

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

By

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## I. Introduction

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

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## II. Relocation in the Courts: A Brief Historical Context

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

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

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1 913 P.2d 473 (Cal. 1996).

2 88 P.3d 81 (Cal. 2004).

3 913 P.2d at 480.

4 *Id.* at 478-79.

5 *Id.* at 482-84.

6 88 P.3d at 94.

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

8 665 N.E.2d 145 (N.Y. 1996).

between the child and the noncustodial parent will remain a central concern.”<sup>9</sup>

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

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

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

<sup>10</sup> 491 A.2d 606 (N.J. 1984).

<sup>11</sup> *Id.* at 613.

<sup>12</sup> 544 A.2d 852 (1988).

<sup>13</sup> *Id.* at 856.

<sup>14</sup> 770 A.2d 214 (N.J. 2001).

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

<sup>16</sup> 166 A.3d 1155 (N.J. 2017).

<sup>17</sup> *Id.* at 1169–70.

<sup>18</sup> 109 S.W.3d 653 (Ark. 2003).

<sup>19</sup> 431 S.W.3d 234, 239–40 (Ark. 2013).

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

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

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

<sup>21</sup> 919 P.2d 776, 784-85 (Colo. 1996).

<sup>22</sup> 113 P.3d 135, 137 (Colo. 2005) (en banc).

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

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

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

### III. The Social Science: From Wallerstein to the Present

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

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

<sup>25</sup> *Burgess*, 913 P.2d at 483 n.11.

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

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

<sup>28</sup> Wallerstein, *supra* note 26, at 311-12.

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

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

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

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

<sup>30</sup> *LaMusga*, 88 P.3d at 83.

<sup>31</sup> See Brief of Richard A. Warshak et al. as *Amici Curiae* on behalf of LaMusga Children at 4-5, *In re Marriage of LaMusga*, No. S107355 (Cal. 2003) (hereinafter “*Warshak Brief*”), <https://www.warshak.com/pdf/publications/LaMusga.pdf>.

<sup>32</sup> See generally *id.*

<sup>33</sup> *Id.* at 2-6.

<sup>34</sup> *Id.* at 2.

<sup>35</sup> See generally *id.*

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

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

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

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

<sup>38</sup> Braver et al., *supra* note 36, at 210.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 216.

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

<sup>42</sup> Braver et al., *supra* note 36, at 214.

dren and fathers who lived more than seventy-five miles away from each other were more likely to lose regular contact.<sup>43</sup>

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

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

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<sup>43</sup> E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR WORSE: DIVORCE RECONSIDERED 134 (2002).

<sup>44</sup> Patrick Parkinson & Judith Cashmore, *Reforming Relocation Law: An Evidence Based Approach*, 53 FAM. CT. REV. 23 (2015).

<sup>45</sup> Patrick Parkinson & Judith Cashmore, *Relocation and the Indissolubility of Parenthood*, 15 J. CHILD CUSTODY 76 (2018).

<sup>46</sup> *Id.* at 79-80.

<sup>47</sup> *Id.* at 86.

<sup>48</sup> *Id.*

<sup>49</sup> Parkinson & Cashmore, *supra* note 44, at 32.

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

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

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

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

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<sup>51</sup> Parkinson & Cashmore, *supra* note 44, at 25.

<sup>52</sup> *Id.* at 34.

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

<sup>54</sup> *Id.* at 368.

<sup>55</sup> *Id.* at 365.

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

The study also found that

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

The authors concluded,

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

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

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

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<sup>56</sup> *Id.* at 368.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 373.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 375 (emphasis in original).

<sup>61</sup> *Id.* at 376.

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

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

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

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<sup>62</sup> Joan B. Kelly & Michael E. Lamb, *Developmental Issues in Relocation Cases Involving Young Children: When, Whether, and How?*, 17 J. FAM. PSYCHOL. 193 (2003).

<sup>63</sup> Kenneth Waldron, *A Review of Social Science Research on Post Divorce Relocation*, 19 J. AM. ACAD. MATRIM. LAW. 337, 371 (2005).

<sup>64</sup> *Id.* at 372.

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

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

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

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

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<sup>66</sup> Austin & Rappaport, *Relocation Disputes*, *supra* note 65, at 56.

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

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

<sup>69</sup> *See generally* Austin, *Part II*, *supra* note 65.

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

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

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

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

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<sup>71</sup> *Id.* at 440.

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

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

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 59.

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

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

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

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

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

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

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

<sup>79</sup> *Id.* at 260, 276.

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

#### IV. Specific Considerations in Relocation Cases

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

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

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

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

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

<sup>82</sup> For purposes of uniformity and clarity, the father is the non-relocating parent in these examples.

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

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

### B. *Co-Parenting Relationships and Relocation*

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

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<sup>83</sup> See Richard A. Warshak & Matheu D. Nunn, ‘Bisbing’ *Evens the Playing Field in Child Relocation Cases*, 223 N.J.L.J. 2914 (Sept. 25, 2017).

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

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

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

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<sup>84</sup> See Austin & Rappaport, *Relocation Disputes*, *supra* note 65, at 67.

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

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

*C. Reasons for the Proposed Move*

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

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

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<sup>87</sup> See *Bisbing*, 166 A.3d at 1170.

<sup>88</sup> See *Stahl*, *supra* note 70, at 443.

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

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

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

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

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

#### D. *Moving Beyond the Surface*

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

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

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

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

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

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

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

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

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

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

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

### E. Psychological Testing

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

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

<sup>95</sup> Valerio, *supra* note 94, at 262-67.

<sup>96</sup> *Id.* at 267; see generally Gould, *supra* note 94.

<sup>97</sup> Valerio, *supra* note 94, at 273-74.

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

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

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

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

## V. Evaluating Long-Distance Parenting Plan Proposals

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

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

<sup>99</sup> Stahl, *supra* note 72, at 117.

<sup>100</sup> *Id.*

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

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

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

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

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

## **V. International Relocations**

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

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

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

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

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

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

<sup>103</sup> For example, a foreign court may make temporary custody orders pursuant to Article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention"), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>; and/or Section 204 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), available at [http://www.uniformlaws.org/shared/docs/child\\_custody\\_jurisdiction/uccjea\\_final\\_97.pdf](http://www.uniformlaws.org/shared/docs/child_custody_jurisdiction/uccjea_final_97.pdf). For a detailed discussion of the interplay between the Convention and the UCCJEA, see Robert G. Spector, *International Abduction of Children: Why the UCCJEA Is Usually a Better Remedy Than the Abduction Convention*, 49 FAM. L.Q. 385, 391 (2015).

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

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

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

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

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

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

## VI. Conclusion

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

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<sup>104</sup> 913 P.2d at 473.

<sup>105</sup> 166 A.3d at 1155.

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

<sup>107</sup> *Id.* at 374 (quoting Parkinson, *supra* note 50, at 1).

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

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

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<sup>108</sup> See, e.g., Warshak, *supra* note 73, at 59.