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The Ties That Bind: Why Texas Should Adopt a Presumption That Relocation Is Not in the Best Interests of the Child

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THE TIES THAT BIND: WHY TEXAS SHOULD ADOPT A PRESUMPTION THAT RELOCATION IS NOT IN THE BEST INTERESTS OF THE CHILD†

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I. INTRODUCTION

Alan and Beverly, the father and mother of a five-year old girl, Carrie, are divorced in Dallas County, Texas. Beverly is given primary custody of Carrie, including the exclusive right to determine her residence. In order to be close to Carrie, Alan establishes his residence only twenty miles away from Beverly's residence. In addition to exercising all of his court-ordered weekend, holiday, and summer visitation with Carrie, Alan attends all of Carrie's dance recitals, soccer games, school plays, and parent-teacher conferences. Alan and Beverly also frequently agree upon additional visitation periods for Alan so that he may take Carrie to visit his relatives who live in the area.

Three years after the divorce, Beverly seeks to relocate with Carrie to Raleigh, North Carolina to remarry and to seek better employment opportunities. If Beverly is allowed to relocate, Alan will have to take a two and one-half hour flight or make an eighteen-hour drive to see Carrie. Even though Beverly offers to increase Alan's summer and holiday access to Carrie, her move will inevitably preclude Alan from being able to continue his daily involvement in Carrie's life. If Alan seeks to modify the divorce decree to impose a geographic domicile restriction on Beverly, should he be required to prove that the proposed relocation is not in Carrie's best interests? Or should Beverly be required to rebut a presumption that relocation is not in Carrie's best interests if it deprives her of "frequent and continuing contact" with Alan?[1]

The Texas Legislature has not articulated any specific standards to apply in relocation cases.[2] However, the Texas Family Code provides that trial courts shall primarily consider the best interests of the child[3]

1. Texas has a public policy to "assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child." TEX. FAM. CODE ANN. § 153.001(a) (Vernon 2002).

2. *See* Lenz v. Lenz, 79 S.W.3d 10, 14 (Tex. 2002) (stating that "the Family Code does not elaborate on the specific requirements for modification in the residency-restriction context, and we have no specific statute governing residency restrictions or their removal for purposes of relocation").

3. The best interest standard is not without criticism. *See, e.g.*, Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 820 (2000). "[One scholar] reasoned that, except in extreme cases, the courts lacked the capacity reliably to determine which parent is 'better' or to discern the child's best interest with any certainty. Providing for a judicial determination of such a subjective and discretionary issue not only failed to further the welfare of children . . . it actually harmed them." *Id.* (citing Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975). In the same article, Woodhouse also discusses criticism of the best interest standard on the basis that it gives judges too much discretion. *See id.* at 821 ("Also a target of critics was the high level of discretion vested in judges by the best interest standard. Pointing to many egregious cases, critics claimed that judges often applied highly biased standards in evaluating parental fitness and were likely to base their rulings on personal prejudices that bore little or no relation to the child's welfare.").

in making custody determinations.[4] The code also provides that it is the public policy of the state to "assure[ ] that children will have frequent and continuing contact with parents who have shown the ability to act in the best interests of the child and to provide a safe, stable, and nonviolent environment for the child."[5] In *Lenz v. Lenz*, the Supreme Court of Texas's only holding bearing upon the issue of custodial parent relocation, the court stated that it must "endeavor to give meaning to these public policy imperatives as we interpret the Family Code modification standards in the relocation context."[6] However, the court also stated that "courts have reassessed the standards for relocation, moving away from a relatively strict presumption against relocation and towards a more fluid balancing test that permits the trial court to take into account a greater number of relevant factors."[7]

This Comment addresses whether Texas's relocation framework should include a presumption that relocation is not in the best interests of the child.[8] After considering the policy in favor of "frequent and continuing contact," the pre-*Lenz* and post-*Lenz* holdings of the Texas courts of appeals, and the social science addressing the effects upon the child of a custodial parent's relocation, this Comment argues that the legislature should adopt such a presumption.[9] Specifically, the legislature should adopt a presumption that requires the relocating party to prove that the relocation would be in the child's best interests, regardless of whether that party is the party seeking to be awarded the right to determine the child's primary residence in an original custody proceeding or a party seeking modification of an existing custody order.[10] This Comment contends that such a presumption harmonizes the public policy in favor of "frequent and continuing contact" with a balancing test that allows a trial court to consider a number of factors when deciding a relocation case.

Part II sets forth the current pertinent Texas public policies and statutes bearing upon the issue of custodial parent relocation.[11] Part III of this Comment addresses the historical background of relocation litigation.[12] Part IV analyzes both the pre-*Lenz* and post-*Lenz* hold-

4. TEX. FAM. CODE ANN. § 153.002 (Vernon 2002).

5. *Id.* § 153.001(a). Other states have adopted similar public policies. *See, e.g.*, IDAHO CODE § 32-717B (Michie 1996); ALA. CODE § 30-3-150 (1998); ME. REV. STAT. ANN. 19-A, § 1653(1), (3) (West 1998 & Supp. 2005); N.J. STAT. ANN. § 9:2-4 (West 2002); CAL. FAM. CODE ANN. § 3020 (West 2004).

6. *Lenz*, 79 S.W.3d at 14.

7. *Id.* at 15.

8. Other states place the burden on the custodial parent to prove that the proposed relocation would be in the child's best interests. *See* 750 ILL COMP. STAT. 5/609(a) (West 1999); ALA. CODE § 30-3-169.4 (Michie Supp. 2005).

9. *See* discussion *infra* Part VI.

10. *See* discussion *infra* note 261.

11. *See* discussion *infra* Part II.

12. *See* discussion *infra* Part III.

ings of the Supreme Court of Texas and the Texas courts of appeals.[13] Part V of this Comment presents the two competing views in social science that address the issue of relocation of the custodial parent and identifies certain elements of both in Texas public policies and statutes and in the relocation holdings of the Supreme Court of Texas and the Texas courts of appeals.[14] Finally, Part VI of this Comment suggests that the Texas Legislature should adopt a rebuttable presumption that relocation is not in the best interests of the child and place the burden on the parent seeking to relocate to prove that the move would be in the child's best interests.[15]

II. Current Texas Public Policies and Statutes Bearing Upon the Issue of Custodial Parent Relocation

In order to give full meaning to the discussion of why Texas should adopt a presumption that relocation is not in the child's best interests, the following is a brief description of the pertinent public policies and Texas statutes bearing upon the issue of custodial parent relocation.

A. *Overarching Public Policies*

Section 153.002 of the Texas Family Code provides that trial courts shall primarily consider the best interest of the child[16] in making custody determinations.[17] The Texas Legislature has adopted a public policy to "assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child."[18] Additionally, in the same section as this public policy, the Legislature has provided that it is the public policy of Texas to:

> (1) assure that children will have frequent and continuing contact with parents who have shown the 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

13. *See* discussion *infra* Part IV.

14. *See* discussion *infra* Part V.

15. *See* discussion *infra* Part VI.

16. Texas has adopted a non-exhaustive list of nine factors for trial courts to consider in deciding the best interest of the child. Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976). Those factors are "(A) the desires of the child; (B) the emotional and physical needs of the child now and in the future; (C) the emotional and physical danger to the child now and in the future; (D) the parental abilities of the individuals seeking custody; (E) the programs available to assist these individuals to promote the best interest of the child; (F) the plans for the child by these individuals or by the agency seeking custody; (G) the stability of the home or proposed placement; (H) the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and (I) any excuse for the acts or omissions of the parent." *Id.*

17. Tex. Fam. Code Ann. § 153.002 (Vernon 2002).

18. *Id.* § 153.001(a)(1).

of raising their children after the parents have separated or dissolved their marriage.[19]

B. *Rights and Duties Provisions in Custody Orders*

In Texas, when a custody order is entered, the rights and duties of each parent are set forth in the order.[20] There is a presumption that the appointment of the parents as joint managing conservators is in the best interests of the child.[21] Most importantly in the relocation context, one parent is given the right to establish the primary residence of the child.[22] The custody order[23] also sets forth each parent's periods of possession with the child.[24] Such periods of possession are conditioned upon whether the noncustodial parent resides within one hundred miles of the child's primary residence.[25]

Additionally, the order sets forth provisions for each parent's possession of the child each year on holidays, Mother's Day, Father's Day, and the child's birthday, and such provisions apply regardless of the distance between the noncustodial parent's residence and the child's residence.[26] However, as the above scenario involving Alan and Beverly indicates, parents may operate under any possession schedule they choose; the standard possession order only applies when the parents cannot agree upon possession periods.[27]

C. *Modification Framework*

Once an initial custody order is entered[28] and a conservator later seeks to modify that order, the parent must prove that the modification (1) "would be in the best interest of the child" and (2) "the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed . . . ."[29] When a parent seeks to modify a custody order either to remove a domicile restriction or to seek to impose a domicile restriction, as is the case

19. *Id.* § 153.001.
20. *See id.* §§ 153.133(a), 153.134 (Vernon 2002 & Supp. 2005).
21. *Id.* § 153.131.
22. *See id.* §§ 153.32–153.154 (Vernon Supp. 2005).
23. *See id.* § 153.311.
24. *See id.* §§ 153.311, 153.313.
25. *Id.*
26. *Id.* § 153.314 (Vernon 2002 & Supp. 2005).
27. *Id.* § 153.311 (Vernon 2002). Additionally, there are other provisions that allow trial courts to deviate from the standard possession order. *See* §§ 153.253, 153.254, 153.256.
28. A custody order can be issued based on either a decree of divorce or an order establishing paternity.
29. TEX. FAM. CODE ANN. § 156.101 (Vernon 2002 & Supp. 2005). However, when the Texas Supreme Court decided *Lenz*, the Texas Legislature also required that the proposed modification be a "positive improvement" for the child. Therefore, a number of holdings discussed in Part IV of this Comment were decided with this additional element included.

above with Alan, Beverly, and Carrie, these elements apply. The Texas Family Code does not elaborate on the specific requirements for modification in the residency-restriction context, and there is no specific statute governing residency restrictions or their removal for purposes of relocation.[30]

III. BACKGROUND

As is evident from the above scenario concerning Alan, Beverly, and Carrie, the relocation of the custodial parent a significant distance away from the noncustodial parent is a problematic issue in family law.[31] In such cases, "the interests of a custodial parent who wishes to move away are pitted against those of a noncustodial parent who has a powerful desire to maintain frequent and regular contact with the child."[32] Historically, courts have taken a restrictive view on whether a custodial parent may relocate with the child.[33] However, the national trend now disfavors a strict presumption against relocation.[34] The Texas Supreme Court has stated that "[i]ncreasing geographic mobility and the availability of easier, faster, and cheaper communication have in part accounted for the shift in perspective."[35]

In order to demonstrate such national trend, the rules of three jurisdictions—New York, New Jersey, and California[36]—are discussed below.

A. *New York*

In New York, a jurisdiction that was once one of the most restrictive with respect to relocation, the court of appeals, the state's highest court, replaced a rule requiring "exceptional circumstances"[37] with a test that balances various factors and considers the best interests of the children over the individual interests of the parents.[38] Under the new test, the custodial parent has the burden of proving that relocation would serve the child's best interests,[39] and he or she may use a number of factors to prove that the proposed move would be in the child's best interests.[40] While the rights of the parents are significant,

30. Lenz v. Lenz, 79 S.W.3d 10, 14 (Tex. 2002).

31. *See* Edwin J. (Ted) Terry, et. al, *Relocation: Moving Forward or Moving Backward?*, 31 TEX. TECH L. REV. 983, 984 (2000).

32. Tropea v. Tropea, 665 N.E.2d 145, 148 (N.Y. 1996).

33. Terry, *supra* note 31, at 986.

34. *Id.*

35. *Lenz*, 79 S.W.3d at 15 (Tex. 2002).

36. *See id.* These are the main jurisdictions to which the Texas Supreme Court refers in the *Lenz* case. *See id.*

37. Weiss v. Weiss, 418 N.E.2d 377, 380 (N.Y. 1981).

38. Tropea v. Tropea, 665 N.E.2d 145, 148 (N.Y. 1996).

39. *See id.* at 151–52; Grathwol v. Grathwol, 727 N.Y.S.2d 825, 827 (N.Y. App. Div. 2001).

40. *See Tropea*, 665 N.E.2d at 151–52.

the interests of children should be accorded the most weight because they are "the innocent victim of their parents' decision to divorce and are the least equipped to handle the stresses of the changing family situation."[41]

In determining whether the custodial parent has met his or her burden, a trial court may consider the following:

> each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and the child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements.[42]

B. *New Jersey*

New Jersey previously required a custodial parent to establish a "real advantage for the move."[43] New Jersey has now codified its relocation statute.[44] The statute provides that a custodial parent may not remove a child from the state for the purposes of relocation, when such child is a native or has been living in New Jersey for five years, without that child's consent, if the child is old enough to give consent, or without the noncustodial parent's permission, if the child is not old enough to give consent, unless good cause is shown.[45] The statute places the burden of persuasion on the custodial parent, and he or she must show good cause by proving "(1) a good faith motive [for the move] and (2) that the move will not be inimical to the interests of the child."[46] Once the custodial parent makes a prima facie showing of these elements, the burden then shifts to the noncustodial parent.[47]

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41. *Id.* at 150.

42. *Id.* at 151. For an example of how New York courts have applied the factors, see *Miller v. Pipia*, 746 N.Y.S.2d 729 (N.Y. App. Div. 2002). In that case, the mother sought to remain with the child in Florida with her parents after taking a trip there. *Id.* at 730. The father filed a writ of habeas corpus, and the parties entered into an agreement on the writ. *Id.* However, the court ultimately transferred custody to the father. *Id.* at 731. On appeal, the court held that the trial court erred in transferring custody to the father and that the best interests of the child would be served by allowing the mother to remain with the child in Florida. *Id.* at 731–32. In applying the *Tropea* factors, the court considered the fact that the mother could not find employment in New York that would pay enough for her to rent an apartment, that the mother could reside in her mother's home in Florida, and that the mother had a support network in Florida that would help provide child care. *Id.* at 731–33. In allowing the mother to relocate to Florida, the court gave particular emphasis to the economic factors supporting the move. *Id.* at 733.

43. Cooper v. Cooper, 491 A.2d 606, 614 (N.J. 1984).

44. *See* N.J. STAT. ANN. § 9:2-2 (West 2002).

45. *Id.*

46. Baures v. Lewis, 770 A.2d 214, 229 (N.J. 2001).

47. *Id.* at 231.

The Supreme Court of New Jersey has articulated the following twelve factors for a trial court to consider in deciding whether to allow a custodial parent to relocate:

> (1) the reasons given for the move; (2) the reasons given for the opposition; (3) the past history of dealings between the parties insofar as it bears on the reasons advanced by both parties for supporting and opposing the move; (4) whether the child will receive educational, health and leisure opportunities at least equal to what is available here; (5) any special needs or talents of the child that require accommodation and whether such accommodation or its equivalent is available in the new location; (6) whether a visitation and communication schedule can be developed that will allow the noncustodial parent to maintain a full and continuous relationship with the child; (7) the likelihood that the custodial parent will continue to foster the child's relationship with the noncustodial parent if the move is allowed; (8) the effect of the move on extended family relationships here and in the new location; (9) if the child is of age, his or her preference; (10) whether the child is entering his or her senior year in high school at which point he or she should generally not be moved until graduation without his or her consent; (11) whether the noncustodial parent has the ability to relocate; (12) any other factor bearing on the child's interests.[48]

New Jersey does not follow the scheme set forth above if the noncustodial parent "shares custody either de facto or de jure or exercises the bulk of custodial responsibilities due to the incapacity of the custodial parent or by formal or informal agreement."[49] In such circumstances, the removal request is treated as a change in custody as opposed to a request to modify the rights and duties of the custodial parent.[50] The custodial parent is then required to prove that "due to a substantial change in circumstances from the time that the current custody arrangement was established, the best interests of the child would be better served by a transfer in custody."[51]

C. *California*

California has replaced its rule that the relocation be "essential and expedient" and "for an imperative reason" or "necessary" with a statutory presumptive right of a custodial parent to change the residence of the children, so long as such change would not prejudice the rights of the children.[52] Section 7501 of the California Family Code provides that a "parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain

48. *Id.* at 229–30.
49. *Id.* at 229 (alteration in original).
50. *Id.*
51. Voit v. Voit, 721 A.2d 317, 326 (N.J. Super. Ct. Ch. Div. 1998).
52. *See* Burgess v. Burgess, 913 P.2d 473, 482 n.10 (Cal. 1996); CAL. FAM. CODE § 7501 (West 2004).

a removal that would prejudice the rights or welfare of the child."[53] When considering whether to grant a custodial parent's request to relocate, a court may consider the following factors:

> the children's interest in stability and continuity in the custodial arrangement; the distance of the move; the age of the children; the children's relationship with both parents; the relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests; the wishes of the children if they are mature enough for such an inquiry to be appropriate; the reasons for the proposed move; and the extent to which the parents currently are sharing custody.[54]

Furthermore, in relocation cases, a change in custody from the custodial parent to the noncustodial parent is not justified simply because the custodial parent has chosen to move to a different location.[55] A change in custody will be granted in such instances only if the child will "suffer detriment rendering it 'essential or expedient for the welfare of the child that there be a change.'"[56]

California, like Texas, has a public policy in favor of assuring "that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship."[57] However, the Supreme Court of California held that such public policy does not limit the trial court's broad discretion to consider all the circumstances in ascertaining the child's best interests.[58] To justify this assertion, the court referred to Section 3040 of the California Family Code which explicitly provides that there is no presumption in favor of any particular custody arrangement.[59]

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53. CAL. FAM. CODE § 7501 (West 2004).
54. Navarro v. LaMugsa, 88 P.3d 81, 100 (Cal. 2004).
55. *Burgess*, 913 P.2d at 482.
56. *Id.* at 480.
57. CAL. FAM. CODE § 3020 (West 2004).
58. *Burgess*, 913 P.2d at 480.
59. *Id.* (citing CAL. FAM. CODE § 3040 (West 2004)). For an example of California's relocation scheme, see *Navarro v. LaMusga*, 88 P.3d 81 (Cal. 2004). In *Navarro*, the mother sought to move to Ohio with the children and her new husband and baby. *Id.* at 86. The father testified that he believed the mother would try to alienate him from the children if she were allowed to relocate. *Id.* The trial court found that the mother was alienating the children against the father, although she was not intentionally doing so. *Id.* at 89. The trial court entered an order that transferred primary custody to the father if the mother chose to relocate. *Id.* The court of appeals reversed the trial court, and the California Supreme Court affirmed the trial court's ruling. *Id.* at 100. The court held that the father met his burden to prove that the move would be detrimental to the children. *Id.* at 94. The trial court properly considered the reports of the psychologist and found that the proposed move would "disrupt the progress being made by the children's therapist in promoting this relationship." *Id.* The court held that the trial court did not place "undue emphasis" on the detriment the children would suffer if they relocated with the mother and that the trial court had the discretion to determine what kind of weight should be given to such factors. *Id.* The court also held that the trial court did not err when it considered the

IV. Relocation Holdings of Texas Courts

In order to demonstrate how Texas courts have dealt with the public policy in favor of "frequent and continuing contact" in the relocation context, the following section sets forth a sampling of the pre-*Lenz* and post-*Lenz*[60] holdings of Texas courts.[61] The cases are presented in chronological order. Because each suit is "intensely fact-driven,"[62] the facts and holdings as they relate to those facts are given in detail. Following the cases is a brief summary of the holdings.

A. *Seidel v. Seidel*[63]—1999

In this first pre-*Lenz* case, the final decree of divorce named the parties as joint managing conservators and designated the mother as the parent with the right to determine the children's residence within Dallas County or Collin County.[64] After the divorce, the mother requested the court to remove the domicile restriction.[65] She argued that her circumstances had "materially and substantially changed."[66] In support, she testified that she might need to move to California at some point in the future because she had family members there who could help her find a job and care for the children.[67] She stated that she needed to secure better employment because the father failed to pay a $38,000 judgment awarded to her in the divorce decree.[68] She also alleged that the father left hostile messages on her answering machine and would not help her transport the children to and from their respective residences and the children's extracurricular activities.[69] The father testified that the mother had definite plans to move to California and that she was hostile to him when he questioned her about incidents that occurred between her boyfriend and the children.[70]

After hearing each party's arguments, the trial court entered a modification order that conditioned a domicile restriction to Dallas County or Collin County upon the father's payment of the $38,000 judgment to the mother.[71] If the father failed to pay the judgment by

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mother's past behavior with regard to encouraging the children's relationship with the father in determining whether the move was in the best interests of the children. *Id.*

60. *Lenz* is the Texas Supreme Court's only holding relating to custodial parent relocation.

61. For additional cases not discussed in this article, see, e.g., In re A.C.S., 157 S.W.3d 9 (Tex. App.—Waco 2004, no pet. h.) and Hoffman v. Hoffman, No. 03-03-00062-CV, 2003 Tex. App. LEXIS 9584 (Tex. App.—Austin Nov. 13, 2003).

62. Lenz v. Lenz, 79 S.W.3d 10, 19 (Tex. 2002).

63. Seidel v. Seidel, 10 S.W.3d 365, 366 (Tex. App.—Dallas 1999, no pet.).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

a certain date, the domicile restriction would be lifted.[72] Yet, on appeal, the Dallas court of appeals held that, per section 154.011 of the Texas Family Code,[73] the trial court could not condition visitation rights upon the payment of child support and found that the removal of the domicile restriction would not be in the children's best interests.[74] The court of appeals held that, while the trial court found that the release of the domicile restriction would be a "positive improvement" for the children, the record did not support such a finding.[75] The court of appeals reasoned that the evidence was legally and factually insufficient to support that finding because the mother's desire to relocate was based upon her to desire to change her residence in the future, as opposed to present circumstances affecting her and the children.[76]

B. *Franco v. Franco*[77]—2002

In *Franco*, the mother and father were named joint managing conservators of the children, but neither was given the right to determine the children's primary residence because each had possession of the children on alternating weeks.[78] The decree provided that the children's residence would remain in El Paso County, where both parents resided.[79] Moreover, the decree also confusingly provided a standard possession order in the section immediately following the provision for alternating weeks of possession.[80] Additionally, the decree provided for long-distance visitation in the event the father, who was an FBI agent, was transferred out of El Paso County, Texas.[81]

Both parties eventually remarried and the mother, an accountant, sought to modify the decree to allow her to move to San Antonio to accept a job for more pay and benefits and to be near her new husband, a physician in the United States Army.[82] The mother testified that her company had laid-off twenty-eight percent of its workforce and she feared that her job was in jeopardy.[83] She alleged that she asked the father for financial assistance and he told her to move in with her parents in New Orleans.[84] The mother also presented compelling evidence that the father's new wife, who had children from a

72. *Id.*
73. TEX. FAM. CODE ANN. § 154.011 (Vernon 2002).
74. *Seidel*, 10 S.W.3d at 370.
75. *Id.*
76. *Id.*
77. Franco v. Franco, 81 S.W.3d 319 (Tex. App.—El Paso 2002, no pet.).
78. *See id.* at 321.
79. *Id.*
80. *See id.*
81. *Id.* at 322.
82. *See id.* at 322, 324.
83. *Id.* at 325.
84. *See id.*

previous marriage, had instituted proceedings in order to move with her children and the father in this case to New Orleans.[85]

The trial court granted the motion to modify and allowed the mother to relocate with the children to San Antonio.[86] On appeal, the father argued that the mother failed to prove that the move would be a "positive improvement" for the children, but the El Paso court of appeals rejected his argument and affirmed the trial court's order.[87] The court of appeals noted that "relocation in this particular instance will cause the [children] to see their father far less frequently."[88] However, the court was persuaded by the weight of the evidence that the father was planning to move from El Paso to New Orleans.[89] The court termed this the "New Orleans factor" and said it would have been more receptive to the father's request absent that factor.[90] The court also considered the mother's testimony that the father suggested she move back to New Orleans to seek assistance from her parents.[91] Thus, the court reasoned that the father "never disapproved of uprooting the children from El Paso, their exemplary school, their friends, and their activities; he just wanted to dictate the location of the move . . . ."[92] In short, the court held, while it may have decided the case differently, the trial court did not abuse its discretion in finding that the modification would be in the best interests of the children.[93]

C. *Bates v. Tesar*[94]—2002

In this case, decided by the El Paso court of appeals on the same day the Texas Supreme Court decided *Lenz*, the divorced mother and the father were named sole managing conservator and possessory conservator of the children, respectively, and the mother was given the right to determine the primary residence of the children without regard to geographic location.[95] Three years after the divorce, when both parties were living in the Metroplex, the mother remarried and notified the father that she might be moving from Dallas to Port Lavaca, Texas, which was approximately 360 miles away from the father's residence in Richardson, Texas.[96] After a few conversations concerning the move, the father obtained a temporary restraining or-

85. *See id.* at 323.
86. *See id.* at 327.
87. *See id.* at 338, 340.
88. *Id.* at 338.
89. *See id.* at 340.
90. *Id.*
91. *Id.*
92. *Id.*
93. *See id.*
94. Bates v. Tesar, 81 S.W.3d 411 (Tex. App.—El Paso 2002, no pet.).
95. *See id.* at 415.
96. *See id.* at 416 n.1.

der to prevent the mother from moving, although the mother had already enrolled the children in school in Port Lavaca and moved most of her things to Port Lavaca.[97] Although the mother discounted his involvement in the children's lives, the father testified that he was very involved in his children's lives.[98] He attended their school functions, attended and helped coach and referee his son's T-ball and soccer games, attended most of his daughter's gymnastic events, was the president of his daughter's school's booster club, and helped both children with their homework.[99]

The mother stated that she wished to relocate to Port Lavaca for financial reasons.[100] Both the mother and her new husband were laid-off in 1999.[101] While the mother testified that it was difficult for her new husband to find work in the Dallas area, she also testified that she was not sure how much effort he put into finding work in the Dallas area.[102] The mother testified that these "financial issues were more important to her than [the father's] . . . relationship with the children if it sustained a 'good home life for the children.'"[103]

The trial court found that the mother's move to Port Lavaca constituted a "material and substantial change"[104] and that a domicile restriction to Dallas County would be in the children's best interests.[105] The trial court found that the father

> had been substantially involved in the children's activities; that he had a close and loving relationship with [them] . . .; that he would not be able to exercise frequent visitation if the children remained in Port Lavaca; that the physical, psychological and emotional needs of the children were served by a joint managing conservatorship establishing their residence in Dallas County; that the children had suffered the strain of relocation; that it was in the best interest of the children that [the father] . . . be involved in their daily lives and activities; and that the "lifestyle" considerations were outweighed by the importance of the children having frequent and continuous contact with their father.[106]

The court of appeals found that there was legally and factually sufficient evidence to support such findings and affirmed the trial court's order.[107]

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97. *Id.* at 416.
98. *See id.* at 416, 418.
99. *Id.* at 416–17.
100. *Id.* at 417.
101. *Id.*
102. *See id.* at 417–18.
103. *Id.* at 418.
104. *Id.* at 432. This was decided under the old standard for modifying a sole managing conservatorship. TEX. FAM. CODE ANN. § 14.08(c)(5) (repealed 1995).
105. *See* Bates v. Tesar, 81 S.W.3d 411, 430–33 (Tex. App.—El Paso 2002, no pet.).
106. *Id.* at 434.
107. *See id.* at 434–35.

D. *Lenz v. Lenz*[108]—2002

In 2002, the Supreme Court of Texas handed down *Lenz*, its only decision addressing the issue of relocation of a custodial parent.[109] In *Lenz*, the mother and father were citizens of Germany.[110] After moving from Germany to Arizona, the parties "legally separated and entered into a Stipulated Consent Decree of Legal Separation pursuant to Arizona law."[111] This decree included a schedule of possession for each parent and incorporated the parents' intent to move to San Antonio.[112] The father then moved to San Antonio and the mother followed four months later.[113] The parents then divorced in San Antonio.[114] The Texas divorce decree incorporated the Arizona agreement, named the parties joint managing conservators, and gave the mother the right to establish residence of the two children within the confines of Texas.[115] Shortly after the entry of the divorce decree, the mother sought to lift the domicile restriction so that she could move back to Germany to remarry and to seek better employment opportunities.[116]

At trial, the jury found that "(1) . . . the statutory requirements for modification had been proven and . . . (2) . . . that [the mother] should have the exclusive right to determine the county of residence and primary residence of the children."[117] The father filed a motion notwithstanding the verdict and the trial court granted it.[118] In its final order, the court gave the mother the right to establish the children's primary residence within Bexar County, thus preventing her from returning to Germany.[119] The San Antonio court of appeals affirmed the trial court's order and the mother appealed.

The Supreme Court of Texas limited its review to the issues of "(1) whether legally sufficient evidence supports the jury's finding that [the children's] relocation to Germany would be a positive improvement for them and in their best interest, thereby justifying modification . . . and (2) whether the trial court had the authority to impose an additional residency restriction contrary to the jury's verdict."[120] The court found that, under section 105.002 of the Texas Family Code, the trial court lacked the authority to contravene the jury's verdict award-

108. Lenz v. Lenz, 79 S.W.3d 10, 13 (Tex. 2002).
109. *Id.* at 14.
110. *Id.* at 12.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *See id.*
116. *Id.*
117. *Id.*
118. *Id.* at 12–13.
119. *Id.* at 13.
120. *Id.* at 11, 13.

ing a parent the right to establish the child's primary residence without regard to geographic location.[121] The court then held that there was more than a scintilla of evidence to support the jury's finding that the children's relocation to Germany would be in their best interests and that the trial court did not have the authority to contravene the jury's verdict.[122] The court found that the children "have strong ethnic and cultural ties to Germany, maintain strong relationships with their extended family in Germany, will benefit from [the mother's] increased well-being in Germany, and can still maintain contact with their father while there."[123] The court also found that the father could readily relocate to Germany and that he had received job offers there even though he had not applied for any positions.[124]

Because the court had not previously considered the issue of relocation, it spent a substantial portion of the opinion analyzing the rules of other jurisdictions with regard to relocation—primarily New York, New Jersey, and California[125]—and stated its preference for a rule on relocation.[126] The court acknowledged that "[r]ecently . . .courts have reassessed the standards for relocation, moving away from a relatively strict presumption against relocation and toward a more fluid balancing test that permits the trial court to take into account a greater number of relevant factors."[127] In looking to the highest courts of New York, New Jersey, and California for guidance on a relocation standard, the court noted that these courts have found bright-line rules to be inappropriate because each case is unique.[128] The court also stressed the importance of "giving meaning to our best-interest standard in the relocation context, particularly in light of the Legislature's overarching goals of assuring that children will have frequent and continuing contact with parents who have shown the ability to act in [their] best interest."[129] The court noted that such frequent contact is an important factor in a best-interest analysis.[130] Thus, by way of dicta, the court reiterated these general guidelines for Texas trial courts and courts of appeals to follow in deciding cases concerning the relocation of the custodial parent.

121. *Id.* at 11–12, 19.
122. *Id.* at 19–20.
123. *Id.* at 19.
124. *Id.* at 18.
125. *Id.* at 15–16. *See* discussion *supra* Part II.
126. Lenz v. Lenz, 79 S.W.3d 10, 14 (Tex. 2002).
127. *Id.* at 14–15.
128. *Id.* at 17 (quoting In re Marriage of Burgess, 913 P.2d 473, 483 (Cal. 1996)).
129. *Id.* at 16 (citing TEX. FAM. CODE ANN. § 153.001(a) (Vernon 2004)).
130. *Id.* at 18.

E. *Echols v. Olivarez*[131]—2002

The Austin court of appeals decided *Echols*, the first post-*Lenz* holding in Texas.[132] In this case, the mother and father were appointed joint managing conservators of the child, and the mother was given the right to determine the primary residence of the child within the confines of the State.[133] Approximately three years later, the mother gave birth to another child from a subsequent relationship.[134] While on extended maternity leave from her employment, her position was filled.[135] Her employer offered her a position in Tennessee for a larger salary and a bonus.[136] The mother filed a motion to modify the existing custody order to remove the residency restriction.[137] The court granted her motion.[138] The father appealed.[139]

In deciding whether to uphold the trial court, the court of appeals acknowledged the guidelines discussed by the *Lenz* court and the trend towards less stringent relocation standards.[140] In determining whether the relocation would be a "positive improvement" and in the best interests of the child, the court of appeals stated that "[a] child's best interest cannot be determined in a vacuum. Although consideration of the visitation rights of the noncustodial parent is important, we must primarily concentrate on the general quality of life for both the child and the custodial parent in assessing whether a change is positive and in the child's best interest."[141] The court noted that "slavish adherence to . . . [a policy in favor of frequent and continuing contact] ignores the realities of a family that has been dissolved."[142]

In upholding the trial court's order allowing the mother to relocate to Tennessee, the court of appeals considered a number of factors, such as the fact that the mother's employer was accepting of her efforts to balance work and family, that the employer no longer had a position available for her in Austin, that the mother would be able to better care for the children in Tennessee, and, perhaps most importantly, that the mother had a good-faith motive for the move and offered to help pay the father's travel costs.[143] The court found that the increase in the mother's quality of life would, in turn, increase the quality of the child's life, and, therefore, be in his best interests.[144]

131. Echols v. Olivarez, 85 S.W.3d 475 (Tex. App.—Austin 2002, no pet.).
132. *Id.* at 475.
133. *Id.* at 476.
134. *See id.*
135. *Id.*
136. *See id.*
137. *Id.*
138. *See id.*
139. *Id.*
140. *See id.* at 480.
141. *Id.* at 482.
142. *Id.* at 480.
143. *See id.* at 481.
144. *See id.* at 482.

The court considered the father's right to have "frequent and continuing contact" with the child, but found that while the frequency of the father's visits with the child would decrease, the duration would increase.[145] The court also hypothesized that the increase in duration may allow for more quality time between the father and child.[146] Thus, after balancing a best-interest analysis with the father's right to "frequent and continuing contact," as set forth in *Lenz*, the court here allowed the mother to relocate to Tennessee despite a decrease in the frequency of the father's visits with the child.[147]

F. *In the Interest of C.R.O. and D.J.O.*[148]—2002

While the majority of the cases discussed in this Section involve situations in which a custodial parent is attempting to remove an existing domicile restriction,[149] in *C.R.O.*, the father and noncustodial parent was seeking to impose a domicile restriction on the mother. The parties were joint managing conservators of their two children, and the mother had the right to determine the children's residence without regard to geographic location.[150] The mother sought to move from Fort Bend, Texas to Hawaii with the two children from her first marriage, her new husband, and their two children together.[151] The mother notified the father, who was living in Florida at the time, that she would be moving with their children to Hawaii because her husband, an airline pilot, had accepted a position with Hawaiian Air.[152] The father filed a motion alleging that the order had become "unworkable or inappropriate under existing circumstances" and requested the court to restrict the children's residence to Fort Bend.[153] The father then rented an apartment in Fort Bend in order to have more frequent contact with the children, although he did not leave his employment in Florida until four months later.[154]

The trial court found that the existing order had become unworkable and that the domicile restriction to Fort Bend and Amarillo was in the best interests of the children.[155] The Amarillo court of appeals affirmed. The court of appeals held that since the rendition of the prior order, the father "established that [the mother] had remarried

145. *See id.*
146. *See id.*
147. *See id.*
148. *In re* C.R.O., 96 S.W.3d 442 (Tex. App.—Amarillo 2002, pet. denied).
149. *See* Seidel v. Seidel, 10 S.W.3d 365, 367 (Tex. App.—Dallas 1999, no pet.); Franco v. Franco, 81 S.W.3d 319, 321 (Tex. App.—El Paso 2002, no pet.); Bates v. Tesar, 81 S.W.3d 411, 415 (Tex. App.—El Paso 2002, no pet.); Lenz v. Lenz, 79 S.W.3d 10 (Tex. 2002); *Echols*, 85 S.W.3d at 475.
150. *See C.R.O.*, 96 S.W.3d at 445.
151. *Id.*
152. *See id.*
153. *Id.*
154. *Id.* at 445–46.
155. *See id.* at 446.

and moved to Texas, his sons have two half sisters, and a move to Hawaii would make their custody arrangement unworkable or inappropriate."[156] The court considered the best interests of the children and, as the *Lenz* court proscribed, attempted to give meaning to the policy in favor of "frequent and continuing contact" between noncustodial parents and their children.

Toward those ends, the court considered the father's testimony that he would be required to make an approximately eleven-hour flight in order to exercise possession of his children. While the mother conceded that this travel would be "very straining" on the father and boys, she argued that the father could keep in contact with the boys through "regularly scheduled telephone calls, videos, and e-mails in addition to visitation . . . ."[157] However, the father countered that he feared he would be "phased out" of the boys' lives, that the mother's suggested methods of communication are no substitute for face-to-face interaction, and he would not be able to maintain his current level of involvement in the boys' lives through holiday and summer contact.[158] The court also considered a list of factors[159] adopted by the Texas Supreme Court that aids trial courts in determining the best interests of children.[160]

After identifying four main justifications for the move—"financial stability, travel and leisure opportunities, the desire of the older son, and the stability of the post-divorce family unit"—the court held that a domicile restriction to Fort Bend County would be in the children's best interests because of close contact between the children and their father, contact between the children and their grandparents, who resided in Texas, a stable residence after nine moves, and improvement in the emotional development of the youngest child.[161] With regard to "frequent and continuing contact," the court held that "the best interests of the children and the public policy of this State are served if [the father] is permitted to maintain meaningful frequent and continuing contact and is able to share in the rights and duties of raising his children . . . ."[162] Thus, as set forth in the *Lenz* dicta, the court here gave meaning to the public policy in favor of "frequent and continuing contact" in its best-interest analysis and, consequently, prevented the mother from relocating to Hawaii.[163]

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156. *Id.* at 449.

157. *Id.* at 450.

158. *See id.*

159. Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976). *See supra* text accompanying note 17.

160. *See C.R.O.*, 96 S.W.3d at 451.

161. *See id.*

162. *Id.* at 451 (citing TEX. FAM. CODE ANN. § 153.001(a) (Vernon 2004)).

163. *See id.* at 452.

G. *Knopp v. Knopp*[164]—2003

In *Knopp*, the mother, who was the sole managing conservator, was given the right to establish the primary residence of the children.[165] Five years after the divorce, the mother moved from Katy, Texas to Santa Barbara, California.[166] The father remained in Katy.[167] After she moved to California, the mother filed a motion to modify in Texas and requested an increase in child support.[168] She also requested an order prohibiting the father from leaving the children unattended during his periods of possession and a temporary restraining order and injunction preventing the father from bringing the children back to Texas.[169] The father filed a counter-motion to modify and asked that he be appointed sole managing conservator of the children and have the right to determine their primary residence.[170]

The father testified that the mother's move to California negatively affected his possession of the children because of the three and one-half hour flight to California and driving time from the airport.[171] Although he admitted to missing some periods of possession with the children while they were living in Texas, the father testified that he attended most of the children's extracurricular activities and helped them with their homework during the mother's periods of possession.

With regard to the best interests of the children, the court of appeals discussed generally the factors set forth in *Holley*, *Lenz*, and *Bates*, and it reasoned that the trial court was correct in finding that the interests of the children were best served by establishing their primary residence in Texas.[172] The court also considered the fact that the father was denied the ability to be substantially involved in the children's lives and the fact that the mother moved to California without telling him.[173] Further, she would not provide him with an address or telephone number. The court also considered the lack of friends or family in California and the fact that the children were deprived of seeing the father's family in Texas.[174]

The trial court named the father sole managing conservator of the children and awarded him the right to determine their residence. The

164. Knopp v. Knopp, 14-02-00285-CV, 2003 Tex. App. LEXIS 3950 (Tex. App.—Houston [14th Dist.], May 8, 2003) (mem. op.). This case was decided by the Houston Court of Appeals, 14th District.

165. *Id.* at *1.

166. *Id.*

167. *See id.* at *2.

168. *Id.* at *1.

169. *Id.* at *1–2.

170. *Id.* at *2–3.

171. *Id.* at *11.

172. *Id.* at *18.

173. *Id.*

174. *See id.* at *19–20.

court of appeals affirmed.[175] The court found that the mother's relocation "deprived [the father] of . . . meaningful access to the children."[176] The court considered the flight to Los Angeles and how the distance shortened his visits with the children.[177] The court also considered the father's testimony that he was unable to be as involved in the children's lives as he was when they lived in Katy.[178] Thus, as did the *C.R.O.* court, this court heavily weighed the public policy in favor of "frequent and continuing contact" as a part of its best-interest analysis and prevented the mother from relocating with the children to California.[179]

H. *Cisneros v. Dingbaum—2005*[180]

In *Cisneros*, the mother and father were never married.[181] After their relationship ended, Mr. Cisneros filed a voluntary petition to establish paternity of M.S.C. and requested, among other things, that M.S.C.'s residence be restricted to El Paso County.[182] About nine months later, the mother married an officer in the United States Army, and the father filed an amended paternity petition and requested, among other things, temporary orders on conservatorship and access.[183] The mother requested the same in a pleading filed that same day.[184] The trial court entered temporary orders that restricted M.S.C.'s residence to El Paso, County,[185] but at trial, awarded the mother the right to establish the child's primary residence without regard to geographic location.[186]

At trial, the only issue litigated by the parties was the domicile restriction.[187] The mother's new husband testified that he had sought assignment to a base in El Paso, and that he expected the Army to transfer him to a base outside of El Paso within the months following the trial.[188] At trial, the father testified that he took an "active role in the care-giving responsibilities" of M.S.C., that the time that M.S.C. spent with his father was beneficial to him, that the father and his

175. *Id.* at *21.
176. *Id.* at *11.
177. *Id.*
178. *Id.*
179. *Id.* at *13.
180. Cisneros v. Dingbaum, No. 08-03-00477-CV, 2005 Tex. App. LEXIS 2063 (Tex. Civ. App.—El Paso 2005, no pet.) (not designated for publication).
181. *See id.* at *2–3.
182. *Id.* at *1–2.
183. *See id.* at *2–3.
184. *Id.* at *3.
185. *Id.* at *4.
186. *Id.* at *25.
187. *See id.*
188. *Id.* at *6. During the span of the trial, which consisted of several hearings, the mother's husband received notice from the Army that he was being transferred to Colorado Springs, Colorado. *Id.* at *6 n.3.

wife, whom he married during the pendency of the case, had a happy and loving home, and that M.S.C. bonded with his extended family in the area and his wife's two sons from a previous marriage.[189] The mother agreed with all of these contentions.[190]

The father testified that he was not seeking custody of M.S.C. and that he did not believe that it was in M.S.C.'s best interests to be separated from his mother.[191] The father voiced only one complaint as to the mother's husband: that he believed that he was selfish in putting his career above M.S.C.'s relationship with his father.[192] The father stated that he wanted equal visitation periods with M.S.C and a domicile restriction to El Paso County so that he could continue to play a meaningful role in M.S.C.'s life.[193] He contended that it was important that he be able to share in M.S.C.'s upbringing, specifically to be able to witness the "firsts" such as M.S.C.'s first time to ride a bike.[194] He testified that the liberal periods of possession granted to him in the temporary orders had allowed him and M.S.C. to bond with each other and that it was in M.S.C.'s best interests to continue those bonds.[195]

The mother testified that her husband's career in the Army was very important to him and that it was difficult to say whether his career was more important to him than the father's relationship with M.S.C.[196] She testified that she thought her husband's service to his country had a positive influence on M.S.C.[197] She contended that she did not want to leave El Paso, as she had family and friends there, but that she would have to follow her husband if he were transferred.[198] She contended that her husband was a wonderful stepfather to M.S.C. and that they, together with her new baby, were a family.[199] While she acknowledged that M.S.C.'s ongoing relationship with his father was important, she testified that that it would be devastating to M.S.C. to be separated from her.[200]

She also testified that she believed that M.S.C.'s relationship with his father could continue to grow if she were allowed to relocate.[201] She proposed separate visitation schedules that were dependent upon whether her husband was relocated within the United States or

189. *See id.* at *4–5.
190. *Id.* at *5.
191. *See id.* at *11.
192. *Id.* at *13.
193. *Id.* at *11.
194. *Id.*
195. *See id.*
196. *See id.* at *7–8.
197. *Id.* at *8.
198. *Id.* at *10.
199. *Id.* at *7.
200. *Id.*
201. *Id.* at *8.

outside of the United States and whether M.S.C. was school-aged.[202] She also testified that she would arrange for videoconferencing for the father and M.S.C., and she also offered to let the father stay with her and her husband during his visits with M.S.C., during which time he could use one of their vehicles.[203]

In addition to their testimony, each party had a psychologist testify at trial.[204] The father's psychologist, who had criticized the work of Dr. Wallerstein,[205] testified that, after observing M.S.C., it appeared that neither parent was the "primary parent," although the psychologist did not observe M.S.C. with his mother and stepfather.[206] However, the mother's psychologist countered much of the father's psychologist's criticism of Dr. Wallerstein and stated that the mother was clearly M.S.C.'s primary parent and that M.S.C.'s relationship with his father could continue to grow if the mother were allowed to relocate with M.S.C.[207]

The trial court entered a final order that awarded the mother the exclusive, but qualified right[208] to determine the child's residence without regard to geographic limitation. The father appealed and contended that the trial court did not "properly apply the mandated state policy of assuring frequent and continuing contact and did not properly evaluate M.S.C.'s best interest."[209] Specifically, the father contended that the burden of proof in original proceedings, as opposed to modification proceedings, should be on the party seeking to relocate.[210] The El Paso court of appeals affirmed the trial court's ruling.[211] The court reasoned that,

> [i]n order for the trial court to conduct an appropriate best-interest analysis in this case, the parties both needed to present evidence in support of their position on the child's best interests. In this regard, both parties carry the burden of introducing sufficient evidence for the trial court to make its decision on the best interest of the child.[212]

The court held that the party seeking to relocate should not have the burden of proof and that the court should not order a domicile restriction because, in an original proceeding, the best interest of the child is

202. *See id.* at *8–9.
203. *See id.* at *9–10.
204. *Id.* at *17.
205. *See infra* Part V.
206. *See Cisneros*, 2005 Tex. App. LEXIS 2063, at *19.
207. *See id.* at *25.
208. *Id.* at *25–28. The order provided a number of qualifications that would result in the child's residence reverting to El Paso County, including termination of the mother's marriage to her husband or if the mother chose not to relocate with the husband to a new assignment within a specified period of time after the assignment.
209. *Id.* at *32.
210. *Id.* at *33–34.
211. *Id.* at *1.
212. *Id.* at *35.

the primary consideration of the court.[213] Thus, the policy in favor of frequent and continuing contact does not place a burden on the party seeking to relocate to prove that there should not be a domicile restriction.[214]

The father also argued that the trial court did not properly consider M.S.C.'s best interests because it based its decision to allow the mother to relocate on her husband's desire to maintain his career in the Army and not on M.S.C.'s best interests. Specifically, the father argued that the trial court's order allowing the mother to determine the primary residence of the child without regard to geographic location was conditioned upon factors involving her husband, not M.S.C.[215] However, the court of appeals disagreed, and held that the trial court fashioned its order on occurrences involving the mother and that there was sufficient evidence to find that the mother should have the right to determine M.S.C.'s residence, subject to the imposed geographical restrictions and qualifications.[216] Thus, the court affirmed the trial court's order.[217]

I. *Summary of Case Holdings*

Of the eight cases discussed above, the custodial parent who sought to relocate had the burden of proving the modification elements in four of the cases—*Seidel*, *Franco*, *Lenz*, and *Echols*.[218] In these cases, the custodial parent had the burden to prove the modification elements because of an existing domicile restriction. In three of the four cases—*Franco*, *Lenz*[219], and *Echols*, the custodial parent was allowed to relocate.

In three of the remaining cases—*C.R.O.*, *Bates*, and *Knopp*—the noncustodial parent seeking to prevent the custodial parent from relocating had the burden to prove the modification elements because the original custody order did not contain a domicile restriction.[220] In each of those three cases, the custodial parent was prevented from relocating.[221]

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213. *Id.* at *36.
214. *See id.*
215. *See id.* at *36–37.
216. *Id.* at *41–42.
217. *Id.* at *42.
218. *See* Seidel v. Seidel, 10 S.W.3d 365, 367 (Tex. App.—Dallas 1999, no pet.); Franco v. Franco, 81 S.W.3d 319 (Tex. App.—El Paso 2002, no pet.); Lenz v. Lenz, 79 S.W.3d 10, 19 (Tex. 2002); Echols v. Olivarez, 85 S.W.3d 475, 482–83 (Tex. App.—Austin 2002, no pet.).
219. *Lenz* was a jury trial. *See* Lenz v. Lenz, 79 S.W.3d 10, 11 (Tex. 2002).
220. *See* Bates v. Tesar, 81 S.W.3d 411, 424 (Tex. App.—El Paso 2002, no pet.); In re C.R.O., 96 S.W.3d 442, 447 (Tex. App.—Amarillo 2002, pet. denied); Knopp v. Knopp, No. 14-02-00285-CV, 2003 Tex. App. LEXIS 3950, *13 (Tex. App.—Houston [14th Dist.], May 8, 2003) (mem. op.).
221. *See Bates*, 81 S.W.3d at 438; *C.R.O.*, 96 S.W.3d at 451; *Knopp*, No. 14-02-00285-CV, 2003 Tex. App. LEXIS 3950, at *12.

In the remaining case, *Cisneros*, the proceeding was an original proceeding, not a modification proceeding.[222] Thus, the parties were litigating custody for the first time.[223] The court required each party to present evidence on the best interests of the child with regard to the issue of relocation.[224]

V. The Interplay of "Frequent and Continuing Contact" and the Best Interests of the Child in the Relocation Context

There are two general schools of thought with regard to the psychological impact upon a child when he or she moves away from an involved noncustodial parent—one stresses the importance of the post-divorce family unit and the other stresses the importance of the child's continuing relationship with the noncustodial parent.[225] This Comment does not attempt to set forth all of the relevant social science theories bearing upon the issue of relocation of the custodial parent. Rather, this Comment discusses the research of two psychologists in order to set forth the competing views on what rules serve the best interests of the child when the custodial parent seeks to relocate. Part A sets forth some of the research findings of Dr. Judith S. Wallerstein,[226] and part B sets forth some of the research findings of Dr. Richard A. Warshak.[227] Part C then addresses the issue as to which theory Texas subscribes.

A. *Importance of the Post-Divorce Family Unit—Dr. Wallerstein's View*

Dr. Wallerstein writes that "[i]t is unrealistic to expect that any family in contemporary American society, whether intact or divorced, will remain in one geographic location for an extended period of time . . . ."[228] Given this geographic mobility, it is not realistic to assume that a child's post-divorce support system will be the same as his or her pre-divorce support system.[229] Dr. Wallerstein provides the fol-

222. *See Cisneros*, No. 08-03-00477-CV, 2005 Tex. App. LEXIS 2063, at *1.
223. *See id.*
224. *See id.* at *35–36.
225. *See* Terry, *supra* note 31, at 984.
226. Judith S. Wallerstein, Ph.D., "founded the Center for the Family in Transition in Marin County, California, in 1980 and served as its executive director from 1980 until 1993." Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 Fam. L.Q. 305, 305 n.* (1997). Dr. Wallerstein wrote an amicus curiae brief in *Burgess v. Burgess*, 913 P.2d 473, 483 n.11 (Cal. 1996).
227. Dr. Richard A. Warshak is a "[c]linical, consulting, and research psychologist in private practice and Clinical Professor at the University of Texas Southwestern Medical Center at Dallas." Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases:* Burgess *Revisited*, 34 Fam. L.Q. 83, 83 n.* (2000).
228. Wallerstein, *supra* note 226, at 310.
229. *See id.*

lowing factors that are attributed to positive post-divorce outcomes in children: "a close, sensitive relationship with a psychologically intact, conscientious custodial parent," "the diminution of conflict and reasonable cooperation between the parents" and "whether or not the child comes to the divorce with pre-existing psychological difficulties."[230]

While Dr. Wallerstein contends that it is important for a child to have a strong relationship with the noncustodial parent, she does not contend that the amount of contact between the noncustodial parent and the child is related to the child's adjustment.[231] An essential element of Dr. Wallerstein's theory is that a new "family unit" is created after divorce.[232] Dr. Wallerstein argues that by prohibiting the custodial parent from relocating, he or she may have to choose between "custody of his or her child and opportunities that may benefit the family unit, including the child as well as the parent. These may include a new marriage, an important job opportunity, or a return to the help provided by an extended family . . . ."[233] Dr. Wallerstein further argues that if the parent becomes depressed by having to remain in a certain area, the child may suffer.[234] Thus, within a best-interest context, Dr. Wallerstein contends that the best interests of the child can be served by allowing him or her to relocate with the custodial parent.

B. *Importance of the Continuing Bond Between the Child and the Noncustodial Parent—Dr. Warshak's View*

In his article, "Social Science and Children's Best Interests in Relocation Cases: *Burgess* Revisited," Dr. Warshak stated that "a comprehensive and critical reading of over seventy-five studies in the social science literature, including [Dr.] Wallerstein's earlier reports, generally supports a policy of encouraging both parents to remain in close proximity to their children."[235] Dr. Warshak disagrees with Dr. Wallerstein's findings that suggest the lack of a link between the frequency of a child's contact with his or her noncustodial parent and positive outcomes in adolescents.[236] Dr. Warshak instead cites studies which found that "regular visitation 'was a compelling factor' predicting children's adjustment."[237] Dr. Warshak believes that such regular visitation cannot be accomplished on holidays and during the sum-

230. *Id.* at 310–11.
231. *Id.* at 311–12.
232. *See id.* at 314.
233. *Id.* at 315.
234. *See id.*
235. Warshak, *supra* note 228, at 83–84.
236. *See id.*
237. *Id.* at 90 (quoting Jessica Pearson & Nancy Thoennes, *Custody After Divorce: Demographic and Attitudinal Patterns*, 60 AM. J. ORTHOPSYCHIATRY 223, 246 (1990)).

mer.[238] Additionally, he opines that "allowing a father to see his children more frequently results in a greater likelihood that he will maintain his financial and emotional obligations to them."[239]

In addition to disagreeing with Dr. Wallerstein's downplaying of the importance of frequent contact between the noncustodial parent and the child, Dr. Warshak faults Dr. Wallerstein for sympathizing too much with the needs of the custodial parent.[240] He writes that

> [Dr.] Wallerstein is concerned that a parent may become depressed by giving up the opportunities associated with relocation or by giving up custody in order to pursue such opportunities . . . . But we should balance this with consideration of the impact on the father or mother whose children are taken away, a parent who may have made his or her own concessions in order to remain involved with the children. Research shows that fathers [or mothers] who are denied access to their children, or are merely threatened with the loss of contact, suffer intense distress.[241]

Similarly, Dr. Warshak disagrees with Dr. Wallerstein's labeling of the custodial parent and child as a family unit and instead claimed that the noncustodial parent is a part of the family unit.[242] He claimed that Dr. Wallerstein views the noncustodial parent as a "stranger to the child's family."[243]

C. *To Which Theory Does Texas Subscribe?*

The Texas Legislature has pronounced that the best interests of the child shall be the primary consideration for the court and has adopted a public policy to "assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child."[244] Here, the legislature uses the word "assure," which means "ensure," or "guarantee." The legislature has not qualified this statute to make it inapplicable or limited in relocation cases. Therefore, the legislature presumes that it is in a child's best interest to have "frequent and continuing" contact with their parents and that this public policy applies in relocation cases. Thus, based solely upon Texas statutes, it appears as though Texas may favor the theory that emphasizes the importance of the noncustodial parent.

However, in *Lenz*, the Texas Supreme Court gave credence to both theories. On the one hand, the court acknowledged the trend of moving away from strict presumptions against relocation.[245] The court

238. *See* Leslie Eaton, *Divorced Parents Move, and Custody Gets Trickier*, N.Y. TIMES, Aug. 8, 2004, *available at* http://home.att.net/~rawars/NYT804.htm.
239. Warshak, *supra* note 228, at 94.
240. *See id.* at 98.
241. *Id.*
242. *See id.*
243. *Id.* at 85.
244. TEX. FAM. CODE ANN. § 153.002 (Vernon 2002).
245. Lenz v. Lenz, 79 S.W.3d 10, 15 (Tex. 2002).

also acknowledged that "[i]ncreasing geographic mobility and the availability of easier, faster, and cheaper communication have in part accounted for this shift in perspective."[246] Additionally, the *Lenz* court discusses California, a jurisdiction which also has a public policy in favor of "frequent and continuing contact."[247] The court stated that Texas should give meaning to this public policy in the relocation context.[248] However, the Supreme Court of California, in interpreting California's public policy in favor of "frequent and continuing contact," has held that such policy "does not so constrain the trial court's broad discretion to determine, in light of *all* the circumstances, what custody arrangements serve the 'best interest' of the minor children."[249] On the other hand, the Texas Supreme Court underscored the importance of the public policy to assure "frequent and continuing contact." In *Lenz*, it stated that "we must endeavor to give meaning to these public policy imperatives as we interpret the Family Code modification standards in the relocation context."[250]

Additionally, the Texas courts of appeals have given importance to the public policy in favor of "frequent and continuing contact."[251] As discussed in Section IV-I above, of the eight holdings discussed in that Section, the court prevented the custodial parent from relocating in four of the cases.[252] These courts primarily emphasized the effect of the proposed move upon the noncustodial parent's ability to have "frequent and continuing contact" with the child.[253] Moreover, of the four holdings in which the custodial parent was allowed to relocate with the child,[254] and after discounting *Lenz* and *Franco* because they involved a jury verdict and a pre-existing agreement to move, respectively, only two courts actually allowed the custodial parent to move despite a likely negative impact on the frequency of the noncustodial parent's access to the child after the move.[255] Thus, the Texas appel-

246. *Id.*

247. *Id.* at 16. *See* CAL. FAM. CODE § 3020 (West 2004).

248. *Lenz*, 79 S.W.3d at 16.

249. Burgess v. Burgess, 913 P.2d 473, 480 (Cal. 1996).

250. *Lenz*, 79 S.W.3d at 14.

251. *See* Bates v. Tesar, 81 S.W.3d 411, 432 (Tex. App.—El Paso 2002, no pet.); *In re* C.R.O. & D.J.O., 96 S.W.3d 442, 447 (Tex. App.—Amarillo 2002, pet. denied); Knopp v. Knopp, No. 14-02-00285-CV, 2003 Tex. App. LEXIS 3950 (Tex. App.—Houston [14th Dist], May 8, 2003) (mem. op.).

252. *See Bates*, 81 S.W.3d at 438; *C.R.O*, 96 S.W.3d at 447; *Knopp*, No. 14-02-00285-CV, 2003 Tex. App. LEXIS 3950, at *13; Seidel v. Seidel, 10 S.W.3d 365, 370 (Tex. App.—Dallas 1999, no pet.).

253. *See Bates*, 81 S.W.3d at 438; *C.R.O.*, 96 S.W.3d at 447

254. *See* Franco v. Franco, 81 S.W.3d 319, 321 (Tex. App.—El Paso 2002, no pet.); Lenz v. Lenz, 79 S.W.3d 10, 19 (Tex. 2002); Echols v. Olivarez, 85 S.W.3d 475, 481 (Tex. App.—Austin 2002, no pet.); Cisneros v. Dingbaum, No. 08-03-00477-CV, 2005 Tex. App. LEXIS 2063 (Tex. Civ. App.—El Paso 2005, no pet).

255. *See Echols*, 85 S.W.3d at 481; *Cisneros*, No. 08-03-00477-CV, 2005 Tex. App. LEXIS 2063, at *25. In *Lenz*, the court was reviewing the jury verdict on a sufficiency of the evidence standard. *Lenz*, 79 S.W.3d at 16. In *Franco*, the court would have

late courts have followed the Texas Supreme Court's dicta in *Lenz* in giving meaning to "frequent and continuing contact" in their best-interest analyses.

VI. Considering the Need for a Legislative Presumption That Relocation is Not in the Child's Best Interests

In relocation cases, the trial judge must decide whether it is in the child's best interests to move with the custodial parent, who may have a legitimate need to move because of a job or to follow a spouse who has been offered a position, or to remain near the noncustodial parent, who has been an integral part of the child's life. One judge noted the quandary that trial judges face in the relocation context by stating,

> [c]hild custody cases are readily conceded by judges to be among the most difficult cases they must decide. Among these cases, ones in which a custodial parent seeks to move to a distant location with the children are especially troubling. In some cases, the justification for moving away may be unassailable, yet the ability to maintain contact between the noncustodial parent and the child may be substantially eroded.[256]

The Texas Legislature has provided a basic framework for trial courts to use in deciding custody cases. It has mandated that the "best interests 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,"[257] and it has also adopted a policy of assuring children "frequent and continuing contact" with parents who have shown the ability to act in their best interests.[258] In *Lenz*, the Texas Supreme Court acknowledged that courts should give meaning to the policy favoring "frequent and continuing contact," but it also noted the trend disfavoring strict presumptions against relocation due to the increasingly mobile nature of our society.[259] Toward that end, the court looked to the factors used by other jurisdictions that focus on the best interests of the child and noted that the factors those jurisdictions use could assist Texas courts in deciding relocation cases.[260]

Thus, because trial courts deciding post-*Lenz* cases are instructed to give meaning to the public policy in favor of "frequent and continuing contact," yet are allowed to weigh a number of factors to decide if the

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been more receptive to the noncustodial parent's argument if the parties had not previously contemplated the relocation of the custodial parent. *See Franco*, 81 S.W.3d at 321.

256. Leben, Steve & Megan Moriarty, *A Kansas Approach to Custodial Parent Move-Away* Cases, 37 WASHBURN L.J. 497, 497 (1998).

257. TEX. FAM. CODE ANN. § 153.002 (Vernon 2002).

258. § 153.001(a)(1).

259. *Lenz*, 79 S.W.3d at 14–15.

260. *Id.* at 15–16.

move is in the best interests of the children, it follows that the policy in favor of "frequent and continuing contact" should act as a rebuttable presumption that relocation is not in the best interests of the child.[261] Such a presumption would be consistent with the policy of making the best interests of the child the primary consideration of the trial court because, if the legislature has adopted a policy in favor of frequent and continuing contact, it must believe that such a policy is in the best interests of the child.

Furthermore, if the policy in favor of "frequent and continuing contact" does not operate to create a presumption that relocation a significant distance away from the noncustodial parent is not in the child's best interests, then the policy can simply be viewed alongside a number of other factors. A court may allow a custodial parent to relocate a significant distance away from the noncustodial parent even though the child would not necessarily be assured "frequent and continuing contact" with the noncustodial parent.[262] Thus, because the policy does not judicially operate as a mandate that would prevent trial courts from allowing a custodial parent to relocate a significant distance away, the best way to give meaning to the policy is for the legislature to create a presumption that such a relocation is not in the best interests of the child.

VII. CONCLUSION

As is evidenced by the scenario concerning Alan, Beverly, and Carrie set forth at the beginning of this Article, the relocation of the custodial parent is a problematic issue in family law.[263] While the Texas

261. An explanation of the practical effects of a presumption that the relocation is not in the best interests of the child follows. In original custody cases, the presumption would have the practical effect of placing the burden on the parent seeking to be named the conservator with the right to determine the primary residence of the child without regard to geographic location to prove that a proposed move a significant distance away from the noncustodial parent would be in the child's best interests. With regard to other issues litigated in the original proceeding (save and except other statutory or judicial presumptions, *i.e.* the presumption of joint managing conservatorship), both parents would carry the burden of introducing evidence on the best interests of the child. In modification cases in which the noncustodial parent seeks to impose a domicile restriction to prevent the custodial parent from relocating with the child a significant distance away, he or she would have the burden of proving only that the move constitutes a "material and substantial change." *See* TEX. FAM. CODE ANN. § 156.101 (Vernon 2005). The burden would then shift to the custodial parent seeking to relocate to prove that the relocation would be in the child's best interests. In modification cases in which the custodial parent seeks to remove a domicile restriction in order to relocate, the custodial parent would have the burden of proving both modification elements under section 156.101. In each of the above scenarios, a custodial parent could overcome the presumption that a proposed move a significant distance away from the noncustodial parent is not in the child's best interests by proving the factors identified in *Lenz* favor relocation. *See Lenz*, 79 S.W.3d at 16–19.

262. *See, e.g.*, Cisneros v. Dingbaum, No. 08-03-00477-CV, 2005 Tex. App. LEXIS 2063, *41–42 (Tex. App.—El Paso 2005, no pet.) (not designated for publication).

263. *See* Terry, *supra* note 31, at 984.

Supreme Court has stated its preference for a relocation rule that gives meaning to Texas's public policy to "assure frequent and continuing contact" between the noncustodial parent and child but that incorporates a number of factors, this Comment argues that the Legislature should adopt a presumption that a custodial parent's relocation is not in the child's best interests.

As the relevant social science underscores,[264] the child's bonds with both the custodial and noncustodial parent are important and essential. Therefore, Texas should adopt a relocation scheme that acknowledges both of those relationships. The Texas Legislature presumes, by virtue of adopting a policy in favor of "frequent and continuing contact," that such contact is in the child's best interests. Thus, in order to acknowledge that policy, yet allow for needed flexibility, the Texas Legislature should adopt a presumption that relocation is not in a child's best interests.

Kelly Gibbons

264. *See supra* Part V.