

“Still the One”: Defending the *Individualized Best Interests of the Child* Standard Against Equal Parenting Time Presumptions

by
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*The best interests test does have a great moral virtue – it directs the child custody court to thoroughly review each child’s particular circumstances without preconceptions or presumptions. The individualized nature of the inquiry is a tribute to our society’s collective sense that relationships between the children and parents are unique and should be judged individually.*¹

Introduction: The *Individualized Best Interests of the Child* Doctrine

The last fifty years of child custody law reflect paradigm shifts and pendulum swings in the prevailing scientific and societal views of what is in the “best interests” of a child.² Since the early 1970s, the *individualized best interests of the child* standard has been part of an evolution in family law to accommodate increasing pluralism in society.³ Ever increasing changes in family cohesiveness, form, and structure have been viewed as making it impossible to talk about the average American family.⁴ What has

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¹ ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 164 (2004).

² Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42(3) FAM. L. Q. 381 (2008).

³ Robert E. Emery, *Changing the Rules for Determining Child Custody in Divorce Cases*, 6(3) CLIN. PSYCHOL. SCI. & PRAC. 323 (1999).

⁴ Troxel v. Granville, 120 S. Ct. 2054 (2000) (O’Connor, J., dissenting).

been called the “postmodern family” is a collective of various family configurations, not always united by marriage or related to the children by biology.⁵ In this context, the *individualized best interests* standard has enabled decisions about children to be based on the facts of each child and family rather than presumptions based upon gender, social stereotypes,⁶ or broad social policies.

Joint custody and shared parenting are issues that invoke impassioned debates among family law and mental health professionals and parents on a recurrent basis.⁷ These debates occur both at the policy level and in individual child custody decisions. Each year numerous state legislatures face proposals for equal parenting time presumptions, mostly from father’s rights groups, and each day judges all over the world are asked to consider requests for “50/50” or equal time as part of *individual best interests of the child* determinations. Whether by legislative mandate or because of a request by one of the parties, consideration of joint physical custody and shared parenting have become more common in discussions of social policy, in the private voluntary development of parenting plans by parents, and in instances where custody disputes require court adjudication.

This article attempts to walk a fine line of supporting shared parenting, even equal time parenting plans, when these can be achieved by parental agreement or through court findings using *the individualized best interests of the child* standard that such an arrangement benefits the child. The article articulates this position as more preferable than using presumptions of shared or equal time parenting to make best interests determinations. Part I frames the issue of the best interests / shared parenting debates. The history and rationale of the individualized best interests ideology is explained. This is followed by an introduction of the concept of presumptions and how these challenge both the best interests standard and the unique culture and role family courts have developed around the need to resolve custody disputes, provide for the well-being of children, and protect children and

⁵ Mary Ann Mason, *The Roller Coaster of Child Custody Law over the Last Half Century*, 24 J. AM. ACAD. MATRIM. LAW. 451 (2012).

⁶ *In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005).

⁷ Robert E. Emery et al., “*Bending*” *Evidence for a Cause: Scholar-Advocacy Bias in Family Law*, 54(2) FAM. CT. REV. 134, 145 (2016).

families from conflict and violence. Part II introduces the role of science and the rules of science in the best interests/shared parenting debate, as well as how advocates have attempted to recruit science in support of their positions. Part III reviews the research data and attempts to apply the best science rules that were outlined in Part II. This section examines the research on the quality and quantity of contact and the relationships between children and their noncustodial parent, the impact of conflict on child and court processes, and the research directly comparing joint versus sole and primary physical custody. A number of prominent meta-analyses that empirically review groups of studies to identify the size of effects between different comparison groups are emphasized, although not to the exclusion of individual studies that may illustrate important points. Part IV directly addresses the call for equal parenting time presumptions from advocates and responds to their claims of scientific support. This response involves a detailed analysis of the arguments and data offered to support equal parenting time presumptions and offers explanations of what this means and does not mean. And finally, Part V examines the legal expansions of parental rights via legislative enactments that have occurred over the past 45 years, up to and including an examination of three states that have embraced presumptions regarding equal parenting time.

I. Equality & *Parens Patriae* in the Individualized Best Interests of the Child

A. The Individualized Best Interests of the Child Task and Objectives

The *individualized best interests of the child* became necessary in the early 1970s after U.S. Supreme Court rulings on the Equal Protection and Due Process Clauses of the Fourteenth Amendment transformed the constitutional basis of family law.⁸ Maternal presumptions regarding custody fell when gender equality decisions prohibited differential treatment of men and women based on "rigid and outdated sexual stereotypes."⁹ The

⁸ See David D. Meyer, *The Constitutionalization of Family Law*, 42(3) FAM. L.Q. 529 (2008).

⁹ See *Reed v. Reed*, 404 U.S. 71 (1971) (establishing that gender-based statutory classifications were subject to the Equal Protection Clause, must serve

Court found that, “[l]egal burdens should bear some relationship to individual responsibility” and “the ability to perform and contribute to society.”¹⁰ Most countries, jurisdictions, and states exalt the “best interests of the child” as the paramount concern in resolving family law disputes. It has repeatedly been referred to as the “polestar” of child custody determinations.¹¹

In 1890, the U.S. Supreme Court (SCOTUS) held that the *parens patriae* doctrine was “inherent in the supreme power of every state, . . . it is a most beneficial function, and often necessary to be exercised . . . for the prevention of injury to those who cannot protect themselves.”¹² In 1962, SCOTUS referenced state obligations and *parens patriae* authority to protect children in matters of divorce. In a custody dispute between two parents with conflicting custody orders from two state courts, the Court commented that “the question of custody, so vital to a child’s happiness and well-being, frequently cannot be left to the discretion of parents. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice.”¹³

In 1972 in *Stanley v. Illinois*, a case involving an unwed father seeking custody of his children, Justice White’s words in eliminating the presumption that children of unwed parents were placed in state custody rather than with their fathers struck a chord that continues to reverberate throughout family law:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly

important government objectives, and must be substantially related to achievement of those objections to pass constitutional scrutiny); *Stanton v. Stanton*, 421 U.S. 7 (1975); *Orr v. Orr*, 440 U.S. 268 (1979) (holding that any statutory scheme that imposes obligations on husbands, but not on wives, establishes a classification based upon sex which is subject to scrutiny under the Fourteenth Amendment; the same must be true of a legal presumption that imposes evidentiary burdens on fathers, but not on mothers); *Craig v. Boren*, 429 U.S. 190 (1976) (invalidating a gender-based distinction in an Oklahoma statute regarding the age at which persons could purchase liquor).

¹⁰ *Frontiero v. Richardson*, 411 U.S. 677, 680 (1973).

¹¹ *Albright v. Albright*, 437 So.2d 1003 (Miss. 1983).

¹² *Mormon Church v. United States*, 136 U.S. 1, 57 (1890).

¹³ *Ford v. Ford*, 371 U.S. 187, 193 (1962).

risks running roughshod over the important interests of both parent and child. It therefore cannot stand.¹⁴

During the 1980s, the privileges that had traditionally been afforded to married parents and children of married parents were extended to unmarried fathers¹⁵ and children of unmarried parents.¹⁶ As individualized determinations replaced presumptions, the volume of people needing the assistance of the family court increased exponentially. The *best interests of the child* concept was not new, but the demand for individualized determinations based upon factors rather than gender or status-based presumptions represented a groundbreaking paradigm shift in child custody law.¹⁷ Rather than grounding custody decisions on gender- or status-based presumptions, judges and courts were charged with making individualized determinations without presumptions or a clear default position.¹⁸ From a constitutional perspective, there is no constitutional right to equal participation in the raising of one's children.¹⁹

The strengths of the *individualized best interests standard* lie in its "child-centered focus, its flexibility, its minimal a priori bias relative to the parties,"²⁰ and its ability to respond to changing social mores, values, and situations in a diverse society.²¹ The best interests standard enables parents to be considered on the merits of their parenting and the strength of their parent-child relationship rather than on their gender, any economic advantage held by one party over the other, or on the parties' sexual orientation or preference.²² A best interests determination requires careful consideration of each individual child's develop-

¹⁴ Stanley v. Illinois, 405 U.S. 645, 656-57 (1972).

¹⁵ *Id.*

¹⁶ Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) (cited in *Gomez v. Perez*, 409 U.S. 535 (1973)).

¹⁷ Elrod & Dale, *supra* note 2, at 392.

¹⁸ *Id.*

¹⁹ Arnold v. Arnold, 679 N.W.2d 296 (Wis. Ct. App. 2004).

²⁰ Melissa M. Wyer et al., *The Legal Context for Child Custody Evaluations*, in *PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS: KNOWLEDGE, ROLES, AND EXPERTISE* 3 (Lois A. Weithorn, ed., 1987).

²¹ Joan B. Kelly, *The Best Interests of the Child: A Concept in Search of Meaning*, 35(4) *FAM. & CONCILIATION CTS. REV.* 377 (1997). See also Elrod & Dale, *supra* note 2.

²² Kelly, *supra* note 21, at 385.

mental and psychological needs rather than presumptively focusing on parental demands, social stereotypes, and cultural traditions.²³ The individualized best interests standard represents the willingness of the law to consider children on a case-by-case basis rather than adjudicating children as a class or homogeneous grouping with identical needs and situations.²⁴

The best interest of the child standard as an individualized determination is the dominant social policy in child custody matters in almost every jurisdiction around the world.²⁵ Despite this clear consensus, or perhaps because of the complex nature of this individualized task and difficulties in implementing it, efforts to create presumptions are commonplace.

The *individualized best interests of the child* standard is a tiebreaker concept. The best interests of the child does not refer to one person, but to a legal standard.²⁶ “Custody and visitation disputes between two fit parents involve one parent’s fundamental right [to parent] pitted against the other parent’s fundamental right [to parent]. The discretion afforded trial courts under the best-interests test . . . reflects a finely balanced judicial response to this parental deadlock.”²⁷

The individualized best interests of the child standard is an open-textured concept. Robert Mnookin noted that it is a unique concept that provides a purpose or objective while leaving the decision-maker the task of figuring out how to achieve that objective when other principles might point in other directions.²⁸ Thinking of the best interests principle in terms of tasks and objectives can be helpful when attempting to operationalize the task and meet the objectives.

The best interest of the child psycholegal task requires an assessment of multiple persons (e.g., the parties, the child[ren]),

²³ *Id.*

²⁴ *Id.*

²⁵ See Shelby R. Arenson & Lisa G. Grumet, *Charts 2020: Family Law in the Fifty States, D.C., and Puerto Rico, Part I*, 54(4) FAM. L.Q. 341 (2020); See also UN General Assembly, Convention on the Rights of the Child, 20 November, United Nations, Treaty Series, vol 1577, at 3.

²⁶ Julia H. McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113 (2009).

²⁷ Griffin v. Griffin, 581 S.E.2d 899, 902 (Va. Ct. App. 2003).

²⁸ Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 231 (1975).

and other significant adults in the home involving individual and comparative analyses of required and relevant factors (identified by statute, case law, relevant social science research, and context) to develop a parenting plan that meets three objectives: (1) provides for the present and future health, welfare, and developmental needs of the child or children; (2) reasonably balances the constitutional and statutory rights of the parents, interested parties, and the child; and (3) provides an enforceable allocation of parental responsibilities to and for the child via a parenting plan.²⁹

Under the best interests standard, child custody determinations become predictions of the future rather than act-oriented investigations of the past.³⁰ Past acts and facts become relevant only insofar as they enable the court to decide what is likely to happen in the future.³¹ When combined with Due Process and Equal Protection principles, the *best interests* concept enables both parents to be considered on the merits of their parenting and the strength of their parent-child relationship.³²

B. Criticisms of the Best Interests Standard

Despite the *best interests* standard being widely embraced, it is also widely criticized.³³ The *best interests* standard is frequently blamed for parental conflict under the theory that the standard is a “vague rule” that causes litigation because the outcome of a court hearing is difficult to predict.³⁴ Critics also opine that it places too much emphasis on judicial discretion.³⁵ And

²⁹ Milfred D. Dale, Jonathan Gould, & Alyssa Levine, *Cross-examining Experts in Child Custody: The Necessary Theories and Models . . . with Instructions*, 33 J. AM. ACAD. MATRIM. LAW. 327, 344 (2021).

³⁰ Mnookin, *supra* note 28.

³¹ *Id.*

³² Kelly, *supra* note 21.

³³ Carl N. Schneider, *Discretion, Rules and Law: Child Custody and the UMCA's Best Interest Standard*, 89 MICH. L. REV. 2215, 2218-19 (1991).

³⁴ See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2002); Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 OHIO STATE L.J. 615 (2004); see also Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U.CHI. L. REV. 1, 23-24 (1987).

³⁵ Robert E. Emery, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6(1) PSYCHOL. SCI. IN PUB. INTEREST 1

finally, there are those that point out there are too many factors that might be considered relevant,³⁶ the factors are not weighted or ranked relative to each other,³⁷ and that the indeterminate nature of the standard invites unpredictability. The best interests has been called

a prime example of the futility of attempting to achieve perfect, individualized justice by reposing discretion in a judge,” then asking the judge to do what is almost impossible: evaluate the child-caring capacities of a mother and a father at a time when family relations are apt to be most distorted by the stress of separation and the divorce process itself.³⁸

C. *Presumptions: Curtailing Discretion or Tying the Hands of the Court as Conflict Manager*

Presumptions or, in most cases, the lack of presumptions, can play a pivotal role in the outcome of negotiations and litigation.³⁹ Efforts to establish 50/50 shared parenting time presumptions in child custody determinations directly challenge the individualized best interests standard and its emphasis on children with notions of “equality” based on parental status. Equality has contributed to increases in culturally- and structurally-diverse family forms.⁴⁰ Evolving changes in America’s pluralistic society have resulted in additional family forms that do not completely replace previous ones, but rather add to the choices. In

(2005); Robert E. Emery, *Rule or Rorschach? Approximating Children’s Best Interests*, 1(2) *CHILD DEV. PERSP.* 132 (2007); *See also* Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 *TUL. L. REV.* 1165, 1170 (1986)(noting, “The ‘best interests’ standard is a prime example of the futility of attempting to achieve perfect, individualized justice by reposing discretion in a judge.”).

³⁶ Daniel W. Shuman, *The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment*, 36 *FAM. L.Q.* 135 (2002).

³⁷ Robert F. Cochran, Jr., *The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker and Joint Custody Preferences*, 20 *U. RICH. L. REV.* 1, 13-16, 18 (1985); Emery, *Critical Assessment*, *supra* note 35, at 10.

³⁸ Glendon, *supra* note 35, at 1181.

³⁹ Elrod & Dale, *supra* note 2, at 390.

⁴⁰ *Obergefell v. Hodges*, 576 U.S. 644 (2015) (extending the right to marry to same-sex couples).

today’s modern societies, traditional family forms coexist with newer ones.

In negotiations, presumptions have an impact as part of the “shadow of the law”⁴¹ regarding what might happen in court. Once in court, legislatively-derived presumptions are often attempts to reign in judicial discretion⁴² via creation of “secondary facts” that judges are required to use in lieu of actual evidence.⁴³ “The presumption must be applied whether or not the underlying assumptions are ‘true,’ supported by scientific evidence, or consistent with the child’s needs.”⁴⁴ For example, because of concerns about the impact of domestic violence on children and families, nearly all fifty states consider domestic violence as a factor in child custody disputes and more than twenty states have presumptions that those guilty of domestic violence shall not be awarded custody of a child.⁴⁵ Proponents of presumptions argue that presumptions reduce demands on the court, decrease the time required to resolve cases, and reduce conflict by creating common expectations of the likely outcome of the cases.⁴⁶

Lyn Greenberg, Diana Gould-Saltman and the Honorable Robert Schneider argue that presumptions complicate the process for the judge.

Tying the hands of decision-makers merely creates another poor model for decision-making, as it results from generalizations about classes of people, parenting patterns, and events, without considering the individual circumstances of children and families. While presumptions may create improved results for some children who have been the subject of poor or uninformed judicial decisions, they also tie the

⁴¹ Mnookin, *supra* note 28.

⁴² John J. Sampson, *Bringing the Courts to Heel: Substituting Legislative Policy for Judicial Discretion*, 33 FAM. L.Q. 565 (1999).

⁴³ Lyn R. Greenberg, Dianna J. Gould-Saltman, & Robert Schneider, *The Problem with Presumptions – A Review and Commentary*, 2006 J. CHILD CUST. 141, 144.

⁴⁴ Greenberg et al., *supra* note 43, at 144.

⁴⁵ Shelby R. Arenson & Lisa G. Grumet, *Charts 2020: Family Law in the Fifty States, D.C., and Puerto Rico, Part 1*, 54(4) FAM. L.Q. 341 (2020). See also Zoe Garvin, *The Unintended Consequences of Rebuttable Presumptions to Determine Child Custody in Domestic Violence Cases*, 50(1) FAM. L.Q. 173 (2015).

⁴⁶ Katherine T. Bartlett, *Preference, Presumptions, and Common Sense: From Traditional Custody Doctrines to the American Law Institute’s Family Dissolution Project*, 36(1) FAM. L.Q. 1 (2002).

hands of the increasing number of trained and concerned judicial officers making decisions about children and families.⁴⁷

Efforts at curtailing judicial discretion through legislative presumptions often fail to acknowledge the evolving role of the court from “fault finder” to “conflict manager” to “differential case manager.”⁴⁸ This evolution is intimately tied to increases in joint legal decision-making and the proliferation of parenting plans that involve shared parenting. The procedural role of judges as “conflict managers” involves facilitating development of a “settlement culture” that attempts to get parents to voluntarily agree on a parenting plan rather than imposing one on them.⁴⁹ The advantages of the settlement culture that emphasizes parental agreement, within which mediation is the dominant approach, are well documented.⁵⁰ Indeed, most parents find ways of managing the dissolution of their relationship and appropriately raising their children without having to litigate.

The settlement culture is also paired with interventions that have developed for parents and families where parents cannot agree or cooperate. For these families, judicial decision making and court orders become a beginning rather than an end of the court’s function. There is a continuum of low to high conflict cases where parents cannot consistently cooperate, that attorneys fail to negotiate, that mediators fail to settle, and that counselors and therapists fail to help.⁵¹ These cases are often referred by courts to progressively more intrusive and coercive interventions that wed mental health and psycholegal interventions – such as court-ordered therapeutic processes, custody evaluations, ongoing co-parent counseling, arbitration, parent coordination, spe-

⁴⁷ Greenberg et al., *supra* note 43, at 150.

⁴⁸ Andrew Shepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395 (2000).

⁴⁹ *Id.*

⁵⁰ Robert E. Emery, David Sbarra & Tara Grover, *Divorce Mediation: Research and Reflections*, 43(1) FAM. CT REV. 22 (2005).

⁵¹ Janet R. Johnston, *Building Multidisciplinary Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families and Their Children: Who Needs What Kind of Help?* 22 U. ARK. LITTLE ROCK L. REV. 453 (2000).

cial masters, and various kinds of supervised access and visitation programs – to the social control mechanisms of the court.⁵²

For cases that do not settle, “discretion” by a family law judge is a necessity, not a bad idea or a “dirty word.” Best interests of the child determinations involve a fact-intensive inquiry seeking an individualized answer.⁵³ Black’s Law Dictionary defines “discretion” in the following way:

A liberty or privilege allowed to a judge, within the confines of right and justice, but independent of narrow and unbending rules of positive law, to decide and act in accordance with what is fair, equitable, and wholesome, as determined upon the peculiar circumstances of the case, and as discerned by his personal wisdom and experience, guided by the spirit, principles, and analogies of the law.⁵⁴

Individualized best interests decisions are often criticized because of the enormous discretion vested in judges to solve the problems of the cases that come to court. Critics have often claimed that it is easy for judges to base custody decisions on their personal biases, morals, and values.⁵⁵ Yet often the cases that require resolution by trial judges are the ones least likely to be successful candidates for joint custody.⁵⁶ Indeed, one psychologist, writing against shared custody presumptions, noted many of the things that usually transpire prior to judicial decision-making:

Entering a courthouse to ask a judge to decide a parenting plan for children communicates an inability for one or both parents to work together in the best interests of children. . . . [B]y the time most parents face a judge, one can safely assume that they have had access to many friends, family members, counselors, lawyers, parent education programs, or mediators who have told them to work out their differences. Countless people would have told them that, while they are separating as intimate partners, they will be parents forever. Many people have told them that conflict hurts children. By this stage of appearing

⁵² *Id.*

⁵³ Dale et al., *supra* note 29, at 348.

⁵⁴ BLACK’S LAW DICTIONARY FREE ONLINE LEGAL DICTIONARY (2d ed.), <https://thelawdictionary.org/discretion/> (last visited Mar. 28, 2022).

⁵⁵ Mnookin, *supra* note 28.

⁵⁶ Nancy Ver Steegh & Dianna Gould-Saltman, *Joint Legal Custody Presumptions: A Troubling Legal Shortcut*, 52 FAM. CT. REV. 263 (2014). See also Dana Harrington Connor, *Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence*, 18 DUKE J. GENDER L. & POL’Y 223, 228 (2011).

in court, the average parent should be starting to appreciate the emotional and financial costs of litigation.⁵⁷

D. *Shared Parenting & Equal Parenting Time Under the Individualized Best Interests of the Child Standard*

Several mutually reinforcing cultural and social trends have contributed to the increasing popularity of joint custody and shared parenting time plans, including involved fathers.⁵⁸ Cultural shifts have included, among other things, a greater acceptance for the importance of fathers and the role of fatherhood, a growing appreciation that children generally benefit from ongoing meaningful relationships with both parents after separation, and a marked increase in women's participation in the labor force.⁵⁹ In response to these changes, states have increasingly developed laws first allowing and with increasing frequency encouraging joint custody and shared parenting.

Because of these developments, a presumption is not the only way a family may enter into a shared parenting or equal parenting time arrangement. Children's living arrangements following parental divorce or separation in the past two decades have included a dramatic increase in shared parenting time between mothers and fathers and a small but significant increase in father's sole residential living arrangements.⁶⁰ The trend has been for greater father involvement and quality of parenting in fathers.⁶¹

⁵⁷ Peter Jaffe, *A Presumption Against Shared Parenting for Family Court Litigants*, 52 *FAM. CT. REV.* 187 (2014).

⁵⁸ Bruce Smyth, Richard Chisholm, Bryan Rodgers & Vu Son, *Legislating for Shared-Time Parenting After Parental Separation: Insights from Australia*, 77 *LAW & CONTEMP. PROBS.* 109, 111 (2014).

⁵⁹ *Id.*

⁶⁰ Maria Cancian et al., *Who Gets Custody Now? Dramatic Changes in Children's Living Arrangements After Divorce*, 51 *DEMOGRAPHY* 1381 (2014); Bruce Smyth et al., *Shared-Time Parenting: Evaluating the Evidence of Risks & Benefits to Children*, in *PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY* 118 (Leslie Drozd, Michael Saini & Nancy Olesen, eds. 2nd 2016).

⁶¹ Jay Fagan, et al., *Should Researchers Conceptualize Differently the Dimensions of Parenting for Fathers and Mothers?* 6 *J. FAM. THEORY & REV.* 390 (2014).

Even when applying the individualized approach, most child custody experts believe shared or equal parenting time approaches have their place and should be considered under the right circumstances. In 2013, I participated with more than thirty other child custody experts in a national Think Tank About Shared Parenting sponsored by the Association of Family and Conciliation Courts (AFCC). This group spent three days extensively reviewing the scientific literature, the social policy debates, and the needs of children and families in relation to shared parenting. It issued two papers about shared parenting. Please note, the term "shared parenting" in the professional literature references parenting plans where the nonresidential parent has the child at least 35% of the time. In summarizing the literature on shared parenting time, this think tank provided five conclusions:

1. The most effective decision making about parenting time after separation is inescapably case specific;
2. Statutory presumptions prescribing specific allocations of shared parenting time are unsupportable because no prescription will fit all, or even the majority of, families' particular circumstances;
3. Social science research strongly supports shared parenting (i.e., frequent, continuing, and meaningful contact) when both parents agree to it. There is also empirical support for shared parenting under broader conditions for children of school age or older;
4. There is no "one-size-fits-all" shared parenting time even for the most vulnerable of families; and,
5. A majority of the Think Tank participants supported a presumption of joint decision making, while a substantial minority espoused a case-by-case approach.⁶²

In deciding individual cases, a number of relational and structural conditions make shared parenting a more viable option.

These conditions include: geographical proximity; the ability of parents to get along and, at minimum, to maintain a "business-like" working relationship as parents with children being kept "out of the middle"; child-focused arrangements, with children's activities forming an integral part of the way in which the parenting schedule is developed; a commitment by everyone to make shared care work; family-

⁶² Marsha Kline Pruett & Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice, and Shared Parenting*, 52(2) FAM. CT. REV. 152 (2014); Volume 52, issue 2 of the 2014 *Family Court Review* is devoted to the debate about the drawbacks, effects, and impacts of shared parenting.

friendly work practices; a degree of financial independence, especially for mothers; and a degree of paternal competence.⁶³

In creating an equal or shared parenting time schedule, courts must also deal with a number of practical issues. There are a number of other important considerations for which there is little to no research data, such as: (1) whether more transitions adversely affect children (e.g., alternating homes every day, every few days, or every week); (2) whether joint physical custody is more beneficial, harmful, or desirable to children of different ages; (3) whether longer separations from each parent harm younger children (e.g., babies may benefit from more transitions and shorter separations from either parent, while school-age children benefit from fewer transitions and longer separations); and (4) whether flexible, evolving parenting plans work better for both children and parents.⁶⁴

In 2007, the Iowa Supreme Court surveyed the research and scholarship on the benefits and risks of joint physical custody before coming to the same conclusion at the AFCC Task Force:

The current social science research cited by advocates of joint custody or joint physical care, . . . is not definitive on many key questions. . . . While it seems clear that children often benefit from a continuing relationship with both parents after divorce, the research has not established the amount of contact necessary to maintain a “close relationship.”⁶⁵

In an analysis of the state of the scientific research, the Iowa Supreme Court noted “substantial questions of definitions and methodology,” conflicting inconclusive and mixed empirical studies, and the lack of a firm basis for a dramatic shift that would endorse joint physical care as the norm in child custody cases.”⁶⁶ The court concluded that physical care issues are not to be resolved based upon perceived fairness to the spouses, but primarily upon what is best for the child.”⁶⁷

⁶³ Stephen Gilmore, *Contact/Shared Residence and Child Well-Being: Research Evidence and Its Implications for Legal Decision-Making*, 20(3) INT'L J. LAW, POL'Y, & FAM. 344, 358 (2006).

⁶⁴ Robert E. Emery, *Psychological Perspectives on Joint Physical Custody*, in SHARED PHYSICAL CUSTODY 1297 (Laura Bernardi & Dimitri Mortelmans, eds. 2021).

⁶⁵ *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007).

⁶⁶ *Id.* at 694.

⁶⁷ *Id.* at 695.

II: Science in the *Best Interests* – Equal Parenting Time Debate: Methodology Matters

A. Methodology Matters in Family Law Debates

Social science research has gradually become intricately involved in debates about what is in the best interests of children.⁶⁸ Courts and legislatures often pay close attention and attempt to weave empirical results into reforms and updated policies.⁶⁹

As science has achieved a more authoritative status, influencing how society thinks about and tries to solve some of its thorniest social dilemmas, the social scientists’ voice in policy debates has been given increasing weight as producers and explainers of the evidence. Advocates on both sides of an issue value researchers as potential allies, who are perceived to provide them with more objective evidence in support of their cause.⁷⁰

Both those attempting to create equal time presumptions and those opposed have tried to recruit science in support of their causes. As the complexity and volume of the joint custody/shared parenting literature have grown, both legal and mental health practitioners seeking to remain “research literate” have been increasingly reliant upon research reviews by “synthesizers” and “translators.” Choices about how to synthesize and translate the research have become increasingly important.

Scientists know that methodology matters – and in many instances, it matters most. In individual cases, the U.S. Supreme Court requires courts to make an assessment of whether the underlying reasoning or methodology of an expert’s testimony is

⁶⁸ See Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942) (noting courts balance “legislative facts” from law and policy with “adjudicative” facts from individual cases). See also Peggy C. Davis, “*There Is a Book Out . . .*”: *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1549 (1986-1987) (citing studies showing that “[p]arties unable to effectively litigate the merits of [psychological parent] theory were considerably disadvantaged.”).

⁶⁹ Sanford I. Braver & Jeffrey T. Cookston, *Controversies, Clarifications, & the Consequences of Divorce’s Legacy: Introduction to the Special Collection*, 52 FAM. REL. 314 (2003).

⁷⁰ Irwin Sandler, et al., *Convenient and Inconvenient Truths in Family Law: Preventing Scholar Advocacy Bias in the Use of Social Science Research for Public Policy*, 54(2) FAM. CT. REV. 150, 151 (2016).

based upon a reliable foundation, is scientifically valid, and has been properly applied to the facts at issue. The same requirement can be said about those attempting to synthesize or translate research findings. The meaning of research evidence is inherently tied to the means of methods used to create it. Understanding and interpreting the meaning of empirical research requires an understanding of the concepts and techniques on which the evidence is based.⁷¹

Children and parents deserve the best possible research on important topics like custody and parenting.⁷² The better the data, the greater are the chances of arriving at effective policies and decision-making.⁷³ “[I]naccurate or misleading use of research may introduce distortions into decision making or public policy that lead to unfortunate outcomes for children and families.”⁷⁴ This section reviews the development and evolution of scientific methodologies that must be understood to properly evaluate claims made for and against either best interests or shared parenting.

B. *Crucial Dimensions of Research Reviews: Qualitative vs. Quantitative*

Reviews that synthesize or translate research can be conceptualized along a continuum from qualitative to quantitative with some approaches combining these characteristics.⁷⁵ Narrative reviews are considered qualitative and allow considerable room for

⁷¹ Joseph E. McGrath, *Methodology Matters: Doing Research in the Behavioral and Social Sciences*, in *HUMAN-COMPUTER INTERACTION: TOWARD THE YEAR 2000* 152 (Ronald M. Baecker, Jonathan Grudin, William A.S. Buxton, & Saul Greenberg, eds., 2d ed. 1995).

⁷² George W. Holden, et al., *Researchers Deserve a Better Critique: Response to Larzelere, Gunnoe, Roberts, and Ferguson (2017)*, 53(5) *MARRIAGE & FAM. REV.* 465 (2017). Although this group was addressing a commentary on parental discipline research, the principle very much applies to the equally important topic of the custody and parenting of children following divorce or parental separation.

⁷³ Bruce M. Smyth, *Special Issue on Shared-Time Parenting After Separation*, 55(4) *FAM. CT. REV.* 494 (2017).

⁷⁴ Ass’n Fam. Conciliation Cts. (AFCC) Task Force on the Guidelines for Use of Social Science Research in Family Law, *Guidelines for Use of Social Science Research in Family Law*, 57(2) *FAM. CT. REV.* 193, 194 (2019).

⁷⁵ NOEL A. CARD, *APPLIED META-ANALYSIS FOR SOCIAL SCIENCE RESEARCH* 6-7 (2012).

subjectivity in synthesis, methodology, and research conclusions.⁷⁶ These qualitative reviews are prone to subjectivity.⁷⁷ Slightly more quantitative are vote counting methods which involve counting research studies in terms of significant positive, significant negative, and nonsignificant effects, and then drawing conclusions based on the number of studies finding a particular result.⁷⁸ On the quantitative end of the continuum are meta-analytic techniques that synthesize empirical research results by calculating and examining effects sizes and confidence intervals.

C. *Impact of Research Design on Data Interpretation, Particularly Causal Inferences*

Unfortunately, family-law-related social science research does not lend itself to classic experimental research design and this fact significantly impacts the interpretations and research conclusions that can be generated.⁷⁹ There are ethical, political, and practical reasons that make it impossible to blindly and randomly assign children to different parenting plans so the effectiveness of various custody and parenting time schedules can be studied.⁸⁰ Therefore, researchers in this area must employ quasi-experimental designs and more cautiously interpret their research findings.

The most commonly used quasi-experimental methodology in the research on joint custody is the cross-sectional or static group design where data is gathered from the sample groups at a single point in time.⁸¹ These quasi-experimental groups have had to allow for self-selection, particularly when it comes to children in joint physical custody. "[D]uring the historical period when many of the JPC [joint physical custody] studies were conducted,

⁷⁶ *Id.* at 7.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Sarah H. Ramsey & Robert F. Kelly, *Assessing Social Science Studies: Eleven Tips for Judges and Lawyers*, 40 FAM. L.Q. 367, 371 (2006).

⁸⁰ *Id.* at 370-71.

⁸¹ See DONALD T. CAMPBELL & JULIAN STANLEY, *EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH* (1963).

families were granted JPC only if both parents (more or less) freely declared that this was the arrangement they preferred.”⁸²

The results of group comparisons where the research subjects self-select into an experimental group — for example comparisons of the adjustment of children in joint custody versus the adjustment of children in sole custody — are limited by this methodology. Because the researcher is unable to control these selections, there are limits to the external validity or generalizability of results to questions about any causal effects of custody or parenting time that show differences between the two self-selected groups that were compared.⁸³ The effects observed in the study may be the result of differences between the two groups rather than occurring as a result of the different custody arrangements. To fully overcome barriers to drawing causal conclusions, randomized experimental methods are required.⁸⁴

1. *Correlation Does Not Prove Causality*

The most significant limitation to cross-sectional or static group quasi-experimental research designs is that it generates correlational data, not proof of cause-and-effect relationships. Correlations do not prove causation.⁸⁵ Because it is not known which variable came first or whether there are alternative explanations for the fact the variables co-vary, a correlation may not be causal at all. The correlation may also be due to a third confounding variable.⁸⁶

With respect to finding if a causal relationship exists, the nineteenth century philosopher John Stuart Mill claimed that a causal relationships can be said to exist if

- (1) the cause preceded the effect, (2) the cause was related to the effect, and (3) we can find no plausible alternative explanation for the effect other than the cause. These three characteristics mirror what

⁸² Sanford L. Braver & Ashley Votruba, *Does Joint Physical Custody “Cause” Children’s Better Outcomes?* 59(5) *J. DIVORCE & REMARRIAGE* 452, 454 (2018).

⁸³ See CAMPBELL & STANLEY, *supra* note 81.

⁸⁴ See THOMAS D. COOK & DONALD T. CAMPBELL, *QUASI-EXPERIMENTATION: DESIGN AND ANALYSIS FOR FIELD SETTINGS* (1979).

⁸⁵ WILLIAM R. SHADISH, THOMAS D. COOK, & DONALD T. CAMPBELL, *EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR GENERALIZED CAUSAL INFERENCE* 7 (2002).

⁸⁶ *Id.*

happens in experiments in which (1) we manipulate the presumed cause and observe an outcome afterward; (2) we see whether variation in the cause is related to variation in the effect; and (3) we use various methods during the experiment to reduce the plausibility of other explanations for the effect along with ancillary methods to explore the plausibility of those we cannot rule out.⁸⁷

2. *Shortcomings of Null Hypothesis Statistical Significance Testing (NHST)*

Researchers and lay persons commonly believe that significance or insignificance are more informative than they are.⁸⁸ "Statistical significance estimates the probability of sample results deviating as much or more than do the actual sample results from those specified by the null hypothesis, given the sample size."⁸⁹ Statistical significance does not evaluate whether results are important because statistical significance tests only evaluate ordinal relationships (e.g., whether two group standard deviations are different or one is larger than the other) and because statistical significance tests are so heavily influenced by sample sizes.⁹⁰ Statistical significance should not be invoked as the sole criterion for evaluating the trustworthiness of research.⁹¹

Conclusions based solely on statistical significance are unsatisfying.⁹² This is because NHST does not provide the information which the researcher wants to obtain, is prone to logical problems derived from the probabilistic nature of NHST, and does not allow psychological theories to be tested.⁹³ Even when a null hypothesis is rejected objectively, it is still necessary to exclude another series of alternative, competing hypotheses prior to verifying the validity of the research hypothesis. Thus, the in-

⁸⁷ Cf. SHADISH, ET AL., *supra* note 85, at 6.

⁸⁸ Gene V. Glass, *Integrating Findings: The Meta-Analysis of Research*, 5 REV. RES. EDUC. 351, 359 (1977).

⁸⁹ Jacob Cohen, *The Earth Is Round* ($p < .05$), 49(12) AM. PSYCHOL. 997, 999 (1994).

⁹⁰ Bruce Thompson, "Statistical," "Practical," and "Clinical": How Many Kinds of Significance Do Counselors Need to Consider? 80 J. COUNSELING & DEVELOPMENT 64, 65 (2002).

⁹¹ *Id.* at 66.

⁹² CARD, *supra* note 75, at 7.

⁹³ Nekane Balluerka, Juana Gomez, & Dolores Hidalgo, *The Controversy over Null Hypothesis Significance Testing Revisited*, 1(2) METHODOLOGY 55 (2005).

creased truthfulness of this hypothesis can only come from a solid theoretical base, an appropriate research design, and multiple replications of the study under different conditions.”⁹⁴

In addition, statements about statistical significance can be misleading. Statistical significance does not evaluate whether results are important because these tests only evaluate ordinal relationships (e.g., whether two group standard deviations are different or one is larger than the other) and because statistical significance tests are so heavily influenced by sample sizes.⁹⁵ “What we want to know is the size of the difference between A and B and the error associated with our estimate, knowing A is greater than B is not enough.”⁹⁶ Null hypothesis significance testing is concerned with whether a research result is due to chance or sampling variability; practical significance is concerned with whether the result is useful in the real world.⁹⁷ What a statistical significance result means is that the effect is not nil, and nothing more.⁹⁸

It is necessary “to clarify the distinction between statistical and practical significance.”⁹⁹ About significance testing, Jacob Cohen once remarked, “What’s wrong with NHST? Well, among many other things, it does not tell us what we want to know, and we so much want to know what we want to know that, out of desperation, we nevertheless believe that it does!”¹⁰⁰ Clinical or practical significance refers to the practical or applied value or importance of the effect of the research finding and whether it makes a genuine, palpable, or noticeable difference.¹⁰¹ Differences that have clinical or practical significance should be used to guide the social policies related to custody and parenting time.

⁹⁴ *Id.* at 58.

⁹⁵ Thompson, *supra* note 90, at 65.

⁹⁶ Roger E. Kirk, *Practical Significance: A Concept Whose Time Has Come*, 56(5) EDUC. & PSYCHOL. MEASUREMENT 746, 750 (1996).

⁹⁷ *Id.*

⁹⁸ Jacob Cohen, *Things I Have Learned (So Far)*, 45 AM. PSYCHOL. 1304, 1307 (1990).

⁹⁹ Thompson, *supra* note 90, at 65.

¹⁰⁰ Cohen, *supra* note 89 at 1307.

¹⁰¹ Kirk, *supra* note 96.

3. Shortcomings of the Box Score or Vote Counting Review

In the late 1970s and early 1980s, reviews of research relied on counts of the number of times the mean of one group exceeded the mean of another group by an amount that is statistically significant.¹⁰² "In the vote-counting method, the available studies are sorted into three categories: those that yield positive significant results, those that yield negative significant results, and those that yield nonsignificant results."¹⁰³ The number of studies in each category are simply tallied with the category receiving the most votes being declared the winner and offered as the best estimate of the true relationship between the independent and dependent variables.¹⁰⁴

The usual method of vote counting does not enable the integrator to determine whether a favored group "wins by a nose or a walk away."¹⁰⁵ The choice of a modal category as the winner can result in very low power if effects or sample sizes or both are small.¹⁰⁶ Because they are ultimately based on significance testing, vote counting or box score reviews have the same limitations; that is, these reviews tell how often one approach is better or worse than another, but they do not say how much better or worse. Vote counting is limited to answering the simple question "is there any evidence of an effect?"

Two additional problems can occur with vote counting, which suggest that it should be avoided whenever possible. First, problems occur if subjective decisions or statistical significance are used to define "positive" and "negative" studies. To undertake vote counting properly, the number of studies showing harm should be compared with the number showing benefit, regardless of the statistical significance or size of their results. Second, vote counting takes no account of the differential weights given to each study. Vote counting might be considered as a last resort in

¹⁰² Larry V. Hedges & Ingram Olkin, *Vote-Counting Methods in Research Synthesis*, 88(2) *PSYCHOL. BULL.* 359 (1980).

¹⁰³ *Id.* at 361.

¹⁰⁴ *Id.* See also Richard J. Light & Paul Smith, *Accumulating Evidence: Procedures for Resolving Contradictions Among Different Research Studies*, 41(4) *HARV. EDUC. REV.* 429 (1971).

¹⁰⁵ Glass, *supra* note 88, at 359.

¹⁰⁶ Hedges & Olkin, *supra* note 102.

situations when standard meta-analytical methods cannot be applied (such as when there is no consistent outcome measure).¹⁰⁷

4. *Superiority of Meta-Analysis: Effect Sizes and Confidence Intervals*

To overcome the shortcomings of narrative and box score reviews, Glass developed the technique of meta-analysis.¹⁰⁸ The term refers to a set of methods for statistically analyzing a large collection of results from individual studies for the purpose of integrating findings. Meta-analytic studies examine effect sizes. “An effect size is a statistic that encodes the critical quantitative information from each relevant study finding. Different types of study findings generally require different effect size statistics.”¹⁰⁹ Effect size statistics are based on the concept of standardization so that the resulting numerical values are consistently interpretable across all of the variables and measures involved in multiple studies.¹¹⁰ An effect size is a quantitative measure of the magnitude of an experimental effect. The larger the effect size, the stronger the relationship between the two variables. Since the late 1990s, the American Psychological Association has emphasized the importance of including effect size calculations in empirical research studies.¹¹¹

Meta-analytic techniques are far less subjective than the methods used in narrative reviews and far more powerful than those used in box score reviews.¹¹² Meta-analyses are viewed as superior to old-fashioned, narrative literature reviews, especially ones based on the box-score (vote counting) method where tal-

¹⁰⁷ Jonathan J. Deeks et al., *Analysing Data and Undertaking Meta-Analyses*, in COCHRANE HANDBOOK FOR SYSTEMATIC REVIEWS OF INTERVENTIONS 276 (Julian Higgins & Sally Green, eds., 2008).

¹⁰⁸ Glass, *supra* note 88, at 359.

¹⁰⁹ MARK W. LIPSEY & DAVID B. WILSON, PRACTICAL META-ANALYSIS 3 (2001).

¹¹⁰ *Id.*

¹¹¹ Leland Wilkinson, *Statistical Methods in Psychology Journals: Guidelines and Explanations*, 54(8) AM. PSYCHOL. 594 (1999).

¹¹² Chen-Lin C. Kulik, James A. Kulik & Peter A. Cohen, *Instructional Technology & College Teaching*, in TEACHING PSYCHOLOGY: A HANDBOOK: READINGS FROM TEACHING OF PSYCHOLOGY 27 (James Hartley & Wilbert J. McKeachie, ed. 1990).

lies of the numbers and directions of null hypothesis rejections over a set of studies determined the conclusion.¹¹³

C. *Evolving Conventions in Effect Size Interpretation*

The conventions for developing effect size (ES) interpretations have evolved. Initially, some researchers classified ESs as small, medium, or large. This approach was first developed by Jacob Cohen in 1962,¹¹⁴ was revised in 1988,¹¹⁵ and revised again in 1992.¹¹⁶ In this simplistic approach, the ESs from standardized means difference calculations are viewed on one scale and point-biserial correlation coefficients were judged on a slightly different scale

Interpretation of Effect Size Magnitude (Cohen, 1992) (1988 in parens)			
	Small	Medium	Large
Standardized Mean Difference	ES ≤ .20	ES = .50	ES ≥ .80
Correlation	r ≤ .10	r = .25 (0.243)	r ≥ .40 (0.371)

A more sophisticated approach suggests the practical significance of an effect size must be placed in context. Cohen has noted that “the size of an effect can only be appraised in the context of the substantive issues involved.”¹¹⁷ This view sees the meaningfulness of an effect as inextricably tied to the particular area, research design, population of interest, and research goal, and it would be inappropriate to wed effect size to some necessa-

¹¹³ REX B. KLINE, *BEYOND SIGNIFICANCE TESTING: STATISTICS REFORM IN THE BEHAVIORAL SCIENCES* 4940 (2d ed., 2013).

¹¹⁴ Jacob Cohen, *The Statistical Power of Abnormal Social-Psychological Research*, 65(3) *J. ABNORMAL & SOC. PSYCHOL.* 145 (1962) (deriving ES benchmarks from a review of results reported in the 1960 volume of the *Journal of Abnormal and Social Psychology*).

¹¹⁵ JACOB COHEN, *STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES* (2d ed., 1988).

¹¹⁶ Jacob Cohen, *A Power Primer*, 112(1) *PSYCHOL. BULL.* 115 (1992).

¹¹⁷ COHEN, *supra* note 115.

rily arbitrary metric of substantive significance.¹¹⁸ Effect size interpretation is optimized when actual comparisons and relationships are used as “benchmarks.”¹¹⁹ Even Cohen has acknowledged that “[t]he terms ‘small,’ ‘medium,’ and ‘large’ are relative, not only to each other, but to the area of behavioral science or even more particularly to the specific content and research method being employed in any given investigation.”¹²⁰

James Hemphill provided another means for placing effect sizes in context. After reviewing two large meta-analyses, one consisting of 78 studies of psychological assessments¹²¹ and another including 302 studies of psychological treatments,¹²² he converted the Cohen *d* statistics to Pearson product-moment correlations before rank ordering the results.¹²³ Hemphill found that the studies in the lower third had effect sizes of less than .20, the middle third had effect sizes of between .20 and .30, and the upper third were above .30.¹²⁴

Hedge’s *g* is another effect size statistic used in meta-analyses.¹²⁵ Hedges *g* allows for a bias corrected standardized mean difference when sample sizes are small and is interpreted similar to Cohen’s *d*, in that small effects are approximately 0.20, medium effects sizes are 0.50, and large effects sizes are greater than 0.80.¹²⁶

¹¹⁸ Ken Kelley & Kristopher J. Preacher, *On Effect Size*, 17(2) *PSYCHOL. METHODS* 137, 145-46 (2012).

¹¹⁹ See Gregory J. Meyer, Stephen E. Finn, Lorraine D. Eyde, Gary G. Kay, Kevin L. Moreland, Robert R. Dies, Elena J. Eisman, Tom W. Kubiszyn & Geoffrey M. Reed, *Psychological Testing and Psychological Assessment*, 56(2) *AM. PSYCHOL.* 128, 134 (2001).

¹²⁰ COHEN, *supra* note 115, at 25.

¹²¹ Gregory Meyer, et al., *supra* note 119 (studies involving medical assessments were removed from this analysis).

¹²² Mark W. Lipsey & David B. Wilson, *The Efficacy of Psychological, Educational, and Behavioral Treatment: Confirmation from Meta-Analysis*, 48 *AM. PSYCHOL.* 1181 (1993).

¹²³ James F. Hemphill, *Interpreting the Magnitudes of Correlation Coefficients*, 58(1) *AM. PSYCHOL.* 78, 79 (2003).

¹²⁴ *Id.* at 79.

¹²⁵ Larry V. Hedges, *Distribution Theory for Glass’s Estimator of Effect Size and Related Estimates*, 6 *J. EDUC. STAT.* 107 (1981).

¹²⁶ Austin McGuire & Yo Jackson, *A Multilevel Meta-analysis on Academic Achievement Among Maltreated Youth*, 21 *CLIN. CHILD & FAM. PSYCHOL. REV.* 450, 454 (2018).

Linda Nielsen has argued that statistically significant but small effect sizes can have practical value for large numbers of a people and should not be discounted. But accepting effect sizes of any magnitude as clinically or practically significant undermines the usefulness of the statistic as more helpful than null hypothesis significance testing.¹²⁷ Nielsen agreed, however, that larger effect sizes indicate which factors are the most closely correlated with one another or which group means are the most different from one another.¹²⁸

And finally, it is not always possible to calculate effect sizes when studies do not include the descriptive statistics necessary to compute the effect size and the effect size's standard error. Typically, the descriptive statistics needed are the means, standard deviations, and sample sizes for standardized mean differences, the correlation and sample size for correlations, or the frequencies in a two by two table for odds ratios.¹²⁹

III. Applying the Rules to the Social Science Research Evidence

A. *Shared Parenting Advocates: Challenging Selection Hypotheses with Causality Arguments*

Father's rights and joint physical custody advocates have struggled in their efforts to persuade the child custody community and lawmakers to embrace legal presumptions for shared parenting or equal parenting time. Here I examine three different efforts, two of which make claims that joint physical custody "causes" positive child adjustment as a way of overcoming explanations that group differences between children in joint physical custody and children in sole physical custody are due to selection effects and the third of which attempts to debunk traditional objections to the use of parental conflict as a determinative varia-

¹²⁷ Christopher Ferguson *An Effect Size Primer: A Guide to Clinicians and Researchers*, 40(5) *PROF. PSYCHOL.: RES. & PRAC.* 532, 538 (2009).

¹²⁸ Linda Nielsen, *Re-examining the Research on Parental Conflict, Coparenting, and Custody Arrangements*, 23(2) *PSYCHOL., PUB. POL'Y & L.* 211, 212 (2017).

¹²⁹ An-Wen Chan et al., *Empirical Evidence for Selective Reporting of Outcomes in Randomized Trials*, 20 *JAMA* 2457 (2004).

ble. Each of these efforts has conceptual challenges and problems.

Any effort to portray the available empirical research as supporting a shared parenting or equal parenting time presumption must deal with the selection hypothesis as the traditional explanation for the group differences found between children of joint physical custody and children of sole physical custody. In cross-sectional or static group research designs that collect data at one point in time, researchers select group criteria based upon hypotheses about the characteristics of each group and how they might differ. If the two groups that naturally occur differ in composition, this selectivity often becomes the most plausible hypothesis to explain any group differences.¹³⁰

Research has often found that the demographic and socioeconomic characteristics of parents of children in joint physical custody differ from those of parents in other post separation arrangements. Parents choosing joint physical custody are more likely to have higher levels of educational attainment, higher incomes, lower levels of conflict, better relationships, and reside closer to one another.¹³¹ The fact that each of these parent characteristics has been linked to positive child adjustment lends support to the hypothesis that the healthier child adjustment of children in joint physical custody is related to their having healthier and wealthier parents.

William Fabricius claims that selection plays a minimal role in the observed benefits because better fathers are often not able to self-select more parenting time and that parenting time plays a larger role in determining child adjustment.¹³² He argues that the effects of divorce on children are largely due to how much the divorce and reduced parenting time with a parent threatens

¹³⁰ See Anja Steinbach & Lara Augustin, *Children's Well-Being in Sole and Joint Physical Custody Families*, 36(2) J. FAM. PSYCHOL. 301 (2022).

¹³¹ Cancian, *supra* note 60; See also Judith Cashmore et al., *Shared Care Parenting Arrangements Since the 2006 Family Law Reforms: Report to the Australian Government Attorney-General's Department* (2010), https://www.arts.unsw.edu.au/sites/default/files/documents/2_AG_Shared_Care.pdf; See also Smyth et al., *supra* note 58.

¹³² William V. Fabricius, *Equal Parenting Time: The Case of a Legal Presumption*, in THE OXFORD HANDBOOK OF CHILDREN AND THE LAW (James G. Dwyer, ed., 2020).

the children's emotional security.¹³³ He posits this fact makes the emotional security of the father-child relationship an important outcome variable "on a par with the more traditional outcome variables such as depression, aggression, and school performance."¹³⁴

Fabricius also claims there is a dose-response pattern to father's parenting time and emotional security in the father-child relationship; that is, more parenting time with the father equates with more emotional security.¹³⁵ He recommends equal parenting time even in cases of high conflict because the emotional security benefits from increased father parenting time outweigh any harm to the child because of the conflicts.¹³⁶ He argues for a legal presumption of equal parenting time based on the idea that divorced fathers need to have enough parenting time to be able to protect children from doubts about how much they matter.¹³⁷

Fabricius also suggests there are several reasons why selection plays a minimal role in the observed benefits and that parenting time plays a causal role. He claims that better fathers are not able to choose to have more parenting time, that the benefits of shared parenting are not due to better and more cooperative parents, and that the child's emotional insecurity comes from the separation from the father and reduced parenting time.

If Fabricius's theory is true, research should find that contact and increases in contact between children and nonresidential parents are positively associated with positive child adjustment, and that the lack of contact or decreases in contact result in nega-

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ William V. 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).

¹³⁶ Fabricius, *supra* note 132, at 10-11 (noting that, "In high conflict families, the little evidence we have suggests that security in relationships with fathers might plateau at 25 percent parenting time, while at 35 percent parenting time children might have more distress about parent conflict and somatic symptoms. Strictly speaking them, in high-conflict families either the 25 percent or equal parenting time might seem best; however, attempting to protect children from insecurity about parent conflict by giving them equal parenting time with their parents is preferable to giving them minimal (25 percent) parenting time with their fathers.").

¹³⁷ *Id.*

tive child adjustment. The research (reviewed later in this article) demonstrates that this is clearly not the case. Specifically, Fabricius's claim is clearly inconsistent with the two meta-analytic reviews showing the lack of a consistent empirical and practically significant association between contact and child adjustment.

A second causality argument from shared parenting advocates asserts that advanced statistical techniques can rule out the self-selection explanation. Sanford Braver and Ashley Votruba claim that (a) employing statistical controls, (b) propensity score analysis, (c) natural experiments, and (d) regression discontinuity or interrupted time series quasi-experiments allow researchers "to probe causality, albeit not prove it."¹³⁸ Ironically, they note an absence of joint physical custody studies using the latter three methods before settling on a claim that ". . . statistical controls, the most ubiquitous approach to dealing with the self-selection confound, have shown rather overwhelmingly that JPC confers substantial benefits to children over and above, or independent of self-selection effects."¹³⁹

This claim is simply scientifically untenable. While statistical analysis of potentially confounding, mediating, or moderating variables adds value to a study, errors or limitations in study design, such as use of cross-sectional or static group comparisons, cannot be compensated for through data analysis.¹⁴⁰

In addition, Sanford Braver and Michael Lamb have claimed that the research supporting joint physical custody is "sufficiently deep and consistent," has reached "a tipping point," and that the benefits of shared parenting can "no longer be doubted."¹⁴¹ After referencing three meta-analyses and a research review, Braver and Lamb proclaimed that, "A consensus has appeared in the literature that around 35% of the child's time is required as a platform on which such high-quality time rests to allow these high-quality interactions and promote the de-

¹³⁸ Braver & Votruba, *supra* note 82, at 455.

¹³⁹ *Id.* at 457.

¹⁴⁰ Christopher J. Pannucci & Edwin G. Wilkins, *Identifying and Avoiding Bias in Research*, 126 (2) *PLASTIC & RECONSTRUCTIVE SURGERY* 619 (2010).

¹⁴¹ Sanford L. Braver & Michael E. Lamb, *Shared Parenting After Parental Separation: The Views of 12 Experts*, 59(5) *J. DIV. & REMARRIAGE* 372 (2018).

velopment and maintenance of meaningful parent-child relationships.”¹⁴²

This article below reviews the very research upon which Braver and his colleagues make their claims (e.g., the meta-analyses by Paul Amato and Joan Gilbreath, Kari Adamsons and Sara Johnson, and Robert Bauserman, as well as the review by Linda Nielsen). Despite the powerful wishes of shared parenting advocates, my position is that there is no “tipping” point and that the research is far from “sufficient and consistent” enough to demonstrate that shared parenting should be presumptively considered as in the best interests of children.

B. *Research on Shared Parenting: Disappointing and Encouraging (But Not Definitive)*

1. *Quality Relationships Matter Most: Time Is Necessary But Not Sufficient*

The debates about parent-child contact, both broadly and in individual cases, frequently focus on the logistics of contact – location, frequency and duration.¹⁴³ Two large meta-analytic reviews of studies of the association between contact and children’s well-being failed to find that time alone was significantly related to child adjustment. Research has shown that it is the quality of the relationships between children and their separated or divorced parents that matters more than the amount of contact or time. It is worth reviewing these two meta-analyses in detail.

a. *Amato and Gilbreath – Meta-Analysis of Nonresidential Father Contact & Relationships*

In 1999, Amato and Gilbreath conducted a meta-analysis of 63 studies examining the relationship between child well-being and frequency of nonresidential father contact, payment of child support, feelings of closeness, and authoritative parenting.¹⁴⁴ “Eighteen of the studies presented data on involvement of a non-resident parent and forms of child well-being without distinguish-

¹⁴² *Id.* at 378.

¹⁴³ Stephanie Holt, *A Case of Laying Down the Law: Post-Separation Child Contact and Domestic Abuse*, 4 IRISH J. FAM. L. 87 (2011).

¹⁴⁴ Paul R. Amato & Joan G. Gilbreath, *Nonresidential Fathers and Children’s Well-Being: A Meta-Analysis*, 61 J. MARRIAGE & FAM. 557 (1999).

ing between nonresident mothers and nonresident fathers. The remaining 45 studies presented data exclusively on nonresident fathers.”¹⁴⁵ The analysis of results focused on the full sample of 63 studies after preliminary analyses found no substantive differences between the groups.¹⁴⁶

Frequency of contact between nonresident fathers and children was not a powerful predictor of child well-being. The data regarding the frequency of contact between nonresident fathers and their children showed frequency of contact was significantly associated with children’s academic success and internalizing problems, but the effect sizes were extremely weak ($d = 0.11$ & $d = 0.03$ for academic success; $d = -0.05$ & $d = -0.02$ for externalizing problems; and $d = -0.16$ & $d = -0.03$ for internalizing problems).¹⁴⁷ Frequency of contact was not significantly associated with externalizing problems. “These results are consistent with the hypothesis that contact between nonresident fathers and children is not a good predictor of child well-being, in general. Nevertheless, a significant degree of variability was present for each child outcome, suggesting that some subset of studies may show stronger associations.”¹⁴⁸

Payment of child support is important. The data showed statistically significant associations between payment of child support with the academic success and freedom from externalizing problems in children, but no significant associations between payment of child support and internalizing problems.¹⁴⁹

Feeling close and having a father who engages in authoritative parenting were found to be important in predicting positive child well-being. Results showed that the strength of the emotional tie between children and fathers and the extent to which the father engaged in authoritative parenting were related to child well-being. Statistically significant but weak positive effect sizes were found between feeling close and children’s academic success, externalizing behavior, and internalizing behavior. If

¹⁴⁵ *Id.* at 561.

¹⁴⁶ *Id.*

¹⁴⁷ The first number is the unweighted effect size and the second number is the weighted effect size (that takes into account other characteristics such as sample size).

¹⁴⁸ *Id.* at 564.

¹⁴⁹ *Id.*

nonresident fathers exhibited behaviors reflecting authoritative parenting, there were statistically significant differences indicating children of these fathers tended to have higher academic achievement, fewer externalizing problems, and fewer internalizing problems.¹⁵⁰ The researchers concluded authoritative parenting is the most robust and consistent predictor of child outcomes of the dimensions of fathering that were studied.¹⁵¹

In discussing the results, Amato and Gilbreath suggested focusing on the father-child relationship in addition to frequency of contact. Their findings showed that fathers contribute resources to their children if fathers are actively engaged in their children's lives and the emotional ties are strong.¹⁵² Regular visitation does not guarantee a high-quality relationship exists between nonresidential fathers and their children. These findings showed that nonresidential fathers who are not highly motivated to act as parents or who lack the skills to be effective parents were unlikely to benefit their children, even under conditions of regular visitation.¹⁵³

b. *Adamsons and Johnson – Updated Meta-Analysis on Contact and Relationships*

In 2013, Adamsons and Johnson noted that a new look at nonresident fathers became necessary due to the numerous changes in policy and family composition that had occurred since the 1999 study. They posited the emergence of a "new era of fatherhood" that expected fathers to be more than financial breadwinners might change conclusions regarding previous findings.¹⁵⁴ They cited research that "levels of nonresident father involvement have increased significantly over the last three decades; they also noted that this might or might not be beneficial for children, depending on context and the quality of the involve-

¹⁵⁰ *Id.* at 565.

¹⁵¹ *Id.*

¹⁵² *Id.* at 568.

¹⁵³ *Id.* at 569 (the effect sizes regarding authoritative parenting were: academic success, $d = 0.17$ & $d = 0.15$; externalizing problems: $d = -0.14$ & $d = -0.11$; internalizing problems: $d = -0.16$ & $d = -0.12$; these reflect unweighted and weighted effect sizes, respectively).

¹⁵⁴ Kari Adamsons & Sara K. Johnson, *An Updated and Expanded Meta-Analysis of Nonresident Fathering and Child Well-Being*, 27(4) J. FAM. PSYCHOL. 589 (2013).

ment.”¹⁵⁵ This meta-analysis reviewed 52 studies and included 164 effect size calculations. It sought to update and expand on the Amato and Gilbreath study and to fill gaps in the understanding of nonresident fathers and their children by examining the associations between overall father involvement and specific types of well-being and between specific types of involvement and overall-well-being.¹⁵⁶

Five types of father involvement and four types of child well-being were examined in a series of univariate meta-analyses. The five types of father involvement were: activities, contact, financial provision, multiple (kinds of involvement combined into a single variable), and relationship quality. The four types of child well-being were: academic, behavioral, psychological, and social.¹⁵⁷

After averaging effects sizes for each study across all forms of child outcome and father involvement type – which preserved independence of these effect sizes, the mean effect size of nonresident father involvement was small but statistically significant from zero and nonresident father involvement was positively associated with child well-being. Four separate univariate analyses by child outcome type showed “[n]onresident father involvement was most strongly associated with child social well-being ($d = 0.15$) and that the effect sizes for the other three outcomes (academic, behavioral, and psychological) were small but also statistically different from zero.”¹⁵⁸ Similarly, five univariate analyses of the mean effect sizes according to father involvement type showed three were positive and significantly different from zero (father involvement in activities: $d = 0.09$; father-child relationship quality: $d = 0.11$; and multiple types of father involvement: $d = 0.11$), while the mean effect sizes for contact ($d = 0.02$) and financial provision ($d = 0.06$) were not.¹⁵⁹

The researchers concluded that their data confirmed and built upon the Amato and Gilbreath findings “that nonresident

¹⁵⁵ *Id.* (citing to Paul R. Amato, C.E. Meyers, & Robert E. Emery, *Changes in Nonresident Father-Child Contact from 1976 to 2002*, 58 *FAM. REL.* 41 (2009)).

¹⁵⁶ *Id.* at 590.

¹⁵⁷ *Id.* at 591.

¹⁵⁸ *Id.* at 593 (Academic, $d = 0.04$; Behavioral, $d = 0.05$; Psychological, $d = 0.03$).

¹⁵⁹ *Id.* at 594.

father involvement can have positive effects on children, but the quality of such involvement matters more than the quantity."¹⁶⁰ Like Amato and Gilbreath, Adamsons and Johnson found that children's well-being was tied more to the quality of the affective climate, the ways the father-child relationship was nurtured, and when the fathers stayed involved in the activities of their children.¹⁶¹

In their conclusion, Adamsons and Johnson noted,

To promote child well-being, policymakers and practitioners should focus on the quality rather than the quantity of fathering, as mere time and dollars spent appear to mean little for children's outcomes. This has important policy implications, because although time and money are the simplest items to legislate, our findings suggest that an exclusive focus on custody/parenting time and child support will be largely ineffective in promoting child well-being.¹⁶²

2. *Conclusions About Contact and Quality of Relationships*

Both quality and quantity of contact between children and both parents matter. But "[t]he idea that a clear linear relationship exists between parenting time and children's outcomes (such that ever-increasing amounts of time necessarily leads to better outcomes for children) appears to lack an empirical basis."¹⁶³ Most practitioners and researchers agree that it is the quality of family relationships that accounts for the positive association between joint physical custody and children's well-being,¹⁶⁴ but this does not mean that the amount of contact and time are not important.

As a matter of common sense, contact between a non-residential parent and the child is a *necessary but not sufficient* condition for a healthy relationship. Simply having possession of the child is neither positive or negative in its own right. Rather, what transpires between the father and the child during that time can influence the child's adjustment. In sum, if the father spends time with his child, he has the

¹⁶⁰ *Id.* at 595.

¹⁶¹ *Id.* at 596.

¹⁶² *Id.* at 598.

¹⁶³ Bruce Smyth, *A 5-Year Retrospective of Post-Separation Shared Care in Australia*, 15 J. FAM. STUD. 36, 41 (2009).

¹⁶⁴ Steinbach & Augustin, *supra* note 130, at 302.

opportunity to contribute a positive (or negative) influence on that child.¹⁶⁵

It is what the parent does with his or her parenting time that matters most. In 1994, a multidisciplinary group of experts, sponsored by the U.S. National Institute of Child Health and Human Development (NICHD) had reached a similar conclusion. This group met to evaluate the empirical evidence regarding the ways in which children are affected by divorce and the impact of various custody arrangements. In 1997, eighteen experts from the NICHD group issued a consensus statement concluding:

Time distribution arrangements that ensure the involvement of both parents in important aspects of their children's everyday lives and routines—including bedtime and waking rituals, transitions to and from school, extracurricular and recreational activities—are likely to keep nonresidential parents playing psychologically important and central roles in the lives of their children. How this is accomplished must be flexibly tailored to the developmental needs, temperament and changing individual circumstances of the children concerned.¹⁶⁶

3. Impact of Parental Conflict on Children and Need for the Court's Protection

Parental conflict is the “enemy” of children and courts often need to play an indispensable leadership role as conflict manager and facilitator of interventions that help and protect children in high conflict families.¹⁶⁷ When the vast majority of custody arrangements are made by cooperating parents outside the family court system, requiring judges to impose custody arrangements that require high amounts of parental cooperation is counterintuitive when these parents have already demonstrated that they lack the ability to effectively cooperate regarding their chil-

¹⁶⁵ Mary F. Whiteside & Betsy J. Becker, *Parental Factors and the Young Child's Postdivorce Adjustment: A Meta-Analysis with Implications for Parenting Arrangements*, 14 J. FAM. PSYCHOL. 5, 20 (2006).

¹⁶⁶ Michael E. Lamb, Kathleen J. Sternberg & Ross A. Thompson, *The Effects of Divorce and Custody Arrangements in Children's Behavior, Development, and Adjustment*, 35 FAM. & CONCILIATION CTS. REV. 393, 400 (1997).

¹⁶⁷ Milfred D. Dale, *Don't Forget the Children: Court Protection from Parental Conflict Is in the Best Interests of Children*, 52(4) FAM. CT. REV. 648 (2014).

dren.¹⁶⁸ A number of alternative dispute resolution mechanisms, such as parenting coordination, have developed to assist in implementation of parenting plans that involve both parents.¹⁶⁹

Interparental conflict is a red flag demanding more individualized decision-making to understand both the conflicts and other related issues. Parents who are unable to accomplish shared decision-making are not strong candidates for joint custody. Research has shown that high levels of interparental conflict following divorce are related to poorer child adjustment,¹⁷⁰ poorer parenting behavior for both mothers and fathers,¹⁷¹ and lower levels of father-child parenting time.¹⁷² The type of conflict, the level of the child's exposure to it, and whether the child is the focus of the conflict affect a child's post-divorce adjustment.¹⁷³ Adjustment problems are more likely when children witness the parental conflict,¹⁷⁴ when the intensity of the conflict

¹⁶⁸ Angela Marie Caulley, *Equal Isn't Always Equitable: Reforming the Use of Joint Custody Presumptions in Judicial Child Custody Determinations*, 27 PUB. INTEREST L.J. 403 (2018).

¹⁶⁹ See Milfred D. Dale, Dolores Bomrad, & Alexander Jones, *Parenting Coordination Law in the U.S. and Canada: A Review of the Sources and Scope of the PC's Authority*, 58(3) FAM. CT. REV. 673 (2020).

¹⁷⁰ Adamsons & Johnson, *supra* note 154; Paul R. Amato & Sandra J. Rezac, *Contact with Nonresident Parents, Interparental Conflict, and Children's Behavior*, 15 J. FAM. ISSUES 191 (1994); Judy Dunn, Thomas G. Connor & Helen Cheng, *Children's Responses to Conflict Between Differerent Parents: Mothers, Stepfathers, Nonresident Fathers, and Nonresident Mothers*, 34 J. CLIN. CHILD & ADOL. PSYCHOL. 223 (2005); Diogo Lamela, et al., *Typologies of Post-Divorce Coparenting and Parental Well-Being, Parenting Quality and Children's Psychological Adjustment*, 47 CHILD PSYCHIATRY & HUM. DEV. 716 (2016).

¹⁷¹ Ambika Krishnakumar & Cheryl Buehler, *Interparental Conflict and Parenting Behaviors: A Meta-Analytic Review*, 49 FAM. REL. 25 (2000).

¹⁷² Irwin N. Sandler, Lorey A. Wheeler & Sanford L. Braver, *Relations of Parenting Quality, Interparental Conflict, and Overnights with Mental Health Problems of Children in Divorcing Families with High Legal Conflict*, 27 J. FAM. PSYCHOL. 915 (2013).

¹⁷³ Sol Rappaport, *Deconstructing the Impact of Divorce on Children*, 47(3) FAM. L.Q. 353 (2013).

¹⁷⁴ See Marsha Kline Pruett et al., *Family and Legal Indicators of Child Adjustment to Divorce Among Families with Young Children*, 17 J. FAM. PSYCHOL. 169 (2003).

is high, and when the conflict focuses on the child.¹⁷⁵ Exposure to high levels of parental conflict can also result in children developing internalizing and externalizing behaviors.¹⁷⁶

In addition, intense and persistent marital conflict undermines parenting, and hostile parenting styles can result in more social, emotional, and behavioral problems in children.¹⁷⁷ Parents who are unable to agree or cooperate with one another are sending up a “red flag” that often signals that more scrutiny, not less, is needed to deal with the additional “disagreement, potential danger, or parenting problems down the road.”¹⁷⁸

In 2017, Linda Nielsen wrote that shared parenting or more equal parenting time should occur even when interparental conflict was high. She argued that the empirical link between child adjustment and the quality of the parent-child relationship is stronger than the link between child adjustment and parental conflict or the quality of the coparenting relationship. She concluded the benefits of in the parent-child relationship outweigh the risks to the child’s adjustment related to conflict.¹⁷⁹

However, while citing to two meta-analytic studies of interparental conflict and child adjustment or problems, Nielsen failed to cite to the meta-analytic data on the associations of father contact and parenting with child adjustment. For example, Nielsen cited to one meta-analysis of 68 studies with 348 statistical effects of interparental conflict and youth internalizing and externalizing problem behaviors that found an average effect size of $d = .32$.¹⁸⁰ She also cited to another meta-analysis of in-

¹⁷⁵ Joan B. Kelly, *Children’s Adjustment in Conflicted Marriage and Divorce: A Decade Review of the Research*, 39 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 963 (2000).

¹⁷⁶ Cheryl Buehler, et al., *Interparental Conflict Styles and Youth Problem Behaviors: A Two-Sample Replication Study*, 60 J. MARRIAGE & FAM. 119, 125 (1998).

¹⁷⁷ Joan B. Kelly, *Risk and Protective Factors Associated with Child and Adolescent Adjustment Following Separation and Divorce*, in PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT, *supra* note 139, at 49.

¹⁷⁸ Nancy Ver Steegh & Dianna Gould-Saltman, *Joint Legal Custody Presumptions: A Troubling Legal Shortcut*, 52 FAM. CT. REV. 263 (2014)

¹⁷⁹ Nielsen, *supra* note 128 at 228.

¹⁸⁰ Buehler, *supra* note 176 (citing to a number of previous meta-analyses of interparental conflict and child adjustment that found effect sizes between

terparental conflict and quality of parenting of 39 studies and 138 effect size calculations regarding interparental conflict and quality of parenting that found an effect size of $d = -0.62$.¹⁸¹ While she references the Amato and Gilbreath meta-analysis from 1999, she does not reference that study's findings of small or weak effect sizes in the relationship between even authoritative parenting and measures of child adjustment.

In my opinion, Nielsen's conclusions about conflict simply do not fit the data. In her advocacy for shared parenting, she minimizes the meta-analytic data summarizing over 200 studies that show larger effect sizes for the relationship between child adjustment and interparental conflict. Balancing the benefits of parent-child relationships with the risks associated with conflict must remain a central consideration in developing parenting plans that support the adjustment of children.

4. *Conclusions About Interparental Conflict and Child Adjustment*

Interparental conflict is a very important variable in *individualized best interests of the child* determinations. Interparental conflict should not be treated as if it were a "silent presumption" against shared parenting, as if any evidence or sign of conflict between divorcing parents precluded shared parenting. When these dynamics become the determinative consideration (i.e., "conflict equals no shared parenting time") or are indiscriminately applied, it causes the same kinds of problems as efforts to apply shared or equal parenting time presumptions. On the one hand, these practices may run roughshod over efforts to reduce conflict without restricting a child's parenting time with a parent.¹⁸² Such treatment may incentivize conflict,¹⁸³ or at least the perception of conflict, in ways that harken back to times when a single parent could unilaterally veto a joint custody and shared

.16 and .50, which indicated that between 4% and 25% of the variance in youth maladjustment was associated with interparental conflict).

¹⁸¹ Ambika Krishnakumar and Cheryl Buehler, *Interpersonal Conflict and Parenting Behaviors: A Meta-Analytic Review*, 49 FAM. REL. 25 (2000).

¹⁸² Nielsen, *supra* note 128, at 228.

¹⁸³ Sanford L. Braver, *The Costs and Pitfalls of Individualizing Decisions and Incentivizing Conflict: A Comment on AFCC's Think Tank Report on Shared Parenting*, 52(2) FAM. CT. REV. 175 (2014).

parenting approach.¹⁸⁴ On the other hand, many interventions within the court's reach (such as mediation, parenting coordination, etc.) evolved in direct response to efforts to maintain parent-child contacts and relationships despite the presence of conflict.

But ignoring, via a presumption for shared or equal parenting time, the effect of interparental conflict on children, parents, parenting, and parent-child relationships as if conflict were always a strategy rather than a reality is similarly repugnant. In addition to the constitutional rights of parents to reasonable parenting time, more than thirty states have modified their statutory lists of best interests factors to include a "friendly parent provision."¹⁸⁵ These statutory protections, when combined with statements about each parent's rights to continuing, ongoing, frequent, and meaningful contact with their child, should be seen as actually expanding the rights of parents. These statutes are controversial because they incentivize cooperation, sometimes in situations where various advocacy groups view cooperation as inappropriate or potentially dangerous.¹⁸⁶

The presence of interparental conflict should serve as a "red flag" as the potential tip of the iceberg for a multitude of other possible problems rather than as a proxy for less than an individualized approach. Children need the courts' protection from interparental conflict and courts have developed a number of different mechanisms that embody that duty.¹⁸⁷

C. *Direct Research on Joint Physical Custody and Shared Parenting*

Careful review of the Bauserman meta-analysis, a second meta-analysis, and the Nielsen systematic review reveals multiple methodological problems that should preclude viewing them as

¹⁸⁴ *Id.* at 178.

¹⁸⁵ J. Herbie DeFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law & Policy*, 52 FAM. CT. REV. 214, 225 (2014).

¹⁸⁶ See Allison C. Morrill et al., *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11(8) VIOLENCE AGAINST WOMEN 1076 (2005); See also William G. Austin, Linda Fieldstone, & Marsha Kline Pruett, *Bench Book for Assessing Parental Gatekeeping in Parenting Disputes: Understanding the Dynamics of Gate Closing and Opening for the Best Interests of Children*, 10(1) J. CHILD CUSTODY 1 (2013).

¹⁸⁷ Dale, *supra* note 169.

strong support for a shared parenting time presumption. While this data is encouraging to those advocating for shared parenting, it is far from robust enough to extrapolate or generalize into support for a presumption favoring shared parenting.

1. *Bauserman Meta-Analysis on JPC Versus SPC*

The primary focus of the Bauserman meta-analytic review was "comparison of joint-custody samples with primarily sole maternal custody samples."¹⁸⁸ The Bauserman meta-analysis included 33 studies conducted between 1982 and 1999. There were 11 published studies and 22 unpublished studies – including 21 doctoral dissertations. Twelve of the studies used convenience samples, eleven samples were from court filings, six were from school populations, two from clinical samples, one from parents seeking counseling at a social service agency, and one from a national telephone survey.¹⁸⁹ The researchers also conducted comparisons of children's adjustment in joint custody versus intact families and joint custody to parental custody families.

Meta-analytic reviews making joint-custody to sole-custody comparisons must deal with ambiguities regarding the definitions of the terms "joint custody" and "sole custody," as well as how these definitions contaminate their comparison groups and limit the generalizability of findings. For example, Bauserman noted that, in many research studies, the term "*joint custody* could refer to either shared physical custody with children spending equal or substantial amounts of time with both parents, or shared legal custody, with primary residence often remaining with one parent."¹⁹⁰ Twenty-one of the thirty-three studies were classified as "joint custody" on the basis of time spent with each parent with 25% or more of the child's or adolescent's time with the nonresidential parent qualifying as joint custody. In six of the studies, "joint custody was self-defined by the parents or left undefined in the report of the study."¹⁹¹ Four of the studies combined joint legal and joint physical custody and another two studies created

¹⁸⁸ Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16(1) J. FAM. PSYCHOL. 91, 92 (2002).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 93 (emphasis added).

¹⁹¹ *Id.*

separate joint physical custody and legal custody groups for comparison to a single sole-custody group. What would be considered a sole-custody arrangement was not defined but for a reference that “sole-custody arrangements . . . emphasize limited visitation with the non-custodial parents.”¹⁹²

Bauserman reported drawing 140 measure-level effect size calculations from the 33 studies. Bauserman found that children in either joint physical custody or joint legal custody scored significantly higher on adjustment measures than sole-custody children (study level effect size $d = .23$; joint physical, $d = .29$ for 20 studies; joint legal, $d = .22$ for 15 studies). Both joint custody groups had lower levels of past and present conflict than those in sole custody, but these conflict variables did not impact the joint-custody effect sizes.¹⁹³

When discussing his findings, Bauserman noted that “selection bias cannot be ruled out” based on findings showing a lower level of conflict in joint custody families. He also cautioned that “[i]t is important to recognize that the findings reported here do not demonstrate a causal relationship between joint custody and child adjustment,” or that joint custody is “preferable to, or even equal to, sole custody in all situations.”¹⁹⁴

2. *Baude et al. Meta-Analysis on JPC Versus SPC*

The 2016 Amandine Baude et al. meta-analysis is often not referenced by the fathers’ rights advocates but is an important review in that it provided an update to the Bauserman data. This meta-analysis sought to estimate the influence of joint custody on children’s development, evaluate whether there are greater differences for certain indicators of children’s development, and examine how the characteristics of the studies and their samples moderated the relation between custody arrangements and children’s adjustment.¹⁹⁵ These authors sought “to identify under

¹⁹² *Id.* at 92.

¹⁹³ *Id.* at 95.

¹⁹⁴ *Id.* at 99.

¹⁹⁵ Amandine Baude, Jessica Pearson, & Sylvie Drapeau, *Child Adjustment in Joint Physical Custody Versus Sole Custody*, 57(5) *J. DIVORCE & RE-MARRIAGE* 338, 356 (2016).

what conditions and for which children joint custody seems to be most appropriate."¹⁹⁶

Baude et al. included nineteen studies published from 1986 to 2013. This group excluded studies that did not provide information about the proportion of time children spent with their parents, that combined the scores of children in joint legal and physical custody, that were not yet published, or that used statistics that could not be used to calculate effects sizes for meta-analysis. "The analyses were conducted by combining the effect sizes of a given study to obtain a general effect size for that study."¹⁹⁷

This study defined joint custody as children spending from 30% to 50% of their time in the homes of both parents. "Two subcategories of time sharing were created according to the authors' definition of joint custody. The subcategories were 30%/70% and 35%/65% on the one hand, and 40%/60% and 50%/50% on the other."¹⁹⁸ The group observed that "the time spent with the noncustodial parent in sole custody situations was rarely described, considered, or controlled for in these analyses, despite the fact that sizable variations can exist."¹⁹⁹

Overall, the Baude meta-analysis found children in joint custody were better adjusted than children in sole custody with an effect size of 0.109. The authors described this result as statistically significant ($p < .001$) but "weak" when viewed within the Cohen guidelines for practical significance.²⁰⁰

The results showed that the strength of the association between custody arrangements and the children's adjustment varied significantly as a function of the proportion of time that the children spent with each parent; that is, the positive results for children in joint custody were only significant for those who spent almost equal amounts of time (40%-60%/50%-50%) with

¹⁹⁶ *Id.* (citing to Jennifer E. McIntosh, *Legislating for Shared Parenting: Exploring Some Underlying Assumptions*, 47 *FAM. CT. REV.* 389 (2009), and S. Vanassche, A.K. Sodermans, K. Matthijs, & Gary Spicewood, *Commuting Between Two Parental Households: The Association Between Joint Physical Custody and Adolescent Well-Being Following Divorce*, 19 *J. FAM. STUD.* 139 (2013)).

¹⁹⁷ Baude et al., *supra* note 195, at 348.

¹⁹⁸ *Id.* at 344.

¹⁹⁹ *Id.* at 353.

²⁰⁰ *Id.* at 348. *See also* COHEN, *supra* note 115.

their two parents.”²⁰¹ An analysis of the eleven studies that defined joint custody as 40%-60%/50%-50% with their two parents produced an effect size of 0.155, which was statistically significant ($p < .001$), yet still described by the authors as “small for this type of custody.”²⁰² Children in joint custody also scored as better adjusted when compared to children in sole maternal custody ($k = 15$, $d = .094$, $p < .01$) but not when compared to children in families in studies that combined families in sole maternal and sole paternal custody arrangements ($k = 4$, $d = .121$, *ns*).

Like the research on contact between nonresident fathers and their children’s well-being, Baude et al. noted the effect sizes for joint physical custody were “weak” and that researchers need to go beyond “a linear reading of the influence of custody arrangements on children’s adjustment and to further explore the world of family processes and temporal and individual characteristics.”²⁰³

Baude et al. did note, however, that many of the studies in their meta-analysis tended to present joint custody families as a homogeneous group and that this group might be different from families where the custody arrangement was court-imposed.²⁰⁴ Along with noting the need for research to evaluate “heterogeneous subdimensions” of family relations,²⁰⁵ Baude et al. concluded that their data support the existence of a relation between joint custody and children’s adjustment in the presence of certain moderators, and likewise support the hypothesis according to which the amount of time spent with the two parents after their separation has beneficial developmental effects. They concluded a key issue would be to investigate in which circumstances joint custody is in the children’s best interest and for which circumstances there is still limited knowledge.²⁰⁶

²⁰¹ *Id.* at 353.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 355.

²⁰⁵ *Id.* at 356 (stating, “It will be necessary to evaluate the role of the quality of parent-child relationships, the number of transitions from one home to the other over a given length of time, the flexible or inflexible nature of contact, the length of separations, and so on.”).

²⁰⁶ *Id.* at 356-57.

3. Nielsen 60 – A Vote Counting Review

Nielsen chose to review 60 studies that she selected “on the basis of whether they had statistically quantitative data that address the questions presented at the outset of the article.” But rather than conducting an empirical meta-analysis, Nielsen chose a “vote counting” methodology.²⁰⁷ She reported,

[Sixty] studies compared children’s outcomes in SPC [Sole Physical Custody] and JPC ([Joint Physical Custody] families. In 34 studies, JPC children had better outcomes on all measures of well-being. In 14 studies they had better outcomes on some measures and equal outcomes on others. In 6 studies, there were no significant differences between the groups on any measures. In 6 studies, JPC children had worse outcomes on one measure, but equal or better outcomes on all other measures.²⁰⁸

However, there are a number of limitations and problems with using a vote counting methodology, none of which are ever mentioned as a limitation in the multiple publications related to her review. Nielsen’s choice of vote counting and significance testing places limits on the weight given to her review. In her efforts to portray JPC or shared parenting as the winner, it is possible that each time Nielsen is counting a “vote,” she may be getting a measurement of the same or a very similar effect and effect size. “The objective appearance of significance testing can lend an air of credibility to studies that have otherwise weak conceptual foundations.”²⁰⁹ When that is the case, having sixty measures of a small effect size may look better to the uninformed than a simple tally of five or ten studies, but the underlying small effect remains unchanged. In Nielsen’s vote counting, methodologically poor studies are “counted” the same as those that are more scientifically sound. In other words, vote counting allows for poor science to count as much as good science.

In addition, Nielsen’s reliance on significance testing and her reports that comparisons where there were no significant differences as signs that the groups were “equal” are similarly problematic. For example, none of the nine studies in her chart that

²⁰⁷ Linda Nielsen, *Joint Versus Sole Physical Custody: Outcomes for Children Independent of Family Income or Parental Conflict*, 15(1) J. CHILD CUSTODY 35 (2018).

²⁰⁸ *Id.* at 39.

²⁰⁹ See KLINE, *supra* note 113.

she labelled as “equal” or “equal or better” used the term “equal” to describe their results.²¹⁰ This mischaracterization of the research appears in numerous tables throughout her writings.²¹¹

When statistical significance testing of comparisons between two groups does not find a difference, this should be accurately described as a finding of “non-significance,” not a finding that the groups were “equal.” When researchers become too preoccupied with statistical significance, other more important aspects of and explanations for the data, such as whether the variables are properly defined and measured, are ignored. Again, the “yes-or-no” answer to questions about significance says nothing about scientific relevance, clinical significance, or effect size and therefore do not aid scientific progress even when properly done and interpreted.²¹²

A final problem with the Nielsen 60 is what one finds when these studies are actually submitted to meta-analytic procedures. Namely, only 22 of the 60 studies Nielsen reviewed provided adequate information for calculation of effect sizes. While Nielsen criticized others whose systematic reviews did not always include the studies she included,²¹³ these other scholars did not use a vote counting methodology that incentivized quantity of studies over quality. A meta-analysis of the 22 studies and 207 effect size comparisons between a mixed group of children in joint physical custody to those in primary or sole custody resulted in an effect size of Hedge’s $g = 0.07$; 95% CI -0.05, 0.18, SE. 06).²¹⁴

²¹⁰ Nielsen, *supra* note 207, at 40-43 (Table 1: Outcomes for Joint Physical Custody vs. Sole Physical Custody Children in 60 Studies includes the term “equal” where there are nonsignificant findings).

²¹¹ Nielsen, *supra* note 128, at 222 (Table 2: Is Joint Physical Custody Linked to Better, Worse, or Equal Outcomes Than Sole Physical Custody After Controlling for Parental Conflict? Includes “equal” where there are nonsignificant findings); Nielsen, *supra* note 209, at 615-616 (Table 1. Outcomes for Children in Shared Parenting Versus Sole Residence Families – includes “equal” where there are nonsignificant findings)

²¹² See Kline, *supra* note 113. See also J. Scott Armstrong, *Significance Tests Harm Progress in Forecasting*, 23 INT’L. J. FORECASTING 321 (2007).

²¹³ Nielsen, *supra* note 207, at 37-38.

²¹⁴ Milfred D. Dale, Austin McGuire, & Stephanie Gusler, *More Data, Less Woozle: Defining Individualized Best Interests in the Shared Parenting Debate*, May 31, 2019, presented at the 56th Annual AFCC Conference in To-

This is simply not the kind of scientific data upon which to base any kind of presumption of social policy of shared or equal time parenting.

4. *Conclusions About the Research on Child Adjustment in JPC Versus SPC*

Even if the research supported a presumption for some level of shared parenting, and the above analysis demonstrates that it does not, using this same evidence base, only a small part of which truly examines equal parenting time arrangements, for a presumption of equal parenting time parenting is simply untenable and scientifically indefensible. Research has consistently shown that children of divorced or separated parents, when taken as a whole, score worse than children who live with both of their biological parents on a range of behavioral, emotional, social, and cognitive difficulties.²¹⁵ Within the group of children of divorced or separated parents, the empirical evidence regarding the association between physical custody arrangements and children's well-being indicates that, in general, joint physical custody has shown mostly neutral to small positive effects.²¹⁶

Currently, the case for viewing the selection effect hypothesis as the best explanation for the data remains strong. The selection effect hypothesis helps explain the trend for smaller effect sizes when comparing the children in joint physical custody to those in sole or primary physical custody; that is, it is likely that the "selectivity," or what might have been more "exclusivity" of shared parenting and joint physical custody in the 1980s and 1990s, has given way to a more heterogeneous group of children and families living in joint custody and shared parenting arrangements. This interpretation fits comparing the 2002 Bauserman .23 effect size with the 2016 Baude et al. effect size of .109 (and .155 of 50/50 arrangements). While some commentators have ex-

ronto, Canada (this Hedge's *g* is a small effect size. CI reflects the Confidence Interval within which 95% of the scores fall).

²¹⁵ See Paul R. Amato, *Research on Divorce: Continuing Trends and New Developments*, 72(3) J. MARRIAGE & FAM. 650 (2010).

²¹⁶ Steinbach & Augustin, *supra* note 130, at 302. See Anja Steinbach, *Children's and Parents' Well-Being in Joint Physical Custody: A Literature Review*, 58(2) FAM. PROC. 353 (2019); See also Baude et al., *supra* note 195; Bauserman, *supra* note 188.

pressed concerns with extrapolating from voluntary joint physical circumstances to those where this arrangement is imposed on the family by court order,²¹⁷ there is little research on this issue.

In individual cases, arguments for shared parenting and joint physical custody emphasize that frequent contact with the non-residential parent (usually the father) leads to increased parental involvement and increases the child's access to both emotional and financial resources.²¹⁸ Added contact between the nonresidential parent and child is also theorized to reduce children's experiences and perceptions of loss and potentially reduce their emotional insecurity²¹⁹ or worries the child might have about that parent.²²⁰ In addition, mothers may benefit from sharing the burdens of providing for the child.²²¹

But there are potential drawbacks or negative effects for children in joint physical custody. Children who are commuting between two homes face stresses related to the challenge of having to adapt to different routines, expectations, and demands.²²² Some theorists have raised concerns that the stresses of joint physical custody can mean that rather than good relationships with both parents, children in JPC situations develop no attachment to either parent.²²³

In fact, the effects size found in the research between child adjustment and interparental conflict are significantly greater than the effects sizes found in the research between child adjustment and either the quantity of contact or the quality of the child's relationship with the nonresidential parent. A broad understanding of the research simply does not support Nielsen's assertion for prioritizing the parent-child relationship and emphasizing shared parenting schedules when the levels of interparental conflict are high.

In an *individualized best interests of the child* approach, this is an AND question, not an OR question. Both conflict and the

²¹⁷ Braver & Votruba, *supra* note 82, at 455.

²¹⁸ Steinbach & Augustin, *supra* note 130, at 302.

²¹⁹ Fabricius, *supra* note 132.

²²⁰ Jan Turunen, *Shared Physical Custody and Children's Experience of Stress*, 58(5) *J. DIVORCE & REMARRIAGE* 371 (2017).

²²¹ Steinbach, *supra* note 215.

²²² Turunen, *supra* note 219.

²²³ ROBERT E. EMERY, *TWO HOMES, ONE CHILDHOOD. A PARENTING PLAN TO LAST A LIFETIME* 228 (2016).

quality of the child’s relationships with both parents must be considered. In essence, the research suggests that each case requires a careful assessment of the interparental conflict and the quality of the parent-child relationships and whether the schedule will include enough time with each parent to provide the opportunity for a meaningful relationship to be sustained.²²⁴

The importance of the amount and frequency of father involvement depends upon, among other things, individual circumstance, context, history, and goals or objectives. Differing amounts of parent-child contact would be recommended for different goals or objectives. For example, is the case-question one of establishing, reestablishing, maintaining, or improving the parent-child relationship? Is the history of the parent-child relationship positive or negative? Are there case-specific facts (e.g., adverse events) or factors (e.g., age or special needs of the child) influencing any time schedule? What are the practical considerations around contact?²²⁵

D. *Parenting Time and Child Support: The Connection and Risk of Drift*

A central tenet of current child support calculations in many states is the assumption that the financial costs a parent incurs when caring for a child increase in accordance with the amount of time the child spends with that parent.²²⁶ Although child support is tied first to the income of the parents, thirty-four state support guidelines include a formulaic adjustment for shared-parenting time that rely on a range of timesharing thresholds for application of the adjustment.²²⁷ Equal parenting time does not automatically eliminate child support orders, but it can.

Child support orders integrating visitation provisions are particularly subject to manipulation because increases in “parenting time” can lead to decreases in the amount of child

²²⁴ Milfred D. Dale, *Of Course, Quantity AND Quality of Nonresidential Family Involvement Matters . . . as Part of Every Individualized Best Interests of the Child Determination: Commentary on Adamsons 2018 Article*, 15(3) J. CHILD CUSTODY 206 (2018).

²²⁵ *Id.*

²²⁶ See Jane C. Venohr, *Child Support Guidelines and Guideline Reviews: State Differences and Common Issues*, 47(3) FAM. L.Q. 327 (2013); Jane C. Venohr & Robert G. Williams, *The Implementation and Periodic Review of State Child Support Guidelines*, 33 FAM. L.Q. 7, 21 (1999).

²²⁷ *Id.* See also Venohr & Williams, *supra* note 225 (asserting that 34 states include parenting time-based adjustments of the amount of child support).

support paid under state child support guidelines.²²⁸ These incentives make it critical for courts to establish the sincerity of parental requests for shared custody and significant amounts of parenting time. In theory, integrating parenting time and child support promotes increased engagement of fathers, enhances fathers' willingness to comply with child support orders, and strengthens the health and welfare of the children.²²⁹

Another dimension of the parenting time / child support connection concerns the stability of different parenting time arrangements and how drift (e.g., informal changes of the arrangement made by parents) might create inequities. The presence of drift is not a new or rare phenomena. As a group, shared parenting arrangements are not as stable as primary care arrangements and the risk for drift out of shared parenting into primary parenting is an important consideration. A California study found a significant "drift" toward de facto mother custody, both in cases where the father was awarded physical custody (drift of nearly 23%) and in joint physical custody (nearly 40%).²³⁰ A longitudinal Australian study tracking parenting arrangements in two samples over three years found that 40% of shared care arrangements in one sample and 50% in a second sample changed, with almost all of the changes reverting to mother-custody.²³¹ A qualitative study of fifty divorced parents in Alberta who had a shared custody order or agreement found that in about 25% of the cases it became a situation where one parent was clearly the primary residential caregiver.²³² Children may be placed at risk when a parent's financial motives inappropriately impact parent-

²²⁸ Venohr, *supra* note 225, at 341.

²²⁹ *Child Support and Fatherhood Initiative in the Administration's FY 2014 Budget*, OFFICE OF CHILD SUPPORT ENFORCEMENT (Apr. 13, 2013), <http://www.acf.hhs.gov/programs/css/resource/child-support-and-fatherhood-initiative-in-the-administrations-fy-2014>, archived at <http://perma.cc/A99E-GCQM> [hereinafter *Administration's FY 2014 Budget*].

²³⁰ Robert H. Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements Are Parents Negotiating?*, in *DIVORCE REFORM AT THE CROSSROADS* 37 (Stephen D. Sugarman & Herma Hill Kay eds. 1990).

²³¹ Bruce Smyth, R. Weston, et al., *Changes in Patterns of Parenting over Time: Recent Australian Data*, 14(1) *J. FAM. STUD.* 23 (2008).

²³² Rick Gill & Cherami Wichmann, *Shared Custody Arrangements: Pilot Interviews with Parents*, 2004-FCY-5, *FAM., CHILD. AND YOUTH, DEP'T OF JUSTICE, CAN.*, http://www.justice.gc.ca/eng/rp-pr/fl-lf/parent/2004_5/index.html.

ing plans, then parenting plans change without the requisite financial considerations.

IV: Not All Equal Parenting Time Statutes Are Created Equal

The constitutional and statutory rights of the parties are becoming increasingly explicit in best interests statutes, both directly and indirectly. Both the substance of statutory enactments and the language used in the statutes themselves have further defined parental rights and possible duties and obligations. Numerous statutes have created presumptions that limit the custodial rights of those guilty of criminal offenses ranging from domestic violence to child abuse and sex offenses.²³³ Friendly parent provisions allow courts to consider and often decide cases based on a parent’s willingness to encourage and facilitate the child’s relationship with the other parent.²³⁴ With increasing frequency, these friendly parent statutes include statements about public policy goals related to the frequency and meaningful nature of parenting time allocations.²³⁵ Parenting plans with detailed requirements of what must be included have replaced references to “reasonable” parent time.²³⁶

The three states that have most strongly embraced equal parenting time (Arizona, Arkansas, and Kentucky) have done so in significantly different ways. The statutes vary regarding the burden of proof for overcoming the equal parenting time presumption, when the presumption may or may not apply, and what exceptions exist that preclude application of the presumption. It is important to identify these different approaches in order to defend the best interests of the child approach.

A. Arizona – Public Policy Presumption, Not Law

In Arizona, there exists strong advocacy for 50-50 shared parenting time plans, including advocates who claim that a 50-50

²³³ See, e.g., MO. REV. STAT. § 452.375 (2021).

²³⁴ See, e.g., VA. CODE ANN. § 20-124.3(6) (2021).

²³⁵ See, e.g., ME. REV. STAT. 19-A §1653(3)(H).

²³⁶ See, e.g., KAN. STAT. ANN. § 23-3213

shared parenting presumption exists.²³⁷ However, this is not true. The effort to create the perception of a “legal presumption” for 50-50 involves use of presumptive language regarding public policy and statutory statements. The three statements are:

- Arizona Revised Statutes § 25-103(B)(1) states: “It is also the declared public policy of this state and the general purpose of this title that absent evidence to the contrary, it is in a child’s best interests: (1) To have substantial, frequent, meaningful and continuing parenting time with both parents.”

- Arizona Revised Statutes § 25-403.02(B) states, *inter alia*, that, “the court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time.”

- Arizona Revised Statutes § 25-411(j) states that “the court shall not restrict a parent’s parenting time rights unless it finds that the parenting time would endanger seriously the child’s physical, mental, moral or emotional health.”

When these changes were made in 2013, some research data showed that “as the number of ‘parenting days’ increases, so does the likelihood of a post-divorce allegation of domestic violence, in the form of arrests and protective orders,”²³⁸ although no causal conclusion or explanation was provided. In 2018, another study showed that the statutory changes did not result in significant changes in legal or interparental conflict, but there were reports of small increases in allegations of domestic violence, child abuse, and substance abuse.²³⁹

However, Arizona courts have not held that there is an equal parenting time presumption. In *Gonzalez-Gunter v. Gunter*, the appellate court held that the public policy directives do “not require equal parenting time or remove the requirement that the court adopt a parenting plan consistent with a child’s best interests” using the factors of Arizona Revised Statutes § 25-403(A) and the requirements of Arizona Revised Statutes §

²³⁷ William V. Fabricius et al., *What Happens When There Is Presumptive 50/50 Parenting Time? An Evaluation of Arizona’s New Child Custody Statute*, 59(5) J. DIVORCE & REMARRIAGE 414 (2018).

²³⁸ Margaret Brinig, *Substantive Parenting Arrangements in the USA: Unpacking the Policy Choices*, 27 CHILD & FAM. L.Q. 3 (2015).

²³⁹ Fabricius et al., *supra* note 239.

25-403(B) regarding parenting plans.²⁴⁰ The court also rejected the father’s argument that the court could not depart from equal physical time without a finding that it would seriously endanger the child.²⁴¹

B. Kentucky – Presumption Preponderance

In 2018, Kentucky became the first state for enact a rebuttable presumption for equal parenting time for initial custody determinations, but it requires only a preponderance of the evidence to overcome the presumption and distinguishes between initial custody determinations and modifications of visitation or timesharing before maintaining the best interests of the child standard for modifications of visitation or timesharing.

The custody determination statute, Kentucky Revised Statutes § 403.270, imposes a presumption at the time of the initial custody determination unless there is a finding of domestic violence. The statute also noted that, if a deviation is warranted, the parenting time schedule should maximize the time each parent has with the child consistent with the child’s welfare.²⁴²

However, the “presumption of joint custody and equal parenting time in KRS 403.270 applies to custody determinations, but it does not apply to modifications of visitation or timesharing.”²⁴³ Kentucky Revised Statutes § 403.320(3) governs the modification of visitation and does not include the equal parenting time presumption language, instead noting that, “The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child; but the court shall not *restrict* a parent’s visitation rights unless it finds that the visitation would endanger seriously the child’s physical, mental, moral, or emotional health.”²⁴⁴

Within Kentucky Revised Statutes § 403.320(3), “the term ‘restrict’ means to provide [either] parent with something less than ‘reasonable visitation.’”²⁴⁵ Therefore, the Kentucky Su-

²⁴⁰ Gonzalez-Gunter v. Gunter, 471 P.3d 1024 (Ariz. Ct. App. 2020).

²⁴¹ *Id.*

²⁴² KY. REV. STAT. § 403.270 (2021).

²⁴³ Layman v. Bohanon, 599 S.W.3d 423, 431 (Ky 2020).

²⁴⁴ KY. REV. STAT. § 403.320(3).

²⁴⁵ French v. French, 581 S.W.3d 45 50 (Ky. Ct. App. 2019).

preme Court found that, regarding motions for modification of the timesharing, the

family court could either (1) order a reasonable timesharing schedule if it found that it would be in the best interests of the children to do so or (2) order a ‘less than reasonable’ timesharing arrangement if it first found that the children’s health was seriously endangered.²⁴⁶

The court noted that there is “no set formula for determining whether a modified timesharing arrangement is reasonable; rather it is a matter that must be decided based upon the unique circumstances of each case.”²⁴⁷ In other words, in Kentucky, the individualized best interests of the child standard applies to modifications of visitations and timesharing. In addition, Kentucky Revised Statutes § 403.315 makes the joint custody and equal shared parenting time inapplicable in either a determination or modification if there is a domestic violence order entered against a party.²⁴⁸

C. *Arkansas – Presumption by Clear and Convincing Evidence*

In 2021, Arkansas became the second state to officially create a legal presumption for joint custody and equal parenting time. Arkansas law states that “‘joint custody’ means the approximate and reasonable equal division of time with the child by both parents individually as agreed to by the parents or as ordered by the court.”²⁴⁹ The presumption may be rebutted if the court “finds by clear and convincing evidence that joint custody is not in the best interests of the child.”²⁵⁰

D. *Preponderance or Clear and Convincing Evidence “of What”*

The mere existence of the best interests of the child standard is proof that the state does not require a showing of harm to intervene, under certain circumstances, to protect the well-being of children without involving the child welfare system. In those states where legislatures have passed equal parenting time presumptions, the question for families and courts weighing or

²⁴⁶ *Layman*, 599 S.W.3d at 432.

²⁴⁷ *Id.*

²⁴⁸ KY. REV. STAT. § 403.315 (2021).

²⁴⁹ ARK. CODE ANN. § 9-13-101(A)(5) (2021).

²⁵⁰ ARK. CODE ANN. § 9-13-101(b)(1) (2021) (emphasis added).

presenting arguments to overcome these presumptions is how to define what they must prove in order to deviate from presumptive equal parenting time.

A fair interpretation of *Layman v. Bohanon* is that the Kentucky Supreme Court rejected the requirement of a showing of "harm" (e.g., serious endangerment) in order to rebut the equal parenting time presumption and channeled decision-making regarding modifications back to an analysis of what constitutes a "reasonable timesharing schedule" using the best interests factors, or a "less than reasonable" timesharing arrangement if the children were seriously endangered.²⁵¹

Whether Arkansas will follow suit regarding the "harm/serious endangerment" standard is an open question. In Arkansas where overcoming the presumption requires clear and convincing evidence that "joint custody is not in the best interests of the child," questions exist about what kind of evidence would be necessary to rebut the presumption under this higher evidentiary burden of proof, as well as what standards might apply to proceedings other than original custody determinations, such as requests for the modification of custody and modifications of parenting time.

Clear and convincing evidence, which is a higher burden of proof than preponderance, has been defined as proof so clear, direct, weighty, and convincing that the fact finder is able to come to a clear conviction, without hesitation, of the matter asserted. It is that degree of proof that will produce in the trier of fact a firm conviction respecting the allegation sought to be established.²⁵²

Like Kentucky's statute, the Arkansas statute references applying the presumption in original custody determinations.²⁵³ However, unlike Kentucky, Arkansas has no statute listing best interests factors and no statute explicitly addressing modifications of parenting time. Therefore, the textual analysis applied in *Layman v. Bohanon*, where the court rejected the serious endangerment requirement and provided a definition of the term "restrict," would not appear to be available.

²⁵¹ *Layman*. 599 S.W.3d 423

²⁵² *Maxwell v. Carl Bierbaum, Inc.*, 893 S.W.2d 346 (Ark. Ct. App. 1995). Cf. *Black v. State*, 915 S.W.2d 300 (Ark. Ct. App. 1996).

²⁵³ ARK. CODE ANN. § 9-13-101(a)(1)(A)(iv)(a) (2021).

What would be the ramifications of judges requiring a showing of “harm” or “serious endangerment” to the child in order to rebut an equal parenting time presumption? There are several potential problems with using the “harm” or “seriously endangerment” standard. First, it decreases the court’s authority and ability to protect children from less competent and poor parenting practices that are not good for children but do not rise to the level of abuse, harm, or serious endangerment. Simply meeting the low threshold of fitness using this evidentiary standard entitles a parent to equal parenting time and undermines ideas of judging parents on the merits of their parenting and parent-child relationships and their ability to be child-focused and committed to their child’s needs and interests. Second, the showing of harm standard may also encourage parents who do not agree to equal parenting time to make allegations of child abuse or domestic violence because the preponderance of evidence burden of proof applies to those issues. Third, might parents be reluctant to choose less than an equal parenting time arrangement for fear of being labeled as someone who has “harmed” the child? Or might a request for a different schedule by one parent be interpreted as an implied allegation of abuse by the other?

V. Conclusions

The welfare of the children, rather than the ‘rights’ of parents, should be top priority in any parenting arrangement. Those who care about the future of children need to be proactive in developing innovative and comprehensive ways to reduce conflict and deal more effectively with high conflict custody cases.²⁵⁴

In the vast majority of jurisdictions, the *best interests of the child* continues to require an individualized parenting plan for every child based upon the facts of his or her situation. Within this approach, both parents are considered on the merits of their parenting, the nature and strength of their parent-child relationships, and what they add to the lives of their children. The increasingly diversity of American society makes it impossible to talk about an “average American family” for which a single presumption or solution would fit all circumstances. The best inter-

²⁵⁴ Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 499 (2002).

est of the child as an individualized determination is responsive not only to such diverse family forms, but also to the fact that change in family form is a common and frequent dynamic – and change is a guarantee after a parental divorce or separation.

To the extent that science informs the best interests-shared parenting debate, the best possible research should be used. Identifying what this research is and what it means is a difficult task centered on a moving target. This article has outlined the state of the research evidence as well as the limitations of this research and the general state of knowledge about what is best for children. This research is simultaneously disappointing and encouraging. It is disappointing because citing to group aggregate research, particularly research where the methodologies are frequently limited or lacking, can easily become misleading. Not every member of any research study sample has the characteristics of the average. It is encouraging in that it shows that previous institutionalized biases are slowly decreasing and that joint custody and shared or equal parenting time are becoming more possible for increasing numbers of children and families.

There is a consensus in the professional child custody community that shared parenting, even equal parenting time, should be encouraged when this can be achieved by parental agreement or through court findings using the *individualized best interests of the child* standard that such an arrangement benefits the child. But there is no consensus that either a shared parenting or equal parenting time presumption can be supported by the existing research evidence. For me, based on what is known and not known, the *individualized best interests of the child* is “Still the One.”²⁵⁵

²⁵⁵ “Still the One” – Orleans, 1975.<https://www.youtube.com/watch?v=S5aMMRes2u4>

