver and his colleagues found that the public favors a policy that would reduce parenting time for the parent who is identified as the primary instigator of conflict.<sup>92</sup>

---

<sup>88</sup> Warshak et al., *supra* note 11, at 58.

<sup>89</sup> *Id.*, at 57, emphasis added.

<sup>90</sup> *Id.*, at 60. The importance of a preexisting parent-child relationship when crafting a parenting plan than includes overnights is generally recognized in the literature. *See, e.g.*, Ludolph & Dale, *supra* note 36, at 33: "In regard to overnights in particular, there are no compelling empirical or theoretical reasons to believe that overnight parenting time in itself will create difficulties for a young child who has experienced a meaningful relationship with the noncustodial parent before the parental separation."

<sup>91</sup> *See, e.g.*, Austin et al., *supra* note 87, at 12.

<sup>92</sup> Sanford L. Braver, Ira M. Ellman, Ashley M. Votruba, & William V. Fabricius, *Lay Judgments About Child Custody After Divorce*, 17 PSYCHOL., PUB. POL'Y. & L. 212 (2011). *See also* Braver, *supra* note 51, at 178 (noting that such a policy would decrease

Instead of a blanket policy that denies children the potential benefits of shared parenting, the consensus report offers recommendations to protect children from consistent exposure to conflict.<sup>93</sup> These recommendations are applicable in situations where parents share overnights and in situations where children live predominantly with one parent and see the other parent less frequently (e.g., a schedule of every other weekend and mid-week contacts with or without overnights).

Pruett et al. (2016) leave the impression that they dissent from the consensus report on the important role of the coparenting relationship and the importance of the child's prior relationship with a parent when in fact their position reiterates the consensus view. Indeed, Pruett et al.'s seven "points of consensus" echo the conclusions of the consensus report published two years earlier.<sup>94</sup>

## MEANING AND VALUE OF THE CONSENSUS REPORT ENDORSEMENTS

McIntosh et al. tried to diminish and distract from the meaning and value of the 110 endorsements of the consensus report. McIntosh et al. asserted that the accomplished scholars and practitioners who endorsed the consensus report put their reputations and integrity on the line by signing a document based solely on "sentiment" and not science, and that the endorsers did not necessarily agree with the evidence for the conclusions and recommendations that they endorsed.<sup>95</sup> This is incorrect.<sup>96</sup> The endorsers received and read the whole paper. As would be

---

incentive to promote conflict and instead "would make it worthwhile for the angry parent to bury the hatchet.").

<sup>93</sup> See *supra* text accompanying note 55.

<sup>94</sup> Pruett et al., *supra* note 29, at 97.

<sup>95</sup> McIntosh et al., *supra* note 26, at 111 and 117.

<sup>96</sup> See *supra* text accompanying notes 55 and 57, for the full text of the consensus report's conclusions and recommendations. Note that these consensus opinions include multiple references to the evidence discussed in the report and to the accuracy and validity of the literature review that preceded the section titled "Conclusions and Recommendations." Following are some excerpts of such references in the statement endorsed by the 110 researchers and practitioners (all emphases added to highlight references to the research and to the evidence): "**Research** allays such concerns. . . . **The research reviewed earlier** on parenting time in intact families shows . . . . Combined with the daycare studies, **this research should put to rest the idea that children are inevitably harmed by extended separations from their mothers.** . . . **The results of the 16 studies** relevant to parenting plans generally support rather than oppose shared parenting and overnights for young children. But predominantly **the studies show little direct impact of overnights in the short run.** The three studies that often are cited as evidence for the harmful effects of greater father involvement with young children actually found mixed or ambiguous results perhaps because the measures used were inadequate by scientific standards. . . . **The research on children being raised by parents who live apart from each other**, in the larger context of scientific knowledge about the factors that foster optimal child development and the formation and maintenance of healthy parent-child relationships, offers guidelines that should inform decision makers and those who assist them, such as parents, mediators, child custody experts, lawyers, and judges." (p. 58)



expected, none would have endorsed the paper if they agreed with the conclusions but disagreed with the evidence that supported the conclusions. In fact, the conclusions referred explicitly and extensively to the evidence reviewed and analyzed in the preceding sections. Rather than enumerate the significant contributions of the endorsers to our base of scientific knowledge, the reader is encouraged to note the names of the scholars and their credentials listed at the end of the consensus report. The qualifications of the endorsers to vet the literature reviews and analyses and to judge the conclusions and recommendations that flow from those analyses are beyond dispute.

Some have questioned the value of publishing a paper with scientists' endorsements. But such papers are not unprecedented. An example is the 1997 article co-signed by eighteen experts that clarified implications of social science evidence for custody arrangements.<sup>97</sup> Similarly, the Warshak consensus report clarifies the social science relevant to parenting plans for young children.

Having the paper reviewed by the endorsers of the Warshak report brought two advantages. The first was the benefit of feedback and vetting from this group on the consensus report's analysis of the bodies of literature on attachment, daycare, parenting plans, and divorce. The endorsers included prominent international authorities in attachment, principal investigators for the celebrated NICHD Study of Early Child Care and Youth Development, and leading researchers who have studied the impact of divorce since the mid-1970s. The second advantage was that the stature of the signatories—with their outstanding

---

And, "To the extent that policy and custody decisions seek to express scientific knowledge about child development, **the analyses in this article should receive significant weight by legislators and decision makers.** . . . [W]e believe that the **social science evidence** on the development of healthy parent-child relationships, and the long-term benefits of healthy parent-child relationships, supports the view that shared parenting should be the norm for parenting plans for children of all ages, including very young children. . . . In general **the results of the studies reviewed in this document** are favorable to parenting plans that more evenly balance young children's time between two homes. **Child developmental theory and data** show that babies normally form attachments to both parents and that a parent's absence for long periods of time jeopardizes the security of these attachments. **Evidence** regarding the amount of parenting time in intact families and regarding the impact of daycare demonstrates that spending half time with infants and toddlers is more than sufficient to support children's needs. Thus, to maximize children's chances of having a good and secure relationship with each parent, we encourage both parents to maximize the time they spend with their children. . . . **Research on children's overnights** with fathers favors allowing children under four to be cared for at night by each parent rather than spending every night in the same home." (p. 59) And, "**The research supports** the growing trend of statutory law and case law that encourages maximizing children's time with both parents. This may be even more important for young children in order to lay a strong foundation for their relationships with their fathers and to foster security in those relationships . . . **There is no evidence to support postponing the introduction of regular and frequent involvement, including overnights,** of both parents with their babies and toddlers. . . . Rather it is our conviction that **our analyses meet the test of scientific validity and reliability, and thus are trustworthy in the legal sphere.** (p. 60).

<sup>97</sup> Lamb et al., *supra* note 2.

careers as social scientists—brings attention to decision makers for the report's conclusions and recommendations.

In sum, the consensus report does not maintain that its conclusions are scientific merely because 110 well-qualified researchers and practitioners endorse the conclusions—science is not settled at the ballot box. Rather, the consensus report reflects that the endorsers, based on their understanding of the literature and on their professional experiences, accept the report's research-based conclusions.

## CONCLUSION

Warshak, with the review and endorsement of 110 researchers and practitioners, analyzed more than four decades of research and issued a peer-reviewed consensus report on parenting plans for young children.<sup>98</sup> As intended, the report stemmed a tide of misinformation that was threatening to resurrect long-discarded myths about child development and enshrine them in professional practice and family law. The list of endorsers and their professional accomplishments reflect the widespread acceptance of the consensus report's findings that favor shared parenting and overnighting for young children under normal circumstances. Two years after its publication, the conclusions and recommendations of the Warshak consensus report remain supported by science.

---

<sup>98</sup> Warshak et al., *supra* note 11.