

# **Stemming the Tide of Misinformation: International Consensus on Shared Parenting and Overnighting**

by  
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## **Abstract**

Richard 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 children under the age of four. As intended, the report stemmed a tide of misinformation that was threatening to resurrect myths about infant attachment and child development and enshrine them in professional practice and family law. The list of endorsers and their professional accomplishments reflect the widespread acceptance among scientists of the consensus report's findings that favor shared parenting and overnighting for young children under normal circumstances. Nearly four years after its publication, the conclusions and recommendations of the Warshak Consensus Report remain supported by science.

## **I. Introduction**

### *A. 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.

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178 *Journal of the American Academy of Matrimonial Lawyers*

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.<sup>1</sup> 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.

*B. Background*

American society holds a curious double standard when it comes to encouraging hands-on shared parenting. For instance, society encourages dads' involvement 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 promising strides in cracking gender barriers, many people still think that moms should care for infants and toddlers, and that young children's wellbeing is jeopardized if we trust dads to do the job.

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<sup>1</sup> Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice and Shared Parenting*, 52 *FAM. CT. REV.* 152, 163 (2014).

The idea that mothers, by nature, are uniquely suited to raise young children—known as the tender years doctrine—dominated child custody decisions throughout the nineteenth century and most of the twentieth.<sup>2</sup> In 1973 the preference for maternal custody received support in an acclaimed book by Joseph Goldstein, Anna Freud, and Albert Solnit.<sup>3</sup> Their position assumed that an infant initially forms an attachment to one parent, usually the mother, and then perhaps to other people, and that if parents separate, young children need maximum time with the primary parent, also called the psychological parent, even if this compromises the child's relationship with the other parent. They believed that separations from the mother carry potential for long-term damage. For a long time this belief fueled opposition to mothers working outside the home because of concerns about leaving children with babysitters and daycare attendants.

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 nineteenth and twentieth 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>4</sup>

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<sup>2</sup> *Commonwealth v. Addicks*, 5 Binn. 520 (Pa. 1813). For another early expression of the tender years doctrine, see *Helms v. Franciscus*, 2 Bland 544, 563 (Ch. Md. 1830)

<sup>3</sup> JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

<sup>4</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 & JOHN KELLY, *FOR BETTER OR WORSE: DIVORCED RECONSIDERED* (2002) (Virginia); 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); 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); John W. Santrock & Richard A. Warshak, *Father Custody and Social Development in Boys and Girls*, 34 J. SOC. ISSUES 112 (1979) (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*

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 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>5</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 night, and in the morning.<sup>6</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>7</sup> Those authors recommended that decision makers

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*Father-Custody and Mother-Custody Homes: The Child's Perspective*, in CHILD. & DIVORCE 29, 38, 42–43 (Lawrence A. Kurdek ed. 1983) (Texas).

<sup>5</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).

<sup>6</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>7</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.

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>8</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>9</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.

Controversy over the previous decade's accepted science with respect to overnights for young children reignited in 2011

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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 6; 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>8</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>9</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.").

182 *Journal of the American Academy of Matrimonial Lawyers*

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 its journal, *Family Court Review* (FCR) in which McIntosh listed herself as an author on nine articles, eight of which were edited transcripts of interviews that McIntosh conducted with people she selected as commentators. The same year AFCC bestowed upon McIntosh its Distinguished Research Award, and then in 2012 invited McIntosh to deliver a plenary address at its annual conference.<sup>10</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 helpful to the primary caregiver.<sup>11</sup> Subsequent articles criticized AFCC, FCR, and Mc-

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<sup>10</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 (2014) (“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>11</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 (2011) (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.”). See also 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), <http://www.child-encyclopedia.com/divorce-and-separation/according-experts/special-considerations-in-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.”).

Intosh for presenting a narrow perspective.<sup>12</sup> Joan Kelly 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>13</sup>

## II. 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* (Warsak Consensus Report) published in the American Psychologi-

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<sup>12</sup> See, e.g., Kelly, *supra* note 10, 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 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>13</sup> Kelly, *supra* note 10, at 10.

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cal Association's journal, *Psychology, Public Policy, and Law*, that is edited by Cambridge University Professor Michael Lamb, a prominent child development scholar.<sup>14</sup> The report was published with the endorsement of 110 of the world's leading researchers and practitioners, several who had conducted the seminal studies cited in the report.

David Faigman, John Monahan, and Christopher Slobogin offer suggestions for measuring general acceptance of scientific opinions. Consistent with those suggestions, the endorsers of the Warshak Consensus Report were an independent group of scientists with expertise across a broad spectrum of the science underlying child custody dispositions and with no financial, professional, or ideological overinvestment in a position either for or against shared parenting and overnights for young children.<sup>15</sup>

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 compelling evidence 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 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-

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<sup>14</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/>.

<sup>15</sup> David L. Faigman, John Monahan, & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 *U. CHI. L. REV.* 461 (2014).



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. Given these observations, after the parents separate, most mothers should have no reason to worry about leaving their very young children in the father's care. In fact, fathers who are more involved with their infants and toddlers become better parents and have better relationships with their children.<sup>16</sup> Better parent-child relationships, in turn, lead to better outcomes in other spheres of development, such as stress-related physical health, grades, mental health, and behavior.<sup>17</sup>

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, in most circumstances both parents should maximize the time they spend with their young children, including sharing 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.

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<sup>16</sup> E.g., Joyce Magill-Evans et al., *Interventions with Fathers of Young Children: Systematic Literature Review*, 55 J. ADVANCED NURSING 248 (2006), doi: 10.1111/j.1365-2648.2006.03896.x (reviewing evidence from 12 interventions the review noted methodological weaknesses in the studies but nonetheless concluded that that a father's active participation with or observation of his infant or toddler improved the father's confidence in parenting, positive view of his child, knowledge of his child, and child care skills).

<sup>17</sup> E.g., W. Thomas Boyce et al., *Early Father Involvement Moderates Biobehavioral Susceptibility to Mental Health Problems in Middle Childhood*, 45 J. AM. ACAD. CHILD. & ADOLESCENT PSYCHIATRY 1510, 1516 (2006) (reporting that high father involvement and coparenting during infancy helped "ameliorate a child's susceptibility to disturbances of mental health and behavior."); William V. Fabricius & Linda J. Lueken, *Postdivorce Living Arrangements, Parent Conflict, and Long-Term Physical Health Correlates for Children of Divorce*, 21 J. FAM. PSYCHOL. 195 (2007), doi:10.1037/0893-3200.21.2.195.

### III. 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 Warshak 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 Jennifer McIntosh, Bruce Smyth, and Margaret Kelaher, issued by the Attorney General's department in Australia, and copyrighted by a clinic founded by the study's first author.<sup>18</sup> The second study, by Samantha Tornello et al., was published in 2013.<sup>19</sup> The Warshak Consensus Report identified significant problems and limitations in both studies that should affect the admissibility and weight of testimony that relies on these studies.<sup>20</sup> As 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>21</sup> The analyti-

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<sup>18</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), <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>19</sup> Samantha L. Tornello, Robert Emery, Jenna Rowen, Danile Potter, Bailey Ocker, & Yishan Xu, *Overnight Custody Arrangements, Attachment, and Adjustment Among Very Young Children*, 75 J. MARRIAGE & FAM. 871 (2013).

<sup>20</sup> See *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

<sup>21</sup> *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). See also JOHN A. ZERVOPOULOS, *CONFRONTING MENTAL HEALTH EVIDENCE* 8 (2d ed. 2015)

cal gap metaphor offers a useful critique of some experts who have expressed opinions based on these two studies. Understanding several kinds of analytical gaps in the testimony of experts who rely on these two studies should inform trial examinations of the reports and testimony of these experts.<sup>22</sup>

#### A. *Gaps Between Research Samples 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 of children under four years old 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 71% for toddlers), and 41% 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 are too wide a gap to bridge. The Warshak 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.<sup>23</sup>

The second study similarly focused predominantly on children whose parents had never been married (75%), half of whom were not living together at the time of the child's birth. 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

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(referencing *General Electric Co. v. Joiner*: "Courts may view opinions with analytical gaps that are too wide as unreliable and thus inadmissible.")

<sup>22</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>23</sup> Warshak, *supra* note 14, at 60 ("[O]ur recommendations apply to children who have relationships 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.").

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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 non-marital births from more than one partner in their teenage or young adult years, and nearly two-thirds had not completed high school.<sup>24</sup> In sum, even if the results from these two studies are trustworthy their relevance to U.S. custody disputes is slim.

### B. *Gaps Between Methodology and Conclusions*

In-depth analyses of the McIntosh et al. and the Tornello et al. studies, published in the Warshak Consensus Report and in other papers, reveal multiple problems in each study's measures, procedures, data analyses, and data reporting—problems that expose wide gaps between each study's methodology and its conclusions. In the McIntosh et al. study, 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>25</sup> The first author subsequently described these negative outcomes as "a cluster of stress regulation problems."<sup>26</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>27</sup> Also, the mean irritability score for the frequent overnighters and the infants in intact families was identical, and the mean irritability score for all groups was within the normal range. Since, for these

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<sup>24</sup> Sara McLanahan, *Fragile Families and Child Wellbeing Study Fact Sheet* (2013), [ChildWellbeingStudyFactSheet.pdf](#). See also *Parental Incarceration and Child Wellbeing in Fragile Families*, 42 FRAGILE FAMILIES RESEARCH BRIEF 1-2 (2008), <http://fragilefamilies.princeton.edu/sites/fragilefamilies/files/researchbrief42.pdf>.

<sup>25</sup> McIntosh et al., *supra* note 18, at 9.

<sup>26</sup> McIntosh, *Special Considerations*, *supra* note 11, at 3.

<sup>27</sup> McIntosh et al., *supra* note 18, at 166.

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 characteristics of their sample and the characteristics of most parents who are separating—is the study’s tiny sample sizes. The irritability scores for infants with occasional overnights came from a sample of 14 infants. Only 11 infants saw their fathers on a schedule that would fit standard definitions of shared parenting. The sample sizes for the 2- to 3-year-olds with frequent overnights ranged from 5–25 depending on the variable analyzed (e.g., only five toddlers were rated for how well they got along with teachers and daycare attendants). An analysis based on five respondents is unlikely to provide meaningful data.<sup>28</sup>

The second analytic gap is the discrepancy between the trustworthiness of a measure and the conclusion based on the results from that measure. The synopsis concluded that the overnighting infants were more “watchful and wary of separation from the primary caregiver.”<sup>29</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 readiness to learn language. The three questions are unreliable in the sense that they have not been established as a valid or reliable measure of children’s stress, anxiety, or attachments to their mother.

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<sup>28</sup> Although the sample size in Tornello et al., *supra* note 19, is larger than previous studies, Emery (who coauthored the Tornello et al. study) and McIntosh included 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: APPLIED RESEARCH FOR THE FAMILY COURT (2D ED.) 118, 133 (Leslie Drozd, Michael Saini & Nancy Olesen eds., 2016).

<sup>29</sup> McIntosh et al., *supra* note 18, at 9.

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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>30</sup> To measure insistent visual monitoring, the researchers 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>31</sup> There was no rating of “insistence.” The authors made the false assumption that because infants when anxious look at their mothers and try to get their attention, being anxious is the only reason infants look at their mothers, and that the more infants look at their mothers, the more anxious 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 three questions are valid measures of a baby’s emotional health, anxiety, ability to manage stress, or ability to regulate emotions. On the instrument from which these three questions were extracted, more frequently looking at the mother and trying to get her attention indicates advanced cognitive development—a precursor of language acquisition—not impaired emotional regulation as McIntosh et al. stated.<sup>32</sup>

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>33</sup> a point also noted by Linda Nielsen in greater detail.<sup>34</sup>

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<sup>30</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>31</sup> Warshak, *supra* note 14, at 55 n.1.

<sup>32</sup> AMY M. WETHERBY & BARRY M. PRIZANT, *COMMUNICATION AND SYMBOLIC BEHAVIOR SCALES DEVELOPMENTAL PROFILE- PRELIMINARY NORMED EDITION* (2001).

<sup>33</sup> Warshak, *supra* note 14, at 55.

<sup>34</sup> Linda Nielsen, *Wozzles: Their Role in Custody Law Reform, Parenting Plans, and Family Court*, 20 *PSYCHOL., PUB. POL’Y. & L.* 164 (2014).

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Similarly, Tornello et al. used an instrument with no established reliability or validity to assess the child's attachment to the mother. The instrument was abbreviated and modified from an established instrument, but there is no evidence of the validity of the modified version instrument. Also, the Warshak Consensus Report and other scholars have questioned the meaning of the attachment findings because the instrument was completed by mothers rather than by trained professional raters.<sup>35</sup> Other researchers using this same attachment measure have acknowledged that it lacks objectivity,<sup>36</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 one 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 three. The press release issued by the lead investigators' university, while failing to mention the unreliability of the attachment measures, incorrectly claimed that infants who spent at least one night per week away

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<sup>35</sup> See Warshak, *supra* note 14, at 54. See also, e.g., 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 (2D ED.), *supra* note 28, at 85, 102; 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, *supra* note 34, at 170; 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), [http://www.psychology.sunysb.edu/attachment/measures/content/aqs\\_method.html](http://www.psychology.sunysb.edu/attachment/measures/content/aqs_method.html)2013.

<sup>36</sup> Sangita Pudasainee-Kapri & Rachel Razza, *Attachment Security Among Toddlers: The Impacts of Coparenting and Father Engagement*, Fragile Families Working Paper WP13-01-FF, at 29, 48, 51 (2013), <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 percentages of insecure attachment than would be expected for these children who were living in poverty with poorly educated mothers.

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from their mothers had more insecure attachments than babies who saw their fathers only during the day. In fact they did not.<sup>37</sup>

Scientists should take pains to ensure that all 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 baby, and the next day show a readout of fifteen pounds for the same ten-pound baby. If the scale lacks validity, the scale can be off by five pounds even though it might consistently show the same incorrect weight every time the baby is weighed.

### C. Gaps Between Data and Interpretation

Another analytic gap is created when important information or portions of the data that undermine the researchers' conclusions are ignored or deemphasized. In Tornello et al.'s study the results were ambiguous. Insecure attachment scores were more common among the frequent overnights, followed by the never overnights, followed by the occasional overnights—the same nonlinear patterns that characterized the McIntosh et al. results.<sup>38</sup> Thus, as the Warshak Consensus Report and others have

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<sup>37</sup> Fariss Samarrai, *Overnights Away from Home Affect Children's Attachments, Study Shows*, UVA TODAY NEWS RELEASE (July 18, 2013), <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 one and three and attachment.

<sup>38</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 (2D ED.), *supra* note 28, 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."). Karina Sokol, 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



noted, frequency of overnights did not predict insecurity in either study.<sup>39</sup>

Interpreting the attachment findings is also complicated by the fact that Tornello et al. did not report this important information: More than half of the children 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 children 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’ homes caused the children’s more insecure attachment to their mothers. The gap between the data and the researchers’ conclusions about insecure attachments 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>40</sup> These factors and others, such as domestic violence, can affect mother-child attachments. Even if the attachment measure had met scientific standards, these results should 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.

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

Another gap is created when expert opinions downplay certain findings and over-emphasize others. Those who rely on the data from McIntosh et al. and Tornello et al. 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

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mother. 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). See also *infra* text at note 62.

<sup>39</sup> See, e.g., Fabricius et al., *supra* note 38, at 81; Michael E. Lamb, *Critical Analysis of Research on Parenting Plans and Children’s Well-Being*, in PARENTING PLAN EVALUATIONS (2D ED.), *supra* note 28, at 182.

<sup>40</sup> McLanahan, *supra* note 24.

that undermine their usefulness as a basis for custody decisions. For instance, one of the authors of the Tornello et al. study, Emery, 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>41</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 and emphasis on the one finding that linked 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.<sup>42</sup>

Given the wide gaps 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>43</sup> that these two studies provide no reliable

<sup>41</sup> Smyth et al., *supra* note 28, at 153.

<sup>42</sup> E.g., Nabanita Datta Gupta et al., *Does Mother Know Best? Parental Discrepancies in Assessing Child Behavioral and Educational Outcomes*, 14 REV. ECON. OF THE HOUSEHOLD (2016), DOI 10.1007/s11150-016-9341-1 (reporting on a longitudinal study of 6000 Danish children using standardized outcome measures and finding large discrepancies between mothers' and fathers' evaluations of their 11-year-old child's behavior and academic performance, with neither parent a more accurate informant than the other.); Rae Kaspiew et al., *Evaluation of the 2006 Family Law Reforms Melbourne*: Australian Inst. Fam. Stud. (2009), <https://aifs.gov.au/sites/default/files/publication-documents/evaluationreport.pdf>.

<sup>43</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 12; 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*

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basis to support custody policy, recommendations, or decisions that restrict overnight shared parenting for young children.<sup>44</sup>

#### IV. Conflict and Parenting Plans

A central question about studies that report positive outcomes in shared physical custody and overnighting arrangements is whether they are relevant to parents who litigate custody or display high levels of conflict when interacting with each other. Some scholars speculate that children do well in joint physical custody because their parents voluntarily agreed to share physical custody from the outset and that couples who share custody are fundamentally different from other parents. They are better educated, more cooperative with each other, and better parents.<sup>45</sup> This view assumes 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 speculation leads to the concern that if the mother does not want her child spending more time with the father, or the parents have a lot of conflict, spending more

(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); Linda Nielsen, *Shared Residential Custody: A Recent Research Review (Part Two)*, 27 AM. J. FAM. L. 123 (2013); Nielsen, *supra* note 34; 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).

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<sup>44</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 34.

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<sup>45</sup> The consensus report cited a 2011 keynote address by David 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. Warshak, *supra* note 14, at 56 (citing David A. Martindale, *Imposed Joint Custody: Does It Work?* Keynote address at the Annual Program of the New York State Interdisciplinary Forum on Mental Health and Family Law, New York County Lawyers Association (May 2011)). Nevertheless, others have discounted the relevance of shared physical custody research for parents in conflict. See, e.g., Smyth et al., *supra* note 28, at 118.

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time with dad will harm rather than help the child. The corollary concern is that if parents are not on the same page with respect to overnights, especially if they take their dispute to court, overnights will harm young children so they are better off seeing their dad only during the day, at least until they are eighteen months old, and some say until four or five years old.<sup>46</sup>

This hypothesis lacks empirical support. A meta-analysis 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>47</sup> Rather than magnify harmful effects of parental conflict, several studies suggested that joint physical custody may protect children from some of the potential negative consequences of conflict.<sup>48</sup>

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<sup>46</sup> See, e.g., *Charting Overnight Decisions for Infants and Toddlers (CODIT)*, available at Jennifer McIntosh's website: <http://childrenbeyonddispute.com/resources-for-parents/>.

<sup>47</sup> Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16 J. FAM. PSYCHOL. 91, 99 (2002).

<sup>48</sup> BRAVER & O'CONNELL, *supra* note 4, 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); 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); 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.

Nielsen conducted the most recent, comprehensive peer-reviewed analysis of joint physical custody studies that controlled for parental conflict.<sup>49</sup> Nielsen concluded that couples with joint custody are no special breed of cooperative, low conflict parents who agreed from the outset to share custody. They do not have lower levels of conflict at the time of separation or in the years following. Joint physical custody is no panacea. It does not reduce levels of parental conflict as some advocates believe. But conflict is not more damaging for children in joint physical custody than those in sole custody. Conflict does not erase the benefits of joint custody.

Nielsen identified sixteen studies that controlled for conflict when comparing children's outcomes on various measures of well-being in joint physical custody and sole physical custody homes. Only the study led by McIntosh reported worse outcomes on some measures for children in joint physical custody. One study found that boys did better and girls worse in joint physical custody when conflict was high. The other fourteen studies reported either better outcomes in joint custody or no differences, even after taking conflict into account.

The fact that joint physical custody children had better outcomes even when a parent initially opposed the plan and even when conflict was high suggests that parental conflict has been oversold as the main factor linked to children's postdivorce adjustment. Nielsen found that in predicting positive outcomes, high quality parent-child relationships are more important than low conflict or cooperative co-parenting. And high quality relationships need sufficient time to develop and flourish.

#### A. *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>50</sup> This

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<sup>49</sup> Linda Nielsen, *Re-examining the Research on Parental Conflict, Coparenting and Custody Arrangements*, 23 PSYCHOL., PUB. POL'Y. & L. 211 (2017).

<sup>50</sup> See Kelly, *supra* note 10, 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

policy sends parents the message that generating or sustaining conflict can be an effective strategy to override shared custody.<sup>51</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>52</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

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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, or 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).") Notwithstanding Kelly's critique, and the studies in the ensuing twelve years that support opposite recommendations, Emery continues to recommend strong restrictions on contact between "nonresidential parents" and their infants and toddlers. Compare Robert E. Emery, *Emery's Alternative Parenting Plans (Child Custody Schedules)*, [http://emeryondivorce.com/parenting\\_plans.php](http://emeryondivorce.com/parenting_plans.php) (last visited Mar. 24, 2017) (presenting sample parenting plans for an "angry divorce" that provide infants and nonresidential parents no more than 6.5 hours of contact per week and no overnights, and toddlers up to the age of three years only one contact period per week, with only two of these contacts in a four-week period being overnights) with ROBERT E. EMERY, *TWO HOMES, ONE CHILDHOOD: A PARENTING PLAN TO LAST A LIFETIME* (2016).

<sup>51</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 48, 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. BALT. L. REV. 83 (2011).

<sup>52</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 10.

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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>53</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>54</sup>

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>55</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>56</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.

B. 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,

<sup>53</sup> Warshak, *supra* note 51, at 97

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<sup>54</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 deinceivize conflict? One, for example, is eliminating the blanket opportunity for one parent to unilaterally veto shared custody.”).

<sup>55</sup> See Joan B. Kelly, *Parents with Enduring Child Disputes: Multiple Pathways to Enduring Disputes*, 9 J. FAM. STUD. 37 (2003); Kelly, *supra* note 10.

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<sup>56</sup> See, e.g., Michael E. Friedman, *The So-Called High-Conflict Couple: A Closer Look*, 32 AM. J. FAM. THERAPY 107 (2004); Kelly, *supra* note 55; Kelly, *supra* note 51; 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 43, at 70.

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200 *Journal of the American Academy of Matrimonial Lawyers*

intense, and ongoing conflict,<sup>57</sup> the Warshak Consensus Report recommended the following:<sup>58</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.
- 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>59</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

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<sup>57</sup> See generally HETHERINGTON & KELLY, *supra* note 4; Kelly, *supra* note 51, at 59. See also Richard A. Warshak, *Parental Alienation: Overview, Management, Intervention, and Practice Tips*, 28 J. AM. ACAD. MATRIM. LAW. 181 (2015); Richard A. Warshak, *Ten Parental Alienation Fallacies that Compromise Decisions in Court and in Therapy*, 46 PROF. PSYCHOL.: RES. & PRAC. 235, 241-43 (2015).

<sup>58</sup> Warshak, *supra* note 14, at 57.

<sup>59</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).

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health, and to the extent possible assuage each other's concerns about the child's development when in the care of the other parent.

## **V. International Expert Consensus Recommendations**

The endorsers of the Warshak Consensus Report, all accomplished researchers or practitioners, agree that the current state of the scientific literature supports the following conclusions and recommendations.<sup>60</sup> 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 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

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<sup>60</sup> Warshak, *supra* note 14, at 58-60.

## 202 *Journal of the American Academy of Matrimonial Lawyers*

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 two-hour 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. Also, our recommendations apply to children who have relationships 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.

## **VI. Aftermath of the Warshak Consensus Report**

The list of endorsers and their stature and accomplishments reflect the field's general acceptance of the Warshak 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>61</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.

A. *Recent Studies*

After the Warshak Consensus Report was published, three new studies lent additional weight to the report’s conclusions. Reanalyzing the data set used by Tornello et al., Karina 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>62</sup>

The second study is Nielsen’s analysis of joint physical custody studies discussed earlier.<sup>63</sup> This analysis affirms the value of shared parenting even when one parent opposes the arrangement and the parents sustain high conflict.<sup>64</sup>

The third recent study is a peer-reviewed study of 116 college students, which found better outcomes for those who, in the first three years of life, spent overnights with their fathers after their parents separated.<sup>65</sup> The more overnights that infants and

<sup>61</sup> Warshak, *supra* note 14, at 46.

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<sup>62</sup> Sokol, *supra* note 38. 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* in text at notes 24, 35-40) equally limit the conclusions that can be drawn from Sokol’s study and its relevance to most separating parents.

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<sup>63</sup> Nielsen, *supra* note 49, and accompanying text.

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<sup>64</sup> *Id.*

<sup>65</sup> William V. Fabricius & Go Woon Suh, *Should Infants and Toddlers Have Frequent Overnight Parenting Time With Fathers? The Policy Debate and New Data*, 23 PSYCHOL., PUB. POL’Y. & L. 68 (2017).

toddlers spent with their fathers, up to half of all overnights, the higher the quality and the more secure were their long-term relationships with fathers *and* mothers. The young adults who had more overnights in infancy felt closer to both parents and were more certain that they were important to their parents. Overnights away from mothers did not harm mother-child relationships.<sup>66</sup> But having more daytime visits in mid-childhood did not compensate for fewer overnights in early childhood. The data failed to support the hypothesis that joint physical custody kids did better because their parents were better educated, had less conflict, and agreed on the parenting plan. The study concluded, “Even when parents present with high conflict, intractable disagreement about overnights, and a child under 1 year old, both parent-child relationships are likely to benefit in the long term from overnight parenting time up to and including equally-shared overnights at both parents’ homes.”<sup>67</sup> Instead of discouraging frequent overnights for litigating parents, this study supports encouraging more overnights to overcome the potential harmful impact of parent conflict on father-child relationships.<sup>68</sup>

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<sup>66</sup> Given the exhaustion parents experience before their infant regularly sleeps through the night, having the father share in nighttime caregiving may be expected to benefit the mother in ways that also benefit the infant. This common sense proposition is supported by a study reporting that when fathers were more involved in daytime and nighttime caregiving for three-month-old infants, both mothers and infants were more likely to sleep through the night at six months. Liat Tikotzky et al., *Infant Sleep Development from 3 to 6 Months Postpartum: Links with Maternal Sleep and Paternal Involvement*, 80 *MONOGRAPHS SOC’Y RES. CHILD DEV.* 107 (2015).

<sup>67</sup> Fabricius & Suh, *supra* note 65, at 80-81. Because the study relied on recollections of parents and children regarding the number of overnights that took place in the past, the possibility of biased recall must be considered. Regarding this possibility, the study’s authors point to the high correlation between the reports of mothers and fathers regarding parenting time during infancy and childhood and between the reports of parents and their young adult children regarding parenting time during childhood and adolescence. Also, this study does not report about child adjustment in the earlier years. For instance, it is possible that overnight separations stressed the mother-child relationship in earlier years, but this effect was temporary and did not extend into later years.

<sup>68</sup> *Id.* (emphasis added) (noting: “[T]he finding that the association between overnights and parent-child relationships was the same for parents with low versus high conflict replicates Fabricius and Luecken’s (2007) findings for father-child relationships when parents separated before children were 16 years old. Both studies suggest that *more parenting time is needed to overcome the*

*B. Reactions to the Warshak Consensus Report*

In addition to the 110 researchers and practitioners who endorsed the Warshak Consensus Report, prominent social scientists, such as Joan Kelly, cited the report favorably in their presentations and literature reviews.<sup>69</sup> The paper has been translated into at least eighteen languages and has informed legislative deliberations throughout the United States and parliamentary deliberations in several countries including the United Kingdom, Canada, Israel, Finland, Romania, Croatia, and Sweden. Nearly four years after its publication the Warshak Consensus Report continues to be one of the most downloaded papers from the journal’s website.

Michael Lamb’s 2016 summary of his understanding of the relevant literature is fully consistent with the conclusions reached by Warshak and the 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>70</sup>

Similarly, in her work after the consensus report and previous to it Kelly offered recommendations consistent with the consensus report. 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. Rather than conclude that parental conflict should trump

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*harmful effects of parent conflict on father-child relationships*, as illustrated in Figure 5A (e.g., in low-conflict families a father-child relationship score of .80 was achieved at ‘3 to 5’ overnights [every two weeks], but in high conflict families it took ‘6 to 7’ overnights to achieve that score).”).

<sup>69</sup> Kelly, *supra* note 10, 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, *supra* note 14, 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.”

<sup>70</sup> Lamb, *supra* note 39, at 180.

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joint physical custody, Kelly instead promoted other solutions that reduce the child’s exposure to conflict.<sup>71</sup>

Along the same lines, in 2016 Marsha Kline Pruett et al. concluded that parental conflict should contraindicate frequent overnights *only if* the conflict interferes with the child’s care.<sup>72</sup> 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 insufficient 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.

The Warshak Consensus Report anticipated that some colleagues would disagree with its opinions and recommendations. But in the nearly four years since its publication, no article, including the only critique of the consensus report, by McIntosh et al., has explicitly identified any errors in the report or disputed any of its conclusions and recommendations. Confronted with the consensus report’s 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 inter-

<sup>71</sup> See, e.g., Kelly, *supra* note 10, 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 (2D ED.), *supra* note 28, at 63, 70, who, based on their understanding of the literature and on Sandler, Wheeler, & Braver’s study, *supra* note 48, 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.”

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<sup>72</sup> Pruett et al., *supra* note 35, at 97 (second emphasis added) (concluding: “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.*”).

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pretations of their data and communicate their amended conclusions to colleagues and the general public.

Neither McIntosh et al. nor Tornello et al. have acknowledged the validity of the major concerns raised about their studies and about the way their results have been reported and interpreted. McIntosh et al. did concede that their three-item visual monitoring scale has “relatively low” reliability and is a “weak link” in their study.<sup>73</sup> This concession is, itself, weak given the problems with this measure and its interpretation, the authors’ failure to address the critiques of their other three untrustworthy measures, and their failure to retract most of the conclusions and recommendations emanating from the faulty measures.

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>74</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>75</sup> These continued assertions of McIntosh et al. are the equivalent of reporting a baby’s weight on a broken scale 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 Tornello et al. replicated their study.<sup>76</sup> This is incorrect. Tornello

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<sup>73</sup> McIntosh et al., *supra* note 30, at 116.

<sup>74</sup> Smyth et al., *supra* note 28, at 153.

<sup>75</sup> McIntosh et al., *supra* note 30, at 113.

<sup>76</sup> *Id.* (“One standard approach to assessing the veracity and reliability of findings is in their replication. Recently, Tornello and 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* Mar-



et al. used different 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>77</sup> In one regard, however, McIntosh et al. made a significant concession by acknowledging that their findings “do not substantiate cautions against *any* overnight care in healthy family circumstances.”<sup>78</sup>

Although the Warshak Consensus Report has clarified the social science relevant to parenting plans, it has not put an end to calls for blanket restrictions. In 2016 Robert Emery, writing with six coauthors for a professional audience, stated: “Four studies constitute an inadequate body of research upon which to speculate about policy implications.”<sup>79</sup> But the same year Emery, writing on his own for a general audience, continued to assert that his study with Tornello linked frequent overnights with more insecure mother-infant attachments and supported recommendations and guidelines for blanket restrictions. Stating that his was the world’s “biggest and best” study relevant to overnights, Emery wrote: “So, including my work, three of four studies raise concerns about babies spending too many overnights away from the primary caregiver in the first year to eighteen months of life.”<sup>80</sup>

McIntosh also continues to support blanket restrictions. On her website she posted a chart and profile to guide parents and professionals making overnight decisions.<sup>81</sup> Although not in-

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sha Kline Pruett, Jennifer E. McIntosh, & Joan B. Kelly, *Parental Separation and Overnight Care of Young Children, Part I: Consensus Through Theoretical and Empirical Integration*, 52 FAM. CT. REV. 240, 249 (2014) (acknowledging with respect to five studies, including McIntosh et al. and Tornello et al.: “Each used different samples and different data sources, asked different questions about how outcomes are related to overnight time schedules for infants, and explored different schedules and amounts of overnight time.”). *See also* Smyth et al., *supra* note 28, at 153 (referring to findings from McIntosh et al., *supra* note 18, and Tornello et al., *supra* note 19, 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>77</sup> Sokol, *supra* note 38.

<sup>78</sup> McIntosh et al., *supra* note 30, at 118.

<sup>79</sup> Robert E. Emery et al., “*Bending*” *Evidence for a Cause: Scholar-Advocacy Bias in Family Law*, 54 FAM. CT. REV. 134, 144 (2016).

<sup>80</sup> EMERY, *supra* note 50.

<sup>81</sup> *CODIT*, *supra* note 46. Also, Pruett, during her tenure as AFCC president, has given a series of AFCC-sponsored presentations (e.g., <http://afccmn>

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210 *Journal of the American Academy of Matrimonial Lawyers*

tended for use as a diagnostic instrument or as the sole basis for decisions the CODIT (for Charting Overnight Decisions for Infants and Toddlers) 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>82</sup> This guideline proposes a rebuttable presumption against more than one overnight per week for children younger than eighteen months, even when the parents consistently and sensitively meet the children’s needs. By contrast, in their commentary about the CODIT, the authors of a recent study on the long-term impact of overnights noted that their data led to a conclusion that directly opposes the CODIT recommendations: “The findings also indicate that normal parent conflict, disagreements about overnights, and children under 1 year of age are not circumstances that should require caution; on the contrary, more overnight parenting time appears to be needed in those cases.”<sup>83</sup>

Although lacking a scientific foundation, CODIT’s 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 further limit the child’s interactions with the father around 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 objection is capricious, even if her motives are vindictive, and even if the father demonstrates superior parenting.

The CODIT is a subjectively rated checklist with no known reliability or validity. For instance, child adjustment is assessed by non-quantified criteria such as “excessive clinging on separation,” “frequent crying,” “aggressive behavior,” and “low persis-

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.org/index.php/events/item/113-feb15hdc) in which she presents and advocates the use of the CODIT. Unfortunately some attendees at Pruett’s presentations, including judges and mediators, developed the false impression that the CODIT, and the articles by three authors from which it is said to be adapted, represent a consensus position of an AFCC 32-member Think Tank or AFCC policy. This is incorrect. The CODIT represents the positions of its authors and not a larger group consensus. For an example of such misunderstanding, see the State of Oregon Judicial Department website: <http://www.courts.oregon.gov/OJD/OSCA/JFCPD/Pages/FLP/Birth-Through-Three.aspx>.

<sup>82</sup> *Id.* at 4.

<sup>83</sup> Fabricius & Suh, *supra* note 65, at 80.

tence in play & learning” with no anchors to distinguish between troubling behavior within normal limits and atypical behavior. Listing behaviors such as these in a tool to guide decisions about overnight parenting plans assumes that troubling behaviors in an infant or toddler that persist more than two weeks are associated with too much overnights and can be eliminated by restricting overnights. The CODIT includes multiple factors that allow gatekeeping parents to use this tool to restrict their children’s overnights with the other parent.

### *C. Misunderstandings of the Warshak Consensus Report*

Since its publication nearly four years ago, the Warshak Consensus Report has at times been misunderstood and misreported. For example, Pruett et al.’s position concurred with the position of the consensus report about the importance of the coparenting relationship when considering decisions about shared parenting. Yet Pruett et al. left the impression that the consensus report failed to consider the coparenting relationship:

Warshak (2014) argues that children benefit from a more evenly balanced amount of time between parents, and that this should be 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>84</sup>

The Warshak Consensus Report offered no such generalization or rationale for shared parenting. And as explained earlier, reducing a child’s time with a parent when the parents are in conflict is hardly “child-centric.”<sup>85</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>86</sup> In many cases there are better ways to protect a child from frequent exposure to conflict than to

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<sup>84</sup> Pruett et al., *supra* note 35, at 96.

<sup>85</sup> See *supra* notes 46-57 and accompanying text.

<sup>86</sup> Braver, *supra* note 54, at 178.

disproportionately deprive the child of important time with a parent.<sup>87</sup>

Contrary to Pruett et al.’s assertion, the Warshak 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>88</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 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>89</sup>

Note that in stressing the importance of coparenting dynamics, the Warshak 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*

<sup>87</sup> See, e.g., Kelly, *supra* note 10, 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 58.

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<sup>88</sup> See, e.g., Warshak, *supra* note 51 (supporting a multi-factored best-interest standard). See also Warshak, *Parental Alienation*, *supra* note 57, 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.”).

<sup>89</sup> Warshak, *supra* note 14, at 58.

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of the conflict, the contributions of each party to it, and the quality of parenting.”<sup>90</sup>

Pruett et al. also misunderstood why the Warshak 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 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 report proposes that conflict between parents should not automatically eliminate the possibility that children can benefit from shared parenting. The Warshak Consensus Report’s viewpoint is child-centric in protecting children by reducing a parent’s motivation to initiate, sustain, and escalate conflict. Moreover, 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.<sup>91</sup> 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>92</sup> Sanford 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>93</sup>

## VII. Meaning and Value of the Warshak Consensus Report Endorsements

McIntosh et al. tried to diminish and distract from the meaning and value of the 110 endorsements of the Warshak Consensus Report. McIntosh et al. asserted that the accomplished scholars and practitioners who endorsed the report put their reputations and integrity on the line by signing a document based solely on

<sup>90</sup> *Id.* at 57 (emphasis added).

<sup>91</sup> Milfred D. Dale, Cooperative & Friendly Parent Statutes (Jan. 2017) (unpublished manuscript available from Milfred Dale, Email: drbuddale@outlook.com) (listing 30 states with “friendly parent” statutes).

<sup>92</sup> See, e.g., Austin et al., *supra* note 88, at 12.

<sup>93</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 54, at 178 (noting that such a policy would decrease incentives to promote conflict and instead “would make it worthwhile for the angry parent to bury the hatchet.”).

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214 *Journal of the American Academy of Matrimonial Lawyers*

“sentiment” and not science, and that the endorsers did not necessarily agree with the evidence for the conclusions and recommendations that they endorsed.<sup>94</sup> This is incorrect.<sup>95</sup> The

<sup>94</sup> McIntosh et al., *supra* note 30, at 111, 117.

<sup>95</sup> See *supra* text accompanying notes 58 and 60, 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.*” Warshak, *supra* note 14, at 58. 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.*” *Id.* at 59. And, “*The research supports the growing trend of statutory law and case law*

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endorsers received and read the whole paper. As would be 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 throughout the paper. Rather than enumerate the significant contributions of the endorsers to the scientific knowledge that informed the consensus report, 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.<sup>96</sup> But such papers are not unprecedented. An example is the 1997 article co-signed by 18 experts that clarified implications of social science evidence for custody arrangements.<sup>97</sup> Some of the 18 co-signers subsequently joined a group of 28 researchers and practitioners who, concerned about the possibility of biased summaries of research, recommended:

The best safeguard against this possibility is a summary that has the consensual endorsement of a large number of experienced and respected social science researchers, as well as enlightened consumers or practitioners of this literature, in this case mental health professionals, such as custody evaluators, mediators, etc. who work with divorcing and divorced families.<sup>98</sup>

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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.*" *Id.* at 60.

<sup>96</sup> Emery et al., *supra* note 79, at 140.

<sup>97</sup> Lamb et al., *supra* note 5.

<sup>98</sup> Brief of Richard A. Warshak et al. as Amici Curiae on behalf of LaMusga Children, *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004) (No. S107355), <http://www.warshak.com/publications/articles-comp.html>. The 27 co-signers are: Constance R. Ahrons, William G. Austin, Sanford L. Braver, James H. Bray, Sidney J. Brown, David Demo, Robert Emery, William Fabricius, James R. Flens, Michael A. Fraga, Michael Gottlieb, Lyn R. Greenberg, Neil S. Grossman, John Guidubaldi, Leslye Hunter, Joan B. Kelly, Michael Lamb, Jay Lebow, Patrick McKenry, Eva Baranoff McKenzie, Nancy Williams Olesen,

The Warshak Consensus Report, with its 110 cosigners, clarified the social science relevant to parenting plans for young children and implemented the above recommendation by issuing the report with consensual endorsement.

Having the paper reviewed by the endorsers of the Warshak report brought two benefits. 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 benefit was that this large, blue-ribbon panel of signatories—with their outstanding careers and statuses 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 a large number of well-qualified researchers and practitioners endorse the conclusions—science is not settled at the ballot box. Rather, the consensus report reflects that 110 highly accomplished professionals, based on their understanding of the literature and on their professional experiences, accept the report's research-based conclusions.

### **VIII. 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

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Kay Pasley, Marsha Kline Pruett, Isolina Ricci, Gary R. Rick, John W. Santrock, and Jan Tyler. *See also* Donald N. Bersoff, *APA's Amicus Briefs: Informing Public Policy Through the Courts*, 44 *MONITOR ON PSYCHOL.* 5 (2013). In this article a past president of the American Psychological Association (APA) explained the purpose of amicus briefs submitted by the APA: "Amicus briefs are a visible and effective means for educating legal decision-makers about social science data relevant to the issues of our time." *See also* Bruce Sales, *Editorial*, 1 *PSYCHOL., PUB. POL'Y. & L.* 243, 245 (1995) (explaining the significance of a cosigned amicus brief: "It had instant scientific credibility, not only because of its authors' credentials and reputations, but also because it was cosigned by 43 other scholars.").



plans for young children.<sup>99</sup> As intended, the report stemmed a tide of misinformation that threatened to resurrect long-discarded myths about child development and enshrine them in professional practice and family law. An Australian investigative journalist found that the report “changed the way courts across the world now deal with such custody matters.”<sup>100</sup> 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. Nearly four years after its publication, the conclusions and recommendations of the Warshak Consensus Report remain supported by science.

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<sup>99</sup> Warshak, *supra* note 14.

<sup>100</sup> Bettina Arndt, *Are Dads Still Being McIntoshed?*, PRAWN OF THE PATRIARCHY (May 16, 2017), <https://www.fighting4fair.com/uncategorized/are-dads-still-being-mackintoshed/>.

