

The Role of the
CHILD AND FAMILY INVESTIGATOR
and the
CHILD'S LEGAL REPRESENTATIVE
IN COLORADO

FIRST EDITION



ROBERT M. SMITH
Managing Editor

**Relocation and Forensic Mental
Health Evaluation in Colorado:
Issues Involving Very Young Children**

William G. Austin, Ph.D.
Austin Child Custody Services

CONTINUING LEGAL EDUCATION IN COLORADO, INC.
COLORADO BAR ASSOCIATION • DENVER BAR ASSOCIATION

Chapter C9

RELOCATION AND FORENSIC MENTAL HEALTH EVALUATION IN COLORADO: ISSUES INVOLVING VERY YOUNG CHILDREN

William G. Austin, Ph.D.*

Austin Child Custody Services

SYNOPSIS

§ C9.1 THE “DELICATE NATURE” OF RELOCATION CASES

§ C9.2 RELOCATION AND VERY YOUNG CHILDREN

§ C9.2.1—Relocation-Associated Harm And *Ciesluk*

§ C9.2.2—Attachment Theory, Social Capital, And Relocation Harm

§ C9.2.3—Reciprocal Connectedness

§ C9.2.4—Problems With The Primary Caregiver Concept

§ C9.2.5—Attachment, Primary Caregiving, And Parenting Effectiveness

§ C9.3 THE FORENSIC APPROACH TO RELOCATION EVALUATION

§ C9.3.1—Investigation And Fact-Based Nature Of Relocation Cases

§ C9.3.2—Risk-assessment Model And Very Young Children

§ C9.3.3—Cost/Benefit Calculation For The Court

§ C9.4 AMBIGUITY IN COLORADO RELOCATION LAW AND THE ETHICAL QUANDARY FOR EVALUATORS

§ C9.4.1—The “Viable Candidate Test” In Relocation

§ C9.4.2—The “Primary Directive” In *Spahmer*

§ C9.4.3—Is There Judicial Flexibility Under *Spahmer*?

§ C9.5 SUMMARY

§ C9.1 • THE “DELICATE NATURE” OF RELOCATION CASES

The Colorado Supreme Court’s pronouncement over 35 years ago of relocation cases being “the most delicate in nature”¹ remains true, especially when it involves very young children. Other state high courts have described relocation cases as the “knottiest,” most “vexatious,”

and a “conundrum.”² In a culture of divorce with a divorce rate holding steady at about 50 percent of first marriages, courts will continue to face the dilemmas associated with relocation where one parent wants to move with the children, usually with cogent reasons. Courts face situations where a parent wants to pursue vocational, educational, and social opportunities that will potentially enhance his or her quality of life and to share a new path with the children. Courts then need to grapple with the other side of the family equation of the nonmoving parent who legitimately wants to maintain the quality in the parent-child relationship and to have continuing involvement with the child. For both parents, issues of fairness and opportunity, of different types to be sure, are always part of the dispute and their intense feelings. With very young children, the relocation conflict and tension are magnified. The cases become more “delicate in nature.” The geographical separation creates the perception and reality of more psychological separation between parent and child when it involves the very young. U.S. Census data show that divorce is more common between parents with younger children, and parents with young children are more like to relocate.³

This chapter takes a close look at relocation involving very young children. Divorce researchers and experts sometimes define the “very young” as younger than three years,⁴ but sometimes under six years.⁵ All litigated cases about relocation concern assertions about potential harm to the nonmoving parent-child relationship, which is also assumed to have direct harm to the child. This is the focus of essentially every state high court opinion on relocation, including Colorado. It may also be assumed that in relocation there will be adverse effects on the child’s adjustment to a new community and school, emotional well-being, or overall development, but the process of harm is viewed as filtering through the effect on the parent-child relationship. It seems to be widely accepted that relocation with a very young child places the *harm to this relationship* at more risk because of attachment issues. In relocation disputes, it is usually asserted that the emotional bond between the nonmoving parent and child will be weakened or destroyed. Ironically, there could be less harm to an infant due to a disrupted attachment and diminished relationship with the nonmoving parent if there is a competent moving parent who provides a high level of parenting, because the attachment relationship has not yet formed. This situation is analogous to an adoption with an infant placed with a single, loving, committed parent. Such children are expected to have a normal, healthy development because there is not a disruption to an established relationship.

The important general question, it would seem, is whether there really is a scientific basis for the hypothesis that disruption of the parent-child relationship associated with relocation places the child at risk for immediate and long-term developmental harm, or if this issue is more about social policy to keep both parents maximally involved following divorce. The Colorado statutes contain a “legislative declaration” to encourage the continued involvement of both parents. There is research that shows on average that children of divorce show a normal development if they have a consistent relationship with one parental figure that provides an authoritative parenting style and emotional warmth to the child.⁶ The communities of divorce researchers and practitioners weighed in on this issue in the form of *amici* briefs in an important California case,⁷ and the consensus clearly was that the long-term adjustment of children of divorce is facilitated when both parents are involved and have quality relationships with the child.⁸ There are several expla-

nations for research that supports this position, as discussed below. The challenge for relocation cases is how to craft a long-distance parenting plan that facilitates the development and continuation of a meaningful and quality relationship with both parents,⁹ because the Colorado relocation law is clear that there cannot be a presumption for or against relocation, even with very young children.¹⁰

The heart of all relocation cases is how to maintain the quality in the nonresidential parent-child relationship in a long-distance parenting plan. With the very young child, this challenge becomes very problematic for developmental reasons. In a recent case, a stay-at-home mother wanted to move to Argentina with her one- and three-year-old children at the time of the dissolution. How can the evaluator recommend a parenting plan that is practical and developmentally sound so that the father could hope to sustain a relationship with his two children? His position was that he would become a stranger to his children or more like an uncle when he did have contact. How could a parenting plan be crafted that would mitigate this harm to their relationship, especially with the legal constraints imposed by Colorado case law in a pre-decree case? The mother had typical reasons for moving — *e.g.*, to gain support from her extensive family in Argentina. She pledged to do everything possible to keep the dad involved in a meaningful way. She would facilitate regular webcam contact and bring the children to Colorado for two weeks every summer, and the girls could eventually come for most of the summer. The father could “visit” Argentina whenever and for as long as he wanted to. Would this be sufficient to sustain a parental relationship or would it become avuncular in nature?

This chapter began in 2005, which coincided almost exactly with the release of the now not-so-new, controlling case law in June 2005. The two cases, one for the pre-decree legal context (*In re Marriage of Spahmer and Gullette*¹¹) and the other for post-decree cases (*In re Marriage of Ciesluk*¹²), were released on the same day, so most observers seem to agree the Colorado Supreme Court intended for the cases to be interpreted in concert. They clearly are complementary and together “clarified” and laid out the legal landscape for courts and evaluators to follow in these complex cases. Judges and legal and mental health practitioners now refer to relocation disputes as *Spahmer* or *Ciesluk* cases.

Since 2005, I have had the opportunity to present numerous workshops on how to evaluate the relocation case under the shadow of the case law and according to the best interests statute with its 11 factors (C.R.S. § 14-10-124(a)(1.5)) and the modification-relocation statute with its 9 additional factors (C.R.S. §§ 14-10-129(1)(a)(II)(c)(I) through (IX)). I have had the opportunity to have dialogue with judges and legal practitioners about issues and fact patterns that comprise the psycho-legal dilemmas involved in relocation. I have discussed what I perceive to be ambiguities in the case law on important issues and found that experienced judges seem not to have answers about how to guide evaluators, so there remain unanswered questions. Some of the apparent ambiguities in the law are the following:

- In the post-decree case, can the court rule against the child relocating without being prepared to order a change in the residential/majority time parent?

- Can the court just rule against relocation in the post-decree case without determining whether the nonresidential parent is a *viable candidate* to be the residential parent and handle the full range of parental responsibilities?
- Can the court consider information (usually available) concerning whether the moving parent would indeed relocate without the children if relocation was denied in a *Ciesluk* case? Can the court only consider this information after making a determination of the residential parent?
- Can the court consider information that the “moving parent” would not actually move without the children in a pre-decree case *prior* to designating a residential parent?
- In a pre-decree case, where the court must assume the parents will be living in the geographical locations that they identify, can the court designate the nonmoving parent as the residential parent under temporary orders and then designate the “moving parent” as the residential parent under permanent orders after that parent indicates he or she would not move without the children?
- In light of the discussions in *Ciesluk* and *Spahmer* on the legitimacy of parents’ motivation to move and expand their opportunities, can the evaluator and court consider the parent’s intended move as evidence of not putting the needs of the child first? This is Factor XI in the best interests statute, C.R.S. § 14-10-124(a)(1.5).
- Other ambiguities are specific to *Spahmer* cases and are discussed below.

I have had the opportunity to be the court-appointed evaluator in many *Spahmer* and *Ciesluk* cases. It is from these cases that some of the ambiguities have been revealed. I also have been the reviewer of the work product of child and family investigator (CFI) and parental responsibility (PRE) evaluations as a retained expert when there appear to be deficiencies in the evaluation. I have discovered misunderstandings of some of the basic aspects of the case law and how to translate the legal context to the complex task of forensic evaluation. I have also had numerous review cases where the evaluator clearly was affected by confirmatory bias¹³ so that information was selectively interpreted and weighted in a manner to recommend against relocation despite the clear message in the case law to place the parents on an “equal footing” on the relocation issue. The reasons evaluators may hold a mindset that disfavors relocation are complicated and will not be discussed here, but it clearly is an important issue that the legal community may want to address in the future.

§ C9.2 • RELOCATION AND VERY YOUNG CHILDREN

Based on the review of the extensive research literature that establishes that relocation is a general risk factor for children of divorce,¹⁴ the evaluator’s approach should be one of predicting the degree of harm to the child associated with the four decisional alternatives¹⁵ and recommending risk management or containment options or strategies for long-distance parenting arrangements. The evaluator’s role inevitably involves making predictions about the child’s short- and long-term adjustment to the recommended custodial arrangements and parenting plan, or concerning developmental outcomes for the child. The prediction of harm is the conceptual

obverse, or mirror image, of making behavioral forecasts about the child that are couched in positive semantics, or best interests.¹⁶ This approach is consistent with Colorado's view of least detrimental alternative (LDA) as subsumed under the best interests of the child standard.¹⁷ This legal context also makes it logically easy to adapt a risk-assessment approach to custody disputes where the salient issues in the case involve potential harm to the child. When relocation involves very young children and the accompanying separation between the child and one of his or her parents, then the LDA approach to relocation analysis is a good fit. The evaluator will be most helpful to the court if the assessment by the CFI or PRE also addresses how to manage the risk of or mitigate the harm associated with a long-distance arrangement with the parenting plan that is pragmatic. The court will want to see a developmentally sensitive parenting time schedule in light of the child's age and the distance of the move; how to handle transportation arrangements and cost; the time flexibility of both parents to facilitate access; and other means of communication to use, *i.e.*, webcam. Use of model parenting plans for long distance may be a useful starting point.¹⁸

§ C9.2.1—Relocation-Associated Harm And *Ciesluk*

The *Ciesluk* opinion presented a truncated review of the professional literature on relocation and concluded there were “philosophical differences of opinion” on the effects of relocation on children. The court also cited the U.S. Census data and added that since relocation was so common in the population and among divorced families, then it could not be that harmful. The opinion preceded the review of the research on the effects of relocation/residential mobility on children of divorce.¹⁹ The research is very clear that relocation is the second most powerful predictor of children's adjustment problems following divorce (the first is economic changes).²⁰ However, *Ciesluk* followed the ardent and comprehensive debate in *In re Marriage of LaMusga*,²¹ a prominent California relocation decision that essentially reversed a presumption for relocation by holding that harm to the nonresidential parent-child relationship could be the basis of denying relocation. In *LaMusga*, the California court was fully informed about the scientific research by the *amici* briefs. While it therefore seemed to finally establish that there was a scientific basis for showing that relocation creates significant risk for harm for children, the research also shows that there will a high level of individual variability in how families and children cope with divorce.²²

The research, then, is consistent with many high court decisions that emphasize the need for a fact-driven approach and “individualized determinations” for each case.²³ This compatibility between the law and science lays a foundation for the best interests approach to relocation. The resolution or conclusion that can be drawn is that while relocation creates a significant risk of harm, it is not at all inevitable that relocating children will indeed suffer harm. Resilient children, resourceful moving parents, and a suitable long-distance parenting plan that facilitates access is a recipe for sound risk management and a successful relocation. With very young children, however, it is much more difficult to create a viable parenting plan that will not result in damage to the parent-child relationship. Relocation inevitably alters the quality of the parent-child relationship due to logistical, practical reasons. There cannot be the same type of weekly involvement with the child. The question is whether this alteration in quality amounts to harm in the relationship that would translate to significant risk of developmental harm to the child.

§ C9.2.2—Attachment Theory, Social Capital, And Relocation Harm

A blanket assertion by an evaluator that relocation will be harmful will be misleading to the court and may ignite a process of confirmatory bias by contagion. It is probable that millions of children of divorce have successfully relocated and had a normal development. Relocation creates risk, but whether the child actually experiences harm depends on many factors. The job of the evaluator is to sort this all out for the court. There are also different, and productive in their own right, ways to conceptualize and measure potential harm to the child.

The *first approach* to relocation harm is based on attachment theory and harm that is hypothesized to result from disrupted attachment relationships. The type of harm is *attachment-related harm* to the very young child. Kelly and Lamb,²⁴ cited in *Ciesluk*, summarized attachment theory and child development research and applied it to relocation with very young children, which they defined as 0 to 3 years. The bonding and attachment process between parent and child is a reciprocal one and occurs in the first two years of life. The literature focuses more on the child attachment to the parent, rather than the reverse. Attachment theory posits that the attachment process is biologically driven, with an evolutionary, survival origin. There are four phases of attachment.²⁵ Children usually are equally attached to both parents by the age of two, even though children typically spend much more time with their mother.²⁶ Experts disagree, but the process may not reach full closure until about the age of four, when the development of language allows parents and children to negotiate expectations about contact, separation, and activities.²⁷ Between ages two and three, the child begins to better tolerate separations from the parents and understand better that the parent will return. The infant mind is changing from the “out of sight, out of mind” reality. This process of object permanence is related to cognitive and language development. Infants and toddlers need regular contact with their attachment figures/parents to sustain those relationships.²⁸

There are different types of attachment relationships: secure and insecure is the main conceptual differentiation, with ambivalent, avoidant, and disorganized as subtypes of the insecurely attached child.²⁹ The challenge of parenting plans for very young children, then, is foremost to facilitate a pattern of access that reinforces the continuation of the development of a healthy, secure attachment relationship, but also to provide sufficient access so as to not impede parent-child attachment, no matter what category or label is most descriptive. Attachment can also be viewed as varying along a continuum of positive-healthy-normal on one end to a parent-child relationship without meaningful attachment, or being very disorganized.³⁰ An alternative view to the types of attachment relationships is to describe the overall quality of the parent-child relationship in terms of both mutual relatedness and effectiveness of parenting that can be observed.

When there is a disruption of one of the parent-child relationships before the age of two years, then the prediction from attachment theory is that it will be difficult to sustain or reestablish this important relationship. Obviously, if a mother relocates away from the father when the child is an infant and there is very little contact, an attachment relationship cannot develop. The harm, then, is found in damage to the attachment relationship itself and potential resulting negative effects to the child. Kelly and Lamb conclude from the research:

Although 12- to 15-month old children can maintain images of their parents for short periods of time, the inability to refresh memory and the absence of regular contact slowly erode relationships, such that, over time, nonmoving parents become strangers.³¹

Attachment theory and research predict long-term adjustment problems and developmental risk if there is disruption (such as relocation) to an important attachment relationship: “The task, therefore, is to make sure that once-trusted attachment figures do not become strangers to their young children, as it is extremely difficult to reestablish relationships between young children and their parents after these have been disrupted.”³² There is ample research to show that loss of a meaningful relationship with one parent places the child at risk of both short-term psychosocial harm, distress, anxiety, and depression and long-term developmental problems.³³

In my experience, practitioners often predict long-term emotional trauma and irreparable harm to very young children due to relocation based on attachment theory and research. The Kelly and Lamb review³⁴ would suggest this would be the case. Why not a presumption against relocation for very young children? But not so fast. While there is substantial research that documents negative effects due to children not having opportunity for relationships with both parents,³⁵ there are other studies that show disrupted attachments do not necessarily result in an abnormal development and such children can have a pretty normal development. It is all about the odds, or risk, not an absolute prediction of harm. There is also a research literature that has found contrasting results or that there can be much instability over time in the nature of parent-child attachment relationships; thus, the type of attachment at one point in the toddler years does not predict strongly the type of attachment at a later toddler age,³⁶ and attachment status may not accurately predict later functioning.³⁷

While some research shows poor long-term adjustment due to early disrupted attachment, other studies show that the effect due to disrupted attachment may not be very strong.³⁸ Early attachment experience is important, but it is transformed by later experiences. Family stress (*i.e.*, divorce) can affect attachment security.³⁹ The explanation for this seemingly contradictory finding is that a child’s long-term development has many contributing causes and early attachment is only one (but a major) potential contributing process to a child’s long-term development.⁴⁰ While a disruption or end to a parent-child relationship creates a risk of harm, it is not inevitable, but the protection and benefit from that attachment relationship is ended. It is a type of opportunity cost. If relocation results in a greatly diminished relationship between a very young child and his or her parent so that there essentially cannot be a meaningful relationship or an attachment relationship, then assuming this is a competent parent who wants to be involved, some degree of attachment-related harm is inevitable and the long-term benefits to the child from that parent’s resources will be greatly diminished or lost.

While it may not be that disrupted attachment per se that creates developmental risk for very young children, there is research that shows that disruption or discontinuity to the parent-child relationship, including divorce, produces adjustment problems.⁴¹ So it is disruption, and part of this is disruption to the attachment aspects of the relationship. Relocation added to divorce

compounds the discontinuity for the child. Attachment is best viewed as a building block for the long-term health of the parent-child relationship or the ability of the child to benefit from that relationship. Attachment may not be a necessary condition, but it is a facilitative process and healthy part of a quality parent-child relationship. The “positive attachment effect” on a child’s adjustment probably also reflects that children in secure attachment relationships are being “well parented,”⁴² so when there is disruption to high quality of parenting, it is natural that there would be a “negative attachment effect.” Divorce and relocation not only produce changes in family stability, there also may be a change in the quality of parental care when there are these types of family transitions.⁴³ While there is research that one healthy relationship with a consistent caregiver who shows warmth and an effective parenting style is the main buffer to the effects of divorce or loss of a parental attachment,⁴⁴ one cannot underestimate the risk that is created when there is a fundamental disruption to one or both of the child’s parental/primary attachment relationships. The early attachment research⁴⁵ involved disruption to all parent-child relationships with children being placed in orphanage care, which is not a fair comparison to situations involving disruption associated with divorce and relocation.

The *second approach* to predicting potential harm to the very young with disrupted parent-child relationship comes from the social capital or resource availability perspective. Social capital is a general concept. It is not inconsistent with understanding child development in part from an attachment theory perspective. Prominent divorce researchers have proposed the concept of social capital to describe this approach.⁴⁶ Social capital is defined as the psychological, emotional, and social contributions that are provided to the child by parents, siblings, extended family, peers, etc., and also by organizations and groups.⁴⁷ It is possible that some relationships would be expected to yield aversive experiences for the child, and this would represent “negative social capital.”⁴⁸ The application of a social capital analysis to child custody disputes allows for a comparative analysis of the expected types and degrees of social capital or human resources that will be available to the child in the two alternative residential living arrangements and with competing parenting time arrangements. This is the analysis the court has to undertake in all child custody disputes, and the evaluator can help the court visualize what life would be like for the child in this fundamental comparison.

Social capital represents a more general concept than attachment and incorporates attachment relationships as part of the child’s repertoire of important sources of social capital. The disruption of an important attachment relationship translates directly to a loss of social capital. Social capital is a useful concept for evaluators and one that attorneys and judges seem to find useful in describing the fundamental comparison in relocation disputes.

Research demonstrates the long-term benefit to children of divorce from having quality relationships with both parents, especially if they can be shielded from conflict,⁴⁹ but even when there is high conflict, children show benefit from the active involvement of the nonresidential parent.⁵⁰ If relocation results in the lack of opportunity for the very young child to have access to one parent’s psychosocial resources, then there is a risk of harm due to the deprivation of potential resources from the parent. In the short-term development of the child, these parental resources would include nurturance, trust, and basic caregiving. In the long-term, the resources would

include being a positive role model, imparting values, supervising friends, providing economic support, participating in school activities, etc. The type of harm is *resource-deprivation harm*. It is due to a loss of social capital. There can be substitute sources of parental social capital, but research from many sources suggests there is not an adequate replacement for parental social capital — *e.g.*, grandparents, etc. — and the U.S. Supreme Court seems to agree by elevating the importance of the parent-child relationship on constitutional grounds.⁵¹ The social capital perspective has been adopted by researchers to help explain children’s adjustment to divorce⁵² and is used in the relocation risk-assessment model to explain the relocation effect.⁵³

The social capital-resource availability perspective on harm and relocation for very young children is a social psychological perspective. Children’s best interests or healthy development is viewed as a function of having an adequate level of interpersonal experiences and resources from important relationships and social activities. It is a highly developed concept and basis for research throughout social science.⁵⁴ It is similar to a family ecology perspective on children’s adjustment to divorce.⁵⁵

The two approaches to relocation-engendered harm concern alternative theoretical perspectives on potential developmental harm to the child. A third type of harm, and the focus of all relocation disputes, concerns indirect harm to the child by altering the quality of the nonmoving or nonresidential parent-child relationship. It can be described as *nonresidential parent-child relationship harm*. There is potential psychological or developmental harm to the child, but the harm is also a social harm to the relationship and the reorganized, post-divorce family system. The Colorado “legislative declaration” in C.R.S. § 14-10-124(1) that “it is in the best interest of all parties to encourage frequent and continuing contact between each parent and the minor children” reflects a social policy of promoting this relationship, and by implication, to avoid harm to it. In addition, many of the 11 best interest factors pertain to examining the parent-child relationships. The social policy of promoting involvement by both parents would seem to be based on many values and economic incentives associated with the development of healthy children, payment of child support, etc.

§ C9.2.3—Reciprocal Connectedness

In a provocative article in the journal of the National Juvenile Court Judges,⁵⁶ Arrendondo and Edwards, a psychiatrist and judge, point out the “limitations and pitfalls” with the concepts of bonding and attachment. They point out the narrow focus of these concepts: “Attachment and bonding have evolved as concepts that focus on security-seeking (the desire for proximity to a caretaker) to the relative exclusion of other critically important aspects of human relationships in the context of development.”⁵⁷ Their position is that the application of attachment theory to family law disputes is similar to the point of the renowned child psychiatrist, Michael Rutter (whom they quote), who suggests the attachment theory literature overlooks “other features of relationships” and discusses relationships “as if attachment security was all that mattered.”⁵⁸

Arrendondo and Edwards assert that “forensic testimony may mislead courts” by using the categorical analysis found in the subtypes of attachment theory — *e.g.*, secure versus insecure — instead of describing other dimensions of the parent-child relationship with other helpful con-

cepts that can vary along a behavioral continuum. The authors also suggest that further issues with emphasizing the attachment concept are (1) the research may not support the direct connection between security of attachment and designation of a primary custodial parent because children can become securely attached to abusive parents, and (2) the attachment process is seen as more unidirectional from child to parent — *i.e.*, “attaching” — instead of a reciprocal interactive perspective of the relationship. The proposed focus by Arrendondo and Edwards is on parenting behaviors/responsiveness to the child and a range of parent-child behaviors that serve to define the quality of the relationship rather than attachment *per se*: trying to teach the child; trying to learn from the caregiver; sharing positive experiences; setting limits but encouraging exploration, etc. *Reciprocal connectedness* is the proposed term that will be more useful to courts. I believe this conceptual approach holds more practical value to evaluators and allows them to more readily translate the forensic data to specific recommendations on a parenting plan, especially in the context of a potential long-distance arrangement.

The reciprocal connectedness approach is going to be more useful as a supplement to the Kelly and Lamb analysis,⁵⁹ which could serve evaluators as a practice guideline for parenting plan analysis for relocation for children under the age of 3 years. Beginning around age 2½, the cognitive development of the child has sufficiently matured so there is an emerging sense of self in the child’s development and language skills allow the child to engage in relationship building and a partnership with the parents. But this is still a very young child. As the young child begins entering the second 3 years of life, the reciprocal connectedness concept is going to be a better fit for the relocation analysis (and custody evaluation analysis generally). This approach is consistent with the resource availability-social capital perspective.

§ C9.2.4—Problems With The Primary Caregiver Concept

A common dispute in relocation cases involving very young children is whether there was a primary caregiver in the family. With a stay-at-home mom in a traditional child-rearing arrangement, this is usually a point of emphasis; it seems just as common that the father offers a competing view. The concept is often used to point to why relocation should be approved, especially in Colorado in a *Spahmer* case. It may be asserted as sort of the primary caregiver corollary that the father is not a viable candidate to be the residential parent and get the job done on the nitty-gritty details of parenting responsibilities.

A common error is to confuse the concept of primary caregiver with a primary attachment figure. As noted above, when there are two parents, the child usually will form attachments to both parents at an early age and an equal intensity of attachment to both and independent of the amount of parent-child contact.⁶⁰ The sophisticated judge will recognize the difference between caregiving and attachment. Primary caregiver is defined in Colorado case law in terms of carrying out the basic duties of day-to-day child rearing.⁶¹ An alternative view of primary caregiver, as a judge recently pointed out to me in the middle of testimony, is which parent is the lead or primary parent in overseeing the child’s needs, making decisions, arranging for preschool, etc., but this may be more applicable to an older child. Typically, the parents will be sharing the decision-making responsibilities. Sometimes, the stay-at-home parent may have discouraged the other parent’s involvement and been a “restrictive gatekeeper.”⁶²

§ C9.2.5—Attachment, Primary Caregiving, And Parenting Effectiveness

Evaluators need to assess the quality of attachment relationships; whether the parents have been primary and regular caregivers; and whether there have been other regular caregivers, such as grandparents. These are all important questions in relocation cases with very young children. Another important issue is whether there have been two working parents versus a traditional arrangement with a primary caregiver and primary breadwinner. The evaluator needs to assess the capacity of each parent to provide quality parenting in the future in either a local or long-distance arrangement. If there has been a traditional arrangement in a pre-decree case, the evaluator needs to assess the genuine motivation of a primary breadwinner to assume a greater role in child-rearing duties. In a post-decree context, the evaluator will be able to gather data on how the family has reorganized and shared parental responsibilities. There will be relatively fresh data on parenting skills for each parent, how they are coping with the transition created by divorce, and their life management skills in the role of a single, divorced parent. The evaluator needs to keep in mind that it is common for parents to struggle psychologically and with managing life and parent management challenges during the first two years following divorce.⁶³

In forecasting the child's long-term development, the concept of parenting effectiveness and the related concepts of parental management and life management skills may be more important than attachment and a past arrangement of a primary caregiver. In the context of relocation, it is even more important for the evaluator to predict how each parent can be an effective "manager" and provider of resources for the child. This includes facilitating the child's access to the psychosocial resources from the other parent (*i.e.*, gatekeeping) and providing for a diversity of life experiences, activities for the child, and the child's educational needs. In forecasting the child's outcomes, the ability of each parent to manage his or her economic situation is important and part of life management skills that carry over to parent management skills. This perspective on the "parent as manager" for the child's needs and the parent's own needs and life development overlaps with the social capital perspective. How the parents can facilitate and cultivate the flow of resources to the child so the child's needs will be met and there will be sufficient opportunities to achieve success in life is what divorce researchers have been describing for several decades.⁶⁴ Whether or not a parent may have been a primary caregiver may be less important than how each parent can create, facilitate, and manage the child's present and future depth and breadth of social capital.

§ C9.3 • THE FORENSIC APPROACH TO RELOCATION EVALUATION**§ C9.3.1—Investigation And Fact-Based Nature Of Relocation Cases**

All relocation cases require the evaluator to do extensive investigation on the relevant statutory factors and circumstances surrounding the move. Data must be presented so the court can visualize and know what life will be like for the child in the two alternative residential living arrangements associated with the parents living in separate communities. All custody disputes are very fact based and require individualized determinations, but this truism applies even more clearly in the relocation context. When there are complex salient issues present, such as high con-

flict, allegations of partner violence, or allegations of child alienation, the investigative function is even more important to be helpful to the court.

§ C9.3.2—Risk-Assessment Model And Very Young Children

The research literature on the effects of relocation or residential mobility on the adjustment of children of divorce⁶⁵ and the relocation forensic risk-assessment model⁶⁶ are easily accessible. Relocation is a general risk factor for children of divorce, and it is possible from the research to describe a “base rate of harm” associated with relocation. However, children are resilient, and moving parents can marshal adequate sources of social capital for children under the right circumstances and if the potential effect of the risk factors can be muted. With relocation, the quality of the parent-child relationship will be different due to the distance and lower frequency of regular involvement, but there still can be adequate quality and a meaningful parent-child relationship. If the moving parent has good coping, life management, and parent management skills, then there can be a “successful relocation” for the child. The key to success, however, may be for the moving parent to be a facilitative gatekeeper and to find ways to keep the nonmoving, nonresidential parent involved. With the very young relocating child, this recipe for mitigating the relocation harm or managing the risk simply may not be possible. This prediction of relocation harm for the very young can be explained by both a disruption of the attachment relationship and diminished social capital from the nonmoving parent.

All of the research-based risk and protective factors for relocation apply to very young children,⁶⁷ but the factors of age and distance combine to create a situation of high risk of harm to the parent-child relationship when there are infants, toddlers, or younger preschool-age children. The risk-assessment approach describes the risk (probability) of potential stakes (consequences; degree of harm) to the child and the parent-child relationship as described above. The evaluator’s communication with the court is a type of risk communication for the judge who is in the position of risk decision-maker. The evaluator’s predictions for the court in the form of expert opinion can take the form of a “risk x stakes” statement. The court wants to reduce the uncertainty for the child’s development, including sustaining a reasonable measure of quality in the non-residential parent-child relationship, if relocation should occur or, conversely, if the parent would move without the child when relocation was denied.

With a very young child, a move involving a very long distance, and two competent parents who are highly motivated to be involved, the risk x stakes prediction must fall into a category of high risk, high potential harm. The reason is that with very young children, there usually is not going to be a satisfactory means to manage the risk and mitigate the expected high level of harm. Unless the nonmoving parent has the flexibility with time and financial resources to travel to the very young child’s new community and spend considerable time every month, then the distant parent will literally fade from the child’s mind. Relocation cases always call for creativity in crafting and implementing parenting time schedules. The challenge is magnified with the very young, who are really too young to participate much in virtual parenting time modalities due to their lack of language development and attention span. The suitability and developmental sensitivity of the parenting plan can increase as a function of the child’s age and the ability of both parents to travel to facilitate access. If the moving parent is not a facilitative gatekeeper,⁶⁸ the

amount of quality contact between the other parent and child is not likely to be sufficient to protect the child and parent-child relationship from harm. This situation can easily be anticipated by the court and probably explains why, in my experience, courts in Colorado continue to show disfavor to relocation proposals. The case law emphasizes that parents are on an “equal footing” at the start of the factual analysis on the child’s best interests, but in reality the moving parent has an uphill battle to convince the evaluator and court that relocation makes sense for the child’s future. If the moving parent could postpone the relocation until the child is older, then the risk is more manageable. I’ve seen evaluators make this observation and even advise parents during the evaluation to postpone their relocation.

There will be relocation scenarios where there is relatively little realistic flexibility for the parent with a very young child not to relocate, *e.g.*, remarriage, military transfer, new job opportunity, etc. The evaluator is then faced with making recommendations on how to reduce the risk of harm to the child and parent-child relationship when it is accepted that there will be a substantial degree of harm. As discussed below, the *Spahmer* case law seems to put in motion this exact scenario. To wit, if the evaluator has to assume each parent is living in his or her designated geographical location, then with a very young child the evaluator knows there will be a high degree of harm no matter which parent is designated as the residential parent. There is a conflict between the law and science in such a scenario. If the evaluator knows there is judicial flexibility on certain issues surrounding the relocation, there are some practical partial solutions for managing the relocation risk.

§ C9.3.3—Cost/Benefit Calculation For The Court

In addition to presenting a detailed descriptive investigation and risk-assessment comparisons for a long-distance arrangement, the evaluator can characterize the data and interpretation in terms of a psychological cost/benefit analysis for the children. A “psychological ledger” of advantages/benefits and disadvantages/costs for the child can be presented for the competing scenarios of moving to the new community versus staying in the home community, possibly with a change in the residential parent if the moving parent must move without the child. This is a social capital analysis, with the evaluator listing the type and degree of resources available to the child in the competing locations and residential living environments. If there are detrimental factors or processes projected, such as conflict, restrictive gatekeeping, or poor educational opportunity, this is part of the psychological ledger. Detriment equates to negative social capital. If there are lost opportunities for resources (quality of the parent-child relationship; loss of friends, grandparents, and activities), these are opportunity costs.

While the Colorado legal standard for relocation in pre- and post-decree cases is the best interest of the child, I submit that all relocation proposals are primarily about the parents’ competing interests. The moving parent wants to return to her family of origin where her parents still live or move with a new spouse for new job or to attend college. The assertion is that the direct benefits to the parent will constitute indirect benefits to the child (increased income, support from extended family, better quality of schools). In the post-decree case in Colorado, the evaluator is supposed to specifically address the parents’ as well as the children’s interests and the indirect as well as direct benefits to the children.⁶⁹ In my review of evaluators’ work product/reports in relo-

cation CFI or PRE evaluations, I have yet to see a psychological accounting of the direct benefits to the parents and indirect benefits to the children specifically described. *Ciesluk* did seem to establish a functional new legal standard of a hybrid of parent and children’s best interests. When there is a very young child, it would be difficult to find any combination of advantages to the child that will outweigh the liabilities associated with the disrupted attachment relationship and loss of parental resources-positive social capital. The moving parent would need to emphasize the protective function of the continuation of her supportive, nourishing parental relationship with the child and the way she will facilitate the nonmoving, nonresidential parent-child relationship in the short and long run.

§ C9.4 • AMBIGUITY IN COLORADO RELOCATION LAW AND THE ETHICAL QUANDARY FOR EVALUATORS

§ C9.4.1—The “Viable Candidate Test” In Relocation

A common strategy exercised by the moving parent in relocation cases is to assert that the other parent is not a viable candidate to be the residential parent. *Spahmer* seems to assume that both parents are competent and fit parents, or that they are both viable candidates to be the residential parent.⁷⁰ If one parent is determined not to be a viable candidate, the issue moves beyond designation of a residential parent to the question of crafting an appropriate long-distance parenting time plan. There would not be the issue of which parent will be the residential parent. If a parent is not a viable candidate, then this may reflect an issue of availability, *i.e.*, the parent travels a lot due to work. Or, it could be due to issues of parental misconduct, potential harm to the child, or safety concerns. Drug and alcohol problems or a severe form of partner violence would be frequent reasons for the lack of viability.

Under *Ciesluk*, it remains ambiguous whether the court can deny relocation without being prepared to change the residential parent, or whether relocation can be denied just based on an analysis that moving would not be in the child’s best interests compared to the status quo with both parents continuing to live in the home community.⁷¹ If the court can deny relocation without being prepared to change custody or the primary residence, then it does not have to address the issue of viability with the nonmoving parent, unless the parent would move without the child because of lack of realistic flexibility.

§ C9.4.2—The “Primary Directive” In *Spahmer*

A central part of the *Spahmer* case is the unusual requirement that the court and the evaluators must assume each parent will be living in the community that they designate as their proposed residence. It makes for unusual law and seems to be the only state high court decision on relocation with this requirement. The result is that *Spahmer* requires the evaluator to make a recommendation on which parent would be the residential and majority time parent in a sort of up-or-down recommendation.

It appears ambiguous under the law whether the evaluators and court can consider if the moving parent would actually move without the child if the other parent was designated as the residential parent, or conversely, if the nonmoving parent would follow the other parent and child if the moving parent was designated as the residential parent. It would seem the spirit and intent of *Spahmer* is that these possibilities cannot be considered until after the opinion is formulated on which parent should be the residential parent for the child's best interests under the required *Spahmer* calculus. To do so would seem to be illogical based on the starting premise that it must be assumed the parents will be living in separate communities. Since parents almost always tell the evaluator whether or not they will move without the child, or whether they could or would follow the child, this situation requires evaluators to act "as if" they do not know this information so they will not be biased. In other words, the evaluator is required to perform the impossible cognitive task of pretending he or she does not see the elephant in the room, or "intentional forgetting."⁷² What I have seen is for the court to designate a residential parent under temporary orders and then ask the other parent to inform the court on his or her intent about where they intend to live. This amounts to a decision on the issue of the child relocating, but it is framed differently under *Spahmer*.

I refer to the "distant proximity assumption" under *Spahmer* as the "primary directive." It is the starting point and basic mindset required of the evaluator and court in the pre-decree case. The case law thus seems to impose a lack of flexibility due to the primary directive. I have always interpreted this part of *Spahmer* in a literal manner, and I think this view has been shared by courts — *e.g.*, that the court and evaluator need to decide/recommend the residential parent in a forced-choice, up-or-down designation of one parent or the other. I have thought this was true even if it was clear there could not be any satisfactory parenting time plan for the long-distance situation. The C.R.S. § 14-10-129 statutory factor of a suitable alternative parenting time plan was viewed as only applying to modification, post-decree cases. In *Spahmer*, it seemed like it was always a least detrimental alternative analysis, as it is subsumed under the best interests of the child standard according to case law.⁷³ It often is like picking your poison when the case involves a very young child, if it must be assumed that there will be a long geographical distance and a psychological separation between the child and one of the parents for most of the year.

Spahmer cases in the instance of very young children inevitably leave a bad taste in the mouth of everyone. If it does not have such an effect on the psychological palate of the moving parent, then that is probably significant on how well the parent is putting the needs of the child first and/or how he or she is able to support the other parent-child relationship. Long-distance parenting arrangements inevitably alter the quality of the parent-child relationship because of the logistical, practical obstacles that occur.⁷⁴ With very young children, *Spahmer* amounts to a *de facto* presumption in favor of a stay-at-home, primary caregiver mother or "the *Spahmer* paradox" because the new case law goes out of its way to disavow any presumptions on relocation and that this was the intent of the legislature when it enacted the changes in the "relocation statute" in 2001⁷⁵ and overturned the *Francis* decision.⁷⁶ With the primary directive, the primary caregiver of a very young child would seem to have a distinct advantage on the relocation issue, or being designated as the residential parent. It is less likely the nonmoving parent would be viewed as a viable candidate.

I have pondered and rethought and reread *Spahmer* many times. From the perspective of an evaluator, who obviously defers to the attorneys and court to interpret the law, I now question whether *Spahmer* really intended for evaluators and judges to be so literal in the interpretation of these complex pre-decree cases *when there are very young children*. Because if there is not flexibility to apply the law and the best interests standard based on the facts, then the result will be an inevitable, high degree of harm to every very young child who relocates a very long distance, or if the court must assume the moving parent will be distant from the child (having moved without the child) when there are two competent and involved parents. This then becomes the “*Spahmer* tragedy” if there is not flexibility, because there is not any parenting time plan that can mitigate the harm or manage the risk of developmental harm to the very young child. There will be an inevitable disruption to the parent-child attachment relationship, no matter which parent receives the coveted designation of residential parent. It will be very difficult for the distant parent to have a quality relationship with the child. It will be very difficult for the child to have access to the psychosocial resources the distant parent can provide, *i.e.*, social capital.

I have lectured and written about this situation for years with the hypothetical vignette of a move of a one-year-old to Guam from Colorado. The child will not be able to sustain a memory of the left-behind parent, no matter how many phone calls there are. Unless there are extraordinary financial resources and time flexibility, or if both parents can move, there cannot be a meaningful relationship between the distant or left-behind parent and his or her child. This perspective is not asserting a presumption against relocation, because the field knows that I have often opposed presumptions in relocation (either way) in different legal forums. It is just what the science demands with very young children and relocation. I testified before the Colorado Senate Judiciary Committee on behalf of the State Interdisciplinary Committee to change the relocation statute, C.R.S. § 14-10-129, so there would not be a presumption for relocation and there should be a best interests standard. I was a co-signee on two *amici* briefs in the California case that addressed relocation in the context of a presumption in the case law.⁷⁷ Conversely, my evaluations have recommended many times in favor of relocation because of the fact pattern. Unless there is little realistic flexibility not to move, parents who have legitimate, sound reasons for moving generally should wait until the child is older, there is an established attachment relationship with both parents, and the child has sufficient cognitive development to understand and put in perspective the separation from the parent. When *Spahmer* is applied to older children, it is a different issue concerning potential harm and risk management.

With a fact pattern that has a one-year-old and three-year old moving to a different continent, the other parent cannot follow and also move, and the parent is competent and motivated to stay involved as a parent, then it is not possible to avoid a situation of a *high level of risk of a high level of developmental harm to the child*. There is not a possible situation of “least detriment” because the level of risk and stakes (harm) are so high, either way in the designation of a residential parent and very long distance, that the concept of least detriment loses its conceptual significance. It becomes almost irrelevant which parent is designated as the residential parent because of this calculus of risk and stakes. The harm cannot be satisfactorily mitigated. If I am correct, then this means there is no “best interests” solution to the situation or resolution of the *Spahmer* primary directive in the case of very young children.

I believe this general dilemma created by *Spahmer* places the custody evaluator in an ethical dilemma from professional guidelines and standards that require, at least for psychologists, to “do no harm.”⁷⁸ It is a binding ethical *standard* for psychologists who are in the role of a court-appointed parenting evaluator.⁷⁹ In forensic evaluations, there is no client for the evaluator. The evaluator is part of the legal process and the court’s expert to conduct a neutral and ethical evaluation. But the ethical duty of the psychologist remains clear *to do no harm*⁸⁰ to the children affected by the litigation.

The only resolution of the conflict between professional standards and the law is for the evaluator not to make specific recommendations on residential parent — *i.e.*, relocation — and to describe the relative advantages and disadvantages for the child and offer a risk assessment on the decisional alternatives based on the science and the data. If the facts or data reveal that the non-moving parent is not motivated to be involved or has engaged in parental misconduct (*e.g.*, child abuse, substance abuse, severe partner violence) or has already relocated away from the child, then the ethical quandary would not apply. The evaluator, however, can be helpful to the court by describing the advantages/disadvantages for the child associated with living primarily with each parent. This cost/benefit analysis of the alternative living environments will help the court visualize what life would be like for the child in the long-distance parenting arrangement with each parent as the residential parent. The sources of social capital can be identified. The evaluator can describe a risk-assessment analysis. Deferring on the ultimate issue opinion is strongly recommended by one respected school of thought in the field of child custody,⁸¹ although courts usually expect ultimate issue testimony from the expert. The judiciary may want to consider relocation and the very young as an exception to receiving forensic prescriptive opinions, but expect the expert to provide full descriptive information relevant to the ultimate issue. A risk-assessment, cost/benefit analysis, and discussion of practical considerations for parenting plan options will be informative and should meet the needs of the court.

§ C9.4.3—Is There Judicial Flexibility Under *Spahmer*?

From my evaluator perspective, there remains ambiguity in the interpretation of *Spahmer* on a number issues that appellate cases or the legislature may address in the future. Under judicial discretion, trial courts may want to consider the issues raised below. These issues may create some degree of both judicial and forensic “wiggle room” so there is flexibility in how to consider the data/evidence in the case so that the outcome is not necessarily harmful to the child and there might be a best interest solution.

There seem to be four issues the court needs to consider to both resolve ambiguity and search for a best interest solution. The *first* issue is whether the court (and the evaluator) can consider information that the moving parent would actually move without the child if the nonmoving parent was designated the residential parent, the resultant implications for harm to the child, and when the court could consider the information. Does the court need to designate a residential parent first under temporary orders before considering the fact that the parent may not actually move? Equally important, can the court consider whether the nonmoving parent has realistic flexibility to also move when it is clear the moving parent has sound reasons for wanting to relocate with the child?

The *second* issue is, if the court needs to assume the parents will be living in their designated communities and it needs to designate a residential parent, how can the court consider facts that show whether either parent is in a position to travel to the other parent's community to facilitate the nonresidential parent-child contact? Courts routinely order parents to meet at a certain location to exchange the child in a long-distance arrangement. Can the court order a moving parent to bring the child to the nonresidential parent's home community for parenting time, for example, for one week per month?

The *third* issue is whether the court can consider the facts relevant to the relocation (*i.e.*, reasons for moving) under the statutory best interests factor of putting the needs of the child first. The primary directive would seem to indicate that relocating cannot be considered as evidence of not putting the needs of the child first.

The *fourth* issue is whether the court can consider the fact of moving with a very young child and the inherent difficulties as evidence of the moving parent not supporting the other parent-child relationship under the statute. This factor represents the parental gatekeeping process that is hypothesized as critical in the successful adjustment of the child in relocation.⁸²

Spahmer seems to be silent on all of these questions. I have always interpreted *Spahmer* to intend that probably the first three issues cannot be considered under the *Spahmer* primary directive. I encourage courts to provide guidance on these questions. It would seem that to not consider data or facts on these questions is to overlook important data relevant to the child's future best interests and trying to craft a parenting plan that could be in the child's best interests when there is a very young child. *Spahmer* requires an "as if" analysis, which essentially means facts will be ignored or reality suspended. For example, if the parent would not move without the child, which is usually the case, then the court and evaluator can better predict the child's future adjustment and there could be a best interests solution and not inevitable harm. If the court could consider the reasons for the move and if the parent is putting the needs of the child first, then this would be relevant to how well he or she could function responsibly as the residential parent and how likely he or she is to include the other parent in the child's life. If the court can consider which parent could travel to the child's home community for extended parenting time, then this would be extremely helpful in creating a best interests solution and would not be directing the parent where to live. This latter possible option for the court — to order the moving parent to bring the child back to the other parent's home community for the exercise of parenting time — may be the most effective tool for mitigating harm. There would, of course, be financial and logistical issues, but this could be the required cost in time and money for relocation when there is a very young child. So, for example, in the vignette with the mother moving to Argentina with one- and three-year-old children, is it fair, reasonable, and feasible that she would be required to bring the children back to Colorado for one week per month?

The issue seems to be to what extent the evaluator and the court can actually consider real data or whether they are somehow barred from making predictions about the child's future development based on actual data. To ignore data that the moving parent would not move without the child or which parent could travel and have parenting time with the child in the other commu-

nity would seem to close the door to the court from considering the conspicuous least-detrimental outcome in the difficult context of relocation.

§ C9.5 • SUMMARY

Relocation involving the very young child, perhaps even an infant, presents a conundrum for the evaluator and court. Cases with the very young usually will be a pre-decree or *Spahmer* case. If the issue is potential harm to the child-parent relationship, then there is not a satisfactory means to ameliorate the risk of harm. It is a situation of high risk of high harm to the relationship. The attachment relationship will be impaired, probably irretrievably if the analysis is that there will be a long-distance relationship, as *Spahmer* presumes. The reality of most such cases if relocation is denied in the sense that the nonmoving parent would be designated as the residential parent is that the parent intending to move would not move without the child. If the circumstances and facts are such that the nonmoving parent is not a viable candidate to be the residential parent, then there is going to be a long-distance arrangement unless both parents move.

With a child under one year of age and a moving parent who is competent and nurturing, it is likely the child will show a satisfactory adjustment and normal mental health. But the child will lose out on the social capital the nonmoving parent has to offer. It is therefore likely that the child will not show the *best* adjustment and development. The nonmoving parent is at risk to play a diminished role or drop out of the child's life.⁸³ The key to a successful relocation generally will be a moving, residential parent who will be a facilitative gatekeeper or proactive in keeping the other parent involved. When there are very young children, then proactive behavior will not be sufficient. There will not be a practical way for the nonresidential parent to stay involved.

Because of this high risk, high harm predicament under the primary directive in a *Spahmer* case, the evaluator may want to defer on offering an ultimate opinion issue on who should be the residential parent. The evaluator will want to provide thorough investigation and a cost/benefit analysis for the court that faces the dilemma of resolving a *Spahmer* relocation problem. There are areas where there may be some flexibility for the evaluator and court to manage the risk, but it may require some bold steps by trial courts or clarification by the appellate courts.

*The author would like to thank Pamela S. Ludolph, Ph.D. for help on the conceptual issues involved with very young children and relocation.

NOTES

1. *Tanttila v. Tanttila*, 382 P.2d 798 (Colo. 1963).
2. See, e.g., *Tropea v. Tropea*, 665 N.E.2d 145, 148 (N.Y. 1996); *Dupré v. Dupré*, 857 A.2d 242, 245 (R.I. 2004); and *In re Marriage of Condon*, 73 Cal. Rptr. 2d 33 (Cal. App. 1998).

3. See W. G. Austin, "Relocation, Research, and Forensic Evaluation: Part I: Effects of Residential Mobility on Children of Divorce," 46 *Fam. Ct. Rev.* 136-49 (2008).
4. J. B. Kelly and M. E. Lamb, "Developmental Issues in Relocation Cases Involving Young Children: When, Whether, and How?" 17 *J. Fam. Psychol.* 193-205 (2003).
5. M. K. Pruett, T. Y. Williams, G. Insabella, and T. D. Little, "Family and Legal Indicators of Child Adjustment to Divorce Among Families with Young Children," 17 *J. Fam. Psychol.* 169-180 (2003).
6. For a review, see J. B. Kelly and R. Emery, "Children's Adjustment Following Divorce: Risk and Resilience Perspectives," 52 *Fam. Relations* 352-62 (2003).
7. *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004).
8. R. A. Warshak et al., *Amici Curiae* Brief, *In re Marriage of LaMusga* (2004); L. E. Shear et al., *Amici Curiae* Brief, *In re Marriage of LaMusga*.
9. W. G. Austin and J. W. Gould, "Exploring Three Functions in Child Custody Evaluation for the Relocation Case: Prediction, Investigation, and Making Recommendations for a Long-Distance Parenting Plan," 3 *J. Child Custody: Research, Issues, and Practices* 65-110 (2006).
10. *In re Marriage of Spahmer and Gullette*, 113 P.3d 158 (Colo. 2005); *In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005); C.R.S. § 14-10-129.
11. *In re Marriage of Spahmer and Gullette*, 113 P.3d 158 (Colo. 2005).
12. *In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005).
13. Confirmatory bias is the process, usually unconscious, where information is selectively considered to support a preferred hypothesis and to not adequately address rival hypotheses. See D. A. Martindale, "Confirmatory Bias and Confirmatory Distortion," 2 *J. Child Custody: Research, Issues, and Practices* 33-50 (2005).
14. See Austin, *supra* n. 3.
15. The four alternatives are: (1) the relocating parent is allowed to relocate with the children; (2) the relocation of the children is denied and the parent decides not to relocate without the children; (3) the relocation is denied and the parent decides to relocate without the children; (4) the relocation is allowed and the other parent also relocates to the new community to be near the children.
16. See Austin, *supra* n. 3.
17. See *In re Marriage of Martin*, 42 P.3d 75 (Colo. App. 2002); *In re Marriage of Hatton*, 160 P.3d 326 (Colo. App. 2007).
18. *Model Parenting Time Plans for Parent/Child Access* (Phoenix: Ariz. Sup. Ct., 2008), available at www.supreme.state.az.us/dr/pdf/parenttime/parenttime5a.pdf.
19. See Austin, *supra* n. 3.
20. Economic changes were the first most powerful predictor; see S. McLanahan and G. Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* (Cambridge, Mass.: Harvard University Press, 1994).
21. *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004).
22. E. M. Hetherington and J. Kelly, *Divorce Reconsidered: For Better or for Worse* (N.Y.: Norton, 2002).
23. *In re Marriage of Francis*, 919 P.2d 776 (Colo. 1996).
24. J. B. Kelly and M. E. Lamb, "Developmental Issues in Relocation Cases Involving Young Children: When, Whether, and How?" 17 *J. Fam. Psychol.* 193-205 (2003).
25. For a review, see J. B. Kelly and M. E. Lamb, "Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children," 38 *Fam. and Conciliation Cts. Rev.* 1 (2000).
26. *Id.*
27. Kelly and Lamb, *supra* n. 24.
28. M. E. Lamb, M. H. Bornstein, and D. M. Teti, *Development in Infancy*, 4th Ed. (Mahwah, N.J.: Erlbaum, 2002).

29. For application to child custody, see P. S. Ludolph, "Answered and Unanswered Questions in Attachment Theory with Implications for Children of Divorce," 6 *J. Child Custody: Research, Issues, and Practices* 8-24 (2009).

30. Part of the reason that there are inconsistencies in the attachment research on the ability to predict long-term stability in attachment and associated adjustment problems with disruption is the use of categories to make accurate predictions. Use of multiple continuous variables will yield more accurate predictions.

31. Kelly and Lamb, *supra* n. 24 at 195.

32. *Id.* For a thorough review of attachment theory and child custody evaluation and issues, see G. Calloway and R. E. Erard, 6 *J. Child Custody* (entire issue) (2009).

33. Kelly and Lamb, *supra* n. 24; J. Bowlby, *Attachment and Loss: Vol. 2, Separation, Anxiety, and Anger* (N.Y.: Basic Books, 1973).

34. Kelly and Lamb, *supra* n. 24.

35. For literature reviews, see Kelly and Lamb, *supra* n. 24; Kelly and Emery, *supra* n. 6.

36. R. A. Thompson, "Early Attachment and Later Development," in J. Cassidy and P. R. Shaver, eds., *Handbook of Attachment: Theory, Research, and Clinical Applications*, 265-86 (N.Y.: Guilford Press, 1999).

37. *Id.*; P. S. Ludolph, "Answered and Unanswered Questions in Attachment Theory with Implications for Children of Divorce," 6 *J. Child Custody: Research, Issues, and Practices* 8-24 (2009).

38. R. A. Thompson, "The Legacy of Early Attachments," 66 *Child Development* 583-96 (2000).

39. *Id.*

40. Thompson, *supra* n. 36; Thompson, *supra* n. 38; R. A. Thompson, "Early Attachment and Later Development," in J. Cassidy and P. R. Shaver, eds., *Handbook of Attachment: Theory, Research, and Clinical Applications*, 2d. Ed., 348-65 (N.Y.: Guilford Press, 2008); L. A. Sroufe, "Attachment and Development: A Prospective, Longitudinal Study from Birth to Adulthood," 7 *Attachment and Human Development* 349-67 (2005).

41. Kelly and Lamb, *supra* n. 24.

42. Ludolph, *supra* n. 37.

43. Thompson, *supra* n. 38.

44. Kelly and Emery, *supra* n. 6.

45. Bowlby, *supra* n. 33.

46. E. M. Hetherington, "Social Capital and the Development of Youth from Nondivorced, Divorced, and Remarried Families," in W. A. Collins and B. Laursen, eds., *Relationships as Developmental Contexts* (Mahwah, N.J.: Erlbaum, 1999); P. R. Amato and J. M. Sobolewski, "The Effects of Divorce on Fathers and Children," in M. E. Lamb, ed., *The Role of the Father in Child Development*, 341-67 (N.Y.: Wiley, 2004).

47. J. S. Coleman, "Social Capital and the Creation of Human Capital," 94 *Am. J. Soc.* 95-120 (1988).

48. Hetherington, *supra* n. 46.

49. P. R. Amato and J. M. Sobolewski, "The Effects of Divorce and Marital Discord on Adult Children's Psychological Well Being," 66 *Am. Soc. Rev.* 900-21 (2001).

50. I. Sandler, J. Miles, J. Cookston, and S. Braver, "Effects of Father and Mother Parenting on Children's Mental Health in High- and Low-Conflict Divorces," 46 *Fam. Ct. Rev.* 282-96 (2008); M. K. Pruett, T. Y. Williams, G. Insabella, and T. D. Little, "Family and Legal Indicators of Child Adjustment to Divorce Among Families with Young Children," 17 *J. Fam. Psychol.* 169-80 (2003).

51. *Troxel v. Granville*, 530 U.S. 57 (2000).

52. Hetherington, *supra* n. 46; Amato and Sobolewski, *supra* n. 46.

53. Austin, *supra* n. 3.

54. N. Lin, K. Cook, and R. S. Burt, eds., *Social Capital: Theory and Research* (N.Y.: Aldine De Gruyter, 2001).

55. M. F. Whiteside, "Custody for Children: Age 5 and Younger," 36 *Fam. and Conciliation Cts. Rev.* 479-502 (1998).
56. D. E. Arrendondo and L. P. Edwards, "Attachment, Bonding and Reciprocal Connectedness: Limitations of Attachment Theory in the Juvenile and Family Court," 2 *J. of Center for Fam.* 109-27 (2000).
57. *Id.* at 110.
58. *Id.* (quoting M. Rutter, "Clinical Implications of Attachment Concepts: Retrospect and Prospect," in *Attachment and Psychopathology*, L. Atkinson and K. J. Zucker, eds., 26 (N.Y.: Guilford Press, 1997)).
59. Kelly and Lamb, *supra* n. 4.
60. Kelly and Lamb, *supra* n. 25.
61. "The term 'primary caregiver' is not defined in the statute, so we must give the term its plain and ordinary meaning. The plain meaning of the term 'primary' is 'first in importance; chief; principal; main'; the plain meaning of 'caregiver' is a 'person who takes care of someone requiring close attention, as a young child or invalid.' In this case, Mother's larger share of parenting time and her status as primary residential parent suggest that she is the 'primary caregiver.'" *Ciesluk*, 113 P.3d at 148.
62. W. G. Austin, "Relocation, Research, and Forensic Evaluation, Part II: Research Support for the Relocation Risk Assessment Model," 46 *Fam. Ct. Rev.* 347-65 (2008).
63. Hetherington and Kelly, *supra* n. 22; Kelly and Emery, *supra* n. 6.
64. S. McLanahan and G. Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* (Cambridge, Mass.: Harvard University Press, 1994); Hetherington and Kelly, *supra* n. 22; Amato and Sobolewski, *supra* n. 46.
65. Austin, *supra* n. 3.
66. W. G. Austin, "Relocation Law and the Threshold of Harm: Integrating Legal and Behavioral Perspectives," 34 *Fam. L. Q.* 63-82 (2000); Austin, *supra* n. 62.
67. Austin, *supra* n. 62.
68. Austin, *supra* n. 3; W. G. Austin, J. R. Flens, and H. D. Kirkpatrick, "Gatekeeping and Child Custody Evaluation: Theory, Measurement & Applications," Association of Family and Conciliation Courts, 47th Annual Conference (June 3, 2010).
69. *Ciesluk*, 113 P.3d at 147, 149.
70. *See Spahmer v. Gullette*, 113 P.3d 158 (Colo. 2005).
71. "The court may decide that it is not in the best interests of the child to relocate with the majority time parent. Then, if the majority time parent still wishes to relocate, a new parenting time plan will be necessary." *Ciesluk*, 113 P.3d at 148.
72. H. Johnson, "Processes of Successful Intentional Forgetting," 116 *Psychological Bulletin* 274-92 (1994).
73. *In re Marriage of Martin*, 42 P.3d 75 (Colo. App. 2002); *In re Marriage of Hatton*, 160 P.3d 326 (Colo. App. 2007).
74. L. E. Shear, "Life Stories, Doctrines, and Decision Making: Three High Courts Confront the Move-Away Dilemma," 34 *Fam. and Conciliation Cts. Rev.* 439-58 (1996).
75. C.R.S. § 14-10-129.
76. *In re Marriage of Francis*, 919 P.2d 776 (Colo. 1996).
77. *In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004); Shear et al., *supra* n. 8; Warshak et al., *supra* n. 8.
78. *See* American Psychological Association, "Ethical Principles of Psychologists and Code of Conduct," 57 *Am. Psychol.* 1060-73 (2002); D. M. Martindale, L. Martin, W. G. Austin, et al., *Model Standards of Practice for Child Custody Evaluation* (Madison, Wis.: Association of Family and Conciliation Courts, 2006); "Model Standards of Practice for Child Custody Evaluation," 45 *Fam. Ct. Rev.* 70-91 (2007).
79. To my knowledge, there are no written guidelines for forensic evaluations and roles by a national organization for other mental health professionals or by a state bar association (or ABA) for lawyers who conduct mental health investigations for the court, e.g., CFI. There are the CFI Standards in

Colorado published by the Colorado Supreme Court (Chief Justice Directive, 04-08, 2008, included as Appendix A to this book), but they do not address either the issue of “do no harm” or ultimate issue opinions.

80. American Psychological Association, *supra* n. 78, Principle A.

81. T. Tippins and J. Wittmann, “Empirical and Ethical Problems with Custody Recommendations,”

43 *Fam. Ct. Rev.* 193-222 (2005).

82. *See* Austin, *supra* n. 62.

83. Hetherington and Kelly, *supra* n. 22.

