RELOCATION AND CUSTODY

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RELOCATION AND CUSTODY

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Child Relocation: Case Law, Social Science, and Practice Implications

By
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I. Introduction

For more than three decades, both the domestic and international family law systems have wrestled with a recurring custody issue: *relocation of children following parental separation or divorce*. During that period, court decisions on relocation shifted—and, in fact, continue to change—due to an evolving knowledge and understanding of children's needs and adjustment when their parents live apart from each other. The current, generally accepted view of social scientists—as evidenced by a broad consensus of highly accomplished researchers and practitioners—is that children benefit from joint/shared physical custody arrangements (at least 35% of a child's time with each parent) except for situations in which a parent is a credible risk to abuse, neglect, or abduct the child; where a parent suffers from substance abuse issues or has committed domestic violence; and/or where one parent actively undermines the child's relationship with the other parent or interferes with contact through unreasonable and excessively restrictive parental gatekeeping. For this reason, we argue that although relocation disputes should be decided without presumptions for or against relocation, decision-makers should exercise caution about depriving children of the well-accepted benefits of shared physical custody. This article discusses the changing domestic case law in child relocation matters, summarizes the social science in this sphere, and provides guidance for judges, attorneys, psychologists, and litigants involved in relocation disputes.

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II. Relocation in the Courts: A Brief Historical Context

From the 1980s to the early part of the 2000s, relocation litigation resulted in several precedent-setting decisions throughout the United States. On one side of the country, the California Supreme Court decided two important relocation cases—*In re Marriage of Burgess*[1] in 1996 and *In re Marriage of LaMusga*[2] in 2004—that sparked conflict within the social science community. In *Burgess*, the California Supreme Court—citing to an "increasingly mobile society"[3] and the importance of continuing the bond with the primary custodial parent[4]—held that custodial parents who seek to relocate did *not* have to prove that the move was necessary. Instead, the *Burgess* court required the non-moving parent to show that the move would cause harm to the child.[5] Eight years later, in *LaMusga,* the California Supreme Court clarified that a non-moving parent did not have the burden to prove harm and held that courts must consider "the likely impact of the proposed move on the noncustodial parent's relationship with the children."[6] However, the *LaMusga* court "reaffirmed" the following passage from *Burgess*: "the paramount need for continuity and stability in custody arrangements—and the *harm* that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—*weigh heavily* in favor of maintaining ongoing custody arrangements."[7]

On the other side of the country, in 1996, New York's highest state court decided *Tropea v. Tropea*,[8] which replaced a test requiring the relocating parent to prove "exceptional circumstances" to justify the move—an onerous burden on the relocating parent—with one that gives "due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child. The impact of the move on the relationship

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1 913 P.2d 473 (Cal. 1996).
2 88 P.3d 81 (Cal. 2004).
3 913 P.2d at 480.
4 *Id.* at 478-79.
5 *Id.* at 482-84.
6 88 P.3d at 94.
7 *Id.* at 93 (emphasis added).
8 665 N.E.2d 145 (N.Y. 1996).

between the child and the noncustodial parent will remain a central concern."[9]

In New Jersey, the Supreme Court's relocation jurisprudence began with its 1984 decision in *Cooper v. Cooper*,[10] which required the moving parent to demonstrate a "real advantage" to the move.[11] This was followed by its 1988 decision in *Holder v. Polanksi*,[12] which abandoned *Cooper*'s "real advantage" requirement and replaced it with a requirement that the moving parent demonstrate a "sincere, good-faith reason" for the move.[13] Then in 2001, the New Jersey Supreme Court decided *Baures v. Lewis,*[14] which required a custodial parent to demonstrate that the proposed move was made in "good faith" and would not cause "harm" to the child.[15] Ultimately, in 2017, the court decided *Bisbing v. Bisbing*,[16] which adopted a child-centered "best interests" standard without presumptions, a need to show harm, or a shifting burden of proof.[17] New Jersey has not been alone in its fluid approach to relocation cases.

Between 2003 and 2017, the Supreme Court of Arkansas charted a similar course to New Jersey. Its jurisprudence moved from the 2003 decision in *Hollandsworth v. Knyzewski*,[18] which created a presumption in favor of relocation for custodial parents with sole or primary custody; to *Singletary v. Singletary*, which held that the *Hollandsworth* presumption did not apply where parents shared joint custody of a child.[19] Finally, in 2017, the Arkansas Supreme Court decided *Cooper v. Kalkwarf*, which held that the *Hollandsworth* "presumption should be applied only when the parent seeking to relocate is not just labeled the 'pri-

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9 *Id.* at 149–50 (replacing the "exceptional circumstance" requirement set forth in Weiss v. Weiss, 418 N.E.2d 377 (N.Y. 1981)).

10 491 A.2d 606 (N.J. 1984).

11 *Id.* at 613.

12 544 A.2d 852 (1988).

13 *Id.* at 856.

14 770 A.2d 214 (N.J. 2001).

15 *Id.* at 230-32. If the custodial parent made this showing—as was often the case—the burden shifted to the non-custodial parent to demonstrate that harm would result from the move.

16 166 A.3d 1155 (N.J. 2017).

17 *Id.* at 1169-70.

18 109 S.W.3d 653 (Ark. 2003).

19 431 S.W.3d 234, 239-40 (Ark. 2013).

mary' custodian in the divorce decree *but also spends significantly more time with the child* than the non-custodial parent."[20] Similarly, from 1996 to 2005, the Supreme Court of Colorado moved from the presumption-based standard that favored the "primary" (or relocating) parent as set forth in *In re Marriage of Francis,*[21] to a statutory based standard devoid of presumptions as set forth in *In re Marriage of Ciesluk*.[22]

Fortunately, most states now use an approach to relocation focused only on a child's best interests[23]—not one that is grounded in the notion that what is "good" for the "primary" parent is good for the child or a standard that pivots on whether the proposed move will cause harm to a child. Notwithstanding most states' use of varying "best interests" or relocation factors, family court judges, psychologists, attorneys, and litigants still struggle with relocation cases. This begs the question: *what is be-*

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20 532 S.W.3d 58, 67 (Ark. 2017) (emphasis added).

21 919 P.2d 776, 784-85 (Colo. 1996).

22 113 P.3d 135, 137 (Colo. 2005) (en banc).

23 Alaska: Chesser–Witmer v. Chesser, 117 P.3d 711, 717 (Alaska 2005); Arizona: ARIZ. REV. STAT. ANN. § 25–408(A), (G); Colorado: *Ciesluk*, 113 P.3d at 137; Connecticut: CONN. GEN. STAT. § 46b–56d(a); Florida: Fredman v. Fredman, 960 So.2d 52, 55–56 (Fla. Dist. Ct. App.), *review denied*, 968 So.2d 556 (Fla. 2007), *cert. denied*, 552 U.S. 1243 (2008); Georgia: Bodne v. Bodne, 588 S.E.2d 728, 729 (Ga. 2003); Hawaii: Fisher v. Fisher, 137 P.3d 355, 365 (Haw. 2006); Idaho: Bartosz v. Jones, 197 P.3d 310, 315 (Idaho 2008); Illinois: 750 ILL. COMP. STAT. 5/609.2(b), (g); Kansas: *In re* Marriage of Whipp, 962 P.2d 1058, 1059 (Kan. 1998); Louisiana: Gray v. Gray, 65 So.3d 1247, 1255 (La. 2011); Maine: Brasier v. Preble, 82 A.3d 841, 844–45 (Me. 2013); Maryland: Braun v. Headley, 750 A.2d 624, 636 (Md. Ct. Spec. App.), *cert. denied*, 755 A.2d 1139 (Md. 2000), *cert. denied*, 531 U.S. 1191 (2001); Minnesota: MINN. STAT. § 518.175; Missouri: Pasternak v. Pasternak, 467 S.W.3d 264, 269 (Mo. 2015) (en banc); Montana: *In re* Marriage of Robison, 53 P.3d 1279, 1283 (Mon. 2002); Nebraska: Schrag v. Spear, 858 N.W.2d 865, 874 (Neb. 2015); New Mexico: Jaramillo v. Jaramillo, 823 P.2d 299, 307–09 (N.M. 1991); New York: Tropea v. Tropea, 665 N.E.2d 145, 149–51 (N.Y. 1996); Ohio: OHIO REV. CODE ANN. § 3109.051(G)(1); Oregon: *In re* Marriage of Colson, 51 P.3d 607 (Or. 2002); Pennsylvania: 23 PA. CONS. STAT. § 5337(h); Rhode Island: Valkoun v. Frizzle, 973 A.2d 566, 577 (R.I. 2009); South Carolina: Latimer v. Farmer, 602 S.E.2d 32 (S.C. 2004); South Dakota: Fortin v. Fortin, 500 N.W.2d 229, 233 (S.D. 1993); Utah: UTAH CODE ANN. § 30–3–37(4); Vermont: Falanga v. Boylan, 123 A.3d 811, 814 (Vt. 2015); Virginia: Wheeler v. Wheeler, 591 S.E.2d 698 (Va. 2004); Wyoming: Arnott v. Arnott, 293 P.3d 440, 457–58 (Wyo. 2012).

hind continued changes to state relocation laws? The answer rests, in part, with the California Supreme Court's *Burgess* decision.

Following *Burgess*, several state courts relied on that decision to form their respective relocation jurisprudence.[24] But, the impact of *In re Marriage of Burgess* on other state courts was not necessarily born out of a particular "test" or "standard" set forth by the California Supreme Court. Rather, its impact stemmed from research submitted to the California Supreme Court by *amicus curiae* Dr. Judith S. Wallerstein,[25] which Wallerstein adapted into a 1996 article.[26] Indeed, several states' highest courts cited Wallerstein's work.[27]

III. The Social Science: From Wallerstein to the Present

Wallerstein's brief in *Burgess* concluded that the custodial parent was the central influence on children's adjustment and that "frequent and continuing contact" between a father and a child is not a significant factor in the child's psychological development.[28] Although not fully presented to the *Burgess* court at the time, Wallerstein's work was not widely accepted in the social science community.[29]

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24 *See, e.g.*, Vachon v. Pugliese, 931 P.2d 371, 380 (Alaska 1996); *Hollandsworth*, 109 S.W.3d at 659; *In re Marriage of Francis*, 919 P.2d at 784 n.6; McGuinness v. McGuinness, 970 P.2d 1074, 1079 (Nev. 1998); *Baures*, 770 A.2d at 214; Stout v. Stout, 560 N.W.2d 903, 910 (N.D. 1997); Kaiser v. Kaiser, 23 P.3d 278, 283 (Okla. 2001); *In re* Marriage of Pape, 989 P.2d 1120, 1130 (Wash. 1999), *as corrected* (Feb. 15, 2000); Resor v. Resor, 987 P.2d 146, 152 (Wyo. 1999); Watt v. Watt, 971 P.2d 608, 616 (Wyo. 1999).

25 *Burgess*, 913 P.2d at 483 n.11.

26 Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 311–12 (1996).

27 *See, e.g., Hollandsworth*, 109 S.W.3d at 659; *Baures*, 770 A.2d at 214; *Kaiser*, 23 P.3d at 284 n.2; *Pape*, 989 P.2d at 1127; *In re Marriage of Littlefield*, 940 P.2d 1362, 1366 (Wash. 1997); *see also* Dupre v. Dupre, 857 A.2d 242, 256 (R.I. 2004) (citing Wallerstein's work and *In re Marriage of Burgess*, 913 P.2d 473, but requiring relocation to be guided by best interests).

28 Wallerstein, *supra* note 26, at 311-12.

29 See Richard A. Warshak, *Social Science and Children's Best Interest in Relocation Cases: Burgess Revisited*, 34 FAM. L.Q. 83 (2000) (hereinafter "*Social Science*"); *see also* William V. Fabricius, *Listening to Children of Divorce:*

Eight years after *Burgess*, Wallerstein reprised her "primary caretaker" theory in *LaMusga*.[30] Therein, Wallerstein reaffirmed her position that a child's development and adjustment did *not* relate to frequent and continuing contact between a child and the non-custodial father.[31] However, unlike Wallerstein's position in *Burgess*, her argument met significant resistance from the social science community, including Dr. Richard A. Warshak and twenty-seven social science researchers and practitioners, who, collectively, participated as *amici curiae*.[32] The Warshak *Amici* critiqued Wallerstein's work in the following areas: (i) the limited scope of research cited by Wallerstein; (ii) inconsistencies between Wallerstein's interpretation of social science and the generally accepted consensus of her colleagues; and (iii) contradictions between Wallerstein's summary of the data from her own research and her past accounts of the same data.[33] The Warshak *Amici,* who relied on seventy-five studies, were united in their opinion that Wallerstein offered "a skewed and misleading account of social science evidence."[34] Contrary to Wallerstein's assertion, the Warshak *Amici* argued that a move that is "good" for the primary custodial parent cannot be presumed to be "good" for the child.[35]

Although many in the social science community rejected Wallerstein's "primary caretaker theory," that community did not have access to empirical studies that focused specifically on the impact of relocation on children following their parents' divorce or separation. Indeed, during the period of time from the California Supreme Court's *Burgess* decision in 1996, through and including the New Jersey Supreme Court's *Bisbing* decision in 2017, only one such empirical study, *Relocation of Children After Divorce and Children's Best Interests: New Evidence and*

New Findings that Diverge from Wallerstein, Lewis and Balkeslee, 52 FAM. REL. 385 (2003).

30 *LaMusga*, 88 P.3d at 83.

31 *See* Brief of Richard A. Warshak et al. as *Amici Curiae* on behalf of LaMusga Children at 4-5, *In re* Marriage of LaMusga, No. SI07355 (Cal. 2003) (hereinafter "*Warshak Brief*"), https://www.warshak.com/pdf/publications/LaMusga.pdf.

32 *See generally id.*

33 *Id.* at 2-6.

34 *Id.* at 2.

35 *See generally id.*

Legal Considerations,[36] was cited by a state's highest court.[37] Therein, Dr. Sanford L. Braver and his colleagues reported a study of 602 college students whose parents were divorced.[38] The study found that students who relocated with their mother more than an hour's drive away from the father had more negative outcomes than those whose parents remained in the same geographic vicinity.[39] The negative outcomes included more hostility, inner turmoil, divorce-related distress, and poorer self-rated physical health—all of which predict higher risk of premature mortality; it also included worse relationships with their fathers and less financial support from parents.[40] The study found no benefits associated with relocation, thus failing to support Wallerstein's hypothesis that relocation brings benefits to the mother that flow to her children.

Follow-up analyses by Braver and his colleagues of the same data set did not support a countervailing hypothesis that negative long-term outcomes resulted because parents who moved had higher levels of inter-parental conflict.[41] While Braver and his co-authors acknowledged that the data could not establish with certainty that relocation would cause children harm, they concluded that relocation of either parent that resulted in the separation of child and father by more than an hour's drive appeared to pose a long-term risk to children's relationships with their parents as well as to their mental and behavioral adjustment.[42] On a similar score, in a longitudinal study recognized by some as a "gold standard" in divorce research, E. Mavis Hetherington found that chil-

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36 Sanford L. Braver et al., *Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations*, 17 J. FAM. PSYCHOL. 206 (2003).

37 See *Ciesluk*, 113 P.3d at 145 n.18; *Bisbing*, 166 A.3d at 1166; Jackson v. Jackson, 96 P.3d 21, 25 n.2 (Wyo. 2004).

38 Braver et al., *supra* note 36, at 210.

39 *Id.*

40 *Id.* at 216.

41 William V. Fabricius & Sanford L. Braver, *Relocation, Parent Conflict, and Domestic Violence: Independent Risk Factors for Children of Divorce*, 3 J. CHILD CUSTODY 7 (2006).

42 Braver et al., *supra* note 36, at 214.

dren and fathers who lived more than seventy-five miles away from each other were more likely to lose regular contact.[43]

Two subsequent articles, published in 2015[44] and 2017[45] by Patrick Parkinson and Judith Cashmore, presented findings of five-year prospective longitudinal studies of relocation disputes in Australia. The study collected data from forty mothers and forty fathers, who had a combined 132 children; thirty-nine mothers wanted to relocate with the children; and one non-resident mother opposed the father's relocation.[46] Although only sixteen of the children participated in at least two interviews over the course of the study, the study revealed that children who moved away generally handled the transitions well.[47] However, the study also revealed that the children regretted moving away from friends and expressed difficulties with long car journeys (as opposed to air travel) and rigid schedules.[48] Unsurprisingly, children who had close relationships with their non-moving fathers prior to the move "experienced a considerable sense of loss."[49]

Parkinson and Cashmore—who recommend against using a relocation-specific checklist—found that children of divorce who relocated generally displayed a healthy adjustment to the relocation, if, among other factors, the custodial (relocating) parent had an effective parenting style that did not marginalize the non-moving parent.[50] However, children who had close relationships with their father prior to the move found it difficult to live so far away from him; in certain cases, the child's distress led the

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43 E. Mavis Hetherington & John Kelly, For Better or Worse: Divorce Reconsidered 134 (2002).

44 Patrick Parkinson & Judith Cashmore, *Reforming Relocation Law: An Evidence Based Approach*, 53 Fam. Ct. Rev. 23 (2015).

45 Patrick Parkinson & Judith Cashmore, *Relocation and the Indissolubility of Parenthood*, 15 J. Child Custody 76 (2018).

46 *Id.* at 79-80.

47 *Id.* at 86.

48 *Id.*

49 Parkinson & Cashmore, *supra* note 44, at 32.

50 *Id.* at 28; *see also* Patrick Parkinson et al., *The Need for Reality Testing in Relocation Cases*, 44 Fam. L.Q. 1, 13 (2010); *cf.* William G. Austin, *Comment on Parkinson and Cashmore's (2015) Research and Proposal for Reforming Child Custody Relocation Law: Child Custody Evaluator and Psychological Perspective*, 54 Fam. Ct. Rev. 620 (2016); Philip M. Stahl, *Critical Issues in Relocation Cases: A Custody Evaluator's Response to Parkinson and Cashmore (2015) and Thompson (2015)*, 54 Fam. Ct. Rev. 632 (2016).

mother to return to the original location.[51] Parkinson and Cashmore recommended that, in contrast to presumptions or bright lines, relocation decisions should be made after consideration of three issues: (i) the closeness and developmental importance of the child's relationship with the non-moving parent; (ii) the viability of proposals for contact between the child and non-moving parent in the event that the relocation is permitted; and (iii) if the child's relationship with the non-moving parent is developmentally important and will be diminished if the move is permitted, whether viable alternatives exist to the parents living a long distance away from each other and whether the child's move away from a parent is the least detrimental alternative.[52]

In May 2018, the American Psychological Association's *Psychology, Public Policy, and Law* published an important ten-year longitudinal study supported by a National Institute of Health grant to Braver and a National Institute of Child Health and Human Development grant to William V. Fabricius.[53] Along with Matthew Stevenson and Jeffrey Cookston, the researchers studied twelve year-old children who lived primarily with their mothers, under circumstances in which the mothers had been living with a stepfather figure for at least the previous year. Approximately half of the children were separated from their biological fathers by more than an hour's drive.[54] Over the course of the study, the researchers collected data from the children (and mothers) at five points in time (child ages 12.5, 14, 15.5, 19.5, and 22) using standardized measures with adequate reliability and validity.[55]

In general, the study found that relocation is associated with: (i) heightened risks to adolescents and young adults of being involved with delinquent peers and the juvenile justice system; (ii) illicit drug use; (iii) symptoms of aggression, depression, and anxiety; and (iv) disturbed relationships with mothers, fathers, and

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51 Parkinson & Cashmore, *supra* note 44, at 25.

52 *Id.* at 34.

53 Matthew M. Stevenson, William V. Fabricius, Sanford L. Braver & Jeffrey T. Cookston, *Associations Between Parental Relocation Following Separation in Childhood and Maladjustment in Adolescence and Young Adulthood*, 24 PSYCHOL., PUB. POL'Y. & L. 365 (2018).

54 *Id.* at 368.

55 *Id.* at 365.

stepfathers.[56] Like the 2003 Braver study, the 2018 study found that relocation of either parent that resulted in the separation of child and father by more than an hour's drive appeared to pose long-term risks to the children's mental and behavioral adjustment.[57] Other notable findings were that from ages 12.5 to 15.5, children "were significantly more likely to harbor doubts about how much they mattered to their nonresident biological fathers."[58] In addition, from "ages 15.5 to 19.5 they were significantly more likely to engage in high-risk behaviors with potentially serious consequences, including involvement with the juvenile justice system, association with delinquent peers, and drug use."[59]

The study also found that

> in families that relocated, adolescents perceived, rather surprisingly, that they mattered less to their *residential* mothers and stepfathers as well. Previous studies on parental relocation have not considered that there may be an additional negative impact of relocation on the child's relationship with the residential mothers and stepfathers with whom the child continued to live.[60]

The authors concluded,

> [t]he absence of empirical findings of benefits to the child's mental and behavioral health and relationships with parents associated with relocation reveals that the factors that have traditionally been considered in relocation cases, such as continuity of the primary caregiver, improvement to the parent's life, and enhancement of the child's opportunities, have not compensated for the risk of harm associated with relocation.[61]

Stated more simply, the study did not offer any support for a presumption that relocation with a "primary parent" actually *benefits* children.

Despite the scarcity of empirical studies that focused on samples of children who relocated with one parent after divorce, several papers in peer-reviewed journals offered valuable data on child relocation issues. Therein, prominent social scientists offered observations and practice recommendations that they ex-

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56 *Id.* at 368.
57 *Id.*
58 *Id.* at 373.
59 *Id.*
60 *Id.* at 375 (emphasis in original).
61 *Id.* at 376.

trapolated from their decades-long professional experience working with contested relocation cases and a robust body of settled knowledge on factors that favor optimal child development within intact and divorced families. For example, Dr. Joan B. Kelly and Dr. Michael E. Lamb argued that relocation may produce long-term adverse consequences as a result of the attenuation, deterioration, and termination of parent–child relationships. Accordingly, they recommended that moves with very young children should be discouraged or delayed and that steps be taken to ensure that children continue to have regular and meaningful interaction with their non-moving parents.[62]

Two years after Kelly and Lamb's work, Dr. Kenneth Waldron concluded: "A parent wishing to relocate introduces risks to the child's adjustment. . . . The weight of social science research falls on the side of not allowing such moves, but there are circumstances in which relocation might provide more benefit to the child than harm done."[63] Waldron noted, "relocation is, in a probabilistic sense, more harmful to children than good for them."[64]

Dr. William G. Austin, a frequent contributor in the field, drew upon research about the impact of children's residential mobility to demonstrate that relocation *adds* to the general risks associated with children of divorce.[65] Specifically, he concluded that "[r]esearch shows that relocation, especially multiple moves

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62 Joan B. Kelly & Michael E. Lamb, *Developmental Issues in Relocation Cases Involving Young Children: When, Whether, and How?*, 17 J. Fam. Psychol. 193 (2003).

63 Kenneth Waldron, *A Review of Social Science Research on Post Divorce Relocation*, 19 J. Am. Acad. Matrim. Law. 337, 371 (2005).

64 *Id*. at 372.

65 William G. Austin & Sol Rappaport, *Parental Gatekeeping Forensic Model and Child Custody Evaluation: Social Capital and Application to Relocation Disputes*, 15 J. Child Custody 55, 56 (2018) (hereinafter "*Relocation Disputes*") (citing William G. Austin, *Relocation, Research, and Forensic Evaluation: Part II: Research Support for the Relocation Risk Assessment Model*, 46 Fam. Ct. Rev. 347 (2008) (hereinafter "*Part II*")); *see also* William G. Austin et al., *Relocation Issues in Child Custody Evaluations: A Survey of Professionals*, 54 Fam. Ct. Rev. 477, 479 (2016) (hereinafter "*Survey*"). *Cf.* Matthew M. Stevenson et al., *Marital Problems, Maternal Gatekeeping Attitudes, and Father-Child Relationships in Adolescence*, 50 Developmental Psychol. 1208 (2014) (analyzing gatekeeping by mothers and the resulting impact on father-child relationships).

or a high degree of residential mobility, is a general risk factor for children of divorce, just as divorce itself is."[66] In an effort to safeguard against the risks of relocation, Austin proposed that evaluators and courts consider whether the relocating parent engages in "restrictive gatekeeping"[67] behaviors.

Austin's "restrictive gatekeeping" behaviors include an analysis of, among other considerations, whether the moving parent: (i) limits or makes telephone contact difficult between the child and non-moving parent; (ii) makes derogatory remarks about the non-moving parent in front of the child; (iii) is inflexible with respect to the parenting time schedule; (iv) withholds information related to the child's school and/or extracurricular activities; and (v) interferes with the non-moving parent's relationship with the child by scheduling the child's activities during the non-moving parent's time.[68] Austin has also advocated for use of a relocation risk assessment model to address the probability of harm associated with relocation.[69]

Dr. Philip M. Stahl, another notable contributor in the field, concurs with the social science community that "children are at risk when relocation occurs," but advises that "courts and custody evaluators need to be open to the particular facts within each family that will help determine the risk and protective factors that exist, rather than look to bright-line rules in solving these cases."[70] Stahl also cited to research in connection with international relocation, which found that "most children found

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66 Austin & Rappaport, *Relocation Disputes*, *supra* note 65, at 56.

67 According to Austin, "restrictive gatekeeping" behaviors are "actions by a parent that are intended [or expected] to interfere with the other parent's involvement with the child and would predictably negatively affect the quality of their relationship." *Id.* at 58; *see also* William G. Austin et al., *Bench Book for Assessing Gatekeeping in Parenting Disputes: Understanding the Dynamics of Gate-closing and Opening for the Best Interests of Children*, 10 J. CHILD CUSTODY 1 (2013).

68 See Austin, *Part II*, *supra* note 65, at 357; *see also* William G. Austin, *Child Custody Evaluation and Relocation, Part I of III: Forensic Guideposts for the Evaluator and Court*, 29 AM. J. FAM. L. 156 (2015) (hereinafter "*Part I*"); William G. Austin et al., *Parental Gatekeeping and Child Custody/Child Access Evaluation: Part I: Conceptual Framework, Research, and Application*, 51 FAM. CT. REV. 485, 489 (2013).

69 *See generally* Austin, *Part II*, *supra* note 65.

70 Philip M. Stahl, *Emerging Issues in Relocation Cases*, 25 J. AM. ACAD. MATRIM. LAW. 425, 441 (2013).

electronic access, via Skype, email, phone, etc., to be less than satisfactory."[71] Stahl, like Austin, believes courts should consider "gatekeeping behaviors" as part of the decision-making process, but cautions against bias in the process (for example, a gender bias that presupposes that mothers are generally the "psychological parent").[72]

In addition to the relocation-specific studies and articles, social science regarding custody arrangements (in general) lends credence to the widely held belief that relocation of children adds to the risks facing children following their parents' divorce or separation. In 2014, Dr. Richard A. Warshak, with the endorsement of an international group of 110 prominent researchers and practitioners, authored *Social Science and Parenting Plans for Young Children: A Consensus Report*,[73] which the American Psychological Association published in *Psychology, Public Policy, and Law*, as edited by Cambridge University Professor Michael Lamb.[74] The consensus concluded: "shared parenting should be the norm for parenting plans for children of all ages, including very young children."[75] The stature and accomplishments of the endorsers of the Warshak consensus report warrant this document's consideration as a learned treatise. Indeed, as Professor Linda Nielsen noted[76]:

> This group consisted of 111 international experts [the author plus 110 endorsers] all of whom were social scientists or mental health practitioners. None were lawyers, judges, or law school professors. Most members of this group had held prestigious academic positions, had edited journals and had long histories of publishing books and peer

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71 *Id.* at 440.

72 *Id.* at 448-49; *see also* Philip M. Stahl, *Avoiding Bias in Relocation Cases*, 3 J. CHILD CUSTODY 111, 114-115 (2006). Stahl also cautions against: "Cultural Bias," "Primacy or Recency Bias," "Confirmatory Bias," "Psychological Testing Bias," "Truth Lies in Somewhere in the Middle" Bias, "Atilla the Hun doesn't marry Mother Theresa" Bias, and "For the Move" or "Against the Move" Bias; *Id.* at 115-19.

73 Richard A. Warshak, endorsed by researchers and practitioners listed in the Appendix, *Social Science and Parenting Plans for Young Children: A Consensus Report*, 20 PSYCHOL., PUB. POL'Y. & L. 46 (2014).

74 *Id.*

75 *Id.* at 59.

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

> reviewed articles on issues germane to child custody. Among this preeminent group of scholars and researchers were 11 people who had held major office in professional associations, 2 former Presidents of the American Psychological Association (APA), 5 university Vice Presidents, Provosts, or Deans, 17 department chairs, 61 full professors, 8 endowed chairs, 2 former presidents of the American Association of Family Therapy, a former president of the American Counseling Association, and a former president of APA's Division for Family Psychology.

In 2017, a group of twelve speakers at the International Conference on Shared Parenting agreed with the conclusion from the 2014 Warshak consensus report that shared physical custody is generally in children's best interest, except for situations such as those that pose a credible risk to the child of abuse, neglect, or abduction; where substance abuse or violence exists; and where one parent actively undermines the child's relationship with the other parent or interferes with contact through unreasonable and excessively restrictive parental gatekeeping.[77]

Warshak's 2014 consensus report is also supported by Dr. Nielsen's 2018 review[78] of the sixty known studies that compared shared physical custody (at least 35% time with each parent) with sole physical custody. The studies that Nielsen reviewed included approximately 70,000 children living in shared physical custody arrangements. The review found consistent benefits associated with parenting plans that divide the children's time more evenly between homes, custody arrangements that are for the most part feasible only for children living in close geographic proximity to both parents.[79] Children in these arrangements had better outcomes on measures of behavioral, emotional, physical, and academic well-being and relationships with parents and grandparents.

Against that backdrop, this article posits that the social science literature detailing the benefits of joint physical custody

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77 Sanford L. Braver & Michael E. Lamb, *Shared Parenting After Parental Separation: The Views of 12 Experts*, 59 J. DIVORCE & REMARRIAGE 372 (2018). The speakers included, among others, Austin, Braver, Lamb, Parkinson, and Warshak.

78 Linda Nielsen, *Joint Versus Sole Physical Custody: Children's Outcomes Independent of Parent–Child Relationships, Income, and Conflict in 60 Studies*, 59 J. DIVORCE & REMARRIAGE 247 (2018).

79 *Id.* at 260, 276.

should be considered in relocation cases. Although an initial custody determination may not implicate relocation-specific issues, the geographic distance created by relocation often precludes shared physical custody parenting plans, which in turn renders many relocations against the weight of social science that looks favorably on joint physical custody arrangements.[80]

IV. Specific Considerations in Relocation Cases

Most states have legislatively prescribed standards or factors that must be considered by a court that presides over a relocation case.[81] Certainly, if a state legislature has created a framework by which a court "shall" decide a relocation case, those factors must be assessed and analyzed by the participants in that case. While some of the considerations set forth below may overlap with state-specific relocation factors, this section is not designed to assess any state-specific relocation statutes or case law. Instead, this section sets forth several important areas of inquiry into child relocation that may further inform the judge tasked with deciding whether to allow relocation.

A. *Parent-Child Involvement Prior to a Move Affects the Potential Impact of the Move*

In some situations, relocation will have a minimal impact on the amount and structure of the child's contact with the non-moving parent. For example: when a father[82] has little involvement with his child; when a father is typically away from home for several weeks at a time except during holidays; when a father

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[80] To be sure, some legal scholars, for example Carol S. Bruch, continued to rely on Wallerstein's theories even after the submission by the Warshak *Amici* in *In re* Marriage of LaMusga, *see, e.g.*, Carol S. Bruch, *Sound Research or Wishful Thinking in Child Custody Cases? Lessons from Relocation Law*, 40 FAM. L.Q. 281 (2006). However, social science regarding custody arrangements and relocation does not support their conclusions.

[81] For example, in Pennsylvania, relocation cases are guided by ten relocation-specific factors. *See* 23 PA. CONS. STAT. § 5337(h). In New Jersey, relocation cases following *Bisbing*, 166 A.3d at 1155, are guided by the best interest factors that must be considered when courts make initial custody determinations. *See* N.J. STAT. ANN. § 9:2-4. For a broader list of statutes and cases, see *supra* note 23.

[82] For purposes of uniformity and clarity, the father is the non-relocating parent in these examples.

forgoes most opportunities to spend time with his child; when a father frequently chooses not to exercise the periods of possession granted by the court; and/or when a father otherwise shows minimal interest, inclination, or availability to be a hands-on, "full-service" parent, the proposed move may not result in a substantial change in contact with the non-moving parent. If so, the disruptions that the move creates in other facets of the child's life, while considerable, may not outweigh the benefits of relocation.

On the other hand, when a non-custodial parent has regularly followed a parenting time schedule that would not be feasible to continue after the relocation, the level and structure of that parent's current involvement means that the child will suffer a substantial decline in contact with that parent. Because the primary risk to a child's best interests in a relocation case is the harm to the child's relationship with the non-moving parent and the losses associated with a diminished relationship, it is essential, particularly where the non-moving parent has had substantial, consistent parenting time with the child, to evaluate what might be *gained* by the move that might offset or compensate for the losses.[83] With that said, although residential mobility is a general risk factor, this factor by itself does not justify a presumption *against* a child's relocation. Rather, it signals the importance of investigating family circumstances that bear on the potential benefits versus potential costs of moving the child a substantial distance from the home community. If the data available to the court demonstrate that the non-moving parent is a "full-service" parent, the potentially harmful impact of a move may be reduced if the move is to a location in sufficient proximity to the non-moving parent's home so that the child can regularly spend school nights with each parent, while remaining in reasonable proximity to the child's school.

B. *Co-Parenting Relationships and Relocation*

Parents who regularly communicate with and cooperatively involve the other parent in raising the child—and who *genuinely* support the child's positive relationship with the other parent—

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[83] *See* Richard A. Warshak & Matheu D. Nunn, 'Bisbing' *Evens the Playing Field in Child Relocation Cases*, 223 N.J.L.J. 2914 (Sept. 25, 2017).

help ameliorate the risks to their child's development that stem from divorce. The extent to which a parent is able and willing to foster the child's relationship with the other parent takes on special significance, and is a more salient factor, in a relocation case.[84]

Relocation creates the opportunity to concentrate more power in the hands and judgment of the relocating parent. Therefore, relocation reduces the "checks-and-balances" provided by the non-moving parent. If the relocating parent devalues the non-moving parent's role in the child's life—even in a passive or tacit manner—or seeks to marginalize the other parent's contributions to the child, the ability to do so is amplified if the child lives a long distance from the non-relocating parent and sees him only once or twice per month. Common sense and experience dictate that the child is more dependent on the residential parent; the result thus may be that the child views the non-relocating parent through the prism of the "primary" parent.

Courts and custody evaluators should not underestimate the risk to the child of relocating with a parent who does not adequately appreciate the importance of the non-moving parent's regular involvement in the child's life and who does not prioritize helping the child maintain a positive relationship with the non-moving parent. Also, it is important not to overvalue the apparently harmonious relationship that the child has with the moving parent. A close parent-child relationship can benefit children, but it can also harm them.[85] Children face increased risk of harm if they are exposed to a parent's anger toward the other parent, are used as pawns to express negative attitudes toward the other parent, and believe that they can gratify a parent by sharing the parent's anger. In such circumstances, children learn to tell the parent what they think he or she wants to hear. When a child joins with a parent in devaluing the absent parent, this can impair the child's relationship with the absent parent and compromise the child's current and future development.[86]

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84 See Austin & Rappaport, *Relocation Disputes*, *supra* note 65, at 67.

85 Richard A. Warshak, *Ten Parental Alienation Fallacies that Compromise Decisions in Court and in Therapy*, 46 PROF. PSYCHOL.: RES. & PRAC. 235, 242 (2015).

86 Richard A. Warshak, *Parental Alienation: Overview, Management, Intervention, and Practice Tips*, 28 J. AM. ACAD. MATRIM. LAW. 181 (2015).

C. *Reasons for the Proposed Move*

Deciding to move with a child a substantial distance from the child's home community and the non-moving parent may be the most significant child-rearing decision a parent makes in the life of the child. Such a move has the potential to fundamentally alter the future course and depth of the relationship between the child and the non-moving parent. Although the New Jersey Supreme Court, for example, abandoned *Baures*' initial focus on the "good faith" (or "bad faith") motivation for the move,[87] the reasons proffered by the relocating parent for the proposed move should remain relevant considerations in the overall relocation analysis.[88]

The reasons a parent proposes either in support of or in opposition to relocation often provide valuable information of psychological significance. For judges and attorneys, the reasoning may provide insight into the parent's credibility,[89] and, as a corollary, the prospects for his or her ability to cooperate with the non-moving parent after the relocation. For all participants involved, reasons offered for or against relocation often provide valuable information that bears directly and indirectly on the child's best interests. In addition to shedding light on the wisdom of the move, evaluating the reasons offered for and against the move contributes to an assessment of: (i) each parent's capacity and willingness to exercise good judgment in decisions that affect the child; (ii) each parent's ability to distinguish between the child's needs and the parent's desires and the priority the parent gives to each; (iii) the extent to which each parent values the child's relationship with the other parent; and (iv) the extent to which each parent values the other parent's role and contributions in raising their child. The purported reasoning may further reveal the extent to which the parent who proposes the reloca-

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87 *See Bisbing*, 166 A.3d at 1170.

88 *See* Stahl, *supra* note 70, at 443.

89 As Austin rightly notes (in the context of his parental gatekeeping model), "[w]hen an evaluator's assessment and investigation does not find sufficient data and context to justify the restrictive parent's lack of support and restrictiveness, then it is referred to as unjustified restrictive gatekeeping." William G. Austin, *Parental Gatekeeping and Child Custody Evaluation: Part III: Protective Gatekeeping and the Overnights "Conundrum"*, 59 J. Divorce & Remarriage 429 (2018).

tion has a realistic or unrealistic image of the tradeoffs necessitated by a move to the new location. In sum, each of these factors bear on parenting decisions and behavior in the present and also in the future.

If a mother, for instance, gives specious reasons for her proposed move, she may be showing that she cares more about satisfying her relatively superficial desires at the expense of her child's adjustment. Indeed, she may be reflecting her conviction that her child is better off with less time with his father or that she attributes little value to her child's existing relationship with his father. Similarly, she may be indicating that she gives little thought to the child's future relationship with his or her soon-to-be absent parent. Stated differently, the move may not express hostility to the father's involvement with the child, but merely reflect that the father-child relationship is not a priority in the mother's eyes. Any of the above issues should raise serious concerns about the extent to which the mother will support the child's positive relationship with the absent parent.

A parent may have a complex variety of motives for wanting to move with the child, some of which may not be explicitly articulated to the evaluators or to the court, or even well-understood by the parent. In some cases, the purpose of the move is exclusively or predominantly to disrupt the relationship between the child and the other parent. If so, the court should determine if the parent has valid reasons for wanting to put distance between the child and the other parent. For instance, a parent may want to move far away from a violent former spouse for her own safety and that of her child. While this reasoning may be valid, it should be verified—and typically is verifiable—through collateral information, which may include the records of child protective service agencies, law enforcement, the court system, medical providers, and mental health professionals. Unless a parent wants to move to secure protection against a violent spouse, a parent rarely articulates that the proposed move is intended to thwart the other parent's involvement, contact, and daily interaction with the child. In some cases, the parent who proposes relocation does not want to alienate the child from the other parent. In other cases—in addition to the reasons explicitly stated for the proposed move—the relocating parent wants to undermine the child's relationship with the other parent and erase or minimize

the other parent's involvement with the child. Accomplishing such goals, and obstructing the child's relationship with a parent, is easier when the child lives a long distance from the parent who is the target of alienating behaviors.[90]

D. *Moving Beyond the Surface*

A fundamental question in a relocation case is the following: *How does the parent who proposes a move weigh the benefits and costs of creating greater physical distance between the child and the other parent*? In evaluating the reasons for a proposed move, it is useful to obtain information through the following list of questions. (i) What other options did the parent consider as a means to accomplish the intended goals of the move (e.g., if a new job is the moving parent's purported reasoning, what efforts did the relocating parent make to find similar employment in closer proximity to the non-moving parent's home)? (ii) Are the reasons offered for the move compelling enough to justify the loss to the child of the non-moving parent's involvement in the fabric of the child's life (e.g., if the child has a medical issue that would be better served in the new community, did the moving parent give consideration to any other geographic areas that had similar medical facilities and would also allow frequent and consistent contact with the non-moving parent)? (iii) Do the reasons offered for the relocation justify placing the child in a situation that requires the child to adjust simultaneously to the loss of the familiar school, community, friends, health care professionals, extracurricular activity groups (e.g., soccer team, dance studio),[91]

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[90] Richard A. Warshak, *In a Land Far, Far Away: Assessing Children's Best Interests in International Relocation Cases*, 10 J. CHILD CUSTODY 295, 303 (2013).

[91] Austin and others have referred to these considerations as part of an overall "social capital" assessment. *See* Austin*, Conundrum, supra* note 89, at 438. It should be noted that evaluators who were surveyed attributed much lower ratings to the importance of social capital considerations. *See* Austin, *Survey*, *supra* note 65, at 484; *see also* Richard A. Warshak, *Night Shifts: Revisiting Blanket Restrictions on Children's Overnights with Separated Parents*, 59 J. DIVORCE & REMARRIAGE 282, 303 (2018) (citing Frank F. Furstenberg, *Banking on Families: How Families Generate and Distribute Social Capital*, 67 J. MARRIAGE & FAM. 809 (2005)). While it is impossible to ignore the evaluators' input in Austin's *Survey*, "social capital" could play a viable role in an overall relocation evaluation (for example, if the child is in his or her junior year in high

along with regular contact with the non-moving parent? (iv) If the proposed relocation is to pursue a new romantic relationship, would the relocating parent have available financial resources to travel to the location of the non-moving parent in order to maintain regular contact with the child? (v) Is there evidence that raises concerns that the moving parent may not do an adequate job of supporting the child's need for a positive relationship with the non-moving parent or might engage in (as Austin calls it) "restrictive gatekeeping" behaviors[92] (e.g., does the relocating parent have a history of violating court orders or marginalizing the non-moving parent's role with the child)?

With those considerations in mind, motives for proposing a move to a distant location are best thought of not as binary—necessary or not, or compelling or not—but as existing on a continuum from most compelling to least compelling. Some of the *more* compelling reasons that might reasonably justify considering such a move are set forth with the following. (i) The child or parent has special health care needs that require moving to the new location because they cannot be met in, or nearby, the current home. (ii) The child has special educational, instructional, or training needs that are either unavailable or vastly inferior in the current location. An example would be a world-class teen athlete or Olympic contender who needs to move in order to train with a team or with a coach who is uniquely suited to help the teen accomplish her goals. (iii) The relocating parent has a severely ill parent and wants to be by the parent's side during the illness. (iv) The new location offers the relocating parent valuable and necessary employment, career, or educational opportunities that are unavailable and far surpass what is available where the family currently lives and would either greatly enhance or prevent a serious decline in the child's lifestyle, opportunities, and standard of living. (v) The relocating parent has a fiancé or new spouse who has his own children and cannot relocate with them. In such a case, if the couple (the relocating parent and new spouse) are to live under the same roof rather than sustain a long-distance relationship, one set of children will have to live apart from a

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school and has a well-established and long-standing network of individuals who are both friends and teammates).

92 Austin & Rappaport, *Relocation Disputes*, *supra* note 65, at 58; *see also* Stahl, *supra* note 70, at 448-49.

parent. Under these circumstances, in addition to considering the pre-relocation custody arrangement of the parties, the custody arrangement of the fiancé or new spouse—and the quality of his or her relationship with his or her children—may be a relevant area of inquiry for evaluators and the court. (vi) The new location offers the relocating parent and child exposure to a large extended family, such as cousins close in age to the child, that are not present where the non-moving parent resided.[93]

The possible motivations for a relocation are vast. Some motives might justify the *parent* moving away from the child but may not easily justify the *child's* move with the parent. That is, the move may be justified—or proposed in "good faith"—but not in the child's *best* interests. For instance, a mother who needs to move far away to care for a dying parent may actually be less available to her child during this period. In turn, the child's best interests—as opposed to the mother's genuine and legitimate interest to care for a dying parent—might be better off remaining with his father who has more time and attention to meet the child's needs. Similarly, a mother moving into a new home with a fiancé who has several children of his or her own, may be less available to her child than if she married a childless partner. Naturally, these examples highlight the need for a fact-sensitive inquiry.

A move to a distant location means that, with the exception of the parent with whom the child moves, all other familiar people and groups—adults and peers—are left behind. Instead of having two parents living nearby to assist the child in coping with the transition, multiple changes, and losses, the child has one parent on whom to rely. And this parent, herself, often is taxed by the demands of coping with the move and establishing herself in the new community, even when the move was chosen with the expectation that it would improve her quality of life.

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[93] Although Austin's 2016 survey revealed that "the relative gain/loss in extended family was rated and ranked the lowest by evaluators," *see* Austin, *Survey*, *supra* note 65, at 481, evaluators and judges should take a fact-sensitive approach to extended familial relationships that considers the child's relationship with *both* parents' extended families both before the proposed move and the likely impacts following relocation.

E. *Psychological Testing*

Psychological testing is frequently used in child custody evaluations[94] and in relocation evaluations. The broad phrase "psychological testing" covers a range of instruments that include objective personality measures (e.g., the Minnesota Multiphasic Personality Inventory (MMPI), the Millon Clinical Multiaxial Inventory, or the Personality Assessment Inventory); projective measures (e.g., the Rorschach test); or parenting inventories (e.g., the Parenting Stress Index).[95] Custody evaluators tend to use an array of these tests to evaluate various aspects of the parents' psychological functioning.[96] Although psychological testing is an important component of a custody evaluation, judges and attorneys must remain mindful that most tests (the MMPI for example) were not designed *for* custody evaluations—certainly not "relocation" evaluations—and are not tests of parenting ability.[97] Like with other assessment tools and information obtained during a custody or relocation evaluation, the findings of psychological testing should be integrated with interviews of the parties, children, and collateral contacts (e.g., teachers, treating physicians/mental health professionals, employers); first-hand observations; and collateral records/documents (e.g., medical records, therapist's records, prior forensic evaluations, court transcripts, police reports, criminal records, diaries, personnel records, and school records).[98]

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94 *See generally* James N. Bow et al., *An Analysis of Administration, Scoring, and Interpretation of the MMPI-2 and MCMI-II/III in Child Custody Evaluations*, 2 J. CHILD CUSTODY 1-21 (2006); Jonathan W. Gould, *Use of Psychological Tests in Child Custody Assessment*, 2 J. CHILD CUSTODY 49 (2008); Sol R. Rappaport, Jonathan Gould & Milfred D. Dale, *Psychological Testing Can Be of Significant Value in Child Custody Evaluations: Don't Buy the "Anti-Testing, Anti-Individual, Pro-Family Systems" Woozle,* 30 J. AM. ACAD. MATRIM. LAW 405 (2018); *see also* Cassandra Valerio & Connie J. Beck, *Testing in Child Custody Evaluations: An Overview of Issues and Uses*, 14 J. CHILD CUSTODY 260, 262-67 (2017).

95 Valerio, *supra* note 94, at 262-67.

96 *Id.* at 267; *see generally* Gould, *supra* note 94.

97 Valerio, *supra* note 94, at 273-74.

98 See JONATHAN W. GOULD & DAVID A. MARTINDALE, THE ART AND SCIENCE OF CHILD CUSTODY EVALUATIONS 93, 103-07 (2007); *see also* American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings* 863-67 (2010), http://www.apa.org/pubs/journals/features/child-custody.pdf; *cf.* Association of Family and Conciliation Courts,

Judges deciding relocation cases in which the experts conducted psychological testing should consider an expert's testimony regarding the tests through the following, practical prism: *did the expert "connect-the-dots?"* Stahl agrees, noting that "there is great risk of . . . misapplication of test data to support a particular conclusion in a relocation case."[99] Stahl cites as examples:

> if a parent who wants to move tests as defensive and presents herself in a favorable light on an MMPI-2, as many custody litigants do, . . . a psychologist who is reluctant to recommend in favor of a move might use that data, and that data alone, to suggest that she cannot be trusted to support the child's relationship with the other parent after she moves. Similarly, a psychologist might suggest that a parent who scores as narcissistic on the MCMI-III and Rorschach might not be sufficiently child-focused to be the primary parent and recommend that the other parent be able to move with the child. The problem with both of these situations is that psychological tests, just like any one data source, should only be used to generate hypotheses about people's personality traits and should never be used to generate recommendations.[100]

Although psychological testing may serve an important role in the process, testing alone should not be used to confirm a hypothesis. Rather, a judge should ensure that the expert explained how and why the results of psychological testing formed an important component of the expert's report. It is incumbent on attorneys to ensure that judges—likely untrained in psychological testing—do not simply rely on rote recitations of scores and subscores from psychological testing without further explanation.

V. Evaluating Long-Distance Parenting Plan Proposals

In addition to the reasons offered for a move, whether the parent proposes a plan to foster and maintain the child's good relationship with the non-moving parent and the nature of the plan and how it was formulated, sheds light on several factors relevant to the child's best interests. The circumstances in which the plan is presented and the plan's details may reveal the extent

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Model Standards of Practice for Child Custody Evaluation 13-24 (2006), http://www.afccnet.org/Portals/0/ModelStdsChildCustodyEvalSept2006.pdf.

99 Stahl, *supra* note 72, at 117.

100 *Id.*

to which the relocating parent has carefully thought about the likely impact of the move on the family; the extent to which the relocating parent prioritizes the child's needs; and the extent to which the relocating parent values the relationship between the child and non-relocating parent.

The following are useful questions regarding a proposed parenting plan that courts and evaluators should consider. (i) Did the parent spontaneously recognize the need for a plan that provides sufficient contact between the child and the non-moving parent? (ii) Was the plan created as an integral part of the decision-making process that led to the choice to relocate? (iii) Was the plan presented in a cavalier manner, as an afterthought perhaps in response to an explicit request or requirement due to employment or a relationship? (iv) Is the plan well-conceived, feasible, practical, and affordable for this family? (v) Is the plan sensitive to the tradeoffs required of the child in order to spend time in the non-relocating parent's home? (vi) Does the plan take into account the likelihood that as the child enters the teen years it will be increasingly difficult for the child to choose between spending time with the parent who lives in another city versus participating in peer activities (e.g., sports events, parties), working a part-time job, and dating? (vii) Are the logistics of portal-to-portal transportation realistic and desirable for the child now and in the future? (viii) Is the non-moving parent's work schedule and control over the work schedule compatible with the proposed plan? (ix) Is the moving parent willing to accept the plan for herself or himself if the court denies the relocation of the child?

Inherent in most family law relocation disputes is the notion that relocation handicaps the parent-child relationship (with the non-relocating parent). Although every child and every parent-child relationship is different, a child may be less likely to regard the distant parent as available to meet the child's needs. Indeed, as a practical matter, the non-moving parent is absent from the significant daily episodes that affect the child, such as facing a bully at school, a romantic "break-up," or suffering an embarrassing incident. Conversations about those types of events are not scheduled or postponed to accommodate weekend contacts. Because those types of conversations are part of the "bricks-and-mortar" of a parent–child relationship, the non-moving parent's

attenuated or delayed involvement through a phone call or Skype leads to a relationship that is not the same as a typical parent-child relationship and one that is, in some ways, weaker and less helpful to the child.

Although adults typically have greater psychological resources than children to maintain long-distance relationships and greater ability to travel frequently in the service of those relationships, relocation disputes typically arise precisely because the alternative options are seen as less desirable and feasible. If maintaining a satisfactory relationship with a child across a long distance were of little consequence and a long-distance relationship approximated the quality and gratifications of living together, the parent who wants to move could do so without uprooting the child. That is, if a long-distance parenting plan proposal served as a reasonably desirable alternative to living in the same geographic area as the child and effectively compensated for living a long distance away, the *moving parent* who proposes the plan *should* also be willing to accept the limitations on contact, the frequent travel, and the absence of involvement with the child during the school week that he or she proposes for the nonmoving parent. For example, a parent who wants to be closer to her family of origin could, instead of moving, remain in the same geographic area as her child and maintain the long-distance relationship with her family through frequent travel. Succinctly put, the parent who seeks relocation could choose to do the traveling and allow the child to remain in the current home environment instead of imposing travel requirements on the child and nonmoving parent.

V. International Relocations

As with proposed moves within a country, the prospect of international relocation offers opportunities and risks. To be sure, laudable grounds for international relocation may include reuniting with family, pursuing career or educational goals, securing greater civil liberties, and/or protecting children. With the prevalence of multinational corporations, a growing number of people work, study, visit, or live temporarily or permanently in a country other than their country of origin. In turn, individuals have the opportunity to create ties to cities and people in new, sometimes distant, locations. An unsurprising corollary is a rise

in intercultural and transnational marriages; but when a relationship fails, one spouse may want to move to another country.

Leslie Shear and Leslie Drozd,[101] and Warshak,[102] have argued that international relocation cases differ qualitatively, substantively, and fundamentally from domestic relocations. Other than the following brief overview of best interest considerations in international cases, the reader should refer to the in-depth discussions provided by Shear, Drozd, and Warshak.

Among considerations that are not typically present in domestic relocations, the foreign nation's laws, judicial practices, customs, educational system, and political structure (and climate) create an environment that may be favorable or hostile to the child's best interests; to the non-moving parent's rights of access; and to the intentions of the court that issues the original custody orders. Countries and circumstances differ in the level of restraint versus freedom for parents and children to travel across borders. After a parent has moved a child to another country, the court may have little, if any, power to enforce or modify the orders. In fact, a court in the new country of residence may assume the authority to modify a custody-related order entered by a judge in the United States.[103] Given the differences—legal and administrative—between two countries, a court deciding whether

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101 Leslie Ellen Shear & Leslie M. Drozd, *To Speak of All Kinds of Things: Child Custody Evaluations and the Unique Characteristics of Relocations to Foreign Countries*, 10 J. CHILD CUSTODY 325 (2013); *see also* Linda D. Elrod, *National and International Momentum Builds for More Child Focus in Relocation Disputes*, 44 FAM. L.Q. 341, 374 (2010) (quoting Parkinson, *supra* note 50, at 1).

102 Warshak, *supra* note 90, at 296-98; *see also* Hague Conference on Private International Law, Permanent Bureau, *Preliminary Note on International Family Relocation* 1, 13 n.71 (2012), https://assets.hcch.net/upload/wop/abduct2012pd11e.pdf (citing Warshak, *Social Science*, *supra* note 29).

103 For example, a foreign court may make temporary custody orders pursuant to Article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention"), https://www.hcch.net/en/instruments/conventions/full-text/?cid=24; and/or Section 204 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), available at http://www.uniformlaws.org/shared/docs/child_custody_jurisdiction/uccjea_final_97.pdf. For a detailed discussion of the interplay between the Convention and the UCCJEA, see Robert G. Spector, *International Abduction of Children: Why the UCCJEA Is Usually a Better Remedy Than the Abduction Convention*, 49 FAM. L.Q. 385, 391 (2015).

to permit relocation must analyze the risks of abduction, the risks of a parent either not producing or not returning a child in the time frame dictated by the court orders, and the risks of other failures to comply with court orders.

A typical maneuver to frustrate a parent's contact with the child may take on different proportions when the parents live on different continents or in different countries. For instance, some parents justify a last-minute cancellation of a contact by claiming that the child is too sick to leave home. If this occurs, and the non-moving parent has traveled to the foreign country to spend time with the child, the parent has no local legal representation, and perhaps is not even able to speak the language to communicate effectively with law enforcement personnel. When the parent travels, for example, eighteen hours to spend time with the child and cannot afford to make more than one trip a year, this tactic can spell the end of a parent-child relationship.

Concerns that differentiate the impact on children of domestic versus international relocations arise primarily from the greater distance and differences between two countries compared with differences between two states within the United States. While a cross-country trip from New York to California may burden the non-moving parent or the traveling child, international travel is fundamentally different from domestic travel. Accordingly, the distance concomitant to international relocation affects how often and where the child will spend time with the non-moving parent and severely changes the feasibility of various parenting time schedules. A more practical, though important concern is that the greater the distance, the more likely that jet-lag adversely impacts the quality of parent-child contacts. Furthermore, with an international relocation, the time difference between the two locations often changes the logistics of communications via telephone, video calls (e.g., Skype and FaceTime), text, email, and social media.

When a parent moves an infant or toddler to another country, the moving parent may not plan to teach the child the language of the non-moving parent. If relocation is permitted, court orders or agreements should include provisions that offer some assurance that language will present no barrier to parent-child communications. Also, if the non-moving parent lacks fluency in the foreign language, barriers exist to the non-moving parent's

ability to effectively communicate with the child's school, pediatrician, counselors, coaches, friends, and others who have a role in the child's life. In an extreme scenario involving health or safety, when the parent-child contacts take place in the foreign country, the parent who does not speak the language is handicapped when it comes to securing emergency health and law enforcement services. If conflicts arise over the parent's access to the child, the parent who does not speak the language is disadvantaged in securing and directing legal counsel and dealing with the foreign court.

Before sending a child to live in a land far away from one parent or restricting the child from accompanying the other parent in a distant move, courts need information and analyses from evaluators who address the widest range of relevant factors, and who do so with sophisticated analyses. Conducting child custody evaluations for proposed domestic relocations is different from evaluations for international relocation cases. Evaluators must attend to differences that arise when considering a move to a foreign country, with a foreign language, different school systems, different holidays and customs, different culture, different laws, and different court practices. When these differences inform evaluation procedures and analyses, experts are most likely to develop opinions that will be useful to the court, the parents, and the children.

VI. Conclusion

In the intervening years between *Burgess*[104] and *Bisbing*,[105] the American Academy of Matrimonial Lawyers, the American Law Institute, and the National Conference of Commissioners on Uniform State Laws, drafted proposed standards to guide relocation disputes; the proposals have not been widely adopted.[106] In fact, relocation of children following parental separation or divorce continues to serve as the "San Andreas Fault"[107] of family law cases both domestically and internationally—and rightfully

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104 913 P.2d at 473.

105 166 A.3d at 1155.

106 Linda D. Elrod, *National and International Momentum Builds for More Child Focus in Relocation Disputes*, 44 FAM. L.Q. 341 n.19-21 (2010).

107 *Id.* at 374 (quoting Parkinson, *supra* note 50, at 1).

so. A parent's relocation to a distant location from the other parent may be the most significant event—for better or worse—in a child's upbringing.

Sensible outcomes of relocation litigation only emerge after careful inquiries into the motives, benefits, and detriments of a proposed relocation on the child; the likely impact of a proposed relocation on a child's relationship with the non-moving parent, on the child's educational adjustment, and on the child's social and familial relations; and the desirability, and feasibility versus impracticality of maintaining optimal relationships with both parents. Current social science data and professional opinions support the view that, in the absence of restrictive parental gatekeeping, child abuse, domestic violence, substance abuse, and/or pre-existing geographical limitations, the norm for parenting plans for children of all ages should be shared—though not necessarily equal—physical custody arrangements.[108] In turn, because it is not feasible to balance a child's time and contact more evenly between homes when his or her parents live a vast distance from each other, the predictable benefits of shared physical custody parenting plans should carry considerable weight in relocation cases.

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108 *See, e.g.*, Warshak, *supra* note 73, at 59.

Commentary:
The Legal and Scientific Perils of Modifying New Jersey's Custody Statute to Include a Presumption of Equal Custody

by Thomas DeCataldo and Eileen Kohutis

Consider a custody dispute involving the parents of a young child, age two. One parent is not employed and readily available to the child, serving primarily as a homemaker during the marriage. The other parent is a partner in an international law firm in New York City, and on average works between 80 and 100 hours per week. To avoid the challenges of commuting an hour both ways, the attorney now resides in Manhattan, with a live-in *au pair*. The case is bitterly acrimonious, and the parties' interactions are governed by a civil restraining order.

Now consider a custody dispute of a different two-year-old child. The parents are amicable and reside in close proximity to one another and their child's daycare. One parent is employed as a teacher and the other as a local police officer. The parents both have the flexibility to tailor their schedule to the child's needs, and benefit from having extended family nearby to assist with child-care when needed.

It takes little scientific or legal training to conclude that the hypotheticals above should likely result in different custodial arrangements. However, if proponents of a proposed overhaul to New Jersey's existing custody statute succeed in implementing a presumption of equal custody, there may soon be a time when these disputes are mechanically decided with similar, if not identical, outcomes.

As of Dec. 2017, over 20 states considered implementing laws with presumptions in favor of 50/50 joint physical and legal custody.[1] Arizona and Kentucky actually enacted laws presumptively favoring equal custody.

In joining with this emerging trend, since 2017 the New Jersey Legislature has introduced two bills that seek to establish a presumption that equal custody in all divorce cases is in the best interests of the child.[2] The bills present a dramatic deviation from longstanding decisional and statutory law and, the authors believe, place the 'best interests of the child' standard in direct peril. In fact, the proposal before the Senate goes so far as to impose a weighty burden on the parent opposed to 50/50 custody, requiring they demonstrate equal custody is "harmful to the child" before the court may deviate from equal custody.

Clearly, a change of this magnitude significantly alters the landscape of custody disputes in New Jersey. This article addresses the legal and scientific reasons the authors believe a presumption of equal physical custody is inappropriate and unwarranted.

The Evolution of Shared Custody Under New Jersey Law

In New Jersey, custody disputes have long been governed by statute.[3] The courts may only render a decision after considering 14 statutory factors, after which time they may award joint custody, sole custody, or any other custodial arrangement they determine to be in the best interests of a child. This exercise is required so family part judges broadly consider numerous factors touching upon the best interests of a child. The Supreme Court of New Jersey repeatedly recognized that a child's best interests are the "lodestar" consideration in a custody matter.[4]

Over the course of the last four decades, New Jersey jurisprudence governing custody and parenting time disputes changed significantly. At one time, New Jersey courts were constrained to award sole custody. It was not until the 1981 landmark decision in *Beck v. Beck* that the Supreme Court of New Jersey first authorized an award of joint custody.[5] In *Beck*, the Court granted joint legal custody *sua sponte*, despite neither party seeking such an award. In fashioning such relief, the Court noted that

joint custody "will prove acceptable in only a *limited class of cases*," purposefully declining to establish a presumption in a favor of a particular custody determination.

The Court also cautioned that in order for parents to qualify for joint custody, at a minimum both parents must be fit and capable of fulfilling the role of parent. Further, a parent must fulfill the additional requirement of exhibiting potential for cooperation in matters of child rearing, and be able to isolate their personal conflicts from their role as parent. The Court observed in its ruling that New Jersey's custody statute contained a "legislative preference for custody decrees that allow both parents full and genuine involvement in the lives of their children." This was consistent with the common law policy that a court should make every effort to "attain for the child the affection of both parents rather than one." The Court recognized that joint parenting, although not a new concept, was becoming a hot topic because the "absolute nature of sole custody determinations" meant one parent wins while the other loses.

Fourteen years later, in *Pascale,* the Supreme Court expanded upon *Beck,* distinguishing between legal and physical custody. The Court described the use of the phrase 'joint custody,' as "broad" and "misleading," holding that there are two elements of joint custody—legal and physical custody. The Court also noted "a review of New Jersey cases leads us to believe that 'joint physical custody' is as rare here as it is in other states,'" again declining to impose a presumption in favor of any particular custodial arrangement.[6]

Both *Pascale* and *Beck* demonstrate that the Supreme Court of New Jersey contemplated joint custody serving as the exception and not the rule, and a rejection of any presumptive arrangement. In the wake of these seminal decisions, varying forms of joint custody have become common in the everyday practice of family law. Legislative support for joint custody also grew, with the Legislature subsequently declaring that in custody disputes, the rights of the parents are equal, and that it is the public policy of the state to assure minor children frequent and continuing contact with both parents after a divorce or separation.[7]

Despite the increasing commonality of joint custody, there remains no presumption in favor of any joint or shared custodial arrangement, and, when appropriate, New Jersey courts still award sole legal custody.[8]

How then, did the law shift from awarding sole custody in the pre-*Beck* era, to contemplating mandatory presumptions in favor of equal custody? To answer that question, the elephant in the room must be addressed. There is an inescapable tension between the interests of divorcing parents and the interests of their children, and a challenging question of which party's interests should be given priority.

There is little question that New Jersey law strives to protect both interests, endeavoring to accomplish two potentially mutually exclusive goals:

- provide parents to a custody dispute equal rights; and
- establish custodial arrangements that protect the best interests of children.[9]

Commonly, achieving these two goals cannot be done symbiotically. In some instances, a parent's conduct may be to blame, such as in cases of domestic violence, substance abuse, abandonment, or physical abuse. Other times, the reason need not be nefarious or extreme. It may simply be a question of employment demands, or a parent's availability to the child. In cases such as these, it can be challenging for a parent to accept a diminished custodial role when they have done nothing 'wrong,' leading to pressure on state legislatures to implement presumptions protecting parents' rights in lieu of individually considering a child's interests.

The authors believe the trend towards expanding shared custodial arrangements tips the scales in favor of the rights of the parents and potentially to the detriment of the best interests of children. As this article will detail, the authors can cite scientific and legal reasons to safeguard the best interests of the children, even if doing so requires subordinating the rights of parents.

The Presumption of 50/50 Physical Custody

The social science research on shared custody is vast and has many tendrils. An in depth discussion of this topic exceeds the scope of this article; therefore, two critical areas are discussed to exemplify what the authors view as the dangers of a presumption of 50/50 physical custody:

(1) overnight parenting time with young children, and
(2) domestic violence

The term 'joint legal custody' and 'shared' parenting (SP) are used synonymously in the research, and both terms refer to the legal decision-making process related to the education, health, and religious practices of the child following parental separation. Physical custody refers to the residence of the child. To mimic the language presented in the proposed bills, shared parenting is used for purposes of this article.

The research on child custody is vast, and there are many areas of controversy and disagreement among custody professionals. One such controversy is that physical custody has not been clearly defined. Some studies consider joint physical custody a 50/50 arrangement where the child spends the same or almost the same amount of time in each parent's house, while other studies consider 35 percent joint physical custody, where the child spends four days out of 14 at the other parent's house.[10] This distinction is important because it limits the generalizability of the research findings.

Shared parenting may not be practical for all families because of a parent's work schedule or the distance between the parents' houses may be too great.[11] Professionals and researchers in the area of family law do agree that children in shared parenting do better academically, socially, and emotionally than children in sole custody families.[12]

Children's Needs Evolve Over Time

Children's developmental needs change as they mature. Spending overnights with the nonresidential parent is an area of major controversy among both practitioners and investigators. Some researchers state that overnights are harmful for children, while other researchers state there is no research to indicate whether overnights benefit a child or at what age overnights should begin.[13] A recent study of children who ranged in age from birth to age 18 found that infants and toddlers had the most difficulty adjusting to a shared parenting schedule, but by ages four and five children were able to adjust more successfully with a shared parenting schedule than a shared custody schedule. Children between the ages of five and 12 adjusted better than children in the joint custody when parental conflict was low, and adolescents wanted flexible parenting arrangements.[14] These findings seem to show that intricate and detailed parenting plans are needed to accommodate a child's development.

In families where the parents agree to joint legal custody, there is no need for the 50/50 presumption, and it is likely that parents with a shared parenting plan had a better relationship prior to the separation and divorce.[15] These parents also tended to have less conflict than parents with a sole custody arrangement.[16] Although the legal system may advocate for SP, this is based on the premise that before the divorce the parent and child had a good relationship and that SP will preserve the parent-child relationship.[17]

A presumption for SP is likely to occur when there is conflict between the parents, where one parent believes SP is not in the child's best interest.[18] Further, the parent arguing for SP initially does not need to offer any proof for this arrangement because it is the other parent who has to rebut the presumption. A best interest analysis only occurs when one parent rebuts the presumption and the best interest factors are focused on the needs of "a *particular* child."[19]

The authors believe joint legal custody presumptions are power imbalances and do not focus on the specific needs of each individual family.[20] Although children in general benefit from SP, that does not mean that "*any individual child will benefit*."[21] The best interest of child standard focuses on what is in each individual child's best interest and not children in general.[22]

Domestic Violence

In fact, in situations of domestic violence children and their parents could be at risk with such a joint legal custody presumption.[23] Allegations of domestic violence may include physical, emotional, sexual, and psychological abuse. It may include stalking and threatening behavior; it may include coercive control. The perpetrator may be able to demonstrate completion of a course on substance abuse or anger management, but the victim remains subject to coercive control by the perpetrator.[24] Parents who use coercive control exhibit different parenting behaviors than those who do not. Men who utilize coercive control may try to undermine the mother's authority and criticize her unrelentingly. These fathers may not be affectionate with their children, may not know what is going on in their children's lives, and may delegate parenting to the mother. Children who witness or are subject to such parenting tend to exhibit more behavioral and emotional problems than those who do not. Further, these children may learn that males should dominate females and that there are no consequences for their actions. Because such parents have poor interpersonal relationships, impaired family relationships, and poor conflict resolution, their children have an increased likelihood of becoming abusive parents as adults too.[25]

Children who have been exposed to domestic violence in a SP arrangement are exposed to different parenting styles, which may erode a child's feeling of stability and safety. In a SP arrangement, the abused parent will be required to engage in ongoing contact with the abuser as they negotiate issues about their child. This gives the abusive parent continuing access to the abused parent and

child. To rebut the SP presumption requires the kind of knowledge and experience with the law that some abused parents may not have and may not be able to afford to finance.[26] How to facilitate the parent-child relationship when a parent has been violent remains an issue for the courts as they protect vulnerable family members while avoiding intruding on the family.[27] Research demonstrates that children do best when parental conflict is low.[28]

The literature on SP versus sole physical custody (SC) is vast, and readers may turn to position papers for a quick overview of the field. However, some may be cleverly written and filled with minefields. For example, they may inaccurately or incorrectly discuss the results of studies or present data in a confusing and unclear manner. Some investigators do not specify whether the parents of children in sole custody were married and then divorced or if the parents in SC were ever married. Children living in an intact family with both parents who then divorce are different from children who have only lived with one parent.

Studies may not define how joint custody was reached. Parents who have reached joint physical custody (JPC) (defined in the research as having the children between 35 to 50 percent of the time) through mutual agreement may have had a different pre-divorce relationship than couples whose joint custody arrangement was court ordered.[29] Parents who have joint custody may have less conflict than parents with SC.[30]

Many investigations employed a cross-sectional design. This design provides information about a group of people at a specific point in time, which may not demonstrate a causal relationship. To illustrate a change over time, other research designs are needed.

The Need for Judicial Discretion and Individualized Consideration in Deciding Custody and Parenting Time

Although there is scientific research to support the benefits of shared parenting, the law repeatedly recognizes the need to give children involved in custody disputes individualized focus. In other words, while something may be good for most, it is not necessarily good for all.

Given the current debate over potentially establishing presumptions of equal custody, the Supreme Court's opinion in *Beck* from nearly 40 years ago appears clairvoyant. The Court specifically warned against presumptions, holding:

> despite our belief that joint custody will be the preferred disposition in some matrimonial actions, we decline to establish a presumption in its favor or in favor of any particular custody determination. Our concern is that a presumption of this sort might serve as a disincentive for the meticulous fact-finding required in custody cases. Such fact finding is particularly important in these cases because of the very interplay of parents and children that gives joint custody a potential value also creates complications different from those found in sole custody arrangements.[31]

The Court emphasized that the uniqueness of each family necessitated "meticulous fact-finding" to determine the most appropriate custody arrangement. The Court gave several enumerated examples of the individualized fact finding that must be made when effectuating an award of custody. The Court made clear that family part judges must examine whether both parents are 'fit,' and capable of fulfilling the role of parent, as well as their ability to effectively communicate and co-parent free of conflict. The Court identified other practical factors for physical custody, such as the geographical proximity of the two homes, and the preference of the child of sufficient age and capacity.

Obviously, these factors were so well reasoned they are now legislatively codified in N.J.S.A. 9:2-4 and mandatory considerations in all custody disputes. The Court recognized that application of these considerations routinely requires expert testimony, and reiterated that the paramount consideration in custody matters is the best interest of the child standard, which protects the "safety, happiness, and physical, mental, and moral welfare of the child."

Presumptions Favoring Equal Custody Subordinate the Child's Interests to the Rights of the Parents

The authors believe the inclusion of a presumption of equal custody in N.J.S.A. 9:2-4 would upend the implementation of the statute as presently situated and divest family part judges of the discretion they rely upon to render decisions in contested custody matters. Instead of undertaking an individualized and meticulous fact-finding, the courts would be compelled to implement 50/50 custody unless a finding was made that it would cause harm to a child(ren).

Viewed differently, there is no requirement that 50/50 actually be in the best interests of the child at issue, so long as it isn't harmful. The authors believe this prioritizes the desire of separating parents to share equal custodial roles over the best interests of the children at issue. Rather than ensuring a custodial arrangement serves the best interests of a child, the authors believe the parents should automatically have equal time so long as children are not subjected to harm.

The authors believe a presumption of equal physical custody dramatically alters the existing law and requires judges to implement a parenting plan that may not best serve a child's needs, simply to guarantee the rights of a parent are equal. Throughout New Jersey law, it is repeatedly noted that the rights of the child take priority over the rights of the parents. By way of an example:

- Parents may never waive child support or use it as a bargaining chip, as it is a right belonging to the child.
- Parties may not address custody or child support in a prenuptial agreement.
- Parents may not consent to an emancipation age if the child is not actually emancipated as defined by New Jersey law.
- Courts have broad discretion to appoint a guardian *ad litem,* whether or not this was requested by the parents, in order to protect the interests of a child in a litigated matter.
- Parents are required to attend parenting education workshops.
- Family part judges may be subject to reversible error if prioritizing calendar concerns over a party's right to have the children's best interests evaluated.

There has been a progressive trend in New Jersey decisional law giving children standing to pursue their parents for college contributions.

If enacted, the authors believe a presumption of equal physical custody would effectively serve as the *only* recognized area of New Jersey law where the rights of the child become subordinate to the rights of the parent. This would occur in the arena most critical to the child's best interests, governing the child's access to his or her parents.

Presumptions of Equal Custody Ignore Critically Individualized Considerations

Although research may show that children generally benefit from a shared custodial arrangement, the authors believe implementing a presumption would oversimply the best interests analysis and neglect the individualized attention a child may need. If parents are presumptively entitled to equal custody, the following considerations would go ignored:

- The child's age (*i.e.*, newborn versus teenage)
- The level of conflict between the parents
- Whether a child has special needs
- Whether a parent has a history of domestic violence
- Whether there is a history of physical abuse or substance abuse
- The quality and continuity of the pre-existing relationship between a parent and child
- Geographic proximity of the parents
- The parents' ability to communicate and agree on matters pertaining to the children

Although these factors could be presented in the context of overcoming a presumption of equal custody, considering their collective importance to a child's best interests the authors believe there is little reason they should only be considered in that context.

New Jersey Courts Have Rejected Presumptions in Similar Settings

The authors believe the dangers of presumptions pertaining to the best interest of children is analogous to existing published decisional law. In *Levine v. Levine,* the Appellate Division was faced with a dispute over competing school districts in a shared custodial arrangement. The parties had joint legal and physical custody of their daughter and nearly equal parenting time. The trial court conducted a plenary hearing and found one school to be superior to the other, based upon expert testimony and records from the New Jersey Board of Education. The Appellate Division reversed, finding that the court improperly basing its ruling on a comparison of the school districts without regard for the child's best interests. In finding an abuse of discretion, the Appellate Division held:

> In the context of the best interests of a child, any evaluation of a school district is inherently subjective. Just as a student cannot be summed up by IQ, verbal skills or mathematical aptitude, a school is more than its teacher-student ratio, or State ranking. The age of its buildings, the number of computers or books in its library and the size of its gymnasium are not determinative of the best interest of an individual child during his or her school years. Equally, if not more important, are peer

> relationships, the continuity of friends and an emotional attachment to school and community that will hopefully stimulate intelligence and growth to expand opportunity.[32]

The rationale underpinning *Levine* is analogous to the implementation of a presumption in favor of equal custody, and the authors believe should be viewed broadly. Adjudicating a custody issue based solely on which school is superior to another school effectively functions in the same manner as a presumption. The authors believe the resolution of custody and parenting time issues should never be made so simple and generalized as to turn on which school may be better, or in the case of presumptive equal custody, which parenting plan is best for most children.

Even if one were to assume that an equal custodial arrangement is best for most children, which clearly is not an established scientific consensus, there still must be individualized consideration of whether equal custody is best for the specific child at issue in a custody dispute, or that family is done a grave disservice. The authors believe that, much like the Appellate Division held in *Levine,* a child's best interests cannot be generalized and summed up based upon conflicting scientific research or the pressure applied to legislative bodies. Instead, the factors codified in N.J.S.A. 9:2-4 require ongoing and individualized consideration to ensure the best interests of New Jersey children are adequately protected.

In sum, the authors believe presumptions in favor of equal custody needlessly jeopardize the best interest of children, with no legal or scientific reason to do so. ■

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This Commentary was written in response to my letter to the journal's Editor. I had contacted him about some concerns with the article and his response was that I write my own Commentary. And, I did.

Eileen A. Kohutis, Ph.D.

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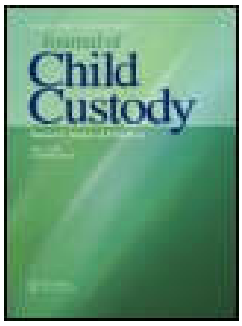

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Commentary on: Joint versus sole physical custody: Outcomes for children independent of family income or parental conflict

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Commentary on: Joint versus sole physical custody: Outcomes for children independent of family income or parental conflict

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ABSTRACT

The debate about joint physical custody rages in the scientific community as scholars and practitioners gather information about what is best for children when parents divorce. The field of child custody is vast and complex, and summaries are welcomed reviews. This commentary is a summary of some of the obstacles that may be encountered.

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How custody of children should be allocated in the case of parental divorce is a matter of intense discussion today in our literature and in our courtrooms with efforts under way in many jurisdictions to establish joint physical custody (JPC) as the standard in law. As researchers try to study the relative merits of JPC and sole physical custody (SPC) in an objective and unbiased manner, advocates of both comb the scientific literature for findings that support their positions. Custody is such a vast and complex field and encompasses so many diverse factors that consolidations and reviews of the data are welcome and can be useful indeed. One consolidation is the following article by Linda Nielsen (2018), "Joint versus sole physical custody: Outcomes for children independent of family income or parental conflict." Unfortunately, what this piece demonstrates most clearly is not the relative merits of custody arrangements, but the potential pitfalls of such reviews, for both authors and users.

As Nielsen (2018) points out, "authors who summarize the research must take great care to report the findings accurately and to include the results of all studies, not just those that support their particular point of view" (p. 38). If not, summaries may end up being misunderstood or misused by readers; this is a disservice to the researchers whose work the summary covers, and it undermines the usefulness of the summary itself. I would add that knowledgeable writers sometimes forget that readers do not

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necessarily share their familiarity with a subject and may not have at their disposal information and assumptions that an expert takes for granted. Furthermore, readers who do not come from research fields—lawyers and legislators, for example—may interpret data in ways that more sophisticated statisticians would not. In keeping with these caveats, I will concentrate primarily on the aspects of Nielsen's presentation that mitigate its usefulness for its likely readership, specifically some aspects of the research design, and the most unsettling aspects of her summary. This is not intended as an exhaustive list of the pitfalls of such works, or of this particular article's shortcomings, but as an illustration of why it behooves us to examine such meta-studies carefully when they come our way.

In her first paragraph, Nielsen establishes JPC as the main focus of her summary and states that it is becoming more common. However, she never defines JPC. Researchers define JPC differently; and these definitions range from a truly equal 50% of time (Kelly, 2007) spent with the nonresident parent (Kelly, 2007), to a much less clearly "joint" custody of 33% of time spent. Nielsen's readers never know exactly what she means when she talks about "joint" physical custody. One of the goals of research is to design studies that can be replicated. Nielsen states that three databases were employed in her summary and the key search words that were used; however, she does not tell us what the criterion was for a study's inclusion and exclusion, and what years the studies in her summary covered.

One purpose of this kind of summary is to demonstrate the similarities and differences between various researchers' results. Yet, Nielsen seldom reports the specifics that would allow her readers to assess the results; they have to take her at her word, which defeats the usefulness of this kind of summary. For instance, in discussing the meta-analyses of Baude, Pearson, and Drapeau (2016) and Bauserman (2002), she states that effect size was small, but she does not say what it was. Why not? What is small to one reader may not be to another. If a statistic is worth mentioning, it should be made explicit, so that readers can make their own assessments of the author's conclusions. We do not have that opportunity here. Similarly, Nielsen goes on to say of the Bauserman (2002) study that the "benefits of JPC were much larger for children who lived 50% time [sic] with each parent than for JPC child who lived less than 50% time with parent." But she does not tell us what "larger" means in the context of these "benefits" (p. 36). Are they large enough to be statistically significant? If so, tell us how much. If not, then what does "larger" matter? This kind of pervasive lack of clarity consistently undermines the points she is trying to make.

There is another example of this in the section entitled "Negative outcome for JPC children," where Nielsen says that "Despite the more positive outcomes overall for JPC children, in 6 of the 60 studies JPC children had

worse outcomes than SPC children on one, but not all, measures [sic] of well-being" (p. 44). How much worse? A little? A lot? What is worse? Again, no statistics are reported. And, a reader who turns back to the table to try to figure out which measures she is referring to quickly discovers that the measures are not listed; she lists only generic categories, such as "academic and cognitive development," and "depression, anxiety, overall life satisfaction, self-esteem." Analyzing conflict among couples, Nielsen writes, "Compared to SPC couples, in 3 studies JPC couples had less conflict; in one study they had more, and in one study the conflict differences depended on the age of the children. In short, cooperation and low conflict are not likely to account for JPC's children's better outcomes" (p. 46). Here, she does not even identify which studies she is talking about; the reader must decipher which studies she means before it is even possible to search for the citations.

Obviously, it is crucial that interested readers of a summary are able to identify easily and accurately the studies discussed; researchers will want to delve deeper into concerns that are relevant to their own work, while legislators need to be able to assess whether a study is of sufficient quality to shape the law and its application. Yet, Nielsen makes it difficult to identify her data sources. She tells us that this current article is the third in a series of three; in each she has summarized 20 studies examining outcomes of children in shared and joint physical custody, and in this third one she has updated the summaries of the 40 previous studies published in the first two. However, she does not indicate in the text which 20 studies she is examining in this particular piece; it is not until the end that we learn, in a note at the head of the reference list that they are marked with an asterisk there. It would have been easy and helpful, and it would have saved this reader a lot of frustration if there had been a note to that effect early in the text as well.

Even more frustrating, many of the studies she discusses in this piece are not listed in the references at all. Nielsen tells us that this is for reasons of space and assures us that the references are available in her previous review articles. However, this is no help to a reader struggling with the massive four-page table into which Nielsen has distilled her analysis, and it goes against the time-honored and wise scholarly convention that references be provided in a article for any material directly discussed therein. Sometimes a name and date in the table *can* be found in the references, but without the full range of authors listed, it is impossible to tell whether this is in fact the study Nielsen has in mind. Furthermore, since there is no indication in the table whether or not a study is among the 20 included in the present article, each and every listing requires a hunt for asterisks in the references to figure that out. For instance, Nielsen lists Cashmore as having authored

three studies but there is no citation for any of these studies in the references; as a result, the reader has no indication to which articles Nielsen is referring. This is particularly problematic since Cashmore has numerous publications, some in which she is the sole author and in others where she has collaborators.

The converse problem exists too: although Fabricius & Suh (2017) is listed in the references, that article is not cited anywhere, either in the article or in the table. In short, a reader engaged in the fundamental task of tracking these studies down will find many bibliographic obstacles in the way. An example: she makes a general statement that "In 6 studies, there were no significant differences between the two groups on any measures" (p. 39). But the six studies are identified only by shorthand names, and only sometimes with dates, in the table's leftmost column. Clearly, this has been done in the interest of saving space, and clearly space-saving is an important priority in such a huge table. But an expansion of the shorthand could have been offered as well, either in a subsidiary table, in the text, or in the references. Without that, it is impossible for the reader to know for certain which studies she is referring to in this paper without referring to another one—or possibly two—because how can we tell which of the two earlier studies will turn out to be the one containing the mystery reference?

As researchers, lawyers, and clinicians, we are accustomed to looking up the other writings of authors who interest us, and to availing ourselves of libraries when we need an article that we do not have at hand. Hunting up references when delving deeper into a subject is standard scholarly operating procedure and one of the pleasures of study. It is not standard operating procedure for an article to fail to provide the references relevant to its own immediate argument. I should add too that this practice occurs many pages into the article; if Nielsen's other articles are the sources of all of the missing references, it would be good to be told that when the problem first arises.

As I have said, the heart of this article is a lengthy and extensive table. It, too, presents serious problems to a reader who wants to use the material as an entrée to further work, to deeper understanding, or even simply to confirm that he or she sees things the same way that Nielsen does. Nielsen combines categories of findings into columns, but provides no clue as to how these (sometimes perplexing) combinations interact. For example, one column is labeled "Depression, anxiety, overall satisfaction, self-esteem"; in some studies, the table tells us, the outcome of one group or another was "better." But what does "better" refer to? Depression? Anxiety? Both? Is self-esteem included? What happens if overall satisfaction is better, but anxiety is not? What if the outcome is listed as "Better life satisfaction?" Does this mean depression and anxiety are not better? The reader has no

way to know which comments apply to which conditions. The table would have been more helpful, and less subject to misinterpretation, if that single column had been broken down into at least two: depression and anxiety, and satisfaction and self-esteem. In that context, the word "better" would have had a clearer meaning. Alternatively, a general category of emotional health with a description of each study's findings would have given the reader more help in understanding the results. It will take inexperienced readers some study to figure out that the table is established with JPC as the point of reference. A clear statement to that effect would have been useful, as the structure of the table itself does not make clear that the two adjacent columns, JPC and SPC, indicate not only the relevant data, but also the direction of the comparison.

Another column is labeled "Peer behavior, substance use, hyperactivity." What does "better" mean there? If there is better integration into a peer group that smokes weed at parties, does that count as better peer behavior, or worse substance abuse? As always, I am assuming that these categories have been collapsed in the interests of space and efficiency. But in this case the results undermine Nielsen's own efforts. Nielsen cites an article by Fransson under the category "JPC equal or better outcomes than SPC 14 studies" and according to her the better outcomes indicate, "equal psychological, better stress, equal drinking, better smoking, better bullying" (p. 41). This example illustrates the neat compactness of the table that gives rise to a tangle of uncertainty and complication. Some categories really are better dealt with separately.

As to Nielsen's representation of the data itself, I will comment here on one study only, which demonstrates at best some serious confusion as to citation, and at worst a serious divergence between Nielsen's report of the study findings and the report of the researchers themselves. In the table summary of Fransson, Turunen, Hjern, Ostberg, and Bergstrom (2016), Nielsen reports that "depression, anxiety, overall life satisfaction, self-esteem" were "better" in children between the ages of 10 and 18 in JPC. She elaborates:

> Having a parent with a graduate degree was more closely linked to children's stress and anxiety than was the physical custody plan. The researchers speculated that highly educated, higher income parents might put more academic and social demands on their children, which, in turn, increase children's stress and anxiety (p. 48).

The authors, however, say something quite different: first, that "*Low* parental education and parental worry/anxiety were associated with more psychological complaints for children" (p. 180; emphasis added); and second, that "the differences between joint physical custody and sole parental care was *not* explained by socioeconomic factors or by parental

ill-health" (p. 183; emphasis added). Although they do distinguish between "low level" and "above low level" incomes and among levels of education, Fransson et al. make no mention at all in this article of social "demands" or graduate "degrees."

I can think of only two reasonable explanations for this discrepancy; one is that Nielsen had in mind an article other than the one cited. Perhaps the date was listed incorrectly and she meant the other Fransson article in the table, or perhaps there is another article by these authors that is not listed, or the article in question was by someone else altogether. The other, which I entertain reluctantly and, in this instance, consider less likely, is that Nielsen's own views on the JPC/SPC controversy distorted her interpretation of the article she was discussing. Either way, however, she weakens her own effort: a reader familiar with Fransson's work will note the inconsistency and conclude that the summary cannot be used with confidence. An unfamiliar reader may well be seriously misled. This is not a reassuring finding, and it is made even more irritating by the fact that the truncated reference list gives us no direct way of checking whether there were other studies by Fransson in Nielsen's database (in addition to the two listed here, one of which has a different date) that might have been confused with this one. There is another Fransson study on the references. When I looked at that study, it is not about parental ill-health. Clearly, she was thinking of an article by another writer.

It is standard practice for scholarly publications to cite the limitations of their manuscript. Curiously, although Nielsen discusses the limitations of the studies she reviewed, Nielsen does not make any statement at the conclusion of her article about any limitations of her own summary. My primary point in this commentary is that there are seemingly nonsubstantive issues in this article that severely limit its usefulness to the reader, who turns to it as a guide to an important field. My secondary point is that inconsistencies and inaccuracies, even small ones, diminish a reader's trust in an author. The imprecision of Nielsen's summary—both the skimpy references and the overly collapsed data categories—make it difficult for her readers to follow her arguments, or feel secure in her conclusions. I have called attention to an instance where I believe that either a study has been cited incorrectly, or that there has been a misrepresentation of its findings. As I have said, my intention in this article is not to detail every possible problem that can be found in it, but to demonstrate the kinds of problems that readers should look for, both for their own protection and to encourage care and "user-friendliness" in authors. I am in no position to speculate on why such problems haunt this particular article. However, they do, and readers therefore need to consider it seriously flawed and lacking reliability.

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

by
Milfred Dale*

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

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

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

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

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

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

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

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

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

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

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5 Mary Ann Mason, *The Roller Coaster of Child Custody Law over the Last Half Century*, 24 J. Am. Acad. Matrim. Law. 451 (2012).

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

7 Robert E. Emery et al., "*Bending" Evidence for a Cause: Scholar-Advocacy Bias in Family Law*, 54(2) Fam. Ct. Rev. 134, 145 (2016).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

During the 1980s, the privileges that had traditionally been afforded to married parents and children of married parents were extended to unmarried fathers[15] and children of unmarried parents.[16] As individualized determinations replaced presumptions, the volume of people needing the assistance of the family court increased exponentially. The *best interests of the child* concept was not new, but the demand for individualized determinations based upon factors rather than gender or status-based presumptions represented a groundbreaking paradigm shift in child custody law.[17] Rather than grounding custody decisions on gender- or status-based presumptions, judges and courts were charged with making individualized determinations without presumptions or a clear default position.[18] From a constitutional perspective, there is no constitutional right to equal participation in the raising of one's children.[19]

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

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

15 *Id.*

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

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

18 *Id.*

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

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

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

22 Kelly, *supra* note 21, at 385.

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

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

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

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

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

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23 *Id.*

24 *Id.*

25 *See* Shelby R. Arenson & Lisa G. Grumet, *Charts 2020: Family Law in the Fifty States, D.C., and Puerto Rico, Part 1.* 54(4) FAM. L.Q. 341 (2020); *See also* UN General Assembly, Convention on the Rights of the Child, 20 November, United Nations, Treaty Series, vol 1577, at 3.

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

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

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

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

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

B. *Criticisms of the Best Interests Standard*

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

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

30 Mnookin, *supra* note 28.

31 *Id.*

32 Kelly, *supra* note 21.

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

34 *See* American Law Institute, Principles of the Law of Family Dissolution (2002); Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 Ohio State L.J. 615 (2004); *see also* Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U.Chi. L. Rev. 1, 23-24 (1987).

35 Robert E. Emery, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System,* 6(1) Psychol. Sci. in Pub. Interest 1

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

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

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

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

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

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

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

38 Glendon, *supra* note 35, at 1181.

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

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

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

In negotiations, presumptions have an impact as part of the "shadow of the law"[41] regarding what might happen in court. Once in court, legislatively-derived presumptions are often attempts to reign in judicial discretion[42] via creation of "secondary facts" that judges are required to use in lieu of actual evidence.[43] "The presumption must be applied whether or not the underlying assumptions are 'true,' supported by scientific evidence, or consistent with the child's needs."[44] For example, because of concerns about the impact of domestic violence on children and families, nearly all fifty states consider domestic violence as a factor in child custody disputes and more than twenty states have presumptions that those guilty of domestic violence shall not be awarded custody of a child.[45] Proponents of presumptions argue that presumptions reduce demands on the court, decrease the time required to resolve cases, and reduce conflict by creating common expectations of the likely outcome of the cases.[46]

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

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

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41 Mnookin, *supra* note 28.

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

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

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

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

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

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

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

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

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

48 Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. Ark. Little Rock L. Rev. 395 (2000).

49 *Id.*

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

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

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

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

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

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

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

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52 *Id.*

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

54 Black's Law Dictionary Free Online Legal Dictionary (2d ed.), https://thelawdictionary.org/discretion/ (last visited Mar. 28, 2022).

55 Mnookin, *supra* note 28.

56 Nancy Ver Steegh & Dianna Gould-Saltman, *Joint Legal Custody Presumptions: A Troubling Legal Shortcut*, 52 Fam. Ct. Rev. 263 (2014). *See also* Dana Harrington Connor, *Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence*, 18 Duke J. Gender L. & Pol'y 223, 228 (2011).

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

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

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

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

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

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

59 *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

66 *Id.* at 694.

67 *Id.* at 695.

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

A. *Methodology Matters in Family Law Debates*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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76 *Id.* at 7.

77 *Id.*

78 *Id.*

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

80 *Id.* at 370-71.

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

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

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

1. *Correlation Does Not Prove Causality*

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

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

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

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

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

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

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

86 *Id.*

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

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

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

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

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

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

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

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

91 *Id.* at 66.

92 CARD, *supra* note 75, at 7.

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

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

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

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

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94 *Id.* at 58.

95 Thompson, *supra* note 90, at 65.

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

97 *Id.*

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

99 Thompson, *supra* note 90, at 65.

100 Cohen, *supra* note 89 at 1307.

101 Kirk, *supra* note 96.

3. *Shortcomings of the Box Score or Vote Counting Review*

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

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

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

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

103 *Id* at 361.

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

105 Glass, *supra* note 88, at 359.

106 Hedges & Olkin, *supra* note 102.

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

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

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

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

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

108 Glass, *supra* note 88, at 359.

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

110 *Id.*

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

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

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

C. *Evolving Conventions in Effect Size Interpretation*

The conventions for developing effect size (ES) interpretations have evolved. Initially, some researchers classified ESs as small, medium, or large. This approach was first developed by Jacob Cohen in 1962,[114] was revised in 1988,[115] and revised again in 1992.[116] In this simplistic approach, the ESs from standardized means difference calculations are viewed on one scale and point-biserial correlation coefficients were judged on a slightly different scale

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

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

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113 Rex B. Kline, Beyond Significance Testing: Statistics Reform in the Behavioral Sciences 4940 (2d ed., 2013).

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

115 Jacob Cohen, Statistical Power Analysis for the Behavioral Sciences (2d ed., 1988).

116 Jacob Cohen, *A Power Primer*, 112(1) Psychol. Bull. 115 (1992).

117 Cohen, *supra* note 115.

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

James Hemphill provided another means for placing effect sizes in context. After reviewing two large meta-analyses, one consisting of 78 studies of psychological assessments[121] and another including 302 studies of psychological treatments,[122] he converted the Cohen *d* statistics to Pearson product-moment correlations before rank ordering the results.[123] Hemphill found that the studies in the lower third had effect sizes of less than .20, the middle third had effect sizes of between .20 and .30, and the upper third were above .30.[124]

Hedge's *g* is another effect size statistic used in meta-analyses.[125] Hedges *g* allows for a bias corrected standardized mean difference when sample sizes are small and is interpreted similar to Cohen's *d*, in that small effects are approximately 0.20, medium effects sizes are 0.50, and large effects sizes are greater than 0.80.[126]

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

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

120 COHEN, *supra* note 115, at 25.

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

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

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

124 *Id.* at 79.

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

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

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

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

III. Applying the Rules to the Social Science Research Evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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133 *Id.*

134 *Id.*

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

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

137 *Id.*

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

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

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

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

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

139 *Id.* at 457.

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

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

velopment and maintenance of meaningful parent-child relationships."[142]

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

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

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

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

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

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

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142 *Id.* at 378.

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

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

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

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

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

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

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145 *Id.* at 561.

146 *Id.*

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

148 *Id.* at 564.

149 *Id.*

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

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

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

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

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150 *Id.* at 565.

151 *Id.*

152 *Id.* at 568.

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

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

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

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

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

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

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

156 *Id.* at 590.

157 *Id.* at 591.

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

159 *Id.* at 594.

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

In their conclusion, Adamsons and Johnson noted,

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

2. *Conclusions About Contact and Quality of Relationships*

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

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

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160 *Id.* at 595.

161 *Id.* at 596.

162 *Id.* at 598.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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175 Joan B. Kelly, *Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of the Research*, 39 J. Am. Acad. Child & Adolescent Psychiatry 963 (2000).

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

177 Joan B. Kelly, *Risk and Protective Factors Associated with Child and Adolescent Adjustment Following Separation and Divorce, in* Parenting Plan Evaluations: Applied Research for the Family Court, *supra* note 139, at 49.

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

179 Nielsen, *supra* note 128 at 228.

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

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

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

4. *Conclusions About Interparental Conflict and Child Adjustment*

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

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

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

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

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

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

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

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

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

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

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184 *Id.* at 178.

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

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

187 Dale, *supra* note 169.

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

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

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

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

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

189 *Id.*

190 *Id.* at 93 (emphasis added).

191 *Id.*

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

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

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

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

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

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192 *Id.* at 92.

193 *Id.* at 95.

194 Id. at 99.

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

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

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

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

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

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

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

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

198 *Id.* at 344.

199 *Id.* at 353.

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

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

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

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

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201 *Id.* at 353.

202 *Id.*

203 *Id.*

204 *Id.* at 355.

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

206 *Id.* at 356-57.

3. *Nielsen 60 – A Vote Counting Review*

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

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

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

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

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

208 *Id.* at 39.

209 *See* KLINE, supra note 113.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In individual cases, arguments for shared parenting and joint physical custody emphasize that frequent contact with the nonresidential parent (usually the father) leads to increased parental involvement and increases the child's access to both emotional and financial resources.[218] Added contact between the nonresidential parent and child is also theorized to reduce children's experiences and perceptions of loss and potentially reduce their emotional insecurity[219] or worries the child might have about that parent.[220] In addition, mothers may benefit from sharing the burdens of providing for the child.[221]

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

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

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

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

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

219 Fabricius, *supra* note 132.

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

221 Steinbach, *supra* note 215.

222 Turunen, *supra* note 219.

223 Robert E. Emery, Two Homes, One Childhood. A Parenting Plan to Last a Lifetime 228 (2016).

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

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

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

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

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

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

225 *Id.*

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

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

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

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

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228 Venohr, *supra* note 225, at 341.

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

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

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

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

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

IV: Not All Equal Parenting Time Statutes Are Created Equal

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

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

A. *Arizona – Public Policy Presumption, Not Law*

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

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233 *See*, *e.g.*, Mo. Rev. Stat. § 452.375 (2021).
234 *See*, *e.g.*, Va. Code Ann. § 20-124.3(6) (2021).
235 *See*, *e.g.*, Me. Rev. Stat. 19-A §1653(3)(h).
236 *See*, *e.g.*, Kan. Stat. Ann. § 23-3213

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

- Arizona Revised Statutes § 25-103(B(1) states: "It is also the declared public policy of this state and the general purpose of this title that absent evidence to the contrary, it is in a child's best interests: (1) To have substantial, frequent, meaningful and continuing parenting time with both parents."
- Arizona Revised Statutes § 25-403.02(B) states, inter alia, that, "the court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time."
- Arizona Revised Statutes § 25-411(j) states that "the court shall not restrict a parent's parenting time rights unless it finds that the parenting time would endanger seriously the child's physical, mental, moral or emotional health."

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

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

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

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

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

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

B. *Kentucky – Presumption Preponderance*

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

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

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

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

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

241 *Id.*

242 KY. REV. STAT. § 403.270 (2021).

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

244 KY. REV. STAT. § 403.320(3).

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

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

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

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

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

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

D. *Preponderance or Clear and Convincing Evidence "of What"*

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

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246 *Layman*, 599 S.W.3d at 432.

247 *Id.*

248 KY. REV. STAT. § 403.315 (2021).

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

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

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

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

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

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

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

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251 *Layman.* 599 S.W.3d 423

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

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

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

V. Conclusions

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

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

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

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

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

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

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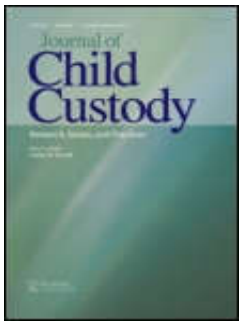
[255] "Still the One" – Orleans, 1975.https://www.youtube.com/watch?v=S5aMMRes2u4



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Bench Book for Assessing Parental Gatekeeping in Parenting Disputes: Understanding the Dynamics of Gate Closing and Opening for the Best Interests of Children

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Bench Book for Assessing Parental Gatekeeping in Parenting Disputes: Understanding the Dynamics of Gate Closing and Opening for the Best Interests of Children

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This Bench Book summarizes theory, research, and a forensic assessment model of parental gatekeeping relevant for understanding and resolving child custody disputes. This concise format is geared primarily as a resource for judges, though it may be equally valuable to evaluators, parenting coordinators, and others. Gatekeeping encompasses a common statutory factor of support for the other parent–child relationship. The gatekeeping model includes a continuum ranging from facilitative to restrictive gatekeeping. Behavioral examples are presented. Implications of a gatekeeping analysis for crafting parenting plans are described, including in relocation cases and when there has been a history of intimate partner violence.

KEYWORDS gatekeeping, parental conflict, Best Interests of the Child

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A common statutory best interest factor to consider in custody disputes is the extent to which each parent can support the other parent's relationship with their child. In many states, the best interests of the child analysis also include the encouragement of both parents' continuing involvement in the life of the child following parental separation and divorce. Some state statutes make this policy explicit in a legislative declaration. For example, Florida statute F.S. § 61.13(2)(c)(1) states: "It is the public policy of this state that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage the parents to share the rights and responsibilities, and joys, of childrearing." This Bench Book provides a concise format for understanding and assessing gatekeeping, which concerns parental attitudes and behaviors related to the best interest factor and legislative declaration. (For a fuller discussion, see Austin, Pruett, Kirkpatrick, Flens, & Gould, 2013.) It is geared toward grounding child custody dispute assessments and the development of parenting plans in specific behaviors and attitudes that are relevant to the parents' future potential to co-parent. The information will assist judges, custody evaluators, family law professionals, and mental health professionals with assessment, conflict resolution, and decision-making processes for parental/caregiver disputes involving co-parenting and timesharing issues.

The contents of this Bench Book provide a:

- definition of parental gatekeeping in the context of separation and divorce and the allocation of parenting responsibilities;
- gatekeeping continuum chart that ranges from proactive, positive facilitative gatekeeping to very restrictive, negative gatekeeping;
- conceptual distinction between justified protective gatekeeping and unjustified restrictive gatekeeping;
- description of areas in which judges can apply the gatekeeping concept to inform their parenting time and access decisions; and
- description of protective gatekeeping as it pertains to a parent's concerns about the other's parenting competence or safety for himself or herself and the child (e.g., due to intimate partner violence [IPV] or domestic violence).

DEFINING PARENTAL GATEKEEPING IN THE CONTEXT OF SEPARATION AND DIVORCE AND ALLOCATION OF PARENTING RESPONSIBILITIES

What is Gatekeeping?

Parental gatekeeping refers to how parents' attitudes and actions affect the involvement and quality of the relationship between the other parent and child. Scholars have proposed a gatekeeping continuum that varies in degrees

of facilitative to restrictive on the issue of supporting the other-parent–child relationship (Austin, 2005a, 2005b, 2011; Austin et al., 2013; Pruett, Arthur, & Ebling, 2007; Trinder, 2008).

Why Gatekeeping Is Important: The Research

The concept of gatekeeping gives judges a uniform way to apply the best interest of the child standard when parents disagree. Research outcomes have verified the importance of both parents to children's adjustment and development, except in cases that pose an imminent threat to a child's physical and/or psychological safety. Research on divorce and maternal gatekeeping demonstrates that:

- Children show best long-term adjustment to parental separation or divorce when 1) they have quality relationships with both parents (Amato & Sobolewski, 2001, 2004; Flouri, 2005); and 2) parents have a positive co-parenting relationship (Amato & Sobolewski, 2004; Camara & Resnick, 1989; Flouri; Sobolewski & King, 2005; Whiteside & Becker, 2000).
- Children's healthy development may be compromised when parenting is generally inadequate for the child's developmental needs and/or one or both parenting styles are rigid and harsh without warmth or sensitivity to the child (Kelly & Emery, 2003; Oppenheim & Koren-Karie, 2012; Sandler, Miles, Cookston, & Braver, 2008).
- Exposure to conflict often results in poor adjustment of children, unless they are shielded from the conflict by at least one parent's compensatory parenting and/or parents' ability to keep the child from being the focus of, or a participant in, the conflict (Buchanan, Maccoby, & Dornbusch, 1991; Hetherington, 1999a).
- When mothers are more satisfied with fathers' parenting, fathers tend to be more positively involved with their children (Beitel & Parke, 1998; Shoppe-Sullivan, Brown, Cannon, & Mangelsdorf, 2008).
- Mothers are more satisfied with fathers' involvement with their child when there is low couple conflict (Sobolewski & King, 2005).
- When mothers have negative attitudes toward fathers, father involvement tends to be less (Herzog, Umaña-Taylor, Madden-Dedrich, & Leonard, 2007; Kulik & Tsoref, 2010).
- Mothers' attitudes toward fathers' parenting after divorce are related to how they feel about the fathers' treatment of them during the marriage (Pruett et al., 2007).

Development of gatekeeping behaviors

During an intact parental relationship, some form of gatekeeping may serve a productive purpose, defining the roles with the child according to parental

availability and expertise. Parental responsibility may also be influenced by cultural background, religion, and general attitudes regarding gender differentiation and parental involvement. Well thought out and communicated delineation of parental responsibility can occur in the couple relationship, or be more implicit in nature, seemingly developing from the patterns assumed by the parents, especially if the parents were never a couple before the child was born. Responsibilities may be reassessed throughout the years according to the developmental needs of the children and to changes in the availability of the parents, or they may be prompted by life cycle events.

Gatekeeping conflict after separation is related to renegotiating the sharing of parental responsibilities as parents begin residing in separate households. Redefining relationships often proves quite challenging during times of transition. Necessary changes may pose threats to the parental identities that were assumed when the parents were together. Power struggles can occur when one parent has difficulty letting go of parental responsibilities and access at the same time that the other parent is attempting to broaden his or her role with the child.

Continuum in gatekeeping behaviors

In a legal dispute, analysis of the gatekeeping issue addresses how facilitative or restrictive the parent is likely to be in the role of a co-parent or in regard to a shared parenting plan. Past behaviors are the best predictors of future behaviors, so in shared parenting litigation the court will need to examine co-parenting attitudes and behaviors of each parent before and after the separation. The court will want to know if restrictive gatekeeping behaviors are tied to the divorce and litigation or if they are likely to be enduring. The Gatekeeping Continuum, presented in Table 1 below, addresses how inclusive each parent is toward the other in attitudes and behaviors.

TABLE 1 Gatekeeping Continuum © William G. Austin, Linda Fieldstone, & Marsha Kline Pruett

Ranges in attitudes/behavior from Facilitative Gatekeeping (FG) to Restrictive Gatekeeping (RG)		
Very Facilitative→Cooperative→Disengaged→Restrictive→Very Restrictive		
Proactive Toward Other Parent	→	Severely Alienating Behaviors
Inclusive of Other Parent	→	Marginalizes Other Parent
Boosts Image of Other Parent	→	Derogates Other Parent
Ongoing Efforts at Communication	→	Refuses to Communicate
Flexible Timesharing	→	Rigid Adherence to Parenting Time Schedule
Ensures Child's Opportunity to Develop Relationship with Other Parent	→	Blocks All Attempts for Engagement/ Closeness with Other Parent

TYPOLOGY IN GATEKEEPING

Facilitative gatekeeping (FG) is frequently described in a state's list of best interest factors. As noted above, in the Florida statute [§ 6.13(3)(a)], for example, it is the first best interest factor and focuses on parents' ability to support each other's child rearing role: "The demonstrated capacity and disposition of each parent to facilitate and encourage a close and continuing parent–child relationship, to honor the time-sharing schedule, and to be reasonable when changes are required." FG occurs when a parent acts to support continuing involvement and maintenance of a meaningful relationship with the child. Facilitating behaviors are proactive, inclusive, and demonstrate for the child that the parent values the other parent's contributions.

Restrictive gatekeeping (RG) refers to actions by a parent that are intended to interfere with the other parent's involvement with the child and would predictably negatively affect the quality of their relationship. While either parent can and does engage in gatekeeping, research and the content of many legal disputes focus on the mother's role as gatekeeper, since they are more often assuming the larger amount of hands-on childrearing. Maternal RG has been estimated to occur in one out of five intact families (Allen & Hawkins, 1999); however, RG is much more common between divorced parents (Fagan & Barnett, 2003), with bilateral RG characterizing high-conflict divorces.

Protective gatekeeping (PG) is a form of RG that arises when a parent acts to limit the other parent's involvement or is critical of the other parent's parenting skills because of concern about possible harm to the child. PG is defined in terms of the reasons a parent wants to limit access or involvement by the other parent. A history of substantial IPV; harsh parenting, substance or alcohol abuse; or a major mental disorder are common reasons for one parent to want to limit the other's access. The judge, of course, will require evidence to validate the parent's allegations. Orders for psychological or parenting time evaluations, substance abuse testing, or risk assessment for domestic violence may be necessary to provide the judge with corroborating information. Parents, usually mothers for example, also act protectively over concerns about the other parent's parenting experience and level of parenting skills. Mothers may assert that overnights for a very young child are premature and this would reflect a motivation to protect the child's well-being and sense of emotional security.

When the evidence supports the restricting parent's position, or corroborates allegations of harm, then it is a case of Justified RG. In such situations, telephonic access may be denied unless supervised on speaker, neutral settings for transfers of the child may occur, parental communication about the child may be restricted to electronic means or completely eliminated, and the other parent's time with the child may be limited to

supervised visitation. Sometimes the personal unresolved issues of a parent may result in RG, rather than concerns that are truly related to the child. When the evidence is not supportive of the gatekeeping behaviors, then it represents Unjustified RG. Applying the concept of Justified RG or Unjustified RG is essential in cases where a risk of harm is raised, such as in abusive relationships, relocation, or allegations of parental alienating behaviors are in question. A central part of child custody or parenting time evaluations is to assess whether RG and a parent's concerns about risk of harm are justified.

In custody disputes when there is a legislative declaration and best interest statutory factor to be supportive of the other-parent–child relationship, this "friendly parent doctrine" creates an inherent dialectical tension when there has been a history of IPV in the marriage. Courts should be extremely cautious about expecting victims of domestic violence to be "friendly" toward the ex-partner, especially when there have been ongoing or more severe forms of IPV (Austin, Drozd, & Dale, 2012; Austin & Drozd, 2012; Dore, 2004; Zorza, 1992). Table 2 illustrates differences between Justified RG and Unjustified RG.

TABLE 2 Justified Versus Unjustified RG © William G. Austin, Linda Fieldstone, & Marsha Kline Pruett

Justified RG – *Limits to parental access may protect children*	Unjustified RG – *Limits to parental access reinforce inappropriate behavior of restrictive gatekeeping parent*
Corroborated history of IPV	Parental belief in the greater importance of his/her role, most common among mothers
Harsh discipline of child/child abuse	Parents questioning the competence of other parent without adequate foundation
Parent's substance/alcohol abuse	Parent feels child's presence is essential to coping with divorce/separation, causing reluctance to share child
Parent's major mental health disorder/not taking prescribed medication	Parent's misperceiving that he or she is being marginalized and his or her value as a parent is not recognized, most common among fathers
Parent's continuous inappropriate parenting and co-parenting behaviors that negatively impact the child	Parent's anger and wish to punish other parent

The majority of separated parents are generally cooperative, often increasingly disengaged from each other and communicating on a limited basis (Maccoby & Mnookin, 1992). Judges are unlikely to see facilitative gatekeepers in court, though sometimes one parent may be cooperative in co-parenting while trying to deal with a restrictive gatekeeper. In pre-decree actions, judges may see parents who are deadlocked with legitimate perspectives on timesharing (e.g., overnights), and there may be an issue of risk of harm (e.g., IPV) that must be addressed before ordering the timesharing

plan. In post-decree and modification actions, judges are more likely to see the subset of parents who continue to experience enduring conflict or whose conflict resurfaces during a major transition (e.g., threatened move away). Each parent's track record on gatekeeping can be examined; RG is often the reason for the litigation.

Custody/Parental Responsibility Evaluation and Parenting Plan Recommendation

When the issue of gatekeeping is not resolved or when there are questions concerning the safety of the child and an investigative or evaluative process is ordered, judges can ask that the reports delineate gate-opening and gate-closing behaviors of each parent.

GATEKEEPING ATTITUDES AND BEHAVIORS

Judges need to be able to distinguish between gatekeeping attitudes and behaviors because unjustified RG attitudes are so commonplace with litigating parents. Parental cooperation and father involvement are related to such attitudes, along with corresponding behaviors. Facilitative gatekeepers encourage child–parent communication and contact. Behaviors are positive, constructive, and child-centered. However, the intense emotionality associated with separation and divorce litigation tends to evoke rigid thinking about the other parent as a person and as a parent that is often temporary and usually negative. Research shows that if parents can compartmentalize their negative feelings from co-parenting behaviors, then children transition more easily (Whiteside, 1998). If fathers can stay involved with the children in ways that facilitate FG behaviors, and/or FG behaviors encourage fathers to stay involved with their children, then the children are likely to show positive adjustment (Pruett, Williams, Insabella, & Little, 2003), even if mothers hold RG attitudes.

Gate-Closing and Gate-Opening Behaviors

A gatekeeping analysis will be more helpful in any legal context (e.g., litigation, evaluation, mediation, parenting coordination) if specific gatekeeping behaviors are identified and documented. Negativity in attitudes and beliefs about the other parent and his or her parenting is most relevant when it carries over into behaviors that cause conflict or separate the child from that parent. As with other issues either in litigation, mediation, or parenting coordination contexts, gatekeeping allegations need to be investigated and corroborated. The "gatekeeping debate" often will mainly consist of "he-said/she-said" data on restrictiveness. The checklist in Table 3 helps identify gate-opening and gate-closing behaviors:

TABLE 3 Indentifying Gate-Opening and Gate-Closing Behaviors © William G. Austin, Linda Fieldstone, & Marsha Kline Pruett

Examples of Gate-Opening Behaviors (FG)	Examples of Gate-Closing Behaviors (RG)
Reinforcement of Child's Relationship With Both Parents	
☐ Having photographs of the other parent in view of or easily accessible to the child	☐ Not permitting child to have photographs of other parent
☐ Praising gifts and cards given to child by other parent; having child send birthday and Mother's/Father's Day card to other parent; having joint birthday parties for child	☐ Denigrating or withholding gifts or cards from other parent; not allowing other parent to child's birthday party
☐ Telling child that there are no secrets between parents	☐ Asking child to keep secrets from the other parent
☐ Ensuring child knows that parents communicate about important matters jointly; refraining from using child as messenger or detective	☐ Using child as a conduit or messenger between parents; asking child for personal information about other parent
Parental Communication/Access to Information	
☐ Providing timely child-related information, without other parent asking for it	☐ Withholding information about the child
☐ Ensuring parent and parent's contact information is on all forms so all records are available to both parents	☐ Not placing other parent's name as parent on school/doctor forms
Parent's Interactions With Child/Child's Exposure to Conflict	
☐ Praising the other parent to the child	☐ Derogating the other parent to or in front of the child
☐ Protecting child from disagreements and parental discord; minimizing parental contact at transfer times; hiding adult information; demonstrating healthy resolution of disagreements	☐ Exposing the child to conflict and nonverbal tension; parental discord at transfer times; phone conversations in front of child; leaving adult information out and easily accessible to child
☐ Protecting child from monetary issues between parents	☐ Discussing child support issues with child; blaming financial difficulties and lack of purchases for child on other parent
☐ Allowing and actively supporting communication between other parent and child	☐ Making communication difficult between other parent and child
☐ Allowing privacy during calls, texts and emails between other parent and child	☐ Holding all conversations between other parent and child by speaker, if allowed at all; reading and censoring written communications between other parent and child
☐ Encouraging child to initiate calls to other parent	☐ Telling child not to call other parent
☐ Scheduling daily time for electronic communication between parent and child, including Skype time	☐ Making sure child is unavailable at call times; not giving child messages that other parent has called.
Timesharing and Child's Activities	
☐ Following the timesharing schedule; trying not to interfere with other parent's time; cooperating on needed changes as situations arise	☐ Not following the parenting time schedule; continuous misinterpretations of parenting plan; frequent requests for changes unrelated to job schedule

(*Continued*)

TABLE 3 Continued

Timesharing and Child's Activities	
☐ Being prompt at transfer times	☐ Being chronically late; providing no notice if delayed or unavailable; not showing on designated days without notice
☐ Being flexible so that the child maintains meaningful contact with other parent; ensuring that child attends life cycle events with each parent	☐ Being inflexible on needed changes to the scheduled times and days; restricting child from attending any event with other parent unless it is that parent's designated time
☐ Offering other parent first option to care for the child when designated parent is unavailable; allowing access to babysitters when needed	☐ Not honoring the right of first refusal if in the parenting plan; not informing who child will be with if not with either parent
☐ Encouraging development of own interests and participation of activities during parent's own parenting time	☐ Denying child's participation in extracurricular activities unless during other parent's time
☐ Sharing child's activities and functions; giving other parent notice of events; participating jointly	☐ Impeding other parent's participation; not giving notice to other parent of events; Not attending child's event if other parent is present
☐ Keeping other parent's time available for child	☐ Unilaterally scheduling activities during other parent's parenting time
☐ Modeling appropriate decorum when attending child-related activities; greeting and having child greet other parent at functions	☐ Putting child in the middle if both parents are at same function; keeping child from other parent

Temporary or enduring RG?

It is important for judges to try to distinguish restrictive behaviors that are separation and divorce litigation related or induced as opposed to signs that the RG will be enduring. After two years, about 80% of parents will be cooperative and postseparation conflict will have mostly dissipated (Hetherington, 1999a). On the other hand, enduring RG will likely fuel re-litigation. Gatekeeping is not an all-or-nothing prospect. There are nuances in gatekeeping behaviors. A parent may be restrictive in one area of co-parenting and cooperative in other areas. Table 4 compares litigation-related RG behaviors to more enduring gate-closing behaviors.

TABLE 4 Distinguishing Temporary From Enduring RG © William G. Austin, Linda Fieldstone, & Marsha Kline Pruett

Separation/divorce litigation related	Enduring gate closing
Mild to moderate resistance to following orders, and only those related to current litigation process	Indiscriminate and ongoing difficulty in following court orders
Progress in parental communication over time	Parental communication still fraught with conflict or is nonexistent
Progress in joint decision making	Automatic resistance to preferences of or requests from other parent
Progress in ability to compromise	No willingness to compromise

Social capital: explaining the gatekeeping effect

The general concept of social capital has been used to explain the "gatekeeping effect" (Austin, 2012; Austin et al., 2013). Social capital is defined as the psychological, emotional, and social contributions that are provided to the child by parents, siblings, extended family, peers, and other important relationships, and also by organizations, groups, and communities. Parents are the main source of social capital for the child. When parents are competent and committed, they both offer the child rich social capital. When the child is exposed to harsh parenting, intense or unresolved parent conflict, substance abuse, or domestic violence (e.g., "negative social capital"), then maladjustment is more likely (Hetherington, 1999b).

Gatekeeping theory generally proposes that RG places the child at risk for adjustment problems and lower developmental outcomes, while FG will produce better outcomes and healthier development. See Table 5 below to indentify behaviors that result in RG which can be addressed through court orders that minimize those occurrences.

TABLE 5 Indentifying Gatekeeping Behaviors That Affect Social Capital © William G. Austin, Linda Fieldstone, & Marsha Kline Pruett

Facilitative Gatekeeping (FG)	Restrictive Gatekeeping (RG)
☐ Regular access to extended family members of both parents	☐ Impeding access to other parent's family members
☐ Siblings on same timesharing schedule for large part/most of the time	☐ Sibling splitting on recurrent and consistent basis
☐ Expertise of other parent highlighted in child's life	☐ Employment of others to effectuate child- related tasks rather than other parent
☐ Child's activities are planned to maximize ongoing involvement in peer, sports, religious, or neighborhood activities	☐ Continuity in child's activities are often compromised by parenting schedules and behaviors
☐ Both parents support other important relationships and adults in child's life, at school, and in community	☐ Child's access and involvement with other important adults is negated, restricted, or actively prohibited to punish or control the other parent
☐ Positive role modeling regarding parenting, co-parenting, discipline, and respect for importance of each parent's developing relationship with the child	☐ Continuing residual domestic violence behaviors (harassment, intrusiveness), harsh parenting, substance abuse, and alienating behaviors by a parent

APPLYING GATEKEEPING TO CHILD-RELATED ISSUES IN LITIGATION

Gatekeeping in Relocation Cases

Potential harm to the nonmoving parent–child relationship, and therefore to the child, is always the central issue in a relocation dispute. FG by the moving

parent will be the key to managing the risk of harm to the child's relationship with the parent left behind. The residential parent in a long distance parenting arrangement needs to be proactive in promoting contact between the other parent and the child. Without this type of active cooperation, the quality in the parent-child relationship will greatly diminish. It could be argued that FG should be a necessary condition for judicial approval of a relocation request. FG is an essential risk management component in the implementation of a long distance plan. How gatekeeping analysis is applied to relocation cases has been discussed in the literature (Austin, 2008, 2012). Judges usually are not going to approve a proposed relocation when there has been Unjustified RG, but the fact pattern and/or legal context may result in a child relocating with the parent even though there is an unfavorable pattern of gatekeeping. In such cases, the parenting plan should be highly structured and very specific on all aspects (e.g., parenting time schedule, electronic contact, exchanges, travel, and so forth). Table 6 provides precautions that may minimize risks in relocation cases with either unjustified or justified RG.

TABLE 6 Components of Parenting Plans That Minimize Risks in Relocation Cases © William G. Austin, Linda Fieldstone, & Marsha Kline Pruett

For relocation cases with unjustified RG	For relocation cases with justified RG
Order child's address, school, activities, and all records to be available for both parents	Protect identity of moving parent/child's exact location, school, activities (e.g., severe domestic violence
Transfers midway or facilitated by moving parent	Neutral locations for transfers; may be midway; supervised transitions may apply
Ongoing communication between parents and between parent and child by phone, text, webcam, email, chat	Ongoing exchange of parental information through electronic means (Our Family Wizard or other Web-based data source); electronic communication between parent and child
Designation in parenting plan of vehicle and responsibility for costs of child's travel	Order regarding vehicle and payment of travel expenses for child
Substantial time set for child with nonmoving parent on a regular basis	Age and extent of child's wishes for contact should be specified and considered

Gatekeeping and Estrangement/Alienation

Behaviors by parents that could reasonably be expected to negatively affect the other-parent–child relationship and involvement represent gate-closing behaviors that typify RG. When such RG is unjustified and results in a child resisting or refusing to have contact with the other parent, the child may be showing signs of disaffection or—at its most extreme—alienation.

A behavioral pattern of alienation occupies the extreme, restrictive end of the gatekeeping continuum. The child is aligned with one parent and rejecting of the other parent in rigid ways, to uncompromising degrees. Cases

of substantial to severe estrangement or alienation may involve disturbed psychological dynamics between the rejected parent and the child and/or the child and a parent who is blocking access to the other parent. Alienation also involves parent–child boundary problems such as enmeshment; the parent may treat the child as a partner (parentification) or is inappropriately protective (infantilizing). As a result, the child is likely to have significant adjustment problems.

In these situations, the child may not benefit from the other parent's psychosocial resources or social capital. These types of parent behaviors require immediate and sustained intervention. It is important to identify specific gate-closing actions that require placement with mandated gate-opening behaviors.

Such cases are exceedingly complex and authorities do not agree on potential intervention strategies, ranging from judges ordering treatment options for child and parents, addressing possible need for reunification between parent and child, changing the conditions of the parenting time arrangement, or even changing the child's residential parent (Saini, Johnston, Fidler, & Bala, 2012). Limiting time with the parent exerting unjustified RG may be a consideration, especially when all else fails.

STRATEGIES TO REDUCE RG AND MOVE TOWARD FG

Optimally, as families complete their court processes, they are left with strategies that will reduce RG and encourage FG. Often with some support, parents can learn to implement these strategies. It is crucial for judiciary and family law professionals to approach cases with the concept of gatekeeping in mind if these issues are to be adequately addressed throughout the court process.

Judicial orders that leave no room for misinterpretation and include well-constructed parenting plans with detailed timesharing arrangements foster greater compliance. Judges can refer parents to resources that can address gatekeeping issues and reinforce changes toward more facilitative behaviors. Orders for services should include specific questions or reasons for the referral.

Professional Resources to Assist Parents With Gatekeeping Issues

Mediation

Gatekeeping can be used as an educational component to help a mediator to facilitate settlement. Mediators can create movement on parents' positions by connecting hindering behaviors to poor outcomes for children. Identification of RG serves to define obstacles in mediation. A PG perspective can help a parent better understand why the other parent is trying to limit his or her parenting time. Mediators may include items in agreements between the parties that limit RG.

Co-parenting education and counseling

Co-parenting counselors and educators can use gatekeeping research (see Austin et al., 2013) to inform parents of the benefits of sharing their children. Framing co-parenting in terms of gatekeeping and social capital can provide concrete reference points from which parents can assess their own co-parenting quality. Parents can be taught the importance of—and how to compartmentalize—negative feelings toward the other parent while co-parenting and can learn to become detached partners involved in the business of parenting and co-parenting.

If both parents are exerting RG, then co-parenting counseling may begin to address the issues. However, when RG is an issue with one parent, individual counseling may be a more appropriate referral; extended co-parenting or joint counseling can be ordered once RG issues are addressed first with the offending parent. Judges can also consider referring the children and parents for family counseling when RG is an issue; older children also may require individual counseling to address their personal issues confidentially. Both therapists can work together to achieve optimal results for the children. The gatekeeping perspective can be useful for professionals who are assisting with repairing ruptured parent–child relationships or even trying to achieve reunification.

Parenting coordination

Parenting Coordinators (PCs) can use a gatekeeping perspective to help parents identify behaviors that are helpful or detrimental to their children and coach parents to find conflict reduction solutions when there is an impasse. PCs can help parents implement their parenting plans, but cannot substantively modify parenting time to punish a restrictive gatekeeper. PCs can refer the parents and children for needed and appropriate services and can contact appropriate authorities, such as the child welfare department, if the gatekeeping behaviors of a parent are harmful to the child.

SPECIFIC CONSIDERATIONS REGARDING GATEKEEPING TO KEEP IN MIND

Judges, family law and mental health professionals, parenting coordinators, and parent educators may find it beneficial to keep the following in mind:

- The greater the conflict experienced by the parents, the greater the need for specificity when writing judicial orders and legal documents.
- Gatekeeping can be facilitative or restrictive (for protective or inhibitory reasons); inhibitory, gate-closing parenting behaviors create a risk of harm to the other parent–child relationship.

- It is important to identify specific gatekeeping behaviors and how these may have direct effects on the parent–child relationship. A danger exists in using the gatekeeping analysis solely for purposes of labeling a parent as a restrictive gatekeeper, without specifying behaviors that demonstrate the label.
- Each parent has social capital to offer his or her child; that social capital supports child healthy development through resources and social support. It is positive in the majority of cases, though not in situations of abuse, family violence, extremely harsh parenting, or estrangement and/or alienation.
- It is important to distinguish between negative-restrictive *attitudes* about the other parent and inhibitory-restrictive *behaviors*. The distinguishing question is: Can the parents compartmentalize their feelings and behave in ways that support the other parent to the child?
- It will be helpful to distinguish time-limited RG and separation and divorce litigation-related RG from an enduring, chronic problem.
- Restrictive behaviors representing justified RG can be distinguished from unjustified RG by determining if safety concerns are at issue.
- Understanding RG situations leads to better decisions about parental access and parenting plan considerations regarding shared parenting and decision making.
- Gatekeeping analysis may be central to relocation disputes; FG is essential in crafting a viable long distance parenting arrangement.
- Any behaviors aimed at disaffection of one parent and parent-alienating behaviors as an extreme form of RG require immediate and sustained intervention.
- Limiting time with the parent exerting RG may be a consideration, but as its impact on the child is poorly understood, such decisions are best saved until all else fails.

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Child Custody Evaluation and Relocation, Part I of III: Forensic Guideposts for the Evaluator and Court

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This is a three-part article on the issue of how to best to conduct child custody evaluations for the relocation case and how to review the quality of relocation-custody reports and evaluations. The article should be useful as a forensic and theoretical tool for custody evaluators, but it also should inform attorneys and judges as to what to expect in a high-quality custody evaluation involving a relocation dispute.

The purposes of Part I are threefold. First, the psycho-legal dilemmas associated with relocation are discussed. The legitimate wishes of a parent to relocate with the child away from the home community and other parent is juxtaposed with the other parent's intense wish to remain highly involved with the child in a "local parenting plan." This is the relocation conundrum. The nonmoving parent is often convinced his (or her) relationship with the child will be irreparably harmed if the court allows the child to relocate. The moving parent will assert that it is grossly unfair should the court deny the relocation request and she (or he) cannot reap the benefit from the purported reasons for the move, for example, a new marriage, a job, or to receive support from extended family in the community of origin.

Second, the nature of relocation and child adjustment are discussed in the context of the relevant theory and research. A large body of literature shows that relocation is a general risk factor for children of divorce just as is divorce itself.[1] It follows that if relocation of the child should occur, then the evaluator needs to address how to contain the risk of potential harm to the child–nonmoving parent relationship.

Third, 15 "guideposts" for evaluators are presented as a general guide or perspective on the challenges that face evaluators in relocation cases, as well for judges to consider.

Relocation cases are difficult to settle because there generally is not a way to compromise on the ultimate issue. Either the moving parent moves with the child, or not. As a result a high percentage of relocation cases are litigated and will require a child custody evaluation. There are exceptions, however. The nonmoving parent also can move to the new location, or somewhere closer, if the court

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permits relocation. Another option, when the moving parent is moving to join a new spouse, is to ask whether the new spouse can move instead of the parent. If there is going to be relocation, then the structure and specifics of the long-distance parenting plan can be negotiated and agreed upon.

Part II presents two alternatives to using a systematic approach to the relocation evaluation. One is the widely used relocation risk assessment forensic model.[2] The other is an efficient, practical, straightforward approach to this complex type of child custody dispute, or a psychological cost/benefit analysis that identifies the relative advantages and disadvantages of the two proposed alternative residential living environments associated with a potential long-distance parenting arrangement. It is an effective approach to the complex problem created by a potential relocation of the child. The evaluator can describe the pros and cons of relocation versus the court denying the parent's motion for the child to move.

Relocation is one of the complex issues that courts and evaluators encounter as defined by the *Model Standards for Custody Evaluation* by the Association of Family and Conciliation Courts.[3] Other complex issues include cases involving allegations of intimate partner violence, child sexual abuse, or alienation. The *Model Standards* call for custody evaluators to adopt a systematic approach when they encounter one of the complex issues. Part II presents two systematic approaches for organizing data collection and interpretation for the relocation case to assist the evaluator in making recommendations to the court.

A high percentage of relocation cases are litigated.

Part III discusses the process of forensic consultation and expert testimony in relocation cases. Due to the complexity of relocation cases it is not uncommon to encounter child custody evaluations that have significant deficiencies, thus making forensic consultation services an attractive option for attorneys. The attorney who encounters an unfavorable recommendation by the court-appointed evaluator and believes there are significant issues with the quality of the evaluation may want to address the issue by requesting the forensic consultation services of a work-product review for a potential rebuttal expert witness. The consulting forensic psychologist should strive to conspicuously adhere to ethical guidelines to conduct an objective review of the custody evaluation and report; be balanced in his or her analysis; be aligned with the data and application of the professional literature; and follow the oath to tell the truth. Otherwise, the testifying rebuttal expert will be viewed by the court as not credible. A consulting forensic expert provides a type of checks and balances in the family court to examine whether the court's expert evaluator was providing reasonable and accurate analysis. The stakes are high in custody disputes, especially in relocation cases, in which the child's future and best interests are under the evaluator's (and judicial) microscope with the potential that a long-distance parenting plan will be put into place.

CURRENT MOBILITY CENSUS DATA

The latest US Census data show that the overall rate of mobility remains high in the United States, although recent data indicate a decline in mobility over time. Of individuals aged one year and over 35.9 million moved to a different residence in the United States between 2012 and 2013. This is an annual "mover rate" of 11.7 percent of the total population,[4] a significant decline from 15.9 percent in the 1998–1999 census.[5] The 2010 census survey data indicates that 100 million people moved, but this was a decline from 107 million in the 2000 census. There were fewer inter-county and interstate moves over the five-year period, 2005–2010. The overall mover rate shows a downward (but still high) trend with 45.9 percent (1995–2000), 39.5 percent (2000–2005), and 35.4 percent (2005–2010). The census bureau publications do not differentiate inter-county and interstate moves; they comprised 15.7 percent in 2010.[6]

Nonresidential/noncustodial parents move with considerable frequency.

Not surprisingly, separated individuals were the most mobile group, 55.1 percent,[7] and this mirrors previous census data.[8] Never married individuals were similarly very mobile (44.2 percent). As with previous estimates, the latest data show that young children have a high mobility rate, at 44.7 percent for five- to nine-year-old children,[9] similar to that found in an Australian study.[10] It seems reasonable

to conclude that this rate reflects both the high divorce rate and the high mobility rate among both young adults and separated or divorcing individuals. The age groups that are more likely to have younger children have higher moving rates, for example, 25–29 years, 65.5 percent and 30–34 years, 45.5 percent. The divorced group has a relatively low rate (26.1 percent) probably reflecting that part of this cohort had been divorced for a number of years and had largely already transitioned into new housing and post-divorce life.

THE RELOCATION CONUNDRUM

Relocation cases are some of the most challenging that judges and evaluators face. Both professionals are presented with a conundrum of competing interests, constitutional rights, and practical challenges on how to craft a workable long-distance parenting plan, if the result of litigation would be the implementation of a long-distance parenting plan. One state high court referred to such disputes as "the most vexatious," in their nature.[11] When custody disputes are litigated and go to trial, judges inevitably will feel as though they are wielding the proverbial "Solomon's sword",[12] but the judicial task is even more daunting when the outcome may be the establishment of a long-distance parenting arrangement.

Relocation often turns a cooperative co-parenting relationship into high conflict.

The psycho-legal relocation dilemmas concern the conflicting social policy goals and constitutional rights of parents to both have the right to travel (and implicitly pursue personal, social, vocational, or educational goals in order to improve one's quality of life) and to have access to and involvement with one's children. On common sense, intuitive grounds for most persons, laypersons as well as professionals, it does not feel right or comfortable for there to be a voluntary separation between a parent and his or her child. This is why for both evaluators and judges the problem of anti-relocation bias is such a real problem in contested relocation cases, as discussed later.[13] There is some indication that as a result of the last downturn in the economy relocation seemed to become more frequent in the hardest hit states, for example, Michigan.[14]

Children and parents both adjust to divorce with time, but separation in a "local" parenting time arrangement poses fewer obstacles in maintaining the parent-child "reciprocal connection."[15] Motivated, responsible nonresidential parents generally are able to stay highly involved with the child and to sustain a meaningful relationship. In contrast, in a long-distance parenting arrangement, it is much more challenging to sustain quality and a meaningful parent-child relationship.

Commonly, the moving parent will present a "maximum access plan."

Authorities point out the reality that relocation, especially with an interstate move, inevitably will alter the quality of the nonresidential/distant parent-child relationship. Even a local move can substantially alter the ability of the nonresidential parent to be involved if there is a conservative parenting time plan in place.[16] This will be the reality with a "substantial local move" in a large urban metropolitan area.

Case law and "relocation statutes" in many states (at least 37 states) show that every state recognizes that a parent's desire to relocate is legitimate and needs to be fairly examined, even when it is an interstate or international move that is being proposed. States do not have case law that requires a "necessity test" to justify the proposed move.[17] Herein lies the psycho-legal dilemma created by relocation. There are two competing, legitimate policies, and realities in post-divorce families. In some instances, albeit infrequently, when a relocation request (for example, a motion to the court) is denied, and the parent (usually the mother) feels she has no choice but to move without the child, then the same risk and challenge for long-distance parenting is created. That is, there will be an extended separation from a parent. It should also be kept in mind that nonresidential/noncustodial parents move with considerable frequency, thus also creating risk for the child. The distance creates the psychological risk to the child. Research shows that considerable geographical distance does indeed negatively affect parent involvement[18] and poses long-term adjustment issues when geographical separation is created by either parent moving.[19]

The challenge for both parents is how to manage the risk of harm to the parent-child relationship and then indirectly to the child when there is a long-distance parenting plan. The research described

below clearly demonstrates both the potential harm to the child of divorce associated with relocation and the importance and benefit to the child's development and well-being when there are quality relationships with both parents, and with fathers.

The author proposed two types of potential "theoretical harms" associated with relocation and the resulting situation of long-distance parenting.[20] There is potential "relationship harm" associated with less involvement and a qualitative negative shift in the relationship due to the practical limitations for involvement associated with long distance. Second, there is potential "developmental harm" to the child due to less involvement by the distant parent and all the psychosocial resources and assets that the parent brings to the table (for example, "parent capital").[21] Children also are placed at risk of adjustment difficulties due to being exposed to the parental conflict that relocation inevitably produces, or "relocation engendered conflict." Relocation often turns what was an existing, established cooperative co-parenting relationship into one characterized by high conflict and mistrust.

Relocation can be considered a general risk factor for children of divorce.

The psycho-legal dilemmas associated with relocation inevitably cause angst, and sometimes, moral outrage in the parents' expressions and behaviors. The nonmoving parent's perspective (usually the father) inevitably will be that relocation will severely damage the quality of his relationships with the children. He often asserts the moving mother is trying to "alienate" the children from him. This will seldom be the case, but the proposed relocation is appropriately analyzed in terms of how supportive the moving parent has been (and will likely be in the future) of the other parent-child relationships, or a parental gatekeeping analysis.[22] The moving parent often will genuinely maintain that she will be supportive of those important relationships. Or, the moving parent's lawyer will advise her (or him) that it is important to appear supportive. Commonly, the moving parent will present a "maximum access plan" for the other parent's parenting time and contact in a proposed long-distance parenting arrangement to demonstrate her support. This may do little to assuage the other parent's sense of anticipatory loss and panic about "losing his child."

From the moving parent's perspective, if the relocation request is denied, she will also experience a sense of emotional loss related to lost opportunity related to the reasons for the move. She will assert the court's decision to deny relocation of the child will be unfair both to her and the child. The reasons for wanting to relocate usually will be legitimate. The most frequent reason for moving is for a mother to want to return home to her community of origin to receive support (for example, social, emotional, financial, and child care) from parents, extended family, and friends. However, courts often are disinclined to approve moves when this is the only reason.[23] Moves due to economic opportunity or remarriage may be more persuasive to the court because of the perception that the parent has little "realistic flexibility" on the moving issue.[24]

Effective parents learn to compartmentalize negative, nonsupportive attitudes.

RELEVANT RESEARCH ON DIVORCE AND RELOCATION

Effects of Relocation on Children of Divorce

Extensive research from sociology and demography shows that residential mobility (or relocation) is a strong predictor of the long-term adjustment and well-being for children of divorce.[25] The research is so impressive that relocation can be considered a general risk factor for children of divorce just as divorce itself is. More moves create more risk, but one high-quality study with a large sample found the "relocation effect" was associated with just one move. There were significantly more emotional and behavioral problems at school for children of divorce compared to children in intact families who moved.[26] As a result of this research, the challenge for custody evaluators is to recommend parenting plan options that will address the issue of managing the risk and mitigating the potential harm associated with long-distance parenting.[27]

Importance of Both Parents

Another substantial research literature shows that children of divorce show better long-term adjustment and well-being when they enjoy quality relationships with both parents, especially if the exposure to

parental conflict can be contained.[28] Similarly, research has demonstrated the importance of fathers for children's development and adjustment,[29] even when there is significant parental conflict.[30]

Social Capital Analysis

Social capital is a widely used concept in the social sciences[31] to explain the way social resources enhance how well individuals cope and succeed. In the context of divorce, social capital refers to the psychosocial resources that children receive from the important relationships and experiences in their lives. Parents are the most important source of social capital, especially for young children. This concept serves to explain why children do better when there are two involved parents following separation and divorce, or the benefits known to be associated with shared parenting time arrangements.[32] Prominent researchers have relied upon the concept of social capital to explain the benefits to children of divorce from continued father involvement.[33] Social capital helps explain the common empirical finding that children in two-parent intact families show better long-term outcomes and well-being compared to children raised in other family structures.[34]

There is great variation in state relocation law.

Parental Gatekeeping

The focus of relocation disputes inevitably is on the potential damage to the nonmoving parent-child relationship. The research-based parental gatekeeping forensic model addresses this issue.[35] Gatekeeping refers to the attitudes and actions of a parent that affects, or can be expected to have an impact on the quality and involvement of, the parent's relationship with the child, either positively or negatively. Research shows maternal gatekeeping is significantly associated with the father's actual involvement and child adjustment.[36]

Thirty-two states have a statutory best-interest factor that can be considered a "gatekeeping factor." This factor takes on added meaning in the context of a relocation dispute. The court will want to know whether the moving residential parent is likely to be supportive, and probably proactively supportive, of the nonresidential, nonmoving parent-child relationships.

The gatekeeping continuum ranges from positive, facilitative, inclusive co-parenting on one end to very restrictive, inhibitory gatekeeping on the other. Severe parent alienating behaviors would exemplify very restrictive gatekeeping. While using other descriptive terms, nonmoving parents routinely assert, in effect, that relocation represents very restrictive gatekeeping by the moving parent.

One could argue that a parent's motion to relocate with the child a very long distance away from the other parent or an interstate or inter-country move, represents restrictive gatekeeping. The question for the evaluator and the court, then becomes one of determining whether the proposed relocation can be justified in light of the context, circumstances, and fact pattern in the case, or reaching the conclusion that relocation would be justified restrictive gatekeeeping.[37]

Colorado has eleven best interest factors and nine relocation factors.

Both parents often engage in restrictive gatekeeping following separation and divorce. It is part and parcel of parental conflict. Effective parents learn to compartmentalize their negative, nonsupportive attitudes about the other parent from their gatekeeping behaviors so that both parents can be active participants in the parenting and co-parenting process, or a constructive shared parenting arrangement. This process of compartmentalization is part of functional co-parenting in spite of residual hostility and resentment that still may be brewing. When the nonmoving parent can demonstrate that the other parent has shown a history of restrictive gatekeeping, then it probably will carry much weight with an evaluator (and judge) on the relocation issue.

Research Factors to Consider

Another source of research that is relevant to approaching the relocation dispute comes from the research literature on child development and the effects of divorce on children. The research-based relocation risk assessment forensic model[38] was extrapolated from this research literature to provide a framework for custody evaluators and courts to use. It is a first step in organizing the data in the case in terms of risk and protective factors. The factors are research-based, and some of the factors

resemble common statutory relocation factors such as gatekeeeping, past involvement by the parents, age, and distance. The research-based factors can be used for organizing the data and relocation analysis in a way that is complementary to the consideration of the legal relocation factors found in the state's statutes and case law. The forensic model is described at length in Part II.

Families Involved in Relocation Custody Litigation

Several creative research projects on relocation have been conducted in several other Western countries. Cashmore and Parkinson and Taylor studied the real life experiences of parents who were involved in relocation custody litigation, both in instances in which relocation was approved by the court and in which it was denied and usually the parent did not move without the child.[39] They have studied a limited number of children to try to ascertain how they adjusted to relocation. All of the relocating parents were mothers.[40]

Facilitative gatekeeping can mitigate relationship harm.

The research is qualitative and descriptive so the findings must be considered preliminary and only as a basis for multiple, interesting hypotheses on relocation issues. Cashmore and Parkinson had a sample of 40 fathers and 40 mothers and they were studied over a period of years. About an equal number of cases resulted in relocation or a denial of relocation. A high percentage of the cases had a child-custody evaluation conducted. A high percentage of fathers (but limited in actual number) followed relocating mothers and children to either live in the new community or to be closer to them. A few mothers moved without the child; one moved back. When relocation was allowed, the left-behind fathers were (not surprisingly) generally still quite distressed after several years. Mothers who were allowed to relocate were the most satisfied and thought the move had turned out well for the children. Only a small number of children were interviewed and assessed on a behavioral measure, but they seemed to have adjusted reasonably well to the move, fit in at school, and made new friends. They reported missing their friends. These are not surprising results, but they are preliminary and suggestive. Mothers who stayed in the home community after relocation was denied were disappointed, but generally came to value the contributions of the father.

The research is useful in revealing many of the practical realities associated with relocation. Children did not like long auto rides to spend time with the distant fathers. They preferred air travel. Many fathers could not exercise all of their court-awarded parenting time due to time constraints and cost. The researchers found that many of the moving mothers had not thought through their proposed move very well and the cost of litigation. When remarriage, re-partnering is the main reason for the move they emphasized that moving parents should consider whether the new partner could move instead.

THE RELOCATION PARADOX

A legislation declaration that can be found in the domestic relations statute in many states announces a social policy to encourage the continuing involvement by both parents in the lives of the children.[41] The research cited previously shows there is scientific support for this pronouncement. Because relocation poses huge obstacles to the continuing involvement by the nonresidential parent, it creates the "relocation paradox." State relocation statutes and case law in effect create the competing social policy of recognizing the legitimacy of a parent's intent to relocate with the child, and hence, the paradox or dilemma found in all contested relocation cases, for example, relocation is likely to diminish involvement and relationship quality.

Summer can become "compensatory parenting time."

The challenge for the court and evaluator is to consider how to manage the risk of relationship harm should there be a long-distance parenting arrangement. There can be a high-quality, noncustodial parent-child relationship with long distance, but it will be a qualitatively different type of relationship.

VARIATIONS IN THE LAW

Unlike other types of custody disputes, relocation cases require evaluators to have an advanced and nuanced understanding of the controlling

state law. In other cases, an evaluator may need to understand the controlling legal standard for a modification of an existing parenting plan and permanent court order and the best interest factors, but it is unlikely that there will be a lot of legal nuances. An evaluator might need to know how to gather data to help the court understand whether there had been a substantial change in circumstances since the previous order was issued, or, what the standard for modification might be if there had been an equal parenting time plan in place. An evaluator might need to know the state's definition of domestic violence if there had been allegations so as to assist the court in making a finding on the issue. Knowing the definition would be necessary to guide data gathering on the issue.

The author's experience is that anti-relocation bias is commonplace.

Professional guidelines and standards direct psychologists and custody evaluators to have an adequate understanding of the law. Both the ethics code for psychologists[42] and the model standards for custody evaluation[43] contain such provisions.

Relocation cases are much more challenging for evaluators to understand the law. There may be many nuances and ambiguities. For example, California and Colorado (pre-decree cases only) require evaluators and the court to assume that each parent will actually be living in the location that they designate for the litigation. This is an ambiguous issue in the law of most states. Surprising, in a recent survey of evaluators[44] the majority of evaluators thought their state law required them to make this assumption about location. It often is ambiguous whether an evaluator can consider if a moving parent would actually move without the child if the relocation motion was denied. California explicitly forbids the court from considering such information. Conversely, it usually is unclear if the evaluator and court could consider if the nonmoving parent could or would follow the moving parent and child. However, the state of Washington explicitly directs the court to consider this information.[45] It may be unclear under state law if the court can simply deny a relocation motion without being prepared to change the residential parent in a post-decree modification case.

Evaluators certainly need to be aware of and measure data on any relocation factors that are present in statute and case law. Some states assign a burden of proof to one of the parties that then may shift when a *prima facie* case is made on the reasons and context for moving, or opposing the child's relocation.[46] The evaluator can assist the court with relevant data so the legal standard can be applied. Typically, the moving parent will have the initial burden of proof to show the move is a reasonable one[47] and sometimes with also providing a "reasonable financial security."[48]

There is great variation in state relocation law[49] with 37 states having relocation factors in a statute (in 2010). Other states, such as California, New York, North Carolina, have relocation factors found only in case law. Some states, such as Colorado and Illinois, have relocation factors in both statute and case law. North Carolina doesn't have best interest factors in either statute or case law, but has relocation factors in case law.

The prevailing trend for a legal standard for relocation among the US states, for many years, has been a "best interest of the child" standard with a list of relocation factors.[50] Only a few states, such as New Jersey, have a presumption either for or against relocation by a residential parent, but not if there is equal parenting time. California has a statutory presumption, but it is overcome by a showing of substantial harm to the nonmoving parent-child relationship.

15 IMPORTANT GUIDEPOSTS FOR EVALUATOR TO CONSIDER

The following starting points or "guideposts" are proposed for child custody evaluators to consider as part of their systematic approach.

(1) *Knowledge of law, importance of legal context for fact pattern, and nuances in the law*.

As noted previously, evaluators will be wise to have a solid foundation in their knowledge of the nuances and differing contexts on the application of relocation law in their state. They should know what legal standard applies and when. They need to assess all of the best interest and relocation factors in statute and case law. The pre-decree vs. post-decree context may be important. The evaluator needs to know if the court should

assume that the parents will be living in the location they designate. It is important to know if there is a bar to considering information on whether the moving parent would move without the child, if relocation were to be denied, or, if information could be considered that the nonmoving parent would also move if relocation were to be approved, as in the state of Washington. When there is ambiguity about the law, the evaluator would be wise to ask the attorneys, who in turn, may need to ask the court for clarification to assist the evaluator.

(2) *What are the moving parent's stated reasons for relocation and the reasons for opposing relocation by the nonmoving parent*? This factor is almost always found in the list of factors found in US states. Sometimes it is referred to as the "motives" for wanting to move, or opposing the move, for example, as in Illinois. The stated reasons for the parents requesting or opposing relocation is almost always found in the pleadings. Judges always want to know if the proposed move makes sense for improving the parent's quality of life and for the child's best interests. The evaluator can assist the court by collecting details on the reasons and whether the data correspond with the parents' stated reasons. The evaluator can assist the court on the issue of whether there appears to be "bad faith" or showing "vindictive motives" in the relocation scenario. These terms are sometimes found in state high court opinions and often have to do with retaliation (for example, a relocation motion in response to a change in custody modification motion) or with trying to minimize the other parent's role in the life of the child (for example, restrictive gatekeeping or alienation). In a well-known California case that was upheld on appeal, the trial court found that the mother's purported intent to receive training in parapsychology in a Florida program was insufficient and suspect as a reason to justify relocation.[51] In a recent New York case[52] the appellate court cited the relocation factors from case law[53] and then performed a factual and practical analysis to determine whether relocation would be in the child's best interests. The mother wanted to move to Texas to be near her family and work in a family business. The court questioned whether there really would be much financial improvement, and the mother was unclear exactly what her salary would be. The court was swayed by the father's degree of involvement and also by that of the paternal grandmother on a regular basis.

(3) *Fundamental comparison and importance of investigation of the facts and issues*. All litigated custody disputes require the evaluator and court to consider data or evidence on what the quality of life will be like in two alternative residential placements or parenting arrangements. In the relocation context, the evaluator needs to be especially vigilant in assembling the necessary data to help the court understand the advantages and disadvantages for the child associated with the alternative living scenarios. The evaluator's duty to be a thorough investigator takes on added meaning and responsibility in the context of relocation. The evaluator needs to help the trier-of-fact visualize what life will be like for the child if he is living primarily with the moving parent versus continuing to live in the home community with the nonmoving parent as the residential parent. With a relocation analysis, the evaluator needs to gather sufficient data to conduct this comparative analysis for the court *as if* there was going to be long-distance parenting in place. Best practice would require the evaluator to conduct a site visit to the proposed new community where extended family can be interviewed, the school examined, and so forth, but it may prove too expensive.

In some states, relocation law is set up so the evaluator needs to explicitly make predictions about the child's outcomes and best interests as if the child would relocate with the moving parent. The fundamental comparison, or comparative analysis, would also require the evaluator to do the same if there was a change in custody (or the residential/custodial parent) due to the parent moving. It appears to be more often the case that the judicial relocation analysis allows the relocation to be denied without addressing the issue of a change in custody and assuming the mother would not move with the child. It appears that the majority of evaluators

assume they need to make the comparative analysis,[54] but it is probably the case that judges routinely turn down a relocation motion without ever addressing the issue of a change in custody. In the New York case reviewed previously[55] the appellate court simply concluded that relocation would not be in the child's best interests. A possible change in custody from the mother to the father was never addressed.

When the state's relocation law permits the court to deny relocation without addressing the issue of a change in residential/custodial parent, this would appear to be a theoretical internal inconsistency in the law. It also functions as a *de facto* presumption against relocation when there is a competent, involved nonmoving, nonresidential parent. The comparative analysis is not how the child's best interests would be served when living in the two communities with the respective residential parent. Instead, the analysis becomes how the child would fare while living in the new community with the moving, residential parent versus the status quo with both parents continuing to live in the home community with continuity and stability in school placement, friends, extended family, and extracurricular activities. This situation is an unfair comparison that will almost always favor the scenario on the child not moving.

(4) *Evaluators should utilize a systematic approach to the case and fact pattern to guide the design and implementation of the forensic evaluation, as suggested by the AFCC Model Standards (2006/2007*). Two options for a systematic approach are discussed in Part II. They include, first, the relocation risk assessment forensic model,[56] and second, describing the relative advantages/disadvantages of the child relocating versus not moving, or a psychological cost/benefit analysis[57] applied to the fundamental comparison.

(5) *Assess the factors from the statute and case law, and other relevant factors.* A majority of US states require evaluators and courts to consider specific relocation factors in addition to the basic best interest factors that may be listed in the statute and case law. For example, in Colorado the court and evaluator must explicitly consider all 20 statutory factors, 11 best interest factors and nine relocation factors.[58] In California, the controlling case law lists nine factors for courts to consider, but indicates there may be other relevant factors.[59] Common relocation factors would include the child's age; the distance of the move; the past pattern of involvement by both parents, including whether there has been a primary caregiver parent; the impact of the move on the child; and whether a suitable alternative parenting time schedule can be created to sustain the continuing involvement of the nonresidential parent.

(6) *Past and projected pattern of parental gatekeeping by both parents*[60] as this factor holds the key to maintaining quality in the parent-child relationships in the context of long-distance parenting. The ability of the moving parent to support the other parent-child relationship will be a focus of most litigated relocation cases as the nonmoving parent will assert that the move will damage his relationship with the child and thereby harm the child. Facilitative gatekeeping provides the family with resources for mitigating relationship harm. Does the moving parent's proposed parenting plan for long-distance represent cooperative co-parenting and facilitative gatekeeping? Will the resident parent be inclusive and proactive on promoting the distant parent-child relationships? The gatekeeping factor is a common statutory best interest and relocation factor in case law.

(7) *What is the degree of realistic flexibility on the moving issue for the moving parent, and if allowed by law, for the nonmoving parent on the option of also moving and following the child?* This is an important consideration for the court in determining whether the move makes sense or is a cogent move. Remarriage, a unique employment opportunity, or the need to care for an aging parent may be examples on the degree of realistic flexibility. The evaluator can gather valuable data for the court on this issue.

(8) *Based on the investigation and forensic assessment, is the nonmoving parent a viable candidate to be a resident parent*? Only if the state

law clearly has to consider a change in custody as an option as part of the relocation analysis is this necessary. If the law places both parents on an even playing field, then this step in data gathering in analysis is necessary. If the nonmoving parent is not a "viable candidate" to be the primary and residential parent in a long-distance parenting arrangement, then the task for the evaluator becomes limited to recommending alternative parenting time or access arrangements and schedules in a new long-distance parenting plan.

(9) *Practical and logistical questions and issues*. More so than in other types of custody disputes in which parents live locally, evaluators need to carefully examine issues of time, travel, and the financial resources of the parents. In an interstate, long-distance arrangement with limited financial resources and flexibility on getting time off work, a nonresidential parent simply may not be able to travel to the child's new community. In the case of a young child, a parent would need to accompany the child with air travel. Custody evaluators seldom need to (and should not) address financial issues between the parents. With relocation, evaluators will want to address the issue of travel costs, but should not make recommendations about who should be responsible for travel costs as this is a matter of equity for the court to consider. Evaluators should not take at face value a nonmoving parent's assertion that he simply cannot afford to travel.

(10) *What do model parenting plans offer in considering alternative parenting plans should there be relocation and long-distance parenting?* Arizona may be the only state that addresses the issue of appropriate or alternative model parenting plan options to consider for long-distance parenting.[61] Evaluators need to have an understanding about what types of plans and schedules will be developmentally appropriate with the overarching consideration of how to sustain quality in the nonresidential parent-child relationships. This is obviously more important for younger children. With an involved nonresidential parent, older children would be expected to would spend long blocks of extended parenting time with the distant parent in the summer and for many of the school vacation times.

(11) *What future access schedules should be anticipated to reflect the changing developmental needs of the children*? If there is to be a long-distance parenting plan with younger children, then evaluators can be helpful to the court by considering gradual increases in parenting time for the nonresidential parent. With younger children the best parenting time schedules may be those with frequent shorter parenting time blocks. Practical realities may preclude this from occurring. With advancing age and developmental maturity, longer blocks of time become appropriate. Summer can become "compensatory parenting time" for the diminished involvement of the nonresidential parent during the school-year months.

(12) *Does the law allow or require that indirect as well as direct benefits associated with relocation be assessed?* Many state relocation laws address whether relocation will improve the quality of life for the parent and child. Evaluators may want to address the issue of indirect benefits to the child separately from the direct benefits to the moving parent, or an expected "trickle-down effect." Several states, including California, Colorado, and Illinois, make this explicit. A moving parent will argue, for example, that an expected improved financial situation associated with relocation (for example, a new job or less expensive housing) and support from extended family are expected to benefit the child. The evaluator with adequate investigation can provide specific data on these details.

(13) *Evaluators can be helpful to the court by presenting data on a "cogency test" for relocation* so the court can determine whether the proposed move makes sense for the child's best interests, and also what will be the least detrimental alternative decision. The cogency test consists of consideration of the reasons for the move; the relative advantages and disadvantages; and the degree of realistic flexibility for the parent on the issue of moving.[62] For example, with a two-year old child a least detrimental approach to the issue would be to ask if the move could

be delayed until the child was five years old, when the child's cognitive development was more mature and the child could more easily retain memories of the distant parent and reap more benefit for electronic communication. Evaluators should address the issue of and make recommendations for "virtual parenting time" (for example, Skype) in every case, if relocation is approved by the court.[63]

(14) *Evaluators need to not view proposed relocation as showing the moving parent is not putting the needs of the child first*, which is a common statutory best interest factor in the U.S.. This is due to the fact that all states recognize a social policy that relocation is a legitimate choice for parents to make in order to better the quality of their life and that of their children. The author's experience in reviewing colleagues' child custody reports and evaluations is that it is not uncommon for evaluators to view relocation in this way. Even though almost all proposals for relocation reflect the wishes and interests of the moving parent, rather than those of the child,[64] case law has described how the child's interests are expected to be intertwined with that of the moving parent.[65]

(15) *Evaluators need to be vigilant about avoiding bias in relocation cases more so than in other types of custody dispute cases*. The author's experience is that anti-relocation bias is commonplace.[66] This is understandable in light of the strong research on the importance of both parents' involvement for the child's best interests. In one case, the judge in ruling against relocation from the bench stated that any relocation case in her courtroom would not be approved "as long as the dad can get up in the morning and look in the mirror." The case was a difficult one with two different fathers for the two young children (ages five and seven years) with a proposed move to China for two years. The move made sense as the primary caregiver mother had a new husband whose job with Intel had ended locally, and he was offered the opportunity to open Intel's first manufacturing plant in China. In another recent case, the evaluator successfully talked the mother out of wanting to move from Colorado to Montana because he thought the children were too young. Making such an intervention might be tempting with very young children, but it would not be ethical to do so.

SUMMARY

Most Western countries have a high divorce rate and concomitant high rate of residential mobility. Young parents with young children may be the most mobile group of parents. This formula makes for child custody relocation disputes with considerable regularity. The difficulty in settling such disputes through negotiation and mediation makes it fairly likely that such disputes end up in the courtroom and for a child custody evaluation to be ordered by the court.

The complexity of relocation disputes and the presence of countervailing social policies require custody evaluators to receive extensive advanced training. They need to adopt a perspective so that value judgments about relocation are checked; bias is controlled; and the parents are viewed as on equal footing on the relocation issue. This is a challenge for many evaluators, especially when a proposed relocation involves a long distance move and a very young child.

The complexity of relocation cases creates psycholegal dilemmas that face the evaluator in every relocation dispute. Research and common sense point out the risk of potential harm to parent-child relationships and the child's overall adjustment and development. The risk of harm associated with relocation, from the literature on the effects of residential mobility on children of divorce, should not be interpreted to mean that most children who relocate will suffer irreparable development harm and will have a low long-term sense of well-being. The risk perspective should not be used as a deterministic view to oppose cogent relocation petitions to the court. Case law points out that some detriment to the nonmoving parent-child relationship is inevitable, but if all a parent had to do was to demonstrate some modest degree of detriment, or relationship harm, then no relocation motion would ever prevail.[67] With resilient children and a resourceful, competent, and nurturing residential parent it can be predicted there will adequate coping, adjustment, and well-being. Evaluators need to take a risk management approach to try to sustain quality in the nonresidential, distant parent and child relationships. Evaluators need to be mindful of the dangers associated with restrictive gatekeeping in a

parent who wishes to relocate. A practical and creative approach to crafting a long-distance parenting plan is needed to keep the distant parent involved, if there is to be a long-distance arrangement.

The research on parent involvement and child well-being following divorce supports the social policy of encouraging the continued involvement of both parents following separation and divorce. The competing social policy of recognizing that it is a legitimate life decision for a divorced parent to wish to relocate with his or her child makes it difficult for the other parent to stay meaningfully involved. This situation is the relocation paradox that is inherent in such cases.

This article presented 15 forensic guideposts to alert custody evaluators to general issues and questions associated with relocation to guide the design and implementation of their evaluation. The guideposts can be used with the forensic evaluation models to be described in Part II that provide structure for the gathering and analyzing data. The guideposts can be considered by attorneys as they scrutinize the quality of a child custody evaluation and recommendations to the court.

There is a large amount of research literature that is relevant and can be directly applied to relocation cases. Some of this research literature is captured in the relocation risk assessment model that will be presented in Part II.[68] The complexity involved in the relocation conundrum allows the custody evaluator to be more scientifically grounded in his or her approach. However, the evaluation process in relocation cases also can illustrate both the art and science of custody evaluations that authorities describe as a useful perspective.[69] The research allows for useful hypotheses to guide data collection and interpretation. At the same time, the realities of relocation disputes and the possibility of long-distance parenting and co-parenting require extensive practical analysis and problem solving.

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Child Custody Evaluation and Relocation, Part II of III: Options for a Systematic Approach to Forensic Evaluation

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Part I of this three-part article (which appeared in the last issue of the *American Journal of Family Law*) ended on a note that the complexities involved in child custody relocation cases presented an opportunity for custody evaluators to be more scientifically-grounded in their approach to the case and that relocation cases require both the art and science approach to custody evaluation.[1] An extensive research literature exists that is relevant to the issues elicited in a relocation dispute, yet every such case requires extensive practical analysis and problem solving on whether a long-distance parenting plan is feasible and workable. Case law and state statutes identify specific relocation factors for courts and evaluators to consider. Yet, state high court opinions emphasize that a best interest of the child analysis must inevitably be fact-intensive that derives from the context and circumstances of the caseor, that there is "no bright line" on how to apply relocation factors and no substitute for the sound application of judicial discretion.[2]

Part I described the psycho-legal dilemmas that are inherent in the conundrum posed by relocation disputes. Social policy dictates it is a legitimate, understandable life decision for a parent to wish to relocate with his or her child while pursuing new opportunities and circumstances to achieve a higher quality of life for parent and the child. There is a countervailing social policy of the other parent's wish to exercise "care and control" of his or her child through active parenting. Both policies are captured by competing constitutional rights that some appellate courts have addressed[3] This tension in the law and the resulting questions that courts and custody evaluators must address creates the relocation conundrum.

This second part describes two complementary approaches that allow the evaluator to take a systematic approach to the design and implementation of a comprehensive child custody evaluation for the relocation dispute. One approach is the well-established relocation risk assessment forensic evaluation model.[4] The second approach is a

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straightforward psychological cost/benefit analysis of the relative advantages and disadvantages associated with the child relocating with the parent versus staying in the home community with the other parent designated as the custodial parent. It is referred to as the Social Capital approach.

GUIDEPOSTS FOR CUSTODY EVALUATION IN RELOCATION CASES

Part I presented 15 "forensic guideposts" for custody evaluators to keep in mind as they design and implement their relocation evaluations. The guideposts can help provide structure to the evaluation process and can be combined with the systematic approaches to relocation custody evaluation described below. For example, one of the guideposts is for the evaluator to always gather sufficient data that will allow for a *comparative analysis* of what the quality of life and well-being will be like for the child in the two alternative residential living arrangements, or family environments, should there be a long-distance parenting arrangement. This is always the prime task for the custody evaluator in every case, but it is much more salient in a relocation dispute. The court may allow the child to relocate with the moving parent, or a parent may relocate without the child in the event that the court denies the relocation motion. This analysis comprises the *fundamental comparison* that is salient in relocation cases as the court ponders relocation and the possibility of implementing a long-distance parenting plan.

There is no "bright line" on how to apply relocation factors.

Another guidepost is for evaluators to gather data on the *degree of realistic flexibility* the moving parent has on the issue of moving in light of the facts and circumstances. There may be a remarriage, job transfer, need to return home to care for an aging parent, and so forth, so the parent perceives it is just not possible to not relocate. The author, in his forensic evaluations, has heard the moving parent (almost always the mother) say "I don't even want to go there," or "not moving is just not an option." It may be that she has a new husband or the job offer of a lifetime. Or, less compelling, but very common, the moving-mother may simply want to return to her home community to receive support from her family These facts help the evaluator and court determine the degree of *cogency* in the proposed move, or whether "it makes sense" and is not part of a strategy to inhibit the involvement of the other parent under the guise of relocation.

Quality of Gatekeeping

Yet another guidepost is for the evaluator to assess the past, present, and likely future quality of co-parenting and *gatekeeping* by the moving parent, and the nonmoving parent as well, should he or she be designated as the residential/custodial parent in a long-distance parenting and co-parenting arrangement. The evaluator will want to assess how responsible a moving parent is likely to be as the parental gatekeeper in a long-distance arrangement. Will the parent be proactive and inclusive of the other parent? Or, will she be a facilitative gatekeeper to keep the other parent involved with the child? A track record of being nonsupportive of the other parent, or a restrictive gatekeeper, does not bode well for sustaining a quality parent-child relationship in a long-distance arrangement. The court will want to know how well each parent would be expected to *manage the parental gate* should he or she be the custodial parent in a long-distance arrangement. The author proposes that the quality of parental gatekeeping is the key to the child having a "successful relocation," or how to keep the other parent close in his heart even though the parent is distant in location. Case law emphasizes the goal of trying to sustain closeness in the noncustodial parent-child relationship should there be relocation and geographical separation.[5]

RELOCATION AND LONG-DISTANCE PARENTING SCENARIOS

The "true relocation" case and dispute involves a post-decree, modification case in which a residential parent wishes to relocate with the child a substantial geographical distance thus making a modification of the parenting time plan necessary, if the court would approve relocation, or if the parent would have to relocate without the child. A long-distance parenting plan would need to be crafted in such a relocation scenario. It sometimes will be the case that there is an equal parenting time and shared decision-making plan and permanent order in place. Such a scenario may require a different

legal analysis as the case may be deemed to be the functional equivalent of a pre-decree case in which the court needs to designate a primary residential or custodial parent, as if the litigation was starting over to determine which family unit would best meet the child's interests and needs.[6]

Pre-decree cases at the time of dissolution, when one parent wants to relocate, will be focused on the legal issue of relocation, but the analysis is likely to be different than a post-decree relocation case.[7] The evaluator may not need to formally consider the state's relocation factors (though it would be a good idea to do so). A straightforward, best-interests-of-the-child legal standard would be the guide for court and evaluator. They would not need to address the issue of showing a change in circumstances for parents and child. The issue of crafting a long-distance parenting plan would need to be addressed by the evaluator as one option for the court to consider. When there is a very young child, even a baby, and a stay-at-home mother who is the primary caregiver, then the circumstances may serve to create a *de facto* presumption for relocation depending on how the nuances of the state's relocation law are interpreted by the judge. If the interpretation of the state's relocation law is one by which the court can deny relocation without being prepared to designate the nonmoving parent as the custodial parent, then the comparison would not be slanted in favor of the moving parent with a baby.

Will a parent be inclusive of the other parent?

Evaluators may encounter other scenarios that involve relocation and long-distance parenting. Nonresidential parents frequently relocate, and for valid reasons. Such cases typically would not involve litigation unless the parents could not agree on a schedule and terms of a long-distance parenting plan. A parent may be transferred with his or her job, but is not contesting custody. A moving nonresidential father, for example, might be asking that his 12-year-old son spend the entire summer and every school spring break with him, and the mother disagrees. Some research suggests that the creation of a long-distance parent-child relationship places the children at risk for long-term detriment, even when it is the nonresidential parent who moves.[8]

Litigation sometimes may be involved when a nonresidential parent who lives a long distance away is asking for a change in custody so that he or she would become the residential/custodial parent. The legal standard for modification may be a difficult one to meet in some states (*e.g.*, showing endangerment to the child). The noncustodial, distant parent would usually need to show there has been a change in circumstances to justify a change in custody.

Parents Moving or Staying?

After relocation litigation, the moving parent will occasionally decide to move without the child when the court denies the relocation motion. It may involve remarriage. A long-distance parenting plan would need to be developed, but the moving parent (usually a mother) and her new spouse might want to consider whether he could move to the home community so there could be a local parenting plan, and one that might involve the mother still being the residential parent. A Washington state statute requires the court to consider this possibility so the evaluator would need to investigate it. The Australian study by Cashmore and Parkinson found that eight out of 49 fathers followed the moving mother and child to the new community.[9]

The qualitative, small sample research programs in Australia and New Zealand with families involved in relocation litigation found that seven of the 49 mothers who were allowed to relocate with the child moved back; two others decided not to move after a favorable relocation decision; and one other moved back within a manageable driving distance of the father. These data seem to show that the "the grass was not always greener" in the context of relocation litigation.[10] Several of the mothers moved without the child when relocation was denied by the court or when they had unilaterally moved with the child and the court ordered the return of the child;.[11]

The quality of parental gatekeeping is the key to "successful relocation."

The "real life" research in Australia found, not surprisingly, that mothers who were allowed to relocate were the most satisfied with follow-interviewing in this five-year study over time. Also, left-behind fathers in the relocation-allowed group were the most dissatisfied and showed much lower health outcomes. Mothers in the relocation-denied group were initially very dissatisfied, but learned

to cope with their loss and reality. The data showed these mothers on average learned to value the involvement of the father in the lives of the children.

Atypical Long-Distance Parenting Dispute: Restrictive Gatekeeping

In a recent case the parents lived in different states. The father had no relationship with a six-year old son. The father had been in the US Marines, stationed in North Carolina, and the mother moved out of state to Colorado when the father was deployed to Iraq for a second time. The marriage was in trouble, and the father helped the mother move from North Carolina to Colorado when the child was a baby. The father had little contact over the years, but alleged the mother had prevented contact when he would travel to Colorado and would not return phone calls. His father lived in the area. It was confirmed the mother prevented the grandfather with having contact with the baby.

Left-behind fathers were the most dissatisfied group.

The data showed the mother had prevented contact, but at one point there was discussion about the father relinquishing his parental rights so that the mother's fiancé might adopt the child because he felt helpless to be involved with his son. He lived in another state and had little ability with his work schedule with the Marines to get time off to travel; he had little financial resources to travel; the mother was a restrictive gatekeeper; and the father could not afford a lawyer. The mother had another son with her fiancé. The mother then died in a motor vehicle accident. Litigation ensued between the father and maternal grandmother who had been awarded temporary custody of both boys. The father sued for custody and moved to the child's home community with the Marines finding an alternative duty placement in the area in Colorado. He then built a relationship through reunification therapy. It took two years with much resistance and obstacles placed in the path of the father's attempts at involvement, for example, grandparental restrictive gatekeeping, but reunification was established. The father wanted custody of the boy and to move back to his new wife's home community in North Carolina. He was going to move for work reasons no matter the outcome of litigation. The father and his wife had a new baby, another "half-sibling." The boy was now almost seven years old. A long-distance parenting plan would need to be created. After a custody evaluation, the court eventually awarded custody to the father due to the age of the grandmother, the higher standard of living and quality of life with father's residential environment and extended family support/social capital, and a year-round school "track schedule" with more frequent extended blocks of time off for visiting the grandmother and brother. Due to high conflict, there probably was going to be restrictive gatekeeping by either party as the residential parent, but the father agreed to an ambitious long-distance parenting plan to facilitate access.

PARENTAL GATEKEEPING AND RELOCATION

The concept of parental gatekeeping is a necessary and central part of any relocation analysis. Gatekeeping was presented and defined in *Part I* and is one of the forensic guideposts that evaluators are well advised to consider and assess, as pointed out previously. It refers to the ability of a parent to support the other parent-child relationship. It encompasses a common statutory best-interest factor concerning mutual support between the parents and the goal of cooperative co-parenting. The willingness and propensity of a moving, custodial parent to support the left-behind parent's continuing involvement with the child will invariably be one of the two focuses of the relocation dispute. The other central and related argument against relocation will be the potential harm to the noncustodial parent-child relationship.

The research-based, gatekeeping forensic model for child custody was described in *Part I*.[12] The relevant research shows that children of divorce do better when they have quality relationships with both parents. Second, it shows how cooperative co-parenting by the mother can produce more involvement by the father and better child adjustment.[13] Third, the relevant research shows the contributions by fathers in the children's well-being and school achievement.[14]

The gatekeeping model recommends that the evaluator describe the parent's gate-opening and gate-closing behaviors in detail, or with behavioral specificity. The evaluator will want to describe the quality of gatekeeping attitudes and actions for

both parents in the past and what it is likely to look like in the future. The evaluator will want to avoid the temptation to use the label of restrictive gatekeeper in a loose way just as evaluators sometimes use the alienation label to refer to unsupportive parents who seem to be undermining the other parent's relationship with a child.

The gatekeeping model can be used in a complementary way to the relocation risk assessment model that is described below as the evaluator anticipates how the custodial/moving parent would be expected to manage the parental gate of access to the child in a long-distance parenting arrangement. The two forensic models can be used in tandem. Responsible gatekeeping by the custodial parent in the past will likely go a long way toward opening the possibility that the court would approve relocation, so the evaluator is well advised to describe the behaviors associated with this factor in detail.

He built a relationship through reunification therapy.

One controlling high court decision described in detail the mother's gatekeeping behavior in the past towards the father and his extended family.[15] The court noted the mother's proposal for extensive future parenting time with nine or 10 trips per year between Massachusetts and Illinois as evidence of future support. It noted the mother and her fiancé's pledge to assume all of the financial responsibility for travel costs. The picture was one of describing the mother's past and expected future responsible, facilitative gatekeeping.

OTHER RELEVANT RESEARCH

Part I reviewed the research literatures that are relevant to the issue of relocation and predicting children's adjustment to the decisional alternatives that face the court in relocation cases. The research is relevant to the evaluator's use of the systematic approaches described below. The research shows that relocation stands as a general risk factor for children of divorce and provides support, or scientific-grounding, for the use of the risk-assessment model. In general, relocation for children of divorce, compared to children in intact families, show negative outcomes associated with relocation, especially if they experience multiple moves.[16] The cohort of mobile children are also at risk for long-term health outcomes as adults.[17]

SYSTEMATIC APPROACH TO RELOCATION

Complex Issues in Child Custody

Professional standards strongly suggest that custody evaluators should take a systematic approach to the common "special issues" that custody evaluators frequently encounter.[18] There may be a number of options available to assist evaluators, depending on the issue. Relocation is one of these special and inherently complex issues. Others include cases involving allegations of intimate partner violence, child sexual abuse, parent alienating behaviors, substance abuse, or harsh parenting.

These special-complex issues all share in common the assertion by one (or both) parents about potential risk of harm to the child concerning alleged behavior by the other parent. The alleging parent has in effect conducted his or her own *personal risk assessment* as to the welfare of the child. As a result, the alleging parent may request that the other parent's access to the child be monitored or restricted (*e.g.*, supervised parenting time) or to make an argument to be designated as the custodial parent with the great majority of parenting time. Adding the language of potential harm to the child in addition to that of best interests will be helpful when one of these complex issues is salient so that safety issues can be addressed, such as in allegations of past domestic violence. In the case of relocation, adding the concept of least detrimental placement may be helpful because the legal context may require a determination of which parent should be the custodial parent in a long-distance arrangement with resulting potential harm due to an extended separation between parent and child.[19]

Relocation, Risk, and a Systematic Approach

Relocation-Associated Harms. Issues of harm in the context of relocation are different from those in the other complex issues in which the allegations often involve issues of physical safety and emotional abuse. Nonetheless, in relocation cases issues of potential harm are prominent. *Part I* described the research on the risk of harm to the child of divorce associated with residential mobility/relocation. Excellent research on residential mobility and

children's adjustment in intact versus other family structures shows that relocation/mobility can be considered a general risk factor for children of divorce.[20]

The risk associated with relocation in the context of custody litigation turns the focus to the two types of harm identified in *Part I*. There is the potential for (1) "relationship harm" to the child's relationship with distant parent in the event of relocation (usually the noncustodial parent) and (2) the carry-over effect of relationship harm to the child's adjustment due to the possible diminished level of social capital, or psychosocial resources, in the child's life. The importance of these potential harms in relocation follows directly from the large research literature that establishes that children of divorce show the best long-term adjustment when they can enjoy quality relationships with both parents and fathers/noncustodial parents remain engaged and involved.[21]

Least Detrimental Alternative (LDA) Approach. The application of the LDA perspective and approach was described in one of the articles in the initial presentation of the relocation risk assessment forensic model that is described below.[22] The research that establishes the potential risk associated with relocation for children of divorce is why a risk assessment approach to relocation is a prudent one for evaluators.[23] Least detriment along with the language of harm is just a different approach to analyzing children's best interests in custody litigation. Detriment is the conceptual obverse to best interests. That is, least detriment translates to "more best interests" and vice versa (*e.g.*, most detriment equates to "least best interests").

FORENSIC EVALUATION MODELS AND FRAMEWORKS

Forensic Guideposts and Legal Relocation Factors

The forensic guideposts listed and discussed in *Part I* represent salient general issues that custody evaluators may want to address. They can be integrated into or added to the relocation analysis using the forensic model and social capital approaches described below. They can be part of the evaluator's systematic approach to the relocation data gathering and interpretation.

The guidepost analysis should enhance the evaluator's relocation and risk communication to the court. They will allow the evaluator to present a more sophisticated and nuanced report to the court and help avoid a superficial and static analysis that is seen too often in relocation evaluations and that is not infrequently tainted with anti-relocation bias in a clear preference for the status quo of a local parenting plan with both parents present and involved.

Relocation is a general risk factor for children of divorce.

The guideposts alert evaluators to issues that will be relevant to the psychological and best interest analysis in most relocation scenarios. One of the guideposts is for the evaluator to assess all of the legal factors (*i.e.*, best interest and relocation) found in the state's statutory and case law. The data on legal factors can be combined with the research-based risk/protective factors as described below. Some commentators have recommended against a list of specific relocation factors in a jurisdiction's statute in favor of relying just on the jurisdiction's best interest factors and judicial discretion for resolving relocation disputes.[24] However, the clear trend has been for states to pass relocation statutes with a list of factors.

Risk Assessment Forensic Model

Overview. In this article two approaches are described to assist evaluators in organizing a relocation evaluation for collecting and analyzing the data and addressing the issues in the relocation case. The first approach is the Relocation Risk Assessment psychological forensic evaluation model that has been widely used by evaluators for 15 years.[25] It is a research-based, actuarial model that consists of identified risk and protective factors that are supported by the research literature on the effects of the factors on children of divorce. A recent survey study suggests that about 60 percent of evaluators use the risk assessment model.[26]

The factors were derived from the divorce-effects research literature and extrapolated to the context of relocation. It is consistent with the general risk and resiliency approach to the study of divorced families.[27] The risk assessment model is a heuristic or framework for organizing the data around factors that will generally be very relevant and also have predictive value. The factors also have a practical appeal on their relevancy, and there is overlap with common statutory relocation factors, such as the gatekeeping factor, age, distance, and relative

past involvement of the parents in parenting. The model allows evaluators to design their evaluation and start their data organization with a scientifically grounded first step in the analysis. As noted, the model is not a "psychological test" or technique that should be subjected to a "*Daubert* test" on admissibility of expert testimony, but it would pass a "*Frye* test" as a commonly used approach to data organization and analysis.[28]

The Model. The factors in the model should be thought of as continuous variables, or varying in potential degree. For example, the factor of degree of past parental involvement with the child may show the nonmoving parent had been an involved father on the spectrum of parental responsibilities, or there was a traditional marriage with a stay-at-home mother serving as a primary caregiver. The eight factors can serve as either a risk or protective factor, depending on where the data fall along the continuum for the variable. For example, on the factor of past support for the other parent-child relationship, if the data show the moving parent has consistently been very supportive, proposes a long-distance parenting time arrangement that is inclusive and liberal in the amount of access, then it serves a protective function for sustaining quality in the parent-child relationship. If there has been restrictive gatekeeping with limited support and flexibility by the moving parent, then it creates risk, and also is a red flag on potential harm to the parent-child relationship. It may validate the noncustodial parent's claim that the other parent is trying to marginalize his future role in the child's life.

The concept of least detrimental replacement may be helpful.

It is important to remember that the risk assessment model and data gathered on the factors are a heuristic for organizing the data and forming "research-based hypotheses" that will be relevant to predictions about the child's future adjustment to relocation, or not relocating. Use of the model is just a *first step* in the analysis. It would be inappropriate to apply the model in a one-on-one, direct way to make predictions about the child's adjustment, or to address the ultimate issue. In a recent Florida international relocation case, a consulting expert reviewed documents, interviewed the moving mother, and offered an opinion in favor of relocation by applying the relocation risk assessment model to the fact pattern.[29] This would be a clear misuse of the forensic model as the father's consulting forensic expert pointed out in an affidavit.

The forensic model in combination with the forensic guideposts can be used in its heuristic function to identify alternative fact patterns that would present a reasonable argument for relocation, or would be a weak case for relocation. For example, a case with a two-year-old child, an interstate move, and past pattern of restrictive gatekeeping would not be a strong case. With an older school-age child, aged nine to 12 years; a pattern of past cooperative co-parenting and a proposed "maximum access plan" for long distance, a high level of individual psychological resources by the moving parent, and a resilient child, then it would be a strong argument for relocation. Other factors would be important as well such as the reasons for the move and financial resources to enable long distance travel.

Risk and Protective Factors. The relocation risk and protective factors consist of the following:

(1) *Age of the Child*. A very young age creates high risk associated with relocation and potential disruption of attachment relationship.[30] Attachment theory not infrequently may be overemphasized by evaluators as suggesting traumatic experience due to disrupted parent-child relationships associated with divorce and relocation[31] because the child's development is so multi-determined by other factors.[32] However, it will be difficult to sustain quality in the nonresidential parent-child relationship when there is disruption and resulting long-distance parenting due to the cognitive limitations of the very young child involving object permanence and memory.[33] Sustaining quality probably would require a minimum of monthly physical contact and probably more often for the child under three years. After the age of three years and the age range of three to six years there is more flexibility due to cognitive growth and expected benefit from "virtual parenting time" (*e.g.*, Skype)[34] and resulting less detriment due to extended separation.[35]

With older school-age children (*e.g.*, eight to 12 years), there is a hypothesis of a "developmental window" to better cope with the physical and psychological separation from the distant/nonresidential parent (Austin, 2008a).[36] Children in these years are in developmental stages where their memory capacity and greater cognitive sophistication allows them to efficiently understand their relationship and emotional connection with the distant parent, usually the father. They can regulate their electronic

contact with the father (*e.g.*, using Skype or Face Time). They can enjoy extended blocks of parenting time with the father and separation from the mother (*e.g.*, winter, spring, and summer school vacations).

Older school-age children are a high-risk group for very different reasons. The known difficulties in fitting in with a new peer group and the possibilities of getting involved with more accepting, but potentially problematic, peer groups pose challenges compared to intact families who may navigate the transition much better and establish new, healthy sources of social capital.[37] The buffer of the intact family is a protective factor concerning older children when there is relocation and change in schools.

The age factor is complicated further by the reality that there often may be two or more children potentially relocating with the moving parent. The children may be in different developmental stages with quite an age difference between the children (*e.g.*, ages three and nine years respectively).

(2) *Geographical Distance of the Move and Travel Time*. Hetherington, based on her 40-year longitudinal study of a large sample of divorced families, proposed that relocation of a distance that was more than a comfortable day trip by auto would likely severely loosen the parent-child bond and lead not infrequently to the noncustodial parent playing a minimal role in the life of the child.[38] Empirical support exists for the correlation between distance and the noncustodial parent's post-separation level of involvement.[39]

(3) *Psychological Stability of Relocating Parent and Parenting Effectiveness of Both Parents*. Extrapolating from existing literature on parenting and parenting style, it is known that children's adjustment is correlated with parents' mental health and symptomatology, especially research on the effect of the mother's depression.[40] It is expected that healthy, resourceful moving mothers/parents would be better positioned to help themselves and the child adjust and cope with the changes associated with relocation. Healthy parents would be more likely to more readily establish a new social network and sources of social capital for self and child. Children show better adjustment when they have a quality relationship with at least one parent[41] who shows an effective parenting style that includes showing warmth and responsiveness to the child's needs.[42]

(4) *Individual Resources/Individual Differences in the Child's Temperament/Special Developmental Needs*. Research shows that children with "difficult temperaments" are not expected to cope well with the stress of divorce.[43] There is a sound theoretical basis for expecting, for example, that children with autism spectrum disorder or attention deficit hyperactivity disorder would be at greater risk to cope with the change and transitions associated both with divorce and relocation. On the other hand, children whose history shows them to be resilient are expected to cope better with relocation.[44] Higher cognitive ability is the strongest predictor of resiliency in children.[45]

(5) *Degree of Involvement by the Nonresidential Parent*. When nonmoving parents have been highly involved and enjoy a quality relationship with the child, then it creates higher risk due to the loss in social capital and support for the child. Research shows the advantages when the child enjoys quality relationships with both parents[46] and fathers.[47] Further, children of divorce benefit from relationships with fathers especially when there has been warmth and responsiveness in parenting style and more intensive involvement (Martinez & Forgatch, 2002; King & Sobolewski, 2006; Fabricius & Luecken, 2007; Sandler et al., 2008).[48] Although relocation would be expected to create more risk for the very involved father due to loss in social capital, paradoxically, it also becomes a protective factor due to the expectation that the highly involved father with a meaningful relationship before relocation will be motivated to remain highly involved albeit in a long-distance relationship.

(6) *Gatekeeping and Support for the Other Parent-Child Relationship (SOPCR)*. As discussed previously, facilitative gatekeeping in a long-distance parenting arrangement is expected to be the main protective factor by helping sustain quality in the child-nonresidential parent relationship. The supportive residential parent with inclusive co-parenting and responsible parental gate management skills can result in effective harm mitigation in the parent-child relationship. Specific gatekeeping behaviors in the context of relocation have been described.[49] Conversely, restrictive gatekeeping in the long-distance arrangement may lead to the marginalization of the distant parent/father relationship just as the nonresidential parent/father often will be asserting. When the residential parent/mother does not proactively cooperate on electronic communication; keeping the other parent well informed about the child's activities and needs; impeding electronic access; and not facilitating long-distance exchanges for parenting time, then the risk of detriment will

result. Restrictive gatekeeping involving a very young child creates a high risk of relationship harm between the child and distant nonresidential parent.

(7) *Interparental Conflict and Domestic Violence*. This is the most complex factor to apply in the relocation analysis. A high level of parental conflict, and an expected accompanying pattern of restrictive gatekeeping, poses problems for the moving parent to justify relocation. However, it may be a case of the nonmoving parent being the primary instigator of the conflict and exposing the children to it. Substantial research shows that exposure to conflict places children at high risk for developing adjustment problems.[50] It may be that the moving parent is not terribly supportive of the other parent due to the instigation of conflict, but she does not impede access and cooperates with the court-ordered parenting plan. To wit, the moving parent may have shown a pattern of being able to compartmentalize her negative attitudes about the aggressive co-parent, ex-spouse from her gatekeeping behaviors. If the moving parent in such a fact pattern presents a cogent case for relocation based on reasons, advantages, and limited realistic flexibility on the moving issue, then it could be a strong case for relocation. In some cases, there may be a compelling argument for a "geographical barrier" hypothesis that relocation may shield the children from exposure to enduring conflict between the parents. On the other hand, the moving parent could be the primary instigator of conflict and the data point to the contrasting hypothesis that she does not value the other parent's contributions to the children without justification for her view. Also, the restrictive gatekeeping may appear to reflect a process of control and marginalization.

Very young age creates high risk relocation.

When there has been a corroborated pattern of intimate partner violence (IPV), for example, domestic violence, with a primary instigator and a substantial level of severity, the relocation issue becomes further complicated. If there has been a pattern of coercive control where the aggressor parent has engaged in controlling, intrusive, authoritarian behaviors during the marriage and continues to show coercive controlling behaviors, then the challenge is for the other parent, usually the mother, to see value in the other parent's contributions, and there may be significant issues of safety and violence risk.[51] The evaluator will need to assess the credibility of the allegations[52] and to consider using a forensic model for assessing the pattern and implications for parenting.[53] With substantial IPV the motion to relocate and possibly to return to a home community to receive family support and protection may readily be viewed as understandable and justified. There may be continuing concerns about safety and violence risk. The nonmoving parent's opposition to relocation may be seen as further evidence of controlling behaviors.

With a pattern of IPV the gatekeeping by the moving parent may be seen as justified restrictive gatekeeping. The gatekeeping analysis needs to be modified when there has been substantial IPV. The victim-parent with substantial IPV, especially the coercive controlling pattern, cannot be expected to be the "friendly," inclusive co-parent. Commentators have been critical about the way courts (and state laws) fail to modify the gatekeeping analysis in the IPV case.[54] In other cases, the IPV may be minor in severity, perhaps one incident at the time of separation, and should not be viewed as terribly relevant to creating a parenting plan or the relocation issue. The most frequent pattern of IPV is the conflict-instigated, situational-specific type ()[55] that most often would be interactive, or mutual in the dynamics. Evaluators report that the most IPV they encounter is one that is associated with the marital separation.[56]

(8) *Recentness of Marital Separation*. Several highly noted authorities on divorce and child development have proposed hypotheses that either the combination of parental separation and divorce[57] or cumulative life stressors such as divorce[58] create more risk for the child. Presumably, the child would likely cope better with relocation if there first had occurred family stabilization following the marital separation and divorce before relocation is considered.[59] The combination of the two might just be too much to handle, that is, facing the challenges of adjusting to a new community while still grieving for the loss of a parent and the security of an intact family. However, the legal reality is that the parents will often wish to relocate with their child at the time of separation and divorce, and not infrequently will do so unilaterally before the divorce action commences.

Social Capital Approach

The second approach can be described as a social capital approach that has been introduced

to the fields of child custody evaluation and family law,[60] particularly in the context of relocation disputes,[61] as a practical, descriptive concept for understanding how individuals' quality of functioning depends on the resources available to them in their respective environments. It was described in *Part I* of the article and defined previously in *Part II*.

Social capital is particularly useful as a descriptive concept in the context of relocation disputes as it is intertwined with the concept of gatekeeping. It is a useful way to conduct the fundamental comparison for the court so that the evaluator can better help the court visualize what life will be like for the child if he or she was living primarily in one community or geographic location primarily with one parent versus living with the other parent in the other community. Social capital is part of the gatekeeping analysis. With restrictive gatekeeping, it would be expected to diminish the nonmoving-child relationship and the explanation would be in terms of the child losing out on access to the parent's psychosocial resources and contributions to the child. Gatekeeping and the potential harm to the nonmoving-party relationship will be the central focus in virtually every relocation dispute and debate. Social capital is one available explanatory concept[62] to address the expected level of the child's adjustment to relocation. It is inextricably intertwined with the gatekeeping analysis. To wit, facilitative, inclusive gatekeeping will open the gate for the distant, nonresidential parent's resources to be available to the child.

Advantages and Disadvantages

With the social capital approach the evaluator assesses the relative advantages and disadvantages (*e.g.*, benefits) expected to be associated with the two options of the child relocating with the moving parent, or staying in the home community with the nonmoving, nonresidental parent becoming the custodial parent. In order to be helpful to the court the analysis needs to describe the advantages in specific terms just as the court's written opinion may be expected to do the same. For example, the custodial report and legal opinion may both describe any apparent differences in the quality of educational opportunities in the two communities.

Part of the social capital analysis will include practical considerations on issues such as the custodial parent (usually mother) being more available to the child with her caregiving due to fewer work hours with remarriage, or change in work hours with an expected new job. Another part of the analysis will be how there can be a suitable alternative parenting plan (albeit a long-distance one) so that an ample level of the noncustodial parent's parental capital can still be available to the child.

Perhaps more often, the legal context leads the judge to compare the child's best interests with relocation vs. the parent not moving, with the court simply denying the relocation of the child. The parent usually would not move and so the status quo would resume in a local parenting plan still in place. The moving parent usually will encounter an inherent disadvantage in showing the relative advantages and greater level of social capital in the new community and conducting the fundamental comparison. The asserted better opportunities and advantages may be more theoretical than empirically confirmed. The moving parent may not yet have the new job, or an excellent job offer may disappear due to the time delay associated with litigation. The new peer friendships and extracurricular activities or sports teams have not yet been established for the child. The moving parent has not yet established a new social network, though often there will be a ready-made network with expected resources available from extended family.

Realistically, the social capital analysis often will be one that is a somewhat "tilted playing field" in favor of the nonmoving/noncustodial parent for these reasons of being able to better identify tangible advantages with continuing a "local parenting plan" with the court denying the child's relocation. However, in some cases the factual analysis may show that the nonmoving parent is not a "viable candidate to be the custodial parent" (*i.e.*, one of the forensic guideposts). This situation could be due to lack of time availability by the noncustodial parent (*e.g.*, due to work schedule). It could be due to an issue of risk of harm posed by the parent (*e.g.*, a history of substantial intimate partner violence or substance abuse). The presence of explicit or implicit anti-relocation bias also will tilt the social capital analysis so that the parents are not starting out on "equal footing" in the analysis of the facts and circumstance (also a forensic guidepost), or application of a factorial analysis.

Using the Approaches in Tandem

The two approaches can both apply to the two scenarios of the child relocating with the parent, or not relocating. The risk assessment approach is

a research-based approach to examine relevant risk and protective factors. The social capital approach is a practical, fact-based component to the data collection and analysis. They are complementary approaches. Many of the facts gathered in custody evaluation or presented in trial as evidence will be "social capital data," or related to specific, identifiable advantages or disadvantages associated with the parenting plan options. Examples of specific advantages and disadvantages would be the quality of schools, the degree of support from extended family in one location versus the other, the improvement in the cost of housing and employment opportunities. Together, these factors would be asserted to enhance the overall quality of life for the relocating parent and child. The identified potential advantages of the move will be linked to the stated reasons for the move. Often, the moving parent would assert that direct benefits to her (*e.g.*, remarriage) will have indirect benefits to the child (another forensic guidepost).

The evaluator can gather data on all of relocation risk factors and describe for the court the complex interplay among the factors. Often the gatekeeping factor will dominate the analysis and the gatekeeping forensic model can be used in the analysis. However, in some cases the data may show both parents have engaged in cooperative co-parenting and facilitative gatekeeping until the relocation issue surfaced. Specific description of the restrictive or facilitative gatekeeping behaviors is encouraged. The evaluator can describe a fact pattern based on the risk and protective assessment of the factors.

SUMMARY AND PRACTICE TIPS

The following are some considerations for evaluators (and attorneys) as they attempt to design and implement their systematic approach to the special and complex issue of relocation and child custody/parenting time, and the need to address the possibility of crafting a long-distance parenting time plan:

- Evaluators are challenged to conduct a careful relocation investigation of the facts related to factors (legal and psychological) and social capital components in the case.

- Evaluators are well advised to understand the basics and nuances of their state's laws on what type of comparative analyses are required or permitted under the law.

- Evaluators may want to consider the forensic guideposts and issues discussed previously and in *Part I*.

- Evaluators should consider as the court might expect them to gather data and offer expert opinion on any and all best interest and relocation factors that may be found in the state's laws.

- Evaluators can consider using the relocation risk assessment forensic model. The factors provide a research basis for the analysis as a first step and as a heuristic for the evaluator and judge to consider with the relevant data on the factors. They complement any state legal and other relevant factors.

- Evaluators and judges can consider using the forensic parental gatekeeping model to complement the relocation analysis. It is an efficient heuristic to use to look at the gatekeeping portion of the legal relocation calculus because it is always going to be relevant. Gatekeeping will generally be the centerpiece of the relocation analysis.

- Evaluators usually are going to describe—at least informally, but sometimes explicitly—the relative advantages and disadvantages associated with relocation of the child with the parent and the alternative options. If there is a statutory factor that requires the analysis of how relocation would improve the *quality of life* for the parent and child, then this would imply a social capital analysis. Evaluators can consider using the social capital concept to make this portion of the relocation analysis more efficient and easy to understand for the court.

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Child Custody Evaluation and Relocation: Part III of III: Forensic Consultation Services and Common Errors by Evaluators[1]

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This is *Part III* of an article on relocation and child custody disputes. *Part I* described the psycho-legal dilemmas and countervailing social policies that mirror the competing interests of divorced parents when one parent wishes to relocate with the child. The moving parent wants to pursue opportunities and improve her quality of life. The nonmoving/nonresidential parent (most often the father) wants to protect his involvement and relationship quality with the child. It is the "relocation conundrum." *Part I* also reviewed the social science research that is relevant to relocation and child custody and presented 15 "forensic guideposts," or salient issues that a custody evaluator and court may want to consider in approaching the relocation dispute.

Part II described relocation as one of the special topics and complex issues that family courts and custody evaluators often encounter. Professional standards recommend that evaluators take a systematic approach to all of the complex issues in organizing their forensic approach, data collection, and analysis for making parenting plan recommendations to the court. Two complementary approaches for custody evaluators were presented. The relocation risk assessment forensic evaluation model, as a research-based model of risk and protection factors, was presented as a useful framework and heuristic for evaluators and courts. The factors overlap with common relocation legal factors in statute and case law. The risk assessment model can be a useful first step in a relocation analysis and provides scientific grounding. A second, complementary social capital approach was described as a straightforward perspective on comparing the relative advantages and disadvantages associated with the proposed relocation, or the alternative judicial outcome of relocation being denied and custody changed to the nonmoving parent. It is part of the fundamental comparison that the evaluator needs to provide so the court can visualize what life will be like for the child in the alternative residential living arrangements in the parents' respective locations.

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In this *Part III*, the process and role of the forensic expert mental health consultant is discussed and the range of services that are provided to retaining attorneys in family law litigation, including relocation cases. This is followed by a discussion of common errors (or inadequate investigation and analysis) found in custody evaluations that forensic consultants encounter when they review the work products of evaluators, for example, the custodial report and evaluation.

RELOCATION LITIGATION

Although there are no studies on the issue, it is probably the case that a higher percentage of relocation cases are litigated compared to other types of custody disputes. The relocation conundrum creates high levels of emotional angst for both parents, making each one determined to prevail on the relocation issue. When a party does not prevail on the relocation issue, either way, part of the response will be that the outcome was not fair. The author's forensic experience is that even when there was a child custody evaluation conducted with clear recommendations, the case is likely to go to trial. One reason for the presumed high litigation rate, as discussed later, is the quality of the forensic evaluation and report that may be problematic.

ROLE AND SERVICES OF THE CONSULTING EXPERT FOR RELOCATION CASES

Overview

Based on the author's experience (and communication with colleagues), due to the complexity and double binds inherent in relocation cases, it is not uncommon for the quality of the child custody evaluation to be lacking. This is not to say that most relocation custody evaluations are not competently conducted. For example, one of the forensic guideposts alerts evaluators and judges to be aware of anti-relocation bias that seems common. Many evaluators, sometimes citing supporting research that shows children of divorce demonstrate the best long-term adjustment when they enjoy quality relationships with both parents, view relocation as inherently harmful to the nonresidential parent-child relationship and therefore to the child. In a recent case, the evaluator on cross-examination stated that, in her opinion, most evaluators held a bias against relocation, and she recommended against relocation from California to Texas with mother and four-year old child. The court rejected the evaluator's recommendations on the basis of bias because the law requires the parents to be on "equal footing" on the relocation issue.

In this part of the article on relocation, the role of the forensic mental health consultant in litigated relocation cases is described along with the forensic services that may be offered in an ethical manner that are intended to be helpful to the court. If the retaining attorney requests that the retained expert become a testifying expert, then the expectation is that case review and analysis will also be helpful to the client's case on the relocation issue. However, the attorney needs to recognize the retained consulting expert's ethical obligations are to be balanced and accurate in the analysis and testimony. This article describes in more detail the role and services of the consulting mental health expert, especially the service of providing a work-product review of the custodial evaluation for the relocation case.

A higher percentage of relocation cases are probably litigated.

Common problems encountered in child custody evaluations for relocation cases are discussed. Child custody evaluations[2] may be the most complicated of all forensic mental health evaluations due to the breadth of knowledge and familiarity with research that is required; diversity of forensic assessment procedures applied; amount of material to be reviewed; amount of data generated; assessment of parents and children; conducting home visits; and complex issues with assertions of harm such as child sexual abuse, intimate partner violence, substance abuse, or parental alienating behaviors. Relocation cases also often require the evaluator to travel a long distance to conduct a site visit, interview extended family, or examine a proposed new school. A final complexity in relocation cases is the need to potentially craft and recommend a long-distance parenting plan that will need to address how to manage the risk of harm to parent-child relationships associated with distance and extended separations. Different possible forensic mental health consulting services are described in the following discussion.

Work Product Review and Testifying Rebuttal Expert

Due to the complexity of relocation cases it will not be unusual for the attorney representing the party who was not favored by the custody evaluator's recommendations to retain a consultant to review the quality of the report and evaluation. The stakes are so high in relocation cases that the disfavored party will be resistant to agreeing with and accepting the evaluator's analysis and recommendations. The retained mental health expert serves a function for the court and the legal process of providing forensic quality control, or providing checks and balances to the evaluator so that court is receiving high quality and accurate forensic work and opinions. The forensic process for conducting a competent and ethical work product review in family law cases has been evolving in the literature over the past 10 years. One authority-psychologist has presented a systematic approach to the process of conducting a work product review for both potential reviewers and attorneys.

Objective Review

The acceptable forensic protocol for a work product review has been described by numerous authorities. When the consultant is contacted by the attorney the protocol is explained in the contact telephone call and also in a retainer agreement with the attorney. The consultant, as a reviewer, is to first conduct an objective review of the custodial report without any preconception or expectation that only deficiencies will be looked for or examined. The work product of the reviewer (*e.g.*, notes and communications with the attorney) will be confidential under attorney work-product privilege. The reviewer then will provide candid feedback to the retaining attorney with a description of both the strengths and weaknesses of the report and evaluation, and the overall quality. The reviewer may want to review psychological testing with this initial examination of the work product. The author's version of the protocol is to conduct a careful reading of the report and to take notes with analysis. The notes would be discoverable if he was to become a testifying expert, but those notes should closely resemble the expected testimony. The notes and analysis also guide the attorney through the reviewer's analysis and guide the reviewers when they may need to prepare for testimony or prepare an expert rebuttal report, which could be months after the review.

If the attorney decides to retain the consultant to be a testifying expert and provide further services, then the reviewer will usually want to review the evaluator's entire case file. If the ethical reviewer's opinions are that the custody evaluation was competently collected and the evaluator's bottom-line opinions seemed to have gotten it basically right for the court on the main issues, then the attorney usually will not request further services. If the retained expert is to provide balanced and accurate testimony, then the testimony is likely to be supportive to a certain degree of the evaluator's work and opinions, but the expert who is asked to testify usually will have identified some serious deficiencies, and some that may qualify as "fatal flaws" on main issues, such as relocation. In other cases, the retaining attorney may request testimony with the expectation that the consultant would provide favorable testimony on the quality of the custody evaluation (*e.g.*, based on the candid feedback provided by the reviewer), or to affirm the custody evaluator's opinions based on the review. In some cases, the testifying, retained expert may be a rebuttal expert witness to the other attorney's retained consultant or testifying expert who is providing rebuttal testimony on the custody evaluation.

Relocation cases often require an evaluator to travel long distances.

The forensic guideposts in *Part I* of the article should be useful to the reviewer in identifying salient issues in the relocation case and conducting the review and analysis. If the consultant-reviewer provides testimony, then this is usually referred to as a rebuttal expert and testimony.

Opinions to Be Offered

Some noted authorities have recommended that evaluators should refrain from expressing ultimate issue opinions based on the assertion that there is a paucity of research on the relative advantages of alternative parenting plan arrangements that may be recommended. These authorities do recommend that evaluators describe the relative advantages and disadvantages of alternative parenting plans and parenting time schedules based on their investigation and facts, and the relevant research. However, most family law courts and judges seem to expect them to formulate opinions and specific

recommendations on the ultimate issues. Other authorities endorse this common, practical, and normative practice of making specific recommendations on an optimal parenting plan for the child's best interests in terms of parenting time, decision-making authority, and relocation.

The field as a whole seems to agree that nonevaluator, testifying experts should not offer ultimate issue opinions, such as what specific parenting plan would be in the child's best interests, or whether relocation of the child should be approved or disapproved for the child's best interests. Many states follow the Federal Rules of Evidence, which state that experts can express opinions of all types and on a range of issues, if they are relevant and will be helpful to the court and if the expert has a sufficient basis for doing so, except on the issue of *mens rea* in a criminal case. However, the author believes that it is good ethical etiquette for nonevaluators and reviewers to refrain from giving ultimate issue opinions because they have not personally evaluated the parties or children in the case. However, reviewers can, and frequently, do give opinions in response to hypothetical questions that closely resemble the fact pattern in the case, and this process, which is permissible under the federal rules, comes close to giving ultimate issue testimony. Judges will vary in how strict they are as gatekeepers in allowing opinion testimony by reviewers, including in response to hypothetical questions.

The testifying, retained expert may be a rebuttal witness.

There appears to be some professional disagreement in the field on the opinions that can or should be offered by the consulting, testifying expert following a review. The conservative position is that reviewers should focus their opinions and testimony on the quality of the forensic methodology and tread cautiously in making independent interpretations of the data reviewed in the evaluator's report and case file that lead to explicit opinions on specific issues. The reasoning is that the reviewer has not personally evaluated the family members involved in the dispute as required by the ethics code for psychologists. The view of these noted authorities would approve of a reviewer opining about whether the evaluator's opinions were supported by the data. They would approve of giving opinions about the data in the evaluator's report and case file based on informing the court whether the opinions are consistent with the relevant research.

The liberal, and probably most frequent, view of the consulting expert's services, in the author's opinion, is that based on the review of the report and case file the reviewer can opine about and mediate issues based on the data and professional literature. This view rests on ethical standards and guidelines that permit psychologists to offer opinions based on a review of documents and data as long as there is sufficient information and data to support the opinions, and it is an exception to the rule that the psychologist must have personally evaluated an individual before offering an opinion about that person. Some state case law also specifically permits medical professionals to express opinions about individuals based on a review of records. The US Supreme Court seems to have endorsed the practice in which psychiatrists would provide forensic consultation, assist in the preparation of the case strategy, assist with cross-examination of another expert, and give testimony based on a review of the case file in cases involving a not-guilty plea by reason of insanity in a criminal case.

Non-evaluator testifying experts should not offer ultimate issue opinions.

This liberal view proposes that data can stand on their own, but within the identified context of the case, and be subject to interpretation as to their meaning on issues in the case. For example, the reviewer should be able interpret the psychological testing data, or whether the forensic models were correctly applied. If the data are sufficient and adequate based on their recording into the evaluator's case file, and the context described, then they should be subject to interpretation by a reviewer. The author's opinion is that to avoid interpreting data that are clear, sufficient for the issue, and for which the context is clearly evident would seem to defy forensic common sense and not be helpful to the court.

If the custody evaluation was competently designed and implemented, and the file well organized and with legible interview notes, then both the evaluator and reviewer should have approximately the same dataset to work with and to form opinions about. There should be ample data to interpret and form opinions on a variety of specific

issues that are relevant to the question of relocation and the child's best interests. For example, there should be data collected on the process of the quality of parental gatekeeping and co-parenting, and how that would be relevant to the operation of a long-distance parenting plan. The data on the stated reasons for the proposed relocation can be interpreted on their face and also in the context of the case and history of the family.

Instructional Testimony for Relocation Cases and Importance of Research

Consultants may be retained for the main purpose of providing instructional testimony, or educating the court about the professional literature and research that are relevant to relocation and other salient issues in the case. Such testimony is likely to provide more of a scientific grounding than was contained in the custodial report. All expert testimony is expected to be "educational" for the court to some degree, but in the family court context and child custody disputes it can be explicitly instructional on the literature and applied to the fact pattern. For example, the testifying expert may explain how attachment theory is relevant to an issue of overnights for a young child, or how the research on the effects of being exposed to parental conflict places the child at risk for harm.

The liberal view proposes that data can "stand on their own."

Evaluators also often provide instructional testimony as part of describing their data and analysis. If they use the relocation or parental gatekeeping forensic models, it would be part of their instructional testimony. To do so automatically would improve the "scientific grounding" of the given testimony. The relocation risk assessment model is widely used as a recent survey of custody evaluators' approach to relocation cases showed. Reviewers also may use the models to analyze the fact pattern and data collected and described by the evaluator. Reviewers often would cite the professional literature in their analysis of the evaluator's report and evaluation. Both experts should try to be helpful to the court in analyzing the issues in the case so the court can make a ruling and order the terms of a parenting plan that will be in the children's best interests. Both the evaluator and reviewer are well advised to freely draw upon and cite the research that is relevant to the bases for the conclusions offered. Research-informed conclusions and opinions will inherently be more reliable. The testifying expert should stay away from forensic frameworks for relocation analysis that are not theoretically sound or research-based.

Relocation is a type of child custody case in which the research is relevant in more ways than perhaps in any other type of case. First, the research on the effects of relocation, or residential mobility, on children of divorce shows that relocation is a general risk factor for children of divorce, as is divorce itself. Relocation, and especially frequent childhood residential mobility, is also classified as one type of adverse childhood event that is correlated with long-term negative outcomes for adults. Second, the relocation risk assessment forensic model consists of risk and protective factors that rest on a research base with correlations with child outcomes. Third, the parental gatekeeping model that complements the risk assessment model rests on an extensive research literature on co-parenting, gatekeeping behaviors, parental conflict, and the correlation with parental involvement with the child and child outcomes. Fourth, with relocation cases involving young or very young children then attachment theory and research is relevant. Evaluators need to be mindful of the nuances in attachment theory and research, and to apply it to the custody and relocation context in a sophisticated way that is consistent with the literature. Fifth, with relocation and the likelihood of extended separations from one or both parents, evaluators will want to reference the large research literature that shows children of divorce demonstrate the best long-term adjustment and well-being when they enjoy quality relationships with both parents and that demonstrates the importance of fathers.[3]

Reviews often cite the professional literature.

The testifying retained expert who is giving instructional testimony can testify about model parenting plans for long distance in the context of the case fact pattern with the age of the children and other key variables.

Although instructional testimony is often part of the testifying expert's case analysis, as discussed later, in some instances it could be "blind didactic

testimony" when the expert is giving "pure" instructional testimony without any knowledge about the case fact pattern, issues, or context. In the relocation context, the expert could describe one or both of the forensic models (*e.g.*, relocation risk assessment and gatekeeping), the effects of relocation on children of divorce in general, or other related issues such as problems with relocation and either very young children or teenagers. The advantage of this approach would be to avoid altogether the issue of the expert being perceived as favoring the retaining attorney's advocacy position. It would avoid the issue of "retention bias" and possibly appearing as though the hired expert has an allegiance with the retaining attorney.

Case Review and Analysis

All testifying experts in child custody litigation may be asked to analyze the issues in the case, but only the court's evaluator will be expected to address the ultimate issues and offer opinions and recommendations on aspects of the parenting plan that would be in the child's best interests. When the testifying expert analyzes the issues in the case with respect to the data gathered by the evaluator and in consideration of the professional literature and research, and applies it to the questions to be answered, then this is part of a case analysis. When the evaluator or reviewer applies a forensic model to the facts and gathered data, this is forensic *and* case analysis.

Retained experts may limit their services to strictly trial consultation.

In addition, the case analysis in relocation cases should always address the practical aspects in implementing a parenting plan. The practical analysis becomes magnified with relocation and the possibility of implementing a long-distance parenting plan. Key variables involve transportation costs and parents' financial resources; time availability for parents to travel for parenting time; and how to set up video-chatting software like Skype or FaceTime. All evaluators and reviewers should be prepared to answer questions and inform the court about the relevant professional literature, or to be specific about "what the research says." The case analysis for court evaluators, reviewers, and instructional testifying experts is a basic component of trying to be helpful to the court.

In some instances, when there has not been a child custody evaluation, a testifying, consulting expert may be asked to review some documents, pleadings, and records, then asked to apply the professional literature to the information and discuss the relevant issues and possible solutions to the custody dispute. This service of case review and analysis is not uncommon. Specific recommendations would not be offered on the parenting plan, or the ultimate issues involved, but the advantages and disadvantages of parenting plan options could be discussed. In the relocation case, the consulting expert could describe the asserted alternative fact patterns,[4] talk about advantages and disadvantages of parenting plans, and discuss ways to manage the potential harm to the parent-child relationships in a long-distance parenting plan.

Testifying and Nontestifying Consulting Experts: Two Roles or One?

In civil litigation it is common practice to have multiple experts involved in a case. Often testifying experts will also provide case consultation services to discuss issues in the case and help with preparing the expert's direct testimony. There has been an evolving and growing professional literature on forensic expert consultation for family law and child custody disputes. There has been an active and healthy professional dialogue on a number of issues associated with how mental health consulting experts can and should provide the most effective services and in an ethical manner. An attempt to create professional guidelines by a task force for the Association of Family and Conciliation Courts failed to reach a consensus, but released a discussion article on the issues in which there was apparent consensus and points of disagreement.

The role of a court-appointed child custody evaluator is unique among forensic evaluations. The evaluator is the court's expert to conduct a comprehensive, neutral, objective evaluation to assist the court in determining the best interests of the child. The overriding goal of the expert is to be helpful to the court as part of being the evaluator in the process of the child custody litigation. It is important to note that the evaluator is a distinct and well-defined role that may be described in statute or court rules.

Some noted authorities have proposed that the testifying consultant-reviewer and trial consultant

are two distinct roles, and these roles should be delineated so that the testifying expert consultants should keep to a minimum their direct trial consultation with the attorney and not participate in a litigation team, working with other experts to assist the attorney. In contrast, the author and his colleagues proposed that there is only one general forensic expert role in family law disputes and litigation for nonevaluator experts, and this is the forensic consultant role. Other prominent child custody practitioner-scholars have taken a similar position. It is proposed that within this general consulting role the retained expert may provide a range of forensic services or engage in a range of professional activities associated with a litigated case. All experts who are not court-appointed evaluators are hired, or retained, by one of the attorneys, or one side in the litigation, just as in other types of civil litigation. There appear to be two schools of thought on this issue as to whether there are two distinct roles and as to the extent of trial consultation services that should be provided by the testifying expert.

Retained experts may limit their services (by agreement with the retaining attorney) to strictly trial consultation and not as a testifying expert. The trial consultant expert may assist with the development of trial strategy in developing a theory of the case; assist in the preparation of areas of inquiry and questions for direct and cross-examination of experts; educate the attorney about relevant professional literature and research; and assist in the acquisition of relevant documents. The trial consultant-expert often would be present in the courtroom during the trial to advise the family law trial attorney. In contrast, as described previously, the consulting expert often is asked to be a testifying expert.

Confirmatory bias may be a widespread problem.

Some respected authorities have proposed that in the best of all worlds the attorney should retain separate experts to provide the services of general trial consultation and another for expert testimony; there can be "role conflict" if the expert provides both extensive trial consultation and expert testimony services. The conservative school of thought does endorse the idea that the testifying expert or reviewer can consult with the attorney to facilitate the efficient delivery of the expert's own direct testimony, but should be cautious in providing more extensive case consultation on trial strategy or for the testifying reviewer expert to participate in a litigation team with other experts. Both schools of thought on the degree of case consultation by testifying experts should agree on the primary importance of all testifying experts to strive to be ethical in their analysis and delivery of accurate and balanced testimony that considers alternative hypotheses and the limitations on opinions that can be offered. Both schools of thought seem to agree that consulting, testifying experts need to work with their retaining attorney to organize their direct testimony so that it properly addresses the issues, is accurate, and relates to the literature and research.

When the consulting expert is to be a testifying expert, then there are questions about the extent of the consultation, discussion, and professional advice-giving that should be provided. The retained, consulting, testifying expert should be following the same ethical guidelines and principles as the court-appointed evaluator-testifying expert and strive to provide accurate testimony. The credibility of all experts depends on their analysis and testimony being perceived as objective, balanced, and an accurate reflection of the data and issues in the case, as well as their interpretation and application of professional literature and research.

COMMON ERRORS BY EVALUATORS IN RELOCATION CASES

Relocation cases are highly complex and probably require that experts show a greater command of the professional literature and understanding of the nuances of the family law in their jurisdiction than any other type of custody dispute case. Evaluators are well advised to examine their forensic skill-set and seek professional consultation before accepting referrals to conduct a child custody relocation evaluation, as evaluators may sometimes overestimate their level of competency to investigate and untangle complex issues. Relocation is also unique in that it is a type of case in which it appears confirmatory bias by both evaluators and judges may be a widespread problem, usually in the form of anti-relocation bias. The following are common errors by evaluators.

Knowledge of the Law

Evaluators always need to have a firm understanding of family law in order to do their jobs for

the court. This is especially true in relocation cases in which the nuances of the law can be quite complex. Evaluators need to understand the legal standard for the context of the case. In states that have identified best interest and relocation factors (at least 38 states) evaluators need to measure the identified factors from statute, case law, and court rules, and to report the collected data for those factors. Evaluators should also understand the ambiguities in the law. For example, in a post-decree case it may be unclear whether evaluators (or the judge) can recommend against relocation without being prepared to recommend a change in the custodial parent. Similarly, it may not be established by case law whether an evaluator can consider (and include in the custody report) if the moving parent (usually the mother) would relocate without the child if the court denied the relocation motion, or if the noncustodial parent would probably follow the child if relocation was allowed.

The nuances of the law can be complex.

In the author's experience, it is not uncommon for evaluators to not understand the nuances of the law. This can result in evaluators not collecting the necessary information or conducting the type of analysis the court requires. For example, in Illinois and Colorado, the controlling case law requires the court to consider indirect as well as direct benefits to the child associated with relocation. If evaluators do not assess and consider the benefits to the moving parent that would be expected to filter down to the child, then this would be problematic. Economic benefits with remarriage or a new job would qualify, but so too would improved happiness from receiving social support from extended family, or living with a new spouse.

Knowledge of Professional Literature and Relevant Research

Relocation is a child custody domain in which there is diverse literature and extensive relevant research. It would not be uncommon for a reviewer to encounter evaluations and custody reports that show little evidence of considering or being familiar with the literature. Most evaluators probably seldom cite references to literature and research in their reports. The author and his colleagues believe this is not acceptable, no matter how frequent this practice and omission may be. The professional literature and research should be an important and the most reliable basis for the evaluator's conclusions. To not reference the literature on key points in the analysis in the custodial report means the attorneys would have to conduct a deposition or go to trial in order to discover the scientific basis for the opinions and conclusions presented in the report. To make reference to "the research says…" without citing the research is not sound practice. Relevant theory and research would include the effects of relocation on the children of divorce; attachment theory and the effects of extended separations; the importance of parental involvement by both parents and fathers; exposure of children to parental conflict; and parental gatekeeping and its importance for a relocation analysis.

Inadequate Factorial Analysis

Many states have a list of both best interest and relocation factors to consider. For example, Colorado has 11 best interest and nine relocation factors in its statutes, and courts are required to explicitly consider all of the factors in a post-decree case. Florida has 20 best interest and 10 relocation factors, and both states have the additional "plus any additional relevant factors" in the statutes. In contrast, New York has only five factors in case law. Evaluators will be remiss if they do not formally assess all of the factors that the court is required to consider.

Failure to Take a Systematic Approach

Relocation is one of the special and complex issues for which professional standards strongly recommend that evaluators take a systematic approach to the issue. Assessing the legal factors satisfies the professional standard of taking a systematic approach, but it will be minimal. There is an abundance of research to assist in the relocation analysis and available forensic models, so there is much relevant research that will add to the quality of the relocation analysis and assist in taking a systematic approach. The sophistication and accuracy of the relocation analysis will be advanced even with just a straightforward investigation of the costs/benefits or advantages/disadvantages of the decisional alternatives for the court.

Confirmatory Bias: Relocation Issue

This concept is a longstanding part of assessing the quality of custody evaluation work product

and is one of the forensic guideposts for evaluators to consider in doing their work. It refers to the process of favoring a preferred hypothesis and not giving due consideration to alternative hypotheses. The author's experience is that antirelocation bias is a rampant problem with evaluators and judges, even though the law in almost every state dictates that the parents should be placed on equal footing on the relocation issue, though possibly after a moving parent has met a burden of proof that the proposed move seems reasonable. It is likely to be more apparent in cases involving the potential relocation of very young children. Contextual factors may trigger a pro-relocation bias, such as a history of domestic violence, lack of substantial involvement by a parent, or a primary caregiver mother with a young child. The bias can appear as one-sided data gathering, for example, accepting one parent's account of allegations about the nature of parent conflict or not being supportive of the other parent, and not properly investigating the other side of the story. What also seems to be common in a bias in favor of relocation is not giving due consideration to the hypothesis that the nonmoving father in a traditional marital arrangement is a viable candidate to be the custodial parent and be a "good enough" parent in handling the broad range of parental responsibilities.

Confirmatory Bias as Misuse of Theory and Research: 'Primary Parent'

Especially with young children, attachment theory is misused and becomes part of confirmatory bias, either with favoring relocation by a moving mother with a young child, or disfavoring relocation by over-emphasizing the presumed threat to the attachment relationship of the child with the nonmoving parent. Attachment theory can be misused in a deterministic way to predict severe trauma to the child with extended separation from the nonmoving parent without giving due consideration to how to manage the risk with parenting plan options. Or, attachment theory can be used deterministically as part of the primary parent concept to favor relocation by a mother.[5] In a recent high conflict case, the parents shared almost 50–50 parenting time and joint decision-making concerning their 10-year-old boy. The parents lived in a Colorado high mountain, ski town. Both grandmothers lived nearby and were highly involved. The boy lived with father, grandmother, and uncle in one residence. The father was well employed. He was the boy's baseball coach in the summer at which the boy excelled. The boy was a state champion skier. He had attended a top-notch private school since preschool. He had established friends, of course. The mother secretly moved two hours away to Denver, where she purchased a house, presumably for a college program for training to work with a minority population. There were ample data that the mother was a restrictive gatekeeper and did not value the father's relationship with the child. The judge accepted an evaluator's recommendation in favor of relocation citing the mother had been a primary caregiver in the early years.

Inadequate Investigation of the Relocation Issue

Evaluators sometimes fall short on the issue of inadequate investigation and insufficient data gathering. The importance of an investigative component in child custody evaluation often is not fully appreciated. This process is the way evaluators are able to scrutinize alternative hypotheses. It is more salient and important in some types of custody cases, such as one involving allegations of intimate partner violence, and also relocation disputes. Evaluators may fail to adequately assess the legal factors; factors indicated by research or the available forensic models; or the relative advantages and disadvantages associated with moving versus not moving. There sometimes can be a paucity of data. This weakness usually translates to an inadequate comparative analysis in which the evaluator fails to properly help the court visualize what life would really be like for the child in the alternative residential living arrangements in the two communities. It is part of the fundamental comparison that evaluators need to do in every case, but it is more salient and more difficult to do in the relocation case.

To say "the research says" without citing the research is not sound.

Cost factors enter into the case with the issue of the evaluator going to the new community. If the parent has already moved, then it appears imperative. A site visit to the new community would usually be helpful to describe new prospective housing, school, and extended family. Video data-gathering to bring the new location to the court would be helpful on the proposed new residence, school, neighborhood, and cultural amenities. All of this allows for

an "ecological comparison" of the relative resources available to the child in the two locations.

Insufficient Analysis of Key Variables: Parental Gatekeeping and Expected Impact of Move on Child

Evaluators will want to assess key variables in every case, especially if they choose not to use a forensic model for their data gathering and analysis. These invariably include the anticipated effect of the move on the child; the quality of the parental gatekeeping should there be a long-distance parenting arrangement; and the resiliency of the child.

Misuse of Available Forensic Models

Experience teaches that evaluators sometime misuse forensic models when they choose to use them. This may operate in conjunction with the evaluator only doing half of the fundamental comparison so that only the effect of moving is examined on the child's anticipated adjustment and the nonmoving-child relationship. The relocation risk assessment model facilitates how evaluators examine and predict the child's functioning if there is a separation from the moving parent in a potential long-distance relationship for each parent as the potential custodial parent. With the parental gatekeeping model, the evaluator needs to assess and anticipate the quality of gatekeeping and coparenting for each parent should they be the custodial parent in a potential long-distance relationship. The author has reviewed custodial reports in which the evaluator only looked at the impact of the move on the child and nonmoving parent-child relationship and not on the moving parent-child relationship. Also, reports in which only the expected quality of parental gatekeeping by the moving parent was examined.

A site visit to the new community would usually be helpful.

Over-Emphasis on Psychological Testing

This forensic procedure occasionally will yield helpful information concerning hypotheses about parents' relative levels of psychological functioning, but always in combination with other data sources. It is likely to be less helpful in relocation cases that occur in a post-decree case in which there has been an established, stable parenting plan in place. When it is being given a high priority the evaluator may be leading the court down the wrong analytic path. Consider a case with a high-functioning mother of two older, school-age children who were well adjusted and by all other data appeared to be resilient children. She had been and continued to be the custodial parent and in a stay-at-home mother role, but desired to establish a career. She had an opportunity to join a family business in a well-to-do family and receive the accompanying social support from grandparents in Washington State. It was a California case so the evaluator needed to assume that the parents would actually be living where they stated they intended to live. Such cases center on the question of which parent is best suited to be the custodial parent in an expected long-distance parenting arrangement. The evaluator and two reviewing experts placed heavy emphasis on the results of the Rorschach Inkblot Test to question whether the mother had sufficient psychological resources to help the children successfully navigate the stress associated with relocation. After the reviewer's testimony and considering the state relocation factors, the judge was not convinced, and relocation was allowed.

Inadequate Development of Long-Distance Parenting Plan and Attention to Practical Analysis

Evaluators need to help the court figure out and craft the practical and pragmatic aspects of a potential long-distance parenting plan should relocation occur, or the scenario of a parent moving away without a child. Relocation may not occur so there might continue to be a local parenting plan. Nonetheless, the competent evaluator who is controlling for potential anti-relocation bias will do the necessary investigation on such issues as travel cost for parenting time; flexibility on time for travel for both parents; supervision of air travel for young children; how to handle exchanges if the distance is close enough for regular auto travel for weekend exchanges; and how to set up virtual parenting time (*i.e.*, video chatting).

CONCLUSION

Due to the expected extreme resistance by both litigants in accepting a relocation child custody evaluator's recommendation that disfavors the

litigant, attorneys often will seek forensic expert consultation services. Consultation services may consist of performing a work product review of the custodial report and evaluation. An ethical forensic protocol should be followed when the reviewer conducts an objective review of the report as the first step and provides candid feedback to the retaining attorney on both the strengths and weaknesses of the evaluation based on the report review. If the consultant-reviewer finds serious deficiencies, then the consultant usually will become a testifying expert and would review the evaluator's case file that would be provided *via* the discovery process.

There are varying perspectives on the types of services a consulting, testifying expert should provide to the retaining attorney and as to the types of opinions that should be offered to the court in the testimony. There are two schools of thought. The conservative school believes there is "role conflict" if the testifying reviewer-expert provides case consultation about trial strategy. The liberal perspective is that there is just one role as a forensic consultant who may provide a range of services or engage in a variety of consulting activities. The conservative school advises against a testifying, consultant expert providing general trial strategy consultation. Both schools indicate it is desirable for the testifying consultant to assist the retaining attorney in developing the direct testimony to elicit efficient and accurate testimony on the salient issues and to be helpful to the court. The liberal school suggests some degree of general trial consultation is permissible, but it must be conducted within a retainer agreement that outlines clearly the ethical parameters on objectivity, balance, and accuracy on all issues in light of the data and professional literature.

Both schools believe the consultant-reviewer should review and communicate about the quality of the forensic methodology employed and applied by the custody evaluator. Both schools indicate that it is permissible and helpful to opine on whether the evaluator's opinions and recommendations are supported by the underlying and sufficient data. The conservative school urges a cautious approach on formulating opinions based on an independent review of the evaluator's forensic data concerning specific and mediate issues in the case, unless it concerns the issue of the evaluator's opinions in light of the research. The liberal school indicates that the consultant-reviewer can and should interpret the data as they exist, but in the context of both the case and literature. Both schools agree the consultant, testifying expert should not express opinions on the ultimate issues involving recommending a specific parenting plan.

Due to the complexities that are inherent in child custody relocation cases it is not uncommon to encounter weaknesses and flaws in the custody evaluation. Common errors found in child custody relocation evaluations were described. These errors range from evaluator anti-relocation confirmatory bias, to sometime bias for relocation based on primary parent perspective, to an inadequate understanding of the nuances of the law in the jurisdiction, to inadequate knowledge and application of the relevant literature and research. Evaluators will be wise if they adopt a systematic approach to their relocation evaluation. The relocation risk assessment model is available, but a straightforward approach of gathering data on and comparing the relative advantages and disadvantages associated with the decisional alternatives (*e.g.*, a social capital analysis) would be sufficient.

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NOTES

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2. Evaluations by court-appointed experts concerning disputes and litigation on issues of child custody, parenting time/access/timeshare are sometimes given other labels in different states. Parental responsibility evaluations, parenting plan, and timeshare evaluations, and social investigations are other labels, but they are equivalent forensic evaluations. In some jurisdictions a Guardian *ad Litem* appointment may be conducted by attorneys or mental health professionals and be close to a functional equivalent of a custody evaluation.

3. This point on the importance of fathers is made because the early research on divorce and children's adjustment almost exclusively focused on the importance of mothers and used mothers as the source of the verbal report data (*see* Warshak, 2000, *supra* n.25, for a review).

4. Relocation cases are dissimilar from many types of custody disputes in that the parties are more likely to agree on the fact pattern compared to a case involving allegations of alienation, domestic violence, child sexual abuse.

5. Research shows that children usually are equally and securely attached to both parents by nine months of age, even when they spend much more time with one of the parents, usually the mother (Kelly, J. B., & Lamb, M. E. (2000). "Using child development research to make appropriate custody and access decisions for young children." *Family and Conciliation Courts Review, 38*, 297–311.).

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Gatekeeping and Alienation

Parental Gatekeeping and Child Alienation

Dr. Austin offers trial consultation services and instructional expert testimony on the research and literature on **parental gatekeeping** and allegations of **alienating behaviors by a parent (ABP)**. He has presented workshops and professional publications on the role parental gatekeeping in child custody disputes and evaluations. Gatekeeping is particularly relevant to relocation disputes where the issue is how well the moving parent can support and help sustain the other parent's relationship with the child.

Child custody or parental responsibility disputes always concern issues of parental gatekeeping or the extent and pattern of each parent's access to and involvement with the child. Child custody evaluations always need to address **gatekeeping** issues between the parents. Child custody trials are "gatekeeping disputes." When allegations are made that one parent is trying to **alienate** the child from the other parent it involves negative gatekeeping behaviors. The parent who is feeling shut-out is alleging that the other parent is engaging in **gate-closing** behaviors to hinder involvement with the child.

A gatekeeping analysis is relevant to cases involving allegations of alienation. Research shows children of divorce show the best long-term adjustment when they enjoy quality relationships with both parents. When a parent is trying to minimize the other parent's involvement with the child without justification, then he or she is engaging in **restrictive gatekeeping** and this will be harmful to the child. When a parent is supportive of the other parent's relationship with child and engages in **gate-opening** behaviors to help with access and involvement, then this represents **facilitative gatekeeping**. When a parent engages in restrictive gatekeeping and there are sound reasons to limit the other parent's involvement, such as when there is a history of intimate partner violence, substance abuse or alcohol abuse, or harsh parenting, then the parent is engaging in **protective gatekeeping**. The gate-closing behaviors are justified. When the facts show that restrictive gatekeeping, or gate-closing behaviors, are not justified then the restrictive parent may be engaging in alienating behaviors, either intentional or unintentional.

Gatekeeping Defined and Research

Parental gatekeeping encompasses attitudes and behaviors by either parent that affect the quality of the other-parent-child relationship and/or level of involvement with the child in either a positive or negative way. Parental gatekeeping is a concept based on solid scientific research on gatekeeping behaviors and attitudes, and co-parenting both with intact and divorced families. It concerns issues of mutual support between parents and quality of the co-parenting relationship. Gatekeeping behaviors between parents can be positive or negative.

It is important to distinguish between gatekeeping attitudes and behaviors. Almost all divorcing parents who are having a parenting/custody dispute hold negative gatekeeping attitudes concerning the other parent. Many of these parents have difficulty in recognizing the continuing importance and value of the other parent for the child's development. Such parents need to learn to compartmentalize their negative attitudes from their gatekeeping behaviors so both parents can be substantially involved with the child. Research shows that even with restrictive gatekeeping attitudes by mothers that if the father stays involved, then young children show good adjustment (Pruett et al., 2003).

Research shows that about 1 in 5 mothers engage in restrictive gatekeeping in intact families. Restrictive gatekeeping is more common after separation and divorce. Both parents often engage in restrictive gatekeeping after separation. Mothers may want to limit the father's involvement out of concern about the father's parenting competence. She may view herself as the "primary parent" who needs to safeguard the children's development. Fathers may be on a "learning curve" after separation about parenting skills and managing the details of the child's life on a daily basis and without "supervision" by the mother. Some mothers may not be supportive and try to restrict the father's access out of anger, hurt, and vindictiveness. Some fathers are not supportive of the mother's role and relationship with the children for similar reasons in the midst of post-divorce conflict.

Research shows that mother's attitudes about fathers' competence and involvement greatly influences the extent of fathers' involvement. Mothers are likely to be more supportive when there is low conflict and the father is responsible about paying child support.

Legal Context of Gatekeeping

Gatekeeping is a process that is found in a common best interest of the child statutory factor in many states that addresses how well each parent can support the other parent-child relationship. At the time of divorce when the parents are in dispute over a parenting plan and parenting time schedule both parents can appear to be not supportive of the other, or to be restrictive gatekeepers. A custody evaluator and the court need to determine if the negative gatekeeping is divorce related and likely to be a problem in the short run, or if it is likely to be enduring and a chronic problem. About 80% of parents learn to move on with their lives and control their conflict after a couple of years. When gatekeeping persists it engenders conflict and the parents may end up in court in a dispute to enforce or modify the parenting plan. Restrictive gatekeeping creates conflict and causes relitigation.

Gatekeeping Continuum

Numerous writers have proposed a gatekeeping continuum to describe the range of gatekeeping behaviors that vary from very positive to very negative gatekeeping (Allen & Hawkins, 1999; Austin, 2005a; 2005b; 2012; Pruett et al., 2007; Trinder, 2008; Austin, Pruett et al., 2012). On one end of the continuum is very facilitative gatekeeping where the parent is proactive in supporting the other parent's role and involvement with the child. It represents constructive, cooperative co-parenting. On the negative end of the continuum is very restrictive gatekeeping where the parent is not supportive of the other's involvement; does not recognize the value of the other parent for the child's development; and is actively hindering involvement. Extreme examples of restrictive gatekeeping would be child abduction/kidknapping and extreme alienating behaviors by a parent (ABP).

Examples of Gatekeeping Behaviors

Restrictive gatekeeping behaviors between divorced parents include the following:

- Making telephone or Skype contact difficult
- Refusing to communicate with the other parent about the child
- Derogating the other parent in front of the child
- Negative nonverbal communication directed at the other parent in front of the child
- Not being flexible on needed adjustments to the parenting time schedule
- Withholding information about the child such about school, events, activities
- Scheduling activities for the child on the other parent's time without communicating
- Being intrusive and disrupting the other parent's time with the children
- Trying to micromanage the child's life during the other parent's time

Why is Gatekeeping Important?

Gatekeeping is important because of the substantial research that shows that children benefit from having both parents substantially involved in their lives unless there is a risk of harm to the child. This research supports the common legislative or social policy declaration found in most state statute that encourages the frequent and continuing involvement of both parents following separation and divorce. Most children of divorce will show a fairly normal development if they have one nurturing, competent parent providing consistent care, but divorce places children at risk for adjustment problems. The risk is reduced most when there are two competent, committed, and loving parents involved. When a loving, competent parent is not allowed to have meaningful time with the child, then it is assumed that this will be harmful to the child. A debate within the profession concerns what amount and pattern of parenting time is sufficient for the nonresidential parent and child to enjoy a meaningful relationship. It has been recommended by authorities that every other weekend is not sufficient to really foster a quality relationship (Kelly & Lamb, 2000).

A proposed "gatekeeping effect" is that children are at less risk of adjustment problems when there is facilitative gatekeeping or at least cooperative co-parenting. Restrictive gatekeeping creates more risk assuming the parent who is being hindered is competent and has substantial psychosocial resources to offer the child. The concept of Social Capital has been proposed as an explanation for the gatekeeping effect. Social capital refers to the psychosocial resources the child receives from the important relationships in his or her life. Parents, siblings, extended family, friends, coaches, etc. provide social capital (Austin, 2008; 2012; Austin et al., 2012).

Protective Gatekeeping

When the reasons for a parent's restrictive gatekeeping behaviors are to protect the child from potential detriment and the facts demonstrate there are sound reasons for the behaviors to limit then it is a situation of Justified Protective Gatekeeping. When the facts do not support the restricting parent's attitudes and behaviors, then it can be viewed as alienating behaviors by the parent that is creating its own risk of harm to the child.

Gatekeeping and Relocation Disputes

Relocation disputes always are about the potential negative effect of moving on the child's relationship with the nonmoving parent. Gatekeeping thus often is the central issue in relocation dispute. Judges want the moving parent to demonstrate that she or he can support the other parent's continuing involvement. In a long distance parenting arrangement the residential/custodial parent is in a vital gatekeeping role where she or he can easily undermine the parent-child relationship. The gatekeeper parent also has the power to promote this relationship. The relocation risk assessment model (Austin, 2008) for relocation disputes has gatekeeping or the ability to support the other parent-child relationship as one of the risk factors. It is probably the key factor for the child to have a "successful relocation" where the child has a satisfactory adjustment to the transition to a new community and maintains a quality relationship with the distant parent. The gatekeeper parent is in a strategic position to manage the risk of relocation harm to the child.

Alienating Behaviors by a Parent (ABP)

Alienation refers to attitudes and behaviors by a parent following divorce that have the effect of negatively affecting the parent's relationship and/or access to the child. It usually involves intentional acts designed to undermine the other parent's relationship with the child and to limit access and involvement. When the alienating behaviors have their intended effect the child may start to resist or refuse to have contact with the other parent and become an alienated child.

Parental Alienation Syndrome (PAS) was proposed in the 1980's Dr. Richard Gardner to describe ABP. PAS created much controversy and has been disavowed by most authorities in the fields of divorce research and child custody. The problem was reformulated in 2001 and the concepts of child alienation, estrangement, alignment, alienating parent, and rejected were substituted (Kelly & Johnson, 2001). The behaviors of both parents and the child were proposed as contributing the child alienation. Rejected parents naturally react very negatively when the child resists spending time and conflict usually ensues.

The Alienated Child

ABPs can cause a child to view the other parent negatively and to begin to resist or refuse spending time with the other parent. When this occurs there is an alienated child. The alienated child usually develops an alignment with the alienating parent and has become estranged from the other parent who is being rejected. In the majority of families when a parent engages in ABPs the child will continue to want to spend time with the other parent and not become alienated despite the inappropriate behaviors by a parent.

When ABPs are justified because of issues or questionable behaviors or circumstances in the other parent's residence, then it is a case of justified protective gatekeeping. When ABPs are not justified in light of the facts and circumstances, then it is a case of restrictive gatekeeping.

Is it Alienation or Protective Gatekeeping?

Child custody evaluators are often called upon to differentiate for the court whether there is alienation going on or whether there is justified protective gatekeeping. Frequently, in the midst of parent conflict over parenting issues a parent will allege there is "parental alienation" occurring. This occurs when there are legitimate differences of opinion about what the time sharing arrangement should be. This usually is not a situation of restrictive gatekeeping or alienation. It is very common in relocation disputes that the nonmoving parent will assert the proposed move represents "parental alienation" and that the moving parent wants to shut other parent out of the child's life, or "marginalize" the nonresidential parent. All states recognize it is a legitimate for parents to want to move to better the quality of their lives in terms of employment, remarriage, or returning to a home community for support from extended family. Relocation should not be equated with restrictive gatekeeping or alienation. However, when facts demonstrate there has been restrictive gatekeeping or that the main reason for moving is to frustrate the other parent's involvement with the child, then judges will deny relocation.

When there has been intimate partner violence between the parents and there are justified concerns about continuing violence, control, intrusiveness, harassment, or emotional abuse, then it cannot be expected that the parent will be friendly towards the other parent. There may need to be a safety plan in place as part of the parenting plan. In such cases there may be concerns about harsh parenting of child abuse by the parent who abused his or her partner. Such situations would also represent justified protective gatekeeping and not alienation, or unjustified protective gatekeeping.

Implications for Parenting Plans and Co-Parenting Education

A gatekeeping analysis can be helpful to the court in creating an appropriate parenting plan, or to determine if an existing plan needs to be modified, including a change in the custodial/residential parent. The court wants parents to cooperate and constructively co-parent even if they do not like each other very much. How the court allocates parenting time and decision making may depend on whether a parent is seen as a restrictive gatekeeper. It is important for a custody evaluator to inform the court about the degree of restrictiveness with specific behavioral descriptions and not just attach a label of "restrictive gatekeeper" on a parent. Parents who are restrictive may vary in the areas of behavior where they are hindering or not promoting the other parent-child relationship. For example the hindering may occur with telephone contact or not sharing school information. Custody evaluators can be helpful by making recommendations for intervention and behavior change tailored to the specific gatekeeping behaviors that need to be addressed.

Gatekeeping also has the potential to be the pivotal idea that guides co-parenting educational interventions and programs (Pruett & Pruett, 2009).

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About the Panelists…

Kristyl M. Berckes is an attorney with Lawrence Law in Watchung, New Jersey. She represents clients in all aspects of matrimonial and family law, including all stages of divorce litigation, mediation and arbitration, custody and parenting time issues, third-party custody, alimony and child support, modification of support obligations, separation and marital settlement agreements, post-judgment litigation, domestic violence, grandparent visitation rights, palimony, and domestic partnership matters under the *Domestic Partnership Acts*.

Ms. Berckes is admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey. She is a former Co-Chair of the Somerset County Bar Association's Young Lawyer's Division and serves as a Trustee for the Association. A Trustee of the New Jersey State Bar Association (NJSBA), she is a member of the NJSBA Appellate Practice Committee and completed a fellowship for the NJSBA Leadership Academy. She was awarded the New Jersey State Bar Association's Young Lawyer's Division Professional Achievement Award in 2016 and is the recipient of several other honors.

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Mr. Freed serves as an Associate Managing Editor of the *New Jersey Family Lawyer* and his articles have appeared in the magazine. He has lectured on family law matters for ICLE, the New Jersey State and Mercer County Bar Associations, and the New Jersey Association for Justice.

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Eileen Kohutis, Ph.D. is a licensed psychologist in private practice in Livingston, New Jersey. She conducts evaluations for child custody and personal injury cases, and her areas of expertise are psychological testing, Munchausen by proxy (now called factitious disorder imposed on another) and reunification. She is also a rebuttal expert.

A member of the international and state chapter of the Association of Family and Conciliation Courts, Dr. Kohutis is a Trustee of the New Jersey Psychological Association Foundation and a member of the American and New Jersey Psychological Associations. She is a former Program Chair of the New Jersey Chapter of the Association of Family and Conciliation Courts (NJ-AFCC) and is on the Medical Staff at St. Barnabas Medical Center in Livingston, New Jersey.

Dr. Kohutis is the co-author of an article on the eggshell skull plaintiff which was published in *Psychological Injury and Law* as well as another article, with Thomas DeCataldo, on the 50/50 presumption which appeared in *New Jersey Family Lawyer*. She has presented locally, nationally and internationally on malingering, psychological testing somatic disorders and factitious disorders imposed on another (formerly called Munchausen syndrome by proxy).

Dr. Kohutis received her B.A. from Trenton State College and her M.A. and Ph.D. in Psychology from Yeshiva University. She also holds Certificates in Psychoanalysis and Psychoanalytic Psychotherapy from the Institute for Psychoanalysis and Psychotherapy of New Jersey.

Jeralyn L. Lawrence, Certified as a Matrimonial Law Attorney by the Supreme Court of New Jersey, is the Managing Member and founder of Lawrence Law in Watchung, New Jersey. She practices in all areas of matrimonial and family law including divorce litigation, mediation and arbitration, custody and parenting time issues, alimony and child support, separation and property settlement agreements, adoption and guardianship advice, domestic partnership matters under the *Domestic Partnership Act*, domestic violence and sexual abuse, and palimony. She is also a trained collaborative lawyer and divorce mediator, and has argued before the New Jersey Supreme Court on behalf of the New Jersey State Bar Association and the American Academy of Matrimonial Lawyers-New Jersey.

President of the New Jersey State Bar Association (NJSBA), Ms. Lawrence is a Fellow of the American Academy of Matrimonial Lawyers (AAML), Past President of the Academy's New Jersey Chapter and has been certified by the AAML as a Family Law Arbitrator. She is also a volunteer attorney with the New Jersey State Bar Military Legal Assistance Program, which provides *pro bono* legal assistance to New Jersey residents who have served overseas or in active duty of the armed forces after September 11, 2001. She is Past Chair of the NJSBA Family Law Section and has been a Trustee of the New Jersey State Bar Foundation and President of the Somerset County Bar Association. Ms. Lawrence has served on the District XIII Attorney Ethics Committee and has been a member of the New Jersey Association for Justice, the New Jersey Women Lawyers Association, the New Jersey Collaborative Law Group, the New Jersey Association of Professional Mediators (NJAPM) and the International Academy of Collaborative Professionals. She was appointed to the Somerset County Domestic Violence Working Group as a Representative of the Somerset County Family Law Section and has also been a member of the Association of Family and Conciliation Courts and the American Bar Association. A Director of the Women's Political Caucus of New Jersey (WPC), she served on the Matrimonial Certification Committee that oversees the statewide matrimonial attorney certification process and is an attorney volunteer at Safe+Sound Somerset.

The 2023 recipient of the Tischler Award for lifetime contributions to the field of family law, Ms. Lawrence is a frequent lecturer at divorce and family law programs and has been a senior editor of the *New Jersey Family Lawyer.* She is a graduate of the National Institute of Trial Advocacy (NITA) and a former member of the Central New Jersey American Inns of Court. Ms. Lawrence is a recipient of the Young Lawyers Division Professional Achievement Award, the Carol Murphy Award bestowed by the Women's Political Caucus of New Jersey, and is a 4-time recipient of the Annual Legislative Recognition Award from the New Jersey State Bar Association. She is also the recipient of the 2008 Outstanding Woman in Somerset County from the Somerset County Commission on the Status of Women, the 2009 Kean University Distinguished Alumna award and several other honors.

Ms. Lawrence received her B.A. from Kean University and her J.D., *summa cum laude*, from Seton Hall University School of Law. While in law school, she was awarded the New Jersey Chapter of the American Academy of Matrimonial Lawyers' Award in addition to serving as the Student Director of the Family Law Clinic.

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The co-author of *Marriage, Divorce and Dissolution* (3rd Edition, Gann Publishing, 2019), Ms. Seiden has moderated and spoken on many panels for ICLE's Family Law Symposium Saturday and Friday night programs on topics involving creative support awards, child support, emancipation and special needs trusts, alimony issues, legislative issues affecting family law, and reexamining relocation laws. She often lectures and educates junior lawyers and

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Ms. Seiden received her B.A., *cum laude*, from American University and is a *magna cum laude* graduate of New York Law School, where she served as the Managing Editor of the *New York Law School Law Review*.