CHILDREN’S NEEDS WHEN CUSTODIAL PARENTS WANT TO RELOCATE:
WISHFUL THINKING OR SOUND RESEARCH?α

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Courts often become involved when a non-custodial parent seeks to prevent the custodial parent from moving with the couple’s children. Approximately 10 years ago, U.S. state courts increasingly permitted such relocations, a practice that was then more widely accepted in Europe. In recent years, however, there has been a strong backlash by a small number of U.S. scholars and a much larger group of legal and mental health practitioners. Flawed research and misleading reviews are often presented to courts and to the public as improvements on the thoughtful work of reputable scholars.

This paper summarizes the relevant legal issues, provides an overview of the credible U.S. research on children’s relevant needs, and critiques the representations that threaten sound judicial outcomes. Although it addresses US cases and scholarship, its analysis also applies to relocation disputes elsewhere.

I. THE FACTUAL AND LEGAL CONTEXT

Americans move for many reasons: for better educational, personal and career opportunities; to better neighborhoods or less costly ones;1 to establish new relationships or leave failed ones; to take up urban life or escape it; to enjoy the snow, the desert or the beach; and to share life’s burdens and pleasures with

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1 MAVIS E. HETHERINGTON & JOAN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 88 (2002) (poor women in their study moved 7 times in the first 6 post-divorce years in what the authors call a “downward spiral” to ever-worse housing, facilities, and schools.
other family members. And they do it often – on average, once every six years.² When they move, they expect to take their children along.

Moves like these that are taken for granted as to intact households may flare into custody disputes when they involve children who live with one, but not both, of their biological parents.³ Because almost half of all US children spend [[an average of 5 years/part of their childhood?] in a single-parent household,⁴ this sets the stage for disagreements between former spouses and lovers.

Litigation may occur when a nonresidential parent⁵ understandably fears that less time or less frequent interactions with the child will weaken their relationship or harm the child. Others are concerned about the quality of the custodial parent’s caretaking skills. For yet others – including those who have not chosen to spend much time with their children – the idea of not having them nearby is nevertheless upsetting. The potential inconvenience and cost of visits are particularly distasteful for many of these parents.⁶ In yet other cases, the nonresidential parent’s concern is less with the children’s welfare and more with controlling or doing battle with the custodial parent.⁷ Often, of course, the behavior of fathers and mothers alike is fueled by multiple and even conflicting emotions.

Surely reactions like these are not new. But the setting in which relocation occurs is. For many years now, men have been urged to share the pleasures

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⁵ For purposes of this discussion, the terms “noncustodial parent,” “nonresidential parent,” and “father” designate a parent (of either gender) whose children are in his household less than 50% of the time. “Father” is used in this fashion because (1) even today far more fathers than mothers are noncustodial parents, and (2) the interests of noncustodial parents are often championed by fathers’ rights advocates and organizations. No distinction is drawn here as to how the time-allocation is reached: de facto or pursuant to orders for sole or joint physical custody. Joint legal custody is intended only when it is mentioned expressly.

⁶ HETHERINGTON & KELLY, supra note 1, at 134 (“Seventy five miles seems to be the point at which inconvenience overcomes paternal guilt. … about the maximum radius of a comfortable day trip.”).
⁷ [ ]
and burdens of child care, and – to the extent that they have taken on this role – it is only natural that they, like caregiving mothers, believe that what they do is integral to their children’s welfare. This does not negate the feelings of other fathers. Men who have played a more traditional role also love their children and may well be distressed by the prospect of a change in their scheduled interactions.

Yet once a couple separates, things cannot remain as they were. As a matter of logic, this is the inevitable price of separations and divorce. But – as in any other setting – those who leave relationships often want to have their cake and eat it, too. A former spouse who happily moves on to a new home or new romance, for example, may completely fail to accept similar behavior by his or her former partner. Such inconsistencies are apparent in relocation law.

For noncustodial parents, the choice is theirs. So long as they are prepared to adjust when or where they will see the children, relocation is always possible. Their reasons are irrelevant. So are the custodial parent’s possible objections. It does not matter if the custodial parent fears that the children will suffer, that parent-child relationships will change, that revised visitation arrangements will be more inconvenient or costly, or that more child care will be necessary. No court will punish the moving parent. The children’s needs will be legally relevant only if there is litigation concerning visitation or support in light of the new circumstances.

For moves by custodial parents, it is another story. Although relocation law differs from state to state, almost every area that is legally irrelevant when a noncustodial parent moves is now open to close examination. Noncustodial

\[\text{\footnotesize[8]}\]

\[\text{\footnotesize[9]}\] See Judith Solomon and Zeynep Biringen, Another Look at the Developmental Research: Commentary on Kelly and Lamb’s “Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children,” 39 Fam. Ct. Rev. 355, 360 (2001): “[W]e know from conversations with fathers in both research and clinical contexts that, for some fathers, access to their children and the opportunity to engage in caretaking (as opposed to play and learning) activities are fundamental to their definition of themselves as good parents.”

\[\text{\footnotesize[10]}\] It may be otherwise in states that presumptively protect the decisions of custodial parents to determine the household’s place of residence. Whether it is often depends on the burden that is required to rebut the relocation decision.
parents often assert, for example, that the true purpose of the move is to interfere with their access to the children. The distant location will make it easy, they often say, for the custodial parent to alienate the children from them. As a result, they may argue that the children’s relationship with them will be seriously harmed or even irredeemably severed. Further typical assertions are that the children will suffer by being taken from familiar places, people and routines, and their school performance will decline. Most significantly, they fear that less frequent contact with the noncustodial parent will deprive the children of the benefits of two involved parents.

Custody evaluations by mental health professionals are common in these cases, and the stakes are high. A judge who disapproves of the custodial parent’s plan may order a contingent custody transfer – that is, an order transferring the child into the noncustodial parent’s care that takes effect only if the custodial parent goes through with the planned move. (Its purpose, of course, is to pressure the custodial parent into abandoning the move.) Sometimes, but rarely, the court does not await developments, but simply orders a custody transfer outright. Unless a court is successful in intimidating the custodial parent, the child will have to move – either with that parent or into the other parent’s home. When custody is transferred, the child’s situation is likely to be more difficult: not only will there be a new community with new schools and new friends; even the people who live with the child on a daily basis will be different as well.

In Part II, I summarize the findings of leading U.S. scholars that shed light on children’s needs in relocation cases; I also note their limitations. In Part III, I discuss the literature and reasoning upon which those who challenge the credible research rely, and outline the degree to which their assertions are unsupported by, or contrary to, the present body of knowledge. Finally, I conclude that many U.S. mental health practitioners and attorneys engage in profitable but disingenuous advocacy that endangers many children and curtails normal life opportunities for those who care for them.

11 An established history of compliance with custody and visitation orders is often ignored by these noncustodial parents and the courts. Indeed, even evaluators often speculate (without any foundation in fact) that custodial parents who have always honored court orders may start to interfere with visitation once they are far enough away; the expert opinion in Marriage of LaMusga took exactly this tack, going on to assert that the compliant mother was “unconsciously” alienating her children and might be tempted to further alienate the children if she were allowed to relocate. []

12 These orders are often entered without considering whether a change of custody is less harmful to the child than relocation in the custodial household. []
II. FINDINGS FROM THE CREDIBLE RESEARCH

A. The Importance of Continuity in Primary Care

During the latter half of the 20th Century, respected scholars identified key requirements for a child’s healthy development that, if disturbed, could lead to serious harm. Attachment theory, which grew out of empirical studies by John Bowlby and Mary Ainsworth, maintains that a child’s ability to form and maintain healthy intimate relationships across the life-span depends on its having had a close and consistent relationship with its mother during its infancy and early childhood. This insight is broadly accepted in child development and developmental psychology, and has greatly influenced the evolution of U.S. child custody law.

Most notable are three related legal doctrines that protect the continuity and stability of the child’s custodial relationship:

13 For an excellent report of the early works and subsequent developments, see Inge Bretherton, The Origins of Attachment Theory: John Bowlby and Mary Ainsworth, 28 DEVELOPMENTAL PSYCHOLOGY 759, 770-71 (1992). “Bowlby’s strategy was, wherever possible, to meticulously test intuitive hunches against available empirical findings and concepts from related domains, thus keeping the theory open to change.” Although it seems plausible that the father or a third party might provide comparable benefits, empirical studies do not bear out this theory. See infra notes 52-[] and accompanying text.

As to the implications of attachment theory to public policy, Bretherton remarks,

A good society, according to Marris, would be one which, as far as humanly possible, minimizes disruptive events, protects each child’s experience of attachment from harm, and supports family coping. . . . When powerful groups in society promote their own control over life circumstances by subordinating and marginalizing others, they make it less possible for these groups to offer and experience security in their own families.


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• the doctrine that a custody order cannot be modified unless there has been a substantial “change in circumstances;”\textsuperscript{15}
• the doctrine that a child’s best interests are served by maintaining the status quo;\textsuperscript{16} and
• a “primary caretaker presumption” – a presumption that a child’s best interest will be served if physical custody is awarded to the adult who has been supplying most of its day-to-day care.\textsuperscript{17}

As will be seen, this reasoning supports maintaining the child’s household composition in relocation cases.

B. The Importance of Parental Behavior & Children’s Developmental Stages

In recent years, several important longitudinal studies of divorce and the post-divorce period have applied statistical analysis to “group aggregated data [concerning the post-divorce period] based on questionnaires, highly structured interviews, and symptom checklists . . . .”\textsuperscript{18} Amato and his colleagues reviewed the research literature and concluded that parental divorce negatively affected children’s social skills and their later abilities to deal with their own marital problems.\textsuperscript{19} In related findings, Cherlin and his colleagues discovered that the emotional difficulties of children whose parents divorced began even before their

\textsuperscript{15} See generally Sally Burnett Sharp, \textit{Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard?}, 68 VA. L. REV. 1263 (1982).

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\textsuperscript{19} Paul R. Amato, \textit{The Consequences of Divorce for Adults and Children}, 62 J. MARRIAGE & FAM. 1269, 1277-78 (2000); Paul R. Amato & Danelle D. DeBoer, \textit{The Transmission of Marital Stability Across Generations: Relationship to Skills or Commitment to Marriage?}, 63 J. MARRIAGE & FAM. 1038, 1038-39 (2001). Indeed, the negative effects were evident even as to grandchildren who were not yet born when their grandparents divorced. []
parents separated\(^{20}\) and extended into their adult years, when they suffered unanticipated but serious psychological difficulties.\(^{21}\)

Additional important findings have come from long-scale empirical research programs begun in the 1970’s\(^{22}\) in California and Virginia by Dr. Judith Wallerstein\(^{22}\) and Professor Mavis Hetherington,\(^{23}\) respectively.

Wallerstein describes areas in which their findings are “in full accord,” “particularly . . . the high anxiety young adults from divorced families experience in relationships with the opposite sex and in parenthood.”

The two studies also identified dramatically heightened rates of mental health problems for these children: Hetherington’s tally of psychiatric symptoms “found that 20% to 25% of the children were troubled adults as compared with 10% among those raised in intact families.”\(^{24}\) This association between parental divorce and troubled lives is even “larger than the [public health implications of the] association between smoking and cancer.”\(^ {25}\)

Wallerstein’s work identifies how children’s developmental stages affected their experience, both initially and over the following 25 years. In a summary of her study’s major findings,\(^{26}\) Wallerstein emphasizes the “radical” changes each family member went through when the parents separated. Stressed-out parents, she reports, provided only “seriously diminished parenting” during the upheaval,

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\(^{22}\) Dr. Wallerstein is trained in social work and psychoanalysis.

\(^{23}\) Professor Hetherington is a developmental psychologist.

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\(^{25}\) [ ]Interview with Prof. E. Mavis Hetherington, N.Y. Times, March 26, 2002, at D6.

\(^{26}\) Wallerstein and Lewis, supra note __. [ ]
and it was the younger children who suffered the most serious consequences.\footnote{27} This finding, echoed by the work of Amato and \_ layoffs co-author/Cherlin?, is particularly relevant to relocation policy, because most custody contests in the United States involve children under 6 years of age, and there is little empirical research on appropriate visitation rules for this age-group.

Some things are now known, however, that speak directly to the current debates about relocation. First, the time children spend with each parent is irrelevant to many of the important issues. For example, although children of divorce believe their parental relationships are “unreliable” and that their closest family relationships “are unlikely to endure,” it would be a serious mistake to argue that maintaining frequent contact with both parents is the solution. Instead, the children’s concern stemmed from the parental breakup and was reinforced over the post-divorce years by witnessing one or both of their parents’ transient love relationships and further marriages and divorces.\footnote{28}

Second, there are additional reasons to pay particular attention to the pre-separation experiences of young children. Memories of domestic violence and abandonment, for example, are particularly powerful for adults who were 6 years old or younger when their parents separated. Frequent visits and shared custody transfers for children in these circumstances are, accordingly, counter-productive. If parents cannot be counted on to show up when the children expect them, a frequent visitation schedule only exacerbates the child’s exposure to disappointment. Similarly, serious stress is inevitable when children witness repeated violence (as is often the case when there are frequent transfers between parents who live near one another). In either setting, the consequences may be grave: repetitive stress in childhood is now understood to cause serious, irreversible damage to the developing brain.\footnote{29}

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\footnote{29} See generally Christine Heim et al., \textit{Pituitary-Adrenal and Autonomic Responses to Stress in Women After Sexual and Physical Abuse in Childhood}, 284 (5) J. AMER. MED. ASSN. (JAMA) 592 (Aug. 2, 2000) (“Severe stress early in life is associated with persistent sensitization of the pituitary-adrenal and autonomic stress response, which, in turn, is likely related to an increased risk for adulthood psychopathological conditions.”); \[
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Third, there were dire economic consequences from their parents’ divorce for the children in both the Hetherington and Wallerstein studies, and there are direct implications for relocation policy. Hetherington reports that divorced women "move out of poverty as they gain more skills, get a job, or remarry, and fall back into poverty with job loss or unexpected economic emergencies." These are precisely the settings in which many relocation requests occur: the custodial parent's desire for further education, a better job or remarriage, or her desire for assistance from her family when misfortune strikes.

Whether a mother seeks to improve her financial situation, or simply seeks to stay afloat, the studies suggest that post-divorce moves are almost inevitable. Hetherington reports, for example, that on average the divorced women in her longitudinal study "moved four times in the first six years [post-divorce], but poor women moved seven times" in what she termed a "downward spiral" as they searched for ever-cheaper accommodations. And Wallerstein reports that children's adult opportunities are also shaped by their mothers' post-divorce financial circumstances. Two-thirds of the children received contributions towards their college expenses only from their mothers, and the consequences for the children's educational opportunities, attainments, and ultimate livelihoods were devastating. Court orders that would deny these women opportunities to improve their financial circumstances out of concern for child-father relationships are unlikely to address these problems: even children who had "friendly relationships and regular visits with their [far more affluent] fathers . . . received regular partial support for college from them" in only 30% of the cases.

30 E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 88 (2002).

31 The result was poorer neighborhoods, with higher crime rates, worse day care and worse schools. Id. Hetherington notes that there were also "more single mothers and children [in the neighborhood] who had serious behavior problems," but doesn't clarify whether these were a subset of her divorce study participants or instead (as seems implied) households headed by never-married women. See id.

32 See Wallerstein and Lewis, supra note [], at 362. Two-thirds of the children had fathers who were successful professionals (attorneys, doctors and businessmen), while the professional mothers worked as teachers, nurses and social workers. The authors report a "wide economic disparity" between the two groups. See id.

33 Id. at 362-63.
Even accepting that moves might improve custodial parents’ lives and assuming that the correlations the above studies show between improved circumstances for mothers and for their children, what explains this pattern?

According to Hetherington, good parenting by the custodial parent is the most effective protection for a child’s post-divorce well-being:

Parenting is not only the most important but often the sole protective social factor in a very young child’s life. But even six years after divorce, when our ten-year-olds were beginning to have access to other potential buffering factors outside the family, we found that a custodial parent – which in most cases meant a mother – remained the first line of defense against the stresses of postnuclear family life.\footnote{HETHERINGTON & KELLY, supra note 1, at 126.}

When inter-parental conflict is low, noncustodial parents, too, can contribute to good outcomes for their children.\footnote{Gender is relevant to these findings: nonresidential fathers (particularly those who are supportive and have an authoritative parenting style) can enhance a boy’s achievement and reduce the odds that he will become delinquent or a substance-abuser. Authoritative noncustodial mothers also can have a positive impact, especially as to their daughters. See id. at 33.} Overall, however, Hetherington concludes,\footnote{Id. at 133-34.}

\[T\]he developmental effects of most non-residential parents are limited. Even if they visit regularly and are skilled, such parents occupy too little emotional shelf space in the life of child to provide a reliable buffer against a custodial parent who goes into free fall [or to] protect against the day-to-day hassles of postdivorce life.\footnote{Id. at 134; [\textit{cf.} Wallerstein \textit{[].}}

Instead, precisely as Wallerstein also reports, “It is the quality of the relationship between the nonresidential parent and child rather than sheer frequency of visitation that is most important.”\footnote{She reports that many noncustodial mothers have abandoned their children, are uninterested in caring for them, or have emotional or substance abuse problems.}

Unfortunately, this relationship is often “less than ideal,” given the personal attributes of many noncustodial parents.\footnote{Id. at 33.} Hetherington points out what should
be obvious: that “visits from an alcoholic, abusive, depressed, or conflict-prone parent do nothing for a troubled child, except possibly make the child more troubled.” Even when these problems do not exist, however, paternal visitation drops off if it becomes inconvenient – many men, for example, are unwilling to drive seventy-five miles to maintain regular visits with their children. Not surprisingly, then, convenient visitation is the goal of many parents who oppose their children’s relocation without expressing any interest in obtaining their custody.

Yet the interest of a noncustodial parent in maintaining frequent, regular visits does not necessarily guarantee a good outcome for the child. Things work out well if he and the custodial parent are among the 20-25% of divorced couples who are able talk over the children’s problems, coordinate household rules and child-rearing practices, and adapt their schedules to fit their children’s needs. Less auspicious are the 50% of cases in which each parent goes forward while ignoring the other, neither coordinating their parenting nor interfering with each other. It is the final 25% of divorcing couples who pose the greatest danger to their children, and a noncustodial parent’s opposition to relocation or interest in maintaining frequent, regular visits in this setting is apt to harm rather than help them. Hetherington explains, “[T]he only childhood stress greater than having two married parents who fight all the time is having two divorced parents who fight all the time.”

Noncustodial fathers, in turn, often do not want the responsibility of caring for their children, particularly following remarriage. HETHERINGTON & KELLY, supra note 1, at 134.

39 See id.

40 Id. at 138.

41 Id. at 136-37. In the heat of parental separation or during custody litigation, conflict is, of course, high. When these events occur within days, weeks or months before or after a child’s birth, it is obvious that stress levels – particularly for new mothers – will quite naturally be extremely high. Even if research suggested that infants could do well while their parents were at war (which it does not), one would have to question policies that would require a spouse who had been rejected at such a momentous time to interact (let alone cooperate) with the other spouse. Sensible family law rules should not demonize normal, understandable responses to such extreme circumstances and impose coercive measures to increase inter-parental interactions. As the text reveals, not only is there no evidence that this would benefit the infant or toddler, the evidence is to the contrary – exposure to parental conflict would be harmful.
C. Inter-parental Conflict Harms Children

Further research is consistent: inter-parental conflict harms children. Important works of the past two decades, all supporting this conclusion, were authored by many leading academics, including Hetherington and colleagues, Wallerstein and colleagues, Maccoby and Mnookin, [] (laundry list needed here). Professor Janet Johnston has conducted a number of studies that address the reactions of children whose parents fight. She recently published an article that summarizes a series of studies that she and her colleagues recently completed. The

[A discussion will be inserted here of Janet Johnston’s relevant work on conflict, including her 38 FLQ 757 (2005) article and the studies upon which it relies.]

D. Children Do Best When Custodial Parents Can Function

On the basis of national data sets and their own research cohorts[] (correct?), sociologists Frank Furstenberg and Andrew Cherlin identified the conditions that maximize good outcomes for children. From their findings, they “distilled” two principles to guide public policy, noting that the first is the more important:

1. The more effectively custodial parents can function, the better will be their children’s adjustment.
2. The less parental conflict children are exposed to, the better will be their adjustment.

A third principle, which they found less securely supported by research, was:

3. The more regularly children visit their noncustodial parents, the better will be their adjustment.

Noting the possible conflict between their principles, the authors made clear that their view is that supporting the custodial parent and reducing parental conflict should be the primary goals, “even if that means a reduction in contact with the noncustodial parent.”


43 Id. at 107-108.

44 Id.

45 Id.
Similar conclusions were reached in another work by leading academics – Psychology Professor Eleanor Maccoby and Law Professor Robert Mnookin. Their study of how custody arrangements were reached challenged popular lore, which held high hopes for shared physical custody as a route to cooperative parenting for children. asserted that cooperative parents were more likely to share physical custody, even conflicted parents could co-parent well and that inter-parental conflict would fade over time in shared physical custody cases. The study revealed that cooperative parents were no more likely than their conflicted peers to choose shared physical custody, and those who were in conflict did not become cooperative if they shared physical custody.

E. Implications for Relocation by Custodial Households

The research literature outlined above does not substantiate assumptions or assertions that maximizing a noncustodial father’s time with a child is necessary to preserve that parent’s influence and the child’s welfare. To the contrary, the quality of the father’s parent-child relationship is not a function of duration or frequency of visits. More importantly, neither increased duration nor frequency of visits has a measurable favorable effect on the child’s emotional well-being, at least so far as anyone has been able to ascertain thus far. Instead, it is the quality of the child’s relationship with its father that matters. What affects a father’s sense of well-being is, of course, a distinct question.

Two negative correlations have, however, been show. When mothers become depressed, mother-child attachments suffer (although father-child attachment is unaffected). Further, if there is high conflict or domestic violence between the

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46 Recasting the question in terms of the parents’ individual interests would raise different policy issues than does the current best-interest-of-the-child rule. Lawmakers would have to consider whether the consequences of divorce should be revised to restrict the current choices former spouses have to remarry or make other similarly weighty life choices, the degree to which children may be harmed if their primary caretaker becomes depressed by a loss of the opportunities that others have, and the gender equality implications of various possible rules. These issues are beyond the scope of this discussion. Dr. Wallerstein has, however, identified the dangers for children of maternal depression if caretaker relocation is restricted. Similar effects are identified in a recent publication which reports that maternal depression adversely affects mother-child attachment.
parents, children deteriorate dramatically when there are frequent visitation
transfers.47

While scholars find certain aspects of these findings puzzling,48 there is a broad
consensus that the central importance of the primary relationship has been
convincingly demonstrated, while no similar support has been found for the
visiting relationship.49

All of the studies listed above deal with groups, and, accordingly, their findings
represent generalizations. Just as a bell curve reflects at its center what is true
for most cases, it also reveals “outliers” on either side, for whom the general rule
does not control.[] (better wording?) Caution must therefore be used in applying
the results of any group studies to an individual – someone who might be an
outlier rather than an average (center-of-the-curve) person. The same principles
apply, of course, to group studies on children’s post-divorce experiences.

But law, like science, is also very interested in what holds true for most people,
and seeks to provide appropriate rules for typical cases. Sometimes doctrines
like strict liability apply, and no provision is made for outlying cases. Usually,
however, rebuttable presumptions and other “escape devices” permit courts to
fine-tune results for special circumstances.

This technique appears, for example, in California relocation law, where a statute
provides that a person with sole physical custody of a child has the right to
determine where the child will live. A court is nevertheless authorized to deny
the child’s relocation if it concludes that a move would prejudice the rights or
welfare of the child – i.e., if the generalized rule that moving with the custodial
parent serves the child’s rights and well-being does not apply to this specific
(exceptional or out-lying) child.

III. Challenging the Research: Has Father-Child Contact Been Undervalued?

A. Findings That Cause the Greatest Difficulty for Fathers’ Advocates

There is clearly less information about father-child relationships than one would
like. Attachment research, for example, has focused primarily on mother-child
interactions. Children’s attachments to their fathers have been studied almost

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exclusively in the context of intact households, and the findings are
disconcerting. It is mothers who are consistently preferred by infants, even those
who receive most of their care from others. In one study, for example, Swedish 8-
month-old infants preferred their mothers even after their fathers had been the
infants’ primary caregiver for at least the most recent month of their lives. In
another, Efe babies who were cared for and nursed by women who were not
their mothers during daytime hours also preferred their mothers.

Theorists, who appear to be nonplused by these results, often express
certainty that gender-neutral attachments will one day be identified. Not much
evidence supports these egalitarian hopes, however, and the common-sense
explanation that infants may prefer the familiar scent and touch of the person in
whose womb they developed is not mentioned. Oblivious to the implications for
later custody battles, children go about their business of developing attachments
to their fathers and mothers simultaneously, at about 5 to 7 months of age. A
somewhat surprising finding, of direct relevance to child custody, is that the
amount of time that infants see their fathers is irrelevant to the quality of their
attachments to them; even minimal interactions are sufficient.

It is the mother-child attachment instead that may be affected by paternal
involvement, and here, increased paternal involvement has a seemingly
pernicious result. It does not enhance the quality of the father-child attachment.
It, does, however decrease the quality of the child’s attachment to its mother.
So, what would have seemed to be a good thing – an infant with generous
amounts of contact with both parents – seems instead to disadvantage the child.
The primary attachment relationship is weakened, but there is no measurable
benefit to the other parent’s relationship with the child.

\footnotesize{\textsuperscript{50} See Michael Lamb et al., \textit{Effects of Paternal Involvement on Infant Preferences for Mothers and Fathers}, 54 \textit{Child Dev.} 450, 455 (1983). The result seems to have surprised those who conducted the research, although common sense would seem to suggest this result. The babies’ mothers had nursed them and stayed home to care for them for at least the first 5 months of these infants’ lives.}

\footnotesize{\textsuperscript{51} See Edward Z. Tronick et al., \textit{Multiple Caretaking of Efe (Pygmy) Infants}, 89 \textit{Am. Anthropologist} (n.s.) 96, 99-100 (1987). \textit{See also id.}, “Multiple Caretaking in the Context of Human Evolution: Why Don’t the Efe Know the Western Prescription for Child Care,” in \textit{The Psychobiology of Attachment and Separation} 293, 305 (Martin Reite & Tiffany Field, eds. 1985)}
How, then, do writers who think fathers should play a far greater role in their children’s lives after divorce deal with this literature? On what do they base their recommendations?

B. Arguments That These Findings Ought Not Apply

Joan Kelly, Michael Lamb, Richard Warshak, Sanford Braver, William Austin, and Leslie Ellen Shear are among the authors who challenge the implications of the findings reported above.

They argue that a secure father-child attachment is a pre-requisite for a child’s long-term well-being and that such attachments require specific kinds of contact in the early months of a child’s life. They assert that infants must therefore be transferred often between the homes of their separated parents – ideally daily – and that fathers must partake in the full range of child care activities. Significant among these, they claim, are bed-time rituals and overnights; indeed, they argue that even breast-feeding newborns should spend alternating nights in their fathers’ and mothers’ homes.

They find the notion that children fare best when their relationship to their primary custodian is protected simply wrong. They reason instead that the implications of children’s developmental needs extend far beyond joint physical custody for infants and toddlers. Older children, too, can also be spared many or even most of the documented harms they currently suffer after divorce according to these authors. To accomplish this, they argue that the law should guarantee frequent visitation arrangements of the sort that are possible only if the parents’ homes are in close geographical proximity. They urge that courts require custodial mothers to reside near their children’s father. They also recommend the entry of frequent access and joint physical custody orders over the objections of the custodial parent, even in cases of (high/moderate) conflict.

The positions these authors take is sympathetic, but without a scientific basis. Often it is directly contrary to the credible scientific evidence. At best, it constitutes wishful thinking. At worst, it is based on deception.

C. Misrepresentations of the Research

Many recent articles in legal, interdisciplinary, and even scientific journals on the topic of child custody law contain serious distortions of the scientific literature. Because judges, lawyers, and editors often lack statistical or scientific training and familiarity with the research literature. As a result, they are often ill-equipped
to judge the quality of empirical works and review articles.\textsuperscript{52} It is, unfortunately, these very weaknesses that authors often exploit.

They do so in several ways.

Let me (1) identify typical shortcomings in their works, and (2) provide examples from publications that are directed at professionals and laymen in the child custody field.

\textbf{Typical shortcomings}

First, the authors of misleading works usually publish exclusively or primarily in legal journals, not scientific ones.\textsuperscript{53} By doing so, they avoid the rigorous peer review leading scientific journals provide to ensure that manuscripts are accepted for publication only if they have scientific merit.\textsuperscript{54} The legal journals in which they publish instead test the relevance of the discussion to legal debates, but do not have the means to test scientific accuracy.\textsuperscript{55} Further, they are not normally read by academicians in sociology, psychology, psychiatry and allied fields. The consequence is that serious misrepresentations are not filtered out, and the scholars whose work has been distorted may never learn of the error.

Next, the authors make broad generalizations without providing support for them, often relying heavily on their own earlier characterizations of the field. There may be a dearth of cited authorities, and it is often difficult for lay readers to distinguish what is fact from what is opinion. Frequently, the authors fail to even address how their conclusions fit into the larger body of existing knowledge.\textsuperscript{56}

Even such basic information as research design and the statistical significance of their reported “findings” may be omitted.\textsuperscript{57} Precise data, for example, may be

\textsuperscript{52} Review articles summarize and evaluate the work of many others on a given topic.

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lacking while imprecise words (such as “more”, “less”, “often,” and “seldom”) appear, making it difficult to evaluate the assertions. Sometimes strikingly different results with direct implications to the topic are glossed over, and the results are lumped together in a way that conceals findings that are directly relevant to the discussion. Finally, policy recommendations may be made that are totally unsupported by, or even contrary to, the data.

As the following discussion reveals, each of these deceptive techniques is now present among the writings of those who wish that the findings concerning children’s relationships with their fathers were otherwise. This unfortunate pattern complicates what should be an even-handed, honest discussion of child custody law and its import for children, their parents, and other important family members, such as siblings, half- or step-siblings, and step-parents.

2. Examples from the custody writings of fathers’ advocates

   a. Publishing in legal or interdisciplinary journals, not scientific ones

The authors whose works are discussed above as credible research are all known research scholars. They are on university faculties or at research institutes where research grants and employment depend on demonstrated scholarship. Their empirical work, as it progresses, is normally published from time to time in peer-reviewed scientific journals. These scientists also publish books concerning their scientific works that can be found in major research libraries.

They may, of course, also publish articles outside their discipline. Typically, these are shorter essays designed to bring their research findings to the attention of professionals in allied fields – in the current context, primarily, family lawyers, judges, law professors, mediators, those who conduct custody evaluations, and policy makers.

Proponents of fathers’ rights, in contrast, publish disproportionately in legal and interdisciplinary journals rather than in their own discipline. A similar pattern is evident among some who once wrote scholarly works, but have long since abandoned research and taken on the role of advocate. Mental health professionals Richard Warshak, Ira Turkat, Deidre Rand, Douglas Darnel and William Austin are examples of writers in the first group – their publications focus
on legal audiences rather than scholars in their own discipline. Richard Gardner, M.D., Joan Kelly, Ph.D., and Michael Lamb, Ph.D. are typical of the second group – authors once known for original research who have long-since turned from scholarly research to advocacy.

Scientific deficiencies in the works of several of these authors have already been identified in publications by scholars in the relevant academic field. Several serious misrepresentations of the research literature in Richard Warshak’s Family Law Quarterly “review” article concerning overnight visits by infants, for example, were identified by Zeynep Biringen, a professor of child development, and her students.

**Assertion**: Warshak implies that each of a child’s multiple attachments is equally important.

**Fact**: The literature indicates otherwise. Even in the Efe culture in Africa, in which different mothers of newborns take turns breastfeeding a baby, the baby prefers interacting with its own mother. Also, children still preferred their mothers in Michael Lamb’s study of Swedish families in which the father had been the primary caregiver for a large portion of the time.

**Assertion**: Warshak says a 1999 study by Solomon and George supports the view that overnight separations are unrelated to security of attachment.

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60 For these purposes, I refer to empirical research undertaken after the completion of the person’s professional degree, not subsequent publication of research undertaken while a student.


62 Zeynep Biringen et al., *Commentary on Warshak’s “Blanket Restrictions: Overnight Contact Between Parents and Young Children,”* 40 Fam. Ct. Rev. 204, 205-06 (2002).

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**Fact:** Solomon and George found overnights with the father did not improve infant-father security of attachment but were related to a higher rate of specifically disorganized attachments with mother – i.e., harmed infant-mother attachments. 68

**Assertion:** Warshak says “about half of infants in [an Israeli kibbutz] communal sleeping arrangement were securely attached to their mothers, a smaller proportion than those who slept with their families” and that there was “no difference” between communal and family sleeping arrangements. 69

**Fact:** The “about half” who were securely attached although sleeping communally was indeed 48%, but dramatically higher rates of secure attachment (80%) existed for those who slept with their families.

Her list goes on. One need read no farther to conclude that Richard Warshak has an agenda that he wants to advance, even if doing so requires serious misrepresentations. 70 As a consequence, anything he writes is suspect, and the

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69 [] His remarks misstate the comparison groups. Attachment patterns were the same for two groups, neither of whom were involved in communal sleeping arrangements: non-kibbutz children and children who had daycare only at the kibbutz.

70 This is not surprising. [] A range of expert services are offered, including service as a “consulting expert (trial consultant),” and to “critique reliance [by other experts] on unproven theories.” See Warshak, “Policy Regarding Custody Related Services,” [http://home.att.net/~rawars/servpol.htm](http://home.att.net/~rawars/servpol.htm) (last visited June 12, 2005). Warshak states he will (rarely) testify in cases in which he has had “an opportunity to conduct and/or review evaluations.” This language does not make clear whether he ever makes recommendations on custody issues if he has not seen both parties and the child. Richard Gardner did so, and similar evaluations by Douglas Darnel, Ph.D. recently led to 2 concurrent 2-year suspensions of Darnall’s license to practice psychology in Ohio. See *In re The Suitability of Douglas C. Darnel, Ph.D. To Retain His License to Practice Psychology, Decision and Order of the Board, Notice of Opportunity for Hearing Issued December 9, 2002* (April 8, 2005) (hereafter Darnel Decision I); *In re The Suitability of Douglas C. Darnel, Ph.D. To Retain His License to Practice Psychology, Decision and Order of the Board, Notice of Opportunity for Hearing Issued September 12, 2003* (April 8, 2005) (hereafter Darnel Decision II). The decisions are being appealed.
better part of valor for someone who wants accurate information – not merely insight into the latest fathers’ rights arguments – will simply skip over them. Distortions and illogic reappear in Warshak’s publications on Parental Alienation Syndrome,\textsuperscript{71} the primary caretaker presumption\textsuperscript{72} and relocation issues.\textsuperscript{73}

This pattern is common in other articles by fathers’ rights advocates. Works by Ira Turkat, Deidre Rand, and William G. Austin all fail even the most basic standards for scientific work. In two related articles, for example, Austin suggests that custody evaluators predict (in specific mathematical terms) “risk factors” and “protective factors” for individual children in the event of relocation with the child’s custodial parent. He bases this recommendation on an existing scheme that seeks to predict the risk of violent behavior \textsuperscript{[] by whom?} Undeterred by a startling error rate of 70% in the use of that model, Austin makes only a glancing reference to the fundamental problem of how risks from relocation for individual children could be assessed:\textsuperscript{74} Although he urges professionals to quantify the gravity of the risks they perceive in percentage terms because that will “assist the court in conceptualizing” how much harm justifies denying the child relocation, he notes only in passing the fundamental conceptual flaw: “while risk factors may be specified with accuracy, \textit{the degree of risk or probability may be unknown}.”\textsuperscript{75}

Perhaps most surprisingly, in their efforts to advance the cause of fathers, Michael Lamb and Joan Kelly now produce similarly flawed work.\textsuperscript{76} Like their colleagues, they repeatedly assert “facts” that are either clearly inaccurate or, at best, highly

\begin{itemize}
\item \textsuperscript{71} [\textsuperscript{[}]
\item \textsuperscript{72} [\textsuperscript{[}]
\item \textsuperscript{73} [See, e.g., Richard A. Warshak, \textit{Social Science and Children’s Best Interests in Relocation Cases: Burgess Revisited}, 34 FAM. L.Q. 83 (2000), which confounds correlations with causation throughout. [\textsuperscript{[}]
\item \textsuperscript{74} Indeed, he does not even provide an empirical basis for identifying what difficulties relocation might cause for children. Instead, he lists concerns that judges have voiced (apparently spontaneously) in specific but unrelated cases from a few states. [\textsuperscript{[}.
\item \textsuperscript{75} [\textsuperscript{[}]
\item \textsuperscript{76} Their earlier empirical works in the 1970's and 1980's, in contrast, met scholarly standards. During that period, each co-authored with others. [\textsuperscript{[}]
\end{itemize}

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doubtful. No supporting citations are supplied – a trait that typifies advocacy rather than scientific argument.\footnote{This technique is never appropriate for works that discuss scientific findings and base legal recommendations upon them. The situation is different, of course, for “think pieces” that are addressed to the members of a specific scientific discipline who are familiar with the extant research literature.}

The purpose of such representations is clearly to convince courts that efforts to protect a child’s primary relationship are misguided and harm children more often than not. But, as the following discussion reveals, the picture they paint is based more in wishful thinking than sound scholarship.

Lamb and Kelly, for example, state that “most relocation cases will result in the residential parent being allowed to relocate with the child.”\footnote{\footnote{[] Austin, supra note \_\_, at 75.}} No citation is given, and it would be surprising if one could be. Having painted this picture, however, they proceed to make sweeping, frequently misleading assertions about the research literature while providing almost no citations to it.\footnote{Two experts in early childhood development, Solomon and Biringen, also note this defect. \textit{See} Judith Solomon and Zeynep Biringen, \textit{Another Look at the Developmental Research: Commentary on Kelly and Lamb’s “Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children,”} 39 \textit{FAM. CT. REV.} 355, 359 (2001) (‘[T]heir treatment of this topic is . . . controversial . . . [in part because] the bulk of the citations . . . are to review articles or thought pieces by the authors themselves.’).} They say they cite review articles instead in order to make their article “readable.” Doing this, however, permits them to put their own gloss on the research literature, thereby concealing the degree to which the underlying empirical scholarship is contrary to their assertions.\footnote{Solomon and Biringen, supra note \_. No malign intent is required to cause mischief when the writer relies on descriptions of research by someone who was not involved in the original work. In a process reminiscent of the childhood game of telephone, the longer the string of intermediate articles in the chain linking the current article to the original empirical work, the more likely it is that inaccuracies will have been picked up along the way.}

This “generalization without citation” technique is common among those who advocate forcing primary caretakers to share physical custody in contested (i.e.,
high-conflict) cases. Equally common is Kelly and Lamb’s pattern of citing – if at all – disproportionately to themselves.  

Such disingenuous methods are used to build a house of cards that collapses as soon as someone takes the time to investigate the facts and consult the original empirical works. This is, for example, what happened when Judith Solomon and Zeynep Biringen examined Kelly and Lamb’s article that claims to apply child development research to formulate custody and visitation guides for very young children.  

The Solomon-Biringen critique exposes the flaws in Kelly and Lamb’s assertion that infants and toddlers under 2 need a broad range of activities with each parent daily or every other day. Kelly and Lamb had explained their position in these words:

> To be responsive to the infant’s psychological needs, the parenting schedules adopted for children younger than 2 or 3 must involve more transitions, rather than fewer, to ensure the continuity of both [parental] relationships and the child’s security and comfort during a time of great change [i.e., the parents’ separation or divorce]. . . . To minimize the deleterious impact of extended separations from either parent, there should be more frequent transitions than would perhaps be desirable with older children.  

This assertion, if true, would probably determine the outcome of the largest sub-group of litigated custody cases. Fully half of all custody disputes involve children under the age of six, and three-quarters of this one-half involve children under the age of three.[] check whether 2 or 3 is correct. The result that Kelly and Lamb urge for babies and toddlers of separated and divorced parents, however labeled, amounts to joint physical custody in high conflict situations – something the empirical research uniformly finds harmful to children.

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81 Id. The same pattern is evident in the writings of David Darnel, Richard Gardner, Deidre Rand, and Ira Turkat. []check these assertions and provide citations to examples for each.

82 Id.

Their views have similarly profound implications for litigation concerning relocation: if believed, they would prevent virtually all relocations by the caretakers of very young children. Unless noncustodial parents moved away first, custodial parents would be forced to remain near them so that the couple’s children could shuttle between them on a daily or near-daily basis. Even the modifications they would condone as the children aged would prevent more than minimal distance between the parents’ household for many years.

Their arguments are not, however, to be believed. Solomon and Biringen report the relevant empirical research in detail and provide thorough citations to the literature. They point out, for example, which findings are based exclusively on studies of intact families, which studies have tested the relevance of fathers’ caretaking activities, and which issues have not yet been resolved or even investigated.

Noting the absence of such rigor in the Kelly-Lamb analysis, Solomon and Biringen identify one of the most damning features of the Family and Conciliation Courts Review article: “[I]t tends to seamlessly weave together empirically tested findings on attachment and divorce with the authors’ opinions, making it difficult for those not expert in development psychology [lawyers, judges and mediators in the targeted audience] to evaluate the findings.”

Solomon and Biringen’s conclusion:

Kelly and Lamb make [the above-quoted] recommendations for custody and access with a provocative claim that has no empirical foundation.

All four authors agree that “most infants in the first year of life develop preferential relationships with their primary care providers (usually their mothers) [and] that the amount of time that infants spend with their fathers is irrelevant to the child-father attachment relationship.” Why, then, do Kelly and Lamb, Warshak and others make such concerted efforts to remove these babies for significant periods from the care of their primary caregivers?

84 Solomon and Biringen, supra note [], at 359.
85 Id.
86 []
A reasonable reader would question whether their concern is for the children or, instead, for fathers who feel disenfranchised.87 Surely good policy supports involving fathers to the extent that it is consistent with the children’s welfare and with the necessary implications of divorce.88

87 In their reply to Solomon and Biringen, Lamb and Kelly claim that fathers “drift out of their children’s lives” because they find their paternal role has been minimized by “traditional legal and judicial decision making”. No such causal connection has been established by the research they cite. Nor does the study they cite for the proposition that orders requiring more overnights (let alone for little children) will keep fathers involved set forth any such finding. There was, indeed, a correlation between overnights and long-term paternal involvement in the Maccoby and Mnookin study, but no causal connection was reported. It is quite possible – perhaps even likely – that these fathers were self-selected, that they were more caring, more responsible, or had less conflicted relationships with the children’s mothers than did the fathers who drifted away. Without information on these issues, there is no reason to assume – let alone state as a fact – that overnight visits will keep these men in their children’s lives in ways that will have “positive implications for their children’s well-being.” Confounding correlations with causation is a fundamental scientific error that no graduate student should make; surely more should be demanded from experienced researchers like Lamb and Kelly. Lamb’s persistent efforts to include precisely such unscientific assertions in the report of a group charged with reaching a consensus on what child-custody-related child development issues needed further research were unsuccessful when Dr. Judith Wallerstein and this author insisted that his draft statements be rendered more faithful to the discussions of the experts and the extant literature. As is typical in such situations, a few people read Lamb’s repeated drafts carefully, while others simply assumed all would be well because others would monitor the drafting. Lamb’s personal agenda took over and, without informing Wallerstein, Bruch, or the other members of the group that he had still not obtained a consensus, he simply dropped Wallerstein and Bruch from his circulations and published his version in the name of the other group members. The political importance of his efforts is revealed in his reply with Kelly: He quotes that “consensus” statement to support his unfounded assertions that specific kinds of parent-child interactions (“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.” For a similarly defective use of correlations rather than causation on these matters, see Warshak- Burgess Revisited, supra note [], at 94.

88 Solomon and Biringen, supra note [], at 360 agrees, but also notes, “We should be as precise as possible, however, about whose needs are primarily being met in this regard.”
The literature makes clear that children benefit from continuing contact with their fathers in low-conflict situations – cases that by their nature are likely to be resolved by the parents’ agreement. It is probably the combination of parental cooperation and greater paternal involvement that explains the good results in these cases, not greater paternal involvement alone. Nothing in the reports of this phenomenon supports the notion that forcing continued involvement by fathers – when either the father himself or the mother objects – will provide similar benefits. To the contrary, the literature consistently shows that inter-parental conflict harms children in the post-divorce period.

Kelly and Lamb’s suggestion that figures showing a decline of conflict after divorce are relevant to the care of children during their infancy is misconceived. These are children whose parents are actively litigating and are extremely unlikely to have resolved their divorce. Even as to toddlers, it is naive at best to base policy arguments on an expectation that inter-parental conflict will have cooled. This is a thoroughly unlikely situation, given (1) the psychological enormity of a relationship breakdown during pregnancy or shortly after childbirth, and (2) how long it takes to finalize a contested divorce or custody case. Meta-analysis is a specific form of review article that is particularly difficult for an outsider to evaluate, and particularly susceptible to misuse. There are the usual dangers of inaccurate statements concerning the scholarship of others that a layperson will not recognize. Then, there is the possibility that an author’s choice of which studies to include and which not will skew the results. Even worse for a layperson is the challenge of following – let alone evaluating – the sophisticated statistical analysis that a meta-analysis requires. The work of Robert Bauserman and his co-authors provides an excellent example.

89 Solomon and Biringen note that even during an intact marriage, “fathers are more aggravated about their toddlers if their wives are working full-time out of the home.” Solomon and Biringen, supra note [], at 358. Surely the forces at work may be even more disrupted – and the consequences for children even more serious – when the relationship between the toddler’s parents has recently broken down. Solomon and George’s findings seem to support this concern: Low communication between the parents about the infant was strongly associated with disorganized father-infant attachments in [both] maritally intact and separate families . . . .” Id. at 358 (discussing J. Solomon and C. George, The development of attachment in separated and divorced families: Effects of overnight visitation, parent, and couple variables, []).

90 See Bruce Rind, Philip Tromovitch, and Robert Bauserman, []. Bauserman is selected for treatment in the text because his later work on joint custody is being widely cited by the authors critiqued in this section. []
In 1998, these authors published a meta-analysis that said sexual abuse may not cause long-term harm to children and was used in legal cases to challenge sex abuse. When leading scientists re-examined the data on behalf of the Leadership Council on Mental Health, they found the initial analysis plagued by a number of problems, including biased samples, the inclusion of very mild sexual encounters in public settings as examples of child sexual abuse, misreporting of original data, and a failure to correct for the many sources of statistical anomalies. The result, according to David Spiegel, M.D., Professor of Psychiatry and Behavioral Sciences at Stanford University, was to downplay an increased vulnerability to a wide range of mental health and social problems in adulthood for childhood victims of sexual abuse. Further, even the findings that demonstrated this connection were downplayed in the authors’ conclusions.

Although the work is not, of course, directly related to relocation cases, but its lessons are. Fully three years passed between the publication of the original meta-analysis and the publication of two scientific critiques by leading scholars. During that lag-time, much mischief may have been done. As this example reveals, in some disciplines even highly controversial claims that receive public attention and strike a lay reader as implausible may not be answered in print for several years. Common sense and caution are, then, in order for some time when “new” work is dramatically out of step with accepted learning. This is also the time for lawyers and policy makers to consult with trusted experts for assistance in evaluating the scholarship.

Further, and of direct relevance to relocation law, Bauserman has since written a meta-analysis on joint custody that is now cited widely by those who propose

91 The Leadership Council is a nonprofit independent scientific organization that promotes the ethical application of psychological science to human welfare by providing accurate, research-based information about a variety of mental health issues. The organization’s title has been revised to reflect its current focus on neglect and abuse. See http://www.leadershipcouncil.org.


93 Id.

94 Dallum et al.,[] (2001); Ondersma et al., [] (2001).
increased time shares for noncustodial parents and decreased opportunities for relocation by custodial households.  

There is, of course, every reason to doubt the scientific merit of this later work. To the extent that incompetence rather than deliberate distortion was the culprit in the first article, one must anticipate that it will continue to plague Bauserman’s writing. However, as in the case of Richard Warshak’s writing, clear misstatements of the research literature denote Bauserman’s willingness to distort facts if it will advance his agenda. This is not scholarship, and those who wish to base their policy choices on credible research have no choice but to consult the original sources rather than accept at face value either his work or the arguments of others that rely upon it.

Serious lapses in methodology are also evident in a 2003 article by Sanford Braver, Ira Ellman and William Fabricius. This exploratory study of students in a first-year psychology course has been widely publicized as establishing that children will benefit if custodial households are prevented from relocating more than an hour’s drive away from the noncustodial parent. It does no such thing, and telling critiques are already available. In comparison to the challenges of understanding a meta-analysis, the flaws in this piece are readily apparent. In fact, as Wallerstein notes, “youngsters in the custody of their fathers when the mother moved or who moved with the father were the only young people who showed troubled behavior.” Indeed, as she points out, “The authors make no effort to explain this truly astonishing finding, and it is hard to see how these findings constitute an argument for barring the custodial mother’s move with her children.”

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99 Wallerstein on Braver, supra note [] (emphasis added). This included significantly more hostility than for the other groups (those in which neither parent moved, where the mother and children moved together, or where the father moved away without the children).
children and changing the custody of the child from mother to father.” Yet those are the very recommendations the authors make.

The information collected from these students through a written survey might appropriately have been used to identify questions worthy of further, more sophisticated study. But the results lack so much information that they raise more questions than they answer. Glenn\(^{100}\) and Blankenhorn\(^{101}\) ask what causes the small differences in the students’ answers, and identify many of the possibly relevant facts that the study left unaddressed.\(^{102}\) Noting that they “disagree on the policy issues at stake” they nevertheless “agree that the Braver study is a weak one that provides no credible evidence on the effects on children of moving away after divorce.” Perhaps equally important is their comment on why solid research on relocation matters:

> The “move-away” issue is politically red-hot today . . . . The debate is quite polarized, with those who support the independence of divorced mothers pitted against fathers rights advocates . . . .

The primary deficiencies in the author’s analysis of the topic they purport to address can be distilled:

**Assertion:** Braver et al. state, “Our data cannot establish with certainty that moves cause children significant harm.”

**Fact:** The study lacks a pre-move baseline. With no information about the condition of children before the move, it is impossible to show whether the move benefited or harmed them.

**Assertion:** Braver et al. claim that relocation does not improve the condition of children.

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\(^{100}\) Professor Norval Glenn is a leading sociologist on the faculty of the University of Texas.

\(^{101}\) David Blankenhorn is founder and president of the Institute for American Values, a private organization “devoted to contributing intellectually to the renewal of marriage and family life and the sources of competence, character, and citizenship in the United States.” He has been active in promoting fatherhood issues.

\(^{102}\) These include the child’s age at divorce, whether either parent remarried, and how much inter-parental fighting or cooperation there was either before or after the divorce. []
Fact: Once again, without a pre-move baseline the study reveals nothing – and can reveal nothing – about this issue. The study does, however, show that as to the students Braver et al. surveyed, “there were no differences among those . . . who remained in the same community and those who moved with the custodial mother.”

Wallerstein captures the important findings that can be gleaned from a careful reading of in the Braver article that were unfortunately glossed over by the authors:

The important findings in this limited study are:

(1) the striking similarities in major mental health measures between children who moved with their mothers and those whose parents did not move (which supports granting custodial mothers’ requests to move with their children), and

(2) the unexplained psychological plight of the children in father custody (which contraindicates denying custodial mothers’ requests to move with their children and requiring the children instead to remain with their fathers).

Because the authors fail to distinguish cases in which mothers stayed nearby of their own volition from those in which courts forced them to stay, one is unable to judge the relative outcomes for children if their mothers are ordered not to move – the very policy question the authors purport to address. Their proffered conclusion that relocation even an hour away causes “significant” problems for children seems, then, as Wallerstein puts it, “to be built not on the study itself but on the goals of the investigators.”

Disregard for basic scientific principles extends to the work of another well-known champion of fathers’ rights. In an important recent development, a public body charged with licensing and regulating the practice of psychology in the state of Ohio considered charges of unprofessional conduct that were based on practices now frequently seen in US custody and relocation cases. In two opinions, the board suspended the license of Douglas C. Darnel, a psychologist and author

\[103\] Id.

\[104\] Darnall Decisions I & II, supra note []; the decisions are being appealed.
who actively supports the doctrine of Parental Alienation Syndrome.\footnote{105} Despite telling critiques, the doctrine (sometimes in a permutation called Parental Alienation) continues to be pressed by many lawyers and mental health professionals in relocation cases, where they argue that custodial parents will alienate the children if they are allowed to relocate.\footnote{106}

Darnall’s work included interpretations of two standard assessment tools – the Minnesota Multiphasic Personality Inventory-Revised (MMPI-2) and the Millon Clinical Multiaxial Personality Inventory-Third Edition (MCMI-III) – to classify behavior as “consistent with individuals who are active or obsessed alienators.” The State Board of Psychology of Ohio concluded that the test interpretations were non-validated, and the alienation taxonomy had no known “base-rates regarding correct or incorrect classifications” and was “not subjected to reliability and criterion-based validation procedures.”\footnote{107} Darnel also used what the board termed “an insufficiently validated instrument, the ‘Parental Alienation Scale,’” and he rendered opinions improperly in custody cases “without observing or otherwise assessing the behaviors of either parent when interacting with their children through standardized observation methods, controlled settings, or other methods to ensure the reliability and validity of the data upon which the opinions were rendered.”


\footnote{106} This concern was expressed by psychologist Philip Stahl in his custody evaluations for the trial court in In re Marriage of LaMusga, 32 Cal. 4th 1072 (2004). As is now common for evaluators who continue to press arguments based on parental alienation theories, Stahl was not deterred by the mother’s years-long history of honoring the court’s visitation orders, nor by her protestations of support for the children’s relationship with their father. Accepting her belief that she was supportive, he voiced another unsubstantiated doctrine, that of “unconscious” alienation. [\[]

\footnote{107} Darnall Decision I, supra note [\[]. Darnall also provided unsolicited opinions on custody and visitation when asked to conduct psychological evaluations of specified persons, and when he had never met the children. \textit{Id.} In Darnall Decision II, supra note 69, Darnall’s practice of rendering expert opinions without having interviewed both parties and the child is reminiscent of the forensic practice of the late Richard A. Gardner, M.D., the originator of Parental Alienation Syndrome. \textit{See} Bruch, supra note [\[], at [\[].
For these and other instances of conduct failing to meet the applicable rules of professional conduct, the Board suspended Darnall's license to practice.  

As recent US experience with alienation theories demonstrates, ideological views may prompt experts, lawyers and judges to shift their focus away from the needs of the children to the sympathetic desires of a litigating parent. Too often the goal of minimizing major changes for children is forgotten, as attention turns to promoting the desire of a parent to restructure the extant parent-child relationship.  

Professor Robert Emory recently noted the limitations of mental health professionals who too-often speak beyond their expertise in child custody cases by predicting what will be best for children in one or the other parent’s custody.  Such prognostication is beyond the professional competence of mental health professionals, and the American Psychological Association has promulgated guidelines that discourage precisely such behavior.  

Mental health professionals and social scientists are not alone in misstating relevant empirical scholarship. In a publication of the Association of California Family Law Specialists, for example, attorney Leslie Ellen Shear wrote:

108 Darnel Decision II, supra note [], at 2. In the board’s opinion, “Prevailing standards when rendering psychological opinions about parenting capacity indicate that direct observations of parent-child interactions should be done.” Id.  

109 Darnall Decisions I & II, supra note [].  

110 It is reassuring, of course, that individuals can change and that the impact of divorce may inspire greater attention to one’s children. Adult awakenings, however, should not be subsidized by increasing the divorce-related hardships for the couple’s children, who are innocent bystanders to the inter-adult drama. 

111 []  

112 []  

Too often we seem to [assume] that it is not only possible, but likely, that parents and children can sustain and strengthen their attachments . . . long distance. The research strongly suggests otherwise. Consider, for example, pre-eminent divorce researcher Mavis Hetherington’s conclusion that long distance parents have no significant impact on their children’s development.

[T]he developmental effects of most non-residential parents occupy too little emotional shelf space in the life of a child to provide a reliable buffer. They are not there to protect against the day-to-day-hassles of post-divorce life.114 Shear went on to assert that “Sociologist Sara McLanahan reaches a similar conclusion, ‘[M]oderate levels of visitation do not appear to help children much. What does seem to help is a close father-child relationship . . .’.115 These quotations seriously alter the meaning of the original texts, which are provided in the footnotes following each quotation. Long distance is not the culprit in the quoted sources Rather, as noted above, Hetherington and McLanahan both emphasize that children do best when they have a close relationship with

114 E. MAVIS HETHERINGTON & JOHN KELLY, supra note 1, at 133-34. The original language describes instead the limited impact of nearby, skilled non-custodial parents when custodial parents are troubled. Dr. Hetherington actually wrote:

Where there is a low level of conflict between parents, a non-residential [parent can have] a positive impact [on a child]. But the developmental effects of most non-residential parents are limited. Even if they visit regularly and are skilled, such parents occupy too little emotional shelf space in the life of a child to provide a reliable buffer against a custodial parent who goes into free fall. They are not there to protect against the day-to-day-hassles of postdivorce life, . . . It is the quality of the relationship between the non-residential parent and child It is the quality rather than sheer frequency of visitation that is most important.

(language Shear omits supplied in italics). Hetherington and Kelly go on to note that “visits from an abusive, depressed or conflict-prone parent do nothing for a troubled child, except possibly make the child more troubled.” Id.


Real joint custody is hard to sustain, and moderate levels of visitation do not appear to help much. What does seem to help is a close father-child relationship, which depends on the parents’ ability to minimize conflict after divorce.
their noncustodial parent and when there is low inter-parental conflict (a group that comprised only 25% of Hetherington’s sample).

Neither of Shear’s sources equates proximity between the parents with low conflict or good parent-child relationships. Indeed, Hetherington specifically separates the two, stating that quality of the parent-child relationship is most important, not frequency of contact. According to McLanahan’s summary of the research, “Three general factors [quite different from the one Shear claims] account for the disadvantages associated with father absence: economic deprivation, poor parenting [by an overextended custodial parent] and lack of social support [in the custodial parent’s community]. Economic security is probably the most important . . . .”

As these examples reveal, the work of several well-known US writers on children’s post-divorce experiences cannot be taken at face value. Accurate information is only assured when original sources are consulted. When necessary, the assistance of impartial experts can illuminate the sufficiency of these empirical works.

IV. DISCUSSION AND CONCLUSION

Children surely love both parents and are seriously pained when access to one parent is impaired. Indeed, children idealize absent, even abandoning, parents, giving these parents perhaps more influence than others would think justified. But none of this negates the importance of protecting and supporting the quality of life in the place where the child primarily resides.

In other contexts, stability is readily understood to mean stability within the household, not stability of geographic location. Intact families who move for whatever reason would surely not be threatened by a loss of their children’s custody to family members who might think the relocation unwise and would wish to retain the children in local child care, schools, youth groups, or therapy sessions. Although a child might be deeply saddened by increased distance from

116 Certified Family Law Specialists who rely on their professional journal for accurate information may, as a result of Shear’s article alone, hold false beliefs and advance fallacious arguments in relocation cases. The chance for professionals to “do good” for your client while “doing well” for yourself may, intentionally or not, foster bad results for those who are less affluent. As the brief of the California Women’s Law Center et al. (hereafter the Women and Children’s Brief) and the Poverty Brief make clear, women and children depend on the simple, clear rule of § 7501. So do the sound policies of California family law.
playmates, teachers, or extended family members, the child’s household unit is protected.

This is precisely the crux of legal doctrines that protect natural parents above all others and protects residential stepparents against strangers. There, as under some relocation rules, the burden of showing detriment or prejudice to the child must be borne by a non-household member who challenges the care of those who share the child’s home. That it is a noncustodial parent rather than a member of the extended family who wishes to contest the child’s departure in contemporary move-away cases does not change the equation in a dispositive fashion.

Once parental separation is at hand, the family constellation must adapt. An initial custody decision between parents is handled with the “best interest” standard. And once made, whether consensually or by court order, a new family unit results. It deserves protection for many of the same reasons that parents are protected from strangers in other contexts. As the discussion above reveals, children’s well-being is strongly – essentially – affected by what happens in the primary household. The credible social science literature and relocation laws that protect the choices of custodial parents in all but unusual cases converge in emphasizing the primary caretaker relationship (rather than geography or visitation) in custody disputes.

Unfortunately, current relocation law and the writings of many of those who distort the underlying literature encourage noncustodial parents to protest changes in the child’s situation whenever an occasion presents itself. Failure to do so might otherwise be taken to indicate a lack of love for the child.\textsuperscript{117} What is lacking in this approach is acceptance.

Divorce in contemporary law carries with it an expectation that former spouses will go in their own directions and that the path each spouse takes is largely up to that person alone. Exceptions to this autonomy exist only to the extent that strong policies require. So long as proper care is given to the children, for example, and so long as proper support is supplied, the person providing either is free to choose how to carry out his or her responsibilities. How much better it would be to emphasize the ways in which a loving noncustodial parent could support the child in adjusting to change. Rather than litigation and acrimony, possibly accompanied by a threat that the child might be removed from its primary caregiver, a child could instead be reassured that love

\textsuperscript{117} There are, of course, also less noble reasons to complain that can contribute to the acrimony that often accompanies a custodial parent’s relocation plan.
will abide and that there will be concrete, even creative ways for the two to stay in touch and be with each other.

More than a decade ago, an interdisciplinary group of scholars drafted nine research and policy-based guidelines for relocation disputes,\(^\text{118}\) eight of which continue to be worthy of consideration. This draft articulated what the group then believed to be relevant policies and explains the assumptions that underlay them. My disavowal of provision 8 is explained below. Although written as a proposed statute to guide judicial decisions, these principles may also be useful for parents who confront the challenges of relocation.

(1) A child’s abilities to form healthy relationships and to adapt to change depend on a healthy primary relationship and are, accordingly, endangered if that relationship is disrupted.
(2) It is in the best interest of children in all but unusual cases to maintain contact with both parents when the parents do not live together.
(3) Research indicates that a child’s healthy psychological adjustment depends on the quality of the attachment between the child and its non-custodial parent, but is not related to the particular visitation pattern or the frequency or length of visits.
(4) It is normal, healthy and desirable for parents whose relationship has ended to build separate lives.
(5) These separate lives can be expected to include changes such as increased reliance on extended family relationships, the creation of new personal and family relationships, and new educational and career choices, any of which may involve relocation.

\(^{118}\) Carol S. Bruch et al., Draft Research and Policy Bases for Relocation Cases (unpublished 1993). This effort was prompted by a request from then-California State Senator Bill Lockyer that I attempt to draft desirable presumptions and burdens of proof that would improve California’s statutory relocation law. My consultations with colleagues concerning sound substantive goals resulted instead in these jointly authored recommendations to supplement, but not replace, the relevant statute then in place. My co-authors were James Cramer, Ph.D. (then-Associate Professor of Sociology at the University of California, Davis), Carol Rodning, Ph.D. (then-Associate Professor of Human Development and Family Studies and Director of the Center for Child and Family Studies at the University of California, Davis), and Judith Wallerstein, Ph.D. (Psychologist, researcher on the effects of divorce on children, and Founding Director of the Center for Families in Transition, Corte Madera, California, since renamed the Judith Wallerstein Center for Families in Transition).
(6) When a parent who is a child’s primary caretaker chooses to relocate for such substantial reasons, it is the public policy of this state to maintain the child in its primary relationship.
(7) It is against the public policy of this state to require a custodial parent to choose between custody of the child and a committed new personal relationship, the parenting of other children, the support of friends or family, or educational or career opportunities.
(8) Except in cases of serious or continuing domestic violence or emotional abuse, however, it is also against the public policy of this state for a primary caretaker to relocate with the child for insubstantial reasons or with the intention of disrupting the child’s relationship with the other parent.
(9) It is also against the public policy of this state, except in unusual circumstances, to order the relocation of a child during the last two years of high school if the child strongly prefers to remain in a school and community in which the child is established.

Some of these recommendations are based on the research literature, while others express the members’ professional expertise, their shared policy judgments, or their appraisal of legislative realities. As a consequence the document contains an important inconsistency in its eighth paragraph, which implies that relocation should be refused if a parent wishes to disrupt the child’s relationship with the other parent or has “insubstantial” reasons for wanting to move. Given the importance of maintaining the custodial household unless the child’s welfare will be advanced by a custody transfer, and viewed strictly from the child’s vantage point, it seems clear that a parent’s motives for moving are generally irrelevant. Just as people marry, divorce, attend school or change jobs for reasons that others might question, they may choose to move for idiosyncratic reasons. From the child’s perspective, the question remains: if the parents are to live further apart, with which parent should the child spend most of its time? Just as the question remains the same, so does the answer: the child should reside with the person who has been providing its primary care unless, for demonstrable reason, its welfare will be harmed so substantially that a custody transfer is required. Punishment of even a selfish or foolish parent by removing the custody of a child who in not endangered is counterproductive for the child.

In the context of relocation, the child will rarely be endangered in any demonstrable, significant fashion, and equally rarely will removal from the primary caregiver’s care alleviate the perceived dangers. Rather, a change in custody will inevitably replace the harm of increased distance from the noncustodial parent with increased distance from the custodial parent – usually an even more harmful result. Education may be effective in convincing parents to cooperate in facilitating a child’s access to both parents’ influence and care, and enforcement measures are available to ensue that access continues following a move.
Punitive custody transfers based on inter-parental concerns, in contrast, cannot provide sensible results for children whose parents' lives diverge. Although this conclusion may be intuitively obvious only when domestic hostility or violence is present, it is also the logically inescapable result of a child-centered inquiry in less dramatic cases. In light of the responsible mental health literature, case law, the above discussion, and several additional policy reasons, I would delete (8) in its entirety.

If, in light of these considerations, relocation is authorized, how might a court make appropriate adjustments in visitation or time shares and support orders affecting the child? Creativity is sorely needed, as little in the reported cases articulates the considerations that should shape these decisions. At a minimum they should include the means (such as telephone, mail, fax, e-mail, and web-cam contact, visits by the child to the noncustodial parent, and visits by the Noncustodial parent to the child) by which a relationship between the child and noncustodial parent can be maintained; the developmental stage of the child as it affects travel possibilities and the length of visits away from the child’s primary residence or primary caretaker; and the child’s needs and schedule as they affect the child’s contact with siblings, stepparents, members of the extended families, and participation in important peer and school activities. These psychological considerations should be supplemented by an appropriate allocation of associated costs and travel burdens.

With greater attention to the children themselves and to the quality of arguments concerning relocation policies, it should be possible to replace wishful thinking with firmly grounded principles that will serve children’s interests by – in most cases – protecting the caretaker’s decisions concerning the child’s household.

119 First, there is reason for concern about the child’s welfare if there are frequent custody transfers in any case of high inter-parental conflict, whether or not that conflict is fairly termed abuse. Second, there is no justification for a rule that permits a noncustodial parent to relocate at will, but constrains the caretaking parent’s life choices. Third, a legal inquiry into parental motives improperly diverts the court’s attention from the children’s interests and inappropriately encourages decisions that punish custodial parents’ life choices at children’s expense. Fourth, appellate relocation decisions in California that were rendered since this proposal was drafted reveal striking disparities in the courts’ responses to the motives of custodial mothers and custodial fathers, suggesting an independent reason for removing this draft language.