Relocation Law and the Threshold of Harm: Integrating Legal and Behavioral Perspectives

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The problem of child custody relocation has received a growing amount of analysis from both legal and behavioral science perspectives. What is the court to do when a competent residential parent wishes to move away from the home community and relocate with the child for valid reasons? Should the residential parent enjoy the right to "move-on" with his or her life facilitated by a "move-away" with the child? To remarry, accept a valuable job opportunity, or receive vocational training? Or just to move back to the parent’s community of origin to receive the benefit of support from extended family? What of the nonresidential parent’s interests in maintaining active involvement in the child’s life? Parenting a child in the same community or even an hour commute away is qualitatively distinct from a situation of long-distance parenting. What of the child’s interests to maintain connections to the old community? When is the child’s preference given heavy weighting in the decision?

Relocation cases are likely to be litigated only when there are two very involved parents in the lives of the children, which make their

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determinations extremely thorny for the decision maker. These cases present courts and mental health expert witnesses with difficult, almost "Catch-22" types of dilemmas. The decision maker may be faced with the question of which type of harm is least detrimental to the child. There may not be a satisfactory solution from the perspective of the child's long-term developmental needs. There is a risk of a "lose-lose" outcome unless the court can craft creative interventions to guard the child's sense of emotional security and maintain continuity in relationships with both parents where effective parenting is possible.

This article examines the psycho-legal dilemma of relocation on the issue of the threshold of harm that is pivotal in relocation child custody determinations. The trier of fact is required to juxtapose issues of social policy with contextual information about the individual family to determine if a sufficient level of harm to the child exists to disallow the child from moving away with the residential parent. A forensic psychological model of relocation risk assessment (i.e., RRA) is presented as an approach to uncovering meaningful behavioral estimates on the issue of harm and to provide a behavioral framework for decision makers to consider when they derive an equitable threshold of harm for the case. The RRA model is extended to the core issue for decision makers: risk and stakes for the child in any relocation decision.

I. Public Policy and Family Realities

Beginning in 1975 with North Carolina, most states passed joint legal custody statutes. The legislative intent seems clear: to encourage involvement by both parents in the rearing and development of their children. The underlying assumption is that it is generally in the best interests of children to enjoy continuity in relationships with both parents. A newer development is to get away from the categorical terms of child custody in favor of parental responsibility laws where the parents are encouraged to allocate relative decision-making responsibilities for the child in all domains of parenting.

The evolution of relocation case law has grappled with this legislative history state by state around the issue of a parent's presumed con-
stitutional right to geographical mobility and the need of the child for stability in the relationship with the primary caretaking parent. The strong pattern in relocation law is to generally allow the residential parent to move-away with the child so long as satisfactory alternative parenting time arrangements with the nonresidential parent can be achieved and there are no bad faith motives for the geographical move. The basis for this development of “permissive” relocation law in favor of the residential parent is a prioritizing of the “new family unit” constituted by the post-divorce relationship between the primary caretaker parent and child. It is assumed that the child’s welfare and healthy development are dependent on continuity in this relationship.

The trend in relocation law reflects the reality of a high degree of geographical mobility in a society, especially in family cohorts likely to have more young children, with a concomitant high divorce rate. Divorce rates have been stable for several decades, but there is a recent trend towards more children born out of wedlock, which may support a presumption in favor of the primary caretaking parent if it is also supported by research that there is a disproportional disappearance of fathers in this out-of-marriage cohort.

The legal emphasis on the new family unit has been questioned as often not reflecting the structural reality and de facto parenting allocations in many families. The designation of a preference for the residential parent or primary caretaker may interfere with understanding the needs of the child in the individual case. The myriad of family forms and changing, or fluid nature of some family systems, and the ability of the child to thrive in these disparate structures, has been

7. Id.; Stout v. Stout, 560 N.W.2d 903 (N.D. 1997); Auge v. Auge, 334 N.W.2d 393 (Minn.1993).
8. Id.; Tropea, 665 N.E.2d at 151; Francis, 919 P.2d, at 785.
9. Austin, supra note 2; see Carol. S. Faber, Geographical Mobility: March 1996 to March 1997 (update), in CURRENT POPULATION REPORTS: POPULATION CHARACTERISTICS, P20–510, U.S. DEP’T OF COMMERCE (July 1998). During 1996–97 16% or 42.1 million Americans moved. Nineteen percent of these relocations were between counties and 15% between states. Of these, 1.6 million female single head of households and 480,000 male single head of households relocated.
documented by researchers who call for a developmental view of the child’s needs. Thus, the question of relocation calls for reliance on judicial discretion and most recent high state court decisions emphasize the simultaneous application of an “individualistic determination” even if there is an operative presumption.

II. Inferential Decision Making and Behavioral Forecasting

Family law can be distinguished from most other areas of legal decision making by the need to make predictions about the future behavior, to wit, of parental figures and how the child will adjust to alternative environments hosted by the parents. This future orientation contrasts with much of criminal and civil law that examines past behavior in making dispositions of sanction or compensation. The family law judge must predict where the child will thrive and where he or she will be insulated from harm.

When the child custody evaluator assists the court there is a need for behavioral forecasting on the behavior of family members and the effects of the environment on the child, but from a behavioral science and clinical perspective and tradition. The evaluator will be guided by factors from statute and case law in gathering clinical data in order to forecast the relative benefits of alternative residential placements and parental access arrangements. Often the expert is describing the effect of certain key factors or factor on recommending parental allocations between two competent and caring parents.

There have been strong criticisms of the ability of mental health professionals to reliably offer predictions and opinions on child custody. The recent trend toward scientifically based forensic psychological custody evaluations demands that the basis for the expert’s behavioral predictions be made clear by identifying the critical factors considered, positively and negatively weighted, and to what degree of

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13. For a discussion of the need for individualistic determinations based on the circumstances of the case, see Burgess, 913 P.2d at 473; Tropea, 665 N.E.2d at 145.
importance.\textsuperscript{16} By boldly asserting a scientific model as workable for the evaluator and useful for the trier of fact, there is a framework for organizing the independent variables, outcome measures for prediction, integrating research findings from aggregate data within the context of the individual case, and to acknowledge the limits on the evaluator’s ability to offer reliable predictions.

The area of violence risk assessment has pioneered the science and art of forensic predictions and provides a useful analogy to relocation cases where often the central issue is the prediction of harm.\textsuperscript{17} Recent research efforts\textsuperscript{18} have expanded upon the early theoretical works\textsuperscript{19} to show promise in substantially increasing predictive validity for specific cases of violence risk prediction. Instead of trying to predict the rare and severe behavioral event of violence, the relocation context demands the behavioral forecasting of potential harmful effects from environmental circumstances. This is quite a different task, but the structural elements for reliable predictions are the same for these two distinct, yet analogous areas of forensic psychology.

All forensic prediction efforts need to establish at least eight core elements.\textsuperscript{20} First, the population or group of individuals needs to be specified. In the child custody context this means the age group of children under consideration. This element allows the evaluator to organize factors that are most relevant to the developmental needs of this age group cohort. It also permits more efficient integration of relevant research findings to the predictive task for the specific case. Second, the outcome to be predicted needs to be specified and how it will be measured in the evaluation. For the relocation case, the child’s adjustment to relocation, or separation from the residential parent with a


\textsuperscript{18} Cf. C. W. Lidz et al., The Accuracy of Predictions of Violence to Others, 269 JAMA 1007 (1993); Christopher D. Webster et al., The Violence Prediction Scheme: Assessing Dangerousness in High Risk Men (1994); Henry J. Steadman et al., Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods, 55 Archives Gen. Psychiatry 1 (1998).


\textsuperscript{20} Kurt Heilbrun & Alfred B. Heilbrun, Jr., Risk Assessment with the MMPI-2 in Forensic Evaluations, in Forensic Applications of the MMPI-2 160 (Yossef S. Ben-Porath et al., eds., 1995).
change in residence, might be measured by emotional status, social adjustment, school performance, and psychophysical symptoms. Third, a base rate of harm for the group needs to be specified. In child custody relocation this is the level of expectable short-term distress that accompanies residential change for the child of divorce.

Fourth, risk factors for harm need to be specified. These are factors that are expected to significantly increase the level of harm beyond the expected base rate of short-term distress. Risk factors are garnered from relevant research and case specific information. Fifth, modulating or protective factors that help insulate the child from harm need to be integrated into the forensic equation. The protection of a solid, positive relationship with the residential parent is the main protective factor in relocation.

Sixth, specifying the probability of the outcome is necessary to help the decision maker consider dispositional options. The language of likelihood or confidence in predictions will be more helpful and accurate than dichotomous statements of harm or no harm due to relocation. Seventh, addressing the issue of prediction errors is crucial in making the translation from behavioral data to forensic application. The evaluator can communicate more effectively with the trier of fact by describing the likelihood of a false positive or false negative (see Section IV). Eighth, the potential consequences of prediction errors allows the decision maker to more clearly formulate an appropriate threshold of harm for the context of the case (see Section VI). Addressing the issue of prediction errors allows the evaluator to anticipate the criticism of the expert’s opinion in this area as overreaching or going beyond the data.

III. Highlights of Recent Relocation Law

Relocation, when there are two involved parents, requires a substantial modification of parenting access. When the nonresidential parent challenges the relocation and requests a change in custody, then the issue becomes one of changing the original custody decree. Relocation thus becomes a subset of child custody/parenting time cases that require modification. An influential analysis by Wexler endorsed the strict

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21. For an example of creating viable predictive models by integrating research and compelling variables based on clinical experience, see THOMAS GRISSE, FORENSIC EVALUATION OF JUVENILES (1998).
22. See MELTON ET AL., supra note 15.
23. Joan G. Wexler, Rethinking the Modification of Child Custody Decrees, 94 YALE L.J. 757 (1985), referenced in Francis, 919 P.2d at 786 n.3.
UMDA standard of endangerment to the child before allowing modification as a practical mechanism to control over-litigation and to promote stability in the child’s environment. Relocation law in Colorado has explicitly integrated relocation and modification into a single, UMDA standard around the issue of residential change. While few states have endorsed this stricter endangerment standard, state laws have evolved into variations around the principle of promoting stability in the residential parent-child relationship and making it difficult to successfully challenge prior custody determinations. Themes of motive, harm, and balancing relative advantages of moving or staying in the home community are found in recent state high court relocation decisions.

Questions of both the motives of the residential parent wanting to move and of the nonresidential parent opposing the move are examined in the context of whether a prima facie case for relocation can be made. Decisions analyze the degree of potential harm to the child associated with moving away versus staying in the home community with a change in custody to the other parent. Appellate decisions recommend the trial court judge should also attempt to balance the advantages to the child by staying in the home community against the advantages of staying with the same residential parent and gains available in the new community.

A. Making a Prima Facie Case

A national trend in state high court decisions on relocation suggests that the residential parent generally will be allowed to relocate with the child if he or she can demonstrate valid reasons for the move. Many states have moved from a negative presumption in favor of the nonresidential parent to prevent relocation to recent standards of a positive presumption in favor of the residential parent once a prima facie case is made. When there still is a negative presumption, it is usually paired with a low threshold for the residential parent to be able to overcome the presumption.

In order to gain the benefit of a favorable presumption most states require a showing there are not vindictive motives for the move and there is benefit of the move to the child with continuing the relationship

25. For examples of a positive presumption for the residential parent, see Burgess, 913 P.2d at 473; Francis, 919 P.2d at 776.
with the residential parent as the main benefit. Other decisions define benefit to the child as isomorphic with benefit to the residential parent. Many states require that there are sound reasons for the residential parent’s planned relocation while others do not examine motives. Sound reasons have included educational or vocational opportunities, remarriage, and seeking support from extended family. All states seem to require that workable alternative parenting time arrangements can be achieved. The child custody evaluator can assist the court on the prima facie examination by providing data on some of the elements (i.e., motives for the move, viability of alternative access arrangements, ability to promote relationship with other parent, educational needs, relationship of child with each parent) while others lie outside the competent realm of the evaluator (i.e., economic advantage).

B. Best Interests Standard, Presumptions, and the Language of Harm

Two recent and influential relocation decisions offer contrasting approaches to the use of a presumption for relocation. In Tropea, the New York Supreme Court adopted a general best interests approach in restructuring how courts should approach relocation. The idea of a presumption was rejected. This decision has been criticized as too “free-wheeling” for the idea that a broad range of factors could be considered on the relocation issue. A careful reading of Tropea, however, shows that while broad discretion is granted to the trial judge, considerable guidance is given to trial courts on how to approach relocation. The decision combined two appellate cases. Specific factors to be considered are listed. Parent and child factors need to be balanced in a cost/benefit analysis. Relocation was affirmed for a situation of the residential parent moving 130 miles even when the nonresidential parent was highly involved with the child. The presence of this parent’s bitterness

27. On disallowing relocation with a showing of vindictive or bad faith motives, see Rissenberger, 669 So. 2d at 1044; Stout, 560 N.W.2d at 903; Auge, 334 N.W.2d at 393; and favoring relocation absent a showing of bad faith, Aaby v. Strange, 924 S.W.2d 623 (Tenn. 1996). The motives of both parents are usually seen as relevant. Cooper v. Cooper, 491 A.2d 606 (N.J. 1984)(also on the need to show a direct or indirect benefit to the child); In re Marriage of Murphy, 834 P.2d 1287 (Colo. Ct. App. 1992).
28. Francis, 919 P.2d at 785; Cooper v. Cooper, 491 A.2d at 612.
29. On a need to show valid reasons, see Gruber v. Gruber, 583 A.2d 434 (Pa. Super. Ct. 1990), and some states where a sensible reason is not required, Silbaugh v. Silbaugh, 543 N.W.2d 639 (Minn. 1996).
31. Wallerstein & Tanke, supra note, 1, at 306.
legal responsibilities where that replaced the joint custody wording.

While these two cases are discussed within their respective

accounts, the California approach was used from a neutral to a

neutral approach, recognizing the residual parental role.

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neutral approach, recognizing the residual parental role.

Reevaluation law and the threshold of harm
The standard for residential change or a substantial change in parenting
time thus became a showing of physical endangerment to the child or
potential for emotional impairment.\textsuperscript{36} The Colorado standard is higher
than the best interests plus harm standard, but \textit{Francis} explicitly al-
lowed for the nonresidential parent to overcome the presumption even
without showing harm if it can be shown that the net relative advantages
of staying in the home community substantially outweigh the advan-
tages of staying with the residential parent.\textsuperscript{37} Thus, the Colorado stan-
dard becomes one of "harm plus a balancing analysis."\textsuperscript{38}

IV. Relocation Risk Assessment for a Child

Custody Evaluation

Because of the need in relocation cases to predict harm potential for
the child, I have proposed elsewhere a Relocation Risk Assessment
forensic psychology model (RRA) for the child custody evaluator to
assist the court in its decision making.\textsuperscript{39} Drawing upon the approach
to violence risk assessment, this model assesses the risk of harm to the
child associated with adjustment to relocation, or conversely, staying
in the home community with the nonresidential parent. It is possible to
estimate a comparative risk with the status quo if the residential parent
would not actually move if the relocation petition was denied, but this
may be prejudicial to the case.\textsuperscript{40} The scientific basis for the model is
derived from several research literatures: (1) effects of residential
change on child adjustment; (2) divorce effects research; (3) resiliency,
competency, and cognitive development literature; and (4) attachment
theory.\textsuperscript{41}

\textsuperscript{37} Francis, 919 P.2d at 785, establishes an ability of the nonresidential parent to
overcome the positive presumption by showing greater advantages to staying in the
home community. For an application of this harm plus a balancing analysis, see also
Steving v. Brown, 980 P.2d 540 (Colo. Ct. App. 1999), and for a straight balancing
test, see Marriage of Sheley, 895 P.2d 850 (Wash. Ct. App. 1995).
\textsuperscript{38} Steving, 980 P.2d at 540.
\textsuperscript{39} Austin, supra note 17.
\textsuperscript{40} American Academy of Matrimonial Lawyers, supra note 2, at 20.
\textsuperscript{41} Cf., E. Mavis Heatherington et al., \textit{What Matters? What Does Not? Five Per-
spectives on the Association Between Marital Transitions and Children’s Adjust-
ment}, 53 AMER. PSYCHOLOGIST 167 (1998); ROBERT E. EMERY, MARRIAGE, DIVORCE &
CHILDREN’S ADJUSTMENT (2d ed. 1998); Mary S. D. Ainsworth, \textit{Infant-Mother At-
tachment}, 34 AMER. PSYCHOLOGIST 932 (1979); Ann S. Masten & J. Douglas Coat-
sworth, \textit{The Development of Competence in Favorable and Unfavorable Environments:}
A. The Predictive Forensic Model

The RRA builds a hierarchical model of risk assessment based on aggregate research findings, clinical experience, and factors specific to the case. The model starts with an estimated base rate, which is the expectable level of distress and adjustment problems associated with residential change and relocation for the child of divorce. A small research literature exists to document this effect. Courts have indicated that there must be a showing of harm beyond this level of expectable distress.

The model next measures risk factors and protective factors that will assist in the prediction of harm. Risk factors include: young age of child, geographical distance, degree of involvement by nonresidential parent, degree of involvement in home community, special developmental needs, poor adjustment to divorce, recency since the divorce, negative psychological status of residential parent, and limited ability of residential parent to promote the relationship between the child and nonresidential parent.

Protective factors include positive relationship with residential parent, older age of child, individual resources of child, especially IQ, ability of residential parent to cope with the stress of relocation, and ability of residential parent to proactively promote relationship between the child and the nonresidential parent. A special factor is the degree of inter-parental conflict or a history of domestic violence. This historical factor may predict better adjustment by the child with relocation due to geographical barrier between the conflictual parents or lessening a fear of abuse. On the other hand, relocation could increase harm if the conflict means the residential parent would try to undermine the child’s relationship with the nonresidential parent. The custody evaluator can assist the court by screening the relocation on this issue. Only clinical data can shed light on whether relocation will help or exacerbate a high conflict family. Warring parents can easily continue their battle from a distance, or the distance may diffuse the conflict by allowing for less contact and actually facilitate the realistic goal of “parallel parenting” by two loving parents who cannot cooperatively parent.


43. See, e.g., In re Marriage of Littlefield, 940 P.2d 1362, 1366 (Wash. 1997).

The RRA attempts to present the clinical data and risk assessment in the form of estimates of risk and degree of relative advantage to the child. The evaluator presents the court with estimates of the probability of harm associated with alternative placements and to discuss the likelihood and effects of prediction errors. The four possible outcomes of any prediction are described in the following table.

**Table 1**

*Prediction Errors Associated with Relocation*

<table>
<thead>
<tr>
<th>Predicted Outcome</th>
<th>True Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Harm Occurs</td>
</tr>
<tr>
<td>Harm Predicted</td>
<td>True Positive</td>
</tr>
<tr>
<td>No Harm Predicted</td>
<td>False Negative</td>
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<tr>
<td></td>
<td>False Positive</td>
</tr>
<tr>
<td></td>
<td>True Negative</td>
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</tbody>
</table>

The table shows when harm is predicted, but the child actually adjusts well to relocation, a *false positive* occurs. This is the over-prediction of harm. Conversely, if no relocation harm is predicted, but the child actually shows substantial adjustment problems, then a *false negative* has occurred. This is the under-prediction of harm. The goal of the RRA is to maximize the likelihood of *true positives* and *true negatives*, or to accurately predict when harm will accompany relocation and when it will not. The dichotomous presentation of the outcomes is an over-simplification. In the reality of true outcomes there will be degrees of error or correctness, but the 2 x 2 table provides a heuristic guide for the understanding of the potential consequences to the child with the different dispositions available to the decision maker.

If the circumstances of the case should happen to provide behavioral samples of any of the four predicted outcomes, then there is a test of the validity of a RRA that may have predicted that outcome. For example, if a child temporarily relocates to the new community while the case is pending (i.e., residential parent has remarried and child accompanies), then this provides data to be compared to the predicted outcome from an evaluation. The same is true if the child remained in the home community on a temporary basis. Temporary placement generally cannot be prejudicial on the determination of final custody dispositions, but it is not unusual for temporary placements to occur in the context of pending relocation litigation. This time frame provides a...
window into how the child will adjust to that situation with an extended separation from the other parent.

A recent Colorado case highlights the use of case data to confirm hypotheses about true outcomes.47 This case has been questioned by jurists as unclear in its application of the state endangerment standard, but the ruling becomes understandable when viewed in terms of predictive outcomes.48 It was established that the mother who had moved to New York with a young child was undermining the relationship with the child’s father in Colorado. The trial court ruled that there was endangerment to the child for this reason, but ruled in favor of the mother. This was the confusing part. The court found that expert testimony predicted removing the child from the mother would be even more harmful than the harm the mother was causing. There was also evidence that when the young child visited the father in Colorado for two weeks there were signs of emotional harm. Translating this evidence into predicted outcomes, it is seen that there was a true positive with harm to the child associated with relocation, but support for a false negative from the father’s point of view with harm demonstrated during the visit when it was not predicted. Both types of harm existed and the court chose the least detrimental of the two placements.

B. Risk Reduction Interventions

Since most relocation cases will result in the residential parent being allowed to relocate with the child, an important role for the evaluator and RRA is to recommend interventions that will reduce the risk of harm due to relocation. Risk reduction interventions may be considered by the court in anticipating the risk, potential consequences, and uncertainty facing the child due to relocation. I have suggested elsewhere several working principles of risk reduction for family therapists/me-

47. Steving, 980 P.2d at 540; Taylor v. Taylor, 849 S.W.2d 319 (Tenn. 1993). In a recent relocation risk assessment that I conducted the circumstances of the case were temporary placement with the nonresidential parent for six months while an order was stayed. The residential parent/mother had relocated from Colorado to North Dakota. The judge felt she had withheld information at trial about a pending remarriage and then moved to a different city in North Dakota. The six months placement allowed the risk assessment to test the prediction of little harm to the child with a change in custody, thus confirming a true negative. There was no parallel information on a temporary placement with the mother, so information became available to the court on part of the predictions.

diators in the relocation case.\textsuperscript{49} Interventions may include special variations on parenting access to promote regular communication, therapy, tutoring, and monitoring of behavior by the residential parent to promote communication between the child and nonresidential parent. In the \textit{Steving} case above, the court attempted to mitigate the harm to the child by ordering interventions of therapy for the child and mother, and monitoring of the mother’s inappropriate behavior.

\textbf{C. Practical Application}

The following questions for the trier of fact are relevant to the issue of relocation caused harm and the RRA is designed to answer them.

1. Where is the harm? What is the \textit{cause} of the harm? What is the \textit{type} of harm identified? What specific \textit{behaviors} will be evidence of the harmful effects of relocation?
2. How likely is the harm to occur?
3. What are the possible consequences if the predictions are wrong?
4. What will be the consequences if the predicted harm does occur?
5. Are there ways to reduce the predicted harm?

\textbf{V. Threshold of Harm Issue}

Almost all of the recent relocation legal decisions integrate a harm analysis to determining the judicial standard for the state. There often is an attempt to provide guidelines for determining when there may be a sufficient level of harm to deny a relocation, but the courts either explicitly refuse to address the issue of a threshold of harm (i.e., \textit{Tropea}) and/or point to the necessary individualistic determination by the trial judge. Courts seem to agree that it is not possible to set a firm threshold of harm, or a “bright line” rule for individual cases.\textsuperscript{50} \textit{Francis}, with a higher endangerment standard, provides examples of harm sufficient for modification that are quite extreme, but then invites a showing of sufficient positive advantages to not moving that might be sufficient to disallow relocation in some circumstances.\textsuperscript{51} Other courts also engage in this balancing analysis. Wexler points out that even with the higher endangerment standard, judicial discretion will result in some cases of

\textsuperscript{50} \textit{See Mize v. Mize, 621 So. 2d 417, 419 (Fla. 1993)}.
\textsuperscript{51} \textit{Francis}, 919 P. 2d at 785.
relatively mild harm to the child being interpreted as sufficiently harmful to allow modification.\textsuperscript{52}

What constitutes harm to a child can be a complicated issue and difficult to measure. Legal definitions of child abuse are attempts to define substantial harm. In the context of child custody, harm can be defined not just as harsh treatment, but also relative to residential placements that substantially interfere with normal development or blocked potential.

Examples of sufficiently harmful situations have included the following:

- Child’s fear of sexual abuse by step-father;\textsuperscript{53}
- Use of force as discipline and stepparent’s emotional problems;\textsuperscript{54}
- Custodial parent’s mental illness;\textsuperscript{55}
- Physical condition of neighborhood;\textsuperscript{56}
- Custodial parent’s alcohol abuse and unstable living arrangements;\textsuperscript{57}
- Removing child from California to Florida with questionable reasons;\textsuperscript{58}
- Removing child from Kansas to Washington, geographical distance alone;\textsuperscript{59}
- Unable to find suitable parenting time schedule because of children’s school and father’s work schedules;\textsuperscript{60} and
- Custodial parent creating conflict and denigrating the nonresidential parent in front of child.\textsuperscript{61}

Examples of situations where courts have found an insufficient potential for harm and relocation has been allowed include:

- Father relocating to another state even with finding child closer emotionally to mother;\textsuperscript{62}

\textsuperscript{52} Wexler, supra note 23, at 777, where a child not achieving her potential in school was deemed at trial to be sufficient to support a change in custody when Illinois used a strict UMDA standard of endangerment. Kraft v. Kraft, 439 N.E.2d 590 (Ill. App.3d 1982).
\textsuperscript{53} In re Marriage of Agner, 659 P.2d 53, 55 (Colo. App. 1982).
\textsuperscript{54} In re Custody of Sussenbach, 485 N.E.2d 367, 370–71 (Ill. 1985).
\textsuperscript{56} Smart v. Smart, 419 N.E.2d 695, 699 (Ill. App. 3d 1981).
\textsuperscript{57} In re Marriage of Miller, 825 P.2d 189, 192 (Mont. 1992).
\textsuperscript{58} Cassady, 56 Cal. Rptr. 2d at 545.
\textsuperscript{59} In re Marriage of Bradley, 899 P.2d 471 (Kan. 1995).
\textsuperscript{60} In re Marriage of Elser, 895 P.2d 619 (Mont. 1995).
\textsuperscript{61} Cloutier v. Lear, 691 A.2d 660 (Me. 1997).
• Making parenting access more difficult;\textsuperscript{63}
• Not enhancing the life of the child;\textsuperscript{64}
• Moving from Oregon to Missouri;\textsuperscript{65} and
• Mother alienating child from father.\textsuperscript{66}

If the threshold of harm is set very high, then it will be very rare that the residential parent cannot relocate with the child. The expected threshold will naturally create behavioral incentives for parents as they negotiate marital dissolution agreements. The higher the standard, the more conflict on residential placement can be expected at the time of the original determination. A high and inflexible standard can be criticized on the grounds that the needs of children change over time and there will be a substantial percentage of cases where relocation will not be in the child’s best interests.\textsuperscript{67} Even advocates of a strong positive presumption for relocation argue for substantial judicial flexibility to respect the “voice of the child” and changing developmental needs.\textsuperscript{68}

VI. Constructing the Threshold of Harm: Risk × Stakes Model

A. A Predictive Framework

Each relocation case requires the decision maker to construct from evidence an appropriate level of harm that is sufficient to justify denying the child relocation with the residential parent. The Relocation Risk Assessment approach allows the evaluator to assist the court in conceptualizing this threshold by providing estimates of risk and consequences that underlie the inferential decision making in the case.

The decision maker will want to know the risk of harm, degree of potential harm, likelihood of prediction errors, potential severity of consequences with a false positive or false negative, and level of uncertainty associated with the available dispositional options. The RRA attempts to provide this information. As a practical matter, while risk factors may be specified with accuracy, the degree of risk or probability may be unknown.

\textsuperscript{63} Cerminara, 669 A.2d at 837.
\textsuperscript{64} In re Marriage of Shelton, 576 N.E.2d 862 (Ill. 1992).
\textsuperscript{65} In re Duckett, 905 P.2d 1170 (Or. Ct. App. 1995).
\textsuperscript{66} Steving, 980 P.2d at 540.
\textsuperscript{67} See, e.g., Shear, supra note 11, at 441; Gindes, supra note 1, at 121–22.
\textsuperscript{68} Wallerstein & Tanke, supra note 1, at 322; MARY ANN MASON, THE CUSTODY WARS 76 (1999).
The tradition of violence risk assessment provides a useful model for deriving the threshold of harm or decision-making schemes in the case of release of criminal offenders or potentially violent psychiatric patients. Grisso and Appelbaum propose in the violence prediction context some situations call for a lower threshold of risk of harm than others before society deprives someone of their liberty. They point to the model of risk (probability of violence) and stakes (consequences of violence) as an approach to integrating risk assessment with other social goals.\textsuperscript{69} So in some contexts a low risk of harm to others is sufficient (sexual offender) and for others (history of moderate assaultiveness) a high level of risk is needed before imposing incarceration or continued hospitalization because of the level of anticipated harm and other social considerations.

The Stakes x Risk model is described in the following table. The cells describe the custody evaluator’s predictions of likely consequences and confidence in the predictions. The decision maker can use this clinical information to set a rule for the individual case of how much probability is enough for a given level of potential harm.

<table>
<thead>
<tr>
<th>Risk of Relocation Harm</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Stakes (Potential Consequences)</strong></td>
</tr>
<tr>
<td>Low</td>
</tr>
<tr>
<td>High</td>
</tr>
</tbody>
</table>

The situation of high risk and high consequences is a likely true positive with much harm to the child due to relocation. The situation of low risk and low consequences is a likely true negative with minimal harm possible. When there is a low probability but the consequences of harm are potentially severe, then the threshold might be set low. For example, if the residential parent has married a convicted sexual offender, then the court might find sufficient harm to deny relocation even though expert testimony is that the risk of sexual harm to the child is quite low, perhaps as low as 10 percent. If the stakes are chronic

unhappiness of the child or inadequate progress on a learning disability with relocation, then the necessary predicted risk might need to be as high as 75 percent. With this method of analysis, defining the threshold of harm becomes context-based and is consistent with the emphasis on judicial discretion and individualistic determinations found in most relocation decisions. Because the difficult legal calculus of the threshold of harm can only be made by the trier of fact after evidence is presented, the custody evaluator cannot hold an opinion on relocation per se. The expert, however, can present data and analysis that makes the decision maker’s inferences more accurate and equitable. In this sense relocation decisions can be more empirically based within the family context and properly balance social policy with the needs of the child.

Risk reduction interventions may be available that change both the risk and stakes for a family. Can the effect of the geographical distance be manipulated by the nonresidential parent also moving, or the residential parent agreeing to move to a different, and closer community that might afford the same benefits she or he is seeking with relocation? Does a teenager want to alternate years between the parents? Are there educational and mental health interventions that might help with adjustment? Can the parents agree to reexamine the issue in two years to see how the child has adjusted?

B. Deriving a Threshold

It is not possible for appellate courts to set forth firm general standards on the threshold of harm that is sufficient for different relocation case scenarios. Courts have consistently stressed the need for individualized determinations for relocation and modification cases. The RRA and Risk x Stakes approaches to relocation offer potential to guide behavioral predictions for the individual case. For certain types of cases of potential relocation harm at less than 50 percent risk, or even much less, may be enough to deny relocation while in other situations a much higher threshold will be necessary. Social policy and behavioral forensic science probably converge on a general recommendation: the higher the stakes, the lower the risk necessary to deny relocation, or to permit a modification of prior orders. When there is a possibility of a rare and severe harmful event in the life of a child, then a very low risk of harm may meet a context-threshold. Conversely, when the harm is a combination of environmental stressors that may produce moderate harm, then a higher level of risk will naturally be demanded. A combination of expert evaluation and judicial discretion can collaboratively define how much harm is enough to consider a change in custodial arrange-
ments or to order specific risk reduction interventions for the benefit of the child.

C. Application

Consider the following case vignettes:

High Stakes, Low Risk: Residential parent/mother with a strong history of competent parenting desires to relocate a short distance with young school age children. She remarries a man convicted of manslaughter five years ago in a drunken driving car crash. He now abstains from alcohol, attends AA, and lives a stable life. The likelihood of harm to the children is low because of recovery from alcohol dependency, but if there is slippage the consequences could be severe. A risk reduction intervention would be to disallow the stepfather from driving alone in the car with the children.

Low Stakes, High Risk: Residential parent desires to move seventy-five miles away for a new job with the school age child. The very involved nonresidential parent opposes the move on the basis of distance and difficulty in staying involved in the child’s extra-curricular activities. There would certainly be changes in the type of parenting by the nonresidential parent because of distance, but liberal access could still be available. There is certainty of short-term distress and adjustment for the child, but the level of long-term harm is low.

Low Stakes, Low Risk: Residential parent/mother wants to move a distance of 1000 miles to return to her home community. The nonresidential parent has had regular, but infrequent parenting time with the twelve year old son. The child wants to relocate with the mother. The new schools are superior and the child looks forward to hunting and fishing with his grandfather in the new community. Any harm to the child could be counter-balanced with extended summer visitation with the father.

High Stakes, High Risk: Residential parent/father wants to move away with a pre-school age child requiring a commute of several hours for parenting time. The nonresidential parent/mother asserts the child has special needs with asthma and the stress of separation may endanger the child’s health. The mother also maintains the separation will be emotionally harmful to the child’s development because of the age and distance interrupting the developmental needs of the child to more frequent contact with the mother. The harm is potentially great and very likely in this context.

In these cases the stakes and risk are assessed from the perspective of predicting harm due to relocation. The decision maker will also want to approach the case with an analysis involving several steps:
Step 1: The decision maker will want to first consider the stakes/consequences in the case. If there is little credible evidence of a significant degree of harm, then relocation will likely focus on working out a viable alternative parenting access schedule.

Step 2: If there is a possibility of significant harm to the child, then the decision maker will want to consider the probability of the predicted outcome (risk). It often will be the case that a firm estimate cannot be given, but an evaluator may be able to say if the risk is more or less likely, and in some cases if it is highly likely.

Step 3: What risk reduction interventions are available? Is there room for compromise? If a residential parent could relocate three hours away instead of a day’s travel, then this can alter not only the risk to the child with more practical involvement by the other parent, but may diffuse the conflict between the parents. In high conflict families it may be helpful to order monitoring on communication and access.

Step 4: What are the predicted consequences if relocation is disallowed and there is a change in custody to the nonresidential parent? This question points to the alternative risk assessment for relocation on the predicted effects on the child with a change in custody.

Step 5: Controversial questions include whether the residential parent would actually move away if the petition was denied and if it was realistic for the nonresidential parent to move to the new location.

The goals of child custody relocation determinations would seem to be to promote the best interests of the child and reduce the potential for harm so the child’s development can follow a reasonably normal path. Social realities dictate that residential parents will be attracted by opportunities that require geographical mobility. Courts respect this desire, but social policy would seem to also require an attempt to reduce uncertainty facing the child and promote stability in all child-parent relationships, not just the dyadic family unit of child and residential parent. While children are malleable in the face of change, they are not always resilient. Care should be taken to carefully scrutinize the wisdom of parental relocations since the threat to the child due to the transition of relocation is a “turning point in the life of the child” and potentially more traumatizing than the parental divorce.70

70. Wallerstein & Tanke, supra note 1, at 306, 309–10.