LONG-DISTANCE PARENTING PLANS: NUTS, BOLTS & CAVEATS

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Formulating and Drafting Long Distance Parenting Plans

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I. Long Distance Parenting Plans - defined as any proposed plan by parents or caretakers, with, or without judicial or dispute resolution assistance to regulate the intra- or interstate or international movement of a child or children with the purpose of sharing caretaking duties and responsibilities. These plans exist on a continuum starting with simple trusting “handshake” agreements to complex schema with highly detailed provisions meant to address every possible occurrence where the participants have little trust in the other. The underlying nature of the caretaker relationship is assumed to be a non-intact family, either pre- or post-judgment.

General Legal Posture. The participants will have some awareness or appreciation of the legal position in which they find themself and the other caretaker. Each is aware of the other’s potential as a unilateral decision maker if agreement cannot be maintained and judicial intervention is sought. Of course this varies from state to state and only Oregon is covered here.

II. EXHIBIT A. LONG DISTANCE PARENTING PLAN.

A. This parenting plan is an example. Sometimes contrary provisions are included, as this is only for purposes of illustration and discussion. It is not

intended to be used wholesale. Also there is an inherent contradiction because many of the provisions proposed are rather unpalatable and may not be able to be incorporated by agreement of the parties. Thus, the inclusion of some of these provisions may require litigation, involving proof of foreign law and expert testimony. This presentation does not directly address litigation method and strategy.

B. LEGAL NATURE OF THIS AGREEMENT **§2**

1. **§1(a)** Substantive law is that of Oregon.
2. Choice of Law. **§2(b)** The agreement or order will be enforced to the extent possible, under the laws of the United States and Oregon. The exception may be when the judgment has been registered and recognized in foreign country see **§5** of the Parenting Plan. Even then, if a preference is stated in the parenting plan it may be honored.
3. ORS 107.104(2). **§2(c)** Sets forth the basis for enforcement.
4. Consent Agreement **§2(d)** The term “consent” is more widely recognized than “stipulated” or “agreed” especially internationally. This paragraph contemplates incorporation into a judgment document.
5. Contract **§2(e)** There may be circumstances where there is no pending proceeding that will conclude with a judgment or decree, or simply an agreement, as long as it is legally binding. See: 18 USC

1804(b)(2)(B): ". . . whether arising by operation of law, court order, or legally binding agreement of the parties". Is a private contract regarding custody legally binding? In *Weaver v. Guinn*, 176 Or. App. 383; 388-389 31 P.3d1119(2001), the court stated: "Agreements concerning the custody of children "are worthy of the court's consideration." *Laurence v. Laurence*, 198 Or. 630, 638, 258 P.2d 784 (1953). They may even constitute an admission on the question of parental fitness. Id. But they do not control the court's decision as to the best interests of the minor child. Id.; see also *Truitt and Truitt*, 124 Or. App. 531, 534, 863 P.2d 1287 (1993) ("trial court is not bound by * * * agreements regarding the custody and visitation of minor children"); *Cope and Cope*, 49 Or App 301, 306, 619 P.2d 883 (1980).

C. BASES OF JURISDICTION

1. Jurisdiction is meant in the traditional sense, the power of a tribunal to declare a custody right. **§3(a)** In Oregon that will almost always be the court adhering to the substantive law and to the to the UCCJEA. However the right of custody can arise by operation of law: ORS 109.030: "Equality in rights and responsibilities of parents. The rights and responsibilities of the parents, in the absence of misconduct, are equal, and the mother is as fully entitled to the custody and control of the children and their earnings

as the father. In case of the father's death, the mother shall come into as full and complete control of the children and their estate as the father does in case of the mother's death." *See: State v Fitouri*, 893 P2d 556, 133 Or App 672 (1995), where the court of appeals upheld the conviction of custodial interference in the first degree under ORS 163.257 where the defendant-father was unaware of a custody order obtained by the mother after he had abducted the child overseas. The court reasoned that all the father needed to know was that he was interfering with mother's equal custodial rights under ORS 109.030. A custodial right by operation of law can also arise under the methods described in ORS 109.175.

2. Other cases finding this similar right between married parents are: *Mota and Mota*, 66 Or. App. 439, 441, 674 P2d 90 (1984)(child support context), *Hruby and Hruby*, 304 Or. 500, 748 P2d 57 (1987)(interpreting right created by ORS 109.030) & *Doherty v. Wizner*, 210 Or. App. 315, 150 P.3d 456 (2006) (changing child's surname).

3. **§3(b)**. The Parenting Plan should include the basis for jurisdiction, home state, significant connection, emergency or the most appropriate and convenient forum.

4. **§3(c)**Then, most definitely in the interstate context, reference to the UCCJEA jurisdictional basis being consistent with the PKPA is

required, in order for another state to give the order full faith and credit.

5. **§3(d)** State the basis of personal jurisdiction, or at least ensure any enforcing court is aware one parent appeared in the child custody proceeding under limited immunity, ORS 109.727. This is also stated under §4(g)

6. **§3(e)** In the modification context This should be cited as a further basis for jurisdiction.

7. **§§3(f) & (g)** Bases for initial and modification jurisdiction.

8. **§3(h)** If you represent a parent remaining in Oregon, you may want to get the other party's agreement that they will not seek to have Oregon decline further jurisdiction and the other state assume it. ORS 109.761(2)(e) cites any agreement of the parties as an enumerated relevant factor.

9. **§§4(a) & (b)** state the basis for the award of custody and to which parent it is made.

10. **§4(c)** In order to have a basic cause of action under the Hague Convention/ICARA, the removal or retention of the child must violate the other parent's right of custody, under the laws of the country where the child is habitually resident. This is a factual predicate to a action under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Found

at: http://www.hcch.net/index_en.php?act=conventions.text&cid=24

The specific ultimate facts which establish habitual residence varies among the federal circuits. When drafting the findings, the applicable law of the federal circuit (or foreign country) in which the left-behind parent is located would initiate the return action is pertinent. ICARA instructs the state or federal court in which a petition alleging international child abduction has been filed to "decide the case in accordance with the Convention." §§11603(b), (d).

11. To illustrate, you represent parent A who resides in Oregon with the child. Oregon would be the child's habitual residence. Parent B exercises parenting time in a country who is a "state party" (not "signatory" - signing the treaty instrument does not mean the treaty will be in force between any two countries, it must enter into force and then the two countries are state parties) to the Convention. Parent A files an application with the US State Department, who will then forward the application to the similar institution in the country where parent B and the child are located (the State Department(Office of Children's Issues) and the "ministry of Justice" in the other countries are the Central Authorities). There may be legal assistance in that country or parent A may have to hire a lawyer there. The lynchpin legal fact is where the child's habitual residence is, and under the laws of that country, in this

example Oregon, was the other parent's right of custody violated? If so, then the removal or retention is said to be "wrongful".

12. Article 5(a) of the Convention defines a right of custody: ". . . shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence".

13. In Oregon, under the normal scheme of legal custody to one parent and parenting time to the other, the only parent with a "right of custody" under articles 3 and 5 is the parent with legal custody. The issue of whether a *ne exeat* right is a "right of custody" was addressed by the US Supreme Court in *Abbott v. Abbott*, 130 S. Ct. 1983, 176 L.Ed.2d 789 (2010). A *ne exeat* right is akin to a *status quo* or temporary protective order of restraint, which allows a non-custodial parent to restrict a child's move out of the state or country. The child in *Abbott* had been moved in violation of a *ne exeat* order, and was thus required to return to the country of habitual residence, where the *ne exeat* order was issued.

14. The problem is when you represent the parent who does not have legal custody, and the custodial parent is allowed to relocate back to their native country with the child. If the custodial parent denies parenting time, the Hague Convention return remedy is of no assistance.

15. **§§4(d) & (e)** Article 5(b) defines a right of access, which is a right

of contact, visitation, parenting time. Thus, a left-behind parent may pursue the same administrative remedy - apply to the US Central authority who will then facilitate the initiation of an access case in the abducted-to country. The court in which the Hague case is filed and pending will decide access. In the US, the federal circuits are in disagreement over whether such an access case can be tried in federal court or must be tried in state court. ICARA allows concurrent jurisdiction in state and federal courts.

16. There are many countries, who are not state parties to the Hague convention. **§4(f)** A federal criminal statute has been of use in recovering wrongfully removed or retained children. 18 USC §1204, the International Parental Kidnaping Crime Act ("IPKCA"). This was made law in 1998, not to be confused with the Parental Kidnaping Prevention Act, or PKPA , 28 USC 1738A, of 1980.

17. IPKCA has a maximum penalty of 3 years imprisonment, which has been used primarily to force the return of children, either in the pretrial stage or as a condition of probation. Notably distinguishing it from the Hague Convention (as well as state custodial interference laws) is that there is a domestic violence defense, and the left-behind parent need not have a right of custody, only a right of access or visitation. *US v Alahmad*, 28 F Supp 2d 1273 (1998)."The three 'parental rights' that trigger criminal liability under IPKCA are joint custody, sole custody and visitation rights".

18. Only the US Attorney may bring this action. So report a removal or retention to it to local law enforcement (who may do nothing), and to the National Center for Missing and Exploited Children (NCMEC), to get the ball rolling with federal law enforcement. Inclusion of this provision in the Parenting Plan may assist in proving intent.

19. **§4(g)** This finding is the *sine qua non* of establishing jurisdiction, exercising and enforcing it under the UCCJEA. See: ORS 109.717, .724, .754, .787, .797 and .804. It is also one of the bases of international comity and recognition of foreign country judgments and is used by the majority of foreign jurisdictions. *Goode and Goode*, 997 P.2d 244, 165 Or. App. 327 (2000); *rev den*. 8 P.3d 219, 330 Or. 412 (2000), and *Hilton v. Guyot*, 159 U.S. 113, 205-06, 16 S.Ct. 139, 40 L.Ed. 95 (1895).

20. **§§4(h) & (I).** That the judgment is final and not being appealed or modified are also bases for recognition.

21. **§5** If the parenting plan is to be enforced in another US state or foreign country, then it will have to be registered and recognized by that jurisdiction. Many of the above findings are directed at making the parenting plan a useful, enforceable set of rules.

22. There is no treaty to which the US is a state party that governs recognition and enforcement of foreign country judgments.

However, the US has signed, but not ratified, the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ("1996 Convention"). Found at: http://www.hcch.net/index_en.php?act=conventions.text&cid=70 The UCCJEA has been revised, and a fourth section added to accommodate and implement the 1996 Convention, which will also require additional federal law for full implementation. The Oregon version of the UCCJEA, at ORS 109.714, incorporates the Model Act section 105 rule on international application which accommodates foreign custody judgments. The 1996 Convention will now require other state parties to recognize US custody judgments. But we are not there yet.

23. **§5** is not the definitive list, but provides ideas for useful agreement prior to registration and recognition efforts. It generally requires the high level of cooperation which makes registration and recognition move smoothly.

24. For interstate cases, find the target state analog to ORS 109.787, and register the judgment. The statute contemplates this in subsection (1), without needing to file any enforcement action at that time. After 21 days post service, the judgment is recognized unless objections are lodged. Note the statute requires an ORCP

7-type notice.

25. International recognition is more involved. The US is a common law jurisdiction, in which recognition is generally limited to reviewing the foreign or foreign country judgment for sound jurisdiction, notice and opportunity to be heard, and finality. This is somewhat true for other common law jurisdictions such as the UK, Australia and Canada. India is chiefly a common law jurisdiction but at this time, in recent Supreme and High Court decisions, they make no bones about it: they will revisit the merits of any US custody order. See: *Thomas vs Arul*, OA. No. 191 of 2011, High Court of Judicature at Madras, July 27, 2011.Other legal systems include but are not limited to French civil law, German civil law (common in Asia) and Chinese law(mix of civil law and socialist law). Each has its own approach to recognition and enforcement of foreign custody judgments.

26. Well in advance of enforcement, the vulnerable party should contact an international family law attorney in the target country to have the judgment or order registered and recognized. Often this means filing an entirely new adversary proceeding in that country. That is why the provisions in **§5** are important, cooperation and cost-sharing.

27. **§6** is meant to cover unanticipated situations. This may provide an

independent basis for attorney fees and costs. ORS 109.811 also provides a more expansive definition of costs than does ORCP 68.

28. **§7** Once working within the international or interstate context, service of process may become challenging, as one can no longer just call their local process server to accomplish this task. There are a number of chapters in Oregon State Bar books that describe service of process outside the State of Oregon, such as Chapter 1, Jurisdiction and Procedure in the Family Law Book, 2013 revision, and Chapter 5, Family Law in Rights of Foreign Nationals.

29. **§7** Focuses on provisions to which the parties may agree in order to remove some of the obstacles to long distance service methods. Many of the provisions rely on Oregon case law having to do with waiver, such as *McInnis and McInnis*, 199 Or App 223, 235-36, 110 P3d 639 (2005) and *Matar and Harake* ____ Or____; ____P3d____(*en banc* 2013).

30. **§8** Passports. If only one parent is to be permitted the exception to the two-parent passport law, this language should be included.

31. **§9** The actual parenting schedule will be formulated based on the facts of your case.

32. **§10** many of you will have additional provisions you have developed in your practice experience.

33. **§11** We have all heard of Oregon parents, in Oregon having trouble

enforcing ORS 107.154, so provisions requiring the other party to assist are useful.

34. **§12** and on - these are provisions that are the result of experiencing problems and attempting to prevent them in the future.

III. In conclusion, any parenting plan has as its primary goal contact with the parents in a manner that will serve the best interests of the child. Dr. Dudley will address those elements. The risks for the child increase when potential loss of contact with either parent results from counsel not anticipating problems that may arise, and this presentation has hopefully increased awareness of potential problems.

Example of Provisions for a LONG DISTANCE PARENTING PLAN for the 2013 Oregon State Bar Family Law Section Annual Conference, Gleneden Beach, Oregon, October 10 & 11, 2013 Regarding Formulating and Drafting Long Distance Parenting Plans

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1. THIS PARENTING PLAN INVOLVES THE FOLLOWING CHILD:
   a. , age .(hereinafter " " or ")
   b. Dob (Protected Information)
   c. Current address: , Oregon
   d. New Address:
2. LEGAL NATURE OF THIS AGREEMENT
   a. The substance of the rights determined by this Parenting Plan is based on the law of the State of Oregon, United States of America.
   b. Choice of Law and Forum
      i. CHOICE OF APPLICABLE LAW. The parties agree that the law of the forum, the State of Oregon, USA shall govern all procedure and substance concerning the construction and interpretation of this Parenting Plan. The enforcement of this parenting plan will be by the law of the state where enforced. Should that law allow the parties to choose Oregon law, in whole or Part as the basis of enforcement, the parties are required to choose Oregon law. In any enforcement action where foreign law must be pleaded and proven, the proof of such law may be satisfied by an authenticated copy and certified translation.
      ii. CHOICE OF FORUM. The parties agree that should a dispute arise over the construction, interpretation or enforcement of this Parenting Plan, that the exclusive forum in which any legal action concerning this Parenting Plan shall be brought is the Circuit Court of the County of _____, State of Oregon, USA, as long as this is consistent with the Uniform Child Custody Jurisdiction and Enforcement Act.
   c. ORS 107.104(2) provides that in a suit for marital annulment, dissolution or separation, the court may enforce the terms set forth in a stipulated general or supplemental judgment)("judgment") signed by the parties, a judgment resulting from a settlement on the record or a judgment incorporating a marital settlement agreement as contract terms using contract remedies, or by imposing any remedy available to enforce a judgment, including but not limited to contempt; or any combination of the above provisions.
   d. Consent Agreement. This parenting plan is a consent agreement of the parties and it is their intention that it be fully incorporated in the judgment document in the same way as if it was written within it.

e. Contract. This parenting plan is a consent agreement of the parties and it is their intention that it be fully enforced as a contract.

3. BASES OF JURISDICTION

a. This Parenting Plan is a child custody determination as defined by the Uniform Child Custody Jurisdiction and Enforcement Act, ORS 109.700 *et seq*.,("UCCJEA")

b. The State of Oregon is the home state of the child(ren); Oregon maintains the most significant contacts with the child; the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse; Oregon is the most convenient and appropriate forum for addressing custody issues and parenting contact.

c. This child custody determination under the UCCJEA is consistent with the Parental Kidnaping Prevention Act, 28 USC §1738A ("PKPA"), the federal full faith and credit act for child custody determinations.

d. Both parties appeared in the legal proceeding in which the court made an award of custody and assigned parenting time rights, and therefore the court had personal jurisdiction over each party or one party appeared under the protection of limited immunity.

e. Oregon statute ORS 107.135(10)(a), provides that the Oregon court retains personal jurisdiction over the parties in a domestic relations action once the court has acquired jurisdiction.

f. The child custody proceeding in which this Parenting Plan is adopted has been adjudicated in the State of Oregon, United States of America and is pursuant to the home state, significant connection, or other jurisdiction as set forth within the Uniform Child Custody Jurisdiction and Enforcement Act.

g. The child custody proceeding in which this Parenting Plan is adopted has been adjudicated in the State of Oregon, United States of America, and the child and one parent, or the child currently reside in Oregon, and therefore is pursuant to Oregon's Continuing Exclusive Jurisdiction under the UCCJEA.

h. [Parent A] will not seek to have Oregon decline further jurisdiction under an inconvenient forum analysis. ORS 109.761(2)(e) allows any agreement of the parties as to which state should assume or continue jurisdiction as a factor in determining the most convenient forum.

4. BASES OF ENFORCEMENT

a. The judgment of the court is that under Oregon law, it is in the best interest of the children that the Parent A/Parent B be awarded sole legal custody, and parenting time be apportioned between the parents as set forth in this judgment.

b. The judgment of the court is that under Oregon law, it is in the best interest of the children that the parents be awarded joint legal custody, and parenting time be apportioned between the parents as set forth in this

judgment.

c. The United States of America, State of Oregon is the country of habitual residence of the child within the meaning of articles 3 and 5 of the Convention on the Civil Aspects of International Child Abduction done at the Hague on October 25, 1980 and its codification, the International Child Abduction Remedies Act, 42 U.S.C. §§11601 *et seq*.

d. Therefore, Parent B has "rights of custody" as that term is used in article 5(a), and Parent A has "rights of access" as set forth in article 5(b) of the Convention on the Civil Aspects of International Child Abduction done at the Hague on October 25, 1980.

e. This section, "Rights of Custody" is consistent with the US Supreme Court's interpretation of article 5 in *Abbott v. Abbott*, 130 S. Ct. 1983, 176 L.Ed.2d 789 (2010).

f. This child custody determination of joint legal custody or legal custody to parent A with parenting time to parent B confers a "parental right" as that term is defined in 18 USC §1204(b)(2)(A), the International Parental Kidnaping Crime Act.

g. Each party declares that they have received all notices and process upon which the legal action resulting in this judgment and parenting plan has been based in a manner reasonably calculated to notify and inform each party of the existence and pendency of the action, with adequate time to appear and defend on the merits, all consistent with Oregon law.

h. The awarding by the court of legal custody to parent A is a final judgment, and the time to appeal has passed.

i. There is no pending action on ____ ____, 2____ to modify this parenting plan.

5. REGISTRATION AND RECOGNITION

a. It is the intent of the parties that this parenting plan be enforceable in the place where the child will be having parenting time.

b. The parties agree that this custody judgment/order and parenting plan is a final determination of the parenting time issues as of the date the judgment was rendered.

c. The parties agree that they will cooperate fully with any efforts by either parent to have this child custody determination registered, recognized and enforced in [Country], or any subsequent country of residence, or location of the children. Under this provision, recognition is complete upon ORCP 7 (as set forth in paragraph 6 below) service on the nonregistering parent of the application to register.

d. Neither parent will object to the other parent's attempt to have this parenting plan registered and recognized in any state or country where the other parent resides or where the child will be having parenting time or travel.

e. Should it be necessary for a legal proceeding to be initiated in the country of the other parent's residence or where enforcement would be sought,

the nonregistering parent consents to such filing and will accept service if lawful.

f. The expense of registration will be shared equally, including attorney fees, and direct costs, such as filing fees and costs of authentication.

6. CERTAIN EXPENSES

a. The parties recognize the essential value of the contact between both parents and the child, and agree that the child be readily accessible to both parents in order for that contact to continue. Accordingly, should either party ever wish to change the residence of the minor child from this State, written notice of this intent shall be given to the other party at least sixty (60) days prior to the time proposed for the move and filed with the court. Approval of both parties or a court's ruling shall be required before a move is undertaken. The parties shall first mediate if a dispute arises. Either party may file a legal action if mediation fails.

b. Should either party relocate or attempt to relocate without following the above procedure of giving notice, seeking mediation or obtaining approval of a court of proper jurisdiction, they shall indemnify the other party on account of all travel expenses, legal fees, costs and disbursements, detective fees, lodging costs, lost wages and all similar and related costs, incurred in finding the new location and bringing a legal action or retaining counsel to bring the child back to this jurisdiction.

c. Should the removing party be permitted to retain the child in the jurisdiction to which removed, the removing party shall pay all transportation costs associated with restoring visitation, including escort for travel, if necessary.

7. SERVICE OF PROCESS

a. The parties agree to provide a residential address as required by Oregon law and notify the other party of any changes immediately.

b. The address in paragraph ____ will be the parent’s address for service of process and legal mail.

c. Should either party relocate outside the USA the parties specifically waive any rights they may have as to service of any document intended to bring about civil enforcement of this judgment and modification of this judgment under the terms of the "Hague Convention On the Service Abroad of Judicial And Extrajudicial Documents in Civil or Commercial Matter," concluded 15 November 1965.

d. The parties agree that all documents to be served may be written in English.

e. Should the "Hague Convention On the Service Abroad of Judicial And Extrajudicial Documents in Civil or Commercial Matter” not be in force in the two countries in which the parties reside, they shall submit to the process of letters rogatory under any treaty, reciprocity, comity or other inter-country agreement for service of process.

f. The parties specifically agree that service will be consistent with Oregon Law. However, Parent A specifically waives personal service for ORS 33

Contempt actions and ORS 163.245 and consents to service by first class mail and restricted delivery certified or express mail, return receipt requested signed by Parent A, who alone is authorized to sign the receipt.

8. PASSPORTS
   a. The Court concludes the pertinent federal law on passport applications and issuance concerning a minor child is: "CFR 22 §51.28(3)(ii)(E) Execution of passport application by one parent or legal guardian. A passport application may be executed on behalf of a minor under age 16 by only one parent or legal guardian if such person provides: * * * (ii) Documentary evidence that such person is the sole parent or has sole custody of the minor. Such evidence includes, but is not limited to, the following:(E) An order of a court of competent jurisdiction granting sole legal custody to the applying parent or legal guardian containing no travel restrictions inconsistent with issuance of the passport; or, specifically authorizing the applying parent or legal guardian to obtain a passport for the minor, regardless of custodial arrangements; or specifically authorizing the travel of the minor with the applying parent or legal guardian * * * ."
   b. There are no restrictions on Petitioner's right to travel internationally with the child. This grant of sole legal custody authorizes the Petitioner acting as the applying parent for the child's US Passport original, replacement, extra pages or renewal to be specifically authorized to do so to the exclusion of the Respondent, and Petitioner is specifically authorized to travel internationally with the minor child.
9. PARENTING SCHEDULE
   a. Regular Parenting Time
      i. The child will have regularly scheduled unsupervised parenting time with Parent B with time computed on the US calendar and Oregon's clock, and based upon the school calendar commencement, adjournment, breaks and activities.
      ii.
   b. Specific Parenting Time
      i. Spring Break: The child will be with Parent B in odd-numbered years for the entire duration of Spring Break. If parenting time takes place in the city that the child resides, parenting time will begin the day school is dismissed until the day school resumes & Parent B will take the child to school. If parenting time will take place outside the city where the child resides, parenting time will commence the day after school is dismissed and will end the day before school resumes. Parent B shall give Parent A twenty-one (21) days notice of the day vacation starts that he will exercise his parenting time.
      ii. Winter Break: In odd-numbered years The child will be with Parent B from the time school is released until December 26th. In even numbered years Parent B will have parenting time with the child from December 27th until the day before school resumes.

iii. Summer: Parent B will have parenting time with the child for one-half of her school summer vacation, beginning no sooner than one week after school adjourns and ending no later than one week, seven (7) days prior to school commencing.

iv. Other Parenting Time In The Portland Area During the School Year: In addition to the parenting time stated in paragraphs 1, 2 and 3 above, Parent B shall have parenting time with the child for up to seven (7) consecutive overnights, up to four (4) times per year, with reasonable notice to Parent A. "Reasonable notice" is defined as no less than 14 days.

v. Once Parent B has given Parent A notice of his intent to exercise parenting time in the city in which the child resides, Parent A shall not schedule the child for any extra curricular activities. However, during such parenting time, the child's regularly scheduled events will still need to occur, but Parent B should otherwise be able to have her in his care during his visits as if the parenting time were taking place in a different state. Parent B will ensure that the child gets to all of her regularly scheduled activities, and to school, in a timely fashion.

vi. Parent A will support Parent B's parenting time in Portland as if Parent B and the child were in another location. In other words, the child will be spending that entire time, including overnights, with Parent B. The child will not go home during said parenting time. The child shall be able to have phone contact with Parent A during that time but not parenting time.

vii. The child shall not be allowed to decide whether she will participate in parenting time with Parent B. The personal plans of Parent A and the child's activities shall not be reasons for failing to follow the parenting time schedule. Neither parent shall register the child for an activity during the other parents parenting time. If one parent unilaterally commits the child to a particular activity, the other parent is not required to use his or her parenting time to have the child participate in that activity.

c. Communication Between Child and Parents

i. Communication Between The child and her parents: When the child is with the other parent, communication needs to be afforded, supported, unfettered, and unmonitored and may be by telephone, email, Skype, in writing or by any means of communication and at any considerate time. Skype communications need to occur on the average of at least two to three times per week, on average. The child and Parent B will schedule the Skype conversations between themselves. Parent B should be allowed to contact the child by telephone with extremely reasonable frequency, and at considerate times. The child shall maintain her own Skype account and have her own cell phone. While the child is with Parent B Parent A shall

have the right to call Parent A or Skype for a reasonable period with Parent A in a similar manner as stated herein.

ii. The child may e-mail each parent at the following e-mail addresses:
(1) Parent A:
(2) Parent B: _____

iii. The cost associated with maintaining internet online access shall be provided by the parent from whose residence the child is initiating the contact.

d. Parent A must provide Parent B with the physical address of where the child is residing. Parent A must notify Parent B within 24 hours if said address changes.

e. Parent A must provide Parent B with a phone number where Parent B can reach the child at all times. Parent A must also provide Parent B with a land line number, if Parent A has one. Parent A must notify Parent B within 24 hours if said telephone number changes.

f. Parent A must provide Parent B of her employment and address and phone number. Parent B shall not use this contact information except in an *bona fide* emergency.

10. Other provisions/conditions of the parenting plan:

a. Illness. The fact that the child is ill does not cancel parenting time. The illness must be of a substantial nature and the child's physician must state in writing that Parent B or Parent A advises against parenting time before illness cancels parenting time.

b. Parent B and Parent A shall list each other as a contact person on all school, extracurricular and medical forms and/or information. Parent A and Parent B will cooperate with each other and the school, to ensure that Parent B can receive copies of any school records, school newsletters, report cards, correspondence between the school and parents, scheduling of special school activities, etc. that they may desire.

c. Parent A will list Parent B as the child's Parent B and Parent B will list Parent A as he child's Parent A on all school records, medical records, and on all other records requesting the name of the child's parents.

d. Each parent will sign any necessary documents to ensure that the other parent can have access to the child's medical, mental health, dental and school records, and each parent shall be responsible for getting their own copies of records and reports directly from the school and medical facilities.

e. Parent A shall notify Parent B of the child's regularly scheduled medical appointments.

f. Each parent shall immediately notify the other parent in the event of an emergency involving the child, or in the event of a substantial change in the child's mental or physical health, including, but not limited to, hospital visits. If the child is ill or on any medication for an illness, each parent shall notify the other parent of the condition and medication.

g. Each parent shall provide the other parent the name, address and telephone number of any professional providing services for The child, as soon as reasonably possible.
h. Each parent shall provide the other parent with the schedule, name, address and telephone number for the contact person for any extra curricular activity.
i. Each Parent shall notify the other parent of any with address and emergency contact telephone numbers at all times.
j. Both parents will provide contact information to the other parent in advance whenever the child will be out of town or away from either home for more than 48 hours, including where Parent A will be staying, with whom, for how long, and the phone number. This includes traveling with the other parent.
k. The parent with whom the child is staying shall be responsible for her daily care, needs and will make any necessary decisions regarding non-emergency medical and dental care, notifying the other parent at the earliest opportunity.
l. Each party shall be restrained and enjoined from making derogatory comments about the other party or in any way diminishing the love, respect, and affection that the child has for the other party.
m. The parties or their attorneys shall submit any future disputes regarding the parenting plan to a mediator prior to instituting court proceedings, unless emergency circumstances make formal mediation impossible or impractical.

11. Statutory Rights Retained by Parent Not Awarded Legal Custody granted by Oregon Law. Both parents specifically agree to support the other parent's rights as set forth and to execute any necessary releases or other documents to allow Parent B:
    a. To inspect and receive school records and to consult with school staff concerning the child's welfare and education, to the same extent as Parent A.
    b. To inspect and receive governmental agency and law enforcement records concerning the child to the same extent as Parent A.
    c. To consult with any person who may provide care or treatment for the child and to inspect and receive the child's medical, dental and psychological records, to the same extent as Parent A.
    d. To authorize emergency medical, dental, psychological, psychiatric, or other health care for the child, if Parent A is, for practical purposes, unavailable.
    e. To apply to be the child's guardian ad litem, conservator, or both.
12. MODIFICATIONS TO THIS AGREEMENT
    a. This agreement may be modified on a temporary basis provided both parents agree in writing. When the parents do not agree, this agreement remains in effect.
    b. If both parents agree to make a change to this agreement, such

modification must be in writing, signed by both parties and filed with the court having UCCJEA jurisdiction.

13. EDUCATION
    a. The child shall be enrolled in school by Parent A and keep Parent B informed about the status of the enrollment and the name and address of the school.
    b. Extra-curricular Activities:
        i. Either parent may register the child and allow them to participate in the activity of the child's choice while in that parent's care.
        ii. The parent with the minor child shall transport the minor child to and/or from all extra-curricular activities, providing all necessary uniforms and equipment are within the parent's possession.
        iii. The costs of the extra-curricular activities shall be paid by: Parent A 50% Parent B 50%
        iv. If the child attends summer camp, the costs shall be paid by Parent A 50% and Parent B 50%.
14. SCHEDULING
    a. School Calendar On or before 01 March each year, both parents shall obtain a copy of the school calendar for the next school year to discuss and create a parenting contact calendar following the child's academic calendar.
    b. Schedule Changes:
        i. A parent requesting a change of schedule shall be responsible for any additional care, efforts or transportation costs resulting from the change.
        ii. If one parent must pay for the child's expenses when it is the responsibility of the other parent to do so, the parent initially responsible will reimburse the other parent for these costs within 30 days of payment.
        iii. Schedule Conflicts shall be resolved by the following.
15. CONFLICT RESOLUTION
    a. The parents will first attempt to cooperatively resolve any disputes that may arise over the terms of this Parenting Plan, outside the presence of the child.
    b. These provisions are not applicable if immediate court action is required to protect the child in an emergency situation.
    c. Conflict resolution jurisdiction shall be held in _____.
    d. Unless otherwise agreed the professional shall be paid by Parent A 50% and Parent B 50%.
16. TRANSPORTATION
    a. The costs of transportation for Parent B's parenting time shall be paid for by Parent B.
    b. The parents shall exchange travel information including travel itineraries and finalize travel plans at least 14 days in advance of the date of travel.
    c. Except in cases of an emergency, any parent requesting a change of

travel plans less than 14 days in advance of the date of travel shall by solely responsible for any additional costs.

d. The child shall fly accompanied by a parent or the parent's designee until old enough to fly unaccompanied.
e. The Local Parent shall wait for the child's flight to become airborne before leaving the airport.
f. The receiving Parent shall pick up the child at the airport where the child arrives.
g. The child shall never be booked on a flight with more than one connection.

By signing this Parenting Plan, I confirm that I have read all of the pages and any attachments, I understand it and I believe that it is in the best interest of my child. I am freely and voluntarily entering into this Agreement and I request that the Judge approve it.

Date Signed: _____ _____

Signature of Parent A

_____ _____

Notary Seal:
Notary Signature: _____

By signing this Parenting Plan, I confirm that I have read all of the pages and any attachments, I understand it and I believe that it is in the best interest of my child. I am freely and voluntarily entering into this Agreement and I request that the Judge approve it.

Date Signed: _____ _____

Signature of Parent B

_____ _____

Notary Seal:
Notary Signature: _____

Exploring three Functions in Child Custody Evaluation for the Relocation Case: Prediction, Investigation, and Making Recommendations for a Long-Distance Parenting Plan

William Austin
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SUMMARY. The psycho-legal dilemmas posed by child custody relocation cases are discussed in terms of the four decisional alternatives facing the court and evaluator. Different legal contexts for relocation are reviewed in terms of their implications for the custody evaluation. Complexities involved in the evaluator's function of making predictions for the court are presented. The need to conduct careful investigation on both risk and pragmatic factors is highlighted by case illustrations. The obstacles of crafting of long distance parenting plans that will be in the best interests of the child are presented as governed by the goal of harm mitigation.

KEYWORDS. Relocation, prediction, investigation, parenting plans

In this paper, we examine three important aspects of conducting child custody evaluations for the relocation case. The first aspect is composed of an examination of the function of making predictions for the court in custody cases. We argue that the evaluator's analysis needs to address issues of potential harm for the child for each proposed parenting plan. The need to construct a good fit between the evaluator's predictions and the legal standard is discussed.

Second, the "fact driven" nature of most relocation cases requires the evaluator to use an investigative model (Austin & Kirkpatrick, 2004). Reliably identifying "real life" factors of the proposed relocation allows for a comparison of those factors against salient "predictive factors," some of which are identified in case law or statute. The investigative task requires the evaluator to do a good bit of forensic psychological detective work in order to provide the court with important descriptive behavioral data.

Third, we discuss the importance of the evaluator collecting data and offering recommendations based on those data on suitable alternative parenting plans. These plans should include recommendations for parenting time based on a relocation of one parent with or without the child. Although state appellate decisions often have pointed to the ameliorating effects of "visitation," we have observed many relocation cases when a substantial geographical distance is placed between a child and parent, no "suitable" parenting plan is easily developed. The evaluator may craft a parenting plan that mitigates the degree of harm

associated with relocation and limits the fundamental changes that will occur in the child-parent relationship. In these extremely difficult and complex cases, the court is trying to grapple with the issue of which type of loss or harm is less painful and less negative in its long-term effects on the child. Data provided by the evaluator can help the court to determine if its definition of the threshold of harm for relocation is met resulting in a decision to allow the relocation or if the threshold of predicted harm is exceeded, resulting in a decision to deny the relocation of the child.

OVERVIEW OF THE LEGAL CONTEXT

Relocation cases continue to present some of the most difficult parenting disputes to custody evaluators and the courts because of the potential for emotional hardship on the parents and developmental harm to the child (Austin, 2000a; 2000b). In one appellate decision, the judge wrote: "Many factors must be considered and weighed by the trial judge, whose responsibility in this type of proceeding is generally difficult and quite frequently most delicate in nature" (*Tanttila v. Tanttila*, 1963). When there is a scenario of (a) two highly involved parents, (b) one of those parents alleges no flexibility and "just has to move," (c) there is a young child, and (d) the other parent alleges that s/he cannot also move, then the court faces the prospect of a "lose-lose-lose" outcome, no matter what the chosen disposition. In such situations, the court's decision may not be geared so much to promote the best interests of the child but to mitigate the degree of harm to the child associated with the natural consequences of the decision. It may often be there is no "good" or "right" decision; the trier of fact will be searching for the least harmful and painful alternative that will allow the child to stay on a normal developmental course.

Evaluators can be most helpful to the courts in producing data-based predictions on the degree of harm associated with different alternative parenting plans and can be helpful in recommending strategies for harm reduction to be included in a parenting plan (Austin, 2000b).

Relocation Scenarios

There are four alternative outcomes effecting residential placement when a parent wants to relocate with that child a considerable geographical distance away from the current home community. The first alterna-

tive is when the child is allowed by the Court to move with the relocating parent and the other parent does not relocate. A second alternative is when the court disallows the relocation request and the parent aspiring to relocate does not move and stays in the home community, thus preserving the status quo. A third alternative is when the court disallows the relocation and the relocating parent moves without the child, resulting in primary custody being transferred to the non-moving parent. A final alternative is when the relocation is allowed and the other parent follows the relocating parent and child to the new community. Some states do not allow courts, in alternative two, to issue conditional orders to preserve the status quo (CO, NC) while appellate courts in other states endorse the practice (NY).

Alternative three, a parent relocating without the child, may seem like it would rarely occur, but relocation of nonresidential parents is not uncommon, a fact pointed to by advocates of legal presumptions for allowing residential parents to relocate (Wallerstein & Tanke, 1996; Bruch & Bowermaster, 1996; Bowermaster, 1992-93). Consider the case of the "father who couldn't sit still." At the time of the marital separation, father relocated from his five and seven year old children to a different part of Colorado about three hours away. Mother conscientiously cooperated with the long drive for every other weekend parenting time, even though temporary orders stipulated visitation would be at "mother's discretion." Five months later, father relocated again, this time to Texas. He informed the mother that "the law says I can have the kids for the entire the summer."

When a residential parent's petition to relocate is denied by the court, conventional wisdom is that the residential parent seldom moves without the child. Research suggests that a residential parent who is denied a request to relocate with the child and who decides to move without the child is not as infrequent as previously believed. Braver, Cookston, and Cohen, (2002) surveyed family law practitioners on their estimate of how frequently their clients who wanted to relocate would do so even if the court turned down the relocation request. In what may seem like a counter-intuitive finding, the aggregate estimate was that relocation without the child would occur 37% of the time. Relocation without the child may be the result of the parent determined to pursue his or her own highly valued interests (e.g., educational or vocational interests) or the result of a lack of flexibility regarding the move (e.g., remarriage).

In a recent case we call, "the mother who wanted to stay home," in a surprise move at the time of the marital separation, the mother relocated with the child to her own mother's community two hours away. The fa-

ther did not immediately oppose the relocation, but asked for primary residential custody in the event the mother did not return to the community. A custody evaluation recommended equal parenting time if the mother returned to the original community and recommended primary custody to the father if she did not return when the boy started preschool in the following fall. A salient factor was the mother's limited ability to support the relationship between the child and father and to facilitate tension-free access to child. The court agreed with the rationale that there were not clear advantages to the child in the new community compared to the home community and the child's relationship with the father would be harmed if relocation was permitted. The mother decided not to return to the original community and the father became the primary residential parent.

More typically, a non-residential parent will relocate without the child. From the perspective of the child, relocation of either parent may create risk. A recent study found negative long-term effects on children of divorced parents with the relocation of *either* parent (Braver, Ellman & Fabricius, 2002). A general explanation for this finding is that like divorce, relocation produces at a temporary lowering of resources available to the child from a variety of sources and relationships, or diminishing of the "social capital" in the child's environment (McLanahan & Sandefur, 1994; Amato & Sobolewski, 2004; Austin, 2005).

Sometimes parents find themselves in "Catch-22" situations concerning relocation. The relocating parent may have very compelling reasons for the move. If the legal climate and the facts of the case do not yield a strong argument for the child relocating with the parent, then the parent may be forced to make choices between his or her own interests and the best interests of the child that may include staying in the home community with the child and foregoing the opportunities that prompted the reasons for the move.

Recent case law has suggested relocation decisions should consider and balance both the interests of the parents and the child (*In re Marriage of Ciesluk*, 2005; *In re Marriage of Spahmer and Gullette*, 2005). There has always been an implicit tension between parent and child interests as well as competing parental interests in relocation cases and law. Forensic lore dictates that relocations are always motivated by a parent's interests that are then cast in a favorable light for the child. *Ireland v. Ireland* (1998) indicates the children's interests in a given case "do not necessarily coincide with those of one or both parents" (p. 680). *In re Marriage of Ciesluk* (2005) makes the dialectical tension among

competing interests explicit in its constitutional law analysis, and further, directs courts (and therefore evaluators) to directly consider parental interests and to what extent they are intertwined with the child's. These interests are represented in the "needs and desires" of the parents, which presumably would be reflected (and measured) in the parent's stated reasons for wanting to relocate and for opposing the relocation. Thus, evaluators operating in those states whose case law has articulated this parental interest analysis should indeed attempt to measure this global factor.

Evaluators should also be aware of their case law that direct trial courts to consider indirect benefits to the child associated with relocation (*Goldfarb v. Goldfarb*, 2004; *In re Marriage of Ciesluk*, 2005). Such benefits can be non-economic and ones that promote the relocating parent's sense of well-being (*Goldfarb v. Goldfarb*, 2004). Some states require benefits to the child as well to the as parent to be demonstrated (Dupré v. Dupré, 2004) while other states have appellate decisions that have indicated both a need to demonstrate relocation is in the best interests of the child (*Berrebbi v. Clarke*, 2004) and in the best interests of the child and the parent (*Russenberger v. Russenberger*, 1996). Evaluators should gather data, then, on all of the ostensible advantages and disadvantages and on the soundness of the reasons for the relocation.

In another case, we call it the "mother who married the asthmatic husband," the parents had enjoyed equal parenting time with their thirteen year old girl. The child alternated every other week (7 days on/7 days off) between each parent's home for the first two years and then alternated every two weeks (14 days on/14 days off) between each parent's homes for the next two years. When the mother remarried, she requested that she be allowed to relocate from rural Colorado to Boston. She cited in her request to relocate that her new husband had a business in Boston and he had a chronic respiratory illness. Relocation from Boston to Colorado would create financial problems and would likely exacerbate his breathing problems. Mother told the evaluator she would not relocate without the child, saying that she would wait to relocate to Boston until after the daughter graduated from high school. Although it appeared that she was willing to place the needs of her child ahead of her own needs, there were no data to suggest that the relocation would benefit the child.

A recent appellate decision affirmed that clear benefits to the child needed to be shown in order for relocation to be seriously considered. In this case, no clear benefits to the child were identified. The evaluator

recommended against relocation and recommended for extended summer parenting time so mother and daughter could go to Boston. The mother promptly announced she was going to relocate without the child. Such a move would likely produce substantial harm as the mother and daughter were quite close. However, evaluation data supported the hypothesis that the mother would likely not actively support the relationship between the daughter and the father if the child relocated with mom. In the event of the mother's relocation without the child, the harm-mitigation intervention that was recommended included the child spending eight weeks during the summer with the mother and for the parents to alternate or split the child's time during other school vacations. The mother could return to Colorado for parenting time as well.

Legal Anticipation of the Relocation Scenarios: The Case of Tennessee

The State of Tennessee tried to anticipate the different relocation contexts or scenarios (*Tennessee Code Annotated, Domestic Relations,* 2004). In determining the viability of a request to relocate out of state, the Tennessee legislature recommended that courts look first at the existing parenting time arrangements. If an equal parenting time arrangement existed, then no presumption in favor of the move would apply and the legal standard used to examine the relocation request would be the best interests of the child. Several best interests factors were to be considered (See Table 1).

If no equal parenting time arrangement existed, then there is a presumption that the residential parent can relocate with the child. To challenge the relocation, the nonresidential parent would need to show the presence of one or more statutorily defined factors that presented risk of harm to the child. If one or more of the factors were found to exist, then the legal standard shifts back to best interests of the child. If, after finding one of the risk factors existed and if the court knew that the residential parent would relocate without the child, then this "fact" can be considered and the proper legal standard would be the best interests of the child.

Relocation Issue at the Time of Dissolution vs. Modification

Case law and the few state statutes that apply to child custody and relocation are primarily designed to address the situation where one par-

TABLE 1

Tennessee's Relocation Statute, T.C.U. § 36-6-108(c)(1-11) Factors to Consider in Relocation
1. Extent to which visitation have been allowed and exercised;
2. Whether the primary residential parent, once out of the jurisdiction, is likely to comply with any new visitation arrangement;
3. The love, affection and emotional ties existing between the parents and child;
4. The disposition of the parents to provide the child with food, clothing, medical care, education, and other necessary care and the degree to which a parent has been the primary caregiver;
5. The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
6. The stability of the family unit of the parents;
7. The mental and physical health of the parents;
8. The home, school, and community record of the child;
9. The reasonable preference of the child if twelve (12) years of age or older;
10. Evidence of physical or emotional abuse to the child, to the other parent or to any other person; and
11. The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child.

ent wants to move away with the child, the other parent wants to stay in the original community, and a modification of an existing parenting plan is required. In our experience, relocation requests arise as frequently at the time of divorce or implementation of the original or permanent orders as they arise in post-judgment requests. When a request to relocate is filed may affect which legal standard applies to the court's analysis of the relocation request. When a relocation request is made during the initial divorce proceedings, the legal standard used to evaluate the request is almost always going to be the best interests of the child. Prior to the signing of the original divorce decree, both parents are considered joint custodians of the child even though a primary custodian may have been designated in temporary orders after the marital separation. Typically, temporary orders are not supposed to prejudice the crafting of the permanent orders or be prejudicial, *res judicata,* against parenting time rights or the eventual final determination of the parenting plan (*In re Marriage of Lawson*, 1980).

When a request to relocate is brought before the court after the implementation of the permanent order, then a presumption for relocation may apply (California; New Jersey; Wyoming; *In re Marriage of Burgess*, 1996; *Baures v. Lewis*, 2001; Watt v. Watt, 1999) or against relocation (*Arizona Revised Statutes, Marital and Domestic Relations*, 2004, LaChappelle v. Mitten, 2000); or one may need to show a substantial change in circumstances due to relocation (North Carolina; *Ramirez-Barker v. Barker*, 1992); or one may need to show harm to the child to make a substantial modification (UMDA standard). Colorado seems to have a unique statute in the treatment of relocation as one form of substantial modification of a parenting plan because relocation is carve out as an exception to the standard of needing to show physical endangerment or emotional impairment (*Colorado Revised Statutes, Dissolution of Marriage–Parental Responsibilities*, 2001), while Tennessee has an elaborate statutory scheme for designating relocation as a unique circumstance in child custody issues (*Tennessee Code Annotated, Domestic Relations* 2004). In these statutory schemes, when a modification will result in a substantial change in parenting time, then the movant parent must show harm to the child, e.g., physical endangerment or risk of emotional impairment, but if the issues concern relocation, then it is a best interests of the child standard.

The Supreme Court of Colorado fashioned novel relocation law on the issue of the timing when relocation becomes a legal issue. *In re Marriage of Spahmer and Gullette* (2005) announced when relocation occurs at the time of dissolution, then court must assume the parents will be living in the location they intend to and statutory factors for relocation in the context of modification should not be considered (e.g., reasons for the move, extended family, advantages/disadvantages, etc.). Further, the court may not issue conditional orders (i.e., the relocating parent could continue as the custodial parent if s/he did not relocate). To do so would unconstitutionally impede the relocating parent's right to travel. Thus, at the time of dissolution, when relocation is on the table, the court must award primary custody to one parent or the other, as if relocation has already occurred. The evaluator, however, has to gather data on the likely effects on the child associated with adjustment to both parents' residences, just as in any custody evaluation, but in this case the effects of relocation need to be estimated.

Relocation Created by a Modification of Primary Custody

An atypical relocation scenario may occur after an institution of a permanent custody order and after one parent moves to another state and the relocated, nonresidential parent seeks a change in the primary custody. In this scenario, a permanent custody order may have been designed to incorporate interstate parenting time arrangements in which the child visits with the nonresidential parent after his/her relocation to another state or after the residential parent and child relocates away from the home community and away from nonresidential parent. After some period of time, the nonresidential parent files a motion to modify the original permanent order, asking for a change in custody which would result in the child relocating away from the residential parent to begin living with the other parent.

In a recent case that we will call "the mother who drank too much," the mother of a ten-year-old boy had been the residential parent since the child was two and a half years old. With the child in the car, the mother was arrested for a DUI traffic offense. Her blood alcohol content was very high (BAC = .28). When she arrived at the local jail to serve her 10-day jail sentence, her BAC was again over the legal limit (BAC = .22). Based upon concerns about the mother's alcohol use, the father filed for a change in custody. The father had relocated from Colorado to Florida when the child was a toddler. His parenting time for eight years had consisted of two long weekends in the son's home community in Colorado and for the past four summers the boy had visited the father in Florida for a week. The father regularly called the boy to talk about daily activities, but the amount of involvement in the boy's life over the years had been quite limited. At the same time that the father motioned the court for a relocation and change in custody, the boy who continued to live with his mother, displayed a healthy and positive developmental growth.

Relocation cases often present the evaluator and the court with situations in which the primary focus is to mitigate harm or to choose which type of harm will be less difficult for the child to handle, e.g., a diminished relationship with the nonresidential parent and loss of resources found in the home community versus a potential diminution of the relationship with the residential and relocating parent. In a Colorado case (*In re the Marriage of Steving*, 1999) in which the mother had relocated to New York, the court found the mother had been alienating the child from the other parent, but the degree of harm estimated to be associated with a change in custody and with a disruption of the child's attachment

to the mother outweighed the harm caused by the alienation processes. In this case, the court was attempting to balance two types of harms: harm from relocation resulting in disrupted attachments to the mother and harm from the mother's alleged alienating the child against the father.

In the case of "the mother who drank too much," in which it was concluded that she had an alcohol dependence disorder, the court was faced with the risk of harm to the child associated with the mother's alcohol consumption versus a known high probability of harm associated with a change in primary custody to a father who had been minimally involved in the life of his child. The evaluator recommended the court consider not ordering the modification. Instead, the evaluator recommended that the child remain with the mother who would be ordered to attend an alcohol treatment program, including monitored Antabuse therapy. These steps reduced the risk of harm to the child resulting from the mother's alcohol disorder. The court disagreed and sent the child to Florida to live with the father demonstrating the point that only the trier of fact can determine the threshold of harm needed either for relocation and/or modification and a change in primary custody. The boy would need to adjust to a change in the primary residence and a new community.

Legal Standards for Relocation Law

There is wide diversity in states' legal standards for relocation. In the 1990's, state case law decisions began to assert legal standards based upon the best interests of the child with stipulations that certain factors should be considered, such as practical advantages to the child, educational opportunities, and presence of extended family (*Gruber v. Gruber*, 1990; *Tropea v. Tropea*, 1996). These case law decisions represented a movement away from standards that codified an explicit presumption against a custodial parent moving away from the other parent with the child (*New Jersey Statutes Annotated, Marriages and Married Persons,* 2004; see, Terry et al., 2000), while allowing for the presumption against a custodial parent moving with the child to be overcome without too much difficulty (*D'Onofrio v. D'Onofrio*, 1976). The factors drawn from case law were meant to indirectly beneficial to the child through direct benefits to the custodial parent.

In the mid-1990's, a trend emerged to assert a legal presumption that a residential parent could relocate with the child unless the other parent could show detriment to the child associated with the move. This trend began with the influential case of *In re Marriage of Burgess* (1996) in

California and several states (CO; WA; NJ) followed suit (*In re Marriage of Francis*, 1998; *In re Marriage of Littlefield*, 1997; *Baures v. Lewis*, 2001). The decisions about relocation represented in these cases generally required a showing of clear detriment to the child to overcome the presumption in favor of moving away (*In re Marriage of Burgess*, 1996) and sometimes after the relocating parent demonstrating a *prima facie* case that the move was sensible (*In re Marriage of Francis*, 1996).

A few states passed statutes specifically to deal with the issue of relocation and in one instance, in 2001, to change the legal standard from a presumption if favor of relocation to a best interests of the child standard with consideration of certain factors [*Colorado Revised Statutes, Dissolution of Marriage–Parental Responsibilities*, 2004; see also, *Tennessee Code Annotated*, 2004]. At least two states continue to have presumptions against relocation (*Arizona Revised Statutes*, 2004; *LaChappelle v. Mitten*, 2000). It was deemed a "compelling state interest" in Minnesota. Thus, the state legal standards can be grouped into four groups: (1) Best Interests of the Child; (2) Best Interests of the Child with specific factors to consider (among all relevant ones); (3) Presumption in favor of Relocation by a residential parent; and (4) Presumption against relocation of the child with the residential parent. There still exists a wide disparity in the standards used to judge the appropriateness of a request to relocate. Several states' relocation law appear to be in a continuing state of flux, often resulting in debate over the proper legal standard to use in relocation analyses. Some of these debates over the proper legal standard to use in relocation analyses have become highly politicized and polarized (e.g., California; *see In re Marriage of LaMusga*, 2004 and accompanying amicae briefs filed by mental health practitioners and social science researchers. Also, Colorado where the Supreme Court recently issued two decisions that greatly altered how relocation can be approached after the legislature nullified the court's early precedent). Two states recently asserted best interests standards after reviewing the existing case law and legal standards across the country (PA and RI; see, *Goldfarb v. Goldfarb*, 2004; *Dupré v. Dupré*, 2004). Several states have put forth constitutional law analyses that contrast a parent's right to travel against a parent's right to have access to his or her child to "care and control." The results of these constitutional law analyses have been equally disparate with Wyoming having a presumption to relocate, Minnesota a presumption against relocation, and Colorado and New Mexico courts stating the two parent rights needed to balanced and juxtaposed with the needs of the child.

THE PROCESS OF PREDICTION IN CHILD CUSTODY EVALUATIONS

Future Orientation of Custody Cases

In forensic psychology, evaluators are routinely called on to make predictions for the court: Will a criminal offender reoffend in the future? Will an involuntarily committed psychiatric patient commit a violent act if released from the hospital? Will parents cause harm to their child if returned to their care, in a dependency and neglect proceeding? Will an elderly, demented person watch out for her best interests if a guardian is not appointed? Will a student act in a violent manner if allowed to return to school, in a school violence risk and threat assessment case?

The family law context also requires the evaluator and the court to make behavioral forecasts about children, in terms of what parenting arrangements will be in the best interests of the child. The fundamental task of the decision maker and of the custody evaluator is to predict how a child will respond and adapt to alternative environmental circumstances associated with differential custodial and access arrangements. In relocation cases, the challenges of predicting how well a child will adapt to the new situation generally will be more difficult because of the obstacles created by geographic separation to maintaining the level of involvement by the other parent in the child's life. The differential predictions will be even more varied due to increased alternatives to consider compared to a "local" parenting plan with the parents both living in the same area.

Elsewhere, Austin (2000b) has discussed how part of the role of the custody evaluator is to make predictions in the form of recommendations about the long-term developmental outcomes for the child. The evaluator offers alternative residential placement suggestions and makes behavioral predictions and forecasts about how well the child will develop and will adjust to each of these placement suggestions.

Social Policy Considerations

The legal standard for custody determination is understandably placed in the positive language of best interests because of social policy concerns for the long-term welfare of the child. It may be that the court's custody decision making more frequently turns on factors related to its perception of the potential harm to the child. A working stra-

tegic hypothesis among legal practitioners seems to be that "detriment," rather than best interests, is what persuades decision makers when it steps into its *parens patriae* role, and directs its foremost concern toward protecting the child from harm.

The task to designate a residential parent when one parent seeks to relocate and the other parent seeks to remain in the original community becomes exceptionally difficult when there are two highly involved and competent parents. No matter what choice is made by the court, the child loses some of the developmental advantages that existed when s/he lived in an environment in which both parents remained active and involved in the child's daily life. When issues of harm are demonstrated to be associated with one parent, e.g., substance abuse, then the resolution of the uncertainty associated with the decision may be less difficult. A similar degree of uncertainty exists when issues of harm are present with both parents.

Best Interests or Harm?

It is proposed that the legal concepts of "best interests" and "least detrimental alternative" are complementary with respect to child custody determinations and child residential placement. Transferring these concepts to the task of behavioral forecasting means both positive and negative developmental outcomes will be considered and weighted in the legal calculus of custody determinations. The child's predicted developmental outcomes (or adjustment following relocation) become the dependent variables in the evaluator's task of behavioral forecasting.

The relationship between the legal concepts of best interests and least detriment recently has been integrated in legal analysis in Colorado. The appellate court [*In re the Marriage of Martin* (2002)] made a ruling that the concept of Least Detrimental Alternative was subsumed under the Best Interests of the Child, as a legal concept because of the linkage provided by the psycho-legal concept of Psychological Parent (as described by Goldstein, Freud and Solnit, 1973). Within this legal context, the behavioral forecasting associated with divorce and custody can be viewed as a prediction of harm to the child.

Historically, the concept of "least detrimental alternative" is associated with the pioneering and controversial work of Goldstein et al. (1973) on residential placement in adoption and divorce. Goldstein et al. proposed that divorce and custody effects are inherently harmful to the child and that placement decisions are most accurately conceptualized as finding arrangements that result in the least detriment to the child. In

the context of a custody evaluation, *it is proposed that least detriment is the conceptual obverse* or mirror image of best interests and that examination of the least detriment to the child may be the more salient area for the decision maker to examine. Best Interests of the Child and Least Detriment both are a function of the net predicted developmental outcomes associated with the short and long-term effects of divorce on the child or the short and long term effects of changes in parenting plans resulting from situations such as relocation.

The literature examining the effects of divorce on children's adjustment has uncovered negative outcomes associated with divorce (Wallerstein & Kelly, 1980; Hetherington & Kelly, 2002; Hetherington, 1999) though the negative effects generally are mild and the base rates are low (Emery, 1998). These data suggest that divorce is a negative life transition event that places children at risk for adjustment problems and developmental harm (Kelly & Emery, 2003). The experience of relocation stands as another negative life transition event that can be experienced by children as even more stressful than the divorce itself (Wallerstein & Tanke, 1996). A hypothesis follows: when divorce and relocation are co-occurring events for the child, the risk of harm is greater (Austin, 2005).

Relocation law presents a conspicuous example of how custody decision makers sometimes need to directly address the degree of predicted harm associated with a change in the child's environmental circumstances. In the controlling case in the State of North Carolina [*Ramirez-Barker v. Ramirez* (1992)], the court recognized that a certain amount of harm is expected when a parent relocates with a child after divorce. In determining whether to allow a parent to move with a child, the court needs to know how the harm to the child resulting from the relocation would be counter-balanced by advantages resulting from the relocation.

There appears to be a national trend by state high court decisions characterized by their use of the language of "harm" that focuses attention on the potential detriment caused by a relocation of a child away from one of his/her parents. Landmark cases such as *Burgess, Baures v. Lewis,* and *Francis* provide harm analyses. It is our position that these decisions reflect a misunderstanding of the logic and the science associated with a detriment standard. That is, the *Burgess* and *Francis* courts appear to assume relocation with a residential parent will be in the child's best interests and that the nonresidential parent must show there is sufficient harm associated with relocation to deny the child from moving.

The available data addressing relocation in general suggests there is a base rate of predictable harm to the child who relocates with his intact family. When the relocation occurs after divorce and involves only one parent, the available research from different studies using distinct methodologies suggests that the child in a family of divorce is at greater risk for harm because of the reduced resources available to the child once s/he moves away from one of his/her parents and associated social and emotional supports (McLanahan & Sandefur, 1994). That is, the research on relocation shows there is a risk of significant harm associated with relocation for children of divorce (McLanahan & Sandefur, 1994; Tucker, Marx & Long, 1998; Hetherington & Kelly, 2002; Braver et al., 2002).

Courts have approached relocation with the assumption that normal best interests factors, found in statute and case law, apply to relocation. These factors can viewed as independent variables in predicting the child's adjustment to the changed circumstances that follow from relocation. There is considerable controversy on the importance of one variable–the nonresidential parent-child relationship. Specifically, this controversy has revealed itself in the high profile California relocation cases, (*In re Marriage of Burgess*, 1996; *In re Marriage of LaMusga*, 2004; see, for elaboration Warshak et al., 2003; Wallerstein et al., 2003; Shear et al., 2003) where the surface issue ostensibly is the relative importance of preserving consistent parent-child physical contact with the residential parent.

Continuity in maintaining child-parent relationships has long been held out as the primary protective factor in the child's adjustment to divorce (Kelly, 1994; Hetherington, Bridges & Insabella, 1998; Kelly & Emery, 2003). The debate within the context of relocation has centered on whether this protective function primarily emanates from emotional security in a high quality relationship with one custodial parent or with high quality relationships with both parents. Perhaps not surprisingly, the group of mental health and legal professionals who has supported a presumption in favor of a residential parent relocating has largely reported research based on older data sets describing more sex role specific parenting roles. In this research, the division of parenting responsibilities in the study samples often reflected family roles at the time in which fathers played a secondary parenting role. A bias in the data gather was that these studies almost always used the self report of mothers addressing both their level of parental involvement and the level of parental involvement of the fathers (Wallerstein et al., 2003; Wallerstein & Tanke, 1996).

The group of mental health professionals and social science researchers supporting a best interests standard and who also oppose legal presumptions as an approach to relocation (Warshak et al., 2003) have based their advocacy on more current research. Quality longitudinal studies, such as Hetherington's forty year representative sample study of families (Hetherington & Kelly, 2002) and Amato's large sample representative survey studies (Amato & Sobolewski, 2001) support the generalization that children's overall, long-term adjustment to divorce is greater when there is the opportunity for meaningful relationships with both parents. Even Wallerstein's small, selective clinical sample of divorced families supports this conclusion (Wallerstein & Kelly, 1980). Stahl (2004) observes how this tenacious debate represents a healthy development for the field of child custody evaluation and how it "reflects an effort to have new research and shifting understanding inform major Court decisions" (p. 15).

The controversy over children's adjustment to divorce is about the potency of independent variables in predicting child outcomes *following divorce* and is only indirectly about relocation, itself, as findings from the divorce effects literature are being extrapolated to the psycho-legal context of relocation (Wallerstein & Tanke, 1996; Warshak, 2000). Even if one accepts the logic of empirical extrapolation to a subset of divorced children (e.g., relocating divorced children), there is the troublesome problem of applying conclusions based on averages drawn from aggregate data to the individual case of the relocating parent and child. Proponents of legal presumptions for relocation often rely on these group averages that are drawn from a broad array of studies (Wallerstein et al., 2003). However, these studies generally produce inconsistent findings likely due to the variability in samples, differences in methodologies and in historical context from which the data were gathered. In their summary of current literature, Kelly and Emery (2003) opine that disruption to the child's relationship with either parent places the child at risk for adjustment difficulties. They suggest that quality relationships with both parents act as the most powerful protective factors for the child.

While there is merit in relying on aggregate research findings to guide social policy, the United States Supreme Court has cautioned about over-reliance on such data in other forensic contexts. The determination of the right of a mentally ill individual to make treatment decisions requires information from individual, case specific evaluations and not information from group research (*Youngberg v. Romeo*, 1982). Legal commentators have noted the challenge for judges in family law

cases is to be sensitive to "the uniqueness of each case and the harm that can result for children from uninformed rulings" (Kleinman, 2004, p. 3).

Case law that has established a rule for using a legal presumption to facilitate relocation (*In re Marriage of Burgess*, 1996; *In re Marriage of Francis*, 1996) also has emphasized the determination of custody issues requiring an "individualistic determination" for each case. This point is emphasized by Hetherington (Hetherington & Kelly, 2002) who indicated her large data set on families of divorce is most informative when the variability among the variables, or the "within-group" variance, rather than the group averages is examined. With this caveat in mind in trying to grapple with the relocation controversy that exists at the social policy level, it is the evaluator's challenge to sort out the data for the individual family and to make predictions for the court on the least harm or best psychological interests of the children, while showing awareness of the relevant research.

Risk x Stakes Model

The court's focus on determining potential harm to the child is a form of risk prediction that we refer to as "risk decision making." In the child custody context, the *risk decision maker* is in the position of predicting outcomes for the child, ranging from predicting outcomes for short term adjustment to predicting outcomes for longer-term development. Instead of using intuitive judgment and common sense alone, the trier of fact has available information presented through live court testimony and/or presented through a written forensic mental health evaluation that summarizes the anticipated effects of different risk factors that the child may face if placed in different custody and access arrangements.

The first step for the risk decision maker is to scrutinize the child's alternative residential and parental access options to reduce the risk of harm. The next step is for the risk decision maker to assess the likelihood of how different residential arrangements will help the child reach his/her maximum developmental potential. The step for the risk decision maker is a prediction, or what Simon (1957) calls the "rational choice in the face of uncertainty" (p. 203).

Austin previously presented an analysis of harm prediction in the relocation context (2000a; 2000b), based upon factors found in the violence risk assessment literature (Webster et al., 1994; Grisso & Appelbaum, 1992). According to this Austin, the decision maker is in the best position to make rational decisions and to reduce uncertainty

for the child when s/he is informed about the probability (i.e., risk) and the likely consequences (i.e., stakes) for the child that are associated with each of the alternative residential arrangements.

The four relocation scenarios discussed above can be assigned a Risk x Stakes behavioral prediction matrix by the evaluator and each risk scenario can be translated into a separate legal calculus by the court. In non-relocation cases when at the time of the original orders there are two involved and competent parents, the court is faced with low risk-low stakes decision making alternatives. In relocation cases in which both parents were active and involved prior to the divorce, the court is often faced with high risk-high harm alternatives. Whether the relocating parent is going to move with or without the child, the child is at risk because of the reduction in resources available to the child as a result of his or her movement away from one previously active and involved parent.

Fitting the Evaluator's Predictions to the Legal Standard

The evaluator's predictions need to be developed to address the relevant state legal standard for relocation. The specific prongs included in each state's legal standards for relocation become the psycho-legal conceptual umbrella that guides the evaluation. In a state with specifically defined factors drawn from statute or from case law that are used by judges to guide their decision making, the evaluator needs to reliably assess the psychological aspects of each relocation prong and to determine its predictive value. Many legal standards include a best interests rule with discretion to the court to consider all relevant factors. Drawing on research and clinical experience, the evaluator needs to investigate other important factors endemic to the case. In states with case law/statutory factors to consider (i.e, extended family), the evaluator needs to gather data on each factor that is a potential independent variable.

In states with a presumption in favor of relocation, the court needs to find substantial harm or detriment to deny a request for a parent to relocation. For the evaluator to recommend against relocation, there would need to be data from which the evaluator predicts with confidence that the child's adjustment to the relocation would be substantially negative.

The concept of "threshold of harm" and the determination of what defines a "threshold of harm" is a legal concept that is within the province of the court (Austin, 2000b). The evaluator can, however, fully inform the court about the nature and quality of risks to the child and may help the court to understand factors that contribute to developing reli-

able decision making criteria. When providing oral testimony or a written report, evaluators are encouraged to use the language of probability of risk and the language of severity of likely outcomes for the child. In a best interests standard state, the evaluator needs to make predictions based on the relevant factors and on the practical matters important to implementing a new parenting plan, or other alternative decisions.

Relocation Risk Assessment

Austin has previously presented a forensic psychology model for conducting a child custody evaluation for the relocation case (2000a). This relocation risk assessment model described a research-based and hierarchical model to help the evaluator assemble factors relevant to predicting the degree of risk for potential harm to the child associated with relocation, or the other alternative decisions. These factors included age of the child, geographical distance, degree of involvement by the non-relocating parent, degree of interparental conflict including history of domestic violence, individual resources of the child, degree of psychological stability of the relocating parent, and ability of the relocating parent to support the relationship between the child and the other parent. At the time the risk assessment model was first published, there was very little direct research on the effects of relocation on children of divorce. The divorce effects literature was reviewed and major findings extrapolated to the potential effects of relocation (Emery, 1998; Hetherington et al., 1998). The risk assessment model was also designed as a heuristic to help decision makers process information on what factors might be associated with positive or negative outcomes for the child in the four placement options discussed above. The risk assessment model also identified protective factors that held potential to moderate potential negative effects due to relocation (see Table 2).

In offering predictions to the court, the evaluator needs to be mindful of the possibility of making *prediction errors*. One must consider the possibility of over-prediction of harm due to the decisional alternatives (i.e., false positive) or under-prediction of harm (i.e., false negative). In the case of "the mother who drank too much" discussed above, the court did not follow the evaluator's recommendations, presumably thinking he had made a false negative prediction. The court appeared to reason that the mother's alcohol treatment plan was insufficient to safeguard the safety of the child. Or, the judge may have reasoned, even if intuitively, that while the risk/probability of relapse was as a low as it could be for the alcohol disorder, the stakes were too high. So, in a low risk,

high stakes scenario, the court ordered a modification of primary custody that produced a relocation of the child. For a sophisticated treatment of the issue of prediction errors in a forensic mental health context, see Horner and Guyer (1991).

THE INVESTIGATIVE COMPONENG IN RELOCATION PARENTING EVALUATIONS: PROVIDING DESCRIPTIVE DATA ON FACTORS, REASONS, AND LOGISTICS

Many contemporary relocation cases and statutes have identified specific factors to be considered in relocation disputes. Part of the conceptual umbrella for the evaluator is to examine these and other specific factors and issues that relate to the relative advantages and disadvantages associated with relocation. These cases require, then, a psychological cost/benefit analysis as well as risk assessment.

Relocation cases are always "fact driven," a point made in numerous appellate cases (*In re Marriage of Ciesluk*, 2005) To uncover the needed data on risk, consequence, and relative advantages, the evaluator often must dig deeply into the unique contextual features of the post-divorce family. The evaluator often needs to do research on key issues (i.e., the quality of the child's new educational program) or go well beyond the surface data on others (i.e., the psychological stability of the relocating parent's new spouse). Data needs to be gathered on the practical, economic realities (transportation costs; can the family afford to pay for air travel?). Factual information on the relocating parent's reasons for moving need to be checked (i.e., is the parent really going to graduate school? Really have the job offer?).

The importance of the investigative component in all custody evaluations has been described (Austin & Kirkpatrick, 2004), but it seems even more important in relocation cases where key pieces of information may make or break the parent's explanation for why the relocation should be permitted, or to show if the relocating parent has met the "threshold for relocation" (*Baures v. Lewis*, 2001). In implementing the investigative and practical component, the evaluator also must mindful of the state legal standard and precedents. For example, in some states data needs to be gathered to show specific benefits to the child associated with the relocation, but not in other states. The types of data gathered through investigation are described in Table 3.

TABLE 2

Austin's (2000a) Relocation Risk Factors	
1.	age of the child;
2.	geographical distance of the proposed move;
3.	degree of involvement by the non-relocating parent;
4.	degree of interparental conflict including history of domestic violence;
5.	individual psychological resources of the child/individual temperament
6.	degree of psychological stability of the relocating parent/coping skills/life management skills
7.	ability of the relocating parent to support the relationship between the child and the other parent.

TABLE 3

Example of Investigative Factors to Assess in Relocation	
8.	the quality of the child's new educational program;
9.	the psychological stability of the relocating parent's new spouse;
10.	resources available to the family likely to assist in paying for air travel;
11.	checking the parent's reasons for moving;
12.	the reasons the non-relocating parent is opposing the move;
13.	tax returns;
14.	college transcripts;
15.	employment history;

Most custody evaluators gather descriptive data on issues that lie outside of research-based factors and perhaps involve data gathering of the type for which the evaluator has no special training or particular expertise to analyze. The data, however, are easily gathered and important for fully informing the court and to help fill in the mortar that cements the issues of the evaluation together. Examples would be gross income from tax returns, availability of daycare in the new community, cost of living, crime index in the communities, etc. In a relocation case, the evaluator may need to examine tax returns to see if the family can financially handle the logistics of the parenting time schedule. S/he may need to examine college transcripts to see if the relocating parent really is a viable candidate for the graduate school.

In relocation cases, it is important to verify or disconfirm the validity of oral reports or stated reasons for the move provided by a primary party to the litigation. Heilbrun, Warren and Picarello (2003) and Aus-

tin and Kirkpatrick (2004) suggest the evaluator should take note of the analogy to investigative journalism and try to find at least two corroborating sources for oral information or one definitive objective piece of information (i.e., a document or public record) to verify or disconfirm a verbal report by a primary party. Reliance on collateral sources to obtain convergent validation of hypotheses may be even more important in relocation cases because of the critical nature of essential facts on the relocation issues.

The Nurse Who Wasn't

In a recent case, the mother wanted to relocate with the seven year old daughter three hours away from the father so she could attend nursing school. She indicated she had an L.P.N degree and a state license and that she wanted to advance her career by obtaining a four year nursing degree. Her two sons, each from a previous marriage, lived in the new community. The court awarded the mother temporary primary custody of the daughter and awarded the father substantial parenting time with the daughter. A call to her former employer who worked at an assisted living center uncovered that mom was not a nurse; research on the state data base confirmed she was not a licensed nurse. A review of a past custody evaluation on a different child from this mother showed an historical pattern of the mother frequently lying, committing antisocial acts, and having several involvements with local law enforcement. As a result of these investigative steps yielding information about the mother's trustworthiness, the evaluator recommended that the court deny the mother's request to relocate. The court accepted the evaluator's recommendations and awarded primary custody of the daughter to the father.

The importance of verifying reasons and practical benefits for a move lie at the heart of relocation cases. State high court decisions have encouraged analyses of the reasons for the move. Analyses of reasons for the move allow the court to determine if the relocation is sensible and if there are advantages to the child. It is common forensic lore that the putative reasons for a move often do not materialize. That is, the initial reason to relocate may be motivated by an engagement to a new romantic partner that eventually falls apart; the job opportunity of a lifetime that motivated the decision to relocate falls through; the educational program that would have provided a long sought after degree does not admit the parent to the desired graduate program.

The Mother Who Wanted to Be a Nurse

In this case, the court designated the mother as primary custodial parent and awarded the father every other weekend parenting time. At the time of the parenting plan, the father had relocated from a rural area in Colorado to Denver to receive training to become an automobile mechanic. He exercised his parenting plan regularly, driving four hours one-way. The court's parenting plan anticipated that the father would return to the home community after 18 months and his parenting time would be increased. Upon his return to the home community, the parenting plan was extended to a long, every other weekend schedule that included one weekday evening per week. This parenting schedule continued for a couple of years. The mother then wanted to relocate to Denver where her parents had moved. She also wanted to attend nursing school. She had been working as a certified nursing aide for several years and had been attending community college. She indicated she had a 3.8 GPA and that she had dropped out of a couple of math classes. Despite several requests for production of her college records, the mother never produced a college transcript. Further investigation revealed that she had not applied to a nursing program in the new community. Additionally, it was uncovered that there was a new R.N nursing program in the home community. Based upon these facts, the evaluator did not recommend relocation. Mother subsequently obtained her old job at the local hospital and found that the hospital had a plan to pay for the nursing school tuition in exchange for a commitment of working at the hospital as a nurse for several years after they became licensed nurses.

The Mother Who Did Become a Nurse

In an evaluation, at the time of original orders, the mother wanted to relocate from Colorado to Kentucky with her three sons, ages 9 and identical 7 year-old twins. One of her stated reasons was to go to nursing school (she had B.S. degree in biology) so she could provide a better economic situation for the children. Temporary orders set up an equal parenting time arrangement. Investigation revealed she had not applied to any nursing program. The father did not oppose the mother relocating so she could pursue her career, but he wanted her first to consider options that were geographically closer. Relocation was not recommended and the case settled. The mother subsequently moved to Fort Collins, went to the university and became a nurse. As a result of the mother's in-state school attendance, the parents worked out a more workable

parenting plan allowing more equal access of the children to both parents who could remain consistently involved with the children. If the mother had demonstrated in the evaluation that she had been accepted to the Colorado State University nursing program, then the relocation would have been recommended. The relocation recommendation would have been based upon specific information that reflected cogent reasons for the mother's move with implications for expanded economic benefits to the children.

In two of these case examples, the relocation issue surfaced at the time of the construction of the original parenting plan; the other was modification case. The evaluations addressed relocation and the overall needs of the children in a parenting plan looking at both risk factors and practical advantages/disadvantages.

Discriminating Use of Collateral Sources

In all custody evaluations, it is important to make use of information obtained from third party sources to assess the credibility of verbal reports by the parties and to collect key data on salient factors (American Psychological Association, 1994; Association of Family and Conciliation Courts, 1995; 2006; Austin, 2002; Austin & Kirkpatrick, 2004; Heilbrun et al., 2003; Kirkland, 2002;). Data from third party interviews and collateral record review can be key in a relocation case.

In the case of the "mother who became a nurse," it was asserted by mom that dad had not been very involved with childrearing and, because of his minimal involvement in childcare, she should be allowed to move. The mother described the father as a peripheral figure in the process of parenting. She was prepared for a parenting time schedule to include most of the summer for dad in this interstate situation. In the past, the parents had been the managers of a large ranch in rural Colorado. Both parents agreed their former employers would be neutral third parties who had known and observed the family for many years. The employer reported how involved the dad had been–"the boys were always with him; he was very involved."

The value of information obtained from neutral third parties cannot be underestimated as a means to confirm or disconfirm rival alternative hypotheses. In this case, information about the degree of parental involvement was crucial in assessing the potential risk to the children associated with an interstate relocation.

In another case that we called the "military bride," the mother remarried a man in the military who was in the military and he received a

four-year duty assignment in Georgia. She wanted to relocate with the seven year-old daughter. The father, who was living in eastern Wyoming, opposed the mother's relocation because the child now would be much farther away from him. When the child was less than two years old, the biological father relocated from Colorado to eastern Wyoming. There was little contact with the child from the age 6 months to 3 years old. Once the father remarried, he decided to become more involved with the child. A parenting plan was set up that called for two weekends per month in which the mother drove four hours one-way to meet father for exchanges. When the child entered kindergarten, the parenting plan called for 8 weeks of summer parenting time with dad. During the second year of extended summer parenting time, the court directed the child to spend 10 weeks with her father. The father insisted that he had been a highly involved father, with frequent calls to the school. Beyond the minimum parenting time consisting of summer and holiday visits, the father and step-mom insisted that they saw the child 3 or 4 extra days per month. They also said that they frequently called the child and spoke with her on the phone.

The mother had cogent reasons for the move. There were no signs of vindictive motives. She had been a responsible "gatekeeper" for the child's access to the father over the years. Data showed she had a facilitated both physical and informational access.

Interviews with teachers and other third parties showed the father had never called the teachers, had never attended a parent-teacher conference, and had been to the child's home community only once in five years. The investigative "red flag" was the father's misrepresentation of his extra contact with the child. Although he maintained that he spent an extra three or four days each month while the child, no data supported the father's contention that the child spent additional time with the father.

A suitable, alternative parenting time plan was developed that provided the father with almost the same amount of parenting time as had been in place prior to the mother's move to Georgia. The irony of this case lay in the father's opposition to the mother's relocation six years earlier, when the father had relocated away from the child.

Going Beyond the Information Given In a Second Evaluation.

Sometimes highly salient pieces of information carry much weight with the court. This may occur when there are missing data in an initial evaluation. In a case, mother and father had one child, a six year old

boy. The mother relocated from Colorado to Oregon with her two daughters from a previous marriage. After the initial evaluation, the court awarded temporary primary custody to the father of the couple's six year old boy. The first evaluator concluded that the father was more committed to parenting. In the second evaluation, new interview data revealed that while being supervised by his father, the boy had discovered a loaded handgun and discharged it, causing burns to his face. The second evaluator had suspicions about the boy's development, with specific concerns focused on developmental delays. Testing revealed that the child had an IQ score of 68 and suffered from attention deficit hyperactivity disorder. The mother was a special education teacher and was better able to address the child's developmental needs. Although the first evaluators reported that the father's IQ was 83, no attention was paid to the father's ability to help ameliorate his boy's intellectual and attentional deficits. After reviewing the data, the second evaluator opined that the father was likely not positioned to be as efficient as the mother in attending to the child's needs concerning education and social development. The data from the second evaluation was useful to the court in determining that a more appropriate placement for this child was with the mother and, as a result, the court allowed the relocation.

ADDITIONAL FACTORS TO CONSIDER IN RELOCATION ANALYSES

In this section, we discuss several additional factors that may be useful to consider in conducting a comprehensive relocation analysis. Table Four lists the factors that we discuss in this section.

Extended Family and Social Support.

Many state statutes and case law recognize extended family and social support as important factors in support of relocation. The value of extended family and social support is mentioned in prominent cases (*Gruber v. Gruber*, 1990) and in some current relocation statutes (Colorado). *In re Marriage of Tropea (1994*), the New York high court noted the support from the maternal grandparents buttressed the mother's argument for the benefit of the move to the children. They often are viewed as sources of child care and generally adding to the resources of the relocating parent's family unit. In New Jersey's *Baures v. Lewis* (2001), support from mother's parents in Pennsylvania was seen as im-

TABLE 4

Additional Factors to Assess in Relocation Analyses
16. Extended Family Involvement
17. Social Support Networks
18. Educational Opportunities for the Parent
19. Educational Opportunities for the Child
20. Community Comparisons
21. Parental Involvement, Past and Present

portant support so mother could return to the workforce and a main reason the relocation was allowed.

The research addressing the benefits of extended family and social support to the children in a divorce-developmental context is unclear and there are few studies that are directly applicable. McLanahan and Sandefur (1994), in a national survey data set, divorced when divorced, single mothers and children lived with grandparents the children actually showed worse adjustment. Although the concept of "social support" appears to be well examined in the psychological literature as found when we conducted a search of the APA database that yielded 11,187 citations under the topic of "social support," few of these studies examined social support and relocation after divorce. A much smaller number of citations were located under a search of the term "extended family" (329 citations) and we found almost no studies directly on the topic of benefits of extended family for children of divorce, and none on relocation.

It is not uncommon for legislative and judicial branches of government to list factors in domestic relations matters that do not have any scientific empirical support, but seem to make common sense. Another example would be legislative provisions on the need to consider child preferences in parenting evaluations. There exists little direct research on the issue. Most evaluators, using "clinical experience" as their knowledge base, would probably agree that support from extended family should be a positive factor in a child's adjustment and as a result, more access to extended family in the new community might be a viable benefit from relocation. Interestingly, a recent review of Canadian appellate and trial court relocation decisions (under a best interests plus factors standard) found extended family was not given much weight by decision makers (Thompson, 2004). When relocating back to the family

of origin was the main reason for relocation, only 30% of the cases were approved.

Gathering information about extended family involvement calls for evaluators to provide descriptive data about historical involvement and about current involvement. While some critics of child custody evaluations are concerned about "overreaching" by evaluators in offering forensic recommendations (Melton, Petrila, Pythress, & Slobogin 1997), these same critics suggest that a beneficial role for evaluators is to provide the court with behavioral descriptions on a variety of issues.

In the case of the "mother who became a nurse," the mother asserted a reason for the move was to reap benefits from her contact and interactions with extended family in Kentucky. Investigations of the historical and current extended family contacts with the mother revealed that her extended family support was very weak. Her parents were both deceased. The only family in the immediate area in the new community was a great uncle of the boys. When the oldest boy, age 9, was asked about the great uncle, he said, "I can't remember what he looks like."

Perhaps the most common extended family circumstances involve grandparents and the resources and support they provide, either directly or indirectly, to the movant and to the child around the time of divorce or at the time of a subsequent relocation. General questions used to examine the degree and nature of grandparental involvement include (1) whether the grandparents will help the relocating parent and children adjust better to the stress surrounding relocation, (2) whether the grandparents will provide continuing support and can increase the availability of resources to the child, and (3) whether the grandparents will provide direct child care.

A mother returning to the community of her family of origin is a common relocation scenario (Weissman, 1994). A few studies demonstrate the benefits to children in general and to children of divorce, in particular, from contact with grandparents (Lussier, Deater-Deckard, Dunn, & Davies, 2002). Grandparent contact likely is the most common source of the asserted "extended family" benefit in relocation cases and likely is viewed as an "intuitive benefit" in the eyes of the court. Sound data gathering and investigation will uncover the degree of support and the resource availability that will come from increased grandparent involvement. Proper investigation can also determine any possibly negative influence brought by extended family involvement.

In the case of *In re Marriage of Tropea* (1996), the New York high court removed the "exceptional circumstances" rule for relocation in favor of "best interests with factors" standard. The mother's relocation

was allowed so she could follow her parents to a new community where they would provide support, where they would provide child care, and where the mother could be better able to find employment.

In the case of "the mother who married the asthmatic husband," the benefit from extended family would be the involvement of the new step-father's two adult children. The step-father's daughter, who had a new baby from a never married relationship, was living in the residence. The adolescent daughter indicated she needed to move with her mother so she would be able to assist in taking care of the baby who had "torticolis." Thus, instead of reaping support, the mother and daughter would be entering a new family unit where they anticipated they would need to assist in the care of an infant with special developmental needs. The extended family that would be left behind included the child's father, with whom there had been an equal time parenting arrangement in place for four years and with whom the child had a positive relationship; an older sister with a new baby; and an aunt who lived next door to the child's father with whom the teenager was quite close.

In the case of "the mother who wanted to stay home" and who refused to move back to the home community to share equal parenting time with the father, the court found the mother and the grandmother "were homebodies and had no friends" so the child would be deprived of normal socialization experiences. The court found, based on the descriptive data in the evaluator's oral testimony and report, that the new community did not offer healthy extended family support.

In another case, the father relocated four hours away for employment purposes. There had been an equal parenting time arrangement for several years. The parents lived in adjoining duplex units. The ten year old boy had a closer relationship with the father than with the mother and he had expressed a clear preference to relocate with the father. The court ruled that the high level of involvement of the maternal grandmother in the life of the child was an important consideration in not allowing the child to relocate to the father's new residence.

In a recent Colorado case, *In re Marriage of Ciesluk* (2004), the trial court did not find the residential parent's argument compelling for relocation, even though the mother had a new job offer and would have the involvement in her child's life of her father and brother in Arizona. The court felt the harm to the father-child relationship outweighed the benefits of increased involvement with extended family that were seen by the court as only indirectly benefiting the child. The Court of Appeals agreed, but the Supreme Court disagreed and cited extended family as one factor that made the mother's request to move sensible.

Educational Opportunities

Relocating for the purpose of obtaining better educational opportunities is a factor identified in case law and statute in numerous states concerning relocation (*Gruber v. Gruber*, 1990; *Colorado Revised Statutes*, 2004; *Tennessee Code Annotated*, 2004). While there are educational consultants who will assist lawyers when this issue comes to the forefront of disputed parenting cases, there does not appear to be a scientific or systematic method for determining the advantages to the child associated with a global comparison of school programs, except in the extreme cases. Nonetheless, it will be helpful to the court to provide descriptive data on the child's educational achievement, including test scores; the school system profile on programs, student-teacher ratios, and average test scores on standardized tests, because the issue of educational opportunities may be argued in court. It will be helpful to provide information on the child's current and past academic and social adjustment to school. How well the child has adjusted to classmates and teachers, both historically and in the current context, are potentially important data, useful in predicting future adaptation to a new environment with relocation. The child's true adjustment and benefit from a particular educational environment ultimately will depend on his or her "goodness of fit" with the school milieu, teachers, and peers. Except in the extreme situations, the quality of the school is usually not a highly determinative factor in relocation, though when the educational achievement of the opposing school systems are highly discrepant, educational opportunities may become a significant factor. If a child had a special developmental need, then the appropriateness of the specific program and the available educational resources would need to be investigated. The argument on the potential comparative advantages associated with a school program or school district would seem to depend on gathering very specific data on a student's needs and the resources available in the respective school programs. If a child has a special educational need, then examination of the specific special educational programs available to children may be tangible issues to research. There was a tangible issue with a special needs child in the New Jersey relocation case, *Baures v. Lewis* (2001). Unfortunately, the state high court seemed to have misinterpreted the data described by the evaluator about the autistic child or it did not appreciate the child was receiving appropriate services in the home community.

Community Comparisons

It is not uncommon for parents to assert relative advantages associated with a community or geographical area as a reason to argue for or against relocation. Such issues as cost of living, crime rate, cultural opportunities may be asserted; urban vs. rural is a frequent question for debate. As with the factor of educational opportunity, it is a very difficult task to make global community comparisons except in the extreme case. The evaluator still may want to provide the court with information about community comparisons based on descriptive data since it may be argued in court. In a case, we'll call it "California Dreaming," the mother wanted to relocate from Steamboat Springs, CO to Santa Barbara, CA. The mother asserted she wanted to get away from the high cost of living in the home community in Colorado and there would be a general better cultural situation, including a low crime rate, access to the ocean, etc. The descriptive data showed the new community was one of very few communities in the country that actually had a higher cost of living than the home community; there was a violent crime index of zero in the home community; and the recreational and aesthetic benefits of the ocean vs. the Rocky Mountains and winter sports opportunities were seen as a stand-off. In this case, the child was about one year old. The main issue was the need to have a parenting plan that facilitated contact between the very young child and both parents. The quality of the community was important to the parent, not the toddler, and both communities afforded opportunities for a high quality of life. The mother was also proposing to relocate away from her extended family that provided extensive support including child care.

Evaluators often encounter value assertions that cannot be resolved. Specific resources that are available to the child will more often come up with older children when there is relocation. Older children may have developed specific interests that are better served in one community compared to another community. It probably would be more often the case that the older child does not want to leave ongoing activities in his/her current community and the child's preference for and interest in his/her ongoing activities will reflect on what the two communities have to offer. For example, the child does not want to leave the volley ball team program at the current school or there may be religious programs in which s/he is intimately involved. Sometimes, the new community has more appealing aspects to a preferred activity for the child such as the daughter who dances ballet and has reaped as much as possible from the smaller, current community. It will probably be the case for older

children that the potential benefits of new community with activities for the child will inevitably need to be juxtaposed with losses of peer relationships, community involvement, and established interpersonal/social connections associated with those activities in the home community. The difficulties adolescents have in fitting in with new peer connections are well established by research (South, Haynie & Boss, 2005).

Parental Involvement

Parental involvement is an omnipresent issue in relocation cases. It defines to a great extent the adjudged degree of loss for the child and resultant harm. Perceived negative changes in the noncustodial parent-child relationship will often be the foundation for denial of relocation. Disruption to the child-noncustodial parent relationship may trump possible concrete advantages to the relocating parent in a best interests state (*Ramirez v. Ramirez-Barker*, 2004) or disruption may be the basis for muting a presumption for relocation by showing potential detriment to the child in a presumption state (In re *Marriage of Burgess*, 1996; *In re Marriage of LaMusga*, 2004; *Baures v. Lewis*, 2001). The child's relationship with both parents and the relative value placed on the child's relationship with the non-moving parent is one of the factors that lie at the heart of the relocation social policy debate (Wallerstein et al., 2003; Warshak et al., 2003).

Parent involvement is one of the key factors in the relocation risk assessment model. The degree of past involvement by a parent, most often the father, will be a focus of attention and debate, sometimes with the relocating parent wanting to minimize the other parent's past involvement in parental responsibilities and the other parent's perceived availability to the child. If the relocating parent shows a relatively low level of past involvement by the other parent, then a showing of lowered involvement may buttresses the argument for relocation based on the degree of perceived loss for the child and the predicted level of harm to the child-non-moving parent relationship. In the case of "the military bride" above, the child's new parenting time schedule with relocation would closely match the plan that was currently in place for an existing interstate parenting arrangement. In contrast, in "the mother who became a nurse" example, credible data did not support her assertion. Historically, the father had been substantially involved and currently he was involved to a similar degree as the mother. Conversely, the non-relocating parent may be motivated to over-emphasize the degree of his or her

past involvement as was the case in the "military bride" case, where the father wanted the evaluator to believe he had been a "full service" parent despite his long-distance parenting arrangement.

Descriptive data on parental involvement are important for the court. Consider a hypothetical case where the parents never married and the father has been provided no opportunity to become involved with the child, despite his wishes. In the "California Dreaming" case above, the mother did not tell the father when she went into labor, left for a three week trip to California to stay with a former boyfriend when the child was a week old, and insisted on supervised parenting time for the father in her parents' home during the first year. She then wanted to relocate with the child out-of-state. Data showed the father was highly motivated to be involved and a "full service" parent to his son. The mother had consistently interfered with the father's attempts to gain access to the child. When the father's parents traveled several times from back East to see the child the mother was uncooperative. This case illustrates the need for the evaluator to gather data both on past involvement by both parents and on the level of genuine motivation to be involved with the child. Motivation can be defined in behavioral terms by specific attempts to be involved and actions. That is, motivation may be operationally defined as assessing what has the parent done since separation to continue and to foster the parent-child relationship; to lend support to the child; to foster the relationship between the child and other parent; and to assume parental responsibilities.

From a social policy perspective, the issue of past parental involvement can lead to a politico-legal controversy and can clash with scientific research. The "Approximation Rule" proposed by the American Law Institute (i.e., ALI), is ripe for application to the issue of relocation. This rule (Kelly & Ward, 2002) proposes that at the time of original orders the parenting time plan following divorce should be based on the pattern of parental responsibilities before the divorce. The problem with this generic proposal is that it does not take account of the post-divorce realities of family reorganization that divorce necessitates and invites a type of behavioral family ledger-keeping on the degree of nitty-gritty parenting behaviors engaged in by each parent (Riggs, 2005). Role responsibilities and definitions are inevitably shifted and changed after the marital break-up. Research shows a high percentage of fathers become more involved with basic childrearing duties and with the children generally, following divorce (Coley, 2001), so the pre-divorce level of involvement is not a good predictor of post-divorce involvement (Hetherington et al., 1998). This is probably a tri-modal distribu-

tion with a group of parents (usually fathers) who continue their high level of involvement; a group who greatly increase their level; and a group who either continue their limited level or decrease what input into parenting they had show in the past, especially if they remarry and have another child (Seltzer, 1991). If the ALI rule was adopted in a state, it is easy to see it would evolve to application to the relocation context, based on a more frequent designation of one parent as a "primary parent." The result might be a *de facto* presumption for relocation, based on pre-divorce patterns of parenting. While extrapolation across national legal boundaries is problematic, Thompson's (2004) Canadian study found trial judges are greatly influenced by the perception of a primary caregiver role: ". . . if the custodial mother can attract the label of "primary caregiver," she will be allowed to move almost always, about 90% of the time. Only very badly behaved "primary caregivers" are denied the right to move" (p. 405). [For a discussion of applying the ALI rule to the relocation context, see, (*Dupré v. Dupré*, 2004)].

One of the evaluator's contributions for the court, then, is to collect reliable data on the issue of past and current levels of behavioral involvement by both parents and their respective motivations for future involvement. In the case of proposed relocation, the revised parenting plan needs to reflect the current quality of the child-parent relationships and the opportunity for a meaningful relationship in the future. When there are two highly involved parents, then if the relocating parent eventually moves, with or without the child, there needs to be a harm-mitigation focus in the parenting plan (Austin, 2000c).

In a case called "the Maui-bound mom," the mother who had her child out of wedlock, had been a primary caretaker since the birth of her now ten year old daughter. Father had not been consistently involved. He was available very early in the child's life for some child care duties while mother worked as a horse ranch manager. Father had alcohol abuse problems and served 18 months in jail for alcohol-related traffic offenses. Then, for about five years he had parenting time of about one weekend a month as the parents lived an hour away from each other along an interstate mountain corridor. Father attended few of the many activities in which the child was involved, including school, sports, and horses. His attendance was inconsistent, promising to show up and being a no show. In the father's mind, he perceived himself as a reasonably involved dad. Mother was the child's main economic support and father was far behind in his child support. Once he married, he became more consistent in his contact with the child, increasing his parenting time to every other weekend. He did not involve himself in other aspects

of the child's life such as teacher conferences. When the mother's job was eliminated by sale of the ranch, she requested permission to relocate with the child to Hawaii where she had lived for many years prior to having the child. She had a job offer. She had become engaged to a former fiancé and she had an established network of friends for social support. She indicated she would not relocate without the child. A co-evaluator conducted an assessment of the fiancé, the new potential living environment, and the schools in the Hawaii community. Relocation was recommended with the father to have extensive summer parenting time and some holiday time. Transportation costs were handled by the child's trust from the deceased paternal grandmother. The mother had demonstrated that she had been a responsible gatekeeper in her role as residential mother. She had promoted the relationship between the child and father over the years despite the father's lack of consistent involvement. Father and his new spouse, in the context of the litigation, were highly derogatory of the mother and were provocative in their actions towards her.

In the "California Dreaming" case, data were collected to show the father was highly motivated to be involved and wanted to eventually be an equal time parent. He had been very consistent in his attempts to exercise parenting time. He had refused to become caught up in the mother's provocative behaviors. He had established a secure attachment relationship with his son. The child's very young age placed him in the high risk category for harm due to relocation (Kelly & Lamb, 2003).

The evaluator can respond to the fact driven nature in relocation cases on this most salient factor of parental involvement by providing the court with complete descriptive data on historical parenting behaviors, on the distribution of parenting responsibilities and care taking behaviors, on parenting involvement and responsibilities since the time of marital separation, and on the perceived level of motivation concerning future parenting.

CRAFTING A SUITABLE ALTERNATIVE PARENTING PLAN

What Is a Suitable Alternative Plan?

In states where there is not a strong presumption in favor of relocation, generally a best interests analysis is appropriate. Case law is replete with references on the necessity to construct a suitable alternative

parenting plan when relocation is at issue. One court opined that "[T]he court must consider the availability of realistic, substitute visitation arrangements which will adequately foster an ongoing relationship between the child and the non-custodial parent" (*Gruber v. Gruber*, 1990, p. 439). Even in states that have moved to a presumption in favor of residential parent relocation, the court's concern about the child's relationship with the non-moving parent is apparent. Another court wrote, "whether, under the facts of the individual case, a realistic and reasonable visitation schedule can be reached if the move is allowed" (*Baures v. Lewis*, 2001, p. 226). A problem exists for evaluators because there are few, if any, formal definitions or a good example of what constitutes a "suitable" plan. We suggest that a "suitable" plan should support and maintain the existing quality and integrity of the child-parent relationship and the plan should also contain provisions intended to facilitate the continuation and growth of this relationship. The support and nurturing of the child's relationship with the non-moving parent becomes a formidable task when there is imposed a substantial geographical distance between the non-moving parent and child. The stated goal in the representative state high court decisions noted above, realistically, may be unobtainable in most relocation scenarios because the unavoidable effect of long distance relocation is to fundamentally alter the qualitative nature of the child-nonresidential parent relationship.

State high courts seem to now accept the reality that some degree of harm to the child-nonresidential parent relationship accompanies any relocation when that parent has been significantly involved with the child. Decisions point out that if all one needed to show was some degree of this type of relationship harm, then no contested relocation case would be approved (*In re Marriage of Edlund and Hales*, cited in *In re Marriage of LaMusga*, 2004; Goldfarb v. Goldfarb, 2004).

Effects of Relocation on the Nonresidential Parent-Child Relationship

The practical and logistical realities of long-distance parenting create automatic changes in the ability of the nonresidential parent to play an effectual part in the daily life of the child. The child will inevitably fall outside the dynamic "sphere of influence" of that parent. While courts often view extended summer parenting time and other school vacation time as "suitable visitation," there inevitably occurs a qualitative shift in the nature of the parent-child relationship that will be exponentially greater with younger children. This may be viewed as an inverse risk

calculus: the younger the child, the greater potential harm to the parent-child relationship.

Relocation alters the distribution of how the daily, nitty-gritty responsibilities of parenthood are provided–the baths and bedtime book reading for the very young; meal preparation, parent-teacher conferences, attending activities for the school age children; monitoring choice of friends, guiding through adolescent issues, and daily encouragement with academic motivation for teenagers. The several statutes that designate 100 miles as the magic number to trigger statutory relocation provisions seem to reflect an intuitive sense that distance can create these types of practical preclusions to the same degree of parental involvement.

Kelly and Lamb (2003) summarized the developmental research relevant to the issue of relocation for very young children. The overall effect can be expected to fundamentally alter the attachment relationship between the child and nonresidential parent unless both parents decide to relocate to the same new community. In light of the knowledge gleaned from attachment theory (Ainsworth, Blehar, Waters, & Wall, 1978), and the young child's limited sense of time and lack of a sense of object permanence concerning the left-behind parent (Kelly & Lamb, 2003) there is probably a scientific and empirical basis for a *de facto* presumption against relocation in the instance of two involved parents and a very young child. When children pass through toddler age and approach school-age and object permanence and language development progresses, then there is more flexibility for considering a lessening of the risk of harm, but the child's sense of time and functional obstacles to parental involvement by the distant parent remain fairly daunting (Kelly & Lamb, 2003). When children advance through the elementary school years they are cognitively more prepared to deal with a long distance relationship with a parent and they can better respond to the logistics of a parenting time schedule it becomes more feasible to mitigate the effects of the changes to the relationship. Telephone contact is more viable. Extended summer parenting time becomes more of an option.

In the case above that we called "California Dreaming," the mother wanted to relocate with her one year old son that would have had the effect of ending the attachment between the child and father. The mother thought a two week summer vacation in California would be sufficient parenting time for dad. In the case of the "Maui-bound-momma," the child was ten years old, mom had been a primary caregiver, and extensive summer parenting time with dad was proposed. The child had a high level of individual resources for her age so an alternative parenting

arrangement was possible, and one that would allow dad to become a full service dad in the summer, an experience he had never before enjoyed with his daughter.

Shear (1996), in perhaps of a bit of hyperbole, suggested the following effect of relocation:

> To sustain any kind of relationship with a parent who lives more than twenty minutes away, the rest of the child's life and activities must be fragmented and compromised to some degree . . . parents and children cannot sustain close relationships unless the parent is involved in all aspects of the child's life and care. A long-distance parent is, at best, a mentor, something like an aunt or uncle. (p. 441)

In the case of "the mother who wanted to stay home," the court decided a distance of two hours was too much to sustain a relationship with both parents when the mother was viewed as a hostile gatekeeper. After the court issued a conditional decree, e.g., there would be equal parenting time and decision making if the mother returned to the home community, the mother decided to stay home with her mother. The court had anticipated the possibility and a parenting time for mom was implemented with three out of four weekends with mom who chose to remain relocated without the child. The evaluator and court both felt shared parenting time was developmentally appropriate and fit the facts of the case. With the mother's choice, a least detrimental alternative parenting plan was implemented, while less than ideal, would allow for the child to have meaningful relationships with both parents. The mother lived close enough to attend special activities of the child in the home community, go to parent-teacher conferences, etc.

Legal Context and Making Developmentally Suitable Modifications to a Parenting Plan

We earlier indicated the relocation issue often arises at the time of original orders. In such a context the determination of a developmentally-suitable parenting plan is needed by the court. This was the case for both the "mom who wanted to stay home" and "California Dreaming" where there were very young children. In most states, this would occur in a legal context of a best interests of the child standard. When there is a modification of an existing parenting plan with a primary custodial parent, then the legal context might be a standard of a presump-

tion in favor of relocation, if there was a designated residential parent. Different legal standards probably produce different "thresholds" for determining when relocation is permitted. There may be a resultant difference in how much potential risk of harm to the child is tolerated. To wit, what is defined as a "suitable" modification to the parenting plan will be viewed differently. In New Jersey, a court might be inclined to view extended summer time and other contacts as suitable when there has been high involvement by the non-relocating parent.

Logistics and Flexibility: Implications for the Custody Evaluator

The evaluator may assist the court by providing descriptive data on the practical and logistics aspects surrounding a proposed relocation. The evaluator should always examine if the non-relocating parent has flexibility to also relocate to the new community when the relocating parent has sensible reasons, little flexibility not to move, and there are advantages to the child. Recently, one of us (WGA) was asked in a workshop if he thought the non-relocating parent has a "duty" also to move. His response to this "legal" question was that relocation cases were inevitably complicated and that evaluators and decision makers should look for creative and practical solutions.

In a recent case, the mother of a ten year old girl wanted to relocate from Durango, CO to Indiana where the extended family of both parents lived. The mother was the residential parent, but the parents had worked out a de facto equal parenting time plan over the years. The father was highly involved in activities such as the child's soccer coach, among other father-child involvements. Mom had remarried and both she and her new husband had marketable job skills to find employment. Dad was a laborer with little practical investment in the home community. Dad opposed the relocation, but the daughter talked him into also relocating prior to trial.

The evaluator may assist the court by gathering data on the reasons for the proposed move, the reasons for the other parent opposing the relocation, and the flexibility with both parents on the relocation issue. In the event a relocation of parent and child will occur, when developing a parenting plan, the evaluator should describe for the court that anticipated logistical and practical issues to be faced by the child and faced by the parents. Descriptive data on transportation and associated cost and time issues should be provided (i.e., can the parents get time off of work; lost wages; cost of staying in the new community for parenting time; airfare cost; etc.).

Practice Tips for Crafting Parenting Time Plans

1. Consider the child's developmental age and recommend more frequent and shorter parenting time contacts with younger children, when feasible. School age and older children can benefit from extended summer and other school vacation times with the nonresidential parent. With very young and younger school-age children, always consider making specific recommendations about changing parenting time schedules as the child matures. That is, at age five the child may benefit from two three week summer times with the other parent, separated by three weeks. At age eight, the child may be ready for six continuous weeks.

2. Encourage and formalize opportunities for the nonresidential parent to have parenting time in the child's new community.

3. Address the issue of transportation costs descriptively for the court, not proscriptively, as this is an issue for the court to address. Address the issue of mode of transportation. Whether a child can travel by air, unaccompanied by a parent, is a common point of contention and there is no professional consensus on the issue. For auto travel the issue of a meeting point between parent residences or alternating transportation responsibilities will need to be addressed. Parents usually work this issue out.

4. Inform the Court about parenting time guidelines for long-distance parenting arrangements specific to the developmental age (Arizona Supreme Court, 2002) while emphasizing the unique aspects of the case and the children's needs (see Kelly, 2005).

5. Make recommendations for liberal virtual parenting time access arrangements that are age-appropriate (Gottfried, 2002) while being mindful about the issue of intrusiveness by the nonresidential parent. Communication modalities of telephone (land line and cell phone), internet e-mail, web-cam, and audio and video electronic recordings should be available within reason. When there is poor communication and conflict, phone contact between parent and child should be specific and structured with younger school-age children. It is expected older school age children (i.e., twelve and older) will largely regulate phone contact themselves and work out satisfactory communication with the parent. There will be exceptions so phone contact occasionally may need to be scheduled with older children.

6. The factor of a child's preference is a UMDA best interests factor and included in almost every state statute. It demands particular scrutiny in relocation cases. Older children may be more resistant to relocation due to their involvement in peer activities and friendships. It may be unwise to uproot a senior in high school, for example, who needs continuity in her academic program. An athletic commitment may be a student's highest priority, in other instances. It may be more likely that the issue of splitting siblings will arise in relocation cases because of different developmental needs and wishes of the children (Rotman, Tomkins, Schwartz, et al., 2000).

7. When there is conflict and poor communication between parents in a relocation context, consideration should be given to the appointment of a parenting coordinator or whatever type of facilitator or conflict reduction role is appropriate for the jurisdiction.

SUMMARY

Children of divorce face both uncertainty and risk of harm when facing prospects of relocation (McLanahan & Sandefur, 1994), as they do following divorce. Some children face divorce and relocation in close temporal proximity. In this article, we have attempted to unravel some of the complexities involved in conducting a child custody relocation evaluation. Such cases inherently are complex. We discussed the psycho-legal context that has great fluidity between the states (Dupré v. Dupré, 2004) and the need for the evaluator to be very familiar with the legal standard for the jurisdiction. Relocation usually requires the evaluator to measure a greater diversity of factors, many of which are dictated by law. We discussed the need for the evaluator to be mindful of the predictions that need to b made for the court concerning the four decisional alternatives in relocation and to be mindful of possible prediction errors. We discussed how relocation is best viewed in terms of mitigating harm for the child and therefore an ultimate issue opinion probably should not be expressed by the evaluator. The evaluator's task is to inform the court so there is an understanding of the degree of risk and potential consequences for the child associated with the decisional alternatives. This will help the trier of fact, in the inherent role of risk decision maker, to act to reduce the uncertainty for the child.

In this article, we presented again the relocation risk assessment model (Austin, 2000a; 2000b). We integrated a discussion of the investigative component of child custody evaluation (Austin & Kirkpatrick, 2004) which is generally more expansive and detailed in relocation cases because of the need to present the court with substantial descriptive data on a number of practical issues that are bound to surface in the relocation context.

Finally, we discussed issues involved with crafting long distance parenting plans. Research from child development and divorce effects are used to examine how to consider the central variable of the child-nonresidential parent relationship. Careful investigation helps better inform the court on this core issue. Throughout the article we tried to illustrate the conceptual and methodological issues with case material to help evaluators get a better feel for how to approach and think through the relocation evaluation, or the art side of the evaluative endeavor (Gould & Stahl, 2000).

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Austin and Gould (2006),in Philip Stahl and Leslie Drozd's *Relocation Issues in Child Custody Cases (2006)* discuss crafting a suitable parenting plan when relocation is allowed. A significant problem is that there are few, if any at all, definitions of what constitutes a suitable long distance parenting plan. The authors recommend that a suitable plan "should support and maintain the existing quality and integrity of the parent-child relationship and the plan should contain provisions intended to facilitate the continuation and growth of the relationship". This is described as a formidable task when there is a substantial geographic distance between parent and child. The non-primary parent is no longer able to have frequent, if not daily, meaningful contact or interactions with the child, who falls largely outside of what Austin and Gould referred to as the parent's "sphere of influence," as such, in addition to the quantitative changes in contact, qualitative changes in interactions and the relationship occur. As such, the goal of maintaining a relationship between the parent and child which is largely consistent with that which existed prior to the relocation is likely impossible. As such, the authors noted above, as well as the perspective this presenter, is at the crafting of a long distance parenting plan is in many ways an effort at harm reduction or risk management.

Another recommended source of information about parenting plans in general, which makes some reference to long distance parenting plans, is *Creating Effective Parenting Plans: A Developmental Approach for Lawyers and Divorce Professionals* (2006) by John Hartson, Ph.D., and Brenda Payne, Ph.D. , published by the American Bar Association.

CAVEAT: There are no "prescriptions" for a long distance parenting plan, although some general principles that have been identified. In addition, general recommendations and mechanisms have been identified by various professions as reviewed by the sources noted above are as follows:

1) A general theme that has emerged in this literature is the relationship between the subject child's age and level development and the amount of time that residential time between the subject child in the non-primary parent can be scheduled. Please see the attachment as an example of how these developmental trends can be operationalized in any given parenting plan. In general, as the subject child gets older, they can spend

increasing amounts of time away from their primary residence, and with the non-primary parent.

When formulating long distance parenting plans, Dr. Dudley recommends maximizing the use of vacation time, for example, such as awarding the health non-primary parent every spring break, and, over time, the majority of the summer, while affording the primary parent time during the summer to exercise some vacation time. A major caveat to this, however, is as the child progresses through adolescence they become more invested in spending time with peers, having a summer job, etc., and they are therefore less likely to be inclined to exercise residential time. It is been my observation that even the most contentious high conflict families that I have worked with have recognized and had some acceptance for this development trend and try to work around it. In addition, depending on the distances involved, maximizing the use of three day weekends in favor of the non-primary parent can be useful.

2) Financial considerations can be a limiting factor in the implementation of any long distance parenting plan. The consideration of financial issues when determining whether or not a move is allowed is beyond the bounds of this presentation, although writers in the field seem to agree that this is an area for consideration in the evaluation process. Regardless, language pertaining to who is responsible or the relative contributions of each parent to paying for the subject child to travel needs to be very clearly delineated and can be a forum for dispute, and resistance.

3) The distance between the residences of course impact travel time. The article cited above makes reference to one writer in the field, indicating that 20 min. travel time greatly impacts the non-primary parent's capacity to interface with the child or children on an ongoing basis with respect to participation in activities, school, etc., and may have an impact on accessibility for midweek visits. I know I have seen, and I am sure we have all seen considerable variation in this regard. What I personally noticed was what I have come to term the "Seattle or Portland" phenomenon whereby travel time of 2 1/2 to 3 hours has a significant impact on the parent's capacity to manage exchanges as well as the child's tolerance for extended time traveling to and from the non-primary parent's residence. In such cases, alterations of a schedule may need to be accommodated in order to deal with increased resistance on the part of the child.

Other factors that impact the subject child's ability to travel include the ability to travel a company or unaccompanied. Airlines have policies regarding the age of children who can travel unaccompanied or who require some form of escort. With

regards to a "Seattle to Portland" case that I'm familiar with, the situation improved considerably once the children reach mid to late adolescence and traveled unaccompanied on the train between Seattle and Portland. In that particular case. The parties were continuing to utilize and alternating weekend schedule, that was rather stressful and the parents themselves, but this was alleviated once the children were able to travel via train. The children themselves found it to be a very empowering and enjoyable experience.

One recommendation or provision that this presenter has sometimes seen overlooked, and which is generally recommended and cited in the literature is the non-primary parent traveling to the primary parent's geographic location. Depending on history the case, common area of resistance that this presenter has heard voiced is the nonprimary parent feeling at a considerable disadvantage that they are no longer "in their neighborhood," and possibly even in hostile territory. However, the benefit of the non-primary parent traveling to the child's primary residential area is the opportunity to get to know the child's friends and directly interface with other people and activities that are important to the child, such as school, coaches, and the like.

It is important for a specific time or times, be designated for the non-primary parent to have telephone or video contact with the subject child via Skype or some other similar service. To the extent possible, the subject child should also be encouraged to initiate contact with the non-primary parent at other times. The utilization of videoconferencing or Skype has been referred to as "virtual contact".

Similarly, some recommendations that or interventions that this writer has seen referenced, include sending audio or video files to the child from the non-primary parent.

A recommendation that particularly applies to younger children, is making photograph albums or scrapbooks that include pictures of the subject child, the nonprimary parent, and other family members.

ATTACHMENT 4B - LONG DISTANCE SCHEDULE

This attachment is part of the Medium/Long Distance Parenting Plan. It is suggested for parents who live 180 miles or more apart from each other. You can decide what schedule is best for you based on your family's needs.

The goal of the schedule is to make sure that (1) children have enough contact with their home base and Parent A, (2) children can participate in age-appropriate activities, and (3) children have as much time as possible with Parent B.

Unless you file another parenting plan with the court in the future, this plan will be in effect until each child is 18 years old. **Please make sure to select an option in each age category,** starting with your child's current age. If you have children of different ages, follow the schedule for the youngest child.

4.1 Schedule for Children under Age 6. Complete only if you have children under age 6. If none of the children are under age 6, skip to paragraph 4.2
(CHECK OPTION 1 OR DESIGN YOUR OWN SCHEDULE IN OPTION 2)

☐ **OPTION 1**

Birth up to age 18 months

Parent B shall have parenting time in Parent A's locale with Parent A nearby as follows: **(CHECK ONE)**

☐ Once every two months, up to 8 hours a day for up to 5 days in a row (Recommended if Parent B has had significant contact with the child)
☐ Once every two months, up to 8 hours a day with Parent A having the option to be present during the first 2 hours of parenting time, for up to 5 days in a row (Recommended if Parent B has not had regular contact with the child)
☐ Other: _____

_____

_____

Age 18 months up to age 36 months

Parent B shall have parenting time in Parent A's locale with Parent A nearby as follows: **(CHECK ONE)**

☐ Once every two months, up to 8 hours a day for up to 5 days in a row
☐ Once every two months, up to 8 hours a day for up to 5 days in a row with one 24-hour period after the third day
☐ Other: _____

_____

_____

Age 3 up to age 6

Routine Parenting Time. Parent B shall have parenting time: **(CHECK ONE)**

☐ One weekend every month from 6 p.m. on Friday until 6 p.m. on Sunday
☐ Other routine parenting time:

_____

_____

_____

☐ We choose not to designate routine parenting time and instead Parent B shall have the children for the additional parenting time indicated below.

Additional Parenting Time. Each additional parenting time period shall be separated by at least two weeks with Parent A. Parent B shall have parenting time: **(CHECK ONE)**

☐ Up to 4 days in a row up to six times each year
☐ Up to three 1-week blocks each year
☐ Other additional parenting time:

_____
_____
_____

Holidays (CHECK ONE)

☐ We will have no specific holiday schedule for children under age 6, but parenting time may be scheduled on or near a holiday when we agree

☐ Parent B will have the option to have the following holiday parenting time each year, which may be scheduled during the routine parenting time listed above or as additional parenting time:

(CHECK ALL THAT APPLY)
☐ Christmas Day in **(CHECK ONE)**
  ☐ Odd-numbered years
  ☐ Even-numbered years
☐ Thanksgiving Day in **(CHECK ONE)**
  ☐ Odd-numbered years
  ☐ Even-numbered years
☐ Child's Birthday in **(CHECK ONE)**
  ☐ Odd-numbered years
  ☐ Even-numbered years

☐ Holiday schedule developed by parents: _____
_____
_____

☐ **OPTION 2 (Schedule for Children Under 6 developed by parents)**

_____
_____
_____
_____
_____

4.2 Routine Schedule for Children Age 6 and Older. For children age 6 and older, parent B shall have the routine parenting time listed below. For children under age 6, Parent B shall have parenting time with the child according to the schedule in 4.1 above. (CHECK OPTION 1 OR DESIGN YOUR OWN SCHEDULE IN OPTION 2)

☐ **OPTION 1**

Age 6 up to age 16 **(CHECK ONE)**
☐ One weekend every month from 6:00 p.m. Friday until 6:00 p.m. Sunday
☐ Other: _____

Age 16 up to age 18 **(CHECK ONE)**
☐ One weekend every month from 6:00 p.m. Friday until 6:00 p.m. Sunday
☐ Scheduling may be determined at the time in consideration of the children's activities, employment schedule, school requirements and other obligations.
☐ Other: _____

☐ **OPTION 2 (Routine Schedule developed by parents)**

_____

4.3 School Breaks and Holiday Schedule for Children Age 6 and Older **(CHECK OPTION 1 OR DESIGN YOUR OWN SCHEDULE IN OPTION 2)**

☐ **OPTION 1**:

Winter Break **(CHECK ONE)**

☐ Parent B shall have parenting time for one week of school Winter Break every year **(OPTIONAL)** ☐ with the week including Christmas Day in **(CHECK ONE)**
☐ Odd-numbered years
☐ Even-numbered years

☐ Parent B shall have parenting time for two weeks of school Winter Break in **(CHECK ONE)**
☐ Odd-numbered years
☐ Even-numbered years

☐ Other: _____

Spring Break **(CHECK ONE)**

☐ Parent B shall have parenting time for Spring Break every year.
☐ Parent B shall have parenting time for Spring Break in **(CHECK ONE)**
☐ Odd-numbered years
☐ Even-numbered years

☐ Other: _____

Thanksgiving Break **(CHECK ONE)**

☐ Parent B shall have parenting time for Thanksgiving Break every year.
☐ Parent B shall have parenting time for Thanksgiving Break in **(CHECK ONE)**
  ☐ Odd-numbered years
  ☐ Even-numbered years
☐ Other: _____

Holiday Weekends **(CHECK ONE)**

☐ Parent B's shall have the option for parenting time on each of the four 3-day weekends that include a legal holiday (Martin Luther King, Jr. Birthday, President's Day, Memorial Day, and Labor Day) from 6:00 PM on Friday until 6:00 PM on Monday.
☐ There will be no planned holiday weekend parenting time unless we agree.

Child's Birthday

☐ Parent B shall have the option to have parenting time for the child's birthday in **(CHECK ONE)**
  ☐ Odd-numbered years
  ☐ Even-numbered years
☐ Parent B will not have parenting time for the child's birthday unless we agree.

☐ **OPTION 2 (School Breaks and Holiday Schedule developed by parents)**

_____

4.4 Summer Schedule for Children Age 6 and Older. (CHECK OPTION 1 OR DESIGN YOUR OWN SCHEDULE IN OPTION 2)

☐ **OPTION 1**

Age 6 up to age 9
Parent B shall have parenting time with the children for **(CHECK ONE)**

☐ Three weeks, exercised in **(CHECK ONE)**
  ☐ One-week blocks separated by at least one week with Parent A
  ☐ Two 10-day blocks separated by at least one week with Parent A
☐ Four Weeks, exercised in **(CHECK ONE)**
  ☐ Two 2-week blocks
  ☐ One 4-week block
☐ Six weeks, exercised in two 3-week blocks
☐ Other: _____

Age 9 up to age 16
Parent B shall have parenting time with the children for **(CHECK ONE)**

☐ Four Weeks, exercised in **(CHECK ONE)**
- ☐ Two 2-week blocks
- ☐ One 4-week block

☐ Six weeks, exercised in **(CHECK ONE)**
- ☐ Two 3-week blocks
- ☐ One 6-week block

☐ Eight weeks, exercised in **(CHECK ONE)**
- ☐ Two 4-week blocks
- ☐ One 8-week block

☐ Other: _____

_____

_____

Age 16 up to age 18
Parent B shall have parenting time with the children for **(CHECK ONE)**

☐ One 2-week block
☐ One 4-week block
☐ Other: _____

_____

_____

_____

☐ **OPTION 2 (Summer Schedule developed by parents)**:

_____

_____

_____

_____

_____

4.4.1 Notice for Summer Scheduling (CHECK ONE)

☐ Before May 1 of each year, Parent B shall notify Parent A, in writing, of the dates chosen for summer parenting time. Parent A has the right to choose the dates for Parent B's summer parenting time if Parent B does not give notice before May 1. Parent B's summer parenting time shall end at least seven days before the children's first day of school.

☐ Other: _____

_____

_____

_____

_____