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Avoiding Bias in Relocation Cases

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SUMMARY. Bias is a risk in all family law matters, for judges, custody evaluators, mediators, and attorneys. This paper is focused on particular risks as they relate to relocation matters. A description of various types of risk is followed by ways to reduce or minimize the risk of bias in these cases. Ultimately, this author will suggest a protocol that evaluators and judges can use when reaching conclusions about whether or not to allow a parent who wishes to relocate to be able to take the child with him/her. [Article copies available for a fee from The Haworth Document Delivery Service: 1-800-HAWORTH. E-mail address: <docdelivery@haworthpress.com> Website: <<http://www.HaworthPress.com>> © 2006 by The Haworth Press, Inc. All rights reserved.]

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Judges, attorneys, family mediators, and child custody evaluators often consider relocation cases among the more difficult and challenging. Many reasons are hypothesized, including: (1) The possibility that they are more difficult to settle since there is rarely a middle ground; (2) Often there is no solution that is optimal for the child; (3) Many jurisdictions have presumptions, which might hurt one class of people (e.g., presumptions in favor of the move may hurt the non-moving party and presumptions against the move may hurt the party requesting the right to move); (4) Jurisdictions sometimes have little guidance in how to decide the case using either case law or statutory law; (5) There is little research guiding custody evaluators and decision-makers in these matters: Fabricious, W and Braver, S, in press, (this issue). Braver, S., Elman, I., and Fabricious, W., 2003; Gindes, M. 1998; and Shear, L. 1996); and (6) The fear that a parent's request to relocate with his/her child may increase polarization and conflict between divorced parents who might otherwise be co-parenting reasonably well.

In the aggregate, these concerns present unique and difficult challenges to lawmakers and policy makers. These challenges contribute to the emotional and difficult decision-making in individual cases. In conversations with custody evaluators and judges from across the country, this author has heard many people have a tendency to view relocation decisions in a biased way. According to the Cambridge Dictionaries Online (2005) bias is defined as "a tendency to support or oppose a particular person or thing in an unfair way by allowing personal opinions to influence your judgment". For purposes of this article, bias is defined as any personal or professional reason that contributes to that person's thinking about relocation leaning in one direction or another most of the time, regardless of the facts of a particular case. Many times, I have heard either evaluators or judges say that parents should not move with their child except under extraordinary circumstances. Such a belief runs a risk of creating an "against the move bias" in every case. I have heard others who believe that a custodial parent should be allowed to move wherever and whenever s/he wants, believing that if a move is good for the custodial parent, it will automatically benefit the children. Such a belief runs the risk of creating a "for the move bias" in every case. In this author's opinion, it is critical for evaluators and judges to resist such biases in relocation cases and to look carefully at each case before deciding what is in that child's best interests.

Custody evaluators are encouraged by practice standards, guidelines, and in some jurisdictions Rules of Court to control for bias. For example, the Association of Family and Conciliation Courts (AFCC), in its Model Standards of Practice for Child Custody Evaluation (1994) states, “[T]he evaluator shall provide information on any inherent bias(es) . . . that he or she holds, prior to the commencement of any evaluation.” Similarly, the American Psychological Association (APA), in its Guidelines for Child Custody Evaluations in Divorce Proceedings (1994) states, “The psychologist is aware of personal and societal biases and engages in nondiscriminatory practice. . . . The psychologist recognizes and strives to overcome any such biases or withdraws from the evaluation.” The 2005 California Rules of Court, Rule 5.220 states, “In performing an evaluation, the child custody evaluator must . . . (m)aintain objectivity, provide and gather balanced information for both parties, and control for bias”. In all of their work, psychologists are expected to control for bias and avoid misleading statements when making public statements or testifying in court (APA, 2002).

Similarly, family law mediators and judges have expectations of avoiding personal bias in their work (AFCC, 2000). For example, the Model Code of Judicial Conduct (ABA, 2004) states, “A judge shall perform judicial duties without bias or prejudice”.

Shortcuts in decision-making, called heuristics, may affect the ways in which people reach conclusions (Gigerenzer, G., Todd, P. & ABC Research Group, 1999). Biases are examples of such heuristics. While there has been some literature on bias in other areas of family law (e.g., overnights with young children, the psychological parent, and attachment issues), there has been no articles or research addressing the issue of bias directly in relocation cases.

This author’s examination of the amicus briefs (see e.g., Warshak, R., 2003; Shear, L., 2003; Wallerstein, J., 2003) submitted to the California Supreme Court prior to their decision in the Marriage of LaMusga (California Supreme Court, 2004) reveals a tendency on all sides to present information that supported the position or outcome that each author wanted, often revealing a pro-move/pro-mother, against-move/pro-father bias. This was particularly troublesome when research findings were highlighted to suggest a particular outcome while ignoring or minimizing research findings that might suggest a different point of view. A careful reading of these three amicus briefs in particular, which psychologists or a lawyer authored, used much of the same research data to reach opposite conclusions about the meaning of those data or how those data should be applied in relocation matters. There is

so little research that directly relates to relocation in divorce that we are often left with interpreting other research and making inferences about how this research might apply in relocation cases. However, by highlighting one set of data over another, e.g., that children's adjustment to divorce is linked to the well-being and psychological functioning of the primary parent (the brief authored primarily by Wallerstein) or that children's adjustment in divorce is linked to having both parents actively engaged in a wide range of their children's life and experiences (the briefs primarily authored by Warshak and Shear), it is easy to make an argument that is either "for the move" or "against the move" in the majority of cases.

While none of the briefs oversimplified things to that extent, it is this author's opinion that all of those briefs highlighted research data that supported the relocation position of those authors. While it is not unusual for experts to take advocacy positions in legislative lobbying or amicus briefs to the court, it is critical that, in individual cases, experts and decision-makers need to control for their personal biases by looking at the facts of each particular case and making the tough recommendation or decision about how to apply the law in that family's jurisdiction and all of the psychological research with the family dynamics when making a recommendation or decision.

BIASES RELEVANT TO RELOCATION CASES

Gutheil (2004) lists several types of bias that may affect expert's work as a way of helping to avoid the impact of those sources of bias. While all sources of bias are relevant in any family law or forensic matter, this author will focus on some potential sources of bias and the risk that each has in deciding a particular relocation case.

Gender Bias

Gender bias is one of the more classic biases in family law, as custody evaluators, family mediators, and judges are frequently accused of gender bias and of treating women or men differently in the system. Politically, there are mother's rights advocates and father's rights advocates who, by their very nature, take advocacy positions on a variety of issues. This author believes that the research which focuses on "the psychological parent" (see e.g., Goldstein, Freud, and Solnit, 1984) tends to support and favor mothers over fathers. Other observers interpret the

growing research data on fathers and their involvement with children (see e.g., Lamb, Sternberg, and Thompson, 1997) as supporting a father's rights bias. It is critical for judges and custody evaluators to avoid gender bias in their work.

Cultural Bias

This refers to the potential that a judge or custody evaluator will make decisions based on aspects of the culture of one or both of the parties being served. One way this may surface in relocation cases is when one of the parents wants to move children to a country that has very different cultural experiences or to a country that has not adopted the Hague Convention on the Civil Aspects Of International Child Abduction. While the cultural issues may be important, especially in a long-distance relocation, it is only one factor and might not be the only relevant issue to be considered. This author has seen a situation in which an evaluator highlighted the distance to a South American country and the need for the child to adjust to a new culture as being more important than all of the other issues in a particular case, including the child's special education needs and the relative attachment differences, when making a recommendation against the move.

Using Research to Support One's Bias

There is a risk that custody evaluators, judges, and those who write amicus briefs and lobby politicians will use research to support a pre-conceived opinion (Ramsey, S, 2006) Many custody evaluators generically describe that "research suggests" a particular thing when formulating opinions and recommendations at the conclusion of an evaluation, without providing citations to the research being mentioned. This author has seen evaluators refer to the need for both parents being actively involved in the child's life experiences and using this as the reason for rejecting a parent's request to move with a child, even though that research might not apply to the particular facts of the case because the other parent had spent very little time with the child over the previous few years. Another example would be when an evaluator cites the primary parent theory as a reason for supporting a move, in spite of the flimsy rationale for the move and the active involvement of the other parent on a regular and consistent basis during the child's life. In addition, none of this research might apply when a parent's job is relocated and the parents have shared custody and the parenting for years. In such

a case, the decision will need to be based on an analysis of advantages of mother-custody in one location or father-custody in the other location rather than a recitation of such research. The risk is that an expert might cite only the research that supports the position with which the expert agrees. This could lead to some type of “pro-mother in favor of the move” or “pro-father against the move” position in a particular relocation case. This author believes that it is important to cite any research used in reaching conclusions to reduce the risk of a bias interfering with those conclusions.

Primacy or Recency Bias

Primacy bias refers to the tendency to rely on the first pieces of information that an evaluator hears, whereas recency bias refers to the evaluator relying on the last pieces of information that an evaluator hears (Gutheil, 2004). While these potential biases are typically associated with bias risk in all custody evaluations, they are a significant risk in relocation cases. For example, if the evaluator hears early in the evaluation from one parent that the other parent who wants to move with the child has often interfered with access two things might occur. First, the evaluator is at risk of interpreting everything s/he hears through the filter of this allegation and anchoring all data toward that filter. Second, the evaluator is at risk of giving that piece of data significantly more weight than all of the rest of the data. A similar risk occurs when an evaluator hears from a collateral witness toward the end of an evaluation that the parent who does not want the child to move has not attended any parent-teacher conferences. While all of this might be important data, the risk of bias occurs when the evaluator stops gathering additional data because s/he believes that this last piece of data puts the proverbial nail in the coffin. If the evaluator anchors data to what is heard first or stops gathering data prematurely when more data might lead to a different conclusion, such potential biases can lead to a conclusion that is not in the child’s best interests.

Confirmatory Bias

Like the bias associated with primacy or recency effects, confirmatory bias is the tendency for a custody evaluator or a judge to look for certain data or evidence that supports a particular position and then try and fit all of the other data into that position. Hence, the evaluator or judge is looking for data to support the position that the evaluator or

judge holds or believes. This is a significant risk in relocation cases if the evaluator or judge believes that moves are either generally a good thing or generally a bad thing. Confirmatory bias interferes with the evaluator's or judge's ability to look for data or evidence that does not support the conclusion reached. In order to reduce the risk of confirmatory bias, the evaluator or judge must consider multiple hypotheses and continue gathering all relevant data before reaching any conclusions on the case. In fact, California Rule of Court 5.220 is clear that child custody evaluators must include all data that supports their conclusions, as well as data that don't support their conclusions in any reports or testimony to the court.

Using Psychological Test Data to Support One's Bias

Like these other biases, psychologists who are prone to view relocation cases a certain way are at risk for interpreting psychological test data to support a particular position rather than using it to generate hypotheses. While there is risk for the misapplication of psychological test data in any child custody evaluation, it is this author's opinion that there is great risk of this misapplication of test data to support a particular conclusion in a relocation case. For example, if a parent who wants to move tests as defensive and presents herself in a favorable light on an MMPI-2, as many custody litigants do (Bathurst, Gottfried, and Gottfried, 1997), a psychologist who is reluctant to recommend in favor of a move might use that data, and that data alone, to suggest that she cannot be trusted to support the child's relationship with the other parent after she moves. Similarly, a psychologist might suggest that a parent who scores as narcissistic on the MCMI-III and Rorschach might not be sufficiently child-focused to be the primary parent and recommend that the other parent be able to move with the child. The problem with both of these situations is that psychological tests, just like any one data source, should only be used to generate hypotheses about people's personality traits and should never be used to generate recommendations (Gould, 1998 and Stahl, 1999). Thus, the risk with psychological test data is that the evaluator will subjectively select those test data which will support the bias that the evaluator holds.

"Truth Lies in Somewhere in the Middle" Bias

This author believes that there are other potential sources of bias that are not mentioned elsewhere in the literature. One example is what this

author calls “truth lies somewhere in the middle” bias. Many evaluators and judges, in particular those who are at risk for burnout because they have worked in the system for so long, are at risk for exhibiting this bias. There is a tendency to perceive that each member of a couple in conflict has equal contribution to that conflict. While that situation is common in many high conflict situations, there are other instances in which one parent drives most of the conflict and the other parent tends to be more reactive to that conflict. This “truth lies somewhere in the middle” bias prevents evaluators and judges from recognizing the unique contributions of each parent to the conflict. However, these unique contributions to the conflict are likely to be an important and relevant factor to consider in a given case, and in particular in a relocation case. Assigning equal blame to both parents is a mistake when the responsibility for different components of the conflict are more likely caused by one parent rather than the other parent. In relocation cases, in particular, this author has seen numerous instances in which evaluators who judge the conflict to be equally driven by both parents avoid recognizing the unique contributions of each parent and how it may be differentially harmful to the child. When that occurs, it is easy for an evaluator to be swayed by his/her pro-move or against-the-move bias rather than by the complete data, including data relevant to each parent’s contribution to the conflict.

“Atilla the Hun Doesn’t Marry Mother Theresa” Bias

Another potential bias that is not described elsewhere is what this author calls “Atilla the Hun doesn’t marry Mother Theresa” bias (Rotman, 2000). Many experienced evaluators and judges have long recognized that in most families, parents are often relatively equal in parenting ability. Like the “truth lies somewhere in the middle” bias, this bias presupposes that a healthy parent is not likely to marry a less functional parent. While that frequently may be the case, it is not necessarily the case. When looking at a family individually, there are many instances in which one parent or the other is clearly psychologically healthier than the other, has a healthier attachment with the child, and/or has a parenting style that is more consistent with a particular child’s temperament and needs. While all custody evaluations and decisions demand clarity on the strengths and weaknesses of all parents, the risk of assuming that parents are equal when they are not is particularly troublesome in relocation cases. This might lead to an assumption that shared custody and not moving is in a child’s best interests when the data would support that the child is more attached to the moving parent or that resid-

ing with one parent is healthier for the child even in a different location away from the other parent.

“For the Move” or “Against the Move” Bias

All of this leads to this author’s concern that many evaluators and judges have a bias that moves are either a good thing or a bad thing for children. Those who tend to be pro-move take the position that a custodial parent who wishes to move should generally be allowed to move as long as the custodial parent has a legitimate reason for moving and is not attempting to interfere with the access rights of the other parent. Evaluators and judges might bring a unitary approach and conclude that this parent can move with the child—once they determine that one or the other parent is “the psychological parent” or primary custodial parent and once they determine that there is a legitimate reason for moving or that there is no evidence of interference with the other parent’s access. Jurisdictionally, there are many states in which case law or statutory law supports such a presumption in favor of moving, but there is no evidence in the literature to suggest that psychologists should have such a presumptive belief in relocation cases.

Similarly, there are many custody evaluators and judges who perceive that it is a parent’s responsibility to stay near the other parent in order to preserve the child’s access to the other parent and the involvement of both parents in her life. This author believes that, while there is research data to support the belief that children benefit with both parents’ active involvement in their lives (Kelly and Emery, 2003), extrapolating that data to support a presumption against moves confounds the issue. Clearly, there are many circumstances in which a move is both legitimate and justified, whether for academic, economic, or other personal/family reasons. In those cases, a parent is going to move, with or without the child. It is incumbent on evaluators and judges not to confuse the preference and value for shared co-parenting that exists in some of the research and some statutory laws with a presumption that moves will harm children. Rather than having a presumption against the move, it is this author’s view that evaluators and judges must consider and weigh the relative risks and benefits of having the child move with one parent vs. having the child not move and remain primarily with the other parent. Those observers who encourage “conditional change of custody orders” to try and prevent some parents from moving (e.g., Braver et al., 2003 and Fabricious and Braver, this issue) run the risk of using an

“against the move” bias as a way to keep both parents in the same geographic location.

REDUCING THE RISK OF BIAS

One of the ways to reduce the risk that bias might affect a person’s conclusions is to clearly recognize that biases exist and that we are all at risk of being affected by our biases. Once we consider this fact, evaluators and judges can examine their conclusions and decisions and look for trends or evidence of such bias. This author has talked with evaluators who have stated that they have rarely recommended in favor of a move. Similarly, this author has talked with judges who have stated that they rarely make an order in favor of a move and other judges who rarely make an order denying a move. If these judges and evaluators do not examine the reasons for this propensity they can never determine if they are based on an “against the move” or “for the move” bias or if they are related to the facts of a specific case. Whenever a person concludes that s/he is acting largely in a particular way, s/he must consider that this is bias driven. If bias is found in one’s decisions, the evaluator or judge should examine both the sources of that bias and look for ways to reduce it.

One way to reduce the risk of such bias is to participate in peer consultation. Discuss your challenging cases (and most relocations are challenging) with several peers, especially those who you know to be equally or more experienced in these matters. This author suggests that evaluators and judges use that consultation to challenge your thinking, so it is helpful to choose colleagues who might not always see things the same way as you. Encourage your colleague to play devil’s advocate with you to force you to make a less biased analysis.

Along the same lines, play devil’s advocate with yourself. Challenge your reasoning. Ask yourself if you’ve considered all of your data or if you’ve showed evidence of confirmatory, recency, primacy, or anchoring bias. Then, show such thinking in your report or your order. If you’ve used multiple methods to gather data or evidence (which is expected of judges and evaluators) and maintained multiple hypotheses at each stage of the case, and if you’ve considered and integrated all data before reaching conclusions, you’ll be at less risk of having a bias affect the outcome of a particular case.

Another excellent way to reduce the risk of bias is to take, and teach, continuing education courses in all areas of assessment and family law.

Evaluators and family law judges need to stay up to date on all of the relevant research in the areas of family law, including relocation, domestic violence, issues of abuse, child development and attachment theory, alienation, the effects of divorce and high conflict on children, and ways to ameliorate the negative effects of divorce. In so doing, they can reduce the likelihood that biases like the ones mentioned above will contribute to their conclusions.

A SUGGESTED PROTOCOL FOR RELOCATION CASES

For purposes of relocation, it is impossible to meet all relevant goals to helping children and their families. It is often difficult to mediate relocation issues, though some families can use mediation successfully in a relocation dispute. Many parents who successfully co parent are unable to remain free of conflict when a parent announces plans to relocate. It is impossible for two parents to continue sharing day-to-day parenting when one of them lives a considerable distance from his/her child. This requires judges and evaluators to develop a different analysis when working with a family where relocation is the issue. All too often, no one wins when either parent wishes to relocate, and the parenting options are more limited when parents are geographically far apart. To reduce the risk of letting bias interfere, it is critical to approach a relocation case differently than all others. The rest of this paper will focus on a suggested way to address the issues, either in your evaluation or in your order.

Tippins and Wittmann (2005) suggested that custody evaluators avoid making recommendations on the ultimate issue. While this author does not agree with their position in general (Stahl, 2005), I agree that one way to avoid bias in many relocation cases is to follow their suggestion. Rather than making custodial recommendations, Tippins and Wittman suggest that evaluators should provide relevant family data and an analysis of that data to help the court understand important family dynamics in relation to the psycho-legal question. Both the psychological literature (Austin, W. 2001 and 2006; Elrod, L., 2006; Kelly and Lamb, 2003; and Stahl, 1999) and statutory or case law in many states describe many factors that are relevant in relocation cases. One example of a comprehensive list of such factors is found in the California Supreme Court decision in the marriage of LaMusga (California Supreme Court, 2003). These factors include:

1. The children's interest in stability and continuity of the custodial arrangement.
2. The distance of the move.
3. The age of the children.
4. The children's relationships with both parents.
5. The relationship between the parents, including but not limited to:
 - a. Their ability to communicate and cooperate effectively.
 - b. Their willingness to put the interests of the children above their individual interests.
6. The wishes of the children if they are mature enough for such an inquiry to be appropriate.
7. The reasons for the proposed move.
8. The extent to which the parents are currently sharing custody.

It is this author's opinion that a comprehensive custody evaluation will list relevant factors that can be found in the literature or in your respective state law and provide an analysis of your understanding of each of these factors. After completing this part of the analysis, it is important to consider an analysis of the advantages and disadvantages of primary mother-custody in one location, primary father-custody in another locations, and shared-custody for the family. As described by Austin (2000 & 2006), this risk-benefit analysis needs to consider all of the relevant factors and not confound the desire for both parents to be actively involved in the child's life with the tough decision needed in a relocation case. Rarely is a relocation case simple enough that all of the benefits fall with one parent and all of the risks fall with the other parent. If that situation exists, the decision will be an easy one and I believe the evaluator in such circumstances can make a recommendation. However, in the vast majority of cases, there will be benefits to be derived from moving with one parent and benefits to be derived from remaining in the current location with the other parent. In an evaluation report, all of these benefits (and any risks) should be described so that the reader can fully understand the comprehensive analysis and the interaction of family data with the legal issues and be confident in a job well done. Similarly, if a judge places such an analysis in his/her statement of decision, keeping focused on the interaction of the family data and the legal mandate, an appellate court will have confidence in a job well done. Of course, there is always a risk that the evaluator will skew which data gets presented because of one's bias, so it is important to include data that supports one's conclusions as well as data that does not support one's conclusions.

As Stahl (1999) previously described, it is best if an evaluator outlines the specific questions that need to be understood in a particular relocation case. With the recent listing of various relevant factors (see e.g., Austin, 2000; Lamb and Kelly, 2003, Marriage of LaMusga, 2004), this author suggests providing a relevant listing of those factors and the responses to those factors. Considering all of the factors addressed in these articles and case law, a variety of factors seems relevant for all relocation cases. An example of the relevant questions and factors follows (for a 10 year old boy):

1. A move typically leads to greater instability and change. How can we expect Steve to deal with these changes in his life?
2. Is the move representative of stability or a pattern of instability on the part of the moving parent?
3. Are there concerns about the mental health of the moving parent and whether or not the moving parent will facilitate a positive relationship between Steve and the other parent over time?
4. Are there concerns about the mental health of the non-moving parent that might mitigate against a change of custody if one would otherwise be warranted?
5. Does Steve have any special needs, siblings, activities or friends that will be affected by the move?
6. What has been the actual custodial arrangements, how have they been working, and what are the problems?
7. Is there some type of detriment to Steve in moving?
8. Does Steve have an interest in stability and continuity of the custodial arrangement?
9. How does the distance of the move affect the recommendation?
10. How does Steve's age affect the recommendation?
11. Describe Steve's relationships with both parents.
12. What is the relationship between the parents, including but not limited to their ability to communicate and cooperate effectively?
13. How willing are they to put Steve's interests above their individual interests?
14. What are Steve's wishes and is he mature enough for such an inquiry to be appropriate?
15. What are the reasons for the proposed move?
16. To what extent are the parents currently sharing custody?

For a child custody evaluation, addressing the specific responses to these questions and overall family data can help lead to an unbiased conclusion as long as all relevant data is presented. At times, the psychological data line up in a way that suggests moving, or not moving, is clearly in the child's best interests. In those circumstances, a specific recommendation is warranted. However, in most circumstances, the evaluator may not have sufficient data to make a specific recommendation about the move and instead should be careful to outline the relative risks and benefits of living with mother in one location vs. living with father in another location. Additionally, in many jurisdictions, it is inappropriate to make a specific recommendation to the court since the relocation is a specific legal issue that is within the purview of the judge.

Under those circumstances, I would encourage custody evaluators to provide 3 sets of recommendations, one if the judge allows the moving parent to take the child with him/her, one if the judge does not allow the moving parent to take the child but the parent moves anyway, and one if the moving parent abandons his/her request to move or both parents end up moving so that both parents are in the same geographic area. By doing so, the evaluator reduces even further the risk that his/her biases might contribute to the recommendations being made while providing the court with the necessary information from which to make a decision.

CONCLUSIONS

In this author's opinion, bias is a phenomenon that cannot be removed; it can only be managed and controlled for. The steps to managing bias are found in identifying it, acknowledging it, self-checking for the impact of bias in our work, and having an approach that reduces the risk of bias interfering with sound conclusions. Relocation cases, by their very nature, are difficult for all practitioners. These cases are often complex and have no "best" answer. By recognizing the risk of bias, by utilizing various methods for gathering data, and ultimately by addressing the factors relevant to relocation cases before reaching our conclusions, custody evaluators and judges will reduce the risk of being influenced by one's bias. Additional research would help us in our understanding of how relocation affects children and families, and hopefully reduce bias as well. Ultimately, we must be very careful in all relocation cases and check against bias, otherwise decision-making will be short-changed and over-simplified.

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