

This electronic prepublication version may contain typographical errors and may be missing artwork such as charts, photographs, etc. Pagination in later versions may differ from this copy; citation references to this material may be incorrect when this prepublication edition is replaced at a later date with the finalized version.

The Problem with Presumptions— A Review and Commentary

Lyn R. Greenberg
Diana J. Gould-Saltman, Esq.
Hon. Robert Schneider

Lyn R. Greenberg, PhD, specializes in work with children and families involved with the courts. She performs child custody evaluations, evaluations of alleged abuse, forensic consultation, expert witness services, parent coordination/special master services, and specialized treatment for court-involved children and families. She has written and presented both locally and nationally on forensic psychology, professional ethics, child custody evaluation, valid interviews of children, and court-related treatment. Dr. Greenberg currently serves as Chair of Continuing Education, and co-chair of the Family Forensic Interest Group for the Division of Family Psychology of the American Psychological Association. She is a Member of the (Southern) Children's Issues Committee of the CA State Bar Association (E-mail: lrgreenberghd@earthlink.net).

Dianna J. Gould-Saltman, attorney at law, is a principal in the Los Angeles firm of Gould-Saltman Law Offices, LLP., specializing in mediation and litigation of family law issues. A certified family law specialist (The State Bar of California, Board of Legal Specialization) and a fellow of the American Academy of Matrimonial Lawyers, Ms. Gould-Saltman received her B.A. in psychology from the University of California, Irvine and her Juris Doctor from Southwestern University School of Law. She has written about family law, ethics and gender bias issues and has presented across the U.S. and Canada. She currently serves as co-vice Chair of the American Bar Association Family Law Section Ethics Committee. She has been named a "Super Lawyer" in each edition of Los Angeles Magazine's special edition and has been named by them as one of the top 50 women lawyers in Southern California (E-mail: dgsaltman@aol.com).

Commissioner Robert Schneider received his AB degree from UC, Berkeley in 1967 and his JD degree from Boalt Hall, UC, Berkeley in 1970. He was a partner in the law firm of Schnider & Schnider from 1971 until his election as a Commissioner of the Superior Court in 1981. In 2002 he was appointed a Judge of that court. In practice he was a Certified Family Law Specialist. Since 1981 he has been assigned to the Family Law Department of the Los Angeles Superior Court at the Central Civil (Mosk) Courthouse handling a variety of family law assignments including ex parte/domestic violence, DA enforcement and general trial matters. In 2005 he began his current assignment as Supervising Judge of the Family Law Department. He has lectured and taught extensively to both lawyers and judicial officers and has received several awards including the Judicial Officer of the Year Award in 1997 from the Family Law section of the State Bar of California and the Outstanding Jurist Award in the year 2000 from the Los Angeles County Bar Association (E-mail: RSchnide@LASuperiorCourt.org).

[Haworth co-indexing entry note]: "The Problem with Presumptions—A Review and Commentary." Greenberg, Lyn R., Diana J. Gould-Saltman, and Robert Schneider. Co-published simultaneously in *Journal of Child Custody* (The Haworth Press, Inc.) Vol. 3, No. 3/4, 2006, pp. 141-174; and: *Relocation Issues in the Resolution of Child Custody Cases* (ed: Philip M. Stahl, and Leslie M. Drozd) The Haworth Press, Inc., 2006, pp. 141-174. Single or multiple copies of this article are available for a fee from The Haworth Document Delivery Service [1-800-HAWORTH, 9:00 a.m. - 5:00 p.m. (EST)]. E-mail address: docdelivery@haworthpress.com].

Available online at <http://jcc.haworthpress.com>
© 2006 by The Haworth Press, Inc. All rights reserved.
doi:10.1300/J190v03n03_07

SUMMARY. Decisions in child custody cases involve a myriad of factors, including the application of state statutes, case law and the specific facts of a case. In recent years, presumptions regarding child custody have become an increasingly frequent part of the decision-making process. Upon the finding of a threshold fact, these presumptions, in effect, create “secondary facts” which the judicial officer is required to use, in lieu of actual evidence, once the threshold fact is established. Barriers to overcome the presumption are often high, and judicial officers may vary as to the standards they apply in determining whether the evidence required to overcome the presumption has been met. In this commentary the authors describe various types of presumptions and arguments usually advanced to support them, then provide a critical analysis of the problems that occur when this type of reasoning is applied to decisions in child custody cases. While some examples of presumptions are discussed and examined in light of relevant research, the authors’ focus is more conceptual, examining the issue of detailed presumptions as a mechanism for decision-making in child custody cases. We suggest that, while much debate focuses on the wisdom of specific custody presumptions, less attention has been focused on the general appropriateness of presumptions as an approach to decision-making about the lives of children and families. *[Article copies available for a fee from The Haworth Document Delivery Service: 1-800-HAWORTH. E-mail address: <docdelivery@haworthpress.com> Website: <<http://www.HaworthPress.com>> © 2006 by The Haworth Press, Inc. All rights reserved.]*

KEYWORDS. Presumptions, child custody, custody decisions, evidence

Nothing matches the appeal of simple solutions to complex problems. When the answer to the question is, “yes” or “no,” it’s much easier (and faster) to make a decision. This is the beauty of a presumption. It allows a court, rather than going through the painstaking task of taking testimony or reviewing evidence, to simply ask, “Does X exist in this case? If so, the result is Q. If not, we must delve deeper.”

Such formulae are particularly attractive when court resources are overstretched, an overcrowded calendar creates extensive delay, and the family does not have the resources necessary for a thorough child custody evaluation or a full presentation of the evidence. Proponents of such presumptions often argue that these mechanisms reduce demands on the court and the time required to adjudicate issues, and provide common expectations of the likely outcome of a case that will reduce litigation in contested family law cases. (Bartlett, 2002). In an area of

law where there has historically been a high degree of turn-over, a directive, more formulaic approach can be attractive both to judicial officers with minimal experience in family law, and to litigants who are fearful of inexperienced judicial officers using their own personal experiences of raising children in the exercise of their discretion in making child custody orders.

In this commentary, we offer a brief description of the types of presumptions and arguments usually advanced to support them, then provide a critical analysis of the problems that occur when this type of reasoning is applied to decisions in child custody cases. While most of the articles in this volume focus specifically on the issue of relocation, we focus more broadly on the issue of detailed presumptions as a mechanism for decision-making in child custody cases. We suggest that, while much debate focuses on the wisdom of specific custody presumptions, less attention has been focused on the general appropriateness of presumptions as an approach to decision-making about the lives of children and families. Moreover, the application of presumption-based decision-making models to relocation cases may involve the less-than-obvious application of other presumptions, including those regarding each parent's prior involvement with the child and presumptions about a child's age-related capacity to express meaningful preferences.

DEFINING TERMS: STANDARDS, GUIDELINES, PARAMETERS AND PRESUMPTIONS

Both legislatures and case precedents establish general parameters for decision-making in child custody cases. "Guidelines" and "Rules of Law" describe general policies that courts must consider in making custody determinations. For example, California law expresses the general policy that children should have "frequent and continuing contact" with both parents after a separation or divorce, except where such contact would endanger or would not be in the best interests of the child.¹ Other laws, based on similar policy considerations, establish a presumption of parenthood in a man who has fulfilled the functions of a child's father and "openly holds out the child as his natural child," even if he is not the biological father of the child.²

"Standards" and "Statutory Factors" set out more specific issues that courts must consider in making custody determinations for children. Many states have adopted some form of "best interest of the child" standard for decision-making in child custody cases, although the defini-

tions and criteria for determining “best interest” vary among jurisdictions (Bartlett, 2002; Krauss & Sales, 2000). Several states, including California, have set out specific factors to be considered by child custody evaluators and the courts in determining the best parenting plans for children.³

Presumptions may be established to augment these standards, further a general expression of public policy, or address a perceived problem in the handling of child custody cases. Presumptions require courts to assume a certain fact if another, prerequisite fact has been established. For example, if a court finds that one parent has committed violence against the other, the court may be required to assume that the aggressor should not have custody of the children. A custody presumption may require a court to weigh one factor more heavily than another. A presumption may impose a greater burden on one parent to produce more evidence than otherwise would be required. It may require one parent to meet a higher standard of proof than otherwise would be required. Depending on the issue involved, such presumptions may or may not be consistent with psychological research findings about how children adjust.

DEVELOPMENT OF THE PROBLEM

Presumptions are not new as an approach to decision-making in family courts, and they have long been reflective of values and prejudices in society. As Bartlett (2002) describes, fathers received automatic preference throughout much of history, while mothers began to receive automatic preference in the 1940’s, a pattern that persisted for at least twenty years. Until the landmark 1972 decision, *Stanley v. Illinois* [405 U.S. 645, 657], unwed fathers in Illinois were presumed to be unfit upon the death of the mother, such that the children were automatically placed in the foster care system. Few current scholars or practitioners would defend any of these presumptions a representing current research or adequate analysis of children’s needs.

As we learned more about the complexity of children and families, more states moved toward some form of the “best interests of the child” standard, as noted above. Jurisdictions vary as to the specificity of their standards and the factors used, but many include such elements as the children’s safety, some assessment of the child’s feelings/wishes and relationship with each parent, and the likelihood that each parent will support the child’s relationship with the other parent. This standard

maximizes judicial discretion in looking at the individual situation of each child and families.

Some proposals for presumptions have been based on perceived problems in the application of the “best interests” standard. Several authors (e.g., Krauss and Sales, 2000; Bartlett, 2002, Emery, Otto, and O’Donohue, 2005) cite the ambiguity of the standard, inconsistencies in its application, ambiguity, and requirement that judges weigh factors that are outside their area of expertise. A number of authors (Krauss & Sales, 2000; Shuman & Sales, 1998, 1999) have also raised concerns about the validity of some evidence presented by the mental health professionals upon whom judicial officers rely to assist with such decisions. These authors have also expressed concern about judicial officers’ ability to assess the quality of services provided by mental health professionals. Concern about children’s exposure to parental conflict have also led some authors to suggest a return to more formulaic, determinative rules for determining parenting plans after parental separation.

For example, the American Law Institute (ALI) proposed a formula for child custody decisions that would require post-separation parental responsibility to be allocated according to the proportion of time that each parent spent caring for the child when the family was intact [American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, Chapter 2 (2002)]. The ALI Principles also support a presumptive right of the custodial parent to move. While the ALI principles allow for adjustment based on the “firm and reasonable” preference of a child or a “gross” disparity in the quality of parent-child relationships, they primarily focus on “concrete acts and patterns of parenting, rather than subjective or qualitative judgments about parenting, the strength of emotional relationships, and the like.” (Bartlett, 2002). The ALI standards do not envision consideration of a host of other variables, such as child temperament, developmental issues, support of peer activities, changes in parenting time or quality based on the post-separation reorganization of the family, or the various dimensions of stability. (E. Mavis Hetherington, 1999; E. M. Hetherington & Kelly, 2002). Many of the factors ignored in such presumptive formulae have been found in other studies (e.g. Emery and Kelly, Amato) to be important in children’s adjustment. Nevertheless, some authors (Emery, Otto, and O’Donohue, 2005) even suggest that these formulaic presumptions remain intact even if parent is known to have a history of depression or substance abuse, *unless the problem impacts parenting to such a degree that the child would*

be removed by Child Protective Services if the family were intact. (emphasis added.) (Emery, Otto, and O'Donohue, 2005.)

PRESUMPTIONS AS A PROBLEM-SOLVING TOOL, OR TO CREATE SPECIFIC RESULTS

Some presumptions have been enacted for more specific purposes, such as resolving a perceived problem in the adjudication of child custody cases. For example, California had established policies favoring both children's safety and their continuing relationship with both parents. A perception then developed that some judicial officers were not applying these presumptions as envisioned by the legislature. Specifically, some legislators and advocates felt that judicial officers were placing a higher priority on frequent parent-child contact than on children's safety, or that their view of safety was impacted by their belief in the importance of frequent and continuing contact. California law was then modified to establish the presumption of safety as more important than continuing contact. This modification did not specify a public policy, since frequency of contact and safety are both established public policies, but it directed judges to prioritize the issue of safety over that of continuing contact.

The last several years have seen an increasing trend toward legislative action in response to individual decisions by appellate courts and even trial judges (Schnider, 2002). In some areas, such as cases with allegations of child abuse or domestic violence, legislatures have gone beyond establishing a primary concern for safety to prescribing specific procedures for evaluations or mediation and imposing sharp restrictions on the discretion that can be exercised by trial judges. These presumptions, in effect, create "facts" which the judge is required to use, in lieu of actual evidence, once the prerequisite fact is established. The presumption must be applied whether or not the underlying assumptions are "true," supported by scientific evidence, or consistent with the child's needs. Barriers to overcome the presumption are often high, and judicial officers may vary as to the standards they apply in determining whether the evidence requiring exercise of the presumption has been met.

As the legislature became more involved in giving detailed directions for resolution of custody cases, political forces become increasingly entwined in the process. While many legislators undoubtedly have a sincere desire to protect children, the political process impacts the depth and quality of information they receive about children's needs. This in-

creases the risk that presumptions may be established that are more reflective of competing political interests than the product of objective deliberation and consideration of social science evidence. For example, as post-*Burgess*⁴ relocation cases progressed through the appellate courts in California, the legislature attempted to pre-empt or restrict future court rulings by establishing the *Burgess* decision as the intent of the legislature. This occurred despite mounting social science evidence about stresses caused by relocation, the importance of father involvement in children's lives, and the multitude of individual characteristics and circumstances that may determine how any child will respond. After the *LaMusga*⁵ decision was issued by the California Supreme Court, attempts were made to pass legislation that would have exalted the primary custodial parent's presumptive right to move over any individual consideration of children's best interests.⁶ Conversely, the California Legislature recently considered legislation that would have established a presumption of 50-50 custody, absent *clear and convincing* evidence that this would be harmful to a child.

Political forces, interest groups, and media coverage of high profile cases have all contributed to legislation that is more reactive, specific in its intent, and restrictive of judicial officers' discretion to consider the circumstances of the individual child and family.

ILLUSORY ADVANTAGES

Proponents have advanced a number of arguments in support of presumptions. In this section, we address some of the primary arguments.

Presumptions Reduce Litigation—Or Do They?

Proponents of detailed presumptions often suggest that they will reduce custody litigation and children's exposure to conflict, by providing "surer, quicker, and more certain results when families break up." (Bartlett, 2002; also see Emery et al, 2005). This argument appears to rest on two premises (1) that the establishment of a presumption will, in fact, reduce litigation; and (2) that, even if true, this mechanism of decision-making will result in custody arrangements that benefit children. Certainly, it is well established that prolonged exposure to parental conflict is harmful to children (Johnston & Roseby, 1997; J. B. Kelly, 2000; J. B. a. E. Kelly, Robert E., 2003; Roseby & Johnston, 1998), and it stands to reason that prolonged litigation may increase children's expo-

sure to conflict. Nevertheless, other mechanisms, such as mandatory mediation, have proven effective in reducing the amount of child custody litigation, without abandoning children's individual interests in favor of a predetermined formula. (Emery, Laumann-Billings, Waldron, Sbarra, & Dillon, 2001)

We have found no controlled studies demonstrating that determinative custody presumptions (i.e. those that prescribe a particular formula for parenting time) have been effective in reducing child custody litigation. The majority of separating parents arrive at a parenting plan through some form of negotiation. This was also the case before the recent movement toward determinative presumptions. While many parents likely negotiate out of a true desire to reach an amicable resolution, it stands to reason that others agree to settlement out of a conviction that the "deck is stacked against them" by the existence of legal presumptions. It is unknown how many of these settlements provide different outcomes than would have been achieved if an evaluation had been conducted or evidence reviewed.

While pre-determined results may reduce custody litigation, predictable results do not necessarily equate to support of children's best interests. With current social science knowledge, few would argue children's best interests' were met by automatic decisions based on the gender of parent, or on the presumption that children would be better off in foster care than with an unwed father. While we have little research about the period when fathers had preference, more recent research (Sanford L. Braver & Griffin, 2000; Pleck, 1997) certainly illustrates that perceived maternal preference has often led to decreased involvement of fathers and hardship to children.

Even if presumptions were shown to discourage litigation by some parents, we have seen no evidence that they would reduce litigation in the 10-15% of cases with the highest level of conflict. These are the cases that consume a disproportionate amount of court time and resources and likely place the greatest burdens on children. Indeed, it has been our observation that, in high conflict cases, presumptions merely shift the focus of conflict to areas not addressed by the presumption, or to an arena that might influence the court to determine that a specific presumption has been met or overcome. This may lead to inflation of allegations and/or distortion of past history to demonstrate that a particular parent has spent more time with the child. As even Emery et al (2005) acknowledge, this may also lead to parents jockeying for position by leaving with children, quitting jobs, or fighting to remain in the marital home, even when a short-term separation might be better for ev-

everyone involved. This could increase children's exposure to parental conflict, which is precisely the outcome that presumption advocates say they want to avoid. Similarly, presumptions requiring strict 50-50 custody splits between high conflict parents may simply shift the arena of conflict to other issues on which, by statute, parents have been given equal authority. The child may be increasingly impacted, or have important aspects of life suspended, as parents litigate issues such as school placement or after-school activities.

All of this suggests that the impact of presumptions on litigation is much more complex than proponents argue. We know of no studies that have provided a comparison of litigation rates before and after presumptions were established. Our own experience suggests that detailed presumptions may discourage litigation in some cases, but not necessarily to the benefit of the child. In effect, a presumption may prompt settlement due to the existence of the presumption, rather than based on the child's individual needs. In other cases, as described above, the presumption may simply shift the focus or timing of litigation, exposing the child to just as much parental conflict.

Many parents are also better able to accept an evaluator's recommendation or decision of the court, if they believe that the evidence regarding their individual cases has been heard and considered, rather than having decisions made based on generalizations that may not be accurately applied to them (Schepard, 2004, suggests that this even applies to domestic violence offenders). This may, in turn, have an effect on the parties' future ability to co-parent.

Further study would likely be needed to determine the relationships between child custody presumptions, litigation, parental conflict, the ability to accept a custody decision and co-parent for the benefit of the child, and future child adjustment. We do not argue that we know the exact nature of these relationships, or that our own professional experience is an accurate reflection of all custody-contesting parents. On the other hand, since we no data to support the *assumption* that detailed child custody presumptions reduce litigation or children's exposure to parental conflict in a way which benefits children, it is not responsible to require trial judges to ignore many other factors (such as qualitative aspects of parent child relationships) that research suggests *are* important to child adjustment.

In our opinion, this issue illustrates the difference between general parameters for decision-making in child custody cases and specific presumptions that predetermine outcomes. Where general parameters (e.g. safety, continuing parent-child contact, stability, etc.) are established to

guide family law decision-making, these issues can be examined in light of the individual circumstances and history of the child and family. As presumptions become more formulaic and determinative, the focus of decision-making is shifted away from the broad-based factors important to child adjustment and onto the specific formulae required by the presumptions. The individual needs of a child can easily get lost in such a process.

“Reigning In” Unreasonable Judges—Or Undermining Good Decision-Making?

Many proponents of child custody presumptions suggest that they are needed to control or prevent inappropriate decisions by judicial officers. These authors suggest that judges have little training in family law or child development, are ill-equipped to evaluate the qualitative aspects of parent-child relationships, and get little useful guidance from the “best interests” standard. They contend that, as a result, judges make their decisions based on personal biases and values, rather than relevant psychological research or parameters set by the legislature. Specifically, it has been argued that judicial officers have been insensitive to the dynamics of domestic violence and child abuse and the impact of these issues on children. (This issue will be discussed in greater detail in a subsequent section.) As a result of their various concerns, proponents of presumptions suggest that judges be limited to fact-based determinations such as “the shares of past care-taking” engaged in by each parent (Bartlett, 2002).

This approach is problematic at best, since pre-separation parenting is not necessarily predictive of post separation parenting. Various factors, including the post-separation need for both parents to work, renegotiation of parental relationships and adjustments in parental “gate-keeping” may impact both the amount and quality of time that parents and children spend together (Emery, 1999; E. M. Hetherington & Kelly, 2003; J. B. Kelly, 2000). Moreover, this proposal also is inconsistent with the research suggesting that the quality of a parent-child relationship is at least as important as the number of hours that parents and children spend together (P. Amato, 2003; P. R. Amato, 1994, Emery and Kelly, 2005). Thus, the proponents of presumptions are arguing that much psychological research be ignored, just to make the decision-making process simpler.

Judicial officers often rely on mental health experts to assist them with decisions in these difficult cases. Elrod (2002) notes that the use of

mental health experts in child custody cases increased from approximately ten percent of cases in the 1960's to over 30 percent in the 1990's. While this may partly reflect the increasing complexity of child custody decisions (i.e. the movement from an automatic gender-based presumption to a more complex assessment of both parent-child relationships), it cannot be denied that mental health experts play increasingly prominent and varied roles in child custody cases. Several authors (Bartlett, 2002; L. R. Greenberg, Martindale, Gould, & Gould-Saltman, 2004; Krauss & Sales, 2000; Shuman & Sales, 1998) have expressed concern about the quality of mental health expertise provided to judicial officers, and about the tendency of some mental health professionals to exceed their roles and applicable knowledge in making recommendations to the court. Treating professionals may also escalate the family conflict if they undertake a biased position in the case, abandon professional objectivity, undertake treatment of a child without attempting to engage both parents, or exceed their roles and available knowledge by offering custody recommendations to the Court (Elrod, 2001, 2002; L. R. Greenberg, Gould, Schnider, Gould-Saltman, & Martindale, 2003; L. R. Greenberg, Gould, Jonathan W., Gould-Saltman, Dianna, & Stahl, Philip M., 2001). Concerns have also been expressed about the ability of judges to differentiate between good and poor quality mental health services or expert testimony (Bartlett, 2002; Krauss & Sales, 2000; Shuman, 2002).

Family law judicial officers certainly come with widely varying personal and professional experiences. Judicial officers, like attorneys and mental health professionals, may have personal and professional biases that impact their perceptions of events. Such biases are not limited to these professionals, of course, and may also become evident in legislation that arises in response to high profile cases or political pressure. Wherever it occurs, if a decision-making process involves a high degree of personal bias, one-sided consideration of the research literature, invalid procedures or short-cuts through the family's individual circumstances, it is more likely that the result will be inappropriate decisions for children and families.

Ultimately, we would argue that the cure for poor decision-making, to the degree that it exists, is better decision-making. Where training gaps exist in the preparation of judicial officers or mental health professionals, the best approach to improving results is to enhance ethical and training standards for those who can so profoundly impact the lives of children (Elrod, 2001, 2002; L. R. Greenberg et al., 2004). Also, training of attorneys and judicial officers should include material on how to

assess the quality of mental health expertise, as well as effective questioning or cross-examination of experts. Movements toward improved training of judicial officers, the recruitment of a specialized family law judiciary, more effective use of children's attorneys, specialized models of court-related treatment, parent coordination and other intervention services, and judicial case management all provide improved possibilities for management of contested family law cases (Elrod, 2001, 2002; L. R. Greenberg, Gould, Gould-Saltman, & Stahl, 2003; L. R. Greenberg, Gould, Schnider et al., 2003; Levanas, 2005; Levanas, Greenberg, Drozd, & Rosen, 2004; Leverette, Crowe, Wenglensky, & Dunbar, 1997; Taylor, Greenberg, & Doi Fick, 2004).

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

THE PROBLEMS WITH PRESUMPTIONS

In the prior sections, we have critically responded to primary arguments that have been advanced to support detailed presumptions in child custody cases. In this section, we describe some of the problems with using such presumptions as the basis for decision-making about children and families.

Labels Don't Describe Reality—Children and Families Are Complicated.

One issue that is characteristic of all child custody presumptions is the attempt to impose relatively simple decision-making rules on complex phenomena. Even those with some sympathy to presumptions (Bartlett, 2002, Emery et al, 2005; Hetherington, 2005) acknowledge that they are based on generalizations, and that past generalizations (e.g. global statements about parenting abilities based on gender or the child's age) did not prove to be accurate, fair or helpful to children. Few scholars, practitioners or legislators currently argue that child custody decisions should be based on the types generalizations or stereotypes

used in the past, yet some are arguing for a renewed use of similar decision-making patterns. The nature of the proposed generalizations may have changed, but they are no more reflective of the complexity of families than has been the case in the past, when generalizations now recognized as inaccurate were used to direct decisions about families.

Recent years have seen an explosion of research regarding the adjustment of both parents and children following parental separation. A review of the professional literature demonstrates the complexity of issues contributing to children's adjustment. Studies with different populations, using different methodologies, may yield strikingly different results. Moreover, where the literature is used in pursuit of a particular agenda rather than for a truly balanced review, findings may be selected, used, or misused to support a particular viewpoint. (R. Gelles, Johnston, Pruett, and Kelly, 2005).

Individual children and families may present circumstances that differ from those found in research studies, and thus caution is needed when applying any research results to an individual case. Austin (this issue) further describes some of these concerns.

Outcome research generally demonstrates that children adjust most successfully when they can develop and/or maintain quality relationships with both parents, particularly when they are not placed in the middle of parental conflict (J. B. Kelly, 2005). Long-term exposure to parental conflict may cause significant harm to children, who may need protection or supervised contact when conflict is intractable or a parent is severely impaired. Such families may also require structured plans for parental decision-making, as well as parent education and treatment services for parents and children (P. R. Amato & Gilbreth, 1999; J. B. Kelly, 1998, 2000, 2001; J. B. a. E. Kelly, Robert E., 2003; Roseby & Johnston, 1998). When high conflict families are assigned to 50-50 custody situations without any decision-making structure in place, the result may be long-term, intractable conflict that has a profound effect on children's lives.

Children may be both directly and indirectly impacted by exposure to parental conflict, domestic violence, changes in family structure and the economic consequences of parental separation. Deterioration of parenting quality is common following parental separation, as parents may be more angry, overwhelmed by situational stressors, less able to separate their own emotional needs from children's needs, less affectionate and less effective with discipline and limit setting (Emery, 1999; E. M. Hetherington & Kelly, 2002; J. B. Kelly, 2005). Disruption of activities, routines, parent-child relationships and extended family rela-

tionships present risk factors for many children. If the child has a primary custodial parent, the psychological health and parenting practices of that parent may be of paramount importance (E. M. Hetherington & Kelly, 2002). Alternatively, if there are unhealthy aspects of both parent-child relationships, the child's relationship with each parent may buffer the child from unhealthy aspects of the other parent-child relationship (J. B. Kelly, 2005).

More fathers are remaining involved with their children after parental separation than at any other time in our history, and most children benefit from such involvement (J. B. Kelly & Lamb, 2003; J. B. a. E. Kelly, Robert E., 2003). While protracted exposure to parental conflict can have profoundly negative effects on children, children whose parents remain in conflict but avoid involving the children often do as well as children of lower-conflict parents (Buchanan, Maccoby, & Dornbusch, 1996; J. B. Kelly, 2000). Moreover, an increasing variety of program models are available for allowing children to have relationships with both parents while reducing their exposure to conflict (Elrod, 2001; L. R. Greenberg, Gould, Schnider et al., 2003; J. B. Kelly, 2001). Of course, issues such as family resources, emotional disturbance in parents, and other situational factors may determine whether these interventions can be successful for particular families.

The relationships among these variables, and their impact on children, are extraordinarily complex (P. R. Amato & Gilbreth, 1999; Bauserman, 2002; E. Mavis Hetherington, 1999; E. M. Hetherington & Kelly, 2003; J. B. Kelly and Emery, Robert E., 2003; King & Heard, 1999). A true understanding of the issues requires an appreciation of that complexity and balanced consideration of research supporting a variety of perspectives. Advocates of generalized solutions often argue that the research purely supports selected global solutions for children, failing to acknowledge the variations that may make different studies applicable to children in different situations (R. Gelles, Johnston, Pruett, and Kelly, 2005).

The complexity of the research, and the inapplicability of simple solutions, can be demonstrated by an examination of three of the most controversial areas addressed by child custody preferences: domestic violence, relocation and children's preferences.

Domestic Violence

There is widespread agreement that exposure to domestic violence can be harmful to children, presenting risks in terms of both parenting

quality and the child's short and long term development. (Ayoub, Deutsch, & Maraganore, 1999; Dawud-Noursi, Lamb, & Sternberg, 1998; Levendosky & Graham-Bermann, 2000; Sternberg, Lamb, & Dawud-Noursi, 1998a). Here, however, much of the unanimity ends.

Some of the early research on domestic violence was conducted by focusing on women and children residing in battered women's shelters. These women were often fleeing severely violent relationships, in which the dynamics of conflicted divorce were often not a factor and the primary focus was on female victims of men exhibiting a pattern of controlling and violent behavior (Austin, 2001; Graham-Bermann, 1998). In subsequent years, definitions of domestic violence have evolved, such that the focus is increasingly on a pattern of coercive conduct by one partner, aimed at controlling the behavior of the other (Greenberg, Drozd & Gonzalez, 2005).

Application of this research is also complicated by the manner in which domestic violence is defined, both in the research and in the statutes governing child custody decisions. These definitions can be widely variable.⁷ In some states, a showing of physical injury or a criminal conviction is necessary, while other states have adopted much broader definitions.⁸ While the research broadly supports the proposition that children are harmed and endangered by exposure to violence, stalking, threatening or intrusive/controlling parenting, the associations are less clear between children's distress and some of the other behaviors that some states, and some scholars, now define as domestic violence. Assessment of these issues is also complicated by evidence of the harmful effects on children exposed to high levels of parental conflict. (Johnston & Roseby, 1997; Roseby & Johnston, 1997).

Disagreement also exists about the characteristics of violence between parents. For example, while there is general agreement that women are more likely to be seriously injured by men than the reverse, some studies indicate that large numbers of respondents in violent relationships reported incidents that were bi-directional and did not result in serious injury (Kwong, Bartholomew, & Dutton, 1999). Several authors have identified subtypes of domestic violence events, and have emphasized the importance of differential assessment for making appropriate assessments, recommendations for child custody, and treatment recommendations (Johnson & Ferraro, 2000; Johnston & Campbell, 1993). Other authors (Bancroft & Silverman, 2002) strongly dispute that any subtypes exist which may be relevant to risk assessment, custody decisions and treatment planning. This may pose particular concerns when a violent incident is an outgrowth of high conflict dynamics, rather than

preceding the separation. The increasing number of domestic violence allegations in custody conflicts (Elrod, 2001), adds to the complexity of the assessment problem.

None of this is intended to deny the serious risks to children from exposure to conflict and violence, nor the importance of prioritizing children's safety over other factors in determining parenting plans. The validity of these concepts varies according to how important terms such as *domestic violence*, *high conflict* and *safety* are defined, and how closely those definitions, and the circumstances of the case, approximate those used in the research cited to support them. Specifically, research conducted on known victims of physical violence may be relevant when the statutory requirements, or facts of the case are similar to the circumstances of the study. On the other hand, one must use much greater caution in applying such research to an allegation that a coffee cup was destroyed or that one parent feels "harassed" by the other. Moreover, recent research has highlighted a number of factors that may contribute to the impact of family violence on children-, including the nature of events experienced, ongoing parental conflict, children's innate resources/resilience, mental health of the parents, external support, systemic stressors, and access to treatment (Austin, 2001; Ayoub et al., 1999; Dawud-Noursi et al., 1998; Sternberg, Lamb, & Dawud-Noursi, 1998b). All of these issues may be relevant to devising the best plan for children and families.

Various authors have proposed complex models for assessing allegations of domestic violence, arriving at custody decisions and devising treatment interventions. These approaches are based on considering a broad range of the research on these issues (Austin, 2001; L. R. Greenberg, Drozd, & Gonzalez, 2005; L. R. Greenberg, Gould, Schnider et al., 2003; Levanas et al., 2004, Dalton and Olesen, 2004). Such complexity is rarely reflected in the position statements of advocacy groups, press accounts of high profile cases, or other highly public political processes. While the research demands a complex, individualized approach, interest groups may demand simple or more sweeping responses. In such a highly charged context, interventions as basic as requiring treatment for victimized parents may be recast as blaming the parent rather than promoting a mentally healthy environment for the child. Given the high stakes involved in protecting a child's safety and the strains on family court resources, simple rules may be particularly appealing to decision-makers but not as effective or helpful to children.

Relocation.

As other authors in this volume have noted, relocation is one of the most difficult problems that family courts face. As Elrod (this issue) noted, relocation cases often involve losses for everyone involved. Even in cases where differences have previously been resolved through negotiation, conflict can rapidly escalate when one parent perceives a threat to his/her relationship with the child due to the proposed relocation, and the other perceives a threat to his/her autonomy and ability to travel if the relocation is denied. As in many high conflict cases, children's independent needs can rapidly be overwhelmed by each parent's attempt to pursue his or her own interests.

As Elrod also observed, relocation cases often invoke an irreconcilable conflict between fundamental rights and issues, e.g., the right of a parent to travel, the right of a parent to care for his or her child and, most importantly, children's needs. The perception that requests to relocate are more frequent among custodial mothers has led to disputes about relocation law being expressed against the heated political backdrop of interest group and gender politics. In the process, psychological research has been selectively cited, extrapolated, and attacked with a level of vitriol that is relatively uncommon in the professional psychological literature. As the trend is toward individual assessment of a child's best interests in contested relocation cases, it is useful for all consumers of the research to have a general understanding of the complexity of the issues, and of what we do and do not know about children's adjustment.

It would be difficult, if not impossible, to conduct fully controlled studies of children's adjustment following a contested relocation case. Such a study would raise serious ethical concerns, as it would require that children be randomly assigned to conditions of relocation or non-relocation and matched based on any number of characteristics that may complicate the outcome in any particular case. As in many types of cases involving real families in actual distress, researchers are limited to those methods that can provide information without increasing risks to the families and children being studied. These methods include surveys and questionnaires, comparing outcome measures in naturally occurring comparison groups, applying research from related areas of study, and in-depth case studies. Each of these methods has limitations, and, for this reason, mental health experts must consider (and convey to the Court) the reasons that particular results are or are not applicable to the case at issue. Amato has provided a useful analysis of the different types of research on divorce, and the information that each can contribute to

our understanding of children's outcomes (P. Amato, 2003). Unfortunately, when the environment discussing these issues becomes politicized, advocates may focus on attacking the weaknesses of research supporting opposing viewpoints, rather than assessing the data to find the results that are most relevant to the individual child at issue. Stahl (this issue) provides an extensive discussion of how such biases enter into discussions and consideration of relocation cases.

Austin (this issue) has presented a critical analysis of research and opinion literature on the impact of relocation on children of divorce. As he discusses, the research on relocation is only one special aspect of research related to the effects of parental separation on children. Our purpose here is not to exhaustively review this research, but rather to highlight core concepts and findings, many drawn from related areas of psychological study and both sides of the relocation debate. Any of these concepts can be selectively cited to support the interests of one advocacy group over the other. To produce the best results for children and families, however, research findings must be discriminately applied to the facts of a specific case.

The first and rather obvious concept is that relocation may be stressful to both children and adults. Relocation requires children to adjust to new surroundings, adapt to new schools and establish friendships and connections to the community. When the relocation follows parental separation, children may need to adjust to profoundly changed relationships with the left-behind parent and extended family, as well as peer networks and other activities in the community of origin. Visitation structures that require the child to spend full summers or vacations in another community may also cause stresses or interrupt peer activities in the new community. Even the proposal to relocate may substantially increase conflict between parents (Elrod, 2002, and Elrod, in press), as one faces the possibility of profound change in his/her relationship with the child. Of course, these disadvantages may be overcome by improvements in economic circumstances or other opportunities, reduced exposure to the parental conflict or an abusive parent, support from family members in the new community, and the improved mental health or happiness of the parent who was permitted to relocate with the child and pursue other goals or opportunities.

Relocation also occurs against the backdrop of children's developmental stages, capabilities, and the skills they must develop at various ages in order to achieve a healthy adjustment. As Kelly and Lamb (2003) and Austin (this issue) note, relocation may pose particular risks to young children, as they are least able to maintain an image of the dis-

tant parent and participate in long-distance communication such as email and telephone contacts. The development of close parent-child relationships takes place across a variety of activities and responsibilities, ranging from intimate care-taking responsibilities to involvement in homework, assisting children with decision-making skills, and providing the developmental experiences that allow children to grow and mature. While Wallerstein (2003) and others have presented case studies (particularly involving older children) in which children have been able to maintain close long-distance relationships with parents, other researchers present data suggesting that relocation risks significant disruption of parent-child relationships and distress to children who are separated from a parent (Stanford L. Braver, Ellman, & Fabricius, 2003; Fabricius, 2003; Fabricius & Braver, in press).

It is likely that each of these outcomes occurs in some children. A new study also suggests that supportive relationships with grandparents may be important to children's adjustment after divorce, and that children's assessment of these relationships does not always coincide with what their parents think of them (Lussier, Deater-Deckard, Dunn, & Davies, 2002). This factor might weigh either in favor or against a parent's desire to relocate, depending on the quality of the grandparent-grandchild relationships and how those relationships would be affected by the proposed relocation.

As several authors have noted, relocation cases often involve forced choices between alternatives that create risks to children whether or not the relocation is permitted. As Austin (this issue) and others have noted, decisions in some cases may ultimately have to be directed toward risk mitigation and harm reduction, rather than producing the "best" outcome. The literature suggests that relevant factors include the child's age, the level of parental conflict, available resources for maintaining both parent-child relationships, each parent's willingness to support the other parent-child relationship, the child's activities and peer involvements, and a host of other *individual* variables. Best-interests analyses, rather than generalized presumptions, are more likely to be consistent with complex research findings and the individual needs of children and families.

Children's Preferences

Recent years have seen an increasing trend toward asking courts to consider children's preferences in child custody decisions. Most states include some consideration of children's preferences in their standards

for child custody decisions, while a few states have established a rebuttable presumption that children's preferences should be controlling after a certain age.⁹ In addition, children's preferences often represent a component in other presumptions, as they are listed among the issues to be considered in determinations about relocation, parenting schedules and other issues. Thus, assumptions about children's statements and decision-making ability may exert a pervasive, and often unrecognized, influence on child custody decisions-including the application of other presumptions.

Like most of the issues discussed in this section, the emphasis on considering children's preferences is based on a commonly accepted premise-i.e., that the thoughts and feelings of children are important and should be considered in reaching decisions about parenting plans. After decades in which children's needs were completely subordinate to the interests of parents, recent years have seen an increasing trend toward valuing and considering the independent needs and concerns of children (Crossman, Powell, Principe, & Ceci, 2002).

Most professionals also accept the fact that not all of children's statements are equally valid, and that poor interviewing can lead to invalid statements and misinterpretation of children's needs. In recent years, there has been an explosion of increasingly sophisticated research and professional literature about valid methods of child interviewing and the appropriate interpretation of children's statements and behavior. While much of this research began around the issues of assessing allegations of child sexual abuse, children's responses have been studied in a wide variety of situations both related and unrelated to allegations of abuse.

Much of the relevant research has been summarized elsewhere (Crossman, Powell, Principe, & Ceci, 2002; Kuehnle, Greenberg, & Gottlieb, 2004; Lamb, Sternberg, & Esplin, 2000; Lamb, Sternberg, Esplin, Hershkowitz, & et al., 1997; Leichtman & Ceci, 1995; Pezdek, Finger, & Hodge, 1997) and a comprehensive review is beyond the scope of this paper. For the purpose of our commentary here, it is sufficient to note the broad areas of agreement and controversy regarding children's preferences and interview data.

As is evidenced by the summary above, appropriate consideration of children's data involves a delicate balance of careful interviewing by trained professions, considering multiple interpretations of children's behavior, asking questions that allow the interviewer to gain some knowledge of the *whole* child (rather than just the child's "position" on a contested issue), appreciation of developmental patterns, and an un-

derstanding of the family factors that may give rise to reasoned preferences, healthy or unhealthy problem solving, or a child “caving in” to pressure from a needy or angry parent. The literature overwhelmingly argues for a multidimensional approach to listening to children.

Unfortunately, as children’s preferences have been incorporated into other presumptions, the responses to children’s data have often become politicized and subsumed into larger battles between adult interest groups. Some authors are now using adult-like discussions of children’s “rights” to advocate that children be given *control* over major parenting decisions—including decisions about parenting plans, contact with parents and extended family, and involvement in medical treatment or psychotherapy. This contrasts with more midrange approaches (Elrod, 2005; L. R. Greenberg, Gould, Gould-Saltman et al., 2003; L. R. Greenberg, Gould, Schneider et al., 2003; J. B. Kelly, 2000, 2005) recommending that children’s information, feelings and perceptions be considered, with weight assigned based on the child’s age, abilities, functioning level, coping skills, family dynamics, and a variety of other individual factors. Those who argue for a more nuanced approach to children’s data have been accused of being unconcerned about children’s feelings, taking children’s safety lightly, or “forcing” children into activities, relationships, or treatment against the child’s wishes (Walker, Brantley, & Rigsbee, 2004).

Even without the politicized environment, responses to children’s data can be emotionally loaded. Responsible adults feel a need to respond to children and, in the case of allegations of violence or abuse, to protect them (Levanas et al, 2004). Children at certain ages (e.g. early adolescents) may also have an emphatic style in expressing their opinions on any subject, which increases the pressure on adults to respond. The judicial officer or mental health professional who does not have (or take) the time to interview the child on issues outside the parental conflict may never learn that the adolescent is equally emphatic on any number of subjects, where a lack of judgment in their opinions may be more apparent. Conversely, some children are able to arrive at effective perceptions or problem solving on issues relevant to their daily lives (e.g., the pros and cons of particular extracurricular activities), but are ill-equipped or emotionally unprepared to express opinions on the major issues in the custody conflict. Such children may become overwhelmed and/or inappropriately emphatic, one-sided and lacking in developmentally expected characteristics when questioned about contested issues in the parental conflict.

Children's expressed preferences may reflect any combination of reasoned opinions or perceptions, unhealthy problem solving, or external influence on the child's perceptions and statements. Careful, balanced, and broad-based interviewing may reveal information that can meaningfully contribute to the evaluator's recommendations or the court's decisions. Conversely, interviewing that exclusively focuses on the adults' contested issues may lead to distorted data and interpretation. The combination of demands on court resources and a highly charged political context may make it difficult to arrive at such a contextual understanding of children's statements. It may also result in overwhelming pressure on children to express "positions" that adults believe are likely to sway the court.

It is useful to place these issues in the context of normal and expected patterns in children's development, as well as typical responses to children's statements in intact and lower-conflict families. A number of authors (including some who have been attacked as not listening to children) have emphasized the importance of children and adolescents having *input* into decisions about their daily routines and parenting plans (Dunn, Davies, O'Connor, & Sturgess, 2001; J. B. Kelly, 2000, 2005). As Kelly (2000, 2005) has pointed out, most children know the difference between having input into decisions and being burdened with the responsibility for adult decisions that they may be unprepared to make, and which may subject them to undue emotional burdens. The first author of this paper commonly conducts informal polls of training participants to assess how many of them commonly allow their children to make unfettered decisions about academic programs, major medical decisions, or attending family events. The results of these unscientific explorations, as well as the professional literature, suggest that most parents commonly serve as gatekeepers for considering their children's preferences.

Allowing children to be *involved* in *decision-making* increases their perception of being heard and considered. Such a process also allows the parent to consider children's reasoned preferences, and provides an opportunity for the parent to engage the child in critical thinking, consideration of alternatives, and effective problem solving (Dunn et al., 2001; Lussier et al., 2002). At the same time, maintenance of final adult authority allows the adult's (usually) more reasoned judgment to prevail, balances children's input with consideration of broader family issues, and helps children to master the coping skills they need to develop successfully.

This process is also consistent with the professional literature, which indicates that most children have better outcomes when they are exposed to authoritative parenting and achieve more successful adjustment when they learn to resolve problems by active engagement with others rather than by simply avoiding a stressful situation (Fields & Prinz, 1997; E. Mavis Hetherington, 1999; E. M. Hetherington & Kelly, 2002). Thus, the child who is having difficulty with a parent may benefit more, both in short and long-term development, by engaging in a therapeutic process designed to address the issues rather than cementing the problems by avoiding contact with the parent (L. R. Greenberg, Gould, Gould-Saltman et al., 2003; L. R. Greenberg, Gould, Schnider et al., 2003; Johnston, Walters, & Friedlander, 2001; J. B. Kelly, 2001, 2002). Even children who have been exposed to violence or abuse may ultimately achieve better adjustment if they have an opportunity to resolve their feelings in a safe and protected environment with the parent involved (Chaffin, Wherry, & Dykman, 1997; L. R. Greenberg et al., 2005; Levanas et al., 2004).

Children's statements and expressed preferences, particularly when stated in emphatic or global terms, may be a tempting "tie breaker" when difficult decisions arise. This is a particular danger in that children's statements, and adults' assumptions regarding them, may carry an unrecognized influence as components of decision-making regarding other child custody presumptions. Certainly, we believe that children's feelings, perceptions and experiences should be strongly considered when decisions are being made about their lives, and the literature suggests that they adjust better when their voices are heard (Crossman et al., 2002; Dunn et al., 2001). Overall, however, both research and common experience argue against global, age-based or "bright line" presumptions about children's statements and expressed preferences. Moreover, available social science argues for scientifically informed interviews and caution in how children's statements are used to support or rebut other presumptions.

Problems with Politicizing Social Science

Social advocacy has long been an effective force in promoting political change. For example, years of denial and minimization about the effects of domestic violence, combined with movements advancing women's rights, led to legislative changes placing a greater emphasis on children's safety. Social science research played a role in those changes. At the same time, as described above, concerns have been raised about

the applicability of earlier studies to different populations or expanded definitions of domestic violence. Few would argue for a return to the “bad old days” in which the seriousness of child abuse or domestic violence was denied. As noted above, however, similar concerns can be raised about the social science research in a variety of other areas, used by interest groups all over the political spectrum.

Political debates, as well as journalistic coverage, tend to be painted in broad strokes. Advocates often select those research results—or parts of research results—that they believe most strongly support their positions and desires regarding the legislation or court case, ignoring or minimizing the limitations in a supportive study or the contributions of research supporting a different view (Stahl, this issue). While psychologists have an ethical obligation to articulate the limitations in data they present (American Psychological Association, 2002; Ceci & Hembrooke, 1998; Gould & Stahl, 2000; L. R. Greenberg et al., 2004), attorneys have an obligation to highlight that data most favorable to the client’s case. Moreover, unrecognized bias may play a role in how professionals *select* the research they review. While no professional has the time to read everything, objective consideration of the research requires balanced consideration of literature supporting a variety of perspectives. The well-informed attorney (or the attorney assisted by a well-informed expert) may be able to effectively cross-examine an opposing expert who presents a one-sided review of the psychological literature. Such opportunities are less likely to exist in advocacy-driven attempts to rewrite the law.

Many legislators are genuinely concerned about children, and may be impacted by high-profile cases or disturbing results in individual cases. By the very nature of their function, legislatures craft broad, generalized solutions. Moreover, the vocabulary used to describe a bill may hide important facts about its provisions. For example, a recently introduced bill in California was represented by proponents as a “shared parenting” bill, when it in fact would have gone a great deal further—requiring a strong presumption (rebuttable only by clear and convincing evidence) that a 50-50 custody arrangement was best for children. As noted above, while there is considerable research support for the benefits of having both parents constructively involved in children’s lives (P. R. Amato & Gilbreth, 1999; J. B. Kelly, 2000), we have seen no scholarly support for a near-blanket presumption that 50-50 custody arrangement is in children’s best interests.

It is sometimes suggested that legislation about child-custody presumptions is advanced by mothers’-rights or fathers’-rights groups in

response to the perception of legislative gains by parents of the other gender. Some of the legislation is also intended to advance truly noble policy goals, such as protecting children. Even the most well-intentioned policy goal, however, rarely achieves good results if it is advanced by poorly conducted, selectively represented or distorted social science.

Not all research is of equal quality, and refinements in research design have allowed us to gain an increased understanding of the complexity of children's reactions and outcomes. It is also in the nature of science-and social science-that it rarely stands still. In the 1980's, for example, concern about allegations of abused children led to slogans such as "believe the children"-with the attendant implications that those who were concerned about suggestibility didn't listen to children-while other organizations described "victims" of child abuse laws. Both groups had compelling case examples to support their generalized opinions about the believability of children's statements. In the ensuing quarter-century, increasingly sophisticated studies have illustrated the complex strengths and weaknesses of both child and adult memories, as well as the types of interview conditions most likely to yield valid or distorted information. Each of these studies has strengths and weaknesses, and responsible authors articulate the both the applicability and limitations of their results. No study, however, can fully account for the individual differences that a judge can hear when he or she considers evidence.

Unintended Consequences and the Importance of Fairness

Detailed presumptions also impact perceptions of fairness in the judicial system, since decisions are based on generalizations about classes of parents and children rather than individual examination of evidence. It is our opinion that where general parameters or child custody presumptions are established, those presumptions need to address significant issues and be supportable based on a broad-based, thorough and balanced consideration of social science research. Presumptions are, by their very nature, short cuts, which reduce the need-and opportunity to present-actual evidence regarding an individual case. As presumptions multiply and become more restrictive or detailed, the result is reduced discretion for the judicial officer and more restricted opportunities for a parent to present his/her case. It stands to reason that custody decisions that are more formulaic and presumption-driven will leave litigants feeling that their individual circumstances have not been heard or con-

sidered. This result may have real consequences, including increased litigation, decreased post-decision involvement by the “losing” parent, and decreased compliance with court orders. The limited social science available suggests that even domestic violence offenders are more likely to comply with court orders if they believe that the process leading to those orders has been reasonably balanced and fair (Schepard, 2004). Thus, it seems reasonable to suspect this dynamic would also operate—perhaps to an even greater degree—in cases that do not involve allegations of violence.

SO WHAT DO WE SUGGEST?

Complexity Is More Difficult, But it Is Also Real

The first step to solving any problem is to recognize and acknowledge its existence. Increasing divorce rates and the escalating caseloads in family courts have created real strains on court resources. High percentages of litigants are unrepresented, and even more are unable to afford the comprehensive evaluations, expert testimony and presentation of evidence that lead to truly individualized decisions. Parent coordination and expert-level treatment may be valuable to many families, but relatively few have the resources to afford them. Conciliation court services are also overstretched, limiting the publicly funded services that can be made available to families.

In this context, formulaic custody presumptions present an appealing, if illusory, solution. Instead of considering qualitative aspects of parenting, the court need only count the hours that a parent has reportedly spent with a child (Bartlett, 2002). Instead of considering the complex impact of a proposed relocation on the child, the Court need only assign the label “primary caretaker” to one parent and the rest of the decisions follow. Instead of considering the subtypes of domestic violence and the varying impact on parent-child relationships, the court need only determine that violence has occurred and assign blame. Instead of determining when conflict is sufficiently high to make 50-50 custody unworkable, the court need only determine if the “clear and convincing” threshold has been met to provide a different parenting plan. By proposing a formulaic outcome, presumptions also present the short-term promise—although quite possibly, *not* the reality—of cost savings in an over-stressed system.

The illusion of a solution is not an actual solution. While presumptions have continued to multiply, judicial caseloads have not decreased. The available evidence suggests that compliance with court orders is actually *more* likely when a parent has had the chance to present evidence (Schepard, 2004) or perceives the Court process as fair. Moreover, research on the impacts of divorce suggest that children are at risk for any number of psychological difficulties that may affect them, their future family relationships, and their functioning in society (Ackil & Zaragoza, 1995; P. Amato, 2003; P. R. Amato, 1994; E. M. Hetherington & Kelly, 2002; J. B. Kelly, 2000, 2002, 2005). The fact that these longer-term outcomes are more difficult to measure doesn't make their costs to society any less real. In our view, the first step to solving these problems is to recognize the fact that detailed child custody presumptions are unlikely to provide effective solutions.

Let Judges Be Judges

The cornerstone of our family law system is an independent judicial officer providing an individualized consideration of evidence regarding children's best interests. While not every judicial officer is equally qualified or interested in family law, many committed judicial officers have accepted or kept family law assignments out of a genuine desire to make a difference in the lives of children. In some jurisdictions, an increased appreciation of the need for training and the importance of family law cases has led to greater interdisciplinary cooperation and more training resources being provided to the family law judiciary (e.g. California Rules of Court, Rule 5.30).

There is no generalized rule that can substitute for the judicial officer's consideration of individual differences and family circumstances. In the words of Justice White¹⁰,

Procedure by presumption is always cheaper and easier . . . than individualized determination. But when . . . the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.

Presumptions may shift the focus of controversy, but they do not eliminate it. Ultimately, the outcome of many cases will rest in the hands of a judicial officer doing his/her best to apply the law fairly and

make decisions that support children's needs. Our informal experience suggests that many judges took the bench out of a sincere desire to serve the law and make a positive difference in people's lives. As noted above, our view is that the best cure for poor outcomes is to provide judges and families with the tools for effective decision-making. This may include access to mental health expertise, resources for judicial case management and, fundamentally, respect for the vital role these judges play in the lives of the children who come before them. To the degree that we restrict judges' ability to consider evidence and make individual decisions, we risk losing the best judicial officers from this vital area of the law.

Make Children a Priority

It is obvious that many of our suggested solutions would require that more resources be made available to the family courts and related services. Unified family courts, parent education, special master/parent coordination, and mental health treatment require expenditure of resources that are not currently available to most family courts. These services, while costly, are likely to offer substantial savings over the massive costs of prolonged family conflict and allowing children's needs to go unmet.

Our rather idealistic suggestion is that true resolution of these problems will require that funding be reallocated to make children a priority. Decisions regarding children's lives must be given a higher priority than disputes over car accidents, property damage, or most other areas of civil law. Judicial resources should be allocated in support of how high the stakes become every time a child's life is before the Court. There is no substitute for considering children's custody thoroughly and deliberately, and we believe our children deserve nothing less.

Ultimately, our society will need to decide if it values children enough to expend the resources necessary to truly protect them. We do not propose to have the solution to every problem. We believe that the best solutions will likely emerge through continued research and interdisciplinary cooperation, applying the different skills of judges, attorneys and mental health professionals to protecting families and assisting them through the crisis of parental separation. As a first step, we believe it essential to recognize that there are no easy, simple, cheap, or short cut solutions that will truly support children's needs. Most children will continue to be best served by arrangements negotiated between their parents, particularly if sufficient supportive services are

available to promote parental cooperation. Those minority of severely impaired or high conflict families who remain will place the most vulnerable children in the hands of our judicial system. Ultimately, the cost of providing resources for these children is likely to be far less than the long-term implications of failing to do so.

NOTES

1. California *Family Code*, Section 3020.
2. California *Family Code*, Section 7611.
3. California *Family Code*, Section 3111.
4. The California Supreme Court, in the case, *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 51 Cal.Rptr.2d 444, 913 P.2d 473, held that after a parent has obtained a judgment which awards him or her sole legal custody (in fact) that parent has the right to change the residence of the child (per *Family Code*, Sec. 7501). The only limitation on this right is if the move is in bad faith or will cause detriment to the child.
5. In the case, *In re the Marriage of La Musga* (2004) 32 Cal.4th 1072, 12 Cal.Rptr.3d 356, 88 P.3d 81, the California Supreme Court, while affirming the *Burgess* decision, appeared to make it easier to prove detriment to the child by overruling Court of Appeal decisions limiting the factors trial courts could consider as constituting detriment to the child. The general perception is that *La Musga* will make it easier to successfully oppose the relocation with the child.
6. California Assembly Bill 721.
7. See, ABA Child Custody Pro Bono Project, http://www.abanet.org/legal_services/probono/childcustody/domestic_violence_chart1.pdf
8. For example, California *Family Code*, Section 3044 states that “a person has ‘perpetrated domestic violence’ when he or she is found by the court to have intentionally or recklessly caused or attempted to cause bodily injury, or sexual assault, or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in any behavior involving, but not limited to, threatening, striking, harassing, destroying personal property or disturbing the peace of another, for which a court may issue an ex parte order pursuant to Section 6320 to protect the other party seeking custody of the child or to protect the child and the child’s siblings.”
9. See: ABA Pro Bono Child Custody Project, http://www.abanet.org/legal_services/probono/childcustody.htm for a comparison of these provisions among jurisdictions.
10. *Stanley v. Illinois*, 405 U.S. 645 (1972) .

REFERENCES

- Ackil, J. K., & Zaragoza, M. S. (1995). Developmental differences in eyewitness suggestibility and memory for source. *Journal of Experimental Child Psychology*, 60(1), 7-83.
- Amato, P. (2003). Reconciling Divergent Perspectives: Judith Wallerstein, Quantitative Family Research, and Children of Divorce. *Family Relations*, 52, 332-339.

- Amato, P. R. (1994). Life-span adjustment of children to their parents' divorce. *Future of Children, 4*(1), 143-164.
- Amato, P. R., & Gilbreth, J. G. (1999). Nonresident fathers and children's well-being: A meta-analysis. *Journal of Marriage & the Family, 61*(3), 557-573.
- American Psychological Association. (2002). Ethical Principles of Psychologists and Code of Conduct. *American Psychologist, 57*(12), 1060-1073.
- Austin, W. G. (2001). Partner violence and risk assessment in child custody evaluation. *Family Court Review, 39*(4), 483-496.
- Ayoub, C. C., Deutsch, R. M., & Maraganore, A. (1999). Emotional distress in children of high-conflict divorce: The impact of marital conflict and violence. *Family & Conciliation Courts Review, 37*(3), 297-314.
- Bancroft, L., & Silverman, J. G. (2002). *The Batterer as Parent*. Thousand Oaks: Sage Publications.
- Bartlett, K. T. (2002). Preference, Presumption, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project. *Family Law Quarterly, 36*(1), 1-25.
- Bauserman, R. (2002). Child adjustment in joint-custody versus sole-custody arrangements: A meta-analytic review. *Journal of Family Psychology, 16*(1), 91-102.
- Braver, S. L., Ellman, I. M., & Fabricius, W. V. (2003). Relocation of Children after Divorce and Children's Best Interests: New Evidence and Legal Considerations. *Journal of Family Psychology, (in press)*.
- Braver, S. L., & Griffin, W. A. (2000). Engaging fathers in the post-divorce family. *Marriage & Family Review, 29*(4), 247-267.
- Buchanan, C. M., Maccoby, E. E., & Dornbusch, S. M. (1996). Adolescents after divorce. In *Cambridge, MA, US: Harvard University Press (1996) x, 331 pp.*
- Ceci, S. J., & Hembrooke, H. (1998). Expert witnesses in child abuse case: What can and should be said in court. In *Washington, DC, US: American Psychological Association (1998) viii, 299 pp.*
- Chaffin, M., Wherry, J. N., & Dykman, R. (1997). School age children's coping with sexual abuse: Abuse stresses and symptoms associated with four coping strategies. *Child Abuse & Neglect, 21*(2), 227-240.
- Crossman, A., Powell, M. B., Principe, G. F., & Ceci, S. (2002). Child testimony in custody cases: A review. *Journal of Forensic Psychology Practice, 2*, 1-31.
- Dawud-Noursi, S., Lamb, M. E., & Sternberg, K. J. (1998). The relations among domestic violence, peer relationships, and academic performance. In M. Lewis & C. Feiring (Eds.), *Families, risk, and competence* (pp. 207-226). Mahwah, NJ: Lawrence Erlbaum Associates, Inc., Publishers.
- Dunn, J., Davies, L. C., O'Connor, T. G., & Sturgess, W. (2001). Family lives and friendships: The perspectives of children in step-, single-parent, and nonstep families. *Journal of Family Psychology, 15*(2), 272-287.
- Elrod, L. D. (2001). Reforming the System to Protect Children in High Conflict Custody Cases. *2001, 28*(2), 495-551.
- Elrod, L. D. (2002). Protecting Children in High Conflict Custody Cases. In R. Brown & L. Morgan (Eds.), *2002 Family Law Update*. New York: Aspen Law and Business.
- Elrod, L. D. (2005). Personal communication. In P. D. Lyn R. Greenberg (Ed.). Los Angeles, CA.

- Elrod, L. D. (in press). Moving On—Searching for Standards for Relocation Cases. *Journal of Child Custody*, in press.
- Emery, R. E. (1999). Marriage, divorce, and children's adjustment (2nd ed.). In *Thousand Oaks, CA, US: Sage Publications, Inc* (1999) xii, 164 pp.
- Emery, R. E., Laumann-Billings, L., Waldron, M. C., Sbarra, D. A., & Dillon, P. (2001). Child custody mediation and litigation: Custody, contact, and coparenting 12 years after initial dispute resolution. *Journal of Consulting & Clinical Psychology*, 69(2), 323-332.
- Emery, R. E., Otto, R.K., O'Donohue, W.T. (2005) A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System. *Psychological Science in the Public Interest*, 6 (1), 1-29.
- Fabricius, W. V. (2003). Listening to Children of Divorce: New Findings That Diverge From Wallerstein, Lewis, and Blakeslee. *Family Relations: Interdisciplinary Journal of Applied Family Studies*, 52(4), 385-396.
- Fabricius, W. V., & Braver, S. H. (in press). Relocation, Parent Conflict, and Domestic Violence: Independent Risk Factors for Children of Divorce. *Journal of Child Custody*.
- Fields, L., & Prinz, R. J. (1997). Coping and adjustment during childhood and adolescence. *Clinical Psychology Review*, 17(8), 937-976.
- Gelles, R. J., Johnston, J. R., Pruett, K. D., & Kelly, J. B. (2005). *The Politics of Research: The Use, Abuse and Misuse of Social Science Data*. Paper presented at the Association of Family and Conciliation Courts, 42nd Annual Conference, Seattle, Washington.
- Gould, J. W., & Stahl, P. M. (2000). The art and science of child custody evaluations: Integrating clinical and forensic mental health models. *Family & Conciliation Courts Review*, 38(3), 392-414.
- Graham-Bermann, S. A. (1998). The impact of woman abuse on children's social development: Research and theoretical perspectives. In G. W. Holden & R. Geffner (Eds.), *Children exposed to marital violence: Theory, research, and applied issues*. (Pp. 21-54). Washington, DC, US: American Psychological Association.
- Greenberg, L. R., Drozd, L. M., & Gonzalez, D. (2005). *Assessment and Management of Cases Involving Domestic Violence*. Paper presented at the Association of Family and Conciliation Courts, California Chapter Conference, Sonoma, CA.
- Greenberg, L. R., Gould, J. W., Gould-Saltman, D. J., & Stahl, P. (2003). Is the Child's Therapist Part of the Problem? What Judges, Attorneys and Mental Health Professionals Need to Know about Court-Related Treatment for Children. *Family Law Quarterly*, 37(2), 241-271.
- Greenberg, L. R., Gould, J. W., Schnider, R., Gould-Saltman, D. J., & Martindale, D. (2003). Effective intervention with high-conflict families: How judges can promote and recognize competent treatment in family court. *Journal of the Center for Families, Children & the Courts*, 4, 49-66.
- Greenberg, L. R., Gould, Jonathan W., Gould-Saltman, Dianna, & Stahl, Philip M. (2001). Is the child's therapist part of the problem? What attorneys, judges, and mental health professionals need to know about court-related treatment for children. *Association of Family & Conciliation Courts of California Newsletter* (Winter), 6-7, 24-29.

- Greenberg, L. R., Martindale, D., Gould, J. W., & Gould-Saltman, D. J. (2004). Ethical Issues in Child Custody and Dependency Cases: Enduring Principles and Emerging Challenges. *Journal of Child Custody*, 1(1), (in press).
- Hetherington, E. M., & index Subject, i. (1999). Coping with divorce, single parenting, and remarriage: A risk and resiliency perspective. In *Mahwah, NJ, US: Lawrence Erlbaum Associates, Inc., Publishers (1999) x*, 359 pp.
- Hetherington, E. M., & Kelly, J. (2002). *For Better or Worse: Divorce Reconsidered*. New York: W.W. Norton.
- Hetherington, E. M., & Kelly, J. (2003). For better or for worse. Divorce reconsidered. *Journal of Child Psychology & Psychiatry & Allied Disciplines*, 44(3), 470-471.
- Johnson, M. P., & Ferraro, K. J. (2000). Research on Domestic Violence in the 1990s: Making Distinctions. *Journal of Marriage & the Family*, 62, 948-963.
- Johnston, J. R., & Campbell, L. E. (1993). A clinical typology of interparental violence in disputed-custody divorces. *American Journal of Orthopsychiatry*, 63(2), 190-199.
- Johnston, J. R., & Roseby, V. (1997). In the name of the child: A developmental approach to understanding and helping children of conflicted and violent divorce. In *New York, NY, US: The Free Press (1997) xiv*, 337 pp.
- Johnston, J. R., Walters, M. G., & Friedlander, S. (2001). Therapeutic Work with Alienated Children and their Families. *Family Court Review*, 39(3), 316-333.
- Kelly, J. B. (1998). Marital conflict, divorce and children's adjustment. *Child & Adolescent Psychiatric Clinics of North America*, 7(2), 259-271.
- Kelly, J. B. (2000). Children's adjustment in conflicted marriage and divorce: A decade review of research. *Journal of the American Academy of Child & Adolescent Psychiatry*, 39(8), 963-973.
- Kelly, J. B. (2001). Legal and educational interventions for families in residence and contact disputes. *Australian Journal of Family Law*, 15, 92-113.
- Kelly, J. B. (2002). Psychological and legal interventions for parents and children in custody and access disputes: Current research and practice. *Virginia Journal of Social Policy & the Law*, 10(147-164).
- Kelly, J. B. (2005). *Adjustment of Children Following Separation or Divorce: Research Updates and Implications for Practice*. Paper presented at the Association of Family and Conciliation Courts, California Chapter, Sonoma, CA.
- Kelly, J. B., & Lamb, M. E. (2003). Developmental issues in relocation cases involving young children: When, whether, and how? *Journal of Family Psychology* (Vol. 17, pp. 193-205). US: American Psychological Assn, US, <http://www.apa.org>.
- Kelly, J. B. a. E., Robert E. (2003). Children's Adjustment Following Divorce: Risk and Resilience Perspectives. *Family Relations*, 52, 352-362.
- King, V., & Heard, H. E. (1999). Nonresident Father Visitation, Parental Conflict, and Mother's Satisfaction: What's Best for Child Well-Being? *Journal of Marriage & the Family*, 61(May, 1999), 385-396.
- Krauss, D. A., & Sales, B. D. (2000). Legal standards, expertise, and experts in the resolution of contested child custody cases. *Psychology, Public Policy, & Law*, 6(4), 843-879.
- Kuehnle, K., Greenberg, L. R., & Gottlieb, M. C. (2004). Incorporating the Principles of scientifically Based Child Interviews Into Family Law Cases. *Journal of Child Custody*, 1(1), (in press).

- Kwong, M. J., Bartholomew, K., & Dutton, D. G. (1999). Gender differences in patterns of relationship violence in Alberta. *Canadian Journal of Behavioural Science, 31*(3), 150-160.
- Lamb, M. E., Sternberg, K. J., & Esplin, P. W. (2000). Effects of age and delay on the amount of information provided by alleged sex abuse victims in investigative interviews. *Child Development, 71*(6), 1586-1596.
- Lamb, M. E., Sternberg, K. J., Esplin, P. W., Hershkowitz, I., & et al. (1997). Assessing the credibility of children's allegations of sexual abuse: A survey of recent research. *Learning & Individual Differences, 9*(2), 175-194.
- Leichtman, M. D., & Ceci, S. J. (1995). "The effects of stereotypes and suggestions on preschoolers' reports": Correction. *Developmental Psychology, 31*(5), 758.
- Levanas, J. M. (2005). Personal communications. In P. D. Lyn R. Greenberg (Ed.) (email communication). Los Angeles, CA.
- Levanas, J. M., Greenberg, L. R., Drozd, L. M., & Rosen, P. (2004, December, 2004). *When Allegations of Abuse Arise: Special considerations for minor's counsel*. Presentation at the conference on Minor's counsel in family law, Los Angeles, CA.
- Levendosky, A. A., & Graham-Bermann, S. A. (2000). Behavioral observations of parenting in battered women. *Journal of Family Psychology, 14*(1), 80-94.
- Leverette, J., Crowe, T., Wenglesky, R., & Dunbar, J. M. (1997). Judicial Case Management and the Custody and Access Assessment: Melding the Approaches. *Canadian Journal of Psychiatry, 42*, 649-655.
- Lussier, G., Deater-Deckard, K., Dunn, J., & Davies, L. (2002). Support across two generations: Children's closeness to grandparents following parental divorce and remarriage. *Journal of Family Psychology* (Vol. 16, pp. 363-376). US: American Psychological Assn, US, <http://www.apa.org>.
- Pleck, J. H. (1997). Paternal involvement: Levels, sources, and consequences. In M. E. Lamb (Ed.), *The role of the father in child development* (3rd ed.) (Pp. 66-103). New York, NY: John Wiley & Sons, Inc.
- Roseby, V., & Johnston, J. R. (1997). High-conflict, violent, and separating families: A group treatment manual for school-age children. In *New York, NY, US: The Free Press (1997) 121 pp.*
- Roseby, V., & Johnston, J. R. (1998). Children of Armageddon: Common developmental threats in high-conflict divorcing families. *Child & Adolescent Psychiatric Clinics of North America, 7*(2), 295-309.
- Salliday, R. (2004). The State; Last-Minute Legislation Challenged; the governor threatens to veto 'gut and amend' measures. Drastically altering dormant bills is common, but it allows little public scrutiny. *Los Angeles Times*, p. B.6.
- Schepard, A. I. (2004). *Children, Divorce and Custody: Interdisciplinary Models for Divorcing Families*. Cambridge, United Kingdom: Cambridge University Press.
- Schneider, R. A. (2002). Family Law: The Increasing Involvement of the California Legislature. *Los Angeles Lawyer, March 2002*.
- Shuman, D. W. (2002). The Role of Mental Health Experts in Custody Decisions: Science, Psychological Tests, and Clinical Judgment. *Family Law Quarterly, 36*(1), 135-162.
- Shuman, D. W., & Sales, B. D. (1998). The admissibility of expert testimony based upon clinical judgment and scientific research. *Psychology, Public Policy, & Law, 4*(4), 226-1252.

- Shuman, D. W., & Sales, B. D. (1999). The impact of Daubert and its progeny on the admissibility of behavioral and social science evidence. *Psychology, Public Policy, & Law*, 5(1), 3-15.
- Sternberg, K. J., Lamb, M. E., & Dawud-Noursi, S. (1998a). Using multiple informants to understand domestic violence and its effects. In *Holden, George W. (Ed); Geffner, Robert (Ed); et al. Children exposed to marital violence: Theory, research, and applied issues.* (Pp. 121-156). Washington, DC.
- Sternberg, K. J., Lamb, M. E., & Dawud-Noursi, S. (1998b). Using multiple informants to understand domestic violence and its effects. In G. W. Holden & R. Geffner (Eds.), *Children exposed to marital violence: Theory, research, and applied issues.* (Pp. 121-56). Washington, DC, US: American Psychological Association.
- Taylor, C. G., Greenberg, L. R., & Doi Fick, L. (2004, December, 2004). *Treatment and Management in High Conflict Cases.* Paper presented at the Minor's Counsel in Family Law, Los Angeles, CA.
- Walker, L. E. A., Brantley, K. L., & RIGsbee, J. A. (2004). A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court. *Journal of Child Custody*, 1(2), 47-74.

SUBMITTED: June 20, 2005

REVISED: January 18, 2006

ACCEPTED: June 3, 2006