

**RELOCATION:
SHOULD I STAY, OR
CAN I GO?**

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Relocation

I. INTRODUCTION

Relocation cases present some of the most perplexing problems that trial courts are called upon to decide, pitting the interests of the parent with primary possession who wishes to move away with the child against the other parent who wishes to maximize possession of and access to a child. These cases are just too complex to be easily handled by presumptions. Presumptions tend to erect artificial barriers to the trial court's consideration of all relevant factors. To hold that a move should always be denied is to overlook any benefits that may accrue to the child physically and emotionally, including remaining with the parent with primary possession. To hold that a move should always be granted overlooks any benefits that may accrue to the child physically and emotionally by remaining in familiar surroundings and remaining close to the other parent.

II. STATE APPROACHES TOWARD RELOCATION LITIGATION

A. Review of State Law Regarding Relocation

It appears that the respective fifty states fall into one of three categories in their statutory and case law approaches toward relocation litigation. These categories are (1) permissive approach toward relocation; (2) restrictive approach toward relocation; and (3) the middle ground.

1. PERMISSIVE APPROACH TOWARD RELOCATION

A number of jurisdictions with specific statutes have adopted the far less restrictive attitude that absent exceptional circumstances, relocation should be allowed. New Jersey, Massachusetts, Michigan, and Minnesota, all have statutes requiring permission from the non-custodial parent or court for a relocation, yet all four have announced the rule that relocation will be favored unless the non-custodial parent can prove the move is not in the child's best interest. See D'Onfrio v. D'Onfrio, 365 A.2d 716 (N.J. 1981),

Hale v. Hale, 429 N.E.2d 340 (Mass. 1981), Henry v. Henry, 326 S.W.2d 493, 497 (Tenn. 1982), Auge v. Auge, 334 N.W.2d 910, 912 (Wis. 1983).

2. RESTRICTIVE APPROACH TOWARD RELOCATION

The restrictive approach toward relocation, as recognized by Wisconsin, Florida and New York, generally holds that relocation of the custodial parent and the child is prohibited unless the custodial parent can demonstrate compelling, exceptional circumstances of pressing concern for the welfare of the custodial parent and the child. But see Handschu, Changing a Child's Residence: New Moves by the Courts New York Law Journal, Feb 26, 1991, Vol 205, page 1.

Several states have codified their restrictive attitude toward relocation of the custodial parent after the divorce, but the existence of a specific statute can be very deceptive. For example, Wisconsin has such a statute, WIS. STAT. ANN. §767.245(6), whereas Florida and New York do not. Nevertheless, New York holds to the view that the child and custodial parent should stay put unless the custodial parent can show exceptional circumstances which would justify interference with the joint right of the child and non-custodial parent to be together for substantial periods. See Weiss v. Weiss, 79 A.D.2d 1110, 436 N.Y.S.2d 862 (1981). Wisconsin and Florida are similarly strict. Interestingly enough, New York seems to focus more on the rights of the non-custodial parent, Wisconsin on the best interest of the child, and Florida on the child's right of access to both parents, all to arrive at the same result.

3. THE MIDDLE GROUND

The middle ground toward relocation as recognized by Illinois, South Dakota and Michigan generally holds relocation should be allowed in the event the primary custodian has a legitimate reason for the relocation and the move is consistent with the best interest of the child. See Bertin, Relocation, No Common Ground, 11 FAM. LAW. ADVOC. 3, at 8.

B. Texas Approach to Relocation Litigation

Given these three general approaches to relocation, the question arises: Where does Texas fit within this scheme?

1. TEXAS CASE LAW

Precisely where Texas fits in this spectrum, nobody knows for sure yet. The scant case law on the subject indicates that Texas would fit in the middle ground and bases the test upon certain statutory requirements and the "best interest of the child". See Bingham v. Bingham 811 S.W.2d 678 (Tex. App.--Fort Worth 1991, no writ). Bingham discusses a joint custody decree, silent as to county of residence for the child, and conferring on each parent the joint right to determine domicile. The mother had a "primary possession," and she and her new husband moved from Dallas to Conroe, Texas. Mother filed a suit to modify the domicile of the child. Dad argued that to do so would require satisfaction of the standards of §156.202 of the TEX. FAM. CODE, i.e. change of circumstances, or unworkability plus positive improvement and best interests. The court rejected that argument stating:

"Clearly, where there is no evidence of the necessity for a change in the mother's status as primary possessory parent, it would not be a positive improvement for the child to have his domicile changed from that of his mother." Bingham at 681.

The court acknowledges the difficulty relocation visits on the non-custodial parent, and shares his anguish but notes that it is powerless to effect any remedy that would in any way benefit the child.

Apparently then, at least one Texas court is serious about focusing on the needs of the child without regard to the legitimate and often conflicting needs of the adults involved. But, does this case hold that the person resisting the move must make a case for modification of primary possession, joint to sole managing conservatorship or possessory conservatorship to sole managing conservatorship, as the situation demands, in order to defeat a move? Hold is a bit strong, but

assuming the reason for the move is legitimate, it certainly seems to suggest that result.

2. TEXAS FAMILY CODE PROVISIONS

In the near absence of Texas case law, it is important to examine the Texas statutory scheme and more specifically the various rights, duties, powers and privileges of conservators to determine and/or choose the residence of a child.

a. Sole Managing Conservatorship

Section 153.132 of the TEX. FAM. CODE contains the rights, privileges, duties and powers of a conservator and, in relevant part, reads as follows:

Unless limited by court order, a parent appointed sole managing conservator of a child has the rights and duties including "(1) the right to establish the primary residence of the child" and the "(3) right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child." (emphasis added).

b. Joint Managing Conservatorship

Section 153.134 of the TEX. FAM. CODE contains provisions regarding appointment of joint managing conservators.

(1) Agreement.

Section 153.133(a)(1) of the TEX. FAM. CODE contains provisions that if a written agreement of the parents is filed with the court, the court shall appoint the parents as joint managing conservators of the child in its decree only if the agreement designates the conservator who has the exclusive legal right to establish the primary residence of the child; and (A)

establishes, until modified by further order, the geographic area within which the conservator shall maintain the child's primary residence; or (B) specifies that the conservator may determine the child's primary residence without regard to geographic location.

(2) Court Order.

Section 153.134(a) of the TEX. FAM. CODE also contains language that if a written agreement of the parents is not filed with the court, the court may appoint the parents as joint managing conservators and in its order the court shall (b)(1) designate the conservator who has the exclusive right to determine the primary residence of the child and (A) establish, until modified by further order, a geographic area consisting of the county in which the child is to reside and any contiguous county thereto within which the conservator shall maintain the child's primary residence; or (B) specify that the conservator may determine the child's primary residence without regard to geographic location.

III. CONSTITUTIONAL ISSUES

As an attorney, there are at least four possible constitutional issues one should be prepared to weigh in relocation cases:

- A. The right to travel.
- B. The right to rear one's own child as one sees fit.
- C. The right of meaningful access to one's child.
- D. The right of a child to meaningful access to one's parents.

Interestingly enough, the Texas Supreme Court deftly sidestepped the precise issue in Ex Parte Rhodes, 163 Tex. 31, 352 S.W.2d 249 (Tex. 1961), wherein it held that a divorce decree restricting a child's residence to Karnes County was not void in a proceeding seeking release of his mother on a writ of habeas corpus after incarceration for contempt in violating the order. The Court was careful to point out...

"[4] While we have held that the restrictive residence provision of the custody decree was not void, it is one of an extreme nature. It may drastically affect the freedom of decision of the custodian of the child as to what is best for the child. And, as is pointed out by the counsel for Betty Rhodes, if request for removal to another county is denied, it may materially restrict the right of a citizen (who would not move without her child) to change the place of his or her residence. If permission to move were denied, she would be in a better position to assert that she was deprived of her liberty without due process. We express no opinion on that matter. In any event, the appellate court will look with care to see whether there has been an abuse of discretion on the part of a court which denies permission to remove the residence of the child to that of the new residence of the person having been adjudged the proper person to be the custodian of the child. By citing White v. Lobstein, 246 S.W.2D 953 (TEX. CIV. APP. – Eastland, 1952), we are not to be understood as approving the decision that there was no abuse of discretion in refusing to grant consent for the removal of the child to the residence of the custodian. That case did not reach this court."

IV. HOW TO DETERMINE THE POSSIBILITY OF A RELOCATION ISSUE

As an attorney in representation of a client,

one must be aware of a possible relocation issue. In other words, utilize the opportunities during representation of your client to insure that you address the relocation issue in the decree of divorce. Consequently, your representation of your client would also include placing appropriate language in a decree regarding residency and/or domicile in order to protect the interest of your client.

While this, of course, sounds good in the theoretical sense, in the practical sense it is often difficult. At the time of the divorce or the dissolution of the marriage, the possibility of what may occur after the divorce seems remote and rarely, if ever, is it actively addressed by the client. The use of a short checklist is advised to determine the possibility of relocation after the divorce. This checklist would contain the following:

1. Ascertaining job stability for either party;
2. Ascertaining the possibility of job advancement for either party;
3. Location of home office for each party's employment;
4. Pattern of advancement in either party's present job situation;
5. Likelihood of job change, educational opportunities, educational goals;
6. economic conditions;
7. location of immediate family;
8. location of extended family;
9. reason/purpose for residing in the present geographic location;
10. does either parent or party have a relocation history;
11. existence of a "significant other" who may have a relocation issue identified above.

After utilizing this checklist, an attorney would have some idea of the possibility of relocation given the facts and circumstances of the party pre-divorce.

V. PROS, CONS, AND OTHER PSYCHOLOGICAL EFFECTS OF RELOCATION ON CHILDREN

Both positive and the negative aspects of the relocation of a child have been studied in great detail. Social scientists look not only at the effects relocation may or may not have on children, but also the issues relocating and non-relocating adults may encounter are studied in great detail.

A. Pros for Relocation

Judith S. Wallerstein argues "To require divorcing parents to spend their lives in the same geographical vicinity is unrealistic." See Wallerstein, Amica Curiae Brief of Dr. Judith S. Wallerstein, Ph.D., filed in Cause No. SO46116, In re Marriage of Burgess, Supreme Court of the State of California, Dec. 7, 1995 [hereinafter Burgess Amica Curiae Brief]. Wallerstein notes that "Prohibiting a move by the custodial parent may force that parent 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." Wallerstein, Burgess Amica Curiae Brief, at 22. The Burgess brief suggests that children are harmed by frustrating a parent's desire to relocate because that parent's suffering over lost opportunities may expose the children to diminished parenting and guilt for causing the parent's disappointment. But, children may also experience the guilt of leaving behind a parent, thereby causing that child great anguish.

When economic improvement accompanies relocation, children may benefit if they get special educational and health care opportunities that were not previously affordable. Although a better economical situation may benefit the child, most experts in the field find that children's adjustment does not improve with better financial status. See Hetherington, Long-Term Effects of Divorce and Remarriage on the Adjustments of Children, 24 J. AM. ACAD. CHILD PSYCHIAT. 518. When children are asked to discuss the bad things about the divorce, they do not complain about material deprivation, but they do complain about not spending enough time with their parents. See Warshack, The Impact of Divorce in Father-

Custody and Mother-Custody Homes: The Child's Perspective, CHILDREN AND DIVORCE 29.

Relocation may occur because the custodial parent is moving closer to their extended family, or there is a pending nuptial for the custodial parent. Both situations can be beneficial for the child because of an added family support system after the break up of the child's once stable family unit. Experts agree that stability is important for a child whose family has been torn apart. And stability may occur with the remarriage of the custodial parent into a supportive relationship, of if the custodial parent and child can get emotional and physical support from the custodial parent's extended family. Of course, this type of relocation will only benefit the child if they are moving into an environment is better than their present environment. Relocation does not always harm the child and can be beneficial to a child's adjustment and development.

B. Cons for Relocation

Substantial evidence links frequent residential moves to problems in child adjustment. Frequent relocation was associated with lower academic performance, and higher rates of problems with depression, conduct, and peer relationships. See Benson, Mobility in Sixth Grade as Related to Academic Achievement, Adjustment, and Socioeconomic Status, 16 PSYCHO. IN SCHOOLS 444 (1979). A child's psychological well-being is challenged by the numerous changes accompanying relocation. These include disrupting familiar routines, changing schools and neighborhoods, leaving friends and familiar care providers, and most important, disrupting the ongoing contact with the other parent. Studies provide limited help in relocation questions because they have not established the threshold level of change necessary to undermine the average child's adjustment. The results suggest that the more relocations, the greater the risk to children's development. But they do not allow us to say how many moves are too much.

Relocation subjects children to the strain of frequent air travel, often unaccompanied by an adult, plus the loss of social and recreational

opportunities. To this list we should add loss of parenting time. She advises that children should not be forced to spend a major part of their growing up years in constant travel. Such concerns may sound like a good argument against relocation. But Judith Wallerstein draws a different lesson. Rather than discuss the hardship of travel as a reason for parents to give pause before relocating, and for courts to preclude relocation, Wallerstein advocates reducing the frequency of travel by using alternatives: restrict visits to summers and vacation periods, alternate residences annually, alternate residences to coincide with transitions in school level and have the parent travel to the child's location for visits.

C. Psychological Effects on Children

It is generally agreed that the disruptive effects of divorce have a negative emotional impact on children. Although children's long-term adjustment might be enhanced by the dissolution of a conflicted marital relationship, the immediate and short-term consequence is that significant stress is introduced into the lives of these children. Additionally, when the children are separated from one of their parents, as happens in any type of relocation, the stress becomes significantly greater.

Given that children differ along a developmental continuum in terms of cognitive, social and emotional maturity, their stage of development will effect not only their perception and understanding of the divorce, but also the quantity and quality of coping skills that can be marshaled to deal with the transition to a new family life. The following are typical reactions to stress seen in many children. Remember, these vary as a function of age:

1. Preschool children (3 years to 5 years of age):
 - confusion, insecurity and sadness;
 - regression in the form of whining, clinging and bed-wetting;
 - bewilderment occasioned by loss of routine;
 - a strong sense of betrayal in their security needs.
2. Young school age children (6 years to 8 years

of age):

- intense and pervasive sadness;
- self-blame and guilt;
- confusion;
- inhibition of anger towards the non-custodial parent;
- anger directed at the custodial parent;
- fantasies of reconciliation;
- conflicts in loyalty.

3. Older school age children (9 years to 12 years of age):

- predominantly angry feelings typically expressed towards the non-custodial parent;
- passive-aggressive behavior directed toward custodial parent and perhaps other significant adults, such as a teacher or a coach;
- fighting with peers.

4. Adolescents (13 years to 18 years of age):

- loyalty conflicts;
- sexual misconduct;
- jealous and angry feelings directed toward step-parents or parents' boyfriends or girlfriends.

The most obvious source of emotional distress is the loss of a non-custodial parent and this varies in degrees, depending upon the amount of pre- and post-divorce contact. Obviously, if post-divorce contact is lessened because one or both parents have relocated, then the stress might actually be analogous to that of a child who has lost a parent through death. There are six problematic attitudes which are often found among children of divorce and again, these attitudes are exacerbated because of relocation.

1. Peer ridicule and avoidance. Many children view parental separation and divorce as a stigma that reflects on them. Children may therefore seek to hide the fact of separation or divorce from their peers, limiting their interaction with potentially supportive friends in fear that their secret will be discovered.
2. Paternal blame. A mature attitude toward divorce is that neither a mother or a father alone

is entirely responsible for the events leading to the separation; both parties contributed in some manner to the marital disruption. Typically, children (and their parents as well) often do not hold such a view, but tend to blame one parent exclusively. In instances of paternal blame, the father is typically blamed for the divorce and often is seen as a bad person in general.

3. Maternal blame. This attitude is the same as paternal blame, but with a shift in the attribution of blame to the mother along with a generally negative evaluation of her.

4. Self-blame. Children sometime feel that if they had been better behaved that their parents would still be living together. Many children perceive that their misbehavior led to marital arguments and ultimately to marital separation. While such an attitude is most prominent in younger children, it is sometimes observed in older children.

5. Fear of abandonment. Divorce typically forces children to reconcile themselves to life with one parent and occasional visits with the other. If there has been a relocation of one or both parties, it is not unusual for children to catastrophize such a situation, feeling that they may be on the verge of being orphaned, since now they only have "one parent." Perhaps more prominent is the fear of psychological abandonment. Divorce has taught the child that people fall out of love and go their separate ways. The child's fear is that if parents can stop loving each other, then they can also stop loving their children. The insecurity inherent in such an attitude can be the source of considerable emotional distress.

The causes of poor post divorce adjustment in children appear to be numerous and varied for different families and different children. However, most psychological studies strongly implicate parental conflict, loyalty pressures, quality of parenting, adjustment of the residential parent, and access and closeness of the non-residential parent as issues. It must be remembered that family processes existed prior to the divorce and

those play a critical role in the nature of children's post divorce adjustment. In all likelihood, divorce exacerbates whatever pre-existing problems existed. For example, children who have modeled coping styles characterized by impulsivity and aggressiveness, may rely on those particular coping styles to an even greater extent when the divorce burdens the child with additional sources of stress. There is mounting evidence which suggests that good relationships with both parents are associated with positive outcomes for the children. Unfortunately, many newly divorced parents and especially those parents who have relocated, are psychologically burdened themselves and may be emotionally and/or physically unavailable to their children.

Overall, the disadvantages of a move may require a child to move away from a school, friends, church, and family with which they have had long attachments. But the move may be beneficial to a child in that it may provide financial and education advancements, a new familial support system which may occur through a remarriage, or a new stability brought by a move closer to a parent's extended family. The court should weigh the pros and cons of the relocation when deciding if relocation is in the child's best interest and should be allowed.

VI. MOTIVES FOR RELOCATION

In many jurisdictions, the parent's motive for relocating is an essential consideration in a court's decision whether or not to allow relocation. Most jurisdictions note motives that do not justify a move are frivolous or advanced out of anger or a desire for revenge that is calculated to prevent or substantially diminish a child's contact with the other parent. See Wallerstein, Burgess Amica Curiae Brief, at 31. Richard A. Gardner adds to the list:

Lack of appreciation of the bonding between the child(ren) and the non-custodial parent; pathological dependency on family members in the locale to which the relocating parent wishes to move; and personality problems that interfere with the parent's ability to adjust to a particular environment, with the

associated fantasy that change of location will somehow result in more gratifying personal relationships.

See Gardner, The Burgess Decision and the Wallerstein Brief, 26 J. AM. ACAD. PSYCHIAT. L. 425, at 428. Motives that justify a move, according to Wallerstein, are those that provide, "occupational, educational, or other opportunities that will enhance the quality of life of the relocating child, as well as the parent." To this we should add motives such as accommodating a new spouse's job transfer, living closer to extended family, or getting away from a violent former spouse.

Divorced parents often move in order to be closer to their own parents. When this results in better quality after-school care for children, or intensification of beneficial ties with extended family, this can have salutary effects on the children. Often the main goal of relocating parents is to get emotional comfort from their own parents in the aftermath of the divorce crisis. For the attorney to successfully litigate a client's desire to relocate, that attorney should establish the client's pure motive, which is a valid and compelling reason for the move.

A. Defending the Right to Relocate

As an attorney defending a relocating client in their decision to relocate, the starting point is to determine the terms of the decree and what rights your client as a relocation expressly or implicitly has under their divorce decree. In defending your client's right to relocate and change the child's residence and/or domicile, an attorney needs to begin with their client's motivation in relocating. If the motive does not justify a move, or the court believes the motive to be frivolous or vindictive, the court will not allow the relocation.

B. Discovering the Motivation

After reviewing the decree to determine the express or implicit rights that your client has with regard to relocation, it is important to discover the motivation of your client. Assuming that the opposing party has filed a motion with the court

attempting to stop or quash your client's right to relocate, it is axiomatic that the motivations behind the decision to relocate will be scrutinized by the court.

Faced with this situation, an attorney must be intellectually honest in forming his or her impressions regarding the client's motives to relocate. To enable the attorney to form an objective impression of the client's motivations, it is suggested that the following factors be examined:

1. What are the child's feelings about the relocation?
2. Does the relocation represent a better life or does it merely represent doing things the same old way?
3. Can the advantages available in the new location be made equally available in the present location?
4. Is the relocation attributable to a remarriage? If so, what are the characteristics of the new spouse and/or family?
5. Is the relocation attributable to an improvement of family relationships because of the existence of extended family?
6. Are the employment or career opportunities better?
7. How does the cost of living compare between the two areas?
8. What are the educational opportunities and advantages of the child?
 - a) Special needs;
 - b) Percent attending college;
 - c) Graduation rate versus dropout rate.
9. What are the environmental factors, such as crime, weather, environment?
10. What is the primary economic focus of the area in which your client is seeking to relocate?
11. What is the current relationship between the child and the non-relocating parent?
12. What disadvantages are there to the relocation?
13. What are the opportunities for

extracurricular activities and/or cultural activities for the child?

14. Is the client moving in order to separate the child from the non-custodial parent?

Examining the relevant factors in determining your client's motivation in relocating will help you provide a quality service to your client in defending the client's right to relocate. If your client is incapable of providing compelling arguments to you for the relocation, then he or she is likely to meet significant difficulty when faced with the adversarial process in court.

C. Trying Relocation Issues

Relocation litigation does not present anything novel about family law litigation. The attorney defending a client in relocation litigation should remember to use prompt discovery to proceed to the ultimate goal of winning the case.

The necessity of an expert witness is fundamental in relocation litigation. If relocation for a child is contemplated, and the child has a meaningful consistent relationship with the non-custodial parent, relocation may jeopardize this relationship. The custodial parent should contact a qualified psychologist or psychiatrist familiar with this field of practice to evaluate the child. Although a relocation is likely to have a negative impact and this negative impact should not be ignored, it can be mitigated by stressing the positive considerations of the move. The positive motivations for a relocation, such as the remarriage of the custodial parent, or a move closer to extended family should be emphasized.

Another tip for litigating relocation is to formulate an alternative visitation schedule. The client should be encouraged to propose visitation arrangements which would minimize the impact of the move on the child.

In order to maximize a client's chance to prevail, there are five practical pointers, which if utilized, may assist the attorney in accomplishing this objective:

1. Know the facts of the case;
2. Develop a theory regarding the motivation behind the relocation;
3. Know the law regarding relocation;
4. Know your judge and/or the court; and
5. Have a backup or contingency plan and/or theory.

VII. WHAT COURTS CONSIDER IN PERMITTING OR DENYING RELOCATION

A. Factors Courts Consider

In an attempt to create consistent relocation standards for courts and legislatures to apply, the American Academy of Matrimonial Lawyers drafted a model relocation statute. Among other things, the act suggests a number of factors courts should consider when determining whether the relocation of a custodial parent should be permitted. These factors include:

1. The nature, quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate and with the non-relocating person, siblings, and other significant persons in the child's life;
2. The age, developmental stage, needs of the child, and likely impact of relocation on the child's physical, education, and emotional development, taking into consideration any special needs of the child;
3. The feasibility of preserving the relationship between the non-relocating person and the child through suitable visitation arrangements, considering the logistics and financial circumstances of the parties;
4. The child's preference, taking into consideration the age and maturity of the child;
5. Whether the person seeking relocation has an established pattern of conduct promoting or thwarting the non-relocating person's relationship with the child;
6. Whether the relocation will enhance the general quality of life for both the

- custodial party seeking relocation and the child, including but not limited to financial or emotional benefit or educational opportunity;
7. The reasons each person seeks or opposes relocation; and
8. Any other factor affecting the best interest of the child.

See Trusch, A Panoramic View of Relocation; Where Have We Been? Where Are We Going?, 20-FALL FAM. ADVICE. 18, at 23. The model relocation act is recommended to assist legislatures and courts with relocation issues that are becoming controversial topics.

B. Reasons Courts May Allow Relocation

In the event the parents or parties have been appointed joint managing conservators, or alternatively, if the facts and/or policy of the court seems to dictate that the modification of residence or domicile in fact constitutes a modification of the terms and conditions for possession of or access to a child or prescribes the relative rights, privileges, duties and powers of conservators, the court must find one of the following:

1. the circumstances of the child or a person affected by the order or a portion of the decree to be modified have materially and substantially changed since the date of rendition of the order or decree; or
2. the order or portion of the decree to be modified has become unworkable or inappropriate under existing circumstances; or
3. the notice required by §105.007 of the TEX. FAM. CODE was not given or there was a change in a conservator's residence which took place outside the jurisdiction of the court.

C. The Substantive Test Courts Use

Upon meeting one of the standards necessary to modify a decree, it would appear the court may also utilize and consider the best interests of the child to decide whether to modify the terms of residence and/or domicile, as contained

in §153.002 of the TEX. FAM. CODE:

“The best interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship, possession and support of and access to the child.”

In the absence of specific statutory guidelines in determining if relocation will be allowed, courts may default to this standard which provides very little guidance concerning how to prepare for such litigation or in predicting the outcome. This test can be too vague with problems arising when people have a problem deciding what exactly is in the best interest of the child.

VIII. PRACTICE TIPS

A. What You Will Need to Evaluate a New Relocation Litigation Case

1. Separation or property settlement agreement to see if there are any geographical restrictions.
2. Underlying agreement, court directive and/or statute requiring notice of intention to move.
3. Court-imposed radius restriction that may appear in the divorce judgment.
4. Prior proceeding that speak to visitation or access issues.
5. Financial terms that may affect visitation.
6. Preliminary orders if presently in effect.

B. Involving the Client in Identifying Prospective Witnesses

1. Ask the client to provide detailed notes about everyone closely involved in the child's life.
2. Set up individual notes for every witness, including phone numbers, employment, and areas of testimony.
3. Types of witnesses:
 - a. family or extended family member.
 - b. significant persons in child's life (teachers, clergy).
 - c. witnesses who will address issues related to the proposed move (example:

employment counselors or therapists on parental motivation).

IX. CONCLUSION

Obviously these cases can only be decided on a case by case basis. In every case an argument can be made for or against relocation and the court must balance the competing interests of the parties and children involved. Ideally the court's only fixed policy should be to have a completely open mind, with no preconceived bias in favor of or against relocation. While all of us like to have an idea of what the court will do, I think it is important also for the courts to remember that cases are settled every day in part based upon counsel's perception of what a court will do. In this particular area I think it is important that there be no preconceived tendency so that all of the many and various aspects of the relocation issue will be explored fully by the parties, rather than one or the other remaining smugly intractable because they “know” what the Judge does in relocation cases. Only that way can these decisions be made by the parties after full consideration of all factors, including the best interests of the children.

APPENDIX A**Sample Relocation Clauses**

Adapted from Sample Relocation Clauses, FAMILY LAW ADVOCATE, Vol 20, No. 2, Fall 1998.

A. Detailed Restrictions

1. It is the intention of the parties to live in relatively close proximity to one another in _____ County, _____ (State) so as to facilitate frequent and regular contact between the child and each parent.
2. It is not presently anticipated that either party will wish to relocate the residence he or she maintains with the minor child. However, in the event that wither party proposes such a relocation in the future, prior to the time the child reaches majority, the following procedures and requirements shall apply.
 - a. The relocating paren shall give the other parent written notice, by certified mail, at least four months (120 days) in advance of any proposed relocation. The written notice shall include, at a minimum, the proposed state and city to which relocation is planned; the proposed street and address for the child; and the name and address of the child's proposed school.
 - b. In the event the non-relocating parent objects to the proposed relocation, he or she shall notify the relocating parent of the objection in writing by certified mail within seven days of his or her receipt of the notice of proposed relocation.
 - c. In the event the non-relocating parent has objected to a proposed relocation as set forth above, the relocating parent shall be obligated to bring the matter before the Superior Court for the Judicial District of _____ at _____ for determination as set forth herein, within 14 days of receipt of the objection if he or she wishes to pursue the issue of relocation of the residence he or she maintains for the minor child, In the event that the parent proposing relocation fails to file an appropriate motion to bring the matter before the court within 14 days, as set forth above, he or she shall be deemed to have abandoned the proposed relocation, and the initial notice requirements shall again apply to any future proposed relocation.
3. The parties agree that in any proceeding before the Superior Court relating to a proposed relocation of the residence of the minor child, the following terms shall govern:
 - a. Before any final determination is made by the court, there shall be a psychological evaluation of the child and of each of the parties;
 - b. The relocation shall not be allowed unless the move is determined by the court to be in the best interests of the minor child;
 - c. The party proposing the relocation shall have the burden of establishing that the move is in the best interests of the child; and
 - d. No interim or temporary relocation shall be allowed prior to a final determination of the relocation issue on the merits by the court.
 - e. In the event that the issue if a proposed relocation of the residence of the minor child is placed before the court for determination, the party proposing the relocation shall pay all incidental costs, fees, and expenses incurred in connection with the psychological evaluation of the child and the parties as set forth above, and shall pay the fees of any attorney appointed to represent the minor child.

B. Notice Requirement

Neither party shall change the principal place of residence of the children from the State of _____ without 90 days' advance notice and a final hearing and a court order from the Superior Court of the State of _____ at (address). AN exception shall be if the parents jointly elect to send the child to a private school. A permanent change of principal residence (except for private school) shall be deemed to be an absence from the State of _____ for more than _____ weeks without mutual written agreement or an order of the court.

C. Mileage Limits

The Wife (Husband) agrees not to establish a residence for the children beyond a distance of _____ miles from _____ as measured by automobile travel over public roads, without the prior written consent of the Husband (wife). This provision shall not be applicable to any temporary residence that the Husband (Wife) may establish for the children or any one of them and the temporary residence is defined by the parties to mean a residence where the children reside for a period of two weeks or less. If the Wife (Husband) shall desire to remove the children, or any one of them, to a permanent address to be located more than _____ miles from his (her) present home at (street address/city/state), to be measured by automobile travel, she (he) shall notify the other in writing of such intention and shall set forth the intended place of the new home for the child or the children, as the case may be. The term "permanent residence" shall be deemed to mean any residence where the children are to reside for a period of more than two weeks unless such residence shall be at a boarding school, college, or university. Upon receipt of such notice, the parties covenant and agree to renegotiate new visitation (parenting) rights. If the parties are unable to come to a mutual agreement within thirty (30) days after the receipt by the Husband (Wife) of the Wife's (Husband's) notice, the Court shall fix new visitation rights and shall determine to what extent, if any, the Wife (Husband) shall be obligated to pay visitation expenses incurred by the Husband (Wife).

D. Written Notification

In the event either party changes their residence to a location outside the State of _____, he or she shall not similarly change the residence of the children without first providing the other party with 90 days' advance written notice and obtaining the written permission of the other parent or the approval of the Superior Court for the Judicial District of _____ at (state) after a full hearing on the matter. It shall be the obligation of the parent seeking to make the change of residence to obtain the approval of the other party or to petition the court for a final determination.

E. Full Discussion and Consultation

The parties anticipate that the child will reside primarily with the Wife (Husband). However, they recognize that changes in circumstances and educational opportunities may make it desirable, at some time in the future, for the child to reside with the (Husband) or at an educational institution. Any changes in the child's residence will be made only after the full discussion and consultation among the Wife, the Husband, and the child. (Such changes will be made only with the child's consent). (The final decision will be left to the Wife/ the Husband/ the parties jointly/ the Superior Court for the Judicial District of _____.)

F. Transportation Costs

It is contemplated that the Wife (Husband) shall be moving with the minor children of the parties to _____. With respect to transportation expenses of the children for the purposes of visitation with the Husband (Wife), Wife (Husband) shall be made responsible for the costs of said transportation. The foregoing transportation expenses have been taken into consideration in agreeing to the amount of child support payments.

G. No Restrictions

The Husband (Wife) will raise no objection in the event that the Wife (Husband) chooses to move out of the state of _____ and relocate with the child to another state. [Such a provision is most often used when relocation is already being anticipated or at least considered. Keep in mind that such a provision probably would not be effective to preclude a court from later determining that the move was not in the best interest of the child in the event the issue was presented for judicial determination.]

APPENDIX B

Listed in the National Register of Health Service Providers in Psychology Certified School Psychologist by the Texas Education Agency Registered Professional by the Texas Commission on Law Enforcement Standards and Education

Number of Texas Child Travelers, Under 12, Unaccompanied - 1999					
Month	1st Fri.	2nd Fri.	3rd Fri.	4th Fri.	5th Fri.
January	2,375	444	1,316	963	1,003
February	1,001	782	1,213	350	-
March	1,379	677	1,605	648	-
April	1,501	385	1,226	119	1,283
May	1,216	420	1,489	825	-
June	1,416	457	1,677	772	-
July	1,971	754	1,729	604	1,912
August	1,803	592	1,660	314	-
September	1,752	337	1,424	381	-
October	2,280	155	1,947	245	2,288
November	2,379	589	3,426	2,874	-
December	484	498	94	557	26
Total	19,555	6,090	18,806	8,650	6,511

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