

Chapter C9

THE CHILD AND FAMILY INVESTIGATOR'S EVALUATION FOR THE RELOCATION CASE

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§ C9.1 • INTRODUCTION

As of the 2006 supplement to this book, it has been a year since the Colorado Supreme Court re-groomed the legal landscape in relocation law with two new cases: *In re Marriage of Ciesluk*¹ and *Spahmer v. Gullette*.² Judges, attorneys, and parenting evaluators now have had experience with the broad array of relocation scenarios that have tested some of the unsettled issues in the new case law. After conducting quite a few relocation parenting-time evaluations and presenting workshops for a number of interdisciplinary organizations throughout Colorado on relocation, this author has a better understanding of how the child and family investigator (CFI) can match the data gathering and recommendations for the court with the analyses found in the *Ciesluk* and *Spahmer* cases. Some ambiguity remains, but a 2006 case from the Colorado Court of Appeals addressed the issue of relocation and equal parenting time.³

When this chapter was first drafted in 2005, the new cases had just come out and it appeared there was less flexibility than was previously the case in working just with the relocation statutes. First, with the addition of *Ciesluk*, it is not clear if the court and evaluator can consider all four decisional alternatives in a post-decree context, namely: (1) the relocating parent is allowed to relocate with the children; (2) the relocation of the children is denied, and the parent decides not to relocate without the children; (3) the relocation is denied, and the parent decides to relocate without the children; or (4) the relocation is allowed, and the other parent also relocates to the new community to be near the children. Second, in a post-decree case, it appeared, on first examination, that the court can rule on the relocation issue without changing the primary residence, if it is known the relocating parent will not move without the child.⁴ The wording in the opinion appears to permit denying relocation without changing the primary residence, but the alternative interpretation is that a long-distance parenting plan is needed if the residential parent is determined to relocate after the court has denied relocation and is prepared to designate the other parent as the new residential parent. This author feels this issue remains unsettled. When this question was posed to judges and attorneys at several workshops, nobody offered an opinion. The audience did not know the answer. If the court can decide the relocation issue without changing the primary residence, this would amount to preserving the status quo if the parent does not relocate without the child. One could argue this interpretation of *Ciesluk* amounts to a presumption against relocation because the status quo generally will be seen to be in the child's best interests except in extraordinary circumstances.⁵ Third, under *Spahmer*, if the non-relocating parent is a viable candidate to be the residential parent, it appears the court can designate this parent as the residential parent, issue temporary orders on parenting time, and give the relocating parent the opportunity to inform the court if he or she will move without the child before a permanent par-

enting-time plan is implemented. The same may be true for the post-decree case, if the court must first decide the issue of who the residential parent should be assuming the current residential parent is relocating. Fourth, the anticipated effects of relocation on the children can be measured and communicated to the court under the best interests factor of “adjustment to home, school and community,”⁶ even though under *Spahmer* it must be assumed the parents are living in the separate communities. The author’s opinion from working with law and new evaluations is that in the post-decree case, the CFI needs to work from the case data or facts on the issue of relocation and child’s adjustment and not assume the parent would not move without the child. This Chapter discusses selected issues for the CFI that follow from the new law; highlights the main points with case illustrations; and presents practice tips for the evaluator to use in conducting a CFI relocation evaluation.

§ C9.2 • FUNDAMENTAL TASK FOR THE CFI

The complexities and subtleties of relocation cases and law can sometimes obfuscate the fundamental task for the CFI. To wit, in any disputed parenting case the investigator needs to assist the court in making a comparative analysis of alternative residential living arrangements, either local or long distance. That this analysis occurs in a relocation context makes it more complex, but the basic task is the same. The evaluator needs to assist the court in anticipating or visualizing what life would be like for the child while living in the two different residential environments afforded by the parents according to alternative and specified parenting-time arrangements.

Under *Spahmer*, the requisite comparison is between two different communities since it must be assumed the parents will be living in the two separate locations where they say they intend to live.⁷ It is unclear whether the investigator can ask the relocating parent if he or she will actually move if the court decides to designate the other parent as the residential parent, but it would seem the investigator and court would want to know the answer to this question so as to anticipate alternative parenting-time schedules, at least after the issue of residential parent is resolved. Again, under *Ciesluk*, it is unclear if the court can consider whether the parent would relocate without the child.⁸ This author’s experience is that most relocating parents will tell the investigator the answer to this question without even being asked. The key variable is the parent’s flexibility on whether he or she has to move. With a remarriage, military assignment, job transfer, acceptance to graduate school, etc., there is little or no flexibility. Flexibility is one of the three elements in the “cogency test” discussed in § C9.4.

Under *Spahmer*, when a parent is intending to relocate at the time of dissolution or already has relocated prior to the hearing, the CFI needs to address only the two alternatives of the child living primarily with the two parents in the intended locations. It is not that uncommon for the non-relocating parent to have the flexibility to also be able to move, *e.g.*, when the parent has not remarried and is fluid on employment options.⁹ The majority of litigated relocation disputes will find there is not much flexibility, *e.g.*, remarriage with step-children or a new child, an established employment situation, etc.

§ C9.2.1—Case Illustration: “The Mom Who Wanted To Go Home 1”

In this recent case, the mother at the time of dissolution wanted to relocate with the children from Colorado back to her home community in Utah. The father opposed and asserted the expected harm to his relationship with the two daughters, ages six and three, as the reason. The father had been an involved parent and more so since the separation. The mother had been the lead parent and was an effective parent with good life management skills. The mother pointed to the big difference in the cost of living and wanting to have a house for the children as a reason for moving. The grandfather would provide a house for them to live in on a newly purchased ranch. The mother was very employable as a radiology technician. She had extensive family in the small farming community with parents, aunts and uncles, and cousins. The children would have a number of same-age cousins for playmates. An uncle was the school superintendent. A step-grandma would be the child’s first grade teacher. It was not a close call under *Spahmer* for the CFI’s recommendation for relocation and a prediction that the children would show a good adjustment. There were no extended family members in the home community. The new community was familiar territory for the children, with an established system of social support. The father and attorney were stuck on the perception and belief that the unfairness of the whole situation would win the day, and the case proceeded to trial. The judge agreed with the father. The mother did not move, and the court ordered an equal parenting time arrangement. The case is under appellate review.

§ C9.3 • EFFECTS OF RELOCATION ON THE CHILD’S ADJUSTMENT**§ C9.3.1—Risk-Assessment Approach To Relocation**

The relocation risk-assessment model¹⁰ is a research-based forensic psychology predictive model for evaluators and a heuristic framework for decision-makers to understand what combinations of factors place the child at risk of harm due to relocation, or if they act as protective factors to buffer the child against the stresses of change and loss associated with relocation. The approach is consistent with views of how children cope with the stress of divorce as a result of a combination of risk and resilience¹¹ or risk and buffering factors.¹² The risk-assessment approach was developed initially for the prediction of violence for psychiatric patients when they are being considered for release from psychiatric hospitalization¹³ and then extended to other forensic populations.¹⁴ In the context of relocation, the basic elements consist of identifying the population (children who are considered for relocation with a parent); the base rate of harm;¹⁵ risk factors that make harm more probable; protective factors that lower the risk of harm; and being mindful of the effects of prediction errors when making recommendations to the court.¹⁶ A risk assessment approach to parenting evaluations is appropriate whenever the child is likely to be exposed to a significant risk of harm — in cases of child maltreatment, partner violence, parent substance and alcohol abuse, or relocation. The language of harm for relocation is widespread in state appellate decisions¹⁷ and is found in the Colorado statute, but it should be kept in mind that a harm analysis is the flip-side, or conceptual obverse, of a best interests analysis.¹⁸

Risk Factors of Relocation

Age of the Child

Research on attachment patterns in families strongly suggests that the child-nonresidential parent relationship will be fundamentally altered with a very young child and diminished with young children due to the lack of regular contact,¹⁹ with relocation producing more of an avuncular relationship.²⁰

Geographical Distance and Time

Geographical distance and time create practical obstacles to the continuation of the child-nonresidential parent relationship and limit the degree of parental involvement, perhaps with the result of the parent dropping out of the child's life.²¹

Degree of Parental Involvement by the Nonresidential Parent

The degree of parental involvement by the nonresidential parent creates the core basis for loss of parental resources and harm to the child-parent relationship, a factor stressed by the trial court judge in *Ciesluk*.²² The challenge for crafting a suitable alternative parenting-time plan with relocation is to find ways to maintain parental involvement following the imposition of geographical distance. Research shows the importance of the child's benefiting from quality relationships with both parents.²³

Residential Parent's Support of the Child-Nonresidential Parent Relationship

The ability of the residential parent to support the child-nonresidential parent relationship, or to act as a "responsible gatekeeper," is vital to lowering the risk of harm to the child and making a successful relocation possible. Research shows that when the residential parent is more supportive of this relationship, the child shows better adjustment.²⁴ When the residential parent tries to limit access to the child, "strict gatekeeping," then there may be less nonresidential parent involvement, more emotional insecurity in the child concerning that relationship, and more conflict between the child and residential parent.²⁵ Research establishes that children overall do much better when they have access to the nonresidential parent, usually the father.²⁶

High Levels of Inter-Parental Conflict and/or Violence

A history of high levels of inter-parental conflict and/or partner violence places the child at risk for developmental harm.²⁷ Higher conflict makes it more likely that fathers will withdraw from involvement with their children.²⁸ Relocation may limit at least the child's direct exposure to parental warfare, thus lowering risk, but it may create other costs by allowing the residential parent to shut out the other parent and possibly alienate the child from the other parent. There is not research on the effects of relocation on inter-parental conflict or alienation processes, but new research has *empirically* established the role of not supporting the other parent-child relationship as one of the causal links that lead to a child rejecting the other parent.²⁹ This factor is one of the many dilemmas and paradoxes in relocation — it may serve as a shield for the child from conflict, but also act as a sword in the relationship with other parent. The evaluator will want to both carefully assess the level of conflict and the subtype of partner violence if it occurred³⁰ and establish the implications for co-parenting. Courts are accustomed to balancing harms, and in cases of

greater gradations of partner violence or child maltreatment, relocation may be a constructive intervention to stabilize the family system, even at the cost of less involvement by an abusive parent or ex-spouse.³¹ The issue of relocation in the context of domestic violence is a very complex issue, and the evaluator may want to seek consultation from a specialist.

It should be kept in mind that family violence occurs along a continuum of the variable of inter-parental conflict. There are subtypes of partner violence³² and issues of control that inter-mix with the history of conflict and violence, which in turn have implications for crafting parenting plans.³³ When a residential parent wants to relocate, it is not unusual for past patterns to assert themselves. An abusive former spouse may try to intimidate the mom from relocating with threats of “I’ll keep you in court forever and get custody of the kids,” and she might very well cave in to this pressure. Or, the nonresidential parent may try to sabotage a legitimate attempt to relocate because he or she has not been able to move on with life and/or accept that the ex-spouse has a new partner and life.

Relocating Parent’s Psychological Stability

The psychological stability of the relocating parent will help position the parent to aid the child in coping with the stress associated with the potentially negative life transition event of relocation. If the parent is clinically depressed or has a personality disorder, then he or she will not be in a good position to manage his or her own affairs (new job, residence), cultivate new resources (social network, new school for the child, new activities), and help the child generally deal with the change. Research shows the importance of the custodial parent’s psychological stability for child adjustment after divorce.³⁴

Psychological Resources of the Child

Research shows that the individual psychological resources of the child are important in predicting which children are likely to cope well with change and loss, and hence be more resilient.³⁵ Cognitive ability appears to be a consistent predictor of better adjustment, so information from school records is important. A child’s “social-emotional IQ” would be important data; thus, collateral interviews with teachers, coaches, etc., would be helpful in anticipating how the child might adjust to new circumstances.

Shortness of Time Since Parental Separation and Divorce

A short length of time between the parental separation and divorce and the relocation is a risk factor. Relocation is an issue that often comes up at the time of original orders, or not long after the parents have separated. Research shows that custodial parents often are not coping well with life and their parenting effectiveness is suffering during the first two years after separation.³⁶ The net effect of the *Spahmer* decision will be to encourage recently separated parents to relocate with the child. See § C9.6, below.

Modulating, Buffering, and Protective Factors in Relocation

Factors that have a modulating, buffering, or protective function in the relocation context often are the same as risk factors, but at the opposite end of a continuum of that variable. Yet, these factors are full of potentially paradoxical and contradictory effects.

For example, *older children* are at less risk because they can understand the issues with separation from a parent, but they stand to lose more with peer relationships and discontinuing community activities, sports teams, coaches, school groups, church friends, etc.

The *degree of involvement by the nonresidential parent* creates the basis for most harm to the child, but it simultaneously protects the child. It is the involved parent who is more likely to work out ways to mitigate the harm by staying involved as a significant parental figure (albeit from a distance), providing social resources, and being a full service “summer parent.”

When *the residential parent is mentally healthy* and can support the relationship between the child and other parent, there is more chance of a successful relocation and less harm.

When the child is *not simultaneously dealing with divorce and relocation*, he or she has the opportunity to cope with the family changes and take advantage of the resources of both parents in the emotionally comfortable milieu of the home community with access to social support from friends and grandparents.

When the child has *more individual resources* to draw upon, especially an average or above IQ, he or she should be better positioned to take advantage of new resources and understand how to redefine the relationship with the other parent and continue to draw upon those resources.

Proponents of a legal standard favoring a presumption for a residential parent to be able to relocate with a child point to the factor of the *residential parent-child relationship* as a protective factor.³⁷ Research shows that when there is a positive relationship between the custodial parent and child, with warmth and authoritative parenting,³⁸ this indeed buffers potential negative effects due to divorce. If there is not such a relationship, then it is a script for a disastrous relocation experience for the child.

Although having a secure and positive relationship with the residential parent is a necessary condition for a successful relationship, it is unlikely that it will be sufficient. The evaluator needs to determine what other factors are needed and whether they provide enough protection for the child, while at the same time assessing the degree of harm associated with potential losses associated with relocation.

§ C9.3.2—Pre-Decree Versus Post-Decree Relocation

An initial reading of the new case law makes it appear that the evaluator should not assess the likely effects of relocation on the children in a pre-decree case. A strong distinction was drawn between the pre-decree and post-decree cases in both *Ciesluk* and *Spahmer*, and there was a labeling of post-decree as the true “relocation case” where the investigator absolutely must assess “the anticipated impact of the move on the child.”³⁹ *Ciesluk* indicated that the court needed to explicitly address all 20 statutory factors in the relevant statutes (C.R.S. §§ 14-10-124 and -129) in a relocation post-decree case,⁴⁰ but only the best interests factors in a pre-decree case.⁴¹ The court in *Spahmer* directed the trial judge to treat the facts as if the parent would be living in the new community when there is a stated intention to move.

The legal opinions do not state that the investigator also has to assume the children are living in the new community. The statute directs the investigator to measure the child’s “adjustment to home, school, and community.”⁴² Therefore, the predicted effect of relocation on the child’s adjustment is relevant and should be carefully considered in the pre-decree case as well. The statute also directs the court to consider all relevant factors, so there is not a limit to the factors on which the CFI can gather data.⁴³ The social science research that was *not* noted in either *Ciesluk* or *Spahmer* on the effect of residential mobility on children of divorce leads to the unavoidable conclusion that relocation is a general risk factor for children of divorce, just as divorce itself creates greater risk.⁴⁴ Thus, it is important to assess the likely effect of the relocation on the children through the appropriate statutory factors. The relocation risk assessment is the analytical building block for the investigator to create the fundamental comparison of the alternative living arrangements. It is extremely important to note that social science research cannot be used to create a presumption either against or for relocation. Research helps identify factors for the evaluator to use in gathering data. In the case illustration in § C9.2.1, “The Mom Who Wanted to Go Home 1,” the variables of benefit from extended family, free housing being provided by the grandfather, good life management skills by the mother and her ability to open a new set of resources for the children, and her ability to support and facilitate the children’s relationship with their father in a long-distance parenting plan were the bases for predicting a healthy adjustment to home, school, and community — *e.g.*, the adjustment to relocation.

§ C9.4 • AN EVEN PLAYING FIELD: AVOIDING BIAS AND *DE FACTO* PRESUMPTIONS IN RELOCATION CASES

Ciesluk directs the court, and thereby the CFI who must inform the court, that the relocation analysis requires that the parties start on an even playing field without a presumption for or against relocation. The opinion reminds us that the statute created a “new methodology” in a “fact driven” analysis of the issues.⁴⁵ The statute overturned the presumption created by case law.⁴⁶ The case in *Ciesluk* was remanded because the trial court judge was seen as acting as if there was a presumption against relocation when he took judicial notice of a social science research study⁴⁷ that suggests there is potential risk of long-term harm to children due to relocation following divorce. In workshops the author has given during the past year on evaluation for the relocation case,⁴⁸ discussions with judges have revealed that there seemed to have emerged an implicit bias against relocation. It was difficult for the relocating parent to make a strong case for relocation. It seems emphasis was often placed on the one statutory factor of potential harm to the nonresidential parent-child relationship.⁴⁹ The Supreme Court in *Ciesluk* attempted to rectify this situation.

As discussed in § C9.3.1, research clearly establishes that residential mobility is a general risk factor for children of divorce, and that children of divorce show better long-term adjustment when they have quality and meaningful relationships with both parents when there is low conflict. For these reasons, it is easy to see how evaluators might hold an inherent bias against relocation, even if it is implicit. Authorities on child custody evaluation have cautioned that the investigator needs to be exceptionally vigilant in guarding against this kind of bias or presump-

tion and keep the case law fully in focus in the gathering and interpreting of the case data.⁵⁰ In an unpublished decision, the court of appeals in 2006 extended the *Ciesluk* analysis to conclude that relocation by itself cannot be interpreted as sufficient harm to create a basis for changing the primary residence.⁵¹

This author reviewed the report of an experienced Colorado parenting evaluator early in 2006, in which the CFI admonished the mother for wanting to move to Texas from Denver with a very young child. The report opined that relocation was always going to be harmful to a child under six years, and the CFI proceeded to try to talk the mother out of relocating. In this author's experience, many attorneys and evaluators share this CFI's bias. Nevertheless, the social policy component in Colorado relocation law that is now embodied in the new case law makes it incumbent upon evaluators to take a balanced approach. In a more recent *Spahmer* case, "I Can't Make a Living in Crested Butte," after thorough investigation, the CFI recommended that the two-year-old child be placed primarily with the father in the home community, with the anticipation that the mother would be moving to Vermont. In post-report correspondence with the mother's attorney, the evaluator opined that if the father had been the one moving, the recommendation would have been the opposite — that the mother be the primary residential parent. Thus, the opinion was based entirely on a presumption against relocation with a very young child. The facts of the case regarding the quality of the child's life with each parent were not relevant. The presumption was ostensibly based on "research" that purportedly showed long-term severe emotional consequences to the child if there was a disruption in the child's attachment relationship with one of her parents. Specific research studies were not cited. The court was asked to accept on faith the evaluator's deterministic prediction.

In a proposed relocation where there have been two involved and competent parents, it may almost always appear that the children's best interests will be served when the children do not relocate. The status quo will seem more stable, "best," with the continuation of relationships, school, etc. This is why courts in Colorado were issuing conditional orders, *i.e.*, "the parent can continue as the residential parent if he or she stays in the present community." When one parent has no flexibility about moving and there would be a change in primary residence, if the motion for relocation of the children is denied, or even if there has been equal parenting time and there is a need now to designate a residential parent, then the investigator needs to be assessing which type of loss or harm is the lesser of two evils, *i.e.*, the least detrimental alternative for the primary residential designation.⁵² The investigator needs to have an open mind about what benefits there may be in the new community. It will almost always be easier to show that the children are benefiting from the status quo.

§ C9.4.1—Social Capital Comparisons

Social capital⁵³ was introduced as an alternative approach to defining one dimension of the "best interests of the child" concept. This approach encourages investigators to identify the sources and degree of psychological and social resources that will be available to the child in the alternative living arrangements. This concept is related logically to the relative advantages and disadvantages of relocating versus not relocating in a post-decree analysis, but it represents sources of data the CFI will want to collect in any evaluation.

The identifiable sources of social capital or social and emotional resources will be known in the home community. In the new community, the resources available to the child generally will not yet be developed or known. Sometimes there will be existing relationships with extended family, but friendships need to be cultivated, the child's adjustment to the school environment is unknown, the child needs to try out for the athletic team, etc. The comparison is inherently imbalanced or unfair because it is one of comparing known, identifiable resources with an alternative of hypothetical resources that are yet to be developed. *Ciesluk* and *Spahmer* would seem to require the investigator to figure out how to dissect this future-oriented analysis so the handicap against relocation is parceled out. There has to be a way for the relocating parent to prevail on this comparative analysis, depending on the facts to be revealed.

Key factors related to resource development may be the potential of the child to cultivate and benefit from new resources and the ability of the relocating parent to cope with the stress and challenge associated with moving and setting up a new life for himself or herself and the children, which are both risk/protective factors in the forensic model discussed in § C9.3. In other words, the individual psychological resources of both the parent and child are predictive factors for the child's adjustment. The investigator needs to collect data on these psychosocial variables so the investigator's report to the court can be designed to enable the trier of fact to visualize what life would be like for the child in the new community and the likely level of resources that will be available. The comparison in the relocation analysis becomes one of the known level of social capital in the home community versus the predicted level of resources that would be available in the future in the new community. In this way, the playing field becomes more level. It is the only way the parties indeed can be on "equal footing."

While the investigator may need to project what the level of social capital will be for the parent and child, *Ciesluk* is clear that the main advantage and reason for the move must be based on "non-speculative information."⁵⁴ It will often be difficult for the relocating parent to demonstrate tangible benefits while still residing in the home community. Specific information can be offered on quality of schools and community, and presence of extended family. It is difficult to get a job offer without already living in the new community. The CFI can make predictions on the likelihood of obtaining employment based on work history and marketable skills, the creation of a new social support system, friends, etc.

§ C9.4.2—Putting The Needs Of The Child First

One could argue that the act of relocation is proof the parent is not putting the needs of the child first, which is a statutory factor, even in a pre-decree case.⁵⁵ The parent's reasons for relocating are bound to mostly reflect his or her interests with a job, relationship, school, or return to the home community. The child does not approach the parent and ask to move. The new case law explicitly recognizes that the parents' interests are relevant to the relocation issue and dispute.⁵⁶

It would appear the analysis of parent and child interests and *Ciesluk*'s social policy endorsement of the legitimacy of parents moving for sensible reasons to explore opportunities makes this interpretation of the "put the needs of the child first" factor not acceptable. *Spahmer*'s edict to courts to assume the parent is living in the new community seems to neutralize the temp-

tation of applying this factor on the issue of choice of location for the new residence. In the post-decree context, while “removing” the child from easy access to the other parent would seem to be not thinking of the child first, this writer believes it is generally not a permissible interpretation under *Ciesluk*. The factor should continue to be interpreted in the context of day-to-day parenting decisions, but not for a relocation that on its face appears sensible.

On the other hand, at post-decree, when there are unsound reasons for the move and few identifiable advantages to the parent compared to the existing situation, this writer believes this statutory factor of putting the needs of the child first can be applied to a relocation analysis. The combination of clear advantages, lack of flexibility, and ability to arrange for continuing involvement by the other parent makes for a higher degree of cogency for the move. If the relocating parent cannot pass the cogency test, then he or she is not putting the needs of the child first and the factor is relevant.

In one case, the mother wanted to relocate to a small Nebraska town. The mother stated that her primary reason was “I’m tired of dealing with him,” who of course was the ex-husband. It had not been a high-conflict divorce, and there had been only two significant parenting time spats in five years. The mother first stated she was going to be offered a job as an office manager at a large state park and she would produce documentation. This was not forthcoming. She then said she planned to open a daycare business, although she had no experience in the field. The judge concurred with the evaluator that there were not relative advantages associated with the child’s moving, and the mom was not positioned to support the child’s relationship with the father. The mother clearly was putting her “needs and desires” (*i.e.*, to get away from the ex-spouse) ahead of those of the child, who enjoyed a close relationship with the father and his very large extended family in the home community. There was not “specific, non-speculative information about the child’s proposed new living conditions.”⁵⁷ The combination of unsound reasons and absence of identifiable advantages made the move appear too parent-centered. This relocation scenario is not at all uncommon, with the primary motivation of the parent to get out of town no matter what. It usually is not going to be a cogent move.

§ C9.4.3—Case Analysis: “Career Change”

This recent case illustrates the issues of cogency for a move and creating an even playing field so the relocating parent is given the opportunity for making a legitimate case for the relocation. In a post-decree case, the mom had been a full-time teacher, was going to graduate school full time in a creative writing program, and was an equal time parent. Her job as a teacher ended due to licensing issues. After finishing her master’s degree in fine arts (MFA), she applied for college teaching jobs. The parents had three older sons. They lived in a small mountain town. The boys were high achieving and resilient. The mom was offered a job as an assistant professor in English at a New Hampshire university, a tenure-track position with excellent benefits, including free college tuition for the boys when they went to college. The boys had many friends, participated in sports, and the hometown was their “familiar territory.” There clearly would be losses of social capital.

The father, with equal parenting time, was self-employed with an income that had fallen by 75 percent over the last few years. The mother's new income would be double that of the father. It was necessary to predict how the mother and boys would recreate their social capital in the new community. The boys were totally ambivalent on their preference and were emotionally torn; they expressed confidence they would easily make new friends because that is how they operate socially. The investigator formed the opinion that the mother and children would open up new sources of social capital and the mother would facilitate the children's relationship with their father. One boy expressed the opinion that if he had to spend all summer in one community, then the home community would be where he would want to be. He could come back to his old friends, play summer sports, and spend the summer with dad. This type of future-oriented analysis allowed for a more equal comparison of the children's likely adjustment over the long term in the two alternative residential living environments. The unique career opportunity for the mother realistically gave her little flexibility on the issue of moving. Two evaluators predicted that the relocation of the children would produce the least detrimental alternative placement.

§ C9.5 • THE "VIALE CANDIDATE TO BE THE RESIDENTIAL PARENT" TEST

This writer has found it useful, in both pre- and post-decree cases, to establish whether the non-relocating parent is a viable candidate to be the residential parent. In a *Spahmer* analysis with pre-decree, if there is not a sufficient degree of viability, the issues are reduced to how to craft the long-distance parenting plan that will be least harmful to the children. If the non-relocating parent is a viable candidate, the full analysis is needed and the court may very well designate the non-relocating parent as the residential parent under the required *Spahmer* assumption of the parents living in their separate communities. It is here where the court may designate the non-relocating parent as the residential parent, issue a temporary order on parenting time, and await word from the relocating parent regarding whether he or she indeed will relocate without the child.

In the post-decree case, the question arises whether the court can rule on relocation without changing the primary residence, or in an equal parenting time arrangement without having to designate a primary residence. As discussed above, it is unclear if the court can consider whether the parent would move without the child as a basis for deciding the relocation issue.⁵⁸ If the non-relocating parent is *not a viable candidate* to be the residential parent and if the parent will not relocate without the child in the event relocation is denied, then the court may not need to address the issue of changing the residential parent. It appears a future appellate case will need to clarify this issue.⁵⁹ Under this same scenario, if the relocating parent has not indicated his or her intention on this issue, the court probably will approve the relocation. If the non-relocating parent is very viable, a full relocation analysis is necessary, and if relocation is denied and the parent requesting it decides to go anyway, a change in primary residence will be necessary. However, the court again may wait to issue permanent parenting time orders until the parent has indicated whether he or she will actually be moving. An additional interesting question, with older children, is whether the children's preferences will help define the viability of designating the nonresiden-

tial parent as the new residential parent. If the non-relocating parent could competently handle the daily parental responsibilities, but the 16-year-old daughter does not want to stay with dad and wants to move in order to continue living primarily with mom, then this may be enough to answer the viability question.

§ C9.5.1—Case Applications

The Case of “Big City Virtues”

In this post-decree case, the mother asserted she needed to leave the small mountain town with a high cost of living so she could find better employment and the children could benefit from urban life — museums, theater, and cultural richness. She wanted to move to northern Virginia, near Washington, DC. The dad was highly involved and a viable candidate to be the residential parent for two young sons, ages six and four. He had a high level of life management skills and had demonstrated he was very supportive of the boys’ relationships with their mother. He had an established real estate company and so had little realistic flexibility on the issue of also moving. Mom did not express an opinion on whether she would or would not relocate without the boys: “I don’t even want to go there.” The mother could not show what her new employment would be with specific information. Data showed she had retreated from parenting responsibilities after she became involved in another relationship and the father seemed to have become the lead parent. The main motivation for moving appeared to be to pursue the romantic relationship. The evaluator opined that the boys’ best interests would be served by the children’s not relocating and that the father could be a very responsible and competent residential parent. Without information on the mother’s relocation, the court would be faced with changing the primary residence, if it agreed with the evaluator, and issuing a temporary parenting-time plan until it received notice of the mother’s decision.

The Case of “The Mom Who Wanted to Go Home 2”

In this case, the mother wanted to return to her home community in Ohio from Boulder in a pre-decree case.⁶⁰ There were two small children, ages six and four. She had been the lead parent. There was an equal parenting time plan under temporary orders. Mom had numerous medical problems and a dependency on narcotic pain medication for a chronic pain condition. She had clinical diagnoses of depression and post-traumatic stress disorder. The father had been a fairly involved parent. He was a firefighter and would work long hours but then have a long time off. He had an eight-year-old child from another relationship with equal parenting time. The children all had established relationships. Dad was a viable candidate to be the residential parent and because of his other child had no flexibility to also move.

The court determined that the dad would be the residential parent in the home community. The court instituted a temporary parenting-time schedule that kept the current 50-50 arrangement in place. If the mother decided to relocate to Ohio, the court presented a long-distance parenting time plan for that eventuality. The court gave the mother 10 days to indicate what her decision would be. The court examined the mother’s reasons for relocating and found they were reasonable, but also found there was more benefit to the children from the father’s extended family in the local community. The court found that the sibling relationship with the father’s other child was important and that the father had little flexibility for moving.

It would appear the court felt that it could, indeed, examine other relevant factors that included “relocation factors,” *e.g.*, extended family, and consider the parent’s reasons for relocating. It felt it could take judicial notice of summaries of the relocation research literature via expert testimony (*i.e.*, the rebuttal witness’s report and testimony). The ruling on keeping the current parenting plan in place unless the mother relocated without the children would appear, at first blush, to be a conditional order and have the “chilling effect” of inhibiting the mother’s right to travel. This was done to deal with the anticipated issue of the mother’s changing her mind about relocation after learning the father was designated as the residential parent. The court made a specific finding that the children’s best interests would be better served by primarily living with the father in the event of the mother’s relocation to Ohio. The court specifically did not order the mother to live in a particular location. This would appear to be a fine line, but the only possible one in order to deal with the practical situation created by the court’s decision, which was made with specific reference to the *Spahmer* analysis of assuming the parents were living in the two separate communities.

The Case of “The Mom Who Wanted to be a Cornhusker”

This post-decree case was described in § C9.4.2 The mother wanted to move to Nebraska and she was tired of dealing with dad. The court knew the mother would not move without the child. There were few identifiable advantages to the child in the new location, direct or indirect, other than continuing to enjoy a warm and healthy relationship with the mom — which she could do in the home community if the mom did not move. The level of social capital in the home community was high, with a large extended family and support system. The father had remarried, and the seven-year-old girl now had two stepsisters, ages six and eight. They were best friends. The child was very attached to her stepmother, who was a highly competent parent. The dad was very involved, but he was not a viable candidate to be the residential parent because of a history of alcoholism with binge drinking. There were not data to suggest he consumed alcohol during his parenting time. The court interpreted *Ciesluk* to allow it to deny the child’s relocation without addressing the issue of changing the residential parent because the mother indicated she would not move without the child.

§ C9.6 • THE SPAHMER PARADOX

Spahmer ostensibly will make it easier for relocation of the child and parent to occur in some relocation scenarios, mainly when there has been a stay-at-home mom with very young children in a pre-decree case. It seems to amount to a *de facto* presumption in favor of relocation. In certain situations — such as where older children are highly connected with their home community, perhaps with substantial extended family present; the non-relocating parent is highly involved; and the children may not be resilient — then it could be expected that the non-relocating parent would be designated the residential parent at pre-decree.

In the “Career Change” case discussed above in § C9.4.3, the children were resilient; there were specific advantages associated with the mother’s new job; and data showed the non-relocating father was not likely to be supportive of the mother’s relationship with the children. In

this post-decree case, the mother was relocating with or without the children. This scenario becomes the equivalent of a pre-decree case. The investigator is examining only two of the decisional alternatives. It becomes a question of where the children will live during the school year because with older children they can spend the summer with the other parent.

The paradox found in *Spahmer* for the pre-decree context emanates from research that supports a hypothesis that relocation is likely to create a greater degree of risk of harm for the children when it co-occurs with divorce. Children will be dealing with the stress and transition associated with divorce *and* relocation. The temporal proximity of relocation to the parental separation and divorce is one of the risk factors in the risk assessment model (under “Risk Factors for Relocation” in § C9.3.1, above). Thus, at pre-decree with very young children, the children may be at highest risk when relocation is easiest to obtain by the relocating parent.

The research that establishes the paradox comes from studies that show that, at the time of separation and divorce, parents on average are psychologically functioning in a sub-normal level and their parenting skills may be at an all-time low. They are likely to be more focused on their own emotional pain and needs. They are dealing with their own issues of loss and adjusting to dating, a new residence, and starting adult life over. The well-respected longitudinal research of Hetherington describes this process and is a basis for this hypothesis.⁶¹ Parents are likely to show this lower level of parenting effectiveness in the first two years following separation and divorce.⁶² Thus, a secondary hypothesis is that a child is likely to show a better adjustment to relocation after his or her life has stabilized following divorce.

§ C9.7 • MEASURING DIRECT AND INDIRECT BENEFITS

Another new aspect of *Ciesluk* is the establishment of the principle that courts must consider indirect as well as direct benefits to the child stemming from the parent's relocation.⁶³ Presumably, the indirect benefits to the child of not relocating should also be examined. This new directive presents investigators with something of a measurement puzzle. There are not going to be any scientific instruments that measure benefits, so the task is to gather descriptive data on direct benefits to the parent and child and then make a practical analysis of how benefits to the parent will have an impact on the child's life. Definitions of direct or indirect benefits are not found in case law or research literature, and there is a logical blurring of these two variables. Presumably, factors that primarily benefit the parent are a possible source of indirect benefit to the child. So, if a move enhances the quality of life and happiness of a parent, there presumably is a trickle-down effect on the child. This seems to have been the reasoning in *Ciesluk* as the case facts were examined. The mother wanted to move to Arizona, where she would have enjoyed family support and possibly an improved employment situation. The experience of this writer is that it is not uncommon for the relocating parent to assert there is an isomorphism between parent and child interests: “If I'm happy, that has got to be good for the kids.”

It would seem in a factual-empirical relocation analysis that the relocating parent will need to show tangible and expected benefits to the child in order to prevail because there usually will be known and substantial direct benefits to the child by staying in the home community when the non-relocating parent is a viable candidate to be the residential parent. In the case of “The Mom Who Wanted to Go Home 1,” discussed in § C9.2.1, there were demonstrably greater direct benefits to the children with extensive family and social support in the new community and better housing. Indirect benefits would be the mother’s improved sense of well-being and a lower cost of living. In comparison, the case of “The Mom Who Wanted to Go Home 2” in § C9.5.1, the court found the mother’s benefit of support from her parents and the children’s increased contact with the maternal grandparents were outweighed by the benefit they would receive from continuing regular contact with their paternal extended family and their half-brother in the home community.

§ C9.8 • MEASURING THE PARENTS’ INTERESTS AND THE INTERTWINING OF INTERESTS

Both of the new cases include discussions of consideration of parents’ interests along with the child’s interests; the conflict between parents’ interests and between the child’s and parents’ interests; the need to balance the three disparate types of interests; and the need to determine the extent to which the parents’ and child’s needs are intertwined.⁶⁴ The parents’ interests are defined in terms of their “needs and desires.”⁶⁵ Again there is not a scientific technique for the investigator to rely on in gathering these data for the court. The task would seem to be, first, one of providing descriptive data for the court with analysis on the parents’ reasons on the relocation issue, pro or con, because this will reflect their needs and desires. Second, the data on direct and indirect benefits or advantages would seem to capture the degree of intertwining parent and child interests. In the case of “Career Change” in § C9.4.3, the mother was moving in order to satisfy her “desire” to begin a new career and her “need” for a better economic situation for herself and her children. The comparative analysis required the investigator to juxtapose the mother’s reasons against the father’s need and desire to have continuing and physically proximal relationship with the children and the benefit the boys would receive from stable sources of social capital in the home community.

§ C9.9 • SUMMARY AND PRACTICE TIPS

The CFI is reminded of the potentially perilous path of conducting an investigation of the relocation case in this statutory role. These cases contain psycho-legal dilemmas that are almost impossible to resolve in a satisfying way. They are always complex cases. The data set needs to be comprehensive. The CFI needs to be mindful of the relevant professional standards⁶⁶ and must gather the necessary and sufficient information so as to be most helpful to the trier of fact. The discussion of issues and implications of the new case law is summarized in the following CFI practice tips:

- Distinguish between the pre- and post-decree legal contexts and determine which decisional alternatives can be addressed; assistance from the court may be needed on this issue in the post-decree context;
- Determine whether the relocating parent would relocate without the child in either a pre- or post-decree context for use in crafting the parenting-time schedule;
- Determine whether the non-relocating parent is a viable candidate to be the residential parent;
- If not, in pre-decree, then concentrate on crafting a suitable long-distance parenting plan; it may be the same in post-decree, depending on how the new law is judicially construed;
- Measure all 11 of the best interests factors in pre-decree cases and explicitly communicate these data to the court, including “all other relevant factors”;
- Measure all 20 of the best interests and relocation factors in post-decree cases and explicitly communicate the data to the court;
- Assess the effects of relocation on the child in pre-decree cases via the factor of “adjustment to home, school, and community,” and in post-decree cases via the “impact of the move on the child” factor;
- Be sensitive to potential anti-relocation bias and help the court anticipate the likely creation of new resources in the new community by the parent and child so there is a fair comparative analysis;
- Measure parents’ interests and the extent they are intertwined with the child’s interests via the direct and indirect benefits to the child;
- Be aware that a proposed relocation cannot be interpreted as showing the parent is not putting the needs of the child first when it is pre-decree or when the parent passes the cogency test on reasons, advantages, and flexibility in post-decree;
- Recommend long-distance and local parenting-time plans for the court when it is known or likely that the relocating parent will not relocate without the child, or for the feasible eventuality of the other parent also relocating to follow the child;
- Conduct careful investigation on the reasons for the move at post-decree and determine whether there is “specific, non-speculative information” on purported advantages of relocating or not relocating;
- Provide a futuristic, data-based analysis on the likely ability of the parent and child to recreate lost social capital after a relocation.

This author believes the new changes in Colorado relocation law will result in more CFI evaluations and future appellate decisions to clarify some of the remaining uncertainties, especially whether the issue of relocation can be decided without the court’s designating a change in the primary residence.

The new case law, with the requirement to measure parents’ interests; intertwining of interests; direct and indirect benefits; and the likelihood of social capital being recreated, makes it more difficult for the CFI to address the ultimate issue of relocation. When there are strong issues of social policy and the need to balance child and parental interests, then this falls within the domain of judicial discretion and wisdom. It is outside the realm of a “scientifically-informed”⁶⁷ parenting-time evaluation. Only the trier of fact can determine whether the risk of harm to the

child exceeds a hypothetical “threshold of harm” that is sufficient to deny or permit relocation.⁶⁸ The CFI can provide data on risk and consequences, advantages and disadvantages, reasons, cogency, parent and child interests, and all of the statutory factors. Some of the data can be research-based, and other data will be descriptive in nature. The well-crafted CFI report will fully inform the decision maker so that it usually will be clear which alternative is likely to be least harmful and which parenting plan will produce the most favorable developmental outcomes for the child.

§ C9.10 • NEW CASE LAW

§ C9.10.1—Finally Addressing The Issue Of Equal Parenting Responsibility

The *Ciesluk* and *In re Marriage of Francis*⁶⁹ courts both expressly declined to address the circumstance of equal parenting and shared decision-making in the relocation and long-distance parenting context. In the past, case law from the court of appeals had ruled that this circumstance of shared parenting on a true equal footing in the post-decree context was an exception to the standard for modification and the functional equivalent to a pre-decree context.⁷⁰ In the only published opinion since the 2005 cases, *In re Marriage of DeZalia*,⁷¹ the court affirmed these earlier rulings to ostensibly resolve the matter of equal parenting time, post-decree parenting plans. It was noted that the relocation analysis with the 20 factors listed in C.R.S. § 14-10-129 is required and “refers only to the circumstances of a party with whom the child resides the majority of the time.”⁷² Moreover, one of the statutory provisions that triggers the § 14-10-129 analysis for modification does not apply: “a reduction in parenting time resulting from the other parent’s relocation with the child [in the case of equal parenting time] is not to be construed as a restriction. . . .”⁷³ *DeZalia* emphasized that a substantial modification of this type of parenting plan, presumably with a local or long-distance arrangement, “closely resembles an initial allocation of parental responsibilities,”⁷⁴ and thus a best interests of the child standard would apply.

This writer felt that this matter had already been resolved by earlier cases, *e.g.*, *In re Marriage of Garst*.⁷⁵ In reviewing other CFI work, the writer continues to be impressed by evaluators who both show an anti-relocation bias and insist on doing a § 14-10-129 analysis either with a pre-decree case or a proposed modification of an equal parenting time arrangement due to relocation. There often will be unusual twists in the fact pattern or parenting plan, but the legal standard remains. In one case, the parents set up an equal parenting time schedule even though the father lived in Douglas County and the mother moved to Wisconsin after the separation. When it came time to modify the plan, it was the best interests standard. The CFI apparently invented the standard of needing to show “emotional endangerment.” In another case, the parents voluntarily changed from a primary residence and sole decision-making parenting plan to an equal parenting time and shared decision-making plan. It was not formalized. When the mother moved to another part of the Denver metro area, the CFI correctly asserted there had been voluntary integration and equal time, but then did a § 14-10-129 analysis as if it were still a primary residence arrangement and relocation.

§ C9.10.2—Distance: What Constitutes A Substantial Change?

One question that has not been answered is the definition of a substantial change in the geographical distance of a parent's move. There is no case law. The answer lies in the hands of judicial discretion. Some states (Michigan, Arizona) treat this issue in their relocation statute with a "100 mile rule" on what constitutes a legal relocation. The key variables involve distance, time, inconvenience, and opportunity for involvement with the child. In urban areas, traffic congestion can make local moves seem like a long distance. A very well known California relocation case⁷⁶ involved a move of 40 miles.

In the above case, this writer, in the role of reviewer, did not feel a move from Aurora to Lakewood constituted a substantial distance, even though it would create logistical burdens. In rural areas of Colorado, individuals' sense of distance is different, so that a 50-mile car ride to work may not be unusual and would be comparable to an urban commute. In a current case, the father lived and worked in Rangely; the mother in Dinosaur, or 20 miles away. The mother then moved with the two young boys to Craig, or 87 miles away, but in the same county, and made it known that she planned to move another 25 miles away to Hayden within the year. The father opposed the move and filed a motion for a change in primary residence. He maintained that there now was a two-hour drive in good weather and that he could not be regularly involved with the boys.

One authority has asserted that urban moves with limited distance can cause a qualitative change in the nonresidential parent's opportunity to be realistically involved with the children.⁷⁷ In the post-decree case, it would be strategically advantageous to the nonresidential parent to get a residential move by the other parent defined as "relocation" because the legal standard for modification would be easier to meet. Thus, it would seem courts will want to address this issue to establish clearer expectations on what exactly constitutes a substantial distance, perhaps in terms of opportunity for realistic involvement with the child. Moves that produce a significant reduction in parenting time would seem to qualify for a definition of "relocation." The parent-child relationship becomes part of long-distance parenting. Residential moves by a parent with the child within the same general area that do not result in a significant reduction in parenting time and still allow for meaningful involvement by the nonresidential parent would seem to still be part of a local parenting time arrangement, even if there is an increase in the hassles of travel and time. Since divorced parents have a high rate of residential mobility, usually involving local moves, it would seem important for courts to clarify this issue.⁷⁸

§ C9.10.3—Reconsidering Relocation, Research, And Harm

This writer believes the main idea in the new case law is that courts (and therefore evaluators) need to take a balanced and fair approach to each case where the issue involves a long-distance parenting plan. The analysis needs to be individualized, as *Francis* asserted, with a factual analysis, and presumptions in any form need to be avoided. Each parent deserves a fair and equal chance to make his or her case on which of the alternative residential living arrangements will be in the child's best interests. The parents' competing constitutional rights need to be juxtaposed. The court's opinion must reflect the revealed facts that are unaltered by any preconception. In an unpublished decision,⁷⁹ the court of appeals vacated and remanded because "the court based its

decision upon a general theory that relocation is harmful to children”⁸⁰ and “because it harms their relationship with the non-moving parent.”⁸¹ There must be “a finding” of harm based on the facts, not an assumption of harm. *DeZalia* reinforced this view by interpreting a “reduction” in parenting time due to a long-distance arrangement as not constituting a legal “restriction” in parenting time.⁸²

It is well known that the *Ciesluk* court interpreted social science research relevant to the relocation dilemma as equivocal in its findings and stated that there were “many schools of thought.”⁸³ It appears from the integrated analysis of the court in *Ciesluk* and *Spahmer* that the trial court judge’s taking judicial notice of one social science study would have been treated as a functional presumption even if the literature showed a consensus of opinion that relocation for children of divorce is associated with a greater likelihood of harm. With any generalization from social science research, there is going to be variation,⁸⁴ so it would seem to be unwise to base legal presumptions in family law on research. The research findings are in the form of aggregate data or group averages, so to directly apply them to the individual case is to make a grievous error in reasoning.⁸⁵ Research findings should serve as the basis for forensic hypotheses for an evaluator, nothing more. Even though research shows that residential mobility is a general risk factor for children of divorce,⁸⁶ it should not be treated as the basis of a presumption or bias. Expert opinions should reflect the data in the case, although research can comprise part of the interpretive lens when the opinions are communicated to the court. It would not appear that the *Ciesluk* court was meaning to discourage courts to hear expert testimony about scientific research or that evaluators should not strive to make their forensic procedures as scientifically grounded as possible. Rather, the court clearly did not want social science theory or research findings to be presented as a presumption under the guise of science.

The court of appeals, in *Hatton*,⁸⁷ did not hesitate to cite specific research studies on the even more controversial concept of parental alienation. In addition, this recent decision reaffirmed *Martin*⁸⁸ that the concept of least detrimental alternative is subsumed under the best interests of the child legal doctrine and standard. Thus, in cases involving issues such as relocation and alienation, the more efficient language concerns potential harm to the child. The challenge for the evaluator and court is how to craft parenting plans designed to mitigate the harm.

NOTES

1. *In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005).
2. *Spahmer v. Gullette*, 113 P.3d 158 (Colo. 2005).
3. *In re Marriage of DeZalia*, 151 P.3d 647 (Colo. App. 2006).
4. *Ciesluk*, 113 P.3d at 148: “The court may decide that it is not in the best interests of the child to relocate with the majority time parent. Then, if the majority time parent still wishes to relocate, a new parenting time plan will be necessary.” This author conducted one evaluation where the judge denied relocation and did not address the issue of changing the primary residence because it was known the mother would not relocate without the child. The case is discussed in § C9.5.1.
5. Research shows children are more likely to have the best long-term adjustment when they enjoy quality relationships with both parents if there is low conflict, and this is more likely to be the case

when there is not relocation. Important resources for the child are already in place for the child in the home community. Relocation is a general risk factor for children of divorce. Geographical separation tends to result in nonresidential parents diminishing their role or dropping out altogether. *See* § C9.4.1.

6. C.R.S. § 14-10-124(1.5)(a)(IV).

7. *Spahmer*, 113 P.3d at 161: “[T]he court must accept the location in which each party intends to live, and allocate parental responsibilities according to the best interests of the child.”

8. *In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005).

9. In one case, the father was a self-employed computer security consultant and followed the mother and child from Denver to Houston. In another case, the mother was employed in a public sector job with a city water department and moved to the children’s new community and found similar employment.

10. W. G. Austin, “Relocation Law and the Threshold of Harm: Integrating Legal and Behavioral Perspectives,” 34 *Family Law Quarterly* 63-82 (2000); W. G. Austin, “A Forensic Psychology Model of Risk Assessment for Child Custody Relocation Law,” 38 *Family and Conciliation Courts Review* 186-201 (2000).

11. J. B. Kelly and R. E. Emery, “Children’s Adjustment Following Divorce: Risk and Resilience Perspectives,” 52 *Family Relations* 352-362 (2003).

12. E. M. Hetherington, “Social Capital and the Development of Youth from Nondivorced, Divorced, and Remarried Families,” in W. A. Collins and B. Laursen, eds., *Relationships as Developmental Contexts* (Mahwah, N.J.: Erlbaum, 1999) at 177-209.

13. E. W. Lidz, E.P. Mulvey, and W. Gardner, “The Accuracy of Predictions of Violence to Others,” 269 *Journal of the American Medical Association* 1007-1011 (1993).

14. R. K. Hanson, “What Do We Know About Sex Offender Risk Assessment?” 4 *Psychology, Public Policy and Law* 50-72 (1998).

15. S. McLanahan and G. Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* (Cambridge, Mass.: Harvard University Press, 1994).

16. W. G. Austin, “Risk Reduction Interventions for the Child Custody Relocation Case,” 33 *Journal of Divorce and Remarriage* 65-72 (2000).

17. *See In re Marriage of LaMusga*, 88 P.3d 81 (Cal. 2004); *In re Marriage of Ciesluk*, 100 P.3d 527 (Colo. App. 2004), *rev’d and remanded*, *In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005).

18. *See, e.g., In re Marriage of Martin*, 42 P.3d 75 (Colo. App. 2002); *In re Marriage of Hatton*, 2007 Colo. App. LEXIS 390 (Colo. App. March 8, 2007).

19. J. B. Kelly and M. E. Lamb, “Development Issues in Relocation Cases Involving Young Children: When, Whether, and How?” 17 *Journal of Family Psychology* 193-205 (2003).

20. L. A. Shear, “Life Stories, Doctrines, and Decision Making: Three High Courts Confront the Move-Away Dilemma,” 34 *Family and Conciliation Courts Review* 439-458 (1996).

21. S. L. Braver, I. M. Ellman, and W. V. Fabricius, “Relocation of Children After Divorce and Children’s Best Interests: New Evidence and Legal Considerations,” 17 *Journal of Family Psychology* 206-219 (2003); E. M. Hetherington, M. Bridges, and G. M. Insabella, “What Matters? What Does Not? Five Perspectives on the Association Between Marital Transitions and Children’s Adjustment,” 53 *American Psychologist* 167-184 (1998).

22. *Ciesluk*, 100 P.3d at 530.

23. P. R. Amato and J. M. Sobolewski, “The Effects of Divorce and Marital Discord on Adult Children’s Psychological Well Being,” 66 *American Sociological Review* 900-921 (2001).

24. V. King and H. E. Heard, “Nonresident Father Visitation, Parental Conflict, and Mother’s Satisfaction: What’s Best for Child Well-Being,” 61 *Journal of Marriage and the Family* 385-396 (1999); M. K. Pruett, T. Y. Williams, G. Insabella, and T. D. Little, “Family and Legal Indicators of Child Adjustment to Divorce Among Families with Young Children,” 17 *Journal of Family Psychology* 169-180 (2003).

25. J. B. Kelly, “Children’s Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research,” 39 *Journal of the American Academy of Child and Adolescent Psychiatry* 963-973 (2000); W. J. Doherty, “Responsible Fathering: An Overview and Conceptual Framework,” 60 *Journal of Marriage and the Family* 277-292 (1998).

26. K. A. Clarke-Stewart and C. Hayward, "Advantages of Father Custody and Contact for the Psychological Well-Being of School-Age Children," 17 *Journal of Applied Developmental Psychology* 239-270 (1996); Amato and Sobolewski, *supra* n. 24.

27. Kelly, *supra* n. 25; M. E. Lamb, "Placing Children's Interests First," 10 *Virginia Journal of Social Policy & the Law* 98-119 (2002); J. H. Grych and F. D. Fincham, "Marital Conflict and Children's Adjustment: A Cognitive-Contextual Framework," 108 *Psychological Bulletin* 267-290 (1990).

28. Kelly, *supra* n. 25.

29. J. R. Johnston, M. G. Walter, and N. W. Olesen, "The Psychological Functioning of Alienated Children in Custody Disputing Families: An Exploratory Study," 23 *American Journal of Forensic Psychology* 39-64 (2005); J. R. Johnston, M. G. Walters, and N. W. Olesen, "Is It Alienating Parenting, Role Reversal, or Child Abuse?" 5 *Journal of Emotional Abuse* 191-218 (2005).

30. W. G. Austin, "Partner Violence and Risk Assessment in Child Custody Evaluations," 39 *Family Court Review* 483-496 (2001).

31. *See In re Marriage of Steving*, 980 P.2d 540 (Colo. App. 1999), where the court permitted relocation, even though it was established that the relocating mother was alienating the child, because the harm due to changing primary residential parents was viewed as a greater harm. The court also ordered therapeutic interventions to address the alienation problem.

32. Austin, *supra* n. 30; J. R. Johnston and L. E. G. Campbell, "A Clinical Typology of Interparental Violence in Disputed Custody Divorces," 63 *American Journal of Orthopsychiatry* 190-199 (1993).

33. L. M. Drozd and N. W. Olesen, "Is it Abuse, Alienation, and/or Estrangement? A Decision Tree," 2 *Journal of Child Custody: Research, Issues, and Practices* 65-106 (2005).

34. Hetherington, *et al.*, *supra* n. 21.

35. A. S. Masten and J. D. Coatsworth, "The Development of Competence in Favorable and Unfavorable Environments: Lessons from Research on Successful Children," 53 *American Psychologist* 205-220 (1998).

36. Hetherington, *et al.*, *supra* n. 21.

37. C. S. Bruch and J. M. Bowermaster, "The Relocation of Children and Custodial Parents: Public Policy, Past and Present," 30 *Family Law Quarterly* 83-114 (2000); J. S. Wallerstein and T. J. Tanke, "To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce," 30 *Family Law Quarterly* 305-332 (1996).

38. Hetherington, *et al.*, *supra* n. 21.

39. C.R.S. § 14-10-129(2)(c)(VII).

40. *Ciesluk*, 113 P.3d at 140.

41. The evaluator in a pre-decree setting should measure "all other relevant factors," according to C.R.S. § 14-10-124(1.5)(a)(XI), and judges can take judicial notice of "facts" on some relocation factors such as benefit from extended family, schools, and advantages.

42. C.R.S. § 14-10-124(1.5)(a)(IV).

43. C.R.S. § 14-10-124(1.5)(a).

44. *See, e.g.*, J. S. Wallerstein and T. J. Tanke, "To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce," 30 *Family Law Quarterly* 305-332 (1996); R. Warshak, "Social Science and Children's Best Interests in Relocation: *Burgess* Revisited," 34 *Family Law Quarterly* 83-114 (2000); C. S. Bruch and J. M. Bowermaster, "The Relocation of Children and Custodial Parents: Public Policy, Past and Present," 30 *Family Law Quarterly* 245-265 (1996); E. M. Hetherington, M. Bridges, and G. M. Insabella, "What Matters? What Does Not? Five Perspectives on the Association Between Marital Transitions and Children's Adjustment," 53 *American Psychologist* 167-184 (1998); P. R. Amato and J. M. Sobolewski, "The Effects of Divorce and Marital Discord on Adult Children's Psychological Well Being," 66 *American Sociological Review* 900-921 (2001); C. J. Tucker, J. Marx, and L. Long, "Moving On: Relocation Mobility and Children's School Lives," 71 *Sociology of Education* 111-129 (1998); J. B. Kelly and R. E. Emery, "Children's Adjustment Following Divorce: Risk and Resilience Perspectives," 52 *Family Relations* 352-362 (2003); J. B. Kelly and M. E. Lamb, "Developmental Issues in Relocation Cases Involving Young Children: When, Whether, and How?" 17

Journal of Family Psychology 193-205 (2003); M. K. Pruett, T. Y. Williams, G. Insabella, and T. D. Little, "Family and Legal Indicators of Child Adjustment to Divorce Among Families with Young Children," 17 *Journal of Family Psychology* 169-180 (2003); W. G. Austin, "Relocation Law and the Threshold of Harm: Integrating Legal and Behavioral Perspectives," 34 *Family Law Quarterly* 63-82 (2000); W. G. Austin, "A Forensic Psychology Model of Risk Assessment for Child Custody Relocation Law," 38 *Family and Conciliation Courts Review* 186-201 (2000); and E. M. Hetherington, "Social Capital and the Development of Youth from Nondivorced, Divorced, and Remarried Families," in W. A. Collins and B. Laursen, eds., *Relationships as Developmental Contexts* (Mahwah, N.J.: Erlbaum, 1999) at 177-209; W. G. Austin, "Relocation, Research, and Forensic Evaluation," *Family Court Review* 46 (2008, in press).

45. *Ciesluk*, 113 P.3d at 140-141.

46. *In re Marriage of Francis*, 919 P.2d 776 (Colo. 1996).

47. S. L. Braver, I. M. Ellman, and W. V. Fabricius, "Relocation of Children After Divorce and Children's Best Interests: New Evidence and Legal Considerations," 17 *Journal of Family Psychology* 206-219 (2003).

48. *See n. 2, supra*.

49. C.R.S. § 14-10-124(1.5)(a)(III).

50. W. G. Austin, "Relocation, Research, and Forensic Evaluation," *Family Court Review* 46 (2008, in press); P. M. Stahl, "Avoiding Bias in Relocation Cases," 3 *Journal of Child Custody* 111-126 (2006).

51. *In re Parental Responsibilities of A.P.H.*, 2006 Colo. App. LEXIS 1256 (Colo. App. Aug. 3, 2006).

52. *See In re Marriage of Martin*, 42 P.3d 75 (Colo. App. 2002), for a description of the least detrimental alternative concept as subsumed under the "best interests of the child" general legal standard for Colorado; *In re Marriage of Hatton*, 2007 Colo. App. LEXIS 390 (Colo. App. March 8, 2007).

53. J. S. Coleman, "Social Capital and the Creation of Human Capital," 94 *American Journal of Sociology* 95-120 (1988).

54. *Ciesluk*, 113 P.3d at 147.

55. C.R.S. § 14-10-124(1.5)(a)(XI).

56. *Ciesluk*, 113 P.3d at 142, 145; *Spahmer*, 113 P.3d at 163.

57. *Ciesluk*, 113 P.3d at 147.

58. *Ciesluk*, 113 P.3d at 148.

59. The late Hon. Peter Craven took the position that the court could indeed deny the child's relocation when the nonresidential parent was not a viable candidate for residential parenthood and it was known that the residential parent would not move without the child; *In re Marriage of Turner and Elliot*, Rio Blanco County, Case No. 00DR14.

60. *In re Marriage of Weaver*, 04DR1176 - Division I, 21st Judicial District, Judge Dan Hale.

61. E. M. Hetherington and J. Kelly, *Divorce Reconsidered: For Better or for Worse* (N.Y.: Norton, 2002) at 45-55.

62. *Id.*; *see also* J. Kelly and R. Emery, "Children's Adjustment Following Divorce: Risk and Resilience Perspectives," 52 *Family Relations* 352-362 (2003).

63. *Ciesluk*, 113 P.3d at 149.

64. *Ciesluk*, 113 P.3d at 142; *Spahmer*, 113 P.3d at 163.

65. *Ciesluk*, 113 P.3d at 142.

66. Colorado's CFI Standards are found in Chief Justice Directive 04-08, amended November 2005, and included in the Appendix to this book. *See also* Association of Family and Conciliation Courts, Model Standards of Practice for Child Custody Evaluation, 2006, available at www.afccnet.org.

67. J. W. Gould and D. A. Martindale, *The Art and Science of Child Custody Evaluations* (N.Y.: Guildford, in press).

68. For a discussion of this issue with relocation, *see* W. G. Austin, "Relocation Law and the Threshold of Harm: Integrating Legal and Behavioral Perspectives," 34 *Family Law Quarterly* 63, 76-77 (2000). For a discussion of the broader issue of expert testimony and the ultimate issue, *see* T. Tippins and

- J. Wittman, "Empirical and Ethical Problems with Custody Recommendations," 43 *Family Court Review* 193-222 (2005); N. Bala, "Tippins and Wittman Asked the Wrong Question: Evaluators May Not be 'Experts,' But They Can Express Best Interests Opinions," 43 *Family Court Review* 554-562 (2005).
69. *In re Marriage of Francis*, 919 P.2d 776 (Colo. 1996).
70. *In re Marriage of Garst*, 955 P.2d 1056 (Colo. App. 1998); *In re Marriage of McNamara*, 962 P.2d 499 (Colo. App. 1998); *In re Marriage of Stewart and Weigle*, 43 P.3d 740 (Colo. App. 2002).
71. *In re Marriage of DeZalia*, 151 P.3d 647 (Colo. App. 2006).
72. *Id.* at 648.
73. *Id.*
74. *Id.* at 649.
75. *In re Marriage of Garst*, 955 P.2d 1056 (Colo. App. 1998).
76. *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996).
77. L. A. Shear, "Life Stories, Doctrines, and Decision Making: Three High Courts Confront the Move-Away Dilemma," 34 *Family and Conciliation Courts Review* 439-458 (1996).
78. Hetherington and Kelly (2002) in a longitudinal study that custodial mothers averaged four moves within the first six years after divorce; Booth and Amato (2001) found 46 percent of young adults reported their custodial parent moved within the first year following divorce. E. M. Hetherington and J. Kelly, *Divorce Reconsidered: For Better or for Worse* (N.Y.: Norton 2002); A. Booth and P. R. Amato, "Parental Predivorce Relations and Offspring Postdivorce Well-Being," 63 *Journal of Marriage and Family* 197-212 (2001).
79. *In re Parental Responsibilities of A.P.H.*, 2006 Colo. App. LEXIS 1256 (Colo. App. Aug. 3, 2006) (**note**: the trial court's opinion occurred prior to the release of the *Ciesluk* and *Spahmer* decisions).
80. *Id.*
81. *Id.*
82. *DeZalia*, 151 P.3d at 648.
83. *Ciesluk*, 113 P.3d at 149; also noted by the court of appeals in *In re Parental Responsibilities of A.P.H.*, 2006 Colo. App. LEXIS 1256 (Colo. App. Aug. 3, 2006).
84. Noted divorce researcher Professor E. Mavis Hetherington remarks that the research is more interesting in its variability within groups rather than the differences between group averages that make for statistically significant results. Hetherington and Kelly, *supra* n. 77.
85. This error is labeled the "ecological fallacy" by statisticians and methodologists. See W. S. Robinson, "Ecological Correlations and the Behavior of Individuals," 15 *American Sociological Review* 351-357 (1950); C. Ostroff, "Comparing Correlations Based on Individual-Level and Aggregated Data," 78 *Journal of Applied Psychology* 569-582 (1993).
86. *Supra* n. 44.
87. *In re Marriage of Hatton*, 2007 Colo. App. LEXIS 390 (Colo. App. March 8, 2007).
88. *In re Marriage of Martin*, 42 P.3d 75 (Colo. App. 2002).