

CRITICAL ISSUES IN RELOCATION CASES: A CUSTODY EVALUATOR'S RESPONSE TO PARKINSON AND CASHMORE (2015) AND THOMPSON (2015)

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Parkinson and Cashmore (2015) and Thompson (2015) have written comprehensive articles outlining suggested reforms to the family law system in relocation cases. This brief article, from a child custody evaluator's perspective as opposed to researchers' and legal scholars' perspectives, highlights areas of agreement, in hope of leading to increased consensus, as well as areas of disagreement, furthering the discussion and debate of critical issues in relocation matters. Rather than an either/or approach to relocation presumptions, this article will identify a both/and perspective on presumptions for these cases. It will also focus on suggestions for evaluators in an effort to help guide ways that evaluations can be most helpful to the court.

Key Points for the Family Court Community:

- Relocation cases are all unique and should be decided based on the best interests of the child.
- Presumptions in relocation cases can lead to unintended consequences.
- Critical factors unique to each case, as well as each jurisdiction, help guide decision makers in determining whether or not to allow the relocation of a child.
- Relocation cases need to be processed and decided in a timely manner, and appeals should be few.
- When well-trained child custody evaluators are present in a community, and the family has sufficient resources, a thorough and well-done child custody evaluation can assist the family and court in decision making.
- Ultimately, relocation cases are not well suited to bright-line rules.

Keywords: *Child Custody Evaluations; Children; Custody; Family Law Policy and Decision Making; Mobility; Move Away; Parenting Arrangements; Presumptions; and Relocation.*

INTRODUCTION

In a mobile society, a parent may have to choose between a career, a new relationship, moving to be near the comfort of family and friends or the need to care for aging family members, and the parenting of his/her child. When one parent needs (or wants) to move with the children and the other parent wants the children to stay, children become caught in a battle over parenting time, custody, and access. In my work teaching judges, attorneys, mediators, and child custody evaluators, I often ask my audiences what types of situations are the most difficult and challenging. Without a doubt, the most common response is relocation cases. Judges in particular find these cases troubling, as there are often limited solutions and challenges to the best interests of children. Perhaps the most troubling aspect of relocation cases is the potential impact on children and families.

In their thoughtful and thought-provoking articles, Parkinson and Cashmore (2015) and Thompson (2015) outlined many important considerations associated with these cases and offered suggestions for legal reform of relocation cases. Largely focusing on specific geographic considerations, Parkinson and Cashmore identified research and legal considerations with Australian and New Zealand families and laws, though they incorporated some U.S. statutory and case law in their considerations. In a similar vein, Thompson focused significantly on case law in Canada and identified suggestions for relocation law reform based on those cases.

Their suggestions will not be described in detail in this article; rather this article will identify areas of agreement with them, challenge some of their recommendations, and offer suggestions for ways that courts can best utilize child custody evaluation services in these cases.

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AREAS OF AGREEMENT

Just as Parkinson and Cashmore (2015) and Thompson (2015) had many areas of agreement, I share in many of those areas of agreement. I suspect that, except for those advocates with the most hardened for-the-move or against-the-move biases (Stahl, 2006), most commentators, legal scholars, researchers, and others who identify critical issues in relocation cases will agree on the following points.

PROVIDING A CHILD FOCUS

The key to all relocation decisions must rest on what is in the child's best interests. Although there is some legal writing that suggests parents' rights are important—and certainly in the United States, the Supreme Court has clearly identified that parents have two fundamental rights that are at odds in relocation matters, that is, the right to live wherever one wants and the right to parent one's children—the decision on where children will live and what parenting plan will follow a parent's request to relocate with one's child is about the child and his/her best interests.

Within that context, and especially in countries that have signed and ratified the United Nations Convention on the Rights of the Child, children's voices need to be heard. Both Parkinson and Cashmore (2015) and Thompson (2015) state that children should not be placed in the middle of the conflict, and I completely agree. Thompson rejects a proposal by Bala and Wheeler (2012) that a presumption be founded upon the wishes of a child, and so do I. If children's wishes are presumptive, the pressure on children by each parent is likely to be enormous. Though beyond the scope of this article, there is ample research suggesting children of all ages can be influenced and pressured by both internal and external factors, and my anecdotal evidence in child custody evaluations confirms that the pressure of parents often influences children's wishes. At the same time, understanding the child's perceptions and thoughts about the proposed move, objections to the move, community ties, friends, and interests and understanding the child's temperament and capacity to adjust to changes in his or her life are all important considerations in any relocation matter.

THE ABSENCE OF RESEARCH GUIDING PRESUMPTIONS

Although there have been many examples in which social scientists have written that research supports either a pro-move or anti-move presumption, both Parkinson and Cashmore (2015) and Thompson (2015) reject such presumptions. Parkinson and Cashmore recognize that there are some studies that suggest that the "happy mother–happy child" position is supportable, but they also suggested the obverse is true, that is, "happy child–happy mother." Other research has clearly identified the benefit to children of having both parents actively involved in the child's day-to-day life, especially in circumstances where parents are not abusive or neglectful. As Thompson says, "a careful reading of the work in each camp reveals a tendency to over-reach in their policy prescriptions from their data" (2015, p. 45).

What we all agree on is that none of this research should lead to any presumptions or burdens for or against relocation of children. Each case is unique and must be considered as such. I will address my thoughts on presumptions and burdens later in the article.

THE RISK THAT PRESUMPTIONS CAN LEAD TO UNINTENDED CONSEQUENCES

I completely agree that jurisdictions that have a presumption in favor of primary custodial parents being able to relocate with their children results in a battle of a different sort, that is, the battle to ensure neither parent has such a presumption. After the *Burgess* (1996) decision in California, which reaffirmed the presumptive right of a custodial parent to move, courts of appeals spent time focusing on what percentage of time actually constitutes "primary" custody. Additionally, most attorneys I

know in such jurisdictions will counsel parents to push for shared custody at the time of separation in order to avoid the risk of presumptive relocation later. These are not considerations that relate to children's best interests, but rather positioning when parents separate and in advance of a potential relocation matter. In contrast, if there is no relocation-related presumption in a case, parents can work together to develop a parenting plan at the time of separation that they believe to be in their child's best interests and modify that plan based on changing family circumstances and changes in the child's needs due to his/her development.

A RECOGNITION THAT RELOCATION IS LIKELY TO RESULT IN SOME RISK TO THE DISTANT-PARENT-CHILD RELATIONSHIP

Relocation is a major change in a child's (and adult's) life. Research has shown that relocation may be one of the biggest risk factors in children's overall adjustment, whether in families of divorce or not. Children who move will have to make new friends, go to a new school, and make changes in their extracurricular activities and will likely miss old friends. In separated families, these children will also typically miss their now-distant parent and there is likely to be a significant change in the nature of their relationship with that parent. All of this creates risk.

Except for cases in which there is a clear finding of abuse or domestic violence, and even in some of those cases, whether or not that risk is manifested is unique to each family and child. Some children adjust to change remarkably well, others may have family and friends already in the new location, and still others will adjust well because of their healthy relationship with the moving parent, who can help the child adjust more easily.

In other words, risk is something that always needs to be compared with protective factors that may mitigate that risk. This will be discussed in the section on evaluations below.

SUPPORT FOR A PRESUMPTION THAT A PARENT SHOULD BE ALLOWED TO RELOCATE IN CIRCUMSTANCES WHERE THERE IS A HISTORY OF VIOLENCE OR ABUSE THAT HAS ENDANGERED THE SAFETY OF THE PARENT OR CHILD

Although I am generally against presumptions, one presumption that would likely exist is that, when there is a finding of a history of coercive control violence or other abuse that has endangered the safety of the moving parent or the child, the parent and child should be allowed to move. Of course, presumptions in family law are typically rebuttable, and it would be important to include rebuttable factors, such as the child's wishes (if not influenced inappropriately by the abusive parent); significant restrictive gatekeeping by the moving parent, even if there is some protective element to the gatekeeping; or other risk factors that might make such a move more likely to be a significant risk to the well-being of the child.

AREAS OF DISAGREEMENT

LIST OF FACTORS

In announcing their agreement with Thompson (2015), Parkinson and Cashmore (2015) state that "a list of factors to consider . . . does not greatly advance the quest for predictability and certainty" (p. 57). They recognize that a list of factors is better than a best interests approach, as they help parties tender evidence likely to be relevant to the resolution of the dispute, but they reject such a list from the court's perspective. Thompson, noting that case and statutory law often provide a list of nonexhaustive factors for judges to consider, states that factors "do little to bring greater predictability to the law" (p. 51). Both were considering the value (or lack thereof) of factors in helping to guide courts in decision making, and both rejected the value of factors in that regard.

In contrast, I strongly believe in the value that factors bring to the decision making. They are useful for public policy purposes (see above regarding presumptions) as well as judicial decision making in any given case. As identified by Austin (2008) and elaborated upon by Stahl (2013), and as described in various statutory (e.g., Arizona Revised Statute, 25-408) and case law (e.g., *In re Marriage of LaMusga*, 2004), a range of factors, often logistical, legal, or psychological in perspective, can play a role in guiding decisions. I will elaborate further in the section below on evaluations.

GOOD FAITH

Another area of disagreement is regarding the role of good faith in relocation law. Both Parkinson and Cashmore (2015) and Thompson (2015) seem to agree that the term “good faith” either has no meaning or is too simplistic. Thompson states that “all but the least imaginative parents (or their lawyers) can always come up with some kind of plausible reason for a move.” Though I agree with their points, I do not believe that good faith is irrelevant. Rather, courts should recognize that, even with good faith reasons for a move by one parent, there may be bad faith elements as well. As stated by the *LaMusga* court,

Absolute concepts of good faith versus bad faith often are difficult to apply because human beings may act for a complex variety of sometimes conflicting motives. As the superior court in the present case observed after finding that the mother was not acting in bad faith because she had legitimate reasons for the move and was not acting for the specific purpose of limiting the father’s contact with his children . . . I think it’s far more subtle than that . . . (p. 377)

Noting that the custody evaluator in the case identified reasonable reasons for moving but added that the mother wanted to move so that she can remove herself, and take the boys from the day-to-day interactions with the father, the court elaborated,

Even if the custodial parent has legitimate reasons for the proposed change in the child’s residence and is not acting *simply* to frustrate the noncustodial parent’s contact with the child, the court still may consider whether one reason for the move is to lessen the child’s contact with the noncustodial parent and whether that indicates, when considered in light of all the relevant factors, that a change in custody would be in the child’s best interests. (p. 377, emphasis added)

I agree with the *LaMusga* court that the subtlety of all the reasons why a parent wants to move is important.

Even if courts do not pay attention to good faith, it is critical to pay attention to bad faith. Bad faith requests to move are the ones with little planning that are largely for the purpose of interfering with the child’s relationship with the other parent. In California case law, perhaps one of the clearest examples of bad faith is found in *Cassady v Signorelli* (1996), in which the court of appeals upheld a denial of the mother’s relocation to Florida, citing the trial court’s finding that her request to move was largely in bad faith, citing her request to move to Florida to begin a new career as a parapsychologist. According to the trial court, there were almost no jobs anywhere in that field, and she had no job waiting for her in Florida. The closest thing to a prospective job was a letter from a university stating that the mother could have a low-paying job if she could find enough students to take a course. The trial court observed that she could be just as unemployed in Florida as in Contra Costa County, California, noting her desire to be about as far away from the father as possible. Thus, while good faith might have less relevance, bad faith should always be considered.

Additionally, one has to consider the reasons that a parent is objecting to the other parent’s move with the child. I have seen many cases in which the noncustodial parent has moved a substantial distance from the custodial parent and children, and yet, when the custodial parent wants to move, the noncustodial parent objects. Again, there can be many reasons for this objection, but I believe that the court should look into any potential bad faith elements associated with the objection. This is

most likely to be a significant issue in cases with domestic violence allegations or in cases with more extreme high conflict.

THE VALUE OF QUESTIONS

Parkinson and Cashmore identify that relocation cases need to focus on three central questions. They are:

1. How close is the relationship between the nonresident parent and the child and how important is that relationship developmentally to the child?
2. If the relocation is to be permitted, how viable are the proposals for contact with the nonresident parent?
3. If the relationship between the child and the nonresident parent is developmentally important to the child and is likely to be diminished if the move is allowed:
 - a. What are the viable alternatives to the parents living a long distance apart?
 - b. Is a move with the primary caregiver the least detrimental alternative?

Thompson generally rejects this view by indicating that these issues do not really constitute reform, and these questions are already typically considered in most relocation matters.

Perhaps this is simply a semantic difference between all of us, but I have mixed agreement and disagreement with these authors. I agree with Parkinson and Cashmore when they identify that the best interests of the child are often very unfocused, and these questions are a starting point in understanding best interests of particular children in a particular relocation case. However, I also agree with Thompson in that there is little reform there and that courts in most relocation cases typically consider these questions in given cases. To me, the questions above are associated with relevant psychological and logistical factors that need to be considered in every relocation case, as already noted.

POLICY CONSIDERATIONS—PRESUMPTIONS AND BURDENS

Perhaps to oversimplify, Parkinson and Cashmore (2015) believe that judicial relocation decisions should not be guided by presumptions for or against the proposed move, while Thompson (2015) believes that presumptions have an important role in the process. Perhaps because the decisions of the California courts of appeal have heavily influenced me, I believe strongly in the following policy considerations:

- Courts need to consider whether or not the move is being requested as a modification of an already determined parenting plan or is being requested in a new determination. In a new determination, there should always be a *de novo* review, as will be described below. If a modification to an existing parenting plan, there will be a different consideration based on whether or not there is a primary parent or parents are sharing parenting time and decision making relatively equally.
- When there is a primary parent:
 - There should be a rebuttable presumption that the primary custodial parent is allowed to move, absent a showing that the move is intended to cause interference with the child's relationship with the other parent, is for a frivolous or unclear purpose, or is likely to be detrimental to the child;
 - The parent who wants to move has a burden to show that s/he has a clear plan that identifies the reason(s) for wanting to move and specifics on where the moving parent wants to move, including address (or neighborhood), proposed new school(s) for the child, and other information that shows the move is not evidence of instability;

- The parent who wants to move has a burden to show how s/he plans to support the child's ongoing relationship with the other parent and how the change in the structure of the time with the other parent will not be detrimental to the child;
 - The noncustodial parent has a burden to show that the move is intended to cause harm to the relationship with the child, is frivolous, or is likely to be detrimental to the child;
 - If the moving parent meets his/her burden and the nonmoving parent does not meet his/her burden, the court would likely allow the move and order a new parenting plan; and
 - If the moving parent does not meet his/her burden or if the nonmoving parent meets his/her burden, there should be a *de novo* review of what parenting plan is in the child's best interests.
- When parents essentially share decision making and both parents are actively involved in the child's life on a regular and frequent basis, such that there is no primary parent, there should be no presumptions and no burdens, and there should be a *de novo* review of what parenting plan is in the child's best interests.
 - Courts should not be allowed to deny a move simply to ensure that both parents are living in the same geographical area and share parenting time.
 - When a parent announces his/her plan to move with the child, the court must make a determination of whether it is in the child's best interests to be in the primary care of the mother in one location or the primary care of the father in the other location and what parenting plan is in the child's best interests. This determination is to be guided by a consideration of relevant factors, which of course are unique to each state.
 - Another issue addressed by the courts in California is whether or not the court should be entitled to ask the moving parent what s/he will do if the court denies the move (and as a corollary, what the parent who is resisting the relocation of the child will do if the court allows the child to move with the other parent). Case law in California prohibits judges (and by extension custody evaluators) from asking that question, recognizing that if the parent who requests to move says s/he is not leaving the child, then the task is over, as the judge can then just deny the move and the status quo holds. Essentially, in my opinion, it is an unfair Solomon-like question to ask parents, so I completely agree with the California courts, as I do not believe that parents in a mobile society should be placed in the position of choosing between hopes and goals for the future or their child.
 - Finally, as noted above, in cases of domestic violence or abuse in which the child or parent are at risk of significant harm, there should be a rebuttable presumption that the victim parent and child should be entitled to move, absent a showing of significant risk from the move itself.

EVALUATIONS—CAN THEY HELP?

I believe that, when available, a child custody evaluation can be a very useful tool in helping the court gather critical information about relevant factors in a relocation case. As I described in previous writings (Stahl, 2010, 2013), there are methods for evaluating families related to various psychological factors that are most likely relevant in a given case. These evaluations require specialized competence (Association of Family and Conciliation Courts, 2006) to ensure that the evaluator has sufficient knowledge and expertise in the unique qualities associated with relocation evaluations. If one is truly unbiased in relocation matters (Stahl, 2006) and follows a well-conceived protocol, such as Austin's Relocation Risk Assessment model (Austin, 2008), the information and analysis will likely be quite useful to the court.

The first step in evaluating such families is to know the law of the jurisdiction to determine if there are specific burdens and presumptions, as well as any factors identified in statutory or case law. In

addition to those factors (if not included below), the following psychologically related factors generally would be evaluated¹:

- Reasons for the move and reasons for resisting the child moving with the other parent
 - As noted above, I believe that the reasons for the requested move matter. Some reasons appear legitimate and reflect continuing stability for the moving parent and child, whereas other reasons appear designed to thwart the child's relationship with the other parent or reflect a pattern of instability on the part of the moving parent. Exploring this issue can be very useful for the court.
 - At the same time, it is important to understand the reasons that the other parent is resisting the relocation of the child. Some parents who have chosen to be less actively involved attempt to interfere with plans that could be very helpful to the child and the other parent. Other parents may be trying to exert control, especially if they have been abusive or controlling in the past. Finally, sometimes a noncustodial parent has already moved, but does not want the other parent to move with the child in order to make his/her access easier. If evaluators are approaching the task in a neutral and nonbiased way, then the reasons for both parents' respective positions become relevant.
- Gatekeeping
 - Gatekeeping, which refers to the extent to which a parent supports and encourages the child's relationship with the other parent, needs to be understood for each parent. According to Austin, Pruett, and Fieldstone (2013), this needs to be evaluated along various dimensions, including whether or not each parent is inclusive of the other parent in decision making, is or is not generally flexible in adjusting parenting time when appropriate, is or is not derogatory toward the other parent, and does or does not share information with the other parent about the child. Parents who do this well are considered facilitative gatekeepers and those who interfere and do not do this well are considered restrictive gatekeepers. It is my view that this is always a significant factor in a relocation case and is perhaps the most important factor in international relocations.
 - Keep in mind that there is a form of gatekeeping known as protective (or justified restrictive) gatekeeping, in which the parent has a legitimate reason for limiting the other parent's involvement with the child. This is usually the case when there are findings of domestic violence or abuse, very poor parenting, substance abuse, or significant and unmanaged mental health issues.
- Age of the Child
 - This involves considering the impact of relocation based solely on the age of the child. Younger children (e.g., under age 5 or 6) generally have a harder time maintaining a relationship across time and distance with the nonmoving parent than school-aged children (ages 6–12) or adolescents. Understanding this issue for the particular child involved is important.
- The Distance of the Move
 - Quite simply, with longer moves, it is more difficult to arrange and maintain frequent access with the nonmoving parent. If the move is international, there are added risks related to travel.
 - An additional consideration in an international relocation is whether or not the court in the new location will create and enforce a mirror order, essentially increasing the likelihood that the moving parent will be expected to comply with parenting plan orders for the other parent's access.
 - Note, however, that many countries will not enforce such orders and in other circumstances the foreign court will entertain requests to modify such orders after the child

has settled in the new country (usually after 1–2 years). An evaluator in an international relocation case must be knowledgeable about all of these critical issues.

- The Child's Functioning, Temperament, and Voice
 - Some children are more adaptable and are less likely to have difficulty moving, changing schools, and making new friends. Others may have more difficulty.
 - Children with special needs may have unique issues that make it so the old or new environment is likely to be more suited to those special needs.
 - Again, as noted throughout this article, as well as Parkinson and Cashmore's and Thompson's articles, the voice of the child is always relevant and needs to be understood. Well-trained child custody evaluators who know how to explore the child's voice and understand potential internal and external influences to that voice can be very helpful to the court.
- The History Of the Parenting Relationships and Each Parent's Historical Involvement with the Child
 - Most states that identify factors include this as a very important one, as it should be. Obviously, the less the child has previously seen the other parent, the less risk there would be in moving further away from that parent. Conversely, when there is a very active relationship with the other parent, the risk is greater, especially as it relates to young children who will not be able to see that parent as frequently. A child custody evaluator can gather important and relevant information about this critical factor from the parents, from the child, and from collateral sources.
- Parenting Quality
 - Each parent needs to be assessed in the critical areas of parenting. There are clear advantages to children in being with a parent whose parenting style is authoritative, rather than authoritarian or overly permissive (Moran & Weinstock, 2011). If there are differences between the parents in these areas, this needs to be addressed.
- Co-Parenting Issues and How Parents Manage Their Conflicts
 - Always an important factor, it is important in relocation cases to consider which parent generally puts the child's needs above their own and which parent is more likely to stir up conflict with the other parent. Although not determinative, it is important to consider how conflict is likely to change following relocation. Keep in mind that sometimes conflict, especially conflict to which the child is exposed, can be exacerbated by distance, though in other cases, it may diminish.
- As noted above, domestic violence is an important factor to be considered. See Ver Steegh and Olson (2008) for important information about the ways in which domestic violence can be considered in a family law case.
- Social Capital
 - Aside from the parents themselves, children benefit from relationships with other significant adults, peers, teachers, and other relatives. It is important to consider the social capital in each location when considering the request for or against relocation.

The final task for the evaluator after gathering this information is to write a report with a comprehensive analysis of these factors, helping to differentiate which factors are risk factors, that is, those that will help make the child's adjustment to relocation or a potential change of custody more difficult, or protective factors, that is, those that will help make the child's adjustment to the relocation or change of custody easier. An analysis of the significant risks and benefits of custody with the mother in one location versus custody with the father in the other location must follow. Although somewhat controversial, I believe that, if the evaluator believes it is a close call, s/he should at least identify that for the court when making specific recommendations. Finally, the evaluator needs to recognize that courts may, or may not, agree with any recommendation about the relocation itself and should offer three sets of recommendations, that is, a parenting plan in the event the child and parent move; a parenting plan in the event the parent moves but the child stays; and a parenting plan in the event

both parents are in the same location, recognizing that sometimes the parent who requests to move chooses not to and sometimes the parent who resisted the move also chooses to move.²

CONCLUSION

In his response to the amicus brief in the California Supreme Court case *In re Marriage of Burgess*, Warshak (2000) stated that bright-line rules should not apply in relocation matters. I have always completely agreed with this statement and this has driven my passionate effort to reduce bias and limit presumptions and burdens in these matters. As noted above, I agree with the California courts' position that requests by one parent to move must be taken at face value and the task for the court is to determine what parenting plan is in a child's best interests, whether the child will be in one parent's primary custody or in the other parent's primary custody, with an eye to the appropriate access with the distant parent.

When considering public policy, it is always important to recognize that family courts in the United States are often overburdened and underfunded. Many communities lack the professional resources to assist families and judges in making optimal decisions. Additionally, for those situations in which the relocation is related to employment, there is a need for a speedy decision. If we are considering public policy changes to the relocation-related family law case, I urge the courts to allocate resources to these cases so that sufficient time can be devoted to the decision and they can be heard more quickly when necessary.

Finally, for many families, even when the decision is made, the case does not end, especially in many jurisdictions where appeals are common. I agree with Professor Mark Henaghan (2011) who wrote,

A responsible legal system would not encourage numerous appeals in relocation cases, particularly where judges are putting weight on different facts in the same case. This is not law; this is the application of personal preference. Once considered and applied, the matter has been decided, and people should move on with their lives, rather than suspend them waiting for an appeal and spending precious resources on litigation that could much better be used for the child. The earlier adjustment to a decision is made, the more likely healing will occur and conflict dissipate. (p. 248)

He added, "judges have to do the best they can [in relocation matters] with limited guidance" (p. 248).

It is my hope that the guidance will come from a careful analysis of all relevant risk and protective factors in the given case and that, with such guidance, the court can avoid the potential bias inherent in these cases and make a determination of the best interests of the particular child in that case.

NOTES

1. See Stahl, 2013 for a more complete outline of these factors and ways in which they should be evaluated.
2. For more on the importance of a comprehensive analysis, see Simon and Stahl, 2014.

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