

Child Custody Evaluation and Relocation: Part III of III: Forensic Consultation Services and Common Errors by Evaluators¹

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This is *Part III* of an article on relocation and child custody disputes. *Part I* described the psycho-legal dilemmas and countervailing social policies that mirror the competing interests of divorced parents when one parent wishes to relocate with the child. The moving parent wants to pursue opportunities and improve her quality of life. The nonmoving/nonresidential parent (most often the father) wants to protect his involvement and relationship quality with the child. It is the “relocation conundrum.” *Part I* also reviewed the social science research that is relevant to relocation and child custody and presented 15 “forensic guideposts,” or salient issues that a custody evaluator and court may want to consider in approaching the relocation dispute.

Part II described relocation as one of the special topics and complex issues that family courts and custody evaluators often encounter. Professional standards recommend that evaluators take a systematic approach to all of the complex issues in organizing their forensic approach, data collection, and analysis for making parenting plan recommendations to the court. Two complementary approaches for custody evaluators were presented. The relocation risk assessment forensic evaluation model, as a research-based model of risk and protection factors, was presented as a useful framework and heuristic for evaluators and courts. The factors overlap with common

relocation legal factors in statute and case law. The risk assessment model can be a useful first step in a relocation analysis and provides scientific grounding. A second, complementary social capital approach was described as a straightforward perspective on comparing the relative advantages and disadvantages associated with the proposed relocation, or the alternative judicial outcome of relocation being denied and custody changed to the nonmoving parent. It is part of the fundamental comparison that the evaluator needs to provide so the court can visualize what life will be like for the child in the alternative residential living arrangements in the parents’ respective locations.

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In this *Part III*, the process and role of the forensic expert mental health consultant is discussed and the range of services that are provided to retaining attorneys in family law litigation, including relocation cases. This is followed by a discussion of common errors (or inadequate investigation and analysis) found in custody evaluations that forensic consultants encounter when they review the work products of evaluators, for example, the custodial report and evaluation.

RELOCATION LITIGATION

Although there are no studies on the issue, it is probably the case that a higher percentage of relocation cases are litigated compared to other types of custody disputes. The relocation conundrum creates high levels of emotional angst for both parents, making each one determined to prevail on the relocation issue. When a party does not prevail on the relocation issue, either way, part of the response will be that the outcome was not fair. The author's forensic experience is that even when there was a child custody evaluation conducted with clear recommendations, the case is likely to go to trial. One reason for the presumed high litigation rate, as discussed later, is the quality of the forensic evaluation and report that may be problematic.

ROLE AND SERVICES OF THE CONSULTING EXPERT FOR RELOCATION CASES

Overview

Based on the author's experience (and communication with colleagues), due to the complexity and double binds inherent in relocation cases, it is not uncommon for the quality of the child custody evaluation to be lacking. This is not to say that most relocation custody evaluations are not competently conducted. For example, one of the forensic guideposts alerts evaluators and judges to be aware of anti-relocation bias that seems common. Many evaluators, sometimes citing supporting research that shows children of divorce demonstrate the best long-term adjustment when they enjoy quality relationships with both parents, view relocation as inherently harmful to the nonresidential parent-child relationship and therefore to the child. In a recent case, the evaluator on cross-examination stated that, in her opinion, most evaluators held

a bias against relocation, and she recommended against relocation from California to Texas with mother and four-year old child. The court rejected the evaluator's recommendations on the basis of bias because the law requires the parents to be on "equal footing" on the relocation issue.

In this part of the article on relocation, the role of the forensic mental health consultant in litigated relocation cases is described along with the forensic services that may be offered in an ethical manner that are intended to be helpful to the court. If the retaining attorney requests that the retained expert become a testifying expert, then the expectation is that case review and analysis will also be helpful to the client's case on the relocation issue. However, the attorney needs to recognize the retained consulting expert's ethical obligations are to be balanced and accurate in the analysis and testimony. This article describes in more detail the role and services of the consulting mental health expert, especially the service of providing a work-product review of the custodial evaluation for the relocation case.

A higher percentage of relocation cases are probably litigated.

Common problems encountered in child custody evaluations for relocation cases are discussed. Child custody evaluations² may be the most complicated of all forensic mental health evaluations due to the breadth of knowledge and familiarity with research that is required; diversity of forensic assessment procedures applied; amount of material to be reviewed; amount of data generated; assessment of parents and children; conducting home visits; and complex issues with assertions of harm such as child sexual abuse, intimate partner violence, substance abuse, or parental alienating behaviors. Relocation cases also often require the evaluator to travel a long distance to conduct a site visit, interview extended family, or examine a proposed new school. A final complexity in relocation cases is the need to potentially craft and recommend a long-distance parenting plan that will need to address how to manage the risk of harm to parent-child relationships associated with distance and extended separations. Different possible forensic mental health consulting services are described in the following discussion.

Work Product Review and Testifying Rebuttal Expert

Due to the complexity of relocation cases it will not be unusual for the attorney representing the party who was not favored by the custody evaluator's recommendations to retain a consultant to review the quality of the report and evaluation. The stakes are so high in relocation cases that the disfavored party will be resistant to agreeing with and accepting the evaluator's analysis and recommendations. The retained mental health expert serves a function for the court and the legal process of providing forensic quality control, or providing checks and balances to the evaluator so that court is receiving high quality and accurate forensic work and opinions. The forensic process for conducting a competent and ethical work product review in family law cases has been evolving in the literature over the past 10 years. One authority-psychologist has presented a systematic approach to the process of conducting a work product review for both potential reviewers and attorneys.

Objective Review

The acceptable forensic protocol for a work product review has been described by numerous authorities. When the consultant is contacted by the attorney the protocol is explained in the contact telephone call and also in a retainer agreement with the attorney. The consultant, as a reviewer, is to first conduct an objective review of the custodial report without any preconception or expectation that only deficiencies will be looked for or examined. The work product of the reviewer (*e.g.*, notes and communications with the attorney) will be confidential under attorney work-product privilege. The reviewer then will provide candid feedback to the retaining attorney with a description of both the strengths and weaknesses of the report and evaluation, and the overall quality. The reviewer may want to review psychological testing with this initial examination of the work product. The author's version of the protocol is to conduct a careful reading of the report and to take notes with analysis. The notes would be discoverable if he was to become a testifying expert, but those notes should closely resemble the expected testimony. The notes and analysis also guide the attorney through the reviewer's analysis and guide the reviewers when they may need to prepare for testimony or prepare an expert rebuttal report, which could be months after the review.

If the attorney decides to retain the consultant to be a testifying expert and provide further services, then the reviewer will usually want to review the evaluator's entire case file. If the ethical reviewer's opinions are that the custody evaluation was competently collected and the evaluator's bottom-line opinions seemed to have gotten it basically right for the court on the main issues, then the attorney usually will not request further services. If the retained expert is to provide balanced and accurate testimony, then the testimony is likely to be supportive to a certain degree of the evaluator's work and opinions, but the expert who is asked to testify usually will have identified some serious deficiencies, and some that may qualify as "fatal flaws" on main issues, such as relocation. In other cases, the retaining attorney may request testimony with the expectation that the consultant would provide favorable testimony on the quality of the custody evaluation (*e.g.*, based on the candid feedback provided by the reviewer), or to affirm the custody evaluator's opinions based on the review. In some cases, the testifying, retained expert may be a rebuttal expert witness to the other attorney's retained consultant or testifying expert who is providing rebuttal testimony on the custody evaluation.

Relocation cases often require an evaluator to travel long distances.

The forensic guideposts in *Part I* of the article should be useful to the reviewer in identifying salient issues in the relocation case and conducting the review and analysis. If the consultant-reviewer provides testimony, then this is usually referred to as a rebuttal expert and testimony.

Opinions to Be Offered

Some noted authorities have recommended that evaluators should refrain from expressing ultimate issue opinions based on the assertion that there is a paucity of research on the relative advantages of alternative parenting plan arrangements that may be recommended. These authorities do recommend that evaluators describe the relative advantages and disadvantages of alternative parenting plans and parenting time schedules based on their investigation and facts, and the relevant research. However, most family law courts and judges seem to expect them to formulate opinions and specific

recommendations on the ultimate issues. Other authorities endorse this common, practical, and normative practice of making specific recommendations on an optimal parenting plan for the child's best interests in terms of parenting time, decision-making authority, and relocation.

The field as a whole seems to agree that nonevaluator, testifying experts should not offer ultimate issue opinions, such as what specific parenting plan would be in the child's best interests, or whether relocation of the child should be approved or disapproved for the child's best interests. Many states follow the Federal Rules of Evidence, which state that experts can express opinions of all types and on a range of issues, if they are relevant and will be helpful to the court and if the expert has a sufficient basis for doing so, except on the issue of *mens rea* in a criminal case. However, the author believes that it is good ethical etiquette for nonevaluators and reviewers to refrain from giving ultimate issue opinions because they have not personally evaluated the parties or children in the case. However, reviewers can, and frequently, do give opinions in response to hypothetical questions that closely resemble the fact pattern in the case, and this process, which is permissible under the federal rules, comes close to giving ultimate issue testimony. Judges will vary in how strict they are as gatekeepers in allowing opinion testimony by reviewers, including in response to hypothetical questions.

The testifying, retained expert may be a rebuttal witness.

There appears to be some professional disagreement in the field on the opinions that can or should be offered by the consulting, testifying expert following a review. The conservative position is that reviewers should focus their opinions and testimony on the quality of the forensic methodology and tread cautiously in making independent interpretations of the data reviewed in the evaluator's report and case file that lead to explicit opinions on specific issues. The reasoning is that the reviewer has not personally evaluated the family members involved in the dispute as required by the ethics code for psychologists. The view of these noted authorities would approve of a reviewer opining about whether the evaluator's opinions were supported by the data. They would approve of giving opinions about the data in the evaluator's report

and case file based on informing the court whether the opinions are consistent with the relevant research.

The liberal, and probably most frequent, view of the consulting expert's services, in the author's opinion, is that based on the review of the report and case file the reviewer can opine about and mediate issues based on the data and professional literature. This view rests on ethical standards and guidelines that permit psychologists to offer opinions based on a review of documents and data as long as there is sufficient information and data to support the opinions, and it is an exception to the rule that the psychologist must have personally evaluated an individual before offering an opinion about that person. Some state case law also specifically permits medical professionals to express opinions about individuals based on a review of records. The US Supreme Court seems to have endorsed the practice in which psychiatrists would provide forensic consultation, assist in the preparation of the case strategy, assist with cross-examination of another expert, and give testimony based on a review of the case file in cases involving a not-guilty plea by reason of insanity in a criminal case.

Non-evaluator testifying experts should not offer ultimate issue opinions.

This liberal view proposes that data can stand on their own, but within the identified context of the case, and be subject to interpretation as to their meaning on issues in the case. For example, the reviewer should be able interpret the psychological testing data, or whether the forensic models were correctly applied. If the data are sufficient and adequate based on their recording into the evaluator's case file, and the context described, then they should be subject to interpretation by a reviewer. The author's opinion is that to avoid interpreting data that are clear, sufficient for the issue, and for which the context is clearly evident would seem to defy forensic common sense and not be helpful to the court.

If the custody evaluation was competently designed and implemented, and the file well organized and with legible interview notes, then both the evaluator and reviewer should have approximately the same dataset to work with and to form opinions about. There should be ample data to interpret and form opinions on a variety of specific

issues that are relevant to the question of relocation and the child's best interests. For example, there should be data collected on the process of the quality of parental gatekeeping and co-parenting, and how that would be relevant to the operation of a long-distance parenting plan. The data on the stated reasons for the proposed relocation can be interpreted on their face and also in the context of the case and history of the family.

Instructional Testimony for Relocation Cases and Importance of Research

Consultants may be retained for the main purpose of providing instructional testimony, or educating the court about the professional literature and research that are relevant to relocation and other salient issues in the case. Such testimony is likely to provide more of a scientific grounding than was contained in the custodial report. All expert testimony is expected to be "educational" for the court to some degree, but in the family court context and child custody disputes it can be explicitly instructional on the literature and applied to the fact pattern. For example, the testifying expert may explain how attachment theory is relevant to an issue of overnights for a young child, or how the research on the effects of being exposed to parental conflict places the child at risk for harm.

The liberal view proposes that data can "stand on their own."

Evaluators also often provide instructional testimony as part of describing their data and analysis. If they use the relocation or parental gatekeeping forensic models, it would be part of their instructional testimony. To do so automatically would improve the "scientific grounding" of the given testimony. The relocation risk assessment model is widely used as a recent survey of custody evaluators' approach to relocation cases showed. Reviewers also may use the models to analyze the fact pattern and data collected and described by the evaluator. Reviewers often would cite the professional literature in their analysis of the evaluator's report and evaluation. Both experts should try to be helpful to the court in analyzing the issues in the case so the court can make a ruling and order the terms of a parenting plan that will be in the children's best interests. Both the evaluator and

reviewer are well advised to freely draw upon and cite the research that is relevant to the bases for the conclusions offered. Research-informed conclusions and opinions will inherently be more reliable. The testifying expert should stay away from forensic frameworks for relocation analysis that are not theoretically sound or research-based.

Relocation is a type of child custody case in which the research is relevant in more ways than perhaps in any other type of case. First, the research on the effects of relocation, or residential mobility, on children of divorce shows that relocation is a general risk factor for children of divorce, as is divorce itself. Relocation, and especially frequent childhood residential mobility, is also classified as one type of adverse childhood event that is correlated with long-term negative outcomes for adults. Second, the relocation risk assessment forensic model consists of risk and protective factors that rest on a research base with correlations with child outcomes. Third, the parental gatekeeping model that complements the risk assessment model rests on an extensive research literature on co-parenting, gatekeeping behaviors, parental conflict, and the correlation with parental involvement with the child and child outcomes. Fourth, with relocation cases involving young or very young children then attachment theory and research is relevant. Evaluators need to be mindful of the nuances in attachment theory and research, and to apply it to the custody and relocation context in a sophisticated way that is consistent with the literature. Fifth, with relocation and the likelihood of extended separations from one or both parents, evaluators will want to reference the large research literature that shows children of divorce demonstrate the best long-term adjustment and well-being when they enjoy quality relationships with both parents and that demonstrates the importance of fathers.³

Reviews often cite the professional literature.

The testifying retained expert who is giving instructional testimony can testify about model parenting plans for long distance in the context of the case fact pattern with the age of the children and other key variables.

Although instructional testimony is often part of the testifying expert's case analysis, as discussed later, in some instances it could be "blind didactic

testimony” when the expert is giving “pure” instructional testimony without any knowledge about the case fact pattern, issues, or context. In the relocation context, the expert could describe one or both of the forensic models (*e.g.*, relocation risk assessment and gatekeeping), the effects of relocation on children of divorce in general, or other related issues such as problems with relocation and either very young children or teenagers. The advantage of this approach would be to avoid altogether the issue of the expert being perceived as favoring the retaining attorney’s advocacy position. It would avoid the issue of “retention bias” and possibly appearing as though the hired expert has an allegiance with the retaining attorney.

Case Review and Analysis

All testifying experts in child custody litigation may be asked to analyze the issues in the case, but only the court’s evaluator will be expected to address the ultimate issues and offer opinions and recommendations on aspects of the parenting plan that would be in the child’s best interests. When the testifying expert analyzes the issues in the case with respect to the data gathered by the evaluator and in consideration of the professional literature and research, and applies it to the questions to be answered, then this is part of a case analysis. When the evaluator or reviewer applies a forensic model to the facts and gathered data, this is forensic *and* case analysis.

Retained experts may limit their services to strictly trial consultation.

In addition, the case analysis in relocation cases should always address the practical aspects in implementing a parenting plan. The practical analysis becomes magnified with relocation and the possibility of implementing a long-distance parenting plan. Key variables involve transportation costs and parents’ financial resources; time availability for parents to travel for parenting time; and how to set up video-chatting software like Skype or FaceTime. All evaluators and reviewers should be prepared to answer questions and inform the court about the relevant professional literature, or to be specific about “what the research says.” The case analysis for court evaluators, reviewers, and

instructional testifying experts is a basic component of trying to be helpful to the court.

In some instances, when there has not been a child custody evaluation, a testifying, consulting expert may be asked to review some documents, pleadings, and records, then asked to apply the professional literature to the information and discuss the relevant issues and possible solutions to the custody dispute. This service of case review and analysis is not uncommon. Specific recommendations would not be offered on the parenting plan, or the ultimate issues involved, but the advantages and disadvantages of parenting plan options could be discussed. In the relocation case, the consulting expert could describe the asserted alternative fact patterns,⁴ talk about advantages and disadvantages of parenting plans, and discuss ways to manage the potential harm to the parent-child relationships in a long-distance parenting plan.

Testifying and Nontestifying Consulting Experts: Two Roles or One?

In civil litigation it is common practice to have multiple experts involved in a case. Often testifying experts will also provide case consultation services to discuss issues in the case and help with preparing the expert’s direct testimony. There has been an evolving and growing professional literature on forensic expert consultation for family law and child custody disputes. There has been an active and healthy professional dialogue on a number of issues associated with how mental health consulting experts can and should provide the most effective services and in an ethical manner. An attempt to create professional guidelines by a task force for the Association of Family and Conciliation Courts failed to reach a consensus, but released a discussion article on the issues in which there was apparent consensus and points of disagreement.

The role of a court-appointed child custody evaluator is unique among forensic evaluations. The evaluator is the court’s expert to conduct a comprehensive, neutral, objective evaluation to assist the court in determining the best interests of the child. The overriding goal of the expert is to be helpful to the court as part of being the evaluator in the process of the child custody litigation. It is important to note that the evaluator is a distinct and well-defined role that may be described in statute or court rules.

Some noted authorities have proposed that the testifying consultant-reviewer and trial consultant

are two distinct roles, and these roles should be delineated so that the testifying expert consultants should keep to a minimum their direct trial consultation with the attorney and not participate in a litigation team, working with other experts to assist the attorney. In contrast, the author and his colleagues proposed that there is only one general forensic expert role in family law disputes and litigation for nonevaluator experts, and this is the forensic consultant role. Other prominent child custody practitioner-scholars have taken a similar position. It is proposed that within this general consulting role the retained expert may provide a range of forensic services or engage in a range of professional activities associated with a litigated case. All experts who are not court-appointed evaluators are hired, or retained, by one of the attorneys, or one side in the litigation, just as in other types of civil litigation. There appear to be two schools of thought on this issue as to whether there are two distinct roles and as to the extent of trial consultation services that should be provided by the testifying expert.

Retained experts may limit their services (by agreement with the retaining attorney) to strictly trial consultation and not as a testifying expert. The trial consultant expert may assist with the development of trial strategy in developing a theory of the case; assist in the preparation of areas of inquiry and questions for direct and cross-examination of experts; educate the attorney about relevant professional literature and research; and assist in the acquisition of relevant documents. The trial consultant-expert often would be present in the courtroom during the trial to advise the family law trial attorney. In contrast, as described previously, the consulting expert often is asked to be a testifying expert.

Confirmatory bias may be a widespread problem.

Some respected authorities have proposed that in the best of all worlds the attorney should retain separate experts to provide the services of general trial consultation and another for expert testimony; there can be "role conflict" if the expert provides both extensive trial consultation and expert testimony services. The conservative school of thought does endorse the idea that the testifying expert or reviewer can consult with the attorney to facilitate the efficient delivery of

the expert's own direct testimony, but should be cautious in providing more extensive case consultation on trial strategy or for the testifying reviewer expert to participate in a litigation team with other experts. Both schools of thought on the degree of case consultation by testifying experts should agree on the primary importance of all testifying experts to strive to be ethical in their analysis and delivery of accurate and balanced testimony that considers alternative hypotheses and the limitations on opinions that can be offered. Both schools of thought seem to agree that consulting, testifying experts need to work with their retaining attorney to organize their direct testimony so that it properly addresses the issues, is accurate, and relates to the literature and research.

When the consulting expert is to be a testifying expert, then there are questions about the extent of the consultation, discussion, and professional advice-giving that should be provided. The retained, consulting, testifying expert should be following the same ethical guidelines and principles as the court-appointed evaluator-testifying expert and strive to provide accurate testimony. The credibility of all experts depends on their analysis and testimony being perceived as objective, balanced, and an accurate reflection of the data and issues in the case, as well as their interpretation and application of professional literature and research.

COMMON ERRORS BY EVALUATORS IN RELOCATION CASES

Relocation cases are highly complex and probably require that experts show a greater command of the professional literature and understanding of the nuances of the family law in their jurisdiction than any other type of custody dispute case. Evaluators are well advised to examine their forensic skill-set and seek professional consultation before accepting referrals to conduct a child custody relocation evaluation, as evaluators may sometimes overestimate their level of competency to investigate and untangle complex issues. Relocation is also unique in that it is a type of case in which it appears confirmatory bias by both evaluators and judges may be a widespread problem, usually in the form of anti-relocation bias. The following are common errors by evaluators.

Knowledge of the Law

Evaluators always need to have a firm understanding of family law in order to do their jobs for

the court. This is especially true in relocation cases in which the nuances of the law can be quite complex. Evaluators need to understand the legal standard for the context of the case. In states that have identified best interest and relocation factors (at least 38 states) evaluators need to measure the identified factors from statute, case law, and court rules, and to report the collected data for those factors. Evaluators should also understand the ambiguities in the law. For example, in a post-decree case it may be unclear whether evaluators (or the judge) can recommend against relocation without being prepared to recommend a change in the custodial parent. Similarly, it may not be established by case law whether an evaluator can consider (and include in the custody report) if the moving parent (usually the mother) would relocate without the child if the court denied the relocation motion, or if the non-custodial parent would probably follow the child if relocation was allowed.

The nuances of the law can be complex.

In the author's experience, it is not uncommon for evaluators to not understand the nuances of the law. This can result in evaluators not collecting the necessary information or conducting the type of analysis the court requires. For example, in Illinois and Colorado, the controlling case law requires the court to consider indirect as well as direct benefits to the child associated with relocation. If evaluators do not assess and consider the benefits to the moving parent that would be expected to filter down to the child, then this would be problematic. Economic benefits with remarriage or a new job would qualify, but so too would improved happiness from receiving social support from extended family, or living with a new spouse.

Knowledge of Professional Literature and Relevant Research

Relocation is a child custody domain in which there is diverse literature and extensive relevant research. It would not be uncommon for a reviewer to encounter evaluations and custody reports that show little evidence of considering or being familiar with the literature. Most evaluators probably seldom cite references to literature and research in their reports. The author and his colleagues believe this is not acceptable, no matter how frequent this practice

and omission may be. The professional literature and research should be an important and the most reliable basis for the evaluator's conclusions. To not reference the literature on key points in the analysis in the custodial report means the attorneys would have to conduct a deposition or go to trial in order to discover the scientific basis for the opinions and conclusions presented in the report. To make reference to "the research says..." without citing the research is not sound practice. Relevant theory and research would include the effects of relocation on the children of divorce; attachment theory and the effects of extended separations; the importance of parental involvement by both parents and fathers; exposure of children to parental conflict; and parental gate-keeping and its importance for a relocation analysis.

Inadequate Factorial Analysis

Many states have a list of both best interest and relocation factors to consider. For example, Colorado has 11 best interest and nine relocation factors in its statutes, and courts are required to explicitly consider all of the factors in a post-decree case. Florida has 20 best interest and 10 relocation factors, and both states have the additional "plus any additional relevant factors" in the statutes. In contrast, New York has only five factors in case law. Evaluators will be remiss if they do not formally assess all of the factors that the court is required to consider.

Failure to Take a Systematic Approach

Relocation is one of the special and complex issues for which professional standards strongly recommend that evaluators take a systematic approach to the issue. Assessing the legal factors satisfies the professional standard of taking a systematic approach, but it will be minimal. There is an abundance of research to assist in the relocation analysis and available forensic models, so there is much relevant research that will add to the quality of the relocation analysis and assist in taking a systematic approach. The sophistication and accuracy of the relocation analysis will be advanced even with just a straightforward investigation of the costs/benefits or advantages/disadvantages of the decisional alternatives for the court.

Confirmatory Bias: Relocation Issue

This concept is a longstanding part of assessing the quality of custody evaluation work product

and is one of the forensic guideposts for evaluators to consider in doing their work. It refers to the process of favoring a preferred hypothesis and not giving due consideration to alternative hypotheses. The author's experience is that antirelocation bias is a rampant problem with evaluators and judges, even though the law in almost every state dictates that the parents should be placed on equal footing on the relocation issue, though possibly after a moving parent has met a burden of proof that the proposed move seems reasonable. It is likely to be more apparent in cases involving the potential relocation of very young children. Contextual factors may trigger a pro-relocation bias, such as a history of domestic violence, lack of substantial involvement by a parent, or a primary caregiver mother with a young child. The bias can appear as one-sided data gathering, for example, accepting one parent's account of allegations about the nature of parent conflict or not being supportive of the other parent, and not properly investigating the other side of the story. What also seems to be common in a bias in favor of relocation is not giving due consideration to the hypothesis that the nonmoving father in a traditional marital arrangement is a viable candidate to be the custodial parent and be a "good enough" parent in handling the broad range of parental responsibilities.

Confirmatory Bias as Misuse of Theory and Research: 'Primary Parent'

Especially with young children, attachment theory is misused and becomes part of confirmatory bias, either with favoring relocation by a moving mother with a young child, or disfavoring relocation by over-emphasizing the presumed threat to the attachment relationship of the child with the nonmoving parent. Attachment theory can be misused in a deterministic way to predict severe trauma to the child with extended separation from the nonmoving parent without giving due consideration to how to manage the risk with parenting plan options. Or, attachment theory can be used deterministically as part of the primary parent concept to favor relocation by a mother.⁵ In a recent high conflict case, the parents shared almost 50–50 parenting time and joint decision-making concerning their 10-year-old boy. The parents lived in a Colorado high mountain, ski town. Both grandmothers lived nearby and were highly involved. The boy lived with father, grandmother, and uncle in one residence. The father was well employed. He was the boy's baseball coach in

the summer at which the boy excelled. The boy was a state champion skier. He had attended a top-notch private school since preschool. He had established friends, of course. The mother secretly moved two hours away to Denver, where she purchased a house, presumably for a college program for training to work with a minority population. There were ample data that the mother was a restrictive gatekeeper and did not value the father's relationship with the child. The judge accepted an evaluator's recommendation in favor of relocation citing the mother had been a primary caregiver in the early years.

Inadequate Investigation of the Relocation Issue

Evaluators sometimes fall short on the issue of inadequate investigation and insufficient data gathering. The importance of an investigative component in child custody evaluation often is not fully appreciated. This process is the way evaluators are able to scrutinize alternative hypotheses. It is more salient and important in some types of custody cases, such as one involving allegations of intimate partner violence, and also relocation disputes. Evaluators may fail to adequately assess the legal factors; factors indicated by research or the available forensic models; or the relative advantages and disadvantages associated with moving versus not moving. There sometimes can be a paucity of data. This weakness usually translates to an inadequate comparative analysis in which the evaluator fails to properly help the court visualize what life would really be like for the child in the alternative residential living arrangements in the two communities. It is part of the fundamental comparison that evaluators need to do in every case, but it is more salient and more difficult to do in the relocation case.

To say "the research says" without citing the research is not sound.

Cost factors enter into the case with the issue of the evaluator going to the new community. If the parent has already moved, then it appears imperative. A site visit to the new community would usually be helpful to describe new prospective housing, school, and extended family. Video data-gathering to bring the new location to the court would be helpful on the proposed new residence, school, neighborhood, and cultural amenities. All of this allows for

an “ecological comparison” of the relative resources available to the child in the two locations.

Insufficient Analysis of Key Variables: Parental Gatekeeping and Expected Impact of Move on Child

Evaluators will want to assess key variables in every case, especially if they choose not to use a forensic model for their data gathering and analysis. These invariably include the anticipated effect of the move on the child; the quality of the parental gatekeeping should there be a long-distance parenting arrangement; and the resiliency of the child.

Misuse of Available Forensic Models

Experience teaches that evaluators sometime misuse forensic models when they choose to use them. This may operate in conjunction with the evaluator only doing half of the fundamental comparison so that only the effect of moving is examined on the child’s anticipated adjustment and the nonmoving-child relationship. The relocation risk assessment model facilitates how evaluators examine and predict the child’s functioning if there is a separation from the moving parent in a potential long-distance relationship for each parent as the potential custodial parent. With the parental gatekeeping model, the evaluator needs to assess and anticipate the quality of gatekeeping and co-parenting for each parent should they be the custodial parent in a potential long-distance relationship. The author has reviewed custodial reports in which the evaluator only looked at the impact of the move on the child and nonmoving parent-child relationship and not on the moving parent-child relationship. Also, reports in which only the expected quality of parental gatekeeping by the moving parent was examined.

A site visit to the new community would usually be helpful.

Over-Emphasis on Psychological Testing

This forensic procedure occasionally will yield helpful information concerning hypotheses about parents’ relative levels of psychological functioning, but always in combination with other data sources. It is likely to be less helpful in relocation cases that occur in a post-decree case in which

there has been an established, stable parenting plan in place. When it is being given a high priority the evaluator may be leading the court down the wrong analytic path. Consider a case with a high-functioning mother of two older, school-age children who were well adjusted and by all other data appeared to be resilient children. She had been and continued to be the custodial parent and in a stay-at-home mother role, but desired to establish a career. She had an opportunity to join a family business in a well-to-do family and receive the accompanying social support from grandparents in Washington State. It was a California case so the evaluator needed to assume that the parents would actually be living where they stated they intended to live. Such cases center on the question of which parent is best suited to be the custodial parent in an expected long-distance parenting arrangement. The evaluator and two reviewing experts placed heavy emphasis on the results of the Rorschach Inkblot Test to question whether the mother had sufficient psychological resources to help the children successfully navigate the stress associated with relocation. After the reviewer’s testimony and considering the state relocation factors, the judge was not convinced, and relocation was allowed.

Inadequate Development of Long-Distance Parenting Plan and Attention to Practical Analysis

Evaluators need to help the court figure out and craft the practical and pragmatic aspects of a potential long-distance parenting plan should relocation occur, or the scenario of a parent moving away without a child. Relocation may not occur so there might continue to be a local parenting plan. Nonetheless, the competent evaluator who is controlling for potential anti-relocation bias will do the necessary investigation on such issues as travel cost for parenting time; flexibility on time for travel for both parents; supervision of air travel for young children; how to handle exchanges if the distance is close enough for regular auto travel for week-end exchanges; and how to set up virtual parenting time (*i.e.*, video chatting).

CONCLUSION

Due to the expected extreme resistance by both litigants in accepting a relocation child custody evaluator’s recommendation that disfavors the

litigant, attorneys often will seek forensic expert consultation services. Consultation services may consist of performing a work product review of the custodial report and evaluation. An ethical forensic protocol should be followed when the reviewer conducts an objective review of the report as the first step and provides candid feedback to the retaining attorney on both the strengths and weaknesses of the evaluation based on the report review. If the consultant-reviewer finds serious deficiencies, then the consultant usually will become a testifying expert and would review the evaluator's case file that would be provided *via* the discovery process.

There are varying perspectives on the types of services a consulting, testifying expert should provide to the retaining attorney and as to the types of opinions that should be offered to the court in the testimony. There are two schools of thought. The conservative school believes there is "role conflict" if the testifying reviewer-expert provides case consultation about trial strategy. The liberal perspective is that there is just one role as a forensic consultant who may provide a range of services or engage in a variety of consulting activities. The conservative school advises against a testifying, consultant expert providing general trial strategy consultation. Both schools indicate it is desirable for the testifying consultant to assist the retaining attorney in developing the direct testimony to elicit efficient and accurate testimony on the salient issues and to be helpful to the court. The liberal school suggests some degree of general trial consultation is permissible, but it must be conducted within a retainer agreement that outlines clearly the ethical parameters on objectivity, balance, and accuracy on all issues in light of the data and professional literature.

Both schools believe the consultant-reviewer should review and communicate about the quality of the forensic methodology employed and applied by the custody evaluator. Both schools indicate that it is permissible and helpful to opine on whether the evaluator's opinions and recommendations are supported by the underlying and sufficient data. The conservative school urges a cautious approach on formulating opinions based on an independent review of the evaluator's forensic data concerning specific and mediate issues in the case, unless it concerns the issue of the evaluator's opinions in light of the research. The liberal school indicates that the consultant-reviewer can and should interpret the data as they exist, but in the context of both the case and literature. Both schools agree

the consultant, testifying expert should not express opinions on the ultimate issues involving recommending a specific parenting plan.

Due to the complexities that are inherent in child custody relocation cases it is not uncommon to encounter weaknesses and flaws in the custody evaluation. Common errors found in child custody relocation evaluations were described. These errors range from evaluator anti-relocation confirmatory bias, to sometime bias for relocation based on primary parent perspective, to an inadequate understanding of the nuances of the law in the jurisdiction, to inadequate knowledge and application of the relevant literature and research. Evaluators will be wise if they adopt a systematic approach to their relocation evaluation. The relocation risk assessment model is available, but a straightforward approach of gathering data on and comparing the relative advantages and disadvantages associated with the decisional alternatives (*e.g.*, a social capital analysis) would be sufficient.

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NOTES

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2. Evaluations by court-appointed experts concerning disputes and litigation on issues of child custody, parenting time/access/timeshare are sometimes given other labels in different states. Parental responsibility evaluations, parenting plan, and timeshare evaluations, and social investigations are other labels, but they are equivalent forensic evaluations. In some jurisdictions a Guardian *ad Litem* appointment may be conducted by attorneys or mental health professionals and be close to a functional equivalent of a custody evaluation.

3. This point on the importance of fathers is made because the early research on divorce and children's adjustment almost exclusively focused on the importance of mothers and used mothers as the source of the verbal report data (see Warshak, 2000, *supra* n.25, for a review).

4. Relocation cases are dissimilar from many types of custody disputes in that the parties are more likely to agree on the fact pattern compared to a case involving allegations of alienation, domestic violence, child sexual abuse.

5. Research shows that children usually are equally and securely attached to both parents by nine months of age, even when they spend much more time with one of the parents, usually the mother (Kelly, J. B., & Lamb, M. E. (2000). "Using child development research to make appropriate custody and access decisions for young children." *Family and Conciliation Courts Review*, 38, 297-311.).