

Shared Physical Custody: Does It Benefit Most Children?

by
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I. Introduction

One of the most complex and controversial issues in family law and custody legislation is: What type of parenting plan is the most beneficial for the majority of children after their parents separate? More specifically, are the outcomes any better for children who continue to live with each parent at least 35% of the time than for children who live primarily with their mother and spend less than 35% of the time living with their father? In other words, is it in most children’s best interests to live in shared physical custody? More important still, is a shared parenting plan beneficial to children when their parents communicate poorly, have high levels of conflict, or have ended up in court or in prolonged legal negotiations in order to resolve their disagreements over the parenting plan? Put differently, do parents have to be cooperative and communicative and “voluntarily” both agree to this plan from the outset for shared parenting plans to benefit the children?

A. Definition of Social Science Terminology

The term “parenting plan” is now often used interchangeably with the term “physical custody.” And the newer term “shared parenting” (sometimes referred to as “shared care”) refers to those families where the children continue to live with each parent at least 35% and typically closer to 50% of the time. In shared parenting plans, neither parent’s home is considered the “primary” residence nor is neither parent relegated to being the “non-residential” parent. Most parents with shared physical custody agreements also share the legal custody so that neither parent has sole legal decision making responsibility for the children. In contrast, the traditional “one size fits all” parenting plan where children live primarily or exclusively with only one parent – 90% of the time with their mother – is now referred to as “sole” residence or a “primary care” plans. In these sole residence plans, children typically spend alternate weekends year

round and a few weeks during summer vacation with their non-residential parent – amounting to roughly 20% of the parenting time with their father. In the present paper these parenting plans will be referred to as “sole” or as “mother” residence plans. Since shared legal custody has become the preferred standard in most states’ custody laws, the controversy has largely become focused on how much parenting time the children will be allowed to receive from each parent in the parenting plan.

B. *How Popular Is Shared Parenting?*

As fathers have become more heavily involved in the daily activities and the physical care of their children, and as more mothers have resumed working full time in the children’s pre-school years, shared parenting after the parents separate has become more common worldwide. For example, in Wisconsin one-third of the parents who divorced in 2007 had a 50-50 shared parenting plan and one-fourth had a 25% time share.¹ It is especially noteworthy that in these families there were nearly as many infants and toddlers (42%) as there were six to ten year olds (46%) in shared parenting.² Moreover, after custody laws were revised to be more favorable to shared parenting, the number of parents who both hired lawyers to settle their custody disputes decreased from 53% to 40%.³ Likewise, in 2008 in Washington State among 4,354 parenting plans, almost half of the children were living at least 35% with each parent.⁴ In Arizona nearly 30% of the parents who separated in 2008 had a shared parenting plan, compared to only 15% in 2002.⁵ In contrast, in Nebraska in a random sample of 392 custody cases statewide from 2002-2012, only 12% had shared physical custody.⁶ Further illustrating the differences among the states, one shared parent-

¹ Maria Cancian et al., *Who Gets Custody Now? Dramatic Changes in Children’s Living Arrangements After Divorce*, 51 *DEMOGRAPHY* 1381 (2014).

² *Id.*

³ *Id.*

⁴ Thomas George, *Residential Time Summary Reports Filed in Washington from July 2007 to March 2008*, Washington State Center for Court Research (2008).

⁵ Jane C. Venohr & Rasa Kaunelis, *Child Support Guidelines*, 43 *FAM. CT. REV.* 415 (2008).

⁶ Michael Saini & Debora Brownyard, *Nebraska 2002-2012 Custody Court File Research Study* (Dec. 31, 2013), available at <https://supremecourt.ne->

ing organization's recent "report card" of states' custody laws gave twenty-three states a "D" and only eight states a "B" in terms of how well their custody laws supported shared parenting and encouraged maximum parenting time for both parents. New York and Rhode Island ranked lowest with an "F."⁷ Since the Census Bureau has never collected data on custody arrangements, no nationwide statistics exist. Still, it is apparent that shared parenting is on the increase in the United States and in other countries. For example, shared parenting has risen in Belgium to 30%, Denmark and the Netherlands,⁸ and France,⁹ to 20% and to nearly 50% in Sweden.¹⁰

Public surveys and revisions in custody laws also reflect changing attitudes towards shared parenting. For example, in a survey of 367 people who had been summoned for jury duty in Arizona, 70% said they would have the children live half time with each parent if they were family court judges. On the other hand, only 28% believed that judges would grant shared parenting.¹¹ In yet another study in Arizona, 90% of the people who were polled favored equal time sharing,¹² as did 85% of the citizens in Massachusetts who voted in favor of shared parenting on a non-binding ballot.¹³ Female and male adults, including many

braska.gov/sites/supremecourt.ne.gov/files/reports/courts/2002-2012-custody-court-file-research-study.pdf.

⁷ Donald Hubin, National Parents Organization, *2014 Shared Parenting Report Card* (2014), available at https://nationalparentsorganization.org/docs/2014_Shared_Parenting_Report_Card%2011-10-2014.pdf.

⁸ An Katrien Sodermans et al., *Post Divorce Custody Arrangements and Binuclear Family Structures of Flemish Adolescents*, 28 DEMOGRAPHIC RES. 421 (2013).

⁹ Laurent Toulemon, *Two Home Family Situations of French Children and Adults*, Inst. Nat'l Demographics, Paris, France (Jan. 25, 2008), <http://ec.europa.eu/eurostat/documents/1001617/4436612/14-35th-CEIES-Seminar-CONFERENCE-25-January-4-1-TOU.pdf/82cc1917-030f-4bf4-8017-c5e5b38769bb>.

¹⁰ Asa Carlsund et al., *Risk Behavior in Swedish Adolescents: Is Shared Physical Custody a Risk or a Protective Factor?*, 23 EUR. J. PUB. HEALTH 3-7 (2012).

¹¹ Sanford L. Braver et al., *Lay Judgments About Child Custody After Divorce*, 17 PSYCHOL., PUB. POL'Y & L. 212 (2011).

¹² Sanford L. Braver et al., *The Court of Public Opinion*, AFCC Annual Conference, Vancouver, British Columbia (2008).

¹³ Fatherhood Coalition, *Shared Parenting Ballot Initiative Election Results*. Fatherhood Coalition, Boston (2004).

who are grandparents, have expressed their support for legislation that is more supportive of shared parenting through organizations such as the National Parenting Organization,¹⁴ as have social scientists who created the International Council on Shared Parenting.¹⁵ And one group of Canadian lawyers have formed an organization called “Lawyers for Shared Parenting.”¹⁶

Changes in attitudes are also reflected in surveys of lawyers, judges, and custody evaluators. For example, in 245 custody cases in North Carolina in 2007, 20% of the court ordered plans granted 50% or more of the parenting time to the father – more fathering time than in plans that were mediated (5%) or negotiated through lawyers (10%).¹⁷ In stark contrast, in a poll of 800 judges conducted fifteen years ago, only 6% believed in shared physical custody.¹⁸ And in another 2002 survey of 149 judges in four Southern states, 40% believed that women were better parents than men.¹⁹ Currently, however, twenty states are considering changes in their custody laws that would be more favorable to shared parenting, while at least ten states have already done so.²⁰ The present legal debates focus primarily on whether custody laws should be revised so that shared parenting with a minimum of 35% shared time becomes the “rebuttal presumption.” But in whatever ways each individual state eventually revises its new custody laws, there is clearly a shift away from the “one size

¹⁴ See generally National Parenting Organization (2015), www.nationalparentsorganization.org.

¹⁵ See generally International Council on Shared Parenting (2014), www.twohomes.org.

¹⁶ See generally Canadian Lawyers for Shared Parenting, www.lawyers4sp.com (2015).

¹⁷ Ralph A. Peeples et al., *It's the Conflict, Stupid: An Empirical Study of Factors that Inhibit Successful Mediation in High Conflict Custody Cases*, 43 WAKE FOREST L. REV. 505, 508 (2008).

¹⁸ Marc J. Ackerman & Linda J. Steffen, *Child Custody Evaluation Practices: A Survey of Family Law Judges*, 15 AM. J. FAM. L. 12 (2001).

¹⁹ Leighton E. Stamps, *Maternal Preference in Child Custody Decisions*, 37 J. DIVORCE & REMARRIAGE 1 (2002).

²⁰ Ashby Jones, *Big Shift Pushed in Custody Disputes*, WALL ST. J., Apr. 16, 2015, available at <http://www.wsj.com/articles/big-shift-push-in-custody-disputes-1429204977>.

fits all” plan where every other weekend and summer vacation with dad is considered in children’s best interests.²¹

The primary questions about parenting plans have now become: How much are children benefitting from shared parenting, if at all? Is there anything that sets these parents apart from those whose children live with their mother and only live with their father on alternate weekends? Can children benefit if the shared parenting plan is court ordered or if the parents do not have a friendly, low conflict, co-parenting relationship?

C. Have You Been Woozled by the Research?

Before addressing these questions, it is important to understand how judges, lawyers and the mental health workers involved in custody issues are too often bamboozled or “woozled” by the research in ways that lead them astray. The process of relying on faulty, limited, partial, or misinterpreted research has been referred to as “woozling” and the myths and misperceptions that consequently arise are called “woozles.” Recognizing this problem, the American Psychological Association’s guidelines explicitly state that professionals who are offering expert opinions should not rely only on a few of the available studies to support a point of view – which is one of the most common ways of “woozling” data. In essence, the A.P.A. is telling expert witnesses: Don’t be woozlers. Social scientists have also pointed out that the research data are too often misrepresented to family court professionals.²² Likewise, judges and lawyers have been warned not to put too much trust in custody evaluations because too many well-intentioned evaluators hold beliefs that are based on distorted, inaccurate, or “woozled” research.²³

²¹ J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 *FAM. CT. REV.* 213 (2015).

²² See Judith Cashmore & Patrick Parkinson, *The Use and Abuse of Social Science Research Evidence in Children’s Cases*, 20 *PSYCHOL., PUBLIC POL’Y & L.* 4 (2014); See also Janet R. Johnston, *Introducing Perspectives in Family Law and Social Science Research*, 45 *FAM. CT. REV.* 15 (2007); Sarah H. Ramsey & Robert F. Kelly, *Assessing Social Science Studies: Eleven Tips for Judges and Lawyers*, 40 *FAM. L.Q.* 367 (2006).

²³ See Joan B. Kelly & Janet R. Johnston, *Commentary on Tippin’s and Whitmann’s “Empirical and Ethical Problems with Custody Recommendations”: A Call for Clinical Humility and Judicial Vigilance*, 43 *FAM. CT. REV.*

The process of woozling and its impact on child custody decisions have been extensively described elsewhere, especially as woozling relates to parenting plans for infants, toddlers, and preschoolers.²⁴ To summarize briefly, the words “woozling” and “woozles” come from the children’s story, “Winnie the Pooh.”²⁵ In the story the little bear, Winnie, dupes himself and his friends into believing that they are being followed by a scary beast – a beast he calls a woozle. Although they never actually see the woozle, they convince themselves it exists because they see its footprints next to theirs as they walk in circles around a tree. The footprints are, of course, their own. But Pooh and his friends are confident that they are onto something really big. Their foolish behavior is based on faulty “data” – and a woozle is born. Though data in any field can be woozled, the term “wooze” was first used by the sociologist Richard Gelles in regard to how the research on domestic violence was being distorted and misused by advocacy groups.²⁶

Three common ways to wooze people are to present only a few of the existing research studies that support one particular point of view, to frequently repeat and to publicize these few studies while exaggerating and sensationalizing the findings, and to fail to mention the serious flaws in the studies while making sweeping generalizations about their importance. Woozles are more likely to take hold when they confirm beliefs that people already hold – an effect referred to as “confirmation bias.”²⁷ That is, we are more likely to accept those studies or to adopt without question those beliefs that confirm what we already believe. This means we are overly critical and dismissive of data or ideas that contradict our existing beliefs. As the British philoso-

233 (2005); See also Joel V. Klass & Joanna L. Peros, *Ten Signs of Questionable Practices in Custody Evaluations*, 11 AM. J. FAM. L. 46 (2011).

²⁴ Linda Nielsen, *Being Mislead by Data Related to Child Custody and Parenting Plans*, J. DIVORCE & REMARRIAGE (forthcoming 2015) (on file with author); See also Linda Nielsen, *Woozles: Their Role in Custody Law Reform, Parenting Plans and Family Court*, 20 PSYCHOL., PUB. POL’Y & L. 164 (2014).

²⁵ A. A. MILNE, WINNIE THE POOH (1926).

²⁶ Richard Gelles, *Violence in the Family: A Review of Research in the Seventies*, 42 J. MARRIAGE & FAM. 873 (1980).

²⁷ David A. Martindale, *Confirmatory Bias and Confirmatory Distortion*, in PSYCHOLOGICAL TESTING IN CHILD CUSTODY EVALUATIONS 31 (James R. Flens & Leslie Drozd, eds. 2005).

pher, scientist, and statesman, Francis Bacon, wrote in 1620 in his treatise *The New Scientific Method*: “For what a man had rather were true he more readily believes.”²⁸ Or as a more recent idiom puts it: “I’ll see it when I believe it.” Once these beliefs take hold and become full-fledged woozles, they become accepted as “what the research shows.” But like Winnie the Pooh and his friends, we are misled too often by the woozles and oblivious to the facts. Judges, lawyers, and forensic psychologists have written amusing yet thought provoking essays acknowledging the impact that woozling can have on child custody decisions: “Have you woozled a judge?”²⁹ “Child custody lore: The case of the runaway woozle,”³⁰ “Psychozoology in the courtroom: Dodo birds, woozles, haffalumps and parenting,”³¹ and “A short treatise on woozles and woozling.”³² Throughout this paper a few examples of woozles will be presented to illustrate how easily we can be led astray by distorted, limited, and flawed data.

Keeping in mind the dangers of woozling, the present paper will briefly summarize *all* of the studies that have compared the outcomes for children in shared parenting families to children in sole residence families. The general limitations of these studies will also be mentioned, though it is beyond the scope of this paper to discuss the strengths and weaknesses of each of the forty studies. Finally, both the negative and the positive outcomes of shared parenting will be presented.

II. Low Conflict, and Cooperative Co-parenting: A Prerequisite for Shared Parenting?

To put the findings from the forty studies into perspective,

²⁸ FRANCIS BACON, *NOVUM ORGANON SCIENTIARUM* (NEW INSTRUMENT OF SCIENCE)(1620).

²⁹ Laurie Hutchins, *Have You Woozled a Judge?*, N.C. B. FAM. L. NEWSL. (Mar. 5, 2014), https://www.facebook.com/permalink.php?story_fbid=651432971572588&id=639013169481235.

³⁰ Karin Franklin, *Child Custody Lore: The Case of the Runaway Woozle* (Feb. 23, 2014), <http://forensicpsychologist.blogspot.com/2014/02/child-custody-lore-case-of-runaway.html>.

³¹ Jean Mercer, *Psychozoology in the Courtroom: Dodo Birds, Woozles, Heffalumps and Parenting*, CHILD MYTHS BLOG (Mar. 18, 2014), <http://childmyths.blogspot.com/2014/03/psychozoology-in-courtroom-dodo-birds.html>.

³² Robert Franklin, *A Short Treatise on Woozles and Woozling* (May 14, 2014), available at <http://menz.org.nz/2014/shared-parenting-evaluated-honestly/>.

one question first has to be addressed: Are most parents with a shared parenting plan a special group who have little or no conflict and communicate well as a co-parenting team, and who voluntarily agreed to this parenting plan from the outset – a choice they made “freely” without pressure from mental health professionals or from mediators, lawyers, or judges? If that is the case, then it is possible that these children are doing well for reasons unrelated to the shared parenting arrangement itself. Especially if their parents are highly educated with high incomes, these children might have equally good outcomes even if they had only spent every other weekend with one of their parents. Moreover, if most shared parenting couples voluntarily and eagerly agreed to share from the outset, then there would be reason to wonder whether children would benefit from shared parenting that is “forced” on one of the parents. “Forced” might mean that a reluctant parent was coerced or persuaded by lawyers or mediators into “agreeing” to share rather than risking the expenses and possible outcomes of taking the dispute to trial. Or “forced” might mean that a judge ordered shared parenting over one of the parent’s wishes. “Forced” can also be interpreted to mean that in those states where custody laws are the most supportive of shared parenting, parents are more likely to feel pressured into accepting shared parenting plans because they believe the judge would probably order it if the parents cannot reach a decision. The far reaching impact of custody laws, even on those parents who agree on all custody issues, is referred to as “bargaining in the shadow of the law” - meaning that a state’s custody laws have an impact on *all* separating parents, not just on the 5% -10% who end up having to go to court to resolve their custody disputes.³³

So are low conflict, friendly, communicative co-parenting relationships necessary for children to benefit from shared parenting? And does shared parenting only benefit children when it is voluntarily chosen from the outset by parents who have very little in common with those who are embroiled in litigation or end up in court to resolve their custody plans?

³³ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

Table One

Researchers Income & conflict 50% time share = 35%-50% ≠	# of Children Physical custody Sole Shared <35% 35%- 50%	Ages	Grades Cognitive Development	Depressed Anxious Dissatisfied	Aggression Drugs & alcohol Misbehavior	Physical health & Smoking	father-child relationship
Bergstrom =	17,350 34,452	12-15	Equal	Better		Better	Better
Bjarnason =	2,206 25,578	11-15		Better			Better
Brevik \$ =	41 483	12-16		Better	Better	Better	
Brotsky =	45 10	1-10		Better	Better		
Buchanan \$ C ≠	51 355	13-16	Better	Better	Better	Better	Better
Cashmore \$ C ≠	84 473 90 411 26 110	0-17 0-17 13-17	Better	Better Better Equal	Better Slightly Better		Better
Campana ≠	207 272	10-18		Better	Better		
Carlsund \$ =	801 270	11-15			Better	Better	Better
Carlsund \$ =	888 2,019	11-15		Better		Better	Better

Fabricius =	30 201	18-20					Better
Fabricius =	337 686	18-20					Better
Fabricius =	75 136	18-20				Better	Better
Fabricius ?	16 56	0-3					Better
Frank =	16 90	College					Better
Irving =	201 194	1-11					Better
Jablonska =	441 2,920	14-15			Better		Better
Janning =	5 17	College					Better
Kaspiew \$ C ≠	947 3,513	0-17	Slightly Better			Slightly Better	
Kline \$ C =	35 58	3-11	Equal			Equal	Better
L Laftman \$ =	1, 573 1,584	15-18				Better	Better
Lee ≠	20 39	6-12				Better	
Lodge C =	105 398	12-18	Equal			Equal	Better
Luepnitz \$ =	22 30	8-13				Equal	Better
McIntosh \$C ≠ x	18-250 14- 360 *	0-4				Mixed	Better
Melli =	597 595	1-16				Equal	Better
Maccoby \$ C ≠	326 1,050	0-12					Better
Neoh =	27 37	8-15				Equal	Better
Pearson =	62 459 9 83	9-12				Better Equal	Better Equal
Pruett ≠	99 33	2-6				Better-girls	
Spruijt \$ C =	135 250	10-16	Equal			Better (girls)	Better (girls)
Smart = x	21 96	6-22				Mixed	Better

Tornello = x	174,1062	0-5			Better	
Turunen \$C =	255,595	10-18			Better	
Vanassche C ≠	395 1,045	12-19		Boys Better Girls Worse		Better
Westphal \$C =	966 2,217	4-16		Better	Better	
Wadsby =	324	14-18		Better		Better
Total number of children	736					
total number of parents	31,483 83,674 62,966 167,348					

TABLE ONE OUTCOMES FOR CHILDREN IN SHARED PARENTING FAMILIES

= Equal: All children lived 50% with each parent
 ≠ Not equal: Children lived anywhere from 35% to 50% time with each
 \$ C study controlled for parents' incomes (\$) or levels of conflict (C)
 x Some data came from instruments/procedures with no established validity or reliability
 * The sample sizes varied widely on the different measures

A. *High Conflict: Can These Children Benefit from a Shared Parenting Plan?*

Those people who believe that shared parenting plans only benefit children when the parents are cooperative coparents may be surprised to learn that the children in shared parenting families had better outcomes than those in sole residence even when there was high conflict or where one of the parents had been “forced” to share. As Table One illustrates, in eleven of the forty studies (marked with “+”) the researchers specifically stated that their sample included high conflict and litigating parents. And in sixteen of the studies (marked with a “C”), the shared parenting couples either had as much conflict as those with sole residence parenting plans or, after controlling for conflict, the outcomes were still better for the shared parenting children. As for being “forced” into sharing, according to the seven studies that gathered this information, the number of shared parenting couples who had not initially wanted to share ranged from 20%,³⁴ to 40%,³⁵ to 50%,³⁶ to 82%.³⁷ Given the results of these seven studies, it is unlikely that in the other thirty-three studies, almost all of the couples with shared parenting plans willingly and enthusiastically agreed to share from the outset. Although it is true that 85%-90% of shared parenting plans are “agreed to” without having a custody hearing, this is also true for 85%-90% of sole residence parenting plans. And even though most couples with

³⁴ Howard H. Irving & Michael Benjamin, *Shared and Sole Custody Parents*, in *JOINT CUSTODY AND SHARED PARENTING* 114, 119 (Jay Folberg ed. 1991).

³⁵ Muriel Brotsky et al., *Joint Custody Through Mediation*, in *id.* at 167; Judith Cashmore et al., *Shared Care Parenting Arrangements Since the 2006 Family Law Reforms*, Social Policy Research Centre, University of New South Wales (May 2010), available at <https://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyLawSystem/Documents/SharedCareParentingArrangementssince2006FamilyLawreformsreport.PDF>; Jessica Pearson & Nancy Thoennes, *Child Custody and Child Support After Divorce*, in *id.* at 114.

³⁶ Marsha Kline et al., *Children's Adjustment in Joint and Sole Physical Custody Families*, 25 *DEV. PSYCHOL.* 430 (1989); Deborah Anne Luepnitz, *A Comparison of Maternal, Paternal and Joint Custody: Understanding the Varieties of Post-Divorce Family Life*, in *JOINT CUSTODY AND SHARED PARENTING*, *supra* note 34, at 105.

³⁷ ELEANOR MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD* (1992).

shared parenting plans do have less intense conflict than other parents at the time they separate, it would be a mistake to assume that the level of conflict is the major factor that sets them apart from the parents who have sole physical custody parenting plans, as we will see later in this article. First, in those studies that asked about the conflict over the parenting plan, most of those with shared plans were in conflict over the plan at the outset. One of the parents initially wanted a sole physical custody parenting plan. Second, we will see that most of these couples do not have a conflict free or exceptionally friendly, “co-parenting” relationship and do not necessarily have less conflict than parents with sole residence plans. With the exception of conflict that reaches the level of physical abuse or violence, the conflict between sharing and non-sharing parents is often not as different as we might expect – especially not in the most recent studies. Ten of the forty studies compared the conflict levels or the quality of the parents’ co-parenting in the shared parenting versus the sole residence families.

Beginning with the oldest study back in the late 1980s, the researchers collected data over a four year period from 1,100 divorced families, 92 of which had their children living at least a third of the time with their fathers. It is worth noting that 82% of these mothers were initially opposed to sharing the physical custody – which means these parents were in conflict over the parenting plan. The majority did not have less conflict or communicate better than the parents with sole residence plans. In fact the researchers concluded: “Parents can share the residential time *even though they are not talking to each other* or trying to coordinate the children rearing environments of their two households”³⁸ Four smaller studies from the 1980s with a total of 117 shared divorced couples also found that most of those with shared plans did not have an especially low conflict, friendly, collaborative relationship where they worked together as a parenting team.³⁹ Most of their relationships were distant and businesslike – a relatively disengaged arrangement that has come to be known as “parallel” parenting in contrast to “co-

³⁸ *Id.* at 292 (emphasis added).

³⁹ MACCOBY & MNOOKIN, *supra* note 37, at 292; Pearson & Thoennes, *supra* note 35, at 185.

parenting” which suggests that the parents are working cooperatively as a friendly, low conflict team.⁴⁰

More recent, larger studies also show that most parents with shared parenting plans are “parallel” parenting, not “co-parenting.” For example, in Wisconsin data were collected three years after divorce from a large representative sample of 590 shared residence and 590 sole residence families.⁴¹ Roughly 15% of the couples in both groups described their relationship as hostile. Most shared parenting couples did not have a conflict free relationship. In fact, they were *more* likely to have conflicts over childrearing issues (50%) than couples whose children lived with their mother (30%). Why? The researchers suggested it was because these fathers were more involved in their children’s lives, unlike the other fathers who were restricted to weekend visits or who had dropped out of the children’s lives completely.

International studies confirm these American findings. In a Dutch study, conflict for the 135 couples with shared parenting and for 350 with sole residence were similar four years after their divorce, although the conflict was initially less for those with shared plans.⁴² Likewise, in a large nationally representative Australian study, 20% of the 645 shared parenting couples had ongoing conflicts and distant relationships even three years after their divorce.⁴³ And in a smaller Australian study with 105 shared parenting and 398 sole residence couples, only 25% of the sharing and only 18% of non-sharing couples said they had a friendly relationship.⁴⁴ In a very small study with twenty British

⁴⁰ Rachel Birnbaum & Barbara Jo Fidler, *The Emergence of Parallel Parenting Orders*, 24 CAN. FAM. L.Q. 111 (2010).

⁴¹ Marygold S. Melli & Patricia R. Brown, *Exploring a New Family Form – the Shared Time Family*, 22 INT’L J. L., POL’Y & FAM. 231, 231 (2008).

⁴² Ed Spruijt & Vincent Duindam, *Joint Physical Custody in the Netherlands and the Well-Being of Children*, 51 J. DIVORCE & REMARRIAGE 65 (2009).

⁴³ Rae Kaspiew et al., *Evaluation of 2006 Family Law Reforms in Australia*, Austl. Inst. Fam. Stud., Canberra, Australia (Dec. 2009), available at <https://aifs.gov.au/publications/evaluation-2006-family-law-reforms/executive-summary>.

⁴⁴ Jodie Lodge & Michael Alexander, *Views of Adolescents in Separated Families*, Austl. Inst. Fam. Stud. (2010).

and fifteen French fathers, the majority did not have cooperative, communicative relationships with their children's mother.⁴⁵

Overall then, most couples with shared parenting plans do not have an exceptionally friendly, cooperative relationship with little to no conflict where they are comfortably communicating and actually "co-parenting" as a team. Instead, most have a "parallel" parenting arrangement where they run households and parent the children as each sees fit, minimizing the interactions and the need for much communication between the parents. As already documented, a number of these parents agreed to a shared parenting plan even though that was *not* their initial preference. Still shared parenting couples are very unlikely to have conflicts that ever reached the level of physically injurious abuse or violence. And as we will later see, they tend to be somewhat better educated and have higher incomes than other separated parents, though those differences appear to be shrinking. But, as we will now see, the impact of conflict on the children and the relationship between conflict and whether the parents end up with a shared parenting plan is not as direct, or as straightforward or as significant as many people might assume.

B. *The Conflict over Conflict: The Tail that Wags the Dog?*

As the sixteen studies in Table One demonstrate (those marked with a "C" for conflict), children benefitted more from shared parenting than from sole residence even when their parents had a conflicted relationship and even when the levels of conflict were factored in as a possible cause for the better outcomes. This is not to say that witnessing intense conflict or frequently being dragged into the middle of the conflicts has no negative impact on most children. But this *is* to say there are many reasons why conflict, even if it has been described as "high," should not be the pivotal factor in determining whether shared parenting will benefit the children. It is not in the best interests of children for decisions makers to let the conflict "tail" wag the parenting plan "dog."

⁴⁵ Alex Masardo, *Managing Shared Residence in Britain and France: Questioning a Default Primary Carer Model*, in *SOCIAL POLICY REVIEW* 21: ANALYSIS AND DEBATE IN SOCIAL POLICY 197 (Kirstein Rummery et al. ed. 2009).

One of the first questions is whether children whose parents cannot resolve their custody conflicts without going to court can possibly benefit from a shared parenting plan. Aren't these the parents whose conflict is so intense, so intractable and so pervasive that their children will inevitably be damaged – and will be even more damaged by continuing to live with each parent at least a third of the time? To my knowledge, there is only one study that has actually explored the impact of legal conflict on the children.⁴⁶ There were 94 formerly married parents with one child between the ages of four and twelve participating in the study. On standardized measures of the children's well-being, two kinds of conflict had no impact on the children's well-being. One was the legal conflict over custody issues. The other was "attitudinal" conflict, which meant feeling angry and hostile and disliking one another's parenting styles, but not acting out that conflict in front of the children. The third kind of conflict, interpersonal conflict, meant the parents acted on their angry feelings and exposed their children to their arguments. It was only this kind of conflict that had any negative impact on the children. Based on their review of the empirical data, these researchers conclude that there is no empirical evidence that legal conflict is linked to worse outcomes for children. In another study, all 728 parents had been designated "high" conflict in family court and all were litigating over parenting time or other custody issues. With an average age of thirteen, the 141 children who gave their parents high ratings for being good parents had fewer behavioral problems than those who gave their parents poor ratings. But the more important finding was this: only when the children spent more than eleven nights a month with their father were the high parenting ratings linked to fewer behavior problems. In other words, in this very high conflict sample of litigating parents, only when the children were actually living with their father at least one-third of the time did their high opinions of his parenting have an impact on their behavior.⁴⁷

There are a number of possible explanations why parents' conflicts and poor communication with one another generally did

⁴⁶ Irwin Sandler et al., *Relations of Parenting Quality, Interparental Conflict, and Overnights with Mental Health Problems of Children in Divorcing Families with High Legal Conflict*, 40 J. FAM. PSYCHOL. 1 (2013).

⁴⁷ *Id.* at 18.

not override or cancel out the positive impact of children's continuing to live with each parent at least one third of the time. Many of these reasons have been pointed out by social scientists who urge us not to overemphasize the importance of conflict – even conflict that involves isolated incidents of physical anger at the time of separation – in making decisions about parenting plans.⁴⁸ First, the intensity and the nature of the conflict is often difficult to determine. Conflict according to whom? Conflict in what situations and over what issues and how often and how intense and how recently? How often do the children actually witness or get dragged into the middle of the conflict? With the exception of physical abuse or violence, the terms “high” and “conflict” cover too wide a range of behaviors to be of much practical significance in regard to decisions about parenting plans. The term is used by parents and by family court professionals to describe anything from ongoing feelings of anger and distrust, to frequent disagreements limited mainly to child-rearing issues, to harassing verbal abuse. To complicate matters further, conflict is highest during the time of separation and litigation. And conflict generally declines within the first year or two after the separation. This means the conflict that most lawyers and judges witness may not be a reliable predictor of future conflict – or of the kind of conflict that will have an impact on

⁴⁸ See EDWARD KRUK, *DIVORCED FATHERS: CHILDREN'S NEEDS AND PARENTAL RESPONSIBILITY* (2011); See also Kari Adamsons & Kay Pasley, *Coparenting Following Divorce*, in *HANDBOOK OF DIVORCE* 241 (Mark A. Fine & John H. Harvey eds. 2006); Robin Deutsch & Marsha Kline Pruett, *Child Adjustment and High Conflict Divorce*, in *THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS*, 353 (Robert M. Galatzer-Levy et al. 2009); William Fabricius et al., *Custody and Parenting Time*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* (Michael Lamb ed., 2010); Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update*, 46 *FAM. CT. REV.* 476 (2008); Michael Lamb & Joan B. Kelly, *Improving the Quality of Parent Child Contact in Separating Families with Infants and Young Children*, *THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS*, *supra*, at 187; Marsha Kline Pruett & Tracy Donsky, *Coparenting After Divorce*, *COPARENTING RESEARCH* 124 (James P. McHale & Kristin M. Lindahl, eds. 2011); Irwin Sandler et al., *Quality of Maternal and Paternal Parenting Following Divorce*, in *PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT* 200 (Kathryn Kuehnle & Leslie Drozd, eds. 2012); Richard A. Warshak, *Parenting by the Clock: The Best Interest of the Child Standard and the Approximation Rule*, 41 *U. BALT. L. REV.* 85 (2011).

the children. It is also possible that parents who litigate in court have conflicts that last longer or have a worse impact on children than parents who reach an agreement without having to go to court. But no study has addressed this question, so it would be a mistake to make that assumption. Then too, litigating parents too often exaggerate or provoke conflict, making it difficult to assess whether the children are actually living in a high conflict environment. Even though being dragged into their parents' ongoing conflicts is not beneficial for children, verbal conflicts are not necessarily harmful. This is especially true when the conflict stems from a sincere desire by two loving, fit parents to maintain an active role in their children's lives. Moreover, conflict has the least impact on children when they have good relationships with one or both of their parents. And educational programs or carefully designed, detailed parallel parenting plans can reduce the conflict for most parents. For example, having the parents pick up and deliver the children at school rather than at the other parent's home reduces conflicts at the time they are most likely to occur – the “switching” hour. Finally, it must be remembered that conflict - especially over childrearing issues - is inevitable for *all* parents – some of which is intense, ongoing, and never fully resolved even though they never separate. Separated parents, therefore, should not be held to a higher standard by being expected to have little to no conflict in order “earn” parenting time or to “qualify” for shared parenting.

Several recent studies illustrate that higher conflict and poorer communication are not necessarily linked to worse outcomes for the children. In a nationally representative, three year study with 3,784 separated parents whose children were seven to nineteen years old, the children with high conflict parents did not have any worse outcomes on eight measures of adolescent and young adult well-being: emotional problems, grades, liking school, self-esteem, life satisfaction, substance use, having sex before age 16, having several different sexual partners as teenagers, marrying or living with someone before age 20, and feeling close to their mother. Misbehaving at school, getting into trouble with the police as teenagers and having closer ties to their fathers

as young adults was only weakly related to high conflict.⁴⁹ After reviewing the available studies, these researchers – one of whom, Paul Amato, is one of the most widely published researchers in the field – conclude: Although it is widely believed that cooperative coparenting is linked to better outcomes for children, almost no studies have actually tested this assumption.

Similarly in another study with 270 parents in a court ordered parenting education program, the children were no more likely to have behavioral or emotional problems when their parents had uncooperative, conflicted relationships.⁵⁰ These researchers agree with Amato and his colleagues that the actual benefits of cooperative coparenting are basically unknown. In other words, having a good parent-child relationship and having at least one parent with good parenting skills may be more beneficial than having parents who get along well in a low conflict, cooperative relationship. Although intuitively it may seem that children would benefit greatly from having parents who get along well together after they separate, the data suggest that the impact of this factor is less robust than other factors such as the quality of the child's relationship with each parent.

For many reasons then, conflict should not be the “tail that wags the dog” in terms of denying children the probable benefits of a shared parenting plan - unless the conflict involves abuse or violence or other serious dysfunctions such as substance abuse that were damaging to the children even when their parents were living together. These children need parenting plans that protect or distance them from their dysfunctional parents. It is estimated that only 10%-15% of parents fall into this latter category. In light of the more positive outcomes linked to shared parenting plans in the forty studies, we should be guided by factors that go beyond how much conflict exists between the parents – primarily, the children's having a good relationship with each parent and each parent's being a fit and loving parent. Especially if the conflict is generated by one parent's trying to marginalize the other's participation in the children's lives, high conflict and a poor co-parenting relationship should not be the excuses for re-

⁴⁹ Paul R. Amato et al., *Reconsidering the “Good Divorce,”* 60 FAM. REL. 511 (2011).

⁵⁰ Jonathon J. Beckmeyer et al., *Postdivorce Coparenting Typologies and Children's Adjustment,* 63 FAM. REL. 526 (2014).

stricting the children's time with one of their parents – or for asserting that a shared parenting plan cannot be in these children's best interests.

C. *Shared Parenting: Only for the Well-to-do and College Educated?*

Two factors that do set many shared parenting couples apart from other separated parents are their level of income and education and their previous marital status. But here again, the differences are not as large as might be assumed and they appear to be shrinking. It goes without saying that both parents must have the kind of work schedules that make it possible for their children to live with them at least one third of the time throughout the year. The more well-educated parents generally have more flexible, family friendly work hours and higher incomes which enable them to hire lawyers to negotiate for shared parenting and to provide two adequate homes for the children. They are also far more likely to have been married and raising their children together before separating. Consequently, they are more likely to have shared parenting plans.⁵¹ This does not mean, however, that most shared parenting couples are college educated or financially well off. Most are not.⁵² Also being well educated is not always linked to being more likely to have a shared parenting plan. For example, for 758 Canadian families in a national survey, the mothers without high school degrees and the clinically depressed mothers were more likely to have a shared parenting plan.⁵³ It may be that the more poorly educated mothers wanted more child-free time to finish their educations or that the depressed mothers felt less overwhelmed when the parenting was more equally shared.

Shared parenting plans are also becoming more prevalent in middle class families. For example, in Wisconsin shared parenting

⁵¹ Heather Juby et al., *Sharing Roles, Sharing Custody*, 67 J. MARRIAGE & FAM. 157 (2005); Ragne Hege Kitterod & Jan Lyngstad, *Untraditional Caring Arrangements Among Parents Living Apart in Norway*, 27 DEMOGRAPHIC RES. 121 (2011); Lodge & Alexander, *supra* note 44; Pearson & Thoennes, *supra* note 35, at 185.

⁵² Cashmore & Parkinson, *supra* note 22, at 707; Luepnitz, *supra* note 36, at 105; Masardo, *supra* note 45, at 197; Melli & Brown, *supra* note 41, at 231.

⁵³ Juby et al., *supra* note 51, at 157.

has increased more for middle income than for higher income families in recent years.⁵⁴ In this study with 1,180 separated families, in the shared parenting families the average father's income was \$40,000 (30% college graduates) compared to \$32,000 (25% college graduates) in the sole residence families. The mothers' incomes and educational levels were virtually the same, \$23,000 versus \$22,000 with only 25% of mothers in either group having a college degree. Still, the highest income parents were more likely to share the parenting, with 55% of the parents sharing when they had a combined income of at least \$120,000. Interestingly too, in contrast to the past where young children lived almost exclusively with their mothers, younger children were no less likely than older children to be living in a shared parenting family.

Finally, the child's gender appears to play a role in parents' decisions to share the parenting. Sons are slightly more likely than daughters to be living in a shared parenting family.⁵⁵ This may be because mothers feel less confident about raising sons on their own. Or it may be that fathers and sons feel more comfortable living together than fathers and daughters. Then too, fathers and sons generally have a closer relationship than fathers and daughters both before and after the parents separate.⁵⁶

⁵⁴ Stephen T. Cook & Patricia Brown, *Recent Trends in Children's Placement Arrangements in Divorce and Custody Cases in Wisconsin* (May 2006), available at <http://irp.wisc.edu/research/childsup/cspolicy/pdfs/Cook-Brown-Task3-2006.pdf>.

⁵⁵ Timothy Grall, *Custodial Mothers and Fathers*, in CURRENT POPULATION REPORTS 60-230 (2006); Juby et al., *supra* note 51, at 157; Kitterod & Lyngstad, *supra* note 51, at 1; Jennifer McIntosh et al., *Post-Separation Parenting Arrangements: Patterns and Developmental Outcomes*, Austl. Inst. Fam. Stud. (2010), available at <https://aifs.gov.au/publications/family-matters/issue-86/post-separation-parenting-arrangements>; Melli & Brown, *supra* note 41, at 231; Katherine Stamps Mitchell et al., *Adolescents with Nonresident Fathers: Are Daughters More Disadvantaged than Sons?*, 71 J. MARRIAGE & FAM. 650 (2009); Spruijt & Duindam, *supra* note 42, at 65.

⁵⁶ See LINDA NIELSEN, FATHER-DAUGHTER RELATIONSHIPS: CONTEMPORARY RESEARCH AND ISSUES (2012).

III. How Trustworthy and Reliable Are the Forty Studies?

A. Overall Description of the Forty Studies

As Table One illustrates, to date there are forty studies that have been published in peer reviewed, academic journals where children living in shared parenting families were compared to those living with their mothers and continuing to spend varying amounts of time with their fathers. Dissertations were not included since these studies have not undergone an anonymous peer review process where experts in the field judge whether the study merits publication in an academic journal. The forty published studies were not about the impact of father “absence” because the fathers in these studies were still spending time with their children after the parents had separated. Some studies only included parents who had formerly been married and then later divorced, while others included never married parents who sometimes separated soon after the children were born. These differences in the samples will be noted in the description of the studies. The exact amount of time that the children who lived with their mothers were spending each month with their fathers was not designated. The most common pattern in mother residence families historically has been every other weekend and several weeks during the summer. So it would be logical to assume this was the typical pattern in most of these mother residence families as well. As illustrated in Table One, in 24 of the 40 studies, the shared parenting children lived 50% time with each parent. In the other 16 studies, the children lived with their each parent anywhere from 35% to 50% of the time.

The studies were found through a key word search of the major data bases in the social sciences: Psyche Index and Social Science Index, using the terms: shared or joint custody, physical custody, parenting plans, overnighting, shared parenting and shared care. Fifteen of the 40 studies included children under the age of six. But only six studies focused exclusively on children under the age of five which is why their findings will be presented in a separate section. In sum, the studies included 31,483 children in shared parenting families and 83,674 children in mother (sole) residence families. The studies were conducted during the past 28 years.

B. *Limitations of the Forty Studies*

Trying to determine what impact shared parenting has on children has been difficult for at least two reasons. First, children whose parents have higher incomes or have the least conflict may have the better outcomes after their parents separate, regardless of the parenting plan. So unless the study controls for income and level of conflict, this leaves open the possibility that it was not the shared parenting per se that made the difference. Unfortunately, only 16 of the 40 studies included income and conflict as controls, as noted on Table One. Still, as already discussed, a number of studies found no significant differences in income or in conflict between sharing and non-sharing couples.⁵⁷

A second limitation is that the parents' characteristics and marital status are not the same in all the studies – and those differences can affect the outcomes for children independent of the parenting plan. For example, the majority of parents in some studies were not married or living together when their children were born – a situation that often goes hand in hand with higher rates of poverty, incarceration, physical abuse, and substance abuse. Along the same lines, some studies draw their conclusions from extremely small, non-random samples while others have impressively large, random samples. As each study is presented, the unique characteristics of the sample and the samples sizes will be noted.

A third limitation is that while most of the researchers used standardized instruments and valid procedures, others used measures that had no established validity or reliability. Sample sizes also varied greatly. Describing the methodological details and naming the many standardized tests used in each study is beyond the scope of this paper. But the limitations of each study and whether the data came from standardized measures will be briefly noted as a way of acknowledging that the findings from some studies merit more weight than others.

⁵⁷ See CHRISTY M. BUCHANAN & ELEANOR MACCOBY, *ADOLESCENTS AFTER DIVORCE* (1996); Cashmore & Parkinson, *supra* note 22, at 707; See also Kline et al., *supra* note 36, at 430; See also An Katrien Sodermans et al., *Characteristics of Joint Physical Custody Families in Flanders*, 28 *DEMOGRAPHIC RES.* 821 (2013).

Despite these limitations and despite the differences among the studies in terms of their methodology and rigor, they have reached remarkably similar conclusions.

C. *The Outcomes that Were Measured*

The 40 studies were identified by searching the databases in Psyche Index and Social Science Research Index. The key words used in the search were: shared parenting, shared care, joint or shared physical custody, shared or dual residence, and parenting plans. The findings of the studies were grouped into five broad categories of child well-being as presented in Table One: (1) academic or cognitive outcomes which includes school grades and scores on tests of cognitive development such as language skills; (2) emotional or psychological outcomes which includes feeling depressed, anxious, or dissatisfied with their lives; (3) behavioral problems which include aggression or delinquency, difficult or unmanageable behavior at home or school, hyperactivity, and drug or alcohol use; (4) physical health and smoking which also includes stress related illnesses such as stomach aches and sleep disturbances; and (5) quality of father-child relationships which includes how well they communicate and how close they feel to one another.

IV. Does Shared Parenting Benefit Most Children?

The first section below begins by summarizing the positive outcomes in the shared parenting families in the forty studies that included children between the ages of one and twenty-two. The six studies that only included children under the age of five will be presented in a separate section. The next section turns to the negative outcomes for children in shared parenting families.

A. *The American Studies*

Beginning with the oldest studies, the Stanford Custody Project collected data from 1100 divorced families with 1,386 children randomly chosen from the county's divorce records. At the end of four years, the 51 adolescents in the shared parenting families made better grades, were less depressed, and were more well-adjusted behaviorally than the 355 adolescents who lived

primarily with their mother. The data came from interviews with the adolescents, parents' questionnaires, and a battery of standardized tests measuring depression, anxiety, substance use, anti-social behavior, truancy, cheating, and delinquency. The shared parenting children were better off on these measures than the other children of divorce. The quality of the parent-child relationship and how often they felt caught between their parents was also assessed through interviews. The shared adolescents were less likely to be stressed by feeling the need to take care of their mother. Moreover, having closer relationships with both parents seemed to offset the negative impact of the parents' conflicts in those families where the conflict remained high. Importantly, this study controlled for parents' educations, incomes, and levels of conflict, used standardized measures to assess the children's well-being, used a randomized sample, followed the children over a four year period, and gathered data from both parents and the children.⁵⁸

Five smaller studies conducted in the late 80s and early 90s also found equal or better outcomes for the shared children. The first study included 35 shared parenting and 58 sole residence children ages three to eleven with white, college educated parents.⁵⁹ Standardized tests were used to measure the parents' anxiety and depression and the children's social, emotional, and behavioral problems, in addition to clinicians' observations of parent-child interactions. Although there were no differences in the children's social or behavioral adjustment scores, the shared children were better adjusted emotionally. Having a depressed mother, having parents in high conflict (which was similar in both types of families), or the child's having a difficult temperament was more closely linked to the children's well-being than was the parenting plan. In another study of similar size, three years after the divorce, the 62 shared parenting children were less depressed, less stressed, and less agitated than the 459 children in sole residence based on standardized tests completed by the mother about the child's mental states and behaviors. Especially important is that all of the children had similar scores three years earlier when their parents divorced, suggesting that the shared

⁵⁸ BUCHANAN & MACCOBY, *supra* note 57, at 1

⁵⁹ Kline et al., *supra* note 36, at 430.

parenting was indeed having a positive impact.⁶⁰ The other study by these same researchers should be viewed more speculatively since there were only 9 children in shared parenting families compared to 83 children living with their mothers. Using a standardized child behavior checklist, the two groups of mothers reported no differences in their children's depression, aggression, delinquency or somatic complaints. And in another very small study with only 11 shared parenting families and 16 sole mother and 16 sole father families four years after divorce, the parents reported no differences in how well adjusted the children were on standardized measures of their well-being and based on researchers' interviews with the parents and the children.⁶¹ In yet another study with small samples, high conflict parents who had volunteered for free counseling to resolve their co-parenting issues reported, at the end of one year, the 13 shared children were better off in regard to stress, anxiety, behavioral problems, and adjustment than the 26 sole residence children. Notably, the children whose parents needed the most intensive counseling at the outset to make the shared parenting work ended up faring as well as the children whose parents initially got along best. The data were derived from clinicians' assessments of the children on standardized measures, interviews with both parents, and feedback from teachers and day care workers at the time of separation, then again at six months and one year. It is worth noting that the shared parenting children ranged in age from one to ten and that in both types of families children under the age of four were better adjusted than the older children.⁶² In a larger study in Toronto only one-third of the 201 parents with shared parenting plans said their parenting plan worked out well from the outset. Despite this, at the end of one year, 91% of these parents said their children were happy and well adjusted, compared to only 80% of the 194 couples without shared parenting plans.⁶³ Overall then, even though the sample sizes were small in these studies, the findings were consistent with the larger studies in regard to the benefits of shared parenting.

⁶⁰ Pearson & Thoennes, *supra* note 35, at 185.

⁶¹ Luepnitz, *supra* note 36, at 105.

⁶² Brotsky et al., *supra* note 35, at 167.

⁶³ Irving & Benjamin, *supra* note 34, at 114.

More recent studies with far larger samples that gathered data from both parents have reached similar conclusions. In a large, randomized sample in Wisconsin, the children in the 590 shared parenting families were less depressed, had fewer health problems and stress related illnesses, and were more satisfied with their living arrangement than the children in the 590 sole residence families.⁶⁴ The data came from both parents' answers to a series of questions asked in telephone interviews. Ranging in age from one to sixteen, the shared children were 30% less likely to have been left with babysitters or in daycare. Nearly 90% of their fathers attended school events, compared to only 60% of the other fathers. And almost 60% of the mothers said the fathers were very involved in making everyday decisions about their children's lives. In fact 13% of the mothers wished the fathers were less involved. In a smaller study with ten to sixteen year olds, the 207 shared children were more likely than the 272 in sole residence to have parents with authoritative parenting styles, which was linked to less anxiety and less depression as measured by standardized tests.⁶⁵ In a very small study with six to ten year-olds, the 20 children in shared parenting were no more aggressive and had no more behavioral problems than the 39 children in sole residence after controlling for parental conflict and the quality of the mother-child relationship.⁶⁶

Studies with college age children have also found better outcomes for those from shared parenting families. In the oldest study, the 30 American college students from the shared parenting families reported having better relationships with both parents than the 201 who had lived with their mothers. In fact, they rated their relationships with their fathers higher than the students from intact families.⁶⁷ Similarly, 105 Canadian students from shared parenting families gave their mothers higher ratings than the 102 students from intact families and rated their fathers

⁶⁴ Melli & Brown, *supra* note 41, at 231.

⁶⁵ Kathryn L. Campana et al., *Parenting Styles and Children's Adjustment to Divorce*, 48 J. DIVORCE & REMARRIAGE 1 (2008).

⁶⁶ Moyee Lee, *Children's Adjustment in Maternal- and Dual-Residence Arrangements*, 23 J. FAM. ISSUES 671 (2002).

⁶⁷ William Fabricius, *Listening to Children of Divorce*, 52 FAM. REL. 385 (2003).

almost as highly.⁶⁸ In an even larger study, the 337 shared parenting students reported having closer relationships with their fathers than the 686 who had lived with their mothers. What was especially important was that the quality of their relationships was linked incrementally to how much overnight time the fathers and children had spent together. That is, as the actual amount of overnight time they spent together during adolescence increased from 1% up to 50%, the young adults' positive ratings of their relationships with their fathers also increased. Even the worst relationships got higher ratings when the father and child had spent more time together during the teenage years.⁶⁹ Similarly in a very small study, the five college students from shared parenting families reported better relationships with their fathers and felt that their parents were equal in terms of their authority compared to the other 22 students with divorced parents.⁷⁰ The young adults' ratings of their relationships with their parents in all of these studies came from questionnaires created by the researchers. And, as was true in the studies with younger children, 75 young adults who had lived in shared parenting families had fewer health problems and fewer stress related illnesses than the other 136 students with divorced parents.⁷¹

B. International Studies

Studies from other countries have yielded similar results to those in the United States and Canada. Seven studies were conducted in Sweden, using national data from standardized tests and national surveys. In the first study, 441 shared parenting children had more close friends and fewer problems making friends than the 2,920 children in sole residence, and were no different in

⁶⁸ Hallie Frank, *Young Adults' Relationships with Parents: Marital Status, Conflict and Post Divorce Predictors*, 46 J. DIVORCE & REMARRIAGE 105 (2007).

⁶⁹ William Fabricius et al., *Parenting Time, Parent Conflict, Parent-Child Relationships and Children's Physical Health*, in PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT 188. (Kathryn Kuehnle & Leslie Drozd, eds. 2012).

⁷⁰ Michelle Janning et al., *Spatial and Temporal Arrangements: Young Adults' PostDivorce Experiences*, 51 J. DIVORCE & REMARRIAGE 413 (2010).

⁷¹ William Fabricius & Linda Luecken, *Postdivorce Living Arrangements, Parent Conflict and Physical Health for Children of Divorce*, 21 J. FAM. PSYCHOL. 195 (2007).

regard to being aggressive or violent, using drugs and drinking.⁷² In the second, the 17,350 shared parenting adolescents rated themselves higher on seven of the eleven scales of wellbeing than the 34,452 in sole residence.⁷³ The shared children were better off in regard to: their emotional, social, and psychological wellbeing, peer relationships and social acceptance, and physical health. Interestingly too, the fifteen year-olds were even more similar than the twelve year-olds to the 112,778 children living in intact families, suggesting that the benefits of shared parenting may become more pronounced after several years. More important still, the shared parenting teenagers felt the most comfortable talking to both of their parents. In the third study, the 270 shared adolescents fared better than the 801 in sole residence families in regard to: smoking, having sex before the age of 15, getting drunk, cheating, lying, stealing, losing their tempers, fighting, bullying, and disobeying adults.⁷⁴ And in the fourth study, the 888 shared children reported being more satisfied with their lives, feeling less depressed, and having fewer stress related health problems. Importantly, after controlling for their parents incomes and educations, the shared children were not significantly different from the intact family children in regard to having stress related health problems and feeling comfortable talking to their parents about things that bothered them.⁷⁵ In the next study the 225 ten to sixteen year-olds who lived equal time with each parent were less stressed than the 595 who lived primarily with one parent. Trained interviewers administered a questionnaire to the children as well as interviewing both the parents and the children. Importantly this study took account of parental conflict, socioeconomic status, and the quality of the parent-child relationship. Interestingly too, regardless of family type, the amount of conflict that the parents reported was not linked to the amount of

⁷² Beata Jablonska & Lene Lindberg, *Risk Behaviors and Mental Distress Among Adolescents in Different Family Structures*, 42 *SOC. PSYCHIATRY & EPIDEMIOLOGY* 656 (2007).

⁷³ Malin Bergström et al., *Living in Two Homes: A Swedish National Survey of Wellbeing in 12 and 15 Year Olds with Joint Physical Custody*, 13 *J. EPIDEMIOLOGY & COMMUNITY HEALTH* 868 (2013).

⁷⁴ Carlsund et al., *supra* note 10, at 318.

⁷⁵ Asa Carlsund et al., *Shared Physical Custody: Implications for Health and Well Being in Swedish Schoolchildren*, 102 *ACTA PAEDIATRICA* 318 (2013).

stress their children reported.⁷⁶ In yet another study with 736 high school students in sole residence and 324 in shared parenting, the shared teenagers were equal to the 2,076 from intact families in terms of mental health, quality of the relationships with their parents, and their overall feelings about the quality of their lives.⁷⁷ And in the one study that looked at 323 teenagers in blended families, these teenagers turned to their parents for help and advice less often than the 1,573 teenagers in the shared parenting families. Turning to parents for advice was then linked to feeling less sad and afraid and to having fewer stress related physical problems like stomach aches and insomnia.⁷⁸

Similar results have emerged in Norway and in the Netherlands. In the Norwegian study, although the 41 shared adolescents were no less likely to drink or use drugs than the 409 adolescents in sole residence, they were less likely to smoke, to be depressed, to engage in antisocial behavior, or to have low self-esteem. The study used standardized tests and controlled for the father's educational level.⁷⁹ In the Netherlands, for 135 children aged ten to sixteen, the shared girls were less depressed, less fearful, and less aggressive than the girls in the 250 sole residence families, as measured by standardized tests. There were no differences for the boys. Moreover, both the boys and the girls in the sharing families reported being as close to their fathers as the children from intact families, even though the sharing parents had similar levels of conflict and the same socio-economic status as the non-sharing parents.⁸⁰ Similarly in another study, the 385 shared adolescents rated their relationships with both parents higher than the 1,045 adolescents who lived with their mother,

⁷⁶ Jani Turunen, *Shared Physical Custody and Children's Experience of Stress*, Families and Societies Working Paper Series #24 (2015), available at <http://www.familiesandsocieties.eu/wp-content/uploads/2015/04/WP24Turunen.pdf>.

⁷⁷ Marie Wadsby et al., *Adolescents with Alternating Residence After Parental Divorce: A Comparison with Adolescent Living with Both Parents or with a Single Parent*, 11 J. CHILD CUSTODY 202 (2014).

⁷⁸ Sara Laftman et al., *Joint Physical Custody, Turning to Parents for Emotional Support and Subjective Health: Adolescents in Stockholm Sweden*, 42 SCAND. J. PUB. HEALTH 456 (2014).

⁷⁹ Kyrre Breivik & Dan Olweus, *Adolescent's Adjustment in Four Family Structures*, 44 J. DIVORCE & REMARRIAGE 99 (2006).

⁸⁰ Spruijt & Duindam, *supra* note 42, at 65.

although they were no less likely to report feeling depressed.⁸¹ The third study also found that the 966 shared children ages four to sixteen were better off than the 2, 217 children who lived with their mother in regard to their pro social behavior, hyperactivity, peer relationships, behavioral problems, and psychological problems. Importantly this study controlled for parents' incomes, levels of conflict, and how involved the father was with the children before the parents separated. Half of the positive impact was linked to the parents having higher incomes and less conflict in the sharing families and half to the shared parenting arrangement itself.⁸²

Turning to Australia, the largest study was based on data from a national survey involving 1,235 children in shared care (the term used in Australia for shared parenting) and 6,415 children in primary care.⁸³ Unlike all of the studies discussed so far, half of these parents were not married when their children were born. Notably, even though the two groups of parents were just as likely to say there had been violence between them, "children in shared care time arrangements seem to fare no worse than children in other care time arrangements where there has been a history of violence or where there is ongoing high conflict between the parents."⁸⁴ Importantly, even after accounting for parents' levels of education and violence, the shared care children had marginally better outcomes on the behavioral and emotional measures, according to their fathers, and had similar outcomes according to their mothers. On the other hand, if the mothers were concerned about the safety of the children when they were with their fathers, they reported worse outcomes for the children in shared care. In three other Australian studies shared care was again more advantageous based on data from standardized tests. In the first study, 84 shared care and 473 primary care children were assessed at ages four and five and then again two years

⁸¹ Sofie Vanassche et al., *Commuting Between Two Parental Households: The Association Between Joint Physical Custody and Adolescent Wellbeing Following Divorce*, 19 J. FAM. STUD. 139 (2014).

⁸² Sarah Westphal & Christiaan Monden, *Shared Residence for Children of Divorce: Testing the Critics' Concerns* (under review, copy on file with author, 2014).

⁸³ Kaspiew et al., *supra* note 43, at 1.

⁸⁴ *Id.* at 273.

later. The shared care children were less hyperactive and had fewer social or academic problems than children in primary care. In the second study, the 90 shared care parents reported better outcomes for their children than the 411 primary care parents in regard to overall happiness, problems moving between homes, and the children's relationships with their parents and their grandparents. Again though, those mothers who had concerns about their children's safety in their father's care reported worse outcomes for the children in shared care. And in the third study, even though the 110 children in primary care and the 26 in shared care were equally satisfied with their living arrangement, more than 40% of the primary care children said they wanted more time with their father.

Smaller Australian studies confirm these findings from the larger studies. For 105 adolescents living in shared care, 398 living with their mother and 120 living with their father, those in shared care reported having the best relationships with both parents, their stepparents and their grandparents two years after their parents' separation. They were no different on social adjustment and academic achievement. But they were much more likely than those in primary care to confide in their fathers (80% versus 45%) and to say they had a close relationship with him (97% versus 65%).⁸⁵ In a smaller study with ten year olds, the 27 shared care children were reported by their mothers as being less hyperactive than the 37 children in primary care. The children reported being equally satisfied with either parenting plan, but the shared care parents reported being more satisfied and less stressed than the other divorced parents. The researchers suggested that being less stressed may have enabled the sharing parents to provide higher quality parenting which, in turn, helped reduce their children's hyperactivity.⁸⁶

Only one shared parenting study has included children from different countries.⁸⁷ In this impressive study, the researchers analyzed data from 36 countries involving nearly 200,000 chil-

⁸⁵ Lodge & Alexander, *supra* note 44, at 1.

⁸⁶ Jennifer Neoh & David Mellor, *Shared Parenting: Adding Children's Voices*, 7 J. CHILD CUSTODY 155 (2010).

⁸⁷ Thoroddur Bjarnason & Arsaell M. Arnarsson, *Joint Physical Custody and Communication with Parents: A Cross-National Study of Children in 36 Western Countries*, 42 J. COMP. FAM. STUD. 871 (2012); Thoroddur Bjarnason et

dren: 148,177 in intact families, 25,578 in single mother, 3,125 in single father, 11,705 in mother/stepfather, 1,561 in father/stepmother, and 2,206 in shared parenting families. The data came from the World Health Organization's national surveys of eleven, thirteen, and fifteen year-olds. Consistent with the studies already discussed, only 29% of the shared parenting children said it was difficult to talk to their fathers about things that really bothered them, compared to 41% of the children who lived with their single mother or with their mother and stepfather. In fact, the children from shared families were somewhat less likely (29%) than those in intact families (31%) to have trouble talking to their fathers. What is especially important about this study is that, in all types of families, how satisfied the children felt with their lives was closely related to how well they felt they communicated with their fathers. In contrast, their satisfaction was not related to how well they believed their family was doing financially. Since the shared parenting children felt they communicated best with their fathers, they were the most satisfied with their lives, regardless of the family's financial situation. Unfortunately daughters were twice as likely as sons to say it was hard to talk to their fathers about things that were worrying them, regardless of family type.

C. Do Girls Benefit More than Boys?

In regard to daughters another question is whether girls benefit any more or any less than boys do from shared parenting. Girls' relationships with their fathers are generally more damaged by their parents' divorce or separation than boys' relationships.⁸⁸ Given this, we might wonder whether girls benefit more than boys from living with their fathers at least 35% of the time after the parents separate. According to the studies that have asked this question, several studies suggest that girls might benefit more than boys. Although adolescent girls felt more caught in the middle of their parents' arguments than the boys did, the girls in shared parenting felt closer to their fathers and felt less need

al., *Life Satisfaction Among Children in Different Family Structures: A Comparative Study of 36 Western Countries*, 26 *CHILD. & SOC'Y* 51 (2010).

⁸⁸ Nielsen, *supra* note 56; Linda Nielsen, *Divorced Fathers and Their Daughters: A Review of Recent Research*, 52 *J. DIVORCE & REMARRIAGE* 77 (2011).

to take care of their mothers than the girls in sole residence.⁸⁹ This suggests that even though girls tend to get more embroiled in their parents' problems, living with their fathers helps to offset the damage this would otherwise do to the father-daughter relationship. Likewise, unlike the boys, adolescent Dutch girls in shared parenting families were less depressed, less fearful, and less aggressive than the girls who lived with their mothers even though they saw their fathers regularly.⁹⁰ On the other hand, in another Dutch study where parent conflict was extremely high, the girls were more depressed and more dissatisfied than the boys when they lived in a shared parenting family.⁹¹ This suggests that boys may find it easier than girls to remain uninvolved in their parents' conflicts. And even much younger girls who were only four to six years old were less socially withdrawn when they spent one or two nights a week with their fathers than when they never spent overnight time in his care. For the boys, however, the overnighing made no difference.⁹²

Overall then, children in shared parenting families had better outcomes than children in sole residence in terms of their psychological, emotional, and social well-being, as well as their physical health and stress related illnesses. Of equal if not greater importance, they had closer, more communicative and more enduring relationships with their fathers.

V. What Plans Are in the Best Interests of Infants, Toddlers, and Preschoolers?

A. *Woozle Warning: What Does "Attachment" Mean?*

Before looking at the six studies that focused exclusively on parenting plans for children under the age of four, we need to put ourselves on "woozle alert." Three of these studies were measuring or were making claims about infants "attachments" to their mothers. Most people, including well educated family court professionals, hearing the term "attachment" would assume that these researchers were measuring either the "quality" of the

⁸⁹ BUCHANAN & MACCOBY, *supra* note 57.

⁹⁰ Spruijt & Duindam, *supra* note 42, at 65.

⁹¹ Vanassche et al., *supra* note 81, at 139.

⁹² Marsha Kline Pruett et al., *Critical Aspects of Parenting Plans for Young Children*, 42 FAM. CT. REV. 39 (2004).

mother's relationship to her baby or the "strength" of their "bond." And when we hear the term "insecurely attached," we would probably assume that the baby has an insecure "relationship" with the mother or that the mother and child are not "securely bonded" to each other. None of these assumptions, however, are correct. When researchers talk about infants' "attachment classifications" or "attachment ratings" *they are not talking about the quality of the child's relationship with the mother or the quality of her parenting.* "Attachment" measures are merely assessing how infants and toddlers react when they are in stressful, new, or challenging situations. For example, if the mother leaves the baby for several minutes in a laboratory playroom, does the baby react happily but without distress when she returns, and does the baby confidently explore new surroundings without fear while in the mother's presence? If so, these are signs of being "securely attached." But if the baby withdraws or gets angry and frustrated when stressed in these situations, or is reluctant to explore new surroundings, then these are signs of being "insecurely attached." When the baby's behavior is too erratic or inconsistent, then it is classified as having a "disorganized attachment." This is, of course, an overly simplified description of the procedures that are used. But the point is that judges and lawyers can easily be woozled by the term "attachment" and by the two research studies where babies who frequently overnights in their father's care had "more insecure attachments" on these attachment measures. To avoid being woozled in regard to parenting plans for infants and toddlers, people would have to be aware that *in the research studies "attachment" is not synonymous with "bond" or "relationship."*⁹³ With that in mind, we can appreciate the way that several of the "baby" studies have been woozled in the media and in custody decisions.

B. *The Six "Baby" Studies: Data vs. Woozles*

Only six of the forty studies were exclusively focused on infants, toddlers, and preschoolers. Since shared parenting for these very young children is a particularly controversial issue and since the parents in these studies differed considerably in terms

⁹³ Pamela S. Ludolph & Milfred D. Dale, *Attachment in Child Custody: An Additive Factor, Not a Determinative One*, 46 FAM. L.Q. 225 (2012).

of marital status, income, and education, additional details about these six studies are provided. Having infants or toddlers live 50% of the time with each parent is so rare that the term “shared parenting” is rarely used for these very young children. Instead, researchers consider the number of overnights the babies spend each month in the father’s care. The word “frequent” or “occasional” overnighting did not mean the same thing in each study. So in order to avoid confusion, the exact numbers of overnights are provided in the following summaries.

The oldest study from 1999 only addressed one question: Is overnighting linked to how securely babies respond when separated from their mothers in a laboratory attachment procedure?⁹⁴ This study is important because it is often mistakenly cited as evidence that spending overnight time with the father contributes to babies being more “insecure attached” to their mothers. The study compared infants 12 to 20 months old in three types of families: 44 who spent some overnight time with their fathers (one to three nights a month), 49 who never overnighted, and 52 who lived with married parents. The infants were categorized as securely or insecurely attached based on the Strange Situation Procedure.

The limitations of this study have been pointed out by a number of scholars, as well as by the researchers themselves.⁹⁵ Since a sizeable minority of the parents were not married or had no stable relationship with each other when their children were born, most of these infants had no relationship with their fathers before the overnighting began. Then too, all of the infants, even those in the married families, had exceptionally high levels of dis-

⁹⁴ Judith Solomo & Carol George, *The Effects on Attachment of Overnight Visitation on Divorced and Separated Families: A Longitudinal Follow up*, in ATTACHMENT DISORGANIZATION IN ATYPICAL POPULATIONS 243 (Judith Solomon & Carol George, eds. 1999).

⁹⁵ Judith Cashmore & Patrick Parkinson, *Parenting Arrangements for Young Children: Messages for Research*, 25 AUSTL. J. FAM. L. 236 (2011); Michael E. Lamb & Joan B. Kelly, *Using the Empirical Literature to Guide the Development of Parenting Plans for Young Children*, 39 FAM. CT. REV. 365 (2001); Marsha Kline Pruett et al., *Supporting Father Involvement After Separation and Divorce*, in PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT 257 (Kathryn Kuehnle & Leslie Drozd, eds. 2012); Richard 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).

organized attachments. Disorganized means that the infant's behavior toward the mother in the laboratory experiment was too inconsistent to be classified as either secure or insecure. The two groups of separated parents were also very different from one another. The overnights' parents were far more combative, more violent, more likely to have children out of wedlock from several different relationships, and more likely to have never lived together. The overnighting was also very inconsistent and rare. Only 20% of the overnighting infants spent more than three nights a month in their father's care and many went for weeks without seeing their father between overnights.

First and foremost, the overnighting infants were not rated as more insecure on the laboratory procedure. The insecure attachment ratings were not related to how often the infants' overnights or to how long they had been overnighting. Second, regardless of whether they overnights, even in the married families the infants with insecure ratings were the ones whose mothers were the most unresponsive and inattentive to their needs. Third, overnighting infants had more disorganized (too inconsistent to be categorized) attachment ratings than infants in married families, but not more disorganized than non-overnights infants. The bottom line is that the researchers concluded that overnighting was not linked to insecure attachment ratings. Likewise, in the second phase of the study one year later, the overnights did as well as the non-overnights on a challenging problem solving task with their mother. One finding from the second phase of this study, however, often gets woozled into evidence against overnighting: When briefly separated from their mother a second time, 40% of the overnights were angry, resistant, or unsettled compared to 30% of the *combined group* of intact family and non-overnights toddlers. But this finding tells us nothing about overnighting since the intact and non-overnights babies were combined into one group. In sum, the researchers concluded that whatever differences emerged in "disorganized" attachments were linked to the parents' characteristics – not to the overnighting.

Five years later, a second study was conducted at Yale University with children between the ages of two and six. Ninety-nine of these 132 children were overnighting, typically eight

times a month, but sometimes more.⁹⁶ The other 33 children spent no overnight time with their fathers, although they did have contact with him during the day. The parents were a representative sample of lower middle class couples with average levels of conflict and no history of substance abuse or physical abuse. Most were Caucasian (86%) and had been married to one another (75%) when their children were born. All data came from standardized tests.

For the two to three year-olds, there were no significant differences between the overnigheters and non-overnigheters in regard to: sleep problems, depression, anxiety, aggression, attentiveness, or social withdrawal. Likewise, for the four to six year-olds, overnighting was not linked to any negative outcomes, but was associated with more positive outcomes in regard to: social problems, attention problems, and thought problems (strange behaviors and ideas, hallucinations, psychotic symptoms). Unlike the two to three year-olds, there were gender differences on several outcomes for the four to six year-olds. The girls who overnighted were less socially withdrawn than girls who did not overnight, while there were no differences for the boys. The girls were also less anxious than the boys when the parenting schedule was inconsistent and when several different people were taking care of them throughout the day. The researchers attributed this to the fact that girls are more socially and verbally mature than boys their age.

Importantly, this study examined the impact of having a number of different people taking care of the child throughout the day. This is important because one of the arguments against overnighting and shared parenting for infants and toddlers is that children this young will be more anxious and distressed if several different adults are taking care of them. As it turned out, the four to six year-olds with multiple caregivers had fewer social, behavioral and attention problems, but had more anxiety and sleep problems. Surprisingly though, having multiple caregivers had no impact at all on the two to three year-olds. Given this, the researchers emphasized that there is no reason to be concerned about toddlers' being taken care of by many adults in an

⁹⁶ Marsha Kline Pruett et al., *The Collaborative Divorce Project: A Court-Based Intervention for Separating Parents with Young Children*, 43 FAM. CT. REV. 38 (2005).

overnighting parenting plan. On the other hand, having a consistent, unchanging schedule and having a good relationship with each parent was more closely related to children's outcomes than whether or not they overnighted. Overall though, overnighting had no negative impact on the two to three year-olds and had a positive impact on the four to six year-olds, especially the girls.

The third study was conducted in Australia.⁹⁷ The children ranged in age from zero to five. Three types of parenting plans were compared: no overnights, occasional overnights (one to three nights monthly for infants and one to nine nights for the two to five year-olds) and "shared care" which meant 4-15 overnights a month for infants and 10-15 overnights for the two to five year-olds. We will look at these findings carefully because this particular study has been widely woozled in the media as evidence that overnighting or shared care have a negative impact on babies and toddlers.

For the four and five year-olds, there were no differences on any of the six measures of well-being or physical health. Similarly for the infants and toddlers, there were no differences on physical health, developmental problems, or reactions to strangers. The shared care toddlers wheezed less often (these researchers interpreted wheezing as a sign of stress). Their scores on a behavioral problems test were higher than the less frequent overnigheters – but the scores were perfectly within normal range. The shared care mothers said their babies stared at them and tried to get their attention more often, which the researchers claimed was a sign of insecurity on a three question test which they designed for their study – a "test" which had no established validity or reliability. Further, *the researchers stated that they were using these three questions as a "proxy" for measuring insecure attachments between mother and child even though this was not a validated attachment measure that is used by attachment researchers.* The shared care mothers said their babies were more irritable than the infants who overnighted one to three times monthly, *but the researchers did not mention that the shared care irritability scores were identical to those of infants from intact families.* Moreover they were no more irritable than infants who never overnighted. Likewise, although the nineteen shared parenting

⁹⁷ McIntosh et al., *supra* note 55, at 1.

toddlers' scores were lower on the "task persistence" scale, the scale did not differentiate healthy/normal scores from unhealthy/abnormal ones. In other words, there is no way to determine whether a lower score means the child has any noticeable or significant problems that would generate any concern about lack of persistence.

Unlike the other baby studies, this particular study has been heavily criticized for its shortcomings and its questionable interpretations of the data. Most importantly, most of the data came from measures with no established validity or reliability, meaning that we cannot know what was actually being measured or how to interpret the findings. Also the sample sizes were extremely small and most of these parents were not married or living together when the babies were born (60% to 90%). Many social scientists have concluded that this study provides no convincing evidence that overnighting or shared parenting had a negative impact on infants or toddlers.⁹⁸ Given its many flaws, it is troubling that this study has been frequently misrepresented or "woozled" in the media and in academic settings as evidence that overnighting has a "deleterious impact" on infants and toddlers.⁹⁹

⁹⁸ Cashmore & Parkinson, *supra* note 95, at 707; Michael Lamb, *Critical Analysis of Research on Parenting Plans and Children's Well-Being*, in PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT, *supra* note 96, at 214; Pamela S. Ludolph & Milfred D. Dale, *Attachment in Child Custody: An Additive Factor, Not a Determinative One*, 46 FAM. L.Q. 225 (2012); Linda Nielsen, *Shared Residential Custody: A Recent Research Review (Part I)*, 27 AM. J. FAM. L. 61 (2013); Linda Nielsen, *Shared Residential Custody: A Recent Research Review (Part II)*, 27 AM. J. FAM. L. 123 (2013); Patrick Parkinson & Judith Cashmore, *Parenting Arrangements for Young Children - A Reply to Smyth, McIntosh and Kelaher*, 25 AUSTL. J. FAM. L. 284 (2011); Pruett et al., *supra* note 95, at 152; Richard Warshak, *Securing Children's Best Interests While Resisting the Lure of Simple Solutions*. University of Haifa, Conference on Parenting in Practice and Law, Haifa, Israel (2012); Richard Warshak, *Social Science and Parenting Plans for Young Children*. 20 PSYCHOL., PUB. POL'Y & L. 46 (2014).

⁹⁹ For a description of the woozling of this study, see Nielsen, *supra* note 98, at 164 (2014).

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The fourth study¹⁰⁰ which was published in 2013 is distinct from the others because it focused exclusively on inner city, impoverished, never married, poorly educated, minority parents with high rates of incarceration, drug and alcohol abuse, and mental health problems who were part of the ongoing “Fragile Families” study.¹⁰¹ Given the unique characteristics of these parents, the findings cannot be generalized to the vast majority of separated or divorced parents – or to most American parents who are living in poverty.

Using six standardized measures of well-being, the researchers compared 384 one year-olds and 608 three year-olds who spent varying amounts of overnight time in their fathers’ care to 1,062 who did not overnight and who rarely had any contact with their fathers. They categorized the infants’ as “occasional” overnights (1-51 overnights a year), and “frequent” overnights (51-256 nights). But they categorized the three to five year-olds differently: rare overnights (1-12 a year), occasional (12-127 nights), and frequent (128-256 nights). Consistent with the other overnighting studies, there were virtually no differences between the frequent, the occasional, and the non-overnighters. On the standardized measures of wellbeing, only one statistically significant difference emerged: The three year-olds who frequently overnights displayed more positive behavior at age five than those who had rarely or never overnights. The three year-olds who had overnights from 51 to 256 nights as infants had more insecure scores on attachment to their mothers than those who overnights less than 51 times. Unfortunately the attachment ratings were not valid because the mothers did the rating, instead of trained observers, which invalidates the results.¹⁰²

The one finding that received the most media attention and was widely “woozled” was this: 41% of the 51 frequently overnighting infants had insecure attachment ratings compared

¹⁰⁰ Samantha L. Tornello, *Overnight Custody Arrangements, Attachment and Adjustment Among Very Young Children*, 75 J. MARRIAGE & FAM. 871 (2013).

¹⁰¹ Sara McClanahan, *Outcomes for Children in Fragile Families*, in CHANGING FAMILIES IN AN UNEQUAL SOCIETY 108 (Paula England & Marcia Carlson, eds. 2011).

¹⁰² Marinus H. van Ijzendoorn et al., *Assessing Attachment Security with the Attachment Q Sort: Meta-analytic Evidence for the Validity of the Observer AQS*, 75 CHILD DEV. 1188 (2004).

to 25% of the 364 non-overnighters and 16% of the 219 occasional overnighters. But for the three year-olds, there was no clear link between attachment and overnighting. For the babies and the toddlers, those who occasionally overnights had more secure attachment ratings than those who never overnights. Ignoring the fact that there were no differences on any of the other five measures of well-being, this one finding was widely misreported in the media under alarming titles. For example, the British Psychological Society reported the study under the headline: “Staying away affects a baby’s attachment”¹⁰³ and the University of Virginia’s press release headline read, “Overnights away from home affect babies attachments.”¹⁰⁴

Why is this an example of woozling? First because the attachment data came from the mothers’ ratings, but when mothers do the rating there is no established validity for the test.¹⁰⁵ It is not clear, therefore what was being measured. Second, although it might seem alarming that 41% of the frequently overnighting infants were rated by their mothers as insecurely attached, this number needs to be put into context. In general population surveys, 61% of the infants and 41% of the toddlers who are living in poverty are rated as insecurely attached.¹⁰⁶ In other words, the children in this study had *lower* rates of insecure attachments than other children living in poverty. But the way this finding was presented in the media created an “anti-overnights” woozle: spending any overnight time in the father’s care causes babies to have a less secure relationship and a weaker bond with their mother. Consequently, the message to judges and lawyers and parents was: parenting plans should not allow overnights in the father’s care until children are past the age of three or four. Overnighting will weaken the child’s bond with the mother and create ongoing problems related to insecurity in future years. In

¹⁰³ *Staying Away Affects a Baby’s Attachment*, BRIT. PSYCHOL. SOC’Y, July 24, 2013, <http://www.bps.org.uk/news/staying-away-affects-babies-attachments>.

¹⁰⁴ Farris Samarrai, *Overnights Away from Home Affect Children’s Attachments, Study Shows*, UVA TODAY, July 18, 2013, <http://news.virginia.edu/content/overnights-away-home-affect-children-s-attachments-study-shows>.

¹⁰⁵ van Ijzendoorn et al., *supra* note 102, at 1188.

¹⁰⁶ Carol Andreassen & Philip Fletcher, *Early Childhood Longitudinal Study: Psychometric Report for the 2-Year Data Collection*, National Center for Education Statistics, Washington, D.C. (2007).

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sum, this fourth study, despite its being widely woozled, found little to no negative effect linked to overnighting.

The fifth study re-analyzed the attachment test data that was used in previous *Fragile Families' Study*.¹⁰⁷ Using exactly the same attachment data, Sokol and her colleagues found no link at all between the actual number of overnights for each child and each child's rating on the attachment procedure. Rather than dividing the children into separate groups according to how frequently they overnighted, these researchers took each child's attachment rating and exact number of times the child overnighted each month to determine whether there was any link. There was none.

Similarly, the sixth and most recent study found no negative link between overnighting as an infant or toddler and the quality of the children's adult relationships with their mother.¹⁰⁸ The 31 adult children who had overnighted six to fourteen times a month as infants or toddlers rated their relationship with their mother just as favorably as those who had not overnighted early in their lives. In short, they did not have less secure or less meaningful relationships with their mother even though they had spent as much as half of each month in their father's overnight care in the earliest years of their lives. But in contrast to those who had not overnighted at least six times a month, those who had overnighted had much better adult relationships with their fathers. These young adults felt more important to their fathers, felt their fathers were more responsive and involved in their lives, and were less likely to blame either their mother or their father for problems in the family. They also had fewer stress related health problems and better overall health. What is especially important about these findings is that the researchers controlled for the amount of conflict and the educational levels of the parents. The more frequent early childhood overnighting was linked to more positive outcomes regardless of the conflict or the educational levels of the parents. As the researchers pointed out, the primary goal of infant overnighting studies

¹⁰⁷ Katerina Sokol, *Short Term Consequences of Overnight Parenting Time for Infants: Current Literature and Re-analysis*, Workshop presented at Association of Family and Conciliation Courts, Toronto (2014).

¹⁰⁸ William Fabricius, *Long Term Correlates of Parenting Time for Infants*, Association of Family and Conciliatory Courts Conference, Toronto (2014).

should be to determine the long term, not the short term, impact of overnighting. Since this is the only study that has looked at these long term outcomes, it is especially relevant in regard to considering the importance of overnighting for the very youngest children.

In sum, the six studies did not provide evidence that regular and frequent overnighting undermines infants' or toddlers' well-being or weakens their bonds to their mothers.

C. *Woozling the Baby Studies: Why Is It So Common?*

Compared to the studies with older children, several of the six baby studies have been frequently woozled in the media and in the academic community.¹⁰⁹ Why? One reason is that most of us have very strongly held beliefs and very emotional feelings about mothers and babies. And as mentioned earlier, “confirmation bias” inclines us to believe those data that confirm our pre-existing beliefs and to discount data that refute our beliefs.

As mentioned earlier, according to confirmation bias, we more accept research that supports what we already believe. We are more easily woozled and more apt to be led astray by studies that reinforce our gut feelings or our personal experiences – even when those studies are flawed and even when they do not represent the larger body of research. In regard to the baby studies, three common beliefs can get in the way of seeing the data clearly and not overreaching the actual data. First, many people still believe that females are, by nature, better than males at raising, nurturing, or communicating with children – especially infants and toddlers. For those individuals, data showing any negative link between the baby's being away from the mother overnight would be more appealing and more likely to capture their attention in the media. In fact, however, there is no empirical evidence that human females have a maternal “instinct” – an inborn, automatic, natural, built in or hard-wired set of skills that better equips them for taking care of babies or older children. A mother's responsiveness or nurturance of a baby – just like a father's - is largely acquired through experience, not through in-

¹⁰⁹ See Nielsen, *supra* note 24, at 164, for a detailed description of this woozling.

instinct or through some unique feature in her brain.¹¹⁰ Indeed certain parts of the mother's brain and the father's brain become more activated when they are interacting with their baby or when they hear their baby cry.¹¹¹ Likewise, fathers are just as capable as mothers of matching and understanding their baby's social signals and emotions – a skill referred to as “synchronicity.”¹¹² In fact, among gay male couples, the father who was doing most of the daily caregiving was better at synchronizing and understanding the baby's signals and had more neural activity in those parts of the brain associated with nurturing behaviors.¹¹³ Then too, both the father's and the mother's oxytocin levels (the amino acid associated with nurturing and affiliative behavior), increase when they are interacting with their baby, while the father's testosterone levels (the hormone associated with aggression) decrease.¹¹⁴ The point is that, despite the scientific evidence, data will be more readily accepted – even if it is woozled data – if it confirms people's pre-conceived notions about mothers and babies.

Another reason the negative findings from some of the overnighting studies attract more attention than the positive or neutral findings might be because those particular findings confirm three other beliefs about babies and their mothers: first, that babies are naturally more attached to their mothers than to their

¹¹⁰ SARAH BLAFFER HRDY, *MOTHERS AND OTHERS: THE EVOLUTIONARY ORIGINS OF MUTUAL UNDERSTANDING* (2009).

¹¹¹ Eyal Abraham, *Father's Brain Is Sensitive to Childcare Experiences*, 111 *PSYCHOL. & COGNITIVE SCI.* 9792 (2014); Shir Atzil et al., *Synchrony and Specificity in the Maternal and Paternal Brain: Relations to Oxytocin and Vasopressin*, 51 *CHILD & ADOLESCENT PSYCHIATRY* 798 (2012); Jennifer S. Mascaro et al., *Behavioral and Genetic Correlates of the Neural Response to Infant Crying Among Human Fathers*, 12 *SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE* 166 (2013); James E. Swaim & Jeffrey P. Lorberbaum, *Imaging the Human Parental Brain*, in *NEUROBIOLOGY OF THE PARENTAL BRAIN* 83 (Robert S. Bridges, ed. 2008).

¹¹² Ruth Feldman, *Infant-Mother and Infant-Father Synchrony: The Coregulation of Positive Arousal*, 24 *INFANT MENTAL HEALTH J.* 1 (2003).

¹¹³ Eyal Abraham, *Father's Brain Is Sensitive to Childcare Experiences*, 111 *PSYCHOL. & COGNITIVE SCI.* 9792 (2014).

¹¹⁴ Ilanit Gordon et al., *Oxytocin and the Development of Parenting in Humans*, 68 *BIOLOGICAL PSYCHIATRY* 377 (2010); Patty X. Kuo et al., *Neural Responses to Infants Linked with Behavioral Interactions and Testosterone in Fathers*, 9 *BIOLOGICAL PSYCHOL.* 302 (2012).

fathers; second, that the infant's attachment or bond with the mother is more "primary" than with the father; and third, that the bond will be weakened if the baby spends too much time away from the mother. According to contemporary attachment research, however, these beliefs are not supported by the empirical data. Babies form equally strong attachments to both parents at around six months of age. And a secure attachment to the father is just as beneficial and just as "primary" in importance. Among a few of the findings from specific studies are that infants and toddlers seek comfort equally from both parents,¹¹⁵ that although most 12-18 month-olds turn first to their mothers when they are distressed, there is no strong preference for either parent,¹¹⁶ that fathers support children's attachment security as much as mothers,¹¹⁷ and that having an insecure relationship with the father at the age of 15 months is just as closely tied to children's behavioral problems at the age of eight as having an insecure relationship as in infant with the mother.¹¹⁸

The baby studies also seem to have been especially vulnerable to being presented out of context, especially by the media – a woozling technique where a study's findings are presented as if they applied to the general population, when in fact they do not. A recent example of woozling in the media relates to Tornello's overnighting study. As already discussed, the university's press release and the study's abstract did not present a balanced overview of the findings. Not surprisingly then, the study was soon being woozled internationally under alarming headlines: "Over-

¹¹⁵ Inge Bretherton, *Fathers in Attachment Theory: A Review*, in EMERGING TOPICS ON FATHER ATTACHMENT: CONSIDERATIONS IN THEORY, CONTEXT, AND DEVELOPMENT 9 (Lisa A. Newland et al., eds. 2011).

¹¹⁶ Michael Lamb & Charlie Lewis, *Father-Child Relationships*, in HANDBOOK OF FATHER INVOLVEMENT 119 (Natasha J. Cabrera & Catherine S. Tamis-LeMonda, eds. 2013).

¹¹⁷ HARRY FREEMAN ET AL., NEW DIRECTIONS IN FATHER ATTACHMENT (2011); L. Alan Sroufe et al., *Placing Early Attachment Experiences in Developmental Context*, in THE POWER OF LONGITUDINAL ATTACHMENT RESEARCH: FROM INFANCY AND CHILDHOOD TO ADULTHOOD 48 (Klaus E. Grossman et al. eds. 2005); Richard Warshak, *New Blanket Restrictions* (under review; copy on file with author 2013).

¹¹⁸ Hannah Furness, *Babies Who Spent More than One Night a Week Away from Mother Are 'More Insecure'*, TELEGRAPH (U.K.), July 22, 2013.

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night separation linked to *weaker bond*,”¹¹⁹ “Babies who spent more than one night away from mother are *more insecure*,”¹²⁰ “Nights away from mum leave babies *less secure*: New findings could affect custody rulings for young children,”¹²¹ “*Divorce study show infants’ attachment to caregivers affected by joint custody*.”¹²² Keep in mind that very few of the parents in the study were divorced because 85% of them had never been married. Illustrating how grossly distorted the data became, one NBC article stated: “A new study suggests parents make or break their child’s ability to form healthy relationships *for life before the baby’s first birthday*. This study uncovered that when babies spend *even one night away from their primary caregivers in that first year* those babies may be in for tough times building relationships as adults.”¹²³ Beyond the United States, similar stories appeared in newspapers and parenting blogs in India,¹²⁴ the United Kingdom,¹²⁵ and Australia,¹²⁶ as well as on a medical

¹¹⁹ Robert Preidt, *Overnight Separation from Mother Linked to Weaker Bond*, HEALTH DAY (July 18, 2013), <http://consumer.healthday.com/kids-health-information-23/child-development-news-124/overnight-separation-from-mother-linked-to-weaker-infant-bond-678506.html>.

¹²⁰ Furness, *supra* note 118, at 1 (emphasis added).

¹²¹ *Nights Away from Mum ‘Leave Babies Less Secure’: New Findings Could Affect Custody Rulings for Young Children*, DAILY MAIL (U.K.), July 21, 2013, <http://www.dailymail.co.uk/news/article-2372868/Nights-away-mum-leave-babies-secure-New-findings-affect-custody-rulings-young-children.html> (emphasis added).

¹²² *Divorce Study Shows Infants’ Attachment to Caregivers Affected by Joint Custody*, HUFFINGTON POST, July 29, 2013, http://www.huffingtonpost.com/2013/07/29/divorce-study_n_3672185.html (emphasis added).

¹²³ Maria Hallas, *New UVA Psyche Study Shows Attachment Issues Newborns Can Have*, NBC29.Com, July 21, 2103, <http://www.nbc29.com/story/22896553/new-uva-psych-study-shows-attachment-issues-newborns-can-have> (emphasis added).

¹²⁴ ANI, *Spending Nights Away from Home Affects Baby’s Attachment*, SIFY NEWS, July 21, 2013, <http://www.sify.com/news/spending-nights-away-from-home-affects-babys-attachment-news-international-nhvoOnfadfhsi.html>.

¹²⁵ *Id.*; Furness, *supra* note 118, at 1; *Nights Away from Mum*, *supra* note 121.

¹²⁶ *Joint-Custody Infants Who Overnight Away from Mums Struggle with Attachment*, MOTHER & BABY, Apr. 10, 2014, <http://www.motherandbaby.com.au/baby/development/2014/4/joint-custody-infants-who-overnight-away-from-mums-struggle-with-attachment/>.

news website,¹²⁷ a law firm's website,¹²⁸ and the Psyche Central website.¹²⁹ Even the British Psychological Association reported the study on its website with the title, "Staying away affects a baby's attachment."¹³⁰ These alarming media reports and woozled versions of the actual data are reminiscent of what happened in the media several years earlier with the Australian baby study whose woozling has been documented elsewhere.¹³¹ In the case of both studies, shortly after the studies were published, the woozles started running amuck in the media.

VI. When Is Shared Parenting Not Beneficial for Children?

Overall the forty studies show that children generally fare better in families where most of them lived at least one-third of the time and usually half time with each parent. But this does not mean that all of the shared children were doing as well or better than children who were living with their mother and spending varying amounts of time with their father. Under some circumstances, the outcomes were worse for the shared parenting children. What were those circumstances?

First, when the mothers in a nationally representative sample of Australian families were worried about the children's safety when they were with their father, the mothers rated the children as being more stressed and more poorly adjusted when they had a shared parenting plan.¹³² These mothers were worried about the father's violent or aggressive behavior or about his being negligent in ways that might jeopardize the children's safety.

¹²⁷ Susan Scutti, *Frequent Overnights with Nonresident Parent Leads to Infant Insecurity*, MED. DAILY, July 21, 2013, <http://www.medicaldaily.com/infant-bonding-and-attachment-frequent-overnights-non-resident-parent-leads-insecurity-247907>.

¹²⁸ Molly Kenny, *Divorce Study Links Infant Attachment Issues with Joint Custody*, Aug. 14, 2013, <http://www.mollybkenny.com/news/divorce-study-links-infant-attachment-issues-with-joint-custody.cfm>.

¹²⁹ Janice Wood, *Overnight Stays Away from Home Affect Babies' Attachments*, PSYCH CENTRAL, July 21, 2013, <http://psychcentral.com/news/2013/07/21/overnight-stays-away-from-home-affect-babies-attachments/57400.html>.

¹³⁰ van Ijzendoorn et al., *supra* note 102, at 1188.

¹³¹ See Nielsen, *supra* note 24, at 164.

¹³² Kaspiew et al., *supra* note 43, at 1.

As for parental conflict, one of the American studies found that teenagers in the shared parenting families were more likely to feel caught in the middle of their parents' disagreements – girls more so than boys. On the other hand, the quality of these teenagers' relationships with their parents was *not* linked to the quality of their parents' relationship with each other – and the shared teenagers had closer relationships with their parents than the teenagers in the sole residence families.¹³³ Similarly, in Belgium, the teenage girls, but not the boys, felt more depressed in a shared parenting family than in sole residence if their parents were in high conflict.¹³⁴ These studies suggest that girls might be more easily stressed than boys by high conflict. Finally, the quality of the children's relationship with their father matters, as evidenced by an American study with 141 teenagers (average age of thirteen) all of whose parents had all been designated as "high" conflict by a judge and all of whom were litigating over parenting time or other custody issues. The teenagers who felt they had a bad relationship with their father had more behavioral problems when they lived in a shared parenting family than when they lived primarily with their mother.¹³⁵

Although not a negative outcome in the sense of creating significant or long lasting problems for the children, living in two homes is more inconvenient for adolescents than for younger children. Given their more complicated social and academic lives, this is not particularly surprising. Nevertheless, even the adolescents reported that living in two homes was worth the trouble, namely because they maintained close relationships with both parents. These studies were based on interviews with 22 children¹³⁶ and 105 adolescents in Australia,¹³⁷ 37 Swedish ado-

¹³³ BUCHANAN & MACCOBY, *supra* note 57.

¹³⁴ Vanassche et al., *supra* note 81, at 139.

¹³⁵ Irwin Sandler, Lorey Wheeler & Sanford 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 (2013).

¹³⁶ Monica Campo & Belinda Fehlberg, *Shared Parenting Time in Australia: Children's Views*, 34 J. SOC. WELFARE & FAM. L. 295 (2012).

¹³⁷ Lodge & Alexander, *supra* note 44, at 1.

lescents,¹³⁸ 21 British adolescents,¹³⁹ and 22 elementary age children,¹⁴⁰ and 80 college students in the United States.¹⁴¹

VII. Is There Any Consensus on Shared Parenting Among Professionals?

Have the experts ever reached any group consensus on shared parenting? On three occasions groups of social scientists or family law professionals have stated their mutual opinions and mutual recommendations on custody issues in published papers. These three papers are considered “consensus” reports because they represent the shared views of a group of professionals in contrast to co-authored articles where several individuals express their mutual views and recommendations.

The first group convened more than two decades ago in 1994 under the sponsorship of the National Institute of Child Health and Human Development.¹⁴² The eighteen participants were experts from developmental and clinical psychology, sociology and social welfare who were asked to evaluate the existing research on how children were affected by divorce and different custody arrangements. Among their conclusions were that most fathers fail to maintain or are prevented from maintaining significant contact with their children. “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, transition to and from school, extracurricular and recreational activities” keep fathers playing important and central roles.¹⁴³ As for parenting plans that allow children to live with each parent, they agreed that “the psychological continuity”

¹³⁸ Gry Mette D. Haugen, *Children’s Perspectives on Shared Residence*, 24 CHILD. & SOC’Y 112 (2010); Anna Singer, *Active Parenting or Solomon’s Justice? Alternating Residence in Sweden for Children with Separated Parents*, 4 UTRECH L. REV. 35 (2008).

¹³⁹ CAROL SMART ET AL., THE CHANGING EXPERIENCE OF CHILDHOOD: FAMILIES AND DIVORCE (2001).

¹⁴⁰ Luepnitz, *supra* note 36, at 105.

¹⁴¹ William V. Fabricius & Jeff A. Hall, *Young Adults’ Perspectives on Divorce*, 38 FAM. CT. REV. 446 (2000).

¹⁴² Michael E. Lamb et al., *The Effects of Divorce and Custody Arrangements on Children’s Behavior*, 35 FAM. & CONCILIATION CTS. REV. 393 (1997).

¹⁴³ *Id.* at 400.

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generally, though not always, “outweighs the disadvantages arising from transitions between parental homes.”¹⁴⁴ Further they concurred that there was too little research about the impact of conflict on children to jump to conclusions about which parenting plans were most beneficial for children with high conflict parents. In sum this group recommended that parenting plans provide children with more fathering time – including time living with him in his home – and that this plan not be ruled out simply because the parents were in high conflict with each other.

The second group was sponsored by an interdisciplinary organization, the Association of Family and Conciliatory Courts (AFCC) in 2013.¹⁴⁵ In the “think tank” there were 19 social scientists or mental health practitioners in the group of 32. The other 13 were judges, lawyers or law school professors. And one was a domestic violence activist. The interdisciplinary group reached no consensus on parenting plans for children younger than five. But they did agree that “having parenting time that is not solely on weekends typically contributes to higher quality parenting and more enduring relationships with children.”¹⁴⁶ They also concurred that: “There is enough research to conclude that children in families where parents have moderate to low conflict and can make cooperative, developmentally informed decisions about the children would clearly benefit from shared parenting arrangements.”¹⁴⁷ A “handful” of participants believed that equal shared parenting should be the norm in custody law. But the majority took the position that each custody decision should be made on a case by case basis rather than relying more heavily on the empirical research. The report did not disclose how many of the 32 participants disagreed with these conclusions and did not describe the process by which these 32 individuals were invited to participate. In sum, the majority of these family law professionals and social scientists felt that shared parenting benefits children, but only if their parents have “low to medium” conflict, collaborative relationship – and only if the children are

¹⁴⁴ *Id.* at 401.

¹⁴⁵ Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice and Shared Parenting*, 44 *FAM. CT. REV.* 152 (2014).

¹⁴⁶ *Id.* at 161.

¹⁴⁷ *Id.* at 162.

older than a certain age, which is not clearly specified in the report.

After the report was released, two articles were published expressing the concerns of two highly regarded researchers who did not participate in the AFCC meeting. Sanford Braver whose work on divorced parents and their children was supported for over forty years by eighteen federal research grants deemed the report “disappointing.” As Braver explained, the report failed to say much of substance, failed to consider the negative impact of individualizing custody decisions, and failed to give proper weight to the empirical research.¹⁴⁸ Michael Lamb, editor of the American Psychological Association’s journal, *Psychology, Public Policy and Law*, agreed with Braver. Further, Lamb criticized the group’s report for overstating the empirical research on high conflict, exaggerating its impact on children and inflating its importance as a factor working against shared parenting. Lamb also noted that the report had embraced the erroneous assumption that individualized decision making is inherently superior to decisions that are guided by the empirical data – an assumption that has been proven incorrect in the research literature.¹⁴⁹ In short, Lamb concluded that the AFCC’s group report was “embarrassingly inconclusive.”¹⁵⁰

The third group of experts to make recommendations about shared parenting was unique in several ways.¹⁵¹ First and foremost, the group consisted of 111 international experts in psychology who were able to reach a consensus on specific recommendations regarding parenting plans. Second, all of the group members were social scientists or mental health practitioners. None were lawyers, judges or law school professors. Third, most of them held or had held prestigious positions or had long histories of publishing books and articles on issues germane to child custody decisions. Among this preeminent group of scholars and researchers were 11 people who had held major office in

¹⁴⁸ Sanford Braver, *The Costs and Pitfalls of Individualizing Decisions and Incentivizing Conflict*, 44 FAM. CT. REV. 175, 180 (2014).

¹⁴⁹ Michael E. Lamb, *Dangers Associated with the Avoidance of Evidence Based Practice*, 44 FAM. CT. REV. 193, 197 (2014).

¹⁵⁰ *Id.* at 194.

¹⁵¹ Richard A. Warshak, *Social Science and Parenting Plans for Young Children: A Consensus Report*, 20 PSYCHOL., PUB. POL’Y & L. 46 (2014).

professional associations, 2 former Presidents of the American Psychological Association (APA), 5 university Vice Presidents, Provosts, or Deans, 14 professors emeriti (including the doyenne of divorce research, Mavis Hetherington), 17 department chairs, 61 full professors, 8 endowed chairs, 2 former presidents of the American Association of Family Therapy, a former president of APA's Division of Family Psychology, and several of the leading attachment and early childhood development researchers in the world. These 111 experts endorsed the conclusions and recommendations in a paper published by the American Psychological Association and written by psychologist and researcher, Richard Warshak whose decades of work on children of divorce are world renown. Among the recommendations and conclusions of these 111 professionals were: "The social science evidence . . . supports the view that shared parenting should be the norm for parenting plans for children of all ages, including very young children."¹⁵² Contrary to the conclusions reached by Jennifer McIntosh et al. and by Samantha Tornello et al. in their own baby studies, the consensus of these 111 professionals was: "There is no evidence to support postponing the introduction of regular and frequent involvement, including overnights, of both parents with their babies and toddlers." And in respect to parental conflict, the group concurred that: "Denying joint physical custody when the parents are labeled high conflict brings additional drawbacks to children by denying them the protective buffer of a two nurturing relationships." "We recognize that some parents and situations are unsuitable for shared parenting, such as parents who neglect or abuse their children and those from whom the children would need protection and distance even in intact families. . .and parents who have no prior relationship or a peripheral one at best with their child."¹⁵³ In sum, these 111 accomplished scientists – professionals whose qualifications to judge the scientific literature relevant to this topic are beyond dispute - concur that shared parenting plans are in the best interests of the majority of children and that shared parenting should not be ruled out just because the children are very young or just because their parents were in high conflict.

¹⁵² *Id.* at 59.

¹⁵³ *Id.* at 59-60.

The only published article that has attempted to rebut the consensus paper was written by the three Australian researchers whose baby overnighting study had been refuted in the consensus paper.¹⁵⁴ Jennifer McIntosh, the lead researcher of the Australian baby study and the lead author of the rebuttal article, and her two co-authors stated that Richard Warshak and the 111 experts who endorsed his paper did not measure up to their definition of a “consensus.” Why? First because the paper was not “commissioned” by any organization. Second because the 111 social scientists had not been “nominated” as “experts.” And third because Warshak did not report how many people who read his paper declined to endorse it and did not explain how the 111 social scientists had become part of this consensus group. In light of these criticisms, it is important to know that Warshak specifically acknowledged in his paper that it did not represent the views of *all* scholars in the shared parenting field and that the paper had been specifically designed to present the views of people who were social scientists. It was not designed, as was AFCC’s think tank, to try to achieve an interdisciplinary consensus in a group that included family law professionals. It is also worth noting that McIntosh was among the 32 people that AFCC’s leaders had “commissioned” and “nominated” as part of their expert panel. Moreover, the 111 members of the consensus group had concurred that the conclusions drawn by McIntosh and by Robert Emery and Tornello in their own infant overnighting studies were unsupportable: Neither of their studies had reliable data that linked frequent overnighting or shared parenting to negative outcomes for infants and toddlers.¹⁵⁵ Finally, it should be noted that in a keynote address at the AFCC annual conference in Australia, McIntosh dismissed the consensus paper published in an APA journal and endorsed by the 111 scholars as “dull, unnecessary, divisive and retrograde” without presenting any arguments to support devaluing the work of such a large group of esteemed colleagues. Further, McIntosh told the audi-

¹⁵⁴ Jennifer McIntosh et al., *Responding to Concerns About a Study of Infant Overnight Care Postseparation, with Comments on Consensus: Reply to Warshak*, 21 PSYCHOL., PUB. POL’Y & L. 111 (2015).

¹⁵⁵ See Nielsen, *supra* note 24, at 164, for details about the woozling of the Australian baby study.

ence that her colleague, Robert Emery, considered the consensus paper “undeserving of time or attention.”¹⁵⁶

In sum, the two groups that were entirely composed of social scientists (129 in total) agreed that the parents’ conflicts should not be a pivotal factor in determining parenting plans. Metaphorically, high conflict should not be the tail that wags the dog. In contrast, some portion of the AFCC group (the numbers were not disclosed) that included family law professionals felt that shared parenting should not be an option for high conflict parents. These two groups agreed that shared parenting plans were in the best interests of most children. But only the group composed entirely of 111 social scientists endorsed overnighting and shared parenting even for the youngest children.

VIII. But the Forty Studies Are Not Applicable to This Case Because . . .

People who dismiss or ignore the findings from the forty studies often make four claims to support their position that “We can’t apply the findings from the forty studies to this particular family or even to the majority of separated parents.” First, all families are unique - which means judges, custody evaluators, and other professionals involved in a case can “predict” more accurately than the forty studies whether the children in the case before the court are likely to benefit from shared parenting. Second, the forty studies compared the average scores of the group of shared parenting children to the average scores of the group in sole residence – which means we cannot apply the findings to any individual child since these are aggregate, actuarial data. Third, even though there was a correlation between shared parenting and better outcomes, this does not “prove” that shared parenting “caused” these benefits. Fourth, these studies are not trustworthy

¹⁵⁶ Jennifer E. McIntosh, J. *Beyond the Baby Wars: Toward an Integrated Approach to the Post-Separation Care of Very Young Children*, Keynote Address: Association of Family and Conciliatory Courts Conference, Melbourne, Australia, Aug. 15, 2014, http://www.familytransitions.com.au/Family_Transitions/Family_Transitions_files/%20McIntosh%20Beyond%20the%20Baby%20Wars%20AFCC%20Australia%20Keynote%20August%202014_JK%20formatted%20for%20website.pdf.

and reliable enough because each study had flaws and because forty studies are not “enough.”

First, the forty studies included almost a quarter of a million parents with varying socio-economic, racial, and cultural backgrounds and varying levels of conflict (including isolated incidents of physical anger and litigation in court). The 115,157 children ranged from one to twenty-two years of age and “sole residence” families included children who were living with their parent and stepparent. Given this, unless it has been established that a particular family has little to nothing in common with the thousands involved in the forty studies, it would be illogical to assume or to predict that the children cannot benefit from shared parenting. Guided by the results of the forty studies where most children benefitted more from actually living at least one-third of the time with each parent, parenting plans can still be individualized to meet a family’s special needs.

Second, actuarial or aggregate data in social science studies have been shown to increase reliability and trustworthiness of predictions. In contrast, serious concerns have been raised about relying on or trusting data from one individual’s custody evaluation¹⁵⁷ or relying on the opinions of family law professionals or expert witnesses who are not well informed about the empirical studies.¹⁵⁸

Third, in regard to trusting correlational data, studies that are comparing the well-being of children in various types of families (rich vs. poor, single parent vs. two parent, shared parenting vs. sole residence, etc.) *have to be correlational* since researchers cannot ethically or practically design “experiments” that would establish direct cause and effect. These correlational studies and aggregate data yield valuable information about which factors

¹⁵⁷ Marc J. Ackerman & Linda J. Steffan, *Custody Evaluators’ Views of Controversial Issues*, 20 AM. J. FAM. L. 200 (2006); James N. Bow et al., *Attorneys’ Beliefs and Opinions About Child Custody Evaluations*, 52 FAM. CT. REV. 213, 239 (2011); Robert E. Emery et al., *Assessment of Child Custody Evaluations*, 6 PSYCHOL. SCI. IN THE PUB. INT. 1 (2005); Kelly & Johnston, *supra* note 23, at 233; Robert F. Kelly & Sarah H. Ramsey, *Child Custody Evaluations: The Need for Systems Level Outcomes Assessments*, 47 FAM. CT. REV. 286 (2009); Klass & Peros, *supra* note 23, at 46.

¹⁵⁸ Braver, *supra* note 148, at 148; Kelly & Johnston, *supra* note 23, at 233; Lamb, *supra* note 149, at 19; Ludolph & Dale, *supra* note 98, at 225; Nielsen, *supra* note 24; Warshak, *supra* note 151, at 46.

are linked to children's well-being. If policy-makers ignored or dismissed correlational data or aggregate data, many policies and laws that benefit children would not exist: for example, laws about adolescent drinking, smoking, driving while texting, or getting a marriage license. Many advances in family law are based on correlational and aggregate data. For example, correlational and aggregate data showed that more fathering time benefitted children which, in turn, led to nationwide change in custody laws to provide children with more fathering time.

Fourth, all social science studies have flaws. This is an inescapable reality. And all areas of research can benefit from more studies. But this does not mean that we should *ignore* the existing research or *do nothing* differently until we "get more information." Finally we need to keep in mind that all of us are inclined to insist on more data when the findings do not confirm our existing beliefs. Conversely, we are easily satisfied with much less data when the findings confirm what we already believe – a flaw in our thinking processes that psychologists refer to as "confirmation bias."¹⁵⁹

In short, it is not in the best interests of children for us to ignore or to dismiss the findings from the forty studies.

IX. Summary and Recommendations

What are five of the most important messages for judges and lawyers from the forty studies? First, shared parenting is linked to better outcomes for children of all ages across a wide range of emotional, behavioral and physical health measures. But these studies should not be misconstrued to mean that children benefit from living with an unfit, unloving, neglectful, or abusive parent – or from a parent who had little or no relationship with the children before the parents separated. Second, regular and frequent overnights for infants and shared parenting for toddlers and other children under five is not linked to negative outcomes. Specifically it does not weaken the young child's relationship with or "attachment" to the mother. Third, even if the parents are in high conflict, most children still benefit from shared parenting if they have loving, meaningful relationship with their parents. In that vein, we should keep in mind that most parents with shared

¹⁵⁹ Martindale, *supra* note 27, at 31.

parenting plans do not have an exceptionally friendly, conflict free, collaborative co-parenting relationship. Fourth, even though most shared parenting couples have higher incomes and less conflict than other separated parents, these two factors alone do not explain the better outcomes for shared parenting. Finally, even though most children acknowledge that living in two homes is sometimes an inconvenient hassle, they feel the benefits outweigh the inconvenience. One of the most beneficial outcomes linked to shared parenting is children's maintaining a loving, meaningful relationship with both parents. Given this, we need to keep in mind that this particular benefit may not become apparent until later in the children's lives. So although children who are living almost exclusively with one parent may appear to be doing "just fine" at present, the relationship with their other parent is more likely to be weakened or to be irreparably damaged as time goes by. And that disadvantage may last a lifetime.

Rather than trusting or being willing to consider empirical data that refute their long held beliefs, some professionals might try to defend their beliefs by insisting that the correlational studies cannot "prove" that shared parenting is responsible for the children's better outcomes. Embracing this position, they might contend that any number of factors in the family's past or in the present may have been the actual cause of the better outcomes for the shared parenting children. This posture brings to mind the anecdote from Mark Twain's *Huckleberry Finn*. Huck is arguing with a girl over the actual "cause" of the death of someone they both knew. The perturbed girl explains to Huck that a person might stump his toe and take medicine for the pain which makes him so dizzy that he falls down a well and breaks his neck and "bust his brains out." Then "somebody come along and ask what killed him and some numskull up and say, Why, *he stumped his toe*." Twain's point, of course, is that we can always claim that what appears to be the most proximal, most obvious, or most immediate "cause" of a particular outcome is not in fact the actual cause – that the real cause, lying elsewhere in the past, has evaded us. In that vein, it is worth remembering that many of the forty studies did factor in other variables such as the family's income and the level of conflict between the parents – and still found better outcomes for the children in the shared parenting families.

Once having been informed of the research, family court professionals should incorporate the empirical data into their decision making and should share the research with their less knowledgeable colleagues. Being familiar with this research decreases the odds that we will act on faulty assumptions or be duped by data that have been distorted, misrepresented, or “woozled.” These research studies enable us to respond more confidently and more effectively when our “woozle alert” sounds the alarm – for example, to question and to be wary when others assert that “the research shows” children cannot benefit from shared parenting plans if their parents do not get along as coparents, or if the custody issues had to be settled in court, or if the children are younger than four. Shared parenting plans, of course, are not the only factors that are correlated with better outcomes for children. Decades of research have established that a number of factors are correlated with negative outcomes for children whether their parents are still living together or not – factors such as the parents’ low incomes, poor parenting, physical abuse, or a parent’s psychological or substance abuse problems. Still, it has become clear that continuing to live with each parent at least one third of the time *is* one of the most beneficial factors – and, unlike low incomes or poor parenting, it is a factor over which family court professionals have some control or influence. Putting our trust in the current research means putting aside negative predictions about shared parenting that are based on the worst situations seen in court – or based on the assumption that a parent’s weaknesses in parenting will cancel out the benefits of shared parenting. Rather than being swayed by hearsay about “what the research shows,” we serve the best interests of children by relying on data over dogma and by being on the alert for woozles that can lead us astray in making decisions about the most beneficial parenting plans for children.