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Bringing Specificity to Child Custody Provisions in California

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COMMENT

BRINGING SPECIFICITY TO CHILD
CUSTODY PROVISIONS
IN CALIFORNIA

SHAWN McCALL*

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INTRODUCTION

Broadly speaking, social science studies help Western nations develop an increased understanding of how children benefit from having strong relationships, including frequent and continuous contact, with both of their parents even in the wake of separation and divorce.¹ Social sciences can inform policy conversations during legislative and judicial processes by providing legal determinations that are empirically supported rather than simply rationally derived.² Policies can be based on information and conclusions drawn from what scientists observe in studies as opposed to what the decision-makers—legislators or judges—opine as relevant factors in a particular case.³

The current standard for courts to make child custody determinations in California is the “best interest of the child.”⁴ This standard has been

¹ See Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16 J. FAM. PSYCHOL. 91, 97 (2002); see also Mo-Yee Lee, *A Model of Children’s Postdivorce Behavioral Adjustment in Maternal- and Dual-Residence Arrangements*, 23 J. FAM. ISSUES 672, 691-92 (2002).

² See generally John Monahan & Laurens Walker, *Social Science Research in Law: A New Paradigm*, 45 AM. PSYCHOLOGIST 465 (1988); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877 (1988).

³ See generally Monahan & Walker, *supra* note 2; Walker & Monahan, *supra* note 2.

⁴ CAL. FAM. CODE § 3011 (2018).

criticized for being vague.⁵ Other criticism includes that the standard's subjectivity limits predictable results from court actions and provides "courts with . . . no guidance or objective basis" to make child custody determinations.⁶ This Comment evaluates the empirical evidence from social science studies to demonstrate that there is currently a sturdy body of social science research to justify using tangible evidence to define terms in the California Family Code, the California Family Courts, and beyond. Because the standard for custody determinations in California is the "best interest of the child" per the state's legislation,⁷ social science research provides a vehicle that can define the "best interest of the child standard." This Comment argues that this can be done empirically by calculating the minimum amount of time a child—in the aggregate—needs with each parent during a two-week period in order to have an optimal opportunity for successful development. Including this calculation in either the statutes or as a judicial bright-line rule would offer a starting point to apply the best interest of the child standard as a matter of policy in all family court proceedings. This Comment prefers this approach for matters involving children over the current method of determining parenting plans on a case-by-case basis using evidentiary proceedings in contested litigation. Additionally, the empirically supported demarcation is a baseline of how much time children need with each parent to maximally benefit during their developmental years and this Comment argues that it should be instituted as a rebuttable presumption in any proceedings involving children. Moreover, the empirically supported demarcation would provide much-needed clarity to parents, attorneys, and judges from the present, disjointed approach that contains neither adequate legislative regulation nor judicial bright-line rules.

The proposed rebuttable presumption would both extend and clarify current California law. Presently, the state Legislature has codified an explicit presumption that joint custody is in the best interest of any involved children, though only when the parents agree.⁸ This Comment argues that the presumption of joint physical custody should be extended to both contested and uncontested matters as a rebuttable presumption. Specifically, social science findings suggest a minimum timeshare for children to spend with each parent to serve the child's best interests dur-

⁵ Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 656 (2006).

⁶ Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-The-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule,"* 41 U. BALT. L. REV. 83, 102-04 (2011).

⁷ FAM. § 3011.

⁸ CAL. FAM. CODE § 3080 (2018).

ing developmental years, and California should follow those findings.⁹ This Comment argues that global social science findings demand that a rebuttable presumption must be instituted, either legislatively with a statute or judicially with a bright line rule. For the current inquiry, a child is defined as a person between the ages of 4 and 18 to avoid entanglement with a separate, controversial question about young children and overnights.¹⁰ This Comment argues that the best interest of the child is served by access to each of the child's parents for at least 35% of the time during a two-week period.¹¹

Part I identifies the issues that confuse parents, lawyers, and judges and examines how social science can provide clarity. A discussion of terminology follows. Part II discusses examples of how social science research findings have influenced both legislative and judicial processes as well as discusses limitations of social science methodologies and models. Part III explores the development of the best interest of the child standard, California's implementation of it, and the shortcomings of the current usage. Finally, Part IV provides a detailed exposition of the germane social science research findings about children having maximum contact with both of their parents.

I. BACKGROUND

A. PRESENTING ISSUES: CLARIFYING CHILD CUSTODY TERMINOLOGY

In the family law context, the term "custody" often encompasses two concepts: decision-making and how much time a child spends with each parent.¹² The decision-making concept is often referred to as legal custody.¹³ In California, when parents share decision-making authority, it is called joint legal custody.¹⁴ However, when only one parent is empowered to make legal choices for the child, it is called sole legal custody.¹⁵

⁹ See generally Linda Nielsen, *Shared Residential Custody: Review of the Research (Part I of II)*, 27 AM. J. FAM. L. 61, 62 (2013).

¹⁰ See Marsha Kline Pruett, Jennifer E. McIntosh & Joan B. Kelly, *Parental Separation & Overnight Care of Young Child., Part I: Consensus Through Theoretical & Empirical Integration*, 52 FAM. CT. REV. 240, 241 (2014). See also Jennifer E. McIntosh, Marsha Kline Pruett & Joan B. Kelly, *Parental Separation & Overnight Care of Young Child., Part II: Putting Theory into Practice.*, 52 FAM. CT. REV. 256 (2014).

¹¹ See generally Nielsen, *supra* note 9, at 62.

¹² See Cal. Fam. Code § 3002 (2018); see also CAL. FAM. CODE §§ 3003-3007 (2018).

¹³ See Fam. § 3003; see also FAM. § 3006.

¹⁴ FAM. § 3003.

¹⁵ FAM. § 3006.

The second concept of time spent with parents has a more developed nomenclature.¹⁶ This is variably referred to as residential custody, parenting access, physical custody, parent-child contact, visitation, and parenting time.¹⁷ In California when a child spends “significant periods” of time with each parent, it is called joint physical custody.¹⁸ When the child resides predominately with only one parent, though the child may have some parenting time with the other parent, it is called sole physical custody.¹⁹ Further, California law defines joint custody as the presence of both joint legal custody and joint physical custody.²⁰ California statutes define the parameters of joint physical custody as a parenting-time schedule where the child has significant periods of time with each parent²¹ that “assure[s] a child of frequent and continuing contact with both parents.”²²

1. *Examples of Different Custody Arrangements*

Under California case law, the interpretative guidance illustrates some examples of circumstances that can be characterized as joint physical custody as well as some that cannot.²³ In *Brody v. Kroll*, the child frequently saw his father four-to-five days per week, and this amount of contact was sufficient to categorize as joint physical custody.²⁴ Specifically, the child spent each Tuesday and Friday overnight with his father, he spent the entire day with his father on Saturday except for those Saturdays that the child attended Hebrew school, and had numerous other contacts with his father during the week.²⁵ In both *In re Marriage of McGinnis* and *In re Marriage of Battenburg*, six complete days—or approximately 43% of the timeshare—spent overnight with one parent in a two-week period satisfied the significant period of time criterion for joint physical custody in jurisprudence.²⁶ Those children spent four days per week with one parent and three days per week with the other parent.²⁷ Conversely, in *In re Marriage of Whealon*, the court held that it was a

¹⁶ See Nielsen, *supra* note 9, at 62.

¹⁷ *Id.*

¹⁸ FAM. § 3004.

¹⁹ FAM. § 3007.

²⁰ FAM. § 3002.

²¹ FAM. § 3004.

²² FAM. § 3004; *see also* CAL. FAM. CODE § 3020(b) (2018).

²³ See *Brody v. Kroll*, 45 Cal. App. 4th 1732, 1734-35 (1996); *see also In re Marriage of McGinnis*, 7 Cal. App. 4th 473, 475 (1992); *In re Marriage of Battenburg*, 28 Cal. App. 4th 1338, 1342 (1994); *In re Marriage of Whealon*, 53 Cal. App. 4th 132, 137 (1997).

²⁴ *Brody*, 45 Cal. App. 4th at 1734-35.

²⁵ *Id.* at 1735.

²⁶ *McGinnis*, 7 Cal. App. 4th at 475; *Battenburg*, 28 Cal. App. 4th at 1342.

²⁷ *McGinnis*, 7 Cal. App. 4th at 475; *Battenburg*, 28 Cal. App. 4th at 1342.

sole parenting arrangement with liberal visitation to the other parent.²⁸ Here, the child spent five days including overnights, approximately 28% of the timeshare, in a two-week period with one of the parents.²⁹

As a practical matter, the majority of family court matters do not end up in the appellate process because cases often settle before trial, which effectively means that parties stipulate to agreements.³⁰ When facing various issues wherein the type of custody has particular bearing, the *Whealon* court made the observation that prior orders must be analyzed to understand if there is actual joint physical custody in practice or if it is only in name.³¹ This is critical to understand when examining circumstances, such as in *In re Marriage of Lasich*, wherein the judgment—decided a decade after *McGinnis*—identified that there was a joint physical custody arrangement even though the child only had parenting time with one parent for approximately 20% of the time during a two-week period.³² Despite the parents' agreement to call their stipulation a joint physical custody arrangement, the court held that the quantity of time that children spend with each parent constituted a sole parenting arrangement with visitation.³³ Unlike in *Monroe v. Rodriguez*, where the trial court's order was for sole physical custody to one parent with visitation to the other, and the trial court calculated the child's parenting time was split 80% and 20%.³⁴ However, the appellate court—which held this case not citable—found that the appropriate split was actually 65% and 35%, which satisfied the criterion of substantial time consistent with joint physical custody.³⁵

2. Government Publications Regarding Custody

The issue of what defines sole or joint physical custody is further complicated by California's court-approved Judicial Council forms³⁶ as

²⁸ *Whealon*, 53 Cal. App. 4th at 137.

²⁹ *Id.*

³⁰ See Judicial Council of Cal., *2016 Court Statistics Report*, CAL. CTS. 132-35, <http://www.courts.ca.gov/documents/2016-Court-Statistics-Report.pdf> (last visited Sept. 9, 2018) (identifying that only 3,228 of the combined 380,160 marital and non-marital family law petitions filed in 2014-2015 had to be resolved by a trial).

³¹ *Whealon*, 53 Cal. App. 4th at 142.

³² *In re Marriage of Lasich*, 99 Cal. App. 4th 702, 710 (2002) (the court erred in stating that the children had 60 hours per week with their father when in fact it was actually 60 hours per two-week period).

³³ *Lasich*, 99 Cal. App. 4th at 710.

³⁴ *Monroe v. Rodriguez*, No. G034854, 2005 Cal. App. LEXIS 11463, at *2-3 (4th Dist. Dec. 13, 2005).

³⁵ *Monroe*, 2005 Cal. App. LEXIS 11463, at *7-12.

³⁶ Judicial Council of Cal., *Child Custody and Visitation (Parenting Time) Order Attachment FL-341*, CAL. CTS. (July 1, 2016), <http://www.courts.ca.gov/documents/fl341.pdf>.

well as various informational offerings by different California counties because none of those sources provide either comprehensive or clear information.³⁷

The greatest damage from the lack of clarity in the law occurs in those divorces, the overwhelming majority, that are settled by the parties before trial. . . . To the extent that it is impossible to get or give sound advice on how a court is likely to resolve a given issue—and a large measure of discretion means exactly that³⁸

Practical experience finds that records are replete with cases that identify joint physical custody where the child has far less than ‘substantial time’ with both parents, including as little as a few hours of parenting time per week with one parent,³⁹ and since the vast majority of these cases settle at the trial court before trial,⁴⁰ there is no readily accessible appellate record to review.⁴¹

Judicial Council form FL-341 is used throughout California at the local level by courts, attorneys, and litigants as part of judgments and orders relating to children.⁴² Paragraph 5 of that form does not provide instructions regarding how physical custody should be understood or applied.⁴³ Partial guidance is provided on the Judicial Council’s website, though it is consistent with the statutory language rather than plain language.⁴⁴ Another form that is available, FL-314-INFO, is represented to provide information about child custody.⁴⁵ Therein, the definitions for joint physical custody arrangements are that “both parents have certain

³⁷ See generally *Child Custody and Visitation Stipulation and Order*, SUPERIOR CT. OF CAL. COUNTY OF S.F. (2018), <http://www.sfsuperiorcourt.org/forms-filing/forms> (follow “Child Custody and Visitation Stipulation and Order”); *Developing a Child Custody Parenting Plan*, SUPERIOR CT. OF CAL. COUNTY OF SAN DIEGO 4-5 (2012), <http://www.sdcourt.ca.gov/pls/portal/docs/page/sdcourt/generalinformation/forms/familyandchildrenforms/fcs058.pdf>; *Custody*, SUPERIOR CT. OF CAL. COUNTY OF SANTA CLARA, http://www.scsccourt.org/self_help/family/custody_visitation.shtml#types (last visited Mar. 2, 2018); *Stipulation and Order for Custody and/or Visitation of Children Packet*, STANISLAUS COUNTY SUPERIOR CT. (July 2012), http://www.stanct.org/sites/default/files/stipulation_and_order_for_cv.pdf.

³⁸ Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1170 (1986).

³⁹ The combined experiences of the author’s prior career as a forensic psychologist as well as law school professional training experiences as a judicial extern and civil extern in family courts has provided the author with an abundance of exposure to family court cases.

⁴⁰ Glendon, *supra* note 38, at 1170.

⁴¹ See Judicial Council of Cal., *supra* note 30, at 132-35.

⁴² Judicial Council of Cal., *supra* note 36.

⁴³ *Id.*

⁴⁴ *Basics of Custody & Visitation Orders*, CAL. CTS., <http://www.courts.ca.gov/17975.htm> (last visited Mar. 6, 2018).

⁴⁵ Judicial Council of Cal., *Child Custody Information Sheet*, CAL. CTS. (Jan. 1, 2012), <http://www.courts.ca.gov/documents/fl314info.pdf>.

responsibilities” and in sole physical custody arrangements “one parent has the responsibility alone.”⁴⁶

Multiple counties have deployed local forms, aggregations of available forms, and posting of information on their websites.⁴⁷ For example, the City and County of San Francisco provides a repository of local forms that are available to the general public,⁴⁸ including a judgment checklist stating that custody orders must be filed if there are children.⁴⁹ To meet this requirement, San Francisco provides a local form compelling identification of sole or joint physical and legal custody with no additional guidance about what the terms mean or how they are defined.⁵⁰ Likewise, San Diego County prepares an informative packet that provides the statutory language, and it does mention sole and joint physical custody by name.⁵¹ Also, Santa Clara County provides a unique form that ostensibly provides definitions related to custody.⁵² Therein, sole physical custody is never mentioned—sole legal custody is not mentioned either—and the included text alludes to the statutory language without providing further specificity.⁵³

Other counties prepare information packets, which are compilations of the already readily available Judicial Council forms. For example, Stanislaus County offers a packet that is dedicated to child custody.⁵⁴ Therein, the aforementioned FL-341-INFO is included as the sole provided guidance.⁵⁵ Similarly, San Diego County provides consolidated packets that provide no further clarity⁵⁶ and Contra Costa County’s packets do no better.⁵⁷

⁴⁶ *Id.*

⁴⁷ See e.g., *All Local Forms*, SUPERIOR CT. OF CAL. COUNTY OF S.F., <http://www.sfsuperiorcourt.org/forms-filing/forms> (last visited Mar. 3, 2018); *Custody*, *supra* note 37; *Custody/Visitation Stipulation*, SUPERIOR CT. OF CAL. COUNTY OF CONTRA COSTA, http://www.cc-courts.org/forms/packets/famLaw010_CustodyVisitationStipulationPacket_7.1.16.pdf (last visited Mar. 3, 2018).

⁴⁸ *All Local Forms*, *supra* note 47.

⁴⁹ *Family Law Judgment Checklist*, SUPERIOR CT. OF CAL. COUNTY OF S.F., <http://www.sfsuperiorcourt.org/forms-filing/forms> (follow “Family Law 11.15: Judgment Checklist”) (last visited Mar. 3, 2018).

⁵⁰ *Child Custody and Visitation Stipulation and Order*, *supra* note 37.

⁵¹ *Developing a Child Custody Parenting Plan*, *supra* note 37, at 4-5.

⁵² *Custody*, *supra* note 37.

⁵³ *Id.*

⁵⁴ *Stipulation and Order for Custody and/or Visitation of Children Packet*, *supra* note 37.

⁵⁵ *Id.*

⁵⁶ *Family Law Packets*, SUPERIOR CT. OF CAL. COUNTY OF SAN DIEGO, http://www.sdcourt.ca.gov/portal/page?_pageid=55.1058589.55.1524847&_dad=portal&_schema=portal (last visited Mar. 2, 2018).

⁵⁷ *Custody/Visitation Stipulation*, *supra* note 47.

Some counties mention these terms on their websites.⁵⁸ On its website, San Mateo County offers language that parallels the state statutes as well as the aforementioned Judicial Council website.⁵⁹ The information provided by Alameda County does not mention sole custody.⁶⁰ Sacramento County's website information similarly lacks references to sole custody.⁶¹

B. SOCIAL SCIENCE TERMINOLOGY

Turning to the social science literature, there are three broad categories of parenting-time schedules: sole physical custody, joint physical custody, and equal-shared custody.⁶² In sole physical custody, children spend most of the time with one parent and have visitation of less than approximately 35% of the timeshare with the other parent.⁶³ This equates to less than five days in a two-week span.⁶⁴

Generally, children that spend at least 35% of the timeshare with each parent, would be considered a joint physical custody arrangement.⁶⁵ An equal, shared parenting-time schedule allocates roughly the same amount of parenting time to each parent during a two-week period.⁶⁶ This is colloquially referred to as a "50/50" arrangement.⁶⁷ There are numerous ways to effectuate an equal-shared parenting-time schedule.

⁵⁸ See *Child Custody and Visitation*, SUPERIOR CT. OF CAL. COUNTY OF SAN MATEO, https://www.sanmateocourt.org/court_divisions/family_law/child_custody_visitation.php (last visited Mar. 3, 2018); see also *Basics of Custody & Visitation Orders*, *supra* note 44; *Child Custody and Visitation: Types of Custody*, SUPERIOR CT. OF CAL. COUNTY OF ALAMEDA, <http://www.alameda.courts.ca.gov/pages.aspx/child-custody-and-visitation#3> (last visited Mar. 2, 2018); *Child Custody/Visitation*, SUPERIOR CT. OF CAL. COUNTY OF SACRAMENTO, <https://www.saccourt.ca.gov/family/custody-visitation.aspx#types> (last visited Mar. 7, 2018).

⁵⁹ *Child Custody and Visitation*, *supra* note 58; see also *Basics of Custody & Visitation Orders*, *supra* note 44.

⁶⁰ *Child Custody and Visitation: Types of Custody*, *supra* note 58; see also *Custody*, *supra* note 37.

⁶¹ *Child Custody/Visitation*, *supra* note 58.

⁶² Nielsen, *supra* note 9, at 62. See also Malin Bergström et al., *Fifty Moves a Year: Is there an Association Between Joint Physical Custody and Psychosomatic Problems in Children?*, 69 J. EPIDEMIOLOGY & CMTY. HEALTH 769, 769 (2015).

⁶³ Nielsen, *supra* note 9, at 62.

⁶⁴ As identified *supra*, there are many names for this, including sole residential custody, sole parenting, or traditional parenting, and this Comment will use sole physical custody as that most closely matches California's established terminology.

⁶⁵ Nielsen, *supra* note 9, at 62. Other names include shared residential custody, joint residential custody, joint parenting, and shared parenting, and this Comment will use joint physical custody in accordance with California's established terminology.

⁶⁶ Bauserman, *supra* note 1, at 93.

⁶⁷ See generally Sanford L. Braver et al., *Lay Judgments About Child Custody After Divorce*, 17 PSYCHOL. PUB. POL'Y & L. 212, 220 (2011); see also 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 J. DIVORCE & REMARRIAGE 414, 414-28 (2018); William Fabricius, *Equal Parenting*

The unifying principle is that the child has parenting time with each parent for seven days in a two-week span.⁶⁸ Both joint physical custody and equal-shared parenting require that a child spends at least 35% of the time with each parent.⁶⁹ However, in social science literature, an equal-shared schedule is a subset of the joint physical custody category because the child spends an equal, or very near equal, amount of time with each parent.⁷⁰ The global trend is toward using a rebuttable presumption of equal-shared custody.⁷¹ However, the science has not yet matured to the point that such a conclusion is beyond reasonable reproach, and this Comment focuses on establishing a rebuttable presumption of joint physical custody in California.⁷²

II. SOCIAL SCIENCE'S INFLUENCE IN LEGISLATION, LITIGATION, AND POLICY

Both legislative and judicial processes can be influenced by and informed with scientific research.⁷³ Both at the federal and state level, judicial and legislative branches have used findings of scientific inquiry to make its respective determinations.⁷⁴

A. SOCIAL SCIENCE'S INFLUENCE IN LEGISLATION

In the United States, federal, state, and local representative bodies use legislative processes to create laws that then provide a framework for the courts to interpret that law when presented with particular facts of

Time: The Case for a Legal Presumption, in OXFORD HANDBOOK OF CHILDREN AND THE LAW (J. G. Dwyer, ed., 2019).

⁶⁸ *Planning for Parenting Time: Arizona's Guide for Parents Living Apart*, ARIZ. SUP. CT. (2009), <https://www.azcourts.gov/portals/31/parentingTime/PPWguidelines.pdf>.

⁶⁹ Nielsen, *supra* note 9, at 62; Bauserman, *supra* note 1, at 93.

⁷⁰ Bergström et al., *supra* note 62, at 769.

⁷¹ *See generally id.*; *see also* Fabricius et al., *supra* note 67, at 414-28.

⁷² Amandine Baude, Jessica Pearson & Sylvie Drapeau, *Children's Adjustment in Joint Physical Custody Versus Sole Custody: A Meta-Analytic Review*, 57 J. DIVORCE & REMARRIAGE 338 (2016) (only one review currently exists comparing children's outcomes with less than 30% time with each parent, between 30% and 35% time with each parent, and between 40% and 50% time with each parent). *But see* Fabricius (*Equal Parenting Time*), *supra* note 67 (identifying that an exactly equal timeshare should be used for children's maximal benefit).

⁷³ *See generally* Monahan & Walker, *supra* note 2; Walker & Monahan, *supra* note 2.

⁷⁴ *See generally* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252 (1964); *see also* Pub. Health: Vaccinations: Hearing on S.B. 277 Before the Assemb. Comm. on Health, Cal. State Leg. 2015-16 Sess., 10, http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0251-0300/sb_277_cfa_20150617_130902_asm_comm.html; *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 855 (1992); *see also* Massachusetts v. EPA, 549 U.S. 497, 507-12 (2007); *see also* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 934-36 (N.D. Cal. 2010).

specific cases in controversy.⁷⁵ Members of the legislature may be informed by scientific, scholarly research and findings as part of their respective decision-making processes.⁷⁶ For example, the U. S. Congress used extensive scientific findings from economists in developing the Civil Rights Act of 1964.⁷⁷ More recently, California's legislators considered medical findings regarding immunology during the passage of California Senate Bill 277.⁷⁸ The personal belief exemption for mandatory childhood vaccinations was voided due to an increase in both incidents of certain illness as well as increased vulnerability of the general population to illness.⁷⁹

B. SOCIAL SCIENCE'S INFLUENCE IN LITIGATION

Courts also use scientific findings when rendering decisions. One of the factors the United States Supreme Court considers in overturning a prior holding and departing from precedent is whether the understanding of the underlying factual basis that guided the prior holding has substantially changed.⁸⁰ The Court's embrace of scientific information can be readily observed in *Massachusetts v. Environmental Protection Agency*, wherein the Supreme Court discussed extensive, germane scientific findings about climate change.⁸¹ The U.S. District Court for the Northern District of California heard extensive testimony about scientific data regarding differences in families headed by same-sex versus opposite-sex parents, including outcomes of children raised in both situations.⁸² The court held that the law in question was unconstitutional because there was no valid demonstration of a difference in families headed by same-sex versus opposite-sex parents upon which to form a basis of validity of a state interest in limiting marriage to only opposite-sex couples.⁸³

⁷⁵ *Sources of Law*, LAWshelf, <https://lawshelf.com/courseware/entry/sources-of-law-judicial> (last visited Oct. 7, 2018).

⁷⁶ See generally *Heart of Atlanta*, 379 U.S. at 252; see also *Pub. Health: Vaccinations: Hearing on S.B. 277 Before the Assemb. Comm. on Health*, *supra* note 74.

⁷⁷ *Heart of Atlanta*, 379 U.S. at 252.

⁷⁸ *Pub. Health: vaccinations: Hearing on S.B. 277 Before the Assemb. Comm. on Health*, *supra* note 74.

⁷⁹ *Id.*

⁸⁰ *Casey*, 505 U.S. at 855 (citing *Roe v. Wade*, 410 U.S. 113 (1973)) (holding that medical technology had advanced to a point that the viability of fetuses was no longer consistent with *Roe's* trimester model).

⁸¹ *Massachusetts v. EPA*, 549 U.S. at 507-12.

⁸² *Perry*, 704 F. Supp. 2d at 934-36.

⁸³ *Id.* at 999-1000.

C. SIMILARITIES AND DIFFERENCES IN UTILIZATION OF SOCIAL SCIENCES BY THE LEGISLATURE AND THE JUDICIARY

Both the legislature and the judiciary use social science to support policy determinations.⁸⁴ Whereas the legislature would likely use social science research findings to support the passage of a piece of legislation, the judiciary would use social science research findings in varied ways. The judiciary can use findings to evaluate if a law should be upheld, stricken, or modified. Moreover, the judiciary can also use social science research findings to invalidate laws that serve the majority's will by compromising the rights of the minority.

D. LIMITATIONS OF SOCIAL SCIENCE RESEARCH

Prior authors have discussed the role of social science findings in shaping laws and public policy.⁸⁵ Three noteworthy limitations of social science research are that a true experiment cannot be achieved, there are numerous factors that influence human behavior and outcome, and the results of studies may vary across time.⁸⁶

First, true experiments regarding custody arrangements cannot be conducted because children cannot be randomly assigned to groups where either their parents stay together or get divorced or separated.⁸⁷ There cannot be placebo groups where children are administered what they think is divorced parents when in actuality their parents are not divorced.⁸⁸ This limits research's ability to pinpoint an identifiable cause of an outcome. Second, children's behavior and how well they transition to adulthood are determined by a number of potential factors, including but not limited to genetic predispositions, cultural mores, and personal

⁸⁴ See *Casey*, 505 U.S. at 855; see also *EPA*, 549 U.S. at 507-12; *Perry*, 704 F. Supp. 2d at 934-36.

⁸⁵ Ben K. Grunwald, *Suboptimal Social Science and Judicial Precedent*, 161 U. PA. L. REV. 1409, 1410 (2013); Ronald G. Roesch, Stephen L. Golding, Valerie P. Hans & N. Dickon Reppucci, *Social Science and the Courts: The Role of Amicus Curiae Briefs*, 15 L. & HUM. BEHAV. 1, 1-3 (1991).

⁸⁶ *True Experimental Design*, EXPLORABLE (Dec. 12, 2018), <https://explorable.com/true-experimental-design>. See generally DONALD CAMPBELL & JULIAN STANLEY, *EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH* (1963), <https://www.sfu.ca/~palys/Campbell&Stanley-1959-Exptl&QuasiExptlDesignsForResearch.pdf>.

⁸⁷ A true experiment meets a number of conditions and is able to isolate one particular variable or group of variables to measure outcome differences when those variables are manipulated.

⁸⁸ *Placebo-Controlled Study*, WIKIPEDIA, https://en.wikipedia.org/wiki/Placebo-controlled_study (last visited Dec. 12, 2018) (a group is led to believe that they are receiving the treatment though in fact they are not in order to assess the psychological effect of belief).

experiences.⁸⁹ This similarly limits research's ability to pinpoint an identifiable cause of an outcome. Third, results may vary across time as a society changes, such that the findings that applied 20 years ago might not hold true 40 years in the future due to factors affecting society as a whole.⁹⁰ With that stated, there is an imperative to use the available tools—flawed or not—to make policy decisions that are likely to promote the best possible outcomes for California's children.

III. BACKGROUND AND EVOLUTION OF THE CURRENT LEGAL STANDARD FOR CUSTODY: BEST INTEREST OF THE CHILD

A. TENDER YEARS DOCTRINE

In the 19th and 20th centuries, there was broad adoption of the “tender years doctrine,” which presumed that mothers were the superior parents for raising children to the exclusion of fathers.⁹¹ The tender-years doctrine was likely initially formulated in an 1813 Pennsylvania case involving two daughters, aged seven and ten years.⁹² The children were undisputedly well-cared for and educated by their mother throughout their lives up to the time of the trial.⁹³ The court held that “[i]t is to *them* [the children], that our anxiety is principally directed; and it appears to us, that considering their tender age, they stand in need of that kind of assistance, which can be afforded by none so well as a mother.”⁹⁴

B. BEST INTEREST OF THE CHILD STANDARD

During the 1960s and 1970s, a new standard emerged: the best interest of the child.⁹⁵ Though it took a while to gain momentum, the best interest of the child standard may have seen its earliest formulation in a

⁸⁹ *Confounding*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Confounding> (last visited Dec. 12, 2018).

⁹⁰ *Cohort effect*, WIKIPEDIA, https://en.wikipedia.org/wiki/Cohort_effect (last visited Dec. 12, 2018).

⁹¹ See Stephanie N. Barnes, *Strengthening The Father-Child Relationship Through a Joint Custody Presumption*, 35 WILLAMETTE L. REV. 601, 605-07 (1999); see also Melissa A. Tracy, *The Equally Shared Parenting Time Presumption—A Cure-All or a Quagmire for Tennessee Child Custody Law?*, 38 U. MEM. L. REV. 153, 156-57 (2007); James W. Bozzomo, *Joint Legal Custody: A Parent's Constitutional Right in a Reorganized Family*, 31 HOFSTRA L. REV. 547, 549 (2002).

⁹² The Tender Years doctrine maintains that mothers should be the primary caretaker of children, particularly young children. See *Commonwealth v. Addicks*, 5 Binn. 520, 521 (Pa. 1813).

⁹³ *Addicks*, 5 Binn. at 521.

⁹⁴ *Id.*

⁹⁵ See Barnes, *supra* note 91, at 608; see also Tracy, *supra* note 91, at 157-58; Bozzomo, *supra* note 91, at 549-50; Warshak, *supra* note 6, at 86.

Kansas court in 1881.⁹⁶ The court held that “when the custody of children is the question . . . the best interest of the children is the paramount fact. Rights of father and mother sink into insignificance before that.”⁹⁷

The best interest of the child standard has received its own criticism despite the intention to promote the welfare of children. Scholarly critiques assert that the best interest of the child standard is too subjective, does not focus on a single determinative factor, provides no guidance, and encourages the use of mental health professionals in legal proceedings.⁹⁸ The criticism is that the best interest of the child standard is nebulous, which both increases litigation due to lacking the explicit limitations that help promote negotiations as well as being so generalized that decisions are excessively subject to personal biases rather than objective guideposts.⁹⁹

In response to the contention between the tender years doctrine and the best interest of the child standard, a competing domestic policy emerged in the 1970s that focused on effectuating five specific factors enumerated in section 402 of the Uniform Marriage and Divorce Act.¹⁰⁰ The courts must consider the following factors in formulating parenting-time plans pursuant to the Uniform Marriage and Divorce Act:

- (1) The wishes of the child’s parent or parents as to his custody;
- (2) The wishes of the child as to his custodian;
- (3) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest;
- (4) The child’s adjustment to his home, school, and community; and
- (5) The mental and physical health of all individuals involved.¹⁰¹

In the early 2000s, the American Law Institute offered the “approximation rule” to replace the best interest of the child standard with a concept that had some clarity and upon which finders of fact could locate some tangible footing for rendering decisions.¹⁰² The rationale underlying the approximation standard is that the child should have about the same amount of parenting time with each of her parents after the parents separate as she had prior to the separation.¹⁰³

⁹⁶ See generally *In re Bort*, 25 Kan. 308 (1881).

⁹⁷ *Id.* at 309-10.

⁹⁸ Warshak, *supra* note 6, at 102-06.

⁹⁹ *Id.* at 94.

¹⁰⁰ UNIF. MARRIAGE & DIVORCE ACT § 402 (amended 1973), 9A U.L.A. 561 (1987).

¹⁰¹ *Id.*

¹⁰² Warshak, *supra* note 6, at 86; Shelley A. Riggs, *Is the Approximation Rule in the Child’s Best Interests?*, 43 FAM. CT. REV. 481, 481 (2005).

¹⁰³ Warshak, *supra* note 6, at 117.

C. CALIFORNIA'S IMPLEMENTATION OF THE BEST INTEREST OF THE CHILD STANDARD

Today in California, the best interest of the child standard persists.¹⁰⁴ California law further developed to include that custody determinations should be aimed at supporting “frequent and continuous contact” between a child and both parents.¹⁰⁵ Additionally, custody determinations should “encourage parents to share the rights and responsibilities” of raising the child, except in instances when such an arrangement would not actually serve the best interest of the child.¹⁰⁶ Although one section of the California Family Code states that it does not create a presumption of any type of parenting plan,¹⁰⁷ the Family Code subsequently creates an explicit presumption that joint custody is in the best interest of the children, which is predicated upon the parents’ agreement on the issue.¹⁰⁸

The California Family Code directly outlines the best interest of the child standard in five paragraphs.¹⁰⁹ In section 3011, the code enumerates what the best interest of the child analysis examines: the child’s health, safety, and welfare; if the person seeking custody has a history of perpetuating abuse against others; the history of the child’s contact with each parent; and the parents’ history of drug and alcohol use.¹¹⁰ California’s public policy goals are that “the health, safety, and welfare of children shall be the court’s primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children.”¹¹¹ Section 3020 also states that the public policy of California is for “children [to] have frequent and continuing contact with both parents.”¹¹²

Section 3040 identifies that there are no presumptions about either a sole or joint custody arrangement being in the child’s best interest with an exception if the parents agree to a joint custody arrangement.¹¹³ The section also addresses when neither parent is fit or if there is an immigration-related concern.¹¹⁴ Section 3042 concerns children speaking to the

¹⁰⁴ Cal. Fam. Code § 3011 (2018).

¹⁰⁵ Fam. § 3020; *see also* CAL. FAM. CODE § 3040 (2018).

¹⁰⁶ Fam. § 3020.

¹⁰⁷ Fam. § 3040(c).

¹⁰⁸ Fam. § 3080.

¹⁰⁹ *See* FAM. § 3011. *See also* CAL. FAM. CODE §§ 3020, 3040, 3042, 3044 (2018).

¹¹⁰ FAM. § 3011.

¹¹¹ FAM. § 3020(a).

¹¹² FAM. § 3020(b).

¹¹³ FAM. § 3040.

¹¹⁴ FAM. § 3040(a)-(b).

court.¹¹⁵ Finally, sections 3020 and 3044 specify that it is not in a child's best interest to be in an abusive household.¹¹⁶

D. CALIFORNIA'S CURRENT BEST INTEREST OF THE CHILD STANDARD DOES NOT SERVE CHILDREN'S BEST INTERESTS

The crux of the problem with the best interest of the child standard is captured in Family Code section 3040(c) which "establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child."¹¹⁷ Wide discretion allows parental feuds to prevent a child from getting the time with each of his or her parents which social sciences have empirically found to be best for most children in the aggregate.¹¹⁸ The factors used by the current best interest of the child standard analysis may continue to find use in modifying any presumptive starting point.¹¹⁹ There should be an empirically supported starting point that may then be modified on a case-by-case basis. Thus, social science findings provide a starting point from which discretion can determine whether a different place is in any particular child's best interest.¹²⁰

Currently, the presumption of joint custody neither extends into contested matters nor is joint custody effectively defined,¹²¹ notwithstanding the fact that California blazed the trail in 1980 by being the first state to authorize courts to make joint custody determinations as well as findings that agreements by the parents to the joint custody were preemptively in the children's best interests.¹²² California needs to lead the nation again—and catch up to some other countries—by taking action.¹²³ California needs to continue the legal community's tradition of employing scientific findings either to codify or to set a bright line to define a rebuttable presumption of the bounds of a custody determination that has been

¹¹⁵ FAM. § 3042.

¹¹⁶ FAM. §§ 3020(a), 3044.

¹¹⁷ FAM. § 3040(c).

¹¹⁸ See Fabricius et al., *supra* note 67, at 412-15.

¹¹⁹ *But see* FAM. § 3011.

¹²⁰ *But see id.*

¹²¹ See FAM. § 3040(c).

¹²² Nancy K. Lemon, *Joint Custody as a Statutory Presumption: California's New Civil Code Sections 4600 and 4600.5*, 11 GOLDEN GATE U. L. REV. 485, 485 (1981).

¹²³ See generally Nielsen, *supra* note 9, at 62; see also Fabricius (*Equal Parenting Time*), *supra* note 67.

shown to actually capture what is, in fact, in most children's best interests.¹²⁴

IV. EXPOSITION OF THE BENEFITS TO CHILD WITH AT LEAST 30-35% TIME WITH BOTH PARENTS

The de facto standard has been that children maximally benefit from being with their mother, which has resulted in the presumptive awarding of custody of the child to mothers throughout most of the 20th century.¹²⁵ Moreover, social sciences and psychology have only been scientific disciplines since after the tender years doctrine was firmly instantiated.¹²⁶ Thus, there is no existing research on the effects of custody awards and differential contributions by mothers and fathers from the time of English or American common law.¹²⁷ Therefore, social science is admittedly skewed towards looking at the effects of adding fathers' involvement into parenting because the baseline assumption was that children do well with mothers.¹²⁸

The available studies reflect that mothers have been awarded general custody since the time of studying divorce began, and studies have been generally aimed at understanding if either parenting time with fathers was problematic for children or if parenting time with fathers provided any benefits to children.¹²⁹ Thus, the exposition of these studies is not meant to devalue the role of mothers in children's lives; rather, their inclusion is meant to provide empirical support for the benefit of children having maximal contact with *both* parents in their developmental years.¹³⁰ Moreover, while the research examined here relates to mothers and fathers, the author would like to revisit information noted before that the courts have previously examined and determined that there are no

¹²⁴ See generally Nielsen, *supra* note 9, at 62; see also Fabricius (*Equal Parenting Time*), *supra* note 67.

¹²⁵ Nielsen, *supra* note 9, at 62 ("Other families will be referred to as "sole residence" or "maternal" residence, since 95% of the children living with only one parent are living with their mothers.") (emphasis in original).

¹²⁶ See Barnes, *supra* note 91, at 605-07; see also Tracy, *supra* note 91, at 156-57; Bozzomo, *supra* note 91, at 549.

¹²⁷ John Bowlby, *Forty-Four Juvenile Thieves: Their Character and Home-Life*, 25 INT'L J. OF PSYCHOANALYSIS 19, 19 (1944).

¹²⁸ Nielsen, *supra* note 9, at 62 ("Other families will be referred to as 'sole residence' or 'maternal' residence, since 95% of the children living with only one parent are living with their mothers.").

¹²⁹ Paul R. Amato & Joan G. Gilbreth, *Nonresident Fathers and Children's Well-Being: A Meta-Analysis*, 61 J. MARRIAGE & FAM. 557, 557 (1999).

¹³⁰ See Fabricius (*Equal Parenting Time*), *supra* note 67; see also Bergström et al., *supra* note 62, at 769; Fabricius et al., *supra* note 67, at 425-26; Baude et al., *supra* note 72, at 338; Nielsen, *supra* note 9, at 63.

significant differences between same-sex and opposite-sex parents.¹³¹ Therefore, the prevailing policy should be that a child needs two parents in their life in most cases.

From a traditional, litigation-focused adversarial perspective, parenting-time awards are a zero-sum scenario wherein increasing parenting time with one parent necessarily leads to a diminution in the other parent's parenting time.¹³² Harkening back to the earliest iteration of the best interest of the child standard in 1881, "when the custody of children is the question . . . the best interest of the children is the paramount fact. Rights of father and mother sink into insignificance before that."¹³³ Additionally, since the system of child support in the United States is based on parenting-time allotments, policymakers will have to further consider how that system provides a tangible, financial incentive for one parent to seek parenting that may be entirely separate from the best interest of the child.¹³⁴

A. GENERAL BENEFITS OF MAXIMUM TIME WITH BOTH PARENTS

Children experience the limited time of a traditional visitation schedule that alternates weekends and Wednesdays as both inadequate and stressful, such that the relationship between a child and that parent deteriorates over time.¹³⁵ However, when children have a positive relationship with their fathers, including more frequent and continuous contact with their fathers, the children evidence better behavioral adjustment and academic performance.¹³⁶ This is particularly true when fathers are involved in their children's activities and education as well as when they discipline in an authoritative manner.¹³⁷ Paternal provision of emotional support to children leads to similar benefits.¹³⁸ The benefits to a child of

¹³¹ *Perry*, 704 F. Supp. 2d at 934-36.

¹³² See generally Edward Greer, *Custodial Relocation and Gender Warfare: Thinking About Section 2.17 of the ALI Principles of the Law of Family Dissolution*, 13 J. L. FAM. STUD. 235, 258 (2011) (For example, if a child spends 70% of the time with one parent, mathematical law dictates that the child must spend exactly 30% of the child's time with the other parent.).

¹³³ *In re Bort*, 25 Kan. at 309-10.

¹³⁴ Karly Schlinkert, *The Numbers Game: Why California's Child Support Formula Should Be Amended to Avoid Parental Abuse*, 44 GOLDEN GATE U. L. REV. 257, 266 (2014).

¹³⁵ Joan B. Kelly & Robert E. Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives*, 52 FAM. REL. 352, 354 (2003).

¹³⁶ Amato & Gilbreth, *supra* note 129, at 564.

¹³⁷ An authoritative parenting style is characterized as having expectations of the child and promoting the maturity and autonomy to rise to the tasks while remaining responsive to the child's experience, interests, and needs. Diana Baumrind, *Effects of Authoritative Parental Control on Child Behavior*, 37(4) CHILD DEV. 887, 891-92 (1966).

¹³⁸ Paul R. Amato, *The Consequences of Divorce for Adults and Children*, 62 J. MARRIAGE & FAM. 1269, 1280 (2000); Chadwick L. Menning, *Absent Parents are More than Money: The Joint*

having ample time with both parents are observable despite the presence of moderate conflict between the parents themselves.¹³⁹

Recent studies have reported that approximately half of children and adolescents from separated and divorced households state a desire for more frequent contact with their fathers, and one-third would like to have longer periods of contact with their fathers.¹⁴⁰ A New Zealand study found that only 2% of children desired to have less contact with a non-residential parent because they experienced their fathers as angry, difficult, or uninterested.¹⁴¹ In a survey of college students whose parents divorced an average of 11 years prior to the study, more than 50% stated that they wished they would have been able to spend more time with their fathers.¹⁴² Only 10% had wanted to see their fathers less.¹⁴³ In Sweden, 15-year-olds who spent equal time with both parents after separation demonstrated better well-being than children who lived primarily with one parent.¹⁴⁴ Seventy percent of a group of college-aged students reported that an equal parenting-time plan would have been ideal, and 93% of the college students who had lived in a shared parenting arrangement following their parents' divorce believed that their arrangement was the best for them.¹⁴⁵ A similar finding came from a group of Norwegian adolescents.¹⁴⁶ In sum, children fare significantly better when their fathers are actively engaged in their lives as well as when the children's relationships with their fathers are positive.¹⁴⁷

Effect of Activities and Financial Support on Youths' Educational Attainment, 23(5) J. FAM. ISSUES 648, 651 (2002); Christine Nord, DeeAnn Brimhall & Jerry West, *Fathers' Involvement in Their Children's Schools*, NAT'L CTR. FOR EDUC. STAT. (1997), <https://nces.ed.gov/pubs98/98091.pdf>.

¹³⁹ Nielsen, *supra* note 9, at 63.

¹⁴⁰ Joan Kelly, *Children's Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research*, 46 FAM. PROCESS 35, 43 (2007).

¹⁴¹ *Id.*

¹⁴² William V. Fabricius, *Listening to Children of Divorce: New Findings that Diverge from Wallerstein, Lewis, and Blakeslee*, 52 FAM. REL. 385, 387 (2003).

¹⁴³ *Id.*

¹⁴⁴ Malin Bergström et al., *Living in Two Homes-A Swedish National Survey of Wellbeing in 12 and 15 Year Olds with Joint Physical Custody*, 13 BMC PUB. HEALTH 868, 868 (2013).

¹⁴⁵ Fabricius, *supra* note 142, at 387.

¹⁴⁶ Linda Nielsen, *Shared Residential Custody: Review of the Research (Part II of II)*, 27 AM. J. FAM. L. 123, 132 (2013).

¹⁴⁷ William V. Fabricius, Sanford L. Braver, Priscila Diaz & Clorinda E. Velez, *Custody and Parenting Time: Links to Family Relationships and Well-Being After Divorce*, in THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 201, 202 (Michael E. Lamb ed., 2010).

B. THERE ARE POSITIVE ENHANCEMENTS TO CHILDHOOD DEVELOPMENT WHEN CHILDREN SPEND THE MAXIMUM AMOUNT OF PARENTING TIME WITH BOTH PARENTS

The quality of the relationship between the father and child is a crucial consideration in understanding how a child does or does not benefit.¹⁴⁸ It is reductionist to only consider the frequency of contact between a father and child.¹⁴⁹ A feeling of closeness between a child and their parent is often used as a variable in research.¹⁵⁰ Studies show that children perceive their relationships with their fathers as incrementally greater the more time they spend together.¹⁵¹

There are several specific findings about the benefits that fathers can provide to adolescents when there is a positive father-child relationship.¹⁵² Fathers have powerful direct and indirect impacts on their children's development.¹⁵³ Additionally, fathers can have a positive impact on their adolescent children's academic performance.¹⁵⁴ Moreover, a large study of nearly 1300 Taiwanese eighth-graders found that each parent had independent contributions to children's development.¹⁵⁵ For example, fathers were found to have an especially meaningful contribution to children's success in sports.¹⁵⁶

A recent study examining a group of 17-year-olds found that the participants who demonstrated secure attachments were rated as being more social and less aggressive by their peers.¹⁵⁷ In the study, the 17-year-olds were administered the Adult Attachment Interview, which is a seminal psychological assessment tool that measures the test taker's attachment with his or her family of origin, as opposed to peers or romantic partners.¹⁵⁸ Thus, adolescent peer relationships are related to

¹⁴⁸ Kelly & Emery, *supra* note 135, at 356-57.

¹⁴⁹ *Id.* at 356.

¹⁵⁰ Bauserman, *supra* note 1, at 98.

¹⁵¹ Fabricius, *supra* note 142, at 389.

¹⁵² Fabricius et al., *supra* note 147, at 217-18.

¹⁵³ Vicky Phares, Ariz Rojas, Idia B. Thurston & Jessica C. Hankinson, *Including Fathers in Clinical Interventions for Children and Adolescents*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 459, 478-79 (Michael E. Lamb ed., 2010).

¹⁵⁴ Xinyin Chen, Mowei Liu & Dan Li, *Parental Warmth, Control and Indulgence and Their Relations in Chinese Children: A Longitudinal Study*, 14 *J. FAM. PSYCHOL.* 401, 413-14 (2000).

¹⁵⁵ Yih-Lan Liu, *An Examination of Three Models of the Relationships Between Parental Attachments and Adolescents' Social Functioning and Depressive Symptoms*, 37 *J. YOUTH & ADOLESCENCE*, 941, 950 (2008).

¹⁵⁶ Kathleen M. Jodl, Alice Michael, Oksana Malanchuk, Jacquelynne S. Eccles & Arnold Sameroff, *Parents' Roles in Shaping Early Adolescents' Occupational Aspirations*, 72 *CHILD DEV.* 1247, 1247 (2001).

¹⁵⁷ Matthew J. Dykas, Yair Ziv & Jude Cassidy, *Attachment and Peer Relations in Adolescence*, 10 *ATTACHMENT & HUM. DEV.* 123, 123 (2008).

¹⁵⁸ *Id.*

children's relationships with their parents.¹⁵⁹ Whereas the conventional wisdom from the middle of the last century was that the adolescent years were a rift where peers' input was more important to adolescents than parents' input,¹⁶⁰ this does not appear to be the case.¹⁶¹

Several large studies have found that most adolescents make use of their parents' emotional and social resources.¹⁶² A recent meta-analysis examined 52 studies on the topic of children's well-being as a function of paternal involvement in situations of separation and divorce.¹⁶³ The finding was that positive paternal involvement was associated with the children demonstrating better social functioning, emotional functioning, behavioral adjustment, and academic achievement.¹⁶⁴ Examples of positive paternal involvement included the father's involvement in the child's activities and having a positive father-child relationship.¹⁶⁵ Importantly, fathers contribute more than just money to children's lives.¹⁶⁶

Moreover, the father-child attachment has been found to have a stronger relationship with a child's adjustment in school in the domains of social and emotional skills than the child's academic achievement.¹⁶⁷ In this way, a father's relationship with a child gives the child the interpersonal skills to succeed in life, which is distinct from a child's intellect.¹⁶⁸ A large study of 4,663 nonresident fathers and their children determined that there was particular benefit to daughters for increased, positive engagement with their fathers.¹⁶⁹ Though both sons and daughters benefited from increased, positive parental contact in terms of better academic performance and fewer sanctions for behavioral issues, the daughters enjoyed the additional benefit of a better internal sense of

¹⁵⁹ *Id.*

¹⁶⁰ Anna Freud, *Adolescence*, 13 *PSYCHOANALYTIC STUDY OF THE CHILD* 255, 277-78 (1958).

¹⁶¹ Dykas et al., *supra* note 157, at 132.

¹⁶² Eleanor E. Maccoby & John A. Martin, *Socialization in the Context of the Family: Parent-Child Interaction*, in 4 *HANDBOOK OF CHILD PSYCHOLOGY* 1, 24-26 (E. Mavis Hetherington ed., 1983); *see generally* Sheena McGrellis, Sheila Henderson, Janet Holland & Sue Sharpe, *THROUGH THE MORAL MAZE: A QUANTITATIVE STUDY OF YOUNG PEOPLE'S VALUES* (2000); Patricia Noller & Victor J. Callan, *Adolescent and Parent Perceptions of Family Cohesion and Adaptability*, 9 *J. OF ADOLESCENCE* 97, 97 (1986).

¹⁶³ Kari Adamsons & Sara K. Johnson, *An Updated and Expanded Meta-Analysis of Nonresident Fathering and Child Well-Being*, 27 *J. FAM. PSYCHOL.* 589, 590-91 (2013).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 595.

¹⁶⁷ Lisa Newland, Hui-Hua Chen, & Diana D. Coyl-Shepherd, *Associations Among Father Beliefs, Perceptions, Life Context, Involvement, Child Attachment and School Outcomes in the U.S. and Taiwan*, 11 *FATHERING* 3, 23 (2013).

¹⁶⁸ *Id.*

¹⁶⁹ Katherine S. Mitchell, Alan Booth & Valarie King, *Adolescents with Nonresident Fathers: Are Daughters More Disadvantaged Than Sons?*, 71 *J. MARRIAGE & FAM.* 650, 655 (2009) (children's ages averaged 16 years).

well-being.¹⁷⁰ Specifically, the daughters were observed to experience fewer internalizing problems when they felt close to their fathers.¹⁷¹ Furthermore, increased involvement by the father has a number of desirable social, behavioral, and psychological benefits for children, including fewer occurrences of behavioral problems for young women and men according to a Swedish study.¹⁷²

C. THERE IS A REDUCTION IN PROBLEMATIC BEHAVIORS WHEN CHILDREN SPEND THE MAXIMUM AMOUNT OF PARENTING TIME WITH BOTH PARENTS

Unlike physical symptoms and illnesses, psychosomatic illnesses are related to stress.¹⁷³ Recently, children who lived in shared parenting arrangements were found to be healthier than those who lived mostly with one parent, such that the children living in shared parenting arrangements had fewer sleeping problems and experienced fewer headaches.¹⁷⁴ A recent Swedish study of nearly 150,000 twelve- and fifteen-year-olds found that children who have an equal-shared parenting-time plan experience fewer psychosomatic illnesses than children living with mostly or predominately one parent.¹⁷⁵

The National Longitudinal Study of Youth has been collecting data for over four decades in order to allow researchers to capture children's development over time.¹⁷⁶ One particular study looked at the benefits of fathers in adolescents' lives during separation and divorce.¹⁷⁷ From a sample of 2,733 adolescents, the study found that the involvement of fathers in adolescents' lives served a protective function.¹⁷⁸ The findings made three conclusions about children whose fathers gave them continuous emotional support through contact and social interaction.¹⁷⁹ First, those children demonstrated a significantly diminished risk of behavioral

¹⁷⁰ *Id.* at 657-59.

¹⁷¹ *Id.*

¹⁷² Anna Sarkadi, Robert Kristiansson, Frank Oberklaid & Sven Bremberg, *Fathers' Involvement and Children's Developmental Outcomes: A Systematic Review of Longitudinal Studies*, 97 ACTA PAEDIATRICA 153, 153 (2008).

¹⁷³ Bergström et al., *supra* note 62, at 772.

¹⁷⁴ *Children's Health Worse if Staying with One Parent, But Better if Custody is Shared*, EDU. J. 17 n.231 (2015).

¹⁷⁵ Bergström et al., *supra* note 62, at 772.

¹⁷⁶ *National Longitudinal Surveys*, BUREAU OF LAB. STAT., <https://www.bls.gov/nls/> (last visited Oct. 9, 2018).

¹⁷⁷ Marcia J. Carlson, *Family Structure, Father Involvement, and Adolescent Behavioral Outcomes*, 68 J. MARRIAGE & FAM. 137, 137 (2006).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 150-51.

problems.¹⁸⁰ Second, each functional unit of parenting involvement carried two to three times the effect when the father lived with the child.¹⁸¹ Third, there is no difference in how paternal involvement affects adolescent boys or girls.¹⁸²

Another study that used the National Longitudinal Survey of Youth data set focused on data of adolescents regarding father-child relationships and the father's parenting style as predictor variables.¹⁸³ The focus was on predictors of delinquency and substance use among adolescents.¹⁸⁴ The study found that there was reduced risk of adolescents engaging in various risky behaviors with more positive relationships between the father and the child.¹⁸⁵ Additionally, it observed that a positive relationship between a father and a child reduces the negative impact of a father's authoritarian parenting style,¹⁸⁶ as opposed to an authoritative parenting style, and that a positive relationship between a father and child reduces the negative impact of a father's permissive parenting style.¹⁸⁷

A Norwegian study found that adolescents in shared parenting arrangements were less likely to smoke cigarettes, suffer from depression, and engage in anti-social behaviors (i.e., criminal behaviors, or experience low self-esteem).¹⁸⁸ A similar finding came from a study of Dutch adolescent girls wherein the children from shared parenting arrangements reported feeling less depressed, less fearful, and less aggressive than those from sole parenting arrangements where they lived mostly with just one parent.¹⁸⁹ Adolescents living in shared parenting-time arrangements rated their relationships with both parents as better than those who lived primarily with just one parent.¹⁹⁰

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Jacinta Bronte-Tinkew, Kristin A. Moore & Jennifer Carrano, *The Father-Child Relationship, Parenting Styles, and Adolescent Risk Behaviors in Intact Families*, 27 J. FAM. ISSUES 850, 850 (2006).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ An authoritarian parenting style is characterized as being harsh, focused on discipline and punishment, and generally not responsive to a child's experience. See, Baumrind, *supra* note 137, at 887-907; see also, Diana Baumrind, *Child Care Practices Antecedent Three Patterns of Preschool Behavior*, 75(1) GENETIC PSYCHOL. MONOGRAPHS 43, 43-88 (1967).

¹⁸⁷ Bronte-Tinkew et al., *supra* note 183, at 876-77. A permissive parenting style is characterized as having few expectations of the child, allows the parent to be used as a resource by the child, and avoids applying punishments and consequences. See Baumrind, *supra* note 137, at 887-907; see also Baumrind, *supra* note 186.

¹⁸⁸ Nielsen, *supra* note 146, at 126.

¹⁸⁹ *Id.*

¹⁹⁰ Sofie Vanassche et al., *Commuting Between Two Parental Households: Joint Physical Custody and Adolescent Wellbeing Following Divorce*, 19 J. FAM. STUDIES 139, 151 (2014).

The National Survey of Families and Households has focused on long-term data collection amongst large samples and has collected data at multiple points over two decades.¹⁹¹ A study with 453 adolescents found that a strong father-child relationship with a nonresident father helped decrease the amount of internalizing and externalizing behaviors of a child who had a weak mother-child relationship when compared to other adolescents that had weak relationships with both of their parents.¹⁹² Similarly, adolescent females were found to be less likely to engage in risky sexual behaviors when they have frequent, on-going contact with a father who is engaged in his children's lives and with whom the daughter has a positive, close relationship.¹⁹³ This is in contrast to the adolescent females who perceived their fathers to be distant or angry and indicated that they experienced more emotional and behavioral problems.¹⁹⁴ Furthermore, the risk increased with the father's absence.¹⁹⁵

D. SPECIFIC OUTCOMES IN ADULT DEVELOPMENT THAT ARE CORRELATED WITH MAXIMUM PARENTING TIME WITH BOTH PARENTS DURING CHILDHOOD

The research identifies areas of concern as well as reason for hope. Numerous studies have observed impaired relationships between young adult children of divorce and their fathers.¹⁹⁶ When compared with young adults from intact families, adult children of divorce also demonstrate the following difficulties in future relationships: lacking affection, lacking trust, and making fewer offers of assistance to others.¹⁹⁷ Hearteningly, young adults who had more frequent contact with their fathers after their parents' separation experienced less distrust of others when compared to other young adults who did not have as much contact with

¹⁹¹ *National Survey of Families and Households*, U. OF WIS., <https://www.bls.gov/nls/> (last visited Oct. 9, 2018).

¹⁹² Valarie King & Juliana M. Sobolewski, *Nonresident Fathers' Contributions to Adolescent Well-Being*, 68 J. MARRIAGE & FAM. 537, 537 (2006) (internalizing behaviors are known as acting in and externalizing behaviors are known as acting out).

¹⁹³ Binta Alleyne-Green, Claudette Grinnell-Davis, Trenette T. Clark, Camille R. Quinn & Qiana R. Cryer-Coupet, *Father Involvement, Dating Violence, and Sexual Risk Behaviors Among a National Sample of Adolescent Females*, 31(5) J. INTERPERSONAL VIOLENCE 810, 823 (2014).

¹⁹⁴ *Id.* at 814.

¹⁹⁵ *Id.* at 823-24.

¹⁹⁶ Constance R. Ahrons & Jennifer L. Tanner, *Adult Children and Their Fathers: Relationship Changes 20 Years After Parental Divorce*, 52 FAM. REL. 340, 348 (2003); Alan Booth & Paul R. Amato, *Parental Divorce Relations and Offspring Postdivorce Well-Being*, 63 J. MARRIAGE & FAM. 197, 210 (2001).

¹⁹⁷ Amato, *supra* note 138, at 1277-82; Booth et al., *supra* note 196, at 210-11 (2001); *see generally* Mavis E. Hetherington, *Should We Stay Together for the Sake of the Children?*, in COPING WITH DIVORCE, SINGLE PARENTING AND REMARRIAGE 93, 93-116 (Mavis E. Hetherington ed., 1999).

their fathers after their parents' separation.¹⁹⁸ This effect was so pronounced that the young adults who had more contact with their fathers showed no differences when compared to young adults whose parents did not divorce.¹⁹⁹

A readily available father figure during the early and adolescent time frame is positively correlated with development of adults who are more compassionate and responsible when they grow up.²⁰⁰ In particular, "boys who feel close to their fathers, regardless of biological status, have better attitudes about intimacy and the prospect of their own married lives than boys who do not feel close to their fathers."²⁰¹ In a study looking at how childhood experiences related to the children's own later romantic relationships, the sample of 205 young adults indicated that people who had experienced more positive and loving fathers were better able to seek solace and comfort from their adult partners as well as feel secure in allowing themselves to rely on their partners.²⁰²

College students who lived in a shared parenting-time arrangement expressed fewer feelings of loss and were better able to perceive their lives as being less defined by their parents' divorce.²⁰³ There does appear to be a positive correlation between how positively young adults retrospectively rate their relationship with their father in adolescence and time spent with their father.²⁰⁴ The more time that a child spent with their father during adolescence directly relates to how positively they view that relationship in retrospect as an adult.²⁰⁵ The effect was sufficiently distinct that even bad relationships seemed better to children who spent more time with their fathers.²⁰⁶ Recently, it was found that the strength

¹⁹⁸ Valarie King, *Parental Divorce and Interpersonal Trust in Adult Offspring*, 64 J. MARRIAGE & FAM. 642, 650 (2002).

¹⁹⁹ *Id.*

²⁰⁰ John R. Snarey, *HOW FATHERS CARE FOR THE NEXT GENERATION: A FOUR-DECADE STUDY 18-20* (Harv. U. Press ed., 1993).

²⁰¹ Sharon C. Risch, Kathleen M. Jodl & Jaquelynne S. Eccles, *Role of the Father-Adolescent Relationship in Shaping Adolescents' Attitudes Toward Divorce*, 66 J. MARRIAGE & FAM. 46, 55 (2004).

²⁰² Katherine A. Black & Emily D. Schutte, *Recollections of Being Loved: Implications of Childhood Experiences with Parents for Young Adults' Romantic Relationships*, 27 J. FAM. ISSUES 1459, 1459 (2006).

²⁰³ Lisa Laumann-Billings & Robert E. Emery, *Distress Among Young Adults from Divorced Families*, 14(4) J. FAM. PSYCHOL. 671-687 (2000).

²⁰⁴ William V. Fabricius, Karina R. Sokol, Priscilla Diaz & Sanford Braver, *Parenting Time, Parent Conflict, Parent-Child Relationships, and Children's Physical Health*, in *PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT* 188, 193-97 (Kathryn Kuehnle & Leslie Drozd eds., 2012).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 194-96.

of a child's relationship *with both parents* may be more strongly related to children's and adolescents' well-being than parental conflict.²⁰⁷

V. CONCLUSION

In the United States and elsewhere, the benefits to children of increased parenting time with both parents following separation and divorce is more widely appreciated and more thoroughly studied.²⁰⁸ As developed nations embrace equalizing parenting time at the policy level, larger scale studies are able to assess and evaluate the impact on the real lives of children.²⁰⁹ Concerns about the "lingering situation of minimal parenting time with fathers for great numbers of children is a serious public health issue."²¹⁰ There are significant benefits for most children to spend as much time as possible with both parents after a separation or divorce.²¹¹ Thus, the body of research indicates that allowing children to enjoy parental involvement from both parents in their daily lives, education, and other activities to the maximum degree possible appears to be optimal for children's development.²¹² The best interest of the child is served by having contact with both of her parents and them being involved in her life regardless of the parents' gender. There are no observable differences between same-sex and opposite-sex parents and research has shown that children benefit from having both parents' in their lives.²¹³ Given that the available research stems from a time when mothers were routinely granted sole physical custody of children and same-sex couples were stigmatized, the welfare of children should not have to wait until each permutation of parenting combinations has been examined. It is sufficient that there are no differences between same-sex and opposite-sex parents as well as that children maximally benefit from having both parents involved in their lives.

Although the California legislative decree that decisions regarding the custody of children should be decided according to the best interest of the child standard, the disjointed approach with neither legislative specificity nor a judicial bright line does not satisfy the best interest of the child standard in many cases. By using social science findings, current law can be extended and clarified to succeed in effectuating custody

²⁰⁷ Linda Nielsen, *Re-Examining the Research on Parental Conflict, Coparenting, and Custody Arrangements*, 23 PSYCHOL. PUB. POL'Y & L. 211, 227-28 (2017).

²⁰⁸ Fabricius (*Equal Parenting Time*), *supra* note 67.

²⁰⁹ Bergström et al., *supra* note 62; *see also* Nielsen, *supra* note 9, at 61-62.

²¹⁰ Fabricius et al., *supra* note 204, at 188.

²¹¹ Fabricius (*Equal Parenting Time*), *supra* note 67.

²¹² *Id.*

²¹³ *Perry*, 704 F. Supp. 2d at 934-36.

determinations that are actually in the best interests of most children between the ages of 4 and 18. Currently, the legislature provides no tangible guidance as to how much contact with a child's parents constitutes joint physical custody.²¹⁴ California jurisprudence states that joint physical custody is satisfied when a child sees each of his or her parents for at least 43% of the time.²¹⁵ A definition of joint physical custody as a child having access to each of his or her parents for a minimum of 35% of the time, five days in a two-week span, is consistent with prior California jurisprudence that is not citable.²¹⁶ Using this definition will extend the presumption that joint physical custody is in the child's best interest when the parents agree²¹⁷ to all proceedings involving children by creating a rebuttable presumption that is scientifically supported as a starting point and can be instituted for the best interest of all children, which could be modified on a case-by-case basis with the current best interest of the child factors.

²¹⁴ CAL. FAM. CODE § 3011 (2018); Volokh, *supra* note 5, at 656; Warshak, *supra* note 6, at 102-04.

²¹⁵ *McGinnis*, 7 Cal. App. 4th at 475; *Battenburg*, 28 Cal. App. 4th at 1342.

²¹⁶ *Monroe v. Rodriguez*, No. G034854, 2005 Cal. App. LEXIS 11463, at *7-12 (4th Dist. Dec. 13, 2005).

²¹⁷ FAM. § 3080.

