

**FLY ME TO THE MOON:
EFFECTIVE ADVOCACY IN RELOCATION CASES**

HON. ROY FERGUSON, *Alpine*
Judge, 394th Judicial District Court

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CHAPTER 40

HON. ROY B. FERGUSON

394th Judicial District Court

Brewster, Culberson, Hudspeth, Jeff Davis, and Presidio Counties

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Professional Affiliations, Honors, Memberships and Awards

- Judge – 394th Judicial District Court (2013-Present)
- COVID-19 Specialty Court Judge – by assignment by Chief Justice Nathan Hecht (2020)
- Judge Pro Tem – 8th District Court of Appeals, El Paso (2015-2016, 2019, 2020)
- Director – Judicial Section, State Bar of Texas (2015-Present)
- Member – Judicial Needs Assessment Committee (2019-Present)
- Member – OCA Uniform Case Management System Study Group (2020)
- Liaison Member – Judicial Committee on Information Technology (2016-Present)
- Member – Texas Judicial Council Civil Justice Committee’s Advisory Council (2018)
- Life Sustaining Fellow – Texas Bar Foundation
- Member – Champions of Justice Society
- Member – Texas Bar College
- Special Service Commendation – State Bar of Texas GPSOLO Section (2014)
- Lawyer of the Year – State Bar of Texas GPSOLO Section (2012)
- Member – District 17 Grievance Committee, State Bar of Texas (2011-2012)
- General Practice Solo and Small Firm Section, State Bar of Texas
 - Councilmember (2003-2016), Officer (2006-2014, including Chair (2009-2010))
- Licensed to practice before the United States Supreme Court
- Member – State Bar of Texas (1995-Present)

Education and Related Honors

- Juris Doctorate of Law, St. Mary’s University, San Antonio, Texas (1994)
- Bachelor of Science in Civil Engineering, University of Texas at Arlington (1992)
- Member, Chi Epsilon, honorary fraternity for civil engineering students
- Member, Kappa Kappa Psi, honorary fraternity for college bandmembers
- Member, Phi Alpha Delta, honorary fraternity for law students

Public Speaking and Articles

- 2020, National Judicial College, Presenter/Panelist, “Virtual Court During a Pandemic: Platforms, Process, and Procedure.”
- 2020, Illinois Judicial College Committee and Committee on Judicial Education, Presenter/Panelist, “Conducting Remote Hearings in Child Protection Cases.”
- 2020, National Center for State Courts, Presenter/Panelist, “Lights, Camera, Motion!: Act II. Conducting Effective Remote Hearings.”
- 2020, Texas Family Law Section CLE, Presenter/Panelist, “Zoom Training for Family Lawyers.”
- 2020, Family Justice Conference, Texas Center for the Judiciary, “Controlling the Courtroom.”
- 2020, Texas Indigent Defense Commission Workshop, Presenter/Panelist, “Rural Public Defenders.”
- 2019, Adv. Family Law Conference, Presenter, “Things (Some) Lawyers Do Well.”
- 2019, SBOT Webcast, Presenter/Panelist, “When a Lie Isn’t a Lie: Dealing with False Testimony During Trial.”
- 2019, State Bar of Texas Annual Meeting, Presenter, “Simple Things Everyone Does Wrong.”

Public Speaking and Articles (continued)

- 2019, Marriage Dissolution 101, Presenter/Panelist, “Gearing Up: Pleadings.”
- 2019, Marriage Dissolution, Presenter/Panelist, “When a Lie Isn’t a Lie: Dealing with False Testimony During Trial.”
- 2019, Adv. Evidence and Discovery Conference, Presenter, “Ethics in the Courtroom.”
- 2019, Presiding Judge, “State of Texas v. Kylo Ren – Mock Jury Selection.”
- 2019, Adv. Trial Skills for Family Lawyers, Presenter, “Trial on the Merits: Winning from the Beginning.”
- 2018, Adv. Family Law Conference, Family Law 101, Presenter, “Discovery: A View from Both Sides of the Bench.”
- 2018, Ector County Bar Association CLE, Presenter, “Simple Things that Everyone Does Wrong.”
- 2017, NM Defense Lawyers Association and West Texas TADC Joint Seminar, Presenter, “A View from the Bench – Ethical and Effective Advocacy: What Works and What Doesn’t.”
- 2017, Texas A&M University School of Law, “Ethical and Effective Representation of Rural Communities.”
- 2017, Presiding Judge, “State of Texas v. Luke Skywalker – Mock Jury Selection.”
- 2016, Adv. Family Law Conference, Presenter, “Parental Alienation: What It Is and What It Isn’t.”
- 2016, State Bar of Texas Annual Meeting, Presenter, “Effective and Ethical Advocacy from the Judge’s Perspective.”
- 2016, Presiding Judge, State of Texas v. Harry Potter – Mock Jury Selection.”
- 2015, Adv. Family Law Conference, Presenter, “Judges’ Tech Tips.”
- 2015, Val Verde County Bar Association Annual CLE, Presenter, “Effective Use of Courtroom Technology in Family Law.”
- 2015, State Bar of Texas Annual Meeting, Presenter, “Effective Advocacy – What Does and Doesn’t Work in the Courtroom from a Judge’s Perspective.”
- 2015, American Legion District Convention, Keynote Presenter, “And Justice for All.”
- 2014, State Bar of Texas CLE, Presenter/Panelist, “What Judges Think Is (and Isn’t) Persuasive With the Use of Technology in the Courtroom.”
- 2014, State of Texas Juvenile Probation Chief’s Conference, Presenter, “Sex, Violence and Video Games.”
- 2014, Region 18 Meeting of School Administrators, Presenter, “Sex, Violence and Video Games.”
- 2014, State Bar of Texas Annual Meeting, Presenter, “Practical and Ethical Impacts of *In re Stephanie Lee*, or: Who Will Speak for the Children?”
- 2013, West of the Pecos Republican Women’s Association, Presenter, “Freedom of Speech is Under Attack!”
- 2012, American Legion Regional Meeting, Presenter, “Defending Freedom of Speech.”
- 2012, State Bar of Texas Annual Meeting, Presenter, “Legal Ethics vs. Moral Compass.”
- 2011, Texas Bar Journal, January Edition, “Referendum 2011 – How Would You Advise a Lawyer to Vote?”
- 2011, State Bar of Texas Annual Meeting, Presenter, “Ethics and the Small Law Firm – That’s an Impact Tremor, That’s What THAT is!”
- 2010, State Bar of Texas Annual Meeting, Moderator and Presenter, “Recent Ethical Issues for the Solo and Small Firm Practitioner.”
- 2010, General Practice Institute, Waco Texas, Moderator
- 2009, State Bar of Texas Annual Meeting, Presenter, “Hot Topics in Legal Ethics.”
- 2008, State Bar of Texas CLE, Presenter, “Ethics and the Small Law Firm.” (webcast)
- 2008, State Bar of Texas CLE, Presenter and Moderator, “Ethics and the Small Firm: Use of Technology in the Development of a Successful and Profitable Practice.”
- 2008, State Bar of Texas Annual Meeting, Presenter, “Ethics and the Small Law Firm – Ten Hot Tips on Avoiding Grievances.”
- 2007, State Bar of Texas Annual Meeting, Presenter, “Ethics and the Small Law Firm – Avoiding Grievances Through Early Detection.”
- 2006, Article, “Ethical Pitfalls for the Community Lawyer – an Outline for Discussion among General Practitioners.”
- 2006, State Bar of Texas Annual Meeting, Presenter/Moderator, “Panel Discussion on Legal Ethics.”

About the 394th Judicial District

The 394th Judicial District is comprised of Brewster, Culberson, Hudspeth, Jeff Davis, and Presidio Counties. The District encompasses approx. 20,000 sq. miles (larger than nine states), and includes over 20% of the United States–Mexico border.

About the Champions of Justice Society

The Texas Access to Justice Commission, created by the Supreme Court of Texas in 2001, is charged with developing and implementing initiatives designed to expand access to, and enhance the quality of, justice in civil legal matters for low-income Texans. The Champions of Justice Society is comprised of those attorneys and judges who show the strongest support of access to justice.

About the Judicial Committee on Information Technology

A part of the Texas Supreme Court's Texas Commission on Judicial Efficiency, the mission of the Judicial Committee on Information Technology is to establish standards and guidelines for the systematic implementation and integration of technology in Texas' trial and appellate courts.

About the Texas Bar Foundation

Founded in 1965, the Texas Bar Foundation has maintained and pursued its mission to assist the public, improve the profession of law, and build a strong justice system for all Texans. Fellows of the Foundation are selected for their outstanding professional achievements and their demonstrated commitment to the improvement of the justice system throughout the state of Texas. Each year, only one-third of one percent of State Bar of Texas members are invited to become Fellows.

About the Texas Bar College

The Texas Bar College is an honorary society of lawyers who are among the best trained attorneys in Texas. Members are qualified attorneys who are interested in both high ethical standards and improved training for all Texas attorneys. The College recognizes and encourages lawyers, paralegals and judges who maintain and enhance their professional skills and the quality of their service to the public by significant voluntary participation in legal education.

About the 394th District Court Mock Jury Selection Program

When Judge Ferguson took the bench on January 1, 2013, public response to jury summonses across the 394th Judicial District was incredibly low – in some counties below 15%. Judge Ferguson implemented a multi-faceted plan to increase and improve jury turnout, with minimal fining or jailing community members in one of the poorest parts of Texas. A key facet of that plan is public education and awareness of the jury system. During Juror Appreciation Week in Texas each year, every high school senior in the District is summoned to appear before Judge Ferguson as a potential juror. Students are placed under oath, qualified, and questioned in a realistic jury selection for a fictional case. In 2016, Harry Potter was tried for the murder of Voldemort. In 2017, Luke Skywalker stood charged with 1.1 million counts of murder for blowing up the Death Star. (Charges against Mr. Potter were dismissed after the jury was empaneled and sworn, and the trial of Mr. Skywalker ended in a mistrial when the defendant leapt from his seat at counsel table and attacked the first witness for the prosecution – Darth Vader.) And in 2019, Kylo Ren was tried for the murder of his father, Han Solo. All fictional defendants are innocent until proven guilty.

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LICENSE:

The State of Texas - May 1991

The Southern District of Texas - November 1992

Mediation Certificate - December 1995

Adv. Family Law Mediation Certificate - December 2002

Board Certified – Family Law

Texas Board of Legal Specialization - 2012

EDUCATION:

December 1996

University of Houston: Master of Laws, Environmental Law

December 1990

Texas Southern University, Thurgood Marshall School of Law: Juris Doctorate

Summer 1990

Notre Dame Law Center: London Law Program

May 1988

Howard University: Bachelor of Arts in Political Science (Cum Laude)

EXPERIENCE:

August 1999 -
Present

Associate Municipal Judge for the City of Stafford.

February 2014 -
Present

Bastine Law Group
Family Law Firm

March 1995-
February 2014

Bastine and Associates:
Family and Civil Law Litigation Firm

Areas of Practice: Family, Business, Environmental Litigation.

May 1996 -
July 1996

Adjunct Professor Thurgood Marshall School of Law:
Seminar in Environmental Criminal Law

May 1994-
March 1995

Bastine & Bastine Attorneys at Law:
Partner - Litigation Firm

Areas of Practice: Business, Personal Injury, Family and
Criminal Defense Litigation.

February 1992-
May 1994

Law Office of Reginald McKamie:
Contract Attorney

Areas of Practice: Pre-Trial Discovery and
Civil Litigation.

July 1991 -
December 1991

Department of Housing and Urban Development:
Attorney - Advisor

Duties: Prepared of litigation files and pre-trial discovery proceedings. Participated in mediations. Completed closings for multifamily properties. Assisted in conducting Multifamily Foreclosure Sales. Approved contracting applications.

HONORS AND ACTIVITIES

2019 - Present	American Academy of Matrimonial Lawyers
2018 - Present	Burta Rhodes Raborn Chapter American Inn of Court
2012 - Present	Texas Academy of Family Law Specialist
2012-Present	Gulf Coast Family Law Specialist Association
2012 - Present	Board Certified in Family Law - Texas Board of Legal Specialization
2014 - Present	The Family Lawyers Group
1995-1999	State Bar Grievance Committee Chair
1995-1997	Legal Counsel - Wheeler Avenue Baptist Church
1994-2003	
2016- Present	College of the State Bar
1994-2000	Alternate Member, Houston Environmental Foresight Committee
1993-1995	Legal Counsel Houston Alumnae Chapter Delta Sigma Theta Sorority
1991-1993	Houston Lawyers Association - Corresponding Secretary

Speaking Engagements and Publications

2020 Innovations – Trying a Custody Case for an Addicted Client

2019 Family Law Essentials - Non-Parent Standing - Huntsville

2018 Family Law Essentials - Temporary Orders – Conroe

2017 – Featured on Cross Roads – Hosted by Melanie Lawson – Channel 13

2016 – Fox News Legal Correspondent

2015 – EmPowerHer Coach – Providing business insights to women entrepreneurs

Area Leader for Second Saturday – Financial and Legal Empowerment Workshop for Divorcing Persons - 2018-2019

Publications – Author of book entitled “From Divorce to Deliverance... Divorce Doesn’t (Have to) Mean Devastation Wisdom from the Judge on Surviving Divorce Legally and Emotionally with Your Sanity, Stability and Spirit Intact” – 2014

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FLY ME TO THE MOON: EFFECTIVE ADVOCACY IN RELOCATION CASES

I. INTRODUCTION

Since Americans both divorce and move in significant numbers it is no surprise that move-away and relocation issues between divorced parents arise frequently. This article will explore what many Family law judges consider to be one the hardest legal decisions they have to make – Relocation and the court's responsibility to balance a parent's desire to move to create a better life for the child with the non-relocating parent's need to continue to have a healthy relationship with their child(ren).

II. REQUIREMENT FOR SPECIFIC GEOGRAPHIC LANGUAGE IN DECREES

A. Geographic Restriction

The Family Code specifies that when a trial court appoints joint managing conservators, it *must* designate the conservator who has the exclusive right to determine the primary residence of the child and must either establish a geographic area within which the conservator shall maintain the child's primary residence or specify that there are no geographic restrictions. TEX. FAM. CODE ANN. § 153.134(b)(1) (West 2014).

III. BEST INTEREST OF THE CHILD

However, the best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child." TEX. FAM. CODE. ANN. § 153.002 (West 2014). The court has wide Gillespie v. Gillespie, 644 S.W.2d 449, 451 (Tex. 1982).

A. Best Interest Factors for Relocation

In the seminal case *Lenz v. Lenz*, the Texas Supreme Court set out additional factors that may be relevant to the determination of a child's best interest regarding a parental relocation. Those factors include (1) the reasons for and against the move, including the parents' good faith motives in requesting or opposing it; (2) health, education, and leisure opportunities afforded by the move; (3) the degree of economic, emotional, and educational enhancement for the custodial parent and child; (4) the child's relationship with and presence of extended family and friends, and the effect the move would have on those relationships; (5) whether the child's special needs or talents could be accommodated at the new location; (6) the effect on visitation and communication with the noncustodial parent to maintain a full and continuous relationship with the child; (7) the possibility of a visitation schedule allowing the continuation of a meaningful relationship between the noncustodial parent and child following the move; and

(8) the ability of the noncustodial parent to relocate. In doing so, the supreme court recognized that cases such as these are intensely fact-driven and therefore involve the balancing of these numerous factors, as opposed to formulaic tests. *Lenz v. Lenz*, 79 S.W.3d 10, 15-16 (Tex. 2002).

B. Holley Best Interest Factors

In addition, a court may consider the Holley factors relevant to a best-interest finding, including (1) the child's desires, (2) the child's current and future physical and emotional needs, (3) any physical or emotional danger to the child in the present and the future, (4) the parental abilities of the individuals involved, (5) the programs available to those individuals to promote the child's best interest, (6) the plans for the child by the individuals, (7) the stability of the home, (8) acts or omissions by a parent tending to show that the existing parent-child relationship is inappropriate, and (9) any excuses for the acts or omissions of a parent. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976).

IV. PUBLIC POLICY CONSIDERATIONS

The Texas Supreme Court has instructed courts to consider the public policies outlined in Section 153.001(a) of the Texas Family Code. *Id.* at 14. Section 153.001 states that the public policy of Texas is to: (1) assure that children will have frequent and continuing contact with parents who have shown an ability to act in the best interest of the child; (2) provide a safe, stable, and nonviolent environment for the child; and (3) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.

V. MATERIAL AND SUBSTANTIAL CHANGE

If seeking a modification to lift a geographical restriction, you must first meet the material and substantial change threshold as outlined Texas Family Code § 156.101(a)(1):

The court may modify an order that provides for the appointment of a conservator of a child, that provides the terms and conditions of conservatorship, or that provides for the possession of or access to a child if modification would be in the best interest of the child and:

- (1) the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the earlier of:
 - (A) the date of the rendition of the order; or
 - (B) the date of the signing of a mediated or collaborative law settlement agreement on which the order is based.

In one of the leading authorities, *Bates v. Tesar*, 81 S.W.3d 411 (Tex. App.-El Paso 2002, no pet.); the court stated, [W]e do not hold that relocation, regardless of distance, will suffice to establish a material and substantial change in circumstances. But if the custodial parent moves a significant distance, a finding of changed circumstances may be appropriate. *Id.* at 430.

The court further held that moving a child from one location to another generally results in some change of the circumstances of the child or parents. The issue is whether such change is material and substantial. Some moves, depending on distance and other factors, may not materially alter or interfere with the relationship of the conservators with the child. Deciding whether the move causes a substantial and material change requires intensive examination of the facts of each case. Factors to be considered in such a determination include the distance involved, the quality of the relationship between the noncustodial parent and the child, the nature and quality of the child's contacts with the noncustodial parent, whether the relocation would deprive the noncustodial parent of regular and meaningful access to the child, the impact of the move on the quality and quantity of the child's contact with the noncustodial parent, the motive for the move, the motive for opposing the move, the feasibility of preserving the relationship between the noncustodial parent and the child through suitable visitation arrangements, and the proximity, availability, and safety of travel arrangements. *Id.* See also *In re A.C.S.*, 157 S.W.3d 9, 23 (Tex. App.-Waco 2004, no pet.).

Practice Tips

Potential preliminary questions; scenarios and options

Is the custodial parent attempting to relocate? Has the custodial parent already relocated? Is there a current geographic restriction? How involved is the non-custodial parent in the life or lives of the child or children? How often do the parents communicate? What is the effectiveness of the communication? Is there extended family? Are those persons involved in the life of the child? What are the reasons if any given by the custodial parent? What offers or concessions did the custodial parent offer to compensate for the distance? Since the case determinations are fact intensive, Get the Facts!

Once the parent becomes a client, explore if there has been compliance with the order's change of address notification and use that evidence to demonstrate compliance with the order or lack of compliance with the order, depending on whether you represent the relocating parent or opposing parent. If there has not been compliance, consider a possible enforcement filing. If the parent has moved with the child in violation of the geographical restriction, consider contempt and writ filings. Remember these filings require personal

service and a bit of finesse may be necessary to determine the new address of a parent who has contemptuously relocated or absconded with a child.

VI. A BREAKDOWN OF THE LENZ FACTORS

In advocating for or against a relocation or lifting of a geographical restriction, a practitioner needs to present as much evidence as practical or available outlining the compliance with or opposition to some or all of the *Lenz* factors. Each of these cases deal with a combination of some or all of the *Lenz* factors which are further outlined below.

A. The reasons for and against the move, including the parents' good faith motives in requesting or opposing it.

1. Relocating Parent Strategies

The relocating parents should present detailed evidence of their reason for the move. For example, if career is the reason for the move, then simply testifying of the desire for a new job may not be enough. One should focus more on need for the new position or career rather than desire. It would be prudent to detail the type of position the relocating parent has been afforded and how it differs from their current position. Showing offer letters of the new job and pay stubs from the position the relocating parent is leaving could improve your chances of success. Showing evidence of the lack of opportunity in the current location in comparison to the opportunities afforded at the new location could assist in swaying the court in your client's favor. If moving due to a new marriage, show that the remarriage would allow the relocating parent to assume the role of full-time care giver (especially if a young child). If the facts do not support a one income home, show the stability, additional support, and improvement of quality of life that occurs as a result of the recent or impending nuptials.

2. Opposing Parent Strategies

The opposing parent should challenge the move by asking for documentation of the stated career opportunities and current position of the relocating spouse in discovery. The opposing parent should consider deposing employers or coworkers to determine whether there really is a need for the move. If challenging the parents reason based on new spouse, look at the newness of the relationship, additional stepsiblings, and additional adjustment for child after divorce. If new spouse is in the military, stress the foreseeability of the possible move. Explore whether there is instability in the living situation of the relocating parent that could lead to the possibility of that parent relocating multiple times.

3. Case Example

In re M.A.M., 346 S.W.3d 10 (Tex.App.– Dallas 2011, pet. denied) In this case, the parents divorced in Dallas County and the Father was given the right to establish the child's primary residence within Dallas and contiguous counties. Father filed modification requesting allowance to relocate with the child to Atlanta, Georgia. Mother opposed and filed a modification requesting the exclusive right to establish the child's primary residence within Dallas and contiguous counties. The trial court changed custody and gave Mother the exclusive right to establish the child's primary residence within Dallas and contiguous counties, thereby keeping the child in her present city of Dallas. The court of appeals affirmed the trial court's decision.

Although Father had a good paying job as a tenured faculty member at SMU, he had not been happy in that job for quite some time. The position at Emory University provided him more money, a better working environment, and more prestige. However, the court found father's "unhappiness" did not demonstrate a *need* for the move.

Further, the evidence presented at trial showed that the child's environment was stable. She had an established routine at school. She had her home with Mother and a close relationship with her maternal grandparents. She had relationships with friends from school and the neighborhood where she lived with Mother. She was involved in activities. The child also had an established pediatrician and therapist. Conversely, the evidence showed uncertainties as to the child's life if she moved with Father to Atlanta. Father testified about a similar international school in Atlanta and good public-school options. He intended to arrange his teaching schedule so that he would be home with the child most of the time. He said a wife of one of his colleagues would help care for the child when he needed assistance. Father testified that if the child did not move to Atlanta, he would be able to return to Dallas and visit her twice a month.

B. The health, education, and leisure opportunities afforded by the move.

1. Relocating Parent Strategies

A relocating parent should describe to the court with specificity the opportunities for the child presented at the new location. If health is an issue, discuss how the health of the parent or the child is positively impacted by the new location. If applicable, describe a need of the child that the present location lacks, and that the new location could fulfill. Detail any enhanced educational opportunities for the child and the relocating parent. For example, if the parent has been accepted into a higher education program, describe how moving to matriculate in that program would allow a significant increase in standard of living for both the parent and the child.

2. Opposing Parent Strategies

Detail the lack of opportunities that the new location has for the child. Describe the lack of leisure and educational opportunities that would be detrimental to the child. For example, if the child is heavily involved in activities, show the court how the new location lacks the activities or involvements the child presently has enjoyed. If dealing with a child with special needs, specify how the needs of the child are met in the current city where the child lives and show the drastic change and difficulty in ensuring that the needs of the child will be met at the new location.

3. Case Example

In re E.C.M., 2010 WL 2943091 (Tex. App.– Amarillo July 28, 2010, no pet.) Parents divorced in Travis County in 2006 and Mother was given the right to establish the primary residence within Travis and contiguous counties. Mother filed a Petition to Modify to remove the geographical restriction to move to Dallas and remarry. A bench trial was held, and the court granted the modification and allowed her to establish the child's primary residence within Dallas County, Tarrant County, Travis county or contiguous counties to each of those counties. The Father appealed claiming there was insufficient evidence of a material and substantial change in circumstance, because he asserted that at the time of divorce it was contemplated that mother would move to Dallas with her boyfriend. Mother testified that she had known boyfriend since college, but a romance developed two years after divorce from Father, therefore no such contemplation had been a factor.

The court found that the relocation would be a positive change in the general quality of life for the Mother and the child in that relocation to Dallas would allow her to remarry, resulting in increased emotional and financial support for the Mother, as well as superior employment opportunities for the Mother. Mother's improved financial situation would allow her to provide a better standard of living for the child. It should be noted that father did not attack this finding directly. Rather he asserted that, in general, the child's current relationship with his "extended family" and the child's current "community" would indicate that the contemplated relocation would not be in the best interest of the child. However, substantial evidence was offered by Mother that the relocation would provide her with 1) a better employment situation, 2) more financial support, and 3) significantly more emotional support. None of this testimony was contradicted by Father. The decision of the trial court was affirmed.

C. The degree of economic, emotional, and educational enhancement for the custodial parent and child.

1. Relocating Parent Strategies

Describe with specificity how the new location presents advanced economic and educational opportunities for both the child and the parent. Describe the hindrances of the relocating parent's current employment or financial circumstances. Describe whether there is a lack of opportunity for employment at the present location and whether the new location presents more opportunities. Describe the current educational opportunities for the child and how the new location offers enhanced educational opportunities for both the child and the parent.

2. Opposing Parent Strategies

Expose that there are few or little differences between the opportunities at the new location versus the current location. Challenge that what the relocating parent describes as a "need" as merely a "want" and that the move would not significantly enhance the lives of the parent or the child.

3. Case Example

In re Cooper, 333 S.W. 3d 656 (Tex.App.–Dallas 2009, no pet.). The Court entered Agreed Temporary Orders providing that the children would reside in South Carolina with Mother while she is completing her residency program. The Temporary Orders provided that the children would continue to be considered residences of Dallas County, Texas and that the question of their permanent domicile would be left open for later resolution. Mother looked for a job in Dallas but accepted a job in North Carolina. Mother filed a request for the Court to modify the temporary orders to allow her to move to North Carolina. The Associate Judge issued a report permitting Mother to temporarily designate Gaston County, North Carolina as the children's residence. Father appealed and the trial court ordered the children to return to Dallas, despite evidence in the record that relocating mother had carried out an unsuccessful job search in the Dallas area, that she had accepted the only position she was offered, that she had purchased a home in North Carolina, that relator's father had moved to North Carolina to assist in the children's care, and that forcing her to relocate to the Dallas area without employment and no place to live would be financially devastating. The trial court overturned the associate judge's ruling and imposed a residency restriction because relocating Mother did not, in the trial court's view, make "extreme efforts" to find employment in Dallas which was the preferred residency "by leaps and bounds."

The appellate court found no authority supporting the trial court's requirement that relator make "extreme efforts" to find employment within the residency-

restricted area. In fact, courts favor modifying residency restrictions to allow the custodial parent to relocate when the proposed relocation will significantly improve the custodial parent's economic circumstances to the child's benefit.

D. The child's relationship with and presence of extended family and friends, and the effect the move would have on those relationships.

1. Relocating Parent Strategies

Be mindful to present testimony of the child's familial relationships in the new location. If possible, have witnesses come testify regarding the age of cousins or family friends that would be around the child. The more testimony that shows strong family ties to the new location, and that the child would benefit from those relationships, the more favorable the new location looks to the fact finder.

2. Opposing Parent Strategies

Present testimony that the new location offers little or no family relationships for the child. Evidence the strength of the family relationships in the child's present city. If applicable show the family relationships in the new location could be detrimental to the child.

3. Case Example

In re Tyson, No. 12-10-00243-CV. (Tex.App.–Tyler 2012, no pet.)

The parties were divorced in Rusk County with parties JMC and Mother granted the right to establish the primary residence in the State of Texas. She told her former spouse that she intended to move from Henderson to Waco, Texas to work with her father and return to school. Father filed a Petition to Modify requesting to be appointed the parent with the right to establish the primary residence within Rusk County. The court granted Father's motion and appointed him the conservator with the right to establish the primary residence within Rusk County. Mother appealed claiming no change of circumstances because the move was contemplated by the order. The Court of Appeals affirmed that there was a material and substantial change. The court further relied on evidence that demonstrated that Father's extended family was very involved with the child and the proposed home environment. Father focused the court on his involvement with the child such as camping, fishing, baseball, soccer, Boy Scouts. He showed that he or his mother picked up the child from school and church. Father further provided evidence of day to day involvement such as cooking, getting ready for school and homework. The court determined that the Mother's proposed living situation did not appear stable.

E. Whether the child's special needs or talents could be accommodated at the new location.

1. Relocating Parent Strategies

Relocating parent should present evidence determining whether the child's special activities, or talents can be fulfilled at the new location. Be very detailed in showing the foresight to arrange any and all new activities or doctors that the new location will have available to the child.

2. Opposing Parent Strategies

Show evidence of very specific needs or activities of the child. For example, if the child has a particular diagnosis, show the importance of the child's reliance on a particular doctor or therapist. If the child is enrolled in a particular private school with a specialized focus, show evidence that the child will be required to forgo that learning environment to which they are accustomed. If the child excels in an extracurricular activity, present testimony of the involvement in that activity that the child will have to forgo due to the move. It could be helpful to also describe the child's temperament and whether the child's personality would lend itself to difficulty in relocating and making new friends.

3. Case Example

In the Interest of P.M.G., 405 S.W.3d 406 (Tex. App. – Texarkana 2013, no pet.) Mother informed Father that she planned to move with child from Texarkana located in Bowie County to Denton, Texas. Father filed a motion to modify asking the trial court to issue a temporary order to restrict the primary residence of the child to Bowie County, Texas. The trial court granted Father's residency restriction to Bowie County. The evidence showed that while living in Texarkana, the child was involved in several extracurricular activities, including dance, soccer, and Girl Scouts. Father and his wife were involved in these activities and often drove the child to and from her various activities. Also, the court found it persuasive that in Texarkana, the child had a strong family support network. The child's grandparents, uncles, aunts, and cousins live in the area but neither Father nor Mother have family in Denton. Despite mother wanting to improve her financial status with a better job opportunity in Denton, the court upheld the restriction of the child to Bowie County.

F. The effect on visitation and communication with the noncustodial parent to maintain a full and continuous relationship with the child.

1. Relocating Parent Strategies

It is incumbent on the relocating parent to present a plan satisfactory to the fact finder for the fostering of the continuing relationship between the opposing parent and the child. The extent of the distance resulting from the relocation is a great consideration. Where the

proposed move would make frequent visits impractical, the relocating parent must convince the fact finder that he/she values the relationship between the opposing parent and the child. Furthermore, the relocating parent must show that he/she is committed to safeguarding and promoting this relationship. A history of good communication and co-parenting flowing from the relocating parent to the opposing parent, regarding the child's activities and day to day events is the best evidence of this commitment. Gather evidence that the relocating parent has:

- Accommodated requests by opposing parent for make-up visits, additional visits and switching periods of possession for opposing parent's convenience;
- Provided the opposing parent (or show the opposing parent had access to) school calendars, photos and schedules of the child's activities;
- Invited the opposing parent to attend child's activities and events while in the possession of the relocating parents (i.e. birthday parties, team parties, recognition at school, scouts); and/or
- Demonstrated a general demeanor of friendship and trust towards the opposing parent. Remember that the conduct of a party in the past speaks much more loudly and clearly than the promises of conduct in the future. While one cannot re-create history, perhaps one can assist in re-writing it. Encourage the relocating parent to be more open towards the other parent, if the records are cloudy.

2. Opposing Parent Strategies

The opposing parent must raise a strong doubt in the mind of the fact finder as to the trustworthiness of the relocating parent. While this may not be a legal burden of proof, it is a practical responsibility which the opposing parent must accept, and, if possible, exploit. Emphasis must be given to any conduct or omission by the relocating parent which could be interpreted as undermining the relationship between the opposing parent and the child. Sometimes the mere tone with which the relocating parent addresses the other parent is indicative of a lack of respect towards the opposing parent. In cases involving the presence of a new spouse or significant other, one must examine the role of that new person in the dynamic as well as their treatment of the opposing parent. Often the new spouse feels the need to protect the relocating parent, to settle an old score, or otherwise be the champion for their newfound love. In many cases, the new spouse may provide the bankroll for litigation and as such, feels (and acts) as a "shareholder" in the case. In representing the opposing parent, the practitioner should gather and explore all evidence available which may assist in development of the mistrust issue. Clearly, instances of intentional exclusion by the relocating parent should be used.

Conduct by the relocating parent which may not be intentional, but which, nevertheless, reveals disrespect toward the opposing parent such as the following can be extremely persuasive:

- Failing to notify opposing parent of important school information;
- Failing to list the opposing parent in school or daycare records and emergency information at school;
- Listing new spouse as “parent” in school or daycare records;
- Failing to notify the opposing parent of doctor’s appointments, dental appointments and important medical developments (even if not required by the decree);
- Use of formal letters and “legalese” when communicating with the opposing parent; and/or
- The recording of transactions by audio and/or video recording. On some occasions, the offending conduct by the relocating parent is obvious. Other times, it is more subtle in nature. By collecting and exposing examples of this subtle behavior, you can establish the presence of a culture in the home of the relocating parent that discourages the relationship with the non-custodial parent.

3. Case Example

In Interest of ACM, No. 08-18-00014-CV. (Tex. App.-El Paso, December 23, 2019.) In this case, evidence was presented regarding the noncustodial Father's ability to maintain a continuous and meaningful relationship with the child through testimony from both parents that they have been cooperative with one another and that both are primarily interested in what is best for their son. Relocating mother testified that, if she relocates from Hidalgo County to the Dallas/Fort Worth area, Father could see the child during holidays and summers. Relocating Mother also stated that she would offer Father extra visitation during the summers and would help get the child to El Paso. Relocating Mother also testified that she does not want to take the child away from his father, she wants Father to have visitation, and she is not trying to hurt Father because she "wouldn't want that." The court found that the record in this case does not demonstrate any reason why the child's parents would not continue to cooperate in parenting after relocation to ensure that the child has a meaningful relationship with both. The court granted Mother's modification to lift the geographical restriction and allowed Mother to move to the Dallas/Fort Worth area.

G. **The possibility of a visitation schedule allowing the continuation of a meaningful relationship between the noncustodial parent and child following the move.**

1. The relocating parent should be mindful to present evidence to the court of their intent to foster and encourage a meaningful relationship between the child and the opposing parent. This can be in the form of offering to alleviate some of the traveling expenses that would be incurred by the noncustodial parent or allowing longer summer visitation periods. The relocating parent should also show a history or pattern of positive communication with the opposing parent. This could include showing a pattern of timely informing the other parent of the child's doctor's appointments, school activities or extracurricular activities and allowing the opportunity for the other parent to attend those appointments or activities. Showing flexibility in schedules and visitations is favorable in demonstrating the intent to foster a positive coparenting relationship.
2. The opposing parent would want to show a pattern that evidences the lack of communication or distrust on the part of the relocating parent. The opposing parent should show a lack of information given by the relocating parent regarding the child's activities and daily life. The opposing parent would want to describe or evidence an attempt by the other parent to manipulate the children or control the children's allegiances.
3. **Case Example**
Echols v. Olivarez, 85 S.W.3d 475 (Tex. App. – Austin 2002, no pet.). The court affirmed the trial court's decision to lift the mother's geographical restriction thereby allowing the mother to relocate. The evidence presented demonstrated that the child would be a direct beneficiary of his relocating due to mother's promotion, both in terms of the financial benefits and in the well-being of his primary caretaker, his mother. There was evidence that the relocating mother would be better able to care for the child in her new position because it offered her additional flexibility along with her employer's acknowledgement and promotion of her work ethic regarding work and family life. Furthermore, the evidence did not demonstrate that relocating mother had a vindictive motive in moving her child from

Texas. Relocating mother's intent was to continue to foster and encourage the child's relationship with his father by giving Echols increased amounts of visitation, reducing her own summer visitation, and paying a majority of the costs incurred in transporting the child to visit his father. Evidence was also presented that the alternate visitation she offered in lieu of the former visitation would provide an adequate basis for preserving and fostering Echols's relationship with the child.

H. The ability of the noncustodial parent to relocate.

1. Relocating Parent Strategies

If possible, the Relocating parent would want to show any ties the custodial parent may have with the new location in which the relocating parent wishes to move. Additionally, the relocating parent may be able to show the lack of ties or connection to the city where the opposing parent currently resides and show evidence that opposing parent could move with ease to the new location where child would reside.

2. Opposing Parent Strategies

Conversely, the opposing parent should show that they have no ties to the new location and more importantly, no ability to move. The opposing parent can show the longevity of their current employment, the strong family ties to their current city, and a lack of opportunity for employment in the new location the relocating parent wishes to move with the child.

3. Case Example

C.B. A.B., No. 02-19-00041-CV. (Tex. App. – Fort Worth, January 16, 2020). In this case, the court allowed the mother to relocate to Anchorage, Alaska from Texas. Relocating mother testified that she was living in Anchorage, Alaska where she met Father. Because Father was employed by the Army Corps of Engineers, and because the work he was performing in Anchorage had been completed, the couple moved to Texas after Father decided that he would rather take a position with the Army Corps of Engineers in Fort Worth, Texas, rather than Nebraska. But Mother said that it was always the couple's plan to move back to Anchorage after Father had accrued enough time with the Army Corps of Engineers. As evidence in opposition of the relocation, the nonrelocating Father testified that he had years of work lined up in Texas and that he did not anticipate being relocated anytime in the near future. However, the trial court had evidence before it that Father owns a house forty-five miles away from where Child will live in Anchorage, Alaska as well as evidence that Father had intended to move back to Anchorage after accruing more time with the Army Corps of Engineers. Thus, mother was able to demonstrate that

Father had the ability to relocate to Alaska with the child. The trial court was free to find that this factor weighed in favor of the ordered geographical restriction allowing mother to live within 60 miles of Anchorage, Alaska.

VII. STATUTE REGARDING INCREASED EXPENSES

A. Pursuant to the Texas Family Code,

if a party is granted the right to relocate, the Court can consider the increased expenses related to the distance and render appropriate orders. This may include a reduction of child support or a specific allocation as to payment of travel expenses.

TFC §156.103 – Expenses Related to Distance (a) If a change of residence results in increased expense for a party having possession of or access to a child, the court may render appropriate orders to allocate those increased expenses on a fair and equitable basis, taking into account the cause of the increased expenses and the best interest of the child. (b) The payment of increased expenses by the party whose residence is changed is rebuttably presumed to be in the best interest of the child. (c) The court may render an order without regard to whether another change in the terms and conditions for the possession of or access to the child is made.

B. Case Law on Expenses

1. *In re R.A.W.*, 2015 WL 1478189 (Tex. App. Amarillo March 27, 2015, no pet.). Mother and Father entered into a SAPCR order providing that they were JMC's with Father having the exclusive right to determine the child's residence for the purpose of determining school districts but limited to Potter and Randall counties. The parties followed a week on/week off visitation schedule. Father filed a petition to modify requesting that he be appointed as the person who had the exclusive right to designate the primary residence of the child and that Mother should have a SPO. Mother filed a counter-motion to modify requesting the same. Neither Mother nor Father mentioned changing the residency restriction in their petitions. The trial court appointed the Father as having the right to establish the primary residence of the child within Potter, Randall, Swisher, Hale or Lubbock Counties. The Court found that Father took the more active role and that Father was married and that his wife had been accepted into the doctoral program at Texas Tech requiring a commute. The Court found that Mother was not as involved in the child's life, did not attend appointments, and moved in with several men. The child's teacher,

therapist and counselor all agreed that Father had more involvement with the child. Mother appealed. The Court of Appeals affirmed the trial court's ruling. Although Mother's attorney mentioned in opening statement that "Today is the first that we've heard that there is a request to lift the geographical restriction that was in place.." the parties proceeded with the hearing and the Mother made no further objection. There was another issue in the case where the trial court ordered the parties to meet halfway to exchange the children and ordered parties to each pay own costs. Mom appealed complaining that court did not require Father to pay her costs. The Court held no abuse of discretion in requiring each to bear own costs of travel where Mom failed to attack the findings of fact by trial court. Moral of the story: Make sure your pleadings include a request for a change to the residency restriction and always request and attack the findings of fact when dissatisfied with court ruling.

2. *In re B.P.R.*, 2014 WL 5306530 (Tex. App. Beaumont Oct. 16, 2014, no pet.). Mother relocated after a jury verdict which allowed the children to reside anywhere in Texas. Trial court ordered parties to meet halfway to exchange possession and ordered Father to reimburse Mother's mileage expenses. Father appealed complaining that Mother was the one who moved and should bear the expenses. The Court of Appeals reversed the trial court's decision regarding travel reimbursement. The court stated that the record showed that Mother wanted to move and did not contain financial information for either party. The Court relied on TFC §156.103(b) which creates a rebuttable presumption that the best interest of the child is served by imposing the increase of expenses due to the move on the party who moved.

VIII. OTHER TRIAL STRATEGIES TO CONSIDER

A. Jury or Bench Trial

The right to a jury is clear. TFC §105.002 provides as follows:

“(c) in a jury trial:

- (1) a party is entitled to a verdict by the jury and the court may not contravene a jury verdict on the issues of:

- (A) the appointment of a sole managing conservator;

- (B) the appointment of a joint managing conservator;
- (C) the appointment of a possessory conservator;
- (D) the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child;
- (E) The determination of whether to impose a restriction on the geographic area in which a joint managing conservator may designate the child's primary residence; and
- (F) if a restriction described in Paragraph (E) is imposed, the determination of the geographic area within which the joint managing conservator must designate the child's primary residence.”

In deciding whether to bring the issue of relocation or geographical restriction to a judge or jury, remember that juries tend to decide more emotionally and sympathetically while judges tend to decide based on precedent and public policy. Consider whether your client or the opposing party would be considered likable or unlikable by a jury. Consider whether your case requires expert testimony who would engage in academic debate or whether your testimony relies on an emotional appeal.

B. Motion for Child to confer with judge

The Court may interview the child in cases related to relocation. TFC §153.009 provides for circumstances when the court shall, may and may not interview the child in chambers:

- (a) In a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the attorney ad litem for the child, the court shall interview in chambers a child 12 years of age or older and may interview in chambers a child under 12 years of age to determine the child's wishes as to conservatorship or as to the person who shall have the exclusive right to determine the child's primary residence. The court may also interview a child in chambers on the court's own motion for a purpose specified by this subsection.
- (b) In a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the attorney ad litem for the child or on the court's own motion, the court may interview the child in chambers to determine the child's wishes as to possession, access, or any other issue in the suit affecting the parent-child relationship.

- (c) Interviewing a child does not diminish the discretion of the court in determining the best interests of the child.
- (d) In a jury trial, the court may not interview the child in chambers regarding an issue on which a party is entitled to a jury verdict.

IX. UNCHARTED TERRITORY –POTENTIAL PANDEMIC RAMIFICATIONS

The current pandemic is sure to have long lasting effects on the nation as well as the world.

It is well settled that employment and opportunities for a better standard of living are strong considerations in determining whether the court will allow the lifting of a geographical restriction in order for a parent to move.

- Consider how the crisis of this pandemic has increased unemployment to historic highs.
- Consider the collapse of entire industries and how that relates to a parent's need to relocate to work in an entirely new industry.
- Consider the financial strain that has been placed on families and the need to move to live with other relatives.
- Consider how social distancing has affected relationships with individuals who are caregivers to elder family members.
- Consider that there may be a need to move from an area with a poor access to medical care.
- Consider how the family dynamic has been affected by this pandemic.
- Consider how some cities have been ravaged by the COVID-19 virus to necessitate a move from that city.

X. OTHER RELOCATION AND GEOGRAPHIC RESTRICTION CASES

A. *Echols v. Olivarez*, 85 S.W.3d 475 (Tex. App. – Austin 2002, no pet.)

Facts:

Parents were never married. Parents separated when child was two years old. Paternity decree entered when child three years old. Mother had right to establish primary residence within Texas. Mother then had another child with another man and lost her job during maternity leave. She received a job offer in Tennessee with substantially greater pay and court granted motion to lift restriction.

Analysis:

The Court found that the evidence did not establish vindictive motive and move would provide greater financial security and child would benefit from mom's promotion. Court found mom would foster continued relationship as she would pay most of the cost of visitation travel and give increased visitation.

B. *Knopp v. Knopp*, 2003 WL 21025527 (Tex. App. – Houston [14th Dist] May 8, 2003, no pet.)

Facts:

Parents divorced in Hidalgo County. Mother appointed Sole Managing Conservator with the exclusive right to establish primary residence. Mother moved to California without telling Father. She then requested and received a TRO to prevent Father from removing the children from California. Father filed a counterpetition seeking to be appointed Sole Managing Conservator and Father prevailed at a bench trial. Mother appealed and the decision of the trial court was affirmed.

Analysis:

Court found the following:

1. Mother failed to notify Father of the move.
2. Father was involved in the children's lives even though he missed some visits and birthday parties.
3. The distance was a significant impediment to visitation.
4. Extended family was in Texas
5. Father was a physician and stated he would reduce his worktime and hire a nanny.
6. Father first heard of move from parent of a friend of the children and Mother refused to provide an address and phone number.
7. Mother removed the children during a semester.
8. Mother monitored phone calls with Father.
9. Mother admitted she smoked marijuana with her adult daughter from another marriage.

Factors the court did not find persuasive:

1. The children wanted to be with Mother.
2. The children continued to do well in school.
3. Mother moved for health reasons (allergies).
4. Mother found a job in California.

5. Father did not help her previously when her house burned down and Mother claimed Father was verbally abusive.

The Court cited the factors that the Court considered in Lenz as:

- The relationship with and presence of extended family;
- The presence of friends;
- The presence of a stable and supportive environment;
- The custodial parent's improved financial situation and ability to provide a better standard of living for the children;
- Positive impact on the custodial parent's emotional and mental state, with beneficial results to the children;
- The non-custodial's parent's right to have regular and meaningful contact;
- The ability of the non-custodial parent to relocate;
- The ability of the non-custodial parent to adapt his work schedule.

Furthermore, in *Bates v. Tesar*, 81 S.W.3d 411 (Tex.App. – El Paso 2002, no pet), the court similarly considered the following:

- The degree to which the custodial parent's and the child's life may be enhanced economically, emotionally, and educationally by the move,
- A comparison of the quality to lifestyle;
- The negative impact of any continued hostility between the parents;
- The effect of the move on extended family relationships; and
- The child's age, community ties, health and educational needs, and preferences.

C. Hoffman v. Hoffman, 2003 WL 22669032 (Tex. App. – Austin Nov. 13, 2003, no pet.)

Facts:

Parents divorced with an Agreed Decree including a geographical restriction for a three-year period to Williamson County, Travis County or a contiguous county. At the conclusion of the three-year period Mother prepared to move to Pennsylvania and Father filed a Petition to Modify. In a bench trial the Court modified the decree to allow Mother to move to Pennsylvania and gave Father over 100-mile SPO.

Analysis:

The Court of Appeals affirmed finding of the trial court:

- Both parties were from Pennsylvania and both had extended family there.
- There was an agreement for the three-year restriction and everyone knew Mother intended to move back to Pennsylvania.
- Court-appointed psychologist testified the move would not be traumatic for the children.
- The parents had poor communication.
- Mother would benefit financially by moving in with her mother and saving expenses as she was attempting to complete a college degree.
- Children could email, phone and visit.

Factors the court did not find persuasive:

- The psychologist said the children did not want to move.
- Father's time with the children would be reduced from 153 days to 53 days per year.
- Travel time was eight hours.
- Dad had intended to relitigate conservatorship when the move did occur.

D. In re A.C.S., 157 S.W. 3d 9 (Tex. App. –Waco 2004, no pet.)

Facts:

Parents entered into an Agreed Decree that contained provisions for sharing of travel expenses if Mother relocated more than 100 miles. Mother had the right to establish primary residence without restriction. Mother moved to South Carolina shortly after the divorce. Father filed a Motion to Modify Child Support then a Motion to Modify Custody. Temporary Orders were entered. Father failed to file an affidavit under 156.102 and court failed to find that children's present environment may endanger them or significantly impair their emotional development. Trial court found that it would be in the best interest of the children to return to Texas. Mother appealed.

Court of appeals found that the Court abused its discretion by finding that requiring the children to return to Texas was in their best interest. The Court said that they must concentrate on the general quality of life for both the child and the custodial parent when assessing child's best interest.

Analysis:

The Court of Appeals reversed finding:

- Failure to attach affidavit was harmless because the court heard evidence from Father before rendering a decision.
- The Court's failure to examine jurisdiction under UCCJEA was harmless given that it would have been justified in finding jurisdiction under UCCJEA.
- Some of the findings of the court were unsupported by the evidence but the court performed its own analysis under the Bates factors.
- Mother would be forced to leave a good-paying job in South Carolina and the ability to live rent-free in her mother's home.
- Visitation arrangements had improved since the entry of the Temporary Orders.

Factors the Court of Appeals found were not sufficient to affirm the trial court:

- There was a long-distance move.
- The children would have less contact with Father.
- Some evidence that Mother was attempting to interfere in Father's access to the children.
- Some evidence one of the children cried during one visit that she would not see her paternal grandmother and cousins.

E. In re A.S.M., 172 S.W.3d 710 (Tex. App. –Fort Worth 2005, no pet.)

Facts:

Parents appointed JMCs with residence restricted to Tarrant and contiguous counties. Mother filed a Petition asking that the residence restriction be removed. Father filed an answer and counter petition asking court to refuse to consider the Petition for failure to attach an affidavit under §156.102 and to make a finding that the Motion was groundless and brought in bad faith and for the sole purpose of harassment. The court refused to consider the petition because there was no affidavit and found that it was groundless, filed in bad faith and brought for the sole purposes of harassment since it was filed two months after agreed order signed. Court awarded \$5000.00 in attorney's fees as sanctions. Mother appealed.

Analysis:

The Court of Appeals affirmed finding: there was no affidavit filed at any time during the proceeding and Mother did not present any

evidence that would have fulfilled the requirements of the affidavit.

Mother filed barely one month after she agreed to the Decree and offered no evidence of changed circumstances.

F. In re I.J.M., No. 13-11-00459-CV (Tex. App. – Corpus Christi 2012, no pet.)

Facts:

The parties divorced in Brazos County and were appointed JMC's with Mother having the right to establish primary residence in Brazos County, Travis County or any county between Brazos County and Travis County. Mother filed Petition to Modify less than one year after the Decree to remove the geographical residence. Mother sought temporary orders allowing her to move which was heard by the Associate Judge. The Associate Judge ruled that Mother could move wherever she could obtain employment. She moved to Illinois. Father sought de novo hearing before trial court which found in favor of Father and awarded him the right to establish primary residence. Mother appealed.

Analysis:

The Court of Appeals affirmed the decision of the trial court. The court found the move to Illinois was a material and substantial change and Father had a close relationship with the child and it was a great distance. The Court also found that the quality of the relationship would suffer as Father would not be able to take the child to school or daycare and he had made adequate transportation arrangements. Of interest is the fact that Mother had received her Ph.D. in Chemistry and only applied for one job in Texas and Illinois was near her family. Mother's new husband was in the same field and testified he had no problem finding a job in Texas.

G. Miller v. Miller, 2015 WL 6830754 (Tex.App. – Austin Nov. 4, 2015, no pet.)

Facts:

Parents were divorced in 2012 after a jury trial and Mother was given the right to establish primary residence in Travis County or contiguous counties or Sacramento, California or its contiguous counties.

Mother decided to relocate to Sacramento, California and original divorce decree required Mother to pay all costs of Father's travel to California to visit child if she moved.

Mother had an apartment and good job in Sacramento at the time of the jury trial. After the move, Mother changed her living circumstances and moved in with her aunt and entered into a romantic relationship. Mother had testified her financial circumstances would improve but they did not and she filed for bankruptcy and listed payments owed to Father for travel expenses on her bankruptcy schedules. She owed Father \$40,000.00 for travel expenses and owed money on payments on their home in Texas. Mother told Father she would not co-parent with him and withheld information about the child from Father. Mother said derogatory remarks about Father and moved in with boyfriend. Trial court granted modification and gave Father the right to establish primary in Travis or contiguous counties.

Analysis:

The Court of Appeals affirmed the trial court's ruling. The fact of relocation itself did not create the material and substantial change as it was contemplated by the decree. However, the change in living circumstances created the material and substantial change. Also, Mother complained that moving in with her fiancé occurred after the modification was filed and it could not be considered and the court disagreed. Court found that even though Mother's income did not change that her ability to "make ends meet" did change and it was significant. Court found it significant that Mother was not committed to preserving a good relationship between child and Father and rejected co-parenting. Court found Mother was not providing a stable home, but not exclusively due to four moves. Court enumerated additional important factors in addition to Holley factors:

- a. Relationship with and presence of extended family;
- b. Presence of friends;
- c. Presence of a stable and supportive environment;
- d. Custodial parent's improved financial situation and ability to provide a better standard of living for child;
- e. The positive impact of the custodial parent's emotional and mental state of the child;
- f. The non-custodial parent's right to have regular and meaningful contact;
- g. The ability of the non-custodial parent to relocate;

- h. The ability of the non-custodial parent to adapt his or her work schedule to the child; and
- i. The child's stability and the need to prevent constant litigation over custody.

H. In re C.L.R., 2015 WL 6278374 (Tex.App. – Amarillo Oct. 21, 2015, no pet.)

Facts:

Parents were divorced in 2004. C.L.R. was a child of a prior marriage of Mother and was adopted by Father. The other two were children of the marriage. Parents divorced in Lubbock. Mother remarried and her husband got a new job offer in Sherman that was a better job and he testified he did not have the ability to remain in Lubbock. Mother sued to remove geographic restriction to move to Sherman. Younger child had been injured when held by C.L.R. which caused a difficult relationship between Father and C.L.R. Mother sought to change primary residence in 2014. The court granted mother the right to establish primary residence without regard to geographic location. Father appealed. Mother was pro se on appeal. Court of Appeals affirmed the decision of the trial court.

Analysis:

Court found courts have wide latitude in determining best interest of children. Even though Father showed the move would interfere in his Thursday and Sunday overnight visitations and that the counselor recommended long-term counseling with Father and C.L.R. which would not be possible in Sherman, the court found the move to Sherman would be in the best interest of the children. Mother testified that if the court did not grant the modification of primary residence she would remain in Lubbock with the children.

I. In re W.H.J., 2015 WL 5626226. (Tex.App. – Corpus Christi Aug. 20, 2015, no pet.)

Facts:

The minor child was nine months old at time of trial. Mother was from China, spoke little English, had her entire family in the People's Republic of China, had no marketable education in the United States and no family support in United States. Father had not supported her during the prenatal period, did not visit during the eight weeks of recovery after her C-section, refused to sign the birth

certificate, and refused to provide his address and phone number to Mother. Mother sought to relocate to China and Father sought to restrict domicile to Nueces County, Texas. The court ruled that Mother could relocate to China and Father would have possession of the child 50 days per year in the city of Mother's residence. Mother said she would only be gone one year. The Court ordered if she relocated back to Texas it would constitute a material and substantial change. The Court ordered Father to pay child support plus \$283.00 per month into a trust account for travel expenses for visitation and if not used for that purpose it could be used for the child's education. Father appealed the failure to impose a geographic restriction.

Analysis:

The court of appeals affirmed. The court discussed the failure of Father to visit the child and the failure of the Mother to thrive in the United States due to limited language, job skills, automobile nor family in the United States. The appeals court further discussed the child's young age as a factor in favor of allowing the child to be removed to China as well as the fact that the child had a half sibling in China and the court had set up a "trust" for travel expenses to assist in visitation.

J. In the Interest of A. M. B.V., 2015 WL 127891 (Tex.App.–Corpus Christi Jan. 8, 2015, no pet.)

Facts:

Parents were not married and child support review order was entered when child approximately 3 months old. At seven months, Father filed a Motion to Modify stating Mother was getting ready to move out of state. The parties entered an agreed order where they were JMCs but Mother had the right to establish primary residence without geographic restriction but requirement for a 60-day notice of intent to move. When the child was three, Mother gave notice that she intended to move to Illinois. Father filed a Petition to Modify seeking to have the right to establish primary residence seeking to have residence restricted to Kleberg County. Mother claimed in 2012 she was moving to Illinois because she was accepted into a premier graduate program. Father testified that before the child was one year old, he had little access but his relationship had grown with the child over three years. The court ruled that it was in the best interest of the child that

Mother remain the parent that had the right to establish primary residence but that residence would be restricted to Kleberg and contiguous counties. Mother appealed.

Analysis:

The court of appeals stated that the court must determine the circumstances at the time of the entry of the last final order and the current circumstances for determination of material and substantial change. The move to Illinois was not the change of circumstances because it was contemplated at the time of the prior Order. The Court found the material and substantial change was the change in the relationship between Father and the child. The court distinguished Zeifman (see below) and found that even though some changes had been anticipated by the prior order that the creation and improvement of the bond between Father and child had not been contemplated by the prior Order and was a material and substantial change. Mother contends that the judge could not have compared the bond in 2009 with the bond between Father and son in 2012. The court indicated that they would give great deference to the findings of the trial court as the trial court "felt the forces, powers and the influences that we cannot discern by merely reading the record".

The court cited Zeifman and Bates regarding the factors to consider in making a determination of relocation including:

1. Distance between the parties after the relocation;
2. Proximity, availability and safety of the travel arrangements;
3. Quality of relationship between the child and non-primary conservator;
4. Nature of the contacts with the non-primary conservator;
5. Possibility that relocation would deprive the non-primary conservator of regular and meaningful access;
6. Impact of the move on quality and quantity of future contacts with the non-primary conservator;
7. Motive for the move; and
8. The feasibility of preserving the relationship through suitable visitation arrangements.

Note the record reflects very hard feelings as the child was born out of a martial affair between Father, who was

married to someone else at the time of conception and Mother. The trial court's decision was affirmed.

K. In the Interest of C.R.A., 453 S.W.3d 623 (Tex. App. – Fort Worth 2014, no pet.)

Facts:

Parents were divorced in Georgia (even though at the time they were both residing in Texas) and the Georgia decree did not give the right to establish primary residence to either parent. Mother remarried and told Father that she wanted to relocate to North Carolina to be with her new husband. Father filed a petition to modify within a year of the decree asking that he have the right to designate the primary residence of the children and that the residence should be restricted to Hood County. Father did not attach an affidavit as required by §156.102. Father asserted that since the prior order did not contain an order for a parent to have the right to establish the primary residence as required by 153.134(b)(1), the statute requiring an affidavit in a situation in which a person sought to modify the designation within one year was not applicable. The trial court appointed the parties as JMC with Mother having the exclusive right to designate the primary residence of the children within Hood County. Mother appealed.

Analysis:

The court of appeals affirmed the trial court's finding that the Georgia order did not comply with section 153.134(b)(1) and therefore, section 156.102 (requiring an affidavit to be attached to a modification filed within one year of an order) was inapplicable. They held that the Georgia order did not comply with §153.134 (b)(1) did not apply. The court considered the following:

1. Public policy in Texas to assure children have frequent and continuing contact with parents;
2. Mother had no job in NC;
3. Mother was financially dependent on new husband;
4. Mother had no relatives in NC if there were problems with new marriage;
5. Father would be a remote and occasional visitor in the children's lives;
6. Father had a job paying \$103k per year;
7. Father's parents lived next door to Father;
8. Grandparents had a very close relationship with children;

9. Children were doing well in school.

10. Mother stated she would stay in Texas if the court ordered the children to remain.

L. In the Interest of C. R. J. 2014 WL 199209 (Tex.App.– Texarkana Jan. 17, 2014, no pet.)

Facts:

Mother and Father divorced and Mother was given the right to establish residence without regard to geographic location. Father heard that Mother intended to remarry and move to New Mexico. Father filed a petition to modify asking that he be given the right to designate residence of the child in Cass County. At the time of hearing Mother had remarried and her husband was in New Mexico. Father argued the move would disrupt his access to child and extended family. Mother was offered a very favorable job in New Mexico. Father offered evidence he was an attentive father and good provider. Trial court granted restriction to within 100 miles of Atlanta, Texas but did not change which parent had the right to establish primary residence. Mother appealed.

Analysis:

The court of appeals affirmed. The court acknowledged that Mother's situation would improve if she were allowed to move to New Mexico with her husband. She testified she would cooperate in visitation and the child would live in a nice apartment and attend a good school. The court noted, however, that there would be difficulty in facilitating visitation. The court deferred to the trial court who entered findings of fact which emphasized the extent of the distance involved in the move.

M. Morgan v. Morgan, 254 S.W.3d 485 (Tex. App.– Beaumont 2008, no pet.)

Facts

Mother and Father involved in original divorce proceeding and all issues agreed upon except geographical restriction. Mother wanted to move to Lafayette, La. and Father wanted residence restricted to designated school district. The trial court restricted domicile to Kirbyville Independent School District. Mother appealed and alleged §153.134 (b) was unconstitutional and that she was being required to prove that a geographic restriction should NOT be imposed.

Analysis:

The Court of Appeals held that §153.134(b) was not unconstitutional. Mother argued it gave her no educational choices and interfered in her due process rights. The court held that restricting to a particular school district did not preclude choices. The court further held that she was not required to demonstrate that there should not be a restriction.

N. In the Interest of B.A.B., C.M.B., and T.D.B., No. 13-11-00457-CV (Tex. App. – Corpus Christi 2012, no pet.)

Facts:

Mother filed a petition to modify the residency restriction. Undisputed facts at the hearing were that Mother had the exclusive right to designate the primary residence of the children within Ellis and contiguous counties or McLennan County, Texas. Mother married a Sgt. in the USMC after dating 4 months and there was no base within the geographic restriction. Trial court granted Mother's modification and lifted the current geographic restriction and placed a new restriction of the children to anywhere in the United States. The trial court found that Mother encouraged visitation with Father by allowing Father access outside the schedule provided in the order and testified that she would encourage communication between children and Father. Mother testified that she would fly the children to see Father once a month. Although new husband may be stationed in Virginia, NC or California, he could be stationed anywhere in the world. Mother put on evidence of the benefits of moving to a military base. Father was a store manager at Walmart and lived with his parents. Testimony also showed that Father did not know the names of the children's teachers and had not visited the school.

Analysis:

The Court of Appeals affirmed the trial court's ruling finding that there was sufficient evidence to support the trial court's ruling.

O. In the Interest of R.H.C., No. 09-15-00429-CV (Tex. App. – Beaumont 2016, no pet.)

Facts:

Mother and Father divorced and Father had exclusive right to designate the primary residence of the child within Walker and Montgomery Counties when the child reaches 5 years old and begins Kindergarten. Father

filed a modification action and the Court modified the residency restriction to Montgomery and contiguous counties and included a provision that such restriction would be lifted if Mother did not reside in Montgomery or contiguous counties. One year later Father filed another modification action requesting the court modify the residency restriction again and included an affidavit stating that Father had already relocated the child outside the restriction (250 miles) because of employment. The trial court denied Father's request and appointed the parties JMC with Mother to have the exclusive right to designate the primary residence of the child within Montgomery County, Texas and contiguous counties, thereto. Father appealed asserting that the Court's decision was solely based on the fact that Father had violated the order and already moved.

Analysis:

The Court of Appeals affirmed the trial court's ruling focusing on Lenz and Holley factors including Mother's new work schedule; her ability to care for him full-time; evidence - Father was neglectful; concerns about diet, hygiene and physical and emotional health; Father refused to take the child to counseling; child wanted Mother to attend school functions.

P. Mitchell v. Wright, No. 03-16-00496-CV, 2017 WL 2927063, at *1-5 (Tex. App.-Austin July 7, 2017, no pet.)(not designated for publication)

Facts:

Mother filed a petition to modify requesting that the Court lift the geographic restriction. Mother was engaged and wanted to move with the child to Vancouver, Washington. The trial court lifted the restriction and terminated Father's child support to offset the travel expenses. Father appealed claiming Mother failed to establish that a material and substantial change in circumstances had occurred and that the trial court abused its discretion and thus erred by finding that lifting the geographic residency restriction was in the child's best interest.

Analysis:

The court found that the evidence showing that, after the 2009 order was rendered, Wright became engaged to a man who was living in Vancouver, Washington, obtained an

employment opportunity with her current employer in that area, planned to move there to live with her fiancé, and she and the child had begun living with her parents temporarily to save money for the move, constituted a material and substantial change.

Mother, who was the child's primary caregiver, testified about her plans if the geographic residency restriction was lifted, including testifying about her employment opportunity in the Vancouver area; the house in which she and the child would be living; the child's relationship with her fiancé, including daily contact; and the child's anticipated school and other activities. Other evidence before the trial court included the guardian ad litem's testimony that she did not find reason to believe that Mother would not support the relationship between Father and the child going forward; the evidence that the child wanted to move with his mother; and the evidence concerning the child's anticipated circumstances if the move occurred. The court of appeals concluded that the trial court did not abuse its discretion in finding that lifting the geographic restriction was in the best interest of the child. Therefore, the court affirmed the trial court's order.