

MODIFICATION

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State Bar of Texas
TEXAS BAR COLLEGE
18TH ANNUAL SUMMER SCHOOL
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Galveston

CHAPTER 31

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EDUCATION:

Texas Tech University School of Law
J.D. May 1994
Student Senator
Officer - Christian Legal Society
Officer - Criminal Trial Lawyers Association
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Texas Tech University
B.B.A. in Management, (summa cum laude) 1990
Beta Gamma Sigma Honor Society
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AREAS OF PRACTICE:

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PROFESSIONAL ACTIVITIES:

State Bar Of Texas
State Bar Of Texas Family Law Section
Tarrant County Bar Association
Tarrant County Family Law Bar Association
Eldon B. Mahon Inn of Court - Barrister (1999-2002, 2008-2009)
The Family Lawyer's Essential Tool Kit – coeditor - 2003 to present
Pro Bono Committee, State Bar of Texas Family Law Section 2005 to present
Co-Chairman, Pro Bono Committee, State Bar of Texas Family Law Section 2010 to present
Family Law Practice Manual Revision Committee, State Bar of Texas (2006-2009)
Family Law Council of the Family Law Section of the State Bar of Texas 2006 to present
Board of Directors, Tarrant County Family Law Bar Association (2007-2009)
Supreme Court of Texas Uniform Forms Task Force 2011 to 2014
Director - Texas Academy of Family Law Specialists 2011 to 2014
Trustee – Texas Family Law Foundation Board of Trustees 2012 to present
Adjunct Professor, Texas Christian University 2008 to present
Fellow, American Academy of Matrimonial Lawyers, 2014 to present
Treasurer of the Texas Academy of Family Law Specialists 2014-2016
Secretary to the Council for the Family Law Section of the State Bar of Texas 2014-2015
Treasurer to the Council for the Family Law Section of the State Bar of Texas 2015-2016

PROFESSIONAL AWARDS:

Recipient of the Eva Barnes Award, Tarrant County Family Law Bar Association 2012
Listed as a Texas Super Lawyer by *Texas Monthly Magazine* 2004 to present
Listed in *Fort Worth, Texas Magazine* as a Top Family Law Attorney 2004 to present

PUBLICATIONS

- "Mediation: When is it Really Over?" (with Gary L. Nickelson) 2002 Advanced Family Law Course
- "Characterization and Tracing on a Budget" (with Gary L. Nickelson) 2003 Marriage Dissolution Institute
- "Family Law for Fun and Profit" (with Gary L. Nickelson) 2003 Advanced Family Law Course
- "Dealing with the Not So Right Client" 2004 Marriage Dissolution Institute
- "The ABCs of Trying the Simple or Complex" Case (with Gary L. Nickelson)
2005 Marriage Dissolution Institute
- "Evidence" 2005 Marriage Dissolution Institute
- "Using Outside Resources" (with Gary L. Nickelson) 2005 Advanced Family Law Drafting
- "If You Can't Get It Before the Factfinder, You Can't Win - Effective and Practical Application of the Rules of Evidence" 2006 Advance Family Law Course
- "Summary Judgments" 2007 Marriage Dissolution Institute
- "Possession Orders, Including Special Circumstances" (with G. Thomas Vick, Jr.)
2007 Advance Family Law Course
- "Evidence & Discovery" 2008 Marriage Dissolution Institute
- "Show Me the Money" Advanced Collection Methods 2008 Advance Family Law Course
- "Courtroom Objections: Proper Methods of Objecting and Otherwise Protecting Your Client in the Courtroom" (with Kimberly M. Naylor) 2009 Advance Family Law Course
- "Creative Possession Schedules" (with Kimberly M. Naylor) 2010 Advance Family Law Drafting Course
- "Venue, Standing and Jurisdiction" 2011 Marriage Dissolution 101
- "Evidentiary Silver Bullets" State Bar College 13th Annual Summer School, 2011
- "Case Law Update - SAPCR" (with Jack W. Marr) 2011 Advance Family Law Course
- "Drafting Motions and Orders in Family Law Cases" 2011 Advanced Family Law Drafting Course
- "Characterization and Tracing" 2012 Marriage Dissolution 101
- "Child Support Enforcement" 2012 Advanced Family Law Course
- "Cross Examination of Experts" 2013 Sex, Drugs & Surveillance
- "Common Law, Informal, and Putative Marriages" 2013 Marriage Dissolution Institute
- "Child Support Enforcement" State Bar College 15th Annual Summer School, 2013
- "Compelling Discovery" 2013 Advanced Family Law Course
- "Evidence" 2014 Marriage Dissolution Institute
- "Enforcement: Possession, Access, Child Support and Property Division" State Bar College 16th Annual Summer School 2014
- "Child Support Enforcement and Possession" State Bar College 17th Annual Summer School, 2015

“Direct and Cross Examination of Collateral Witnesses” with Cindy Tisdale 2015 Advanced Family Law Course

“Enforcement: Possession, Access, Child Support and Property Division” Texas Advanced Paralegal Seminar, 2015

“Threshold Pleading Issues – What Do You Draft, What Do You Include or Not Include, Emergency Issues” Advanced Family Law Drafting Course, 2015

“Child Support Enforcement and Possession” State Bar of Texas Annual Meeting 2016

“Modification” Texas Bar College 18th Annual Summer School, 2016

SPEAKER AND LECTURER

Speaker at Family Law Essentials Seminar, presented by the Family Law Section September 2003, Lubbock, TX

Speaker at 2003 Family Law Seminar, presented by the Family Law Section October 2003, Wichita Falls, TX

Speaker at 2004 Marriage Dissolution Institute, April 2004, Fort Worth, TX

Speaker at 2004 Annual Meeting, June 2004, San Antonio, TX

Speaker at 2004 Family Law Boot Camp, presented by the Family Law Section August 2004, San Antonio, TX

Speaker at LAU Seminar, presented by the Legal Assistants Division September 2004, Fort Worth, TX

Speaker at Family Law Essentials for \$2000 or Free, presented by the Pro Bono Committee of the Family Law Section, September 2004, Laredo, TX

Speaker at 2005 Marriage Dissolution Institute, April 2005, Galveston, TX

Speaker at 2005 Annual Meeting, June 2005, Dallas, TX

Course Director, Family Law Basic Training, by the Family Law Section, August 2005, Dallas, TX

Speaker at 2005 Family Law Seminar, presented by the Family Law Section September 2005, Eagle Pass, TX

Speaker at 2006 Advanced Family Law Course, August 2006, San Antonio, TX

Course Director, Family Law Essentials for \$2000 or Free, presented by the Pro Bono Committee of the Family Law Section, April 2007, Mineral Wells, TX

Speaker at 2007 Marriage Dissolution Institute, May 2007, El Paso, TX

Speaker, Family Law Essentials for \$2000 or Free, presented by the Pro Bono Committee of the Family Law Section, October 2007, Laredo, TX

Course Director, Family Law Essentials for \$2000 or Free, presented by the Pro Bono Committee of the Family Law Section, April 2008, Wichita Falls, TX

Speaker at 2008 Advanced Family Law Course, August 2008, San Antonio, TX

Moderator of a panel at 2009 Marriage Dissolution Institute, April 2009, Fort Worth, TX
“Psychology of a Possession Order”

Moderator of a panel at the 9th Annual Family Law On The Front Lines, June 2009, San Antonio, TX,

“When You Play, You May Pay! Paternity Fraud – The Newest Form of Birth Control”

Speaker, 2009 Advanced Family Law Course, August 2009, Dallas, TX

Course Director, Pro Bono Family Law Seminar, presented by the Family Law Section
October 2009, Eagle Pass, TX

Speaker, Parent-Child Relationships: Critical Thinking for Critical Issues, January, 2010, Austin, TX

Course Director and Speaker, Pro Bono Family Law Seminar, presented by the Family Law Section,
September 2010, Sherman, TX

Course Director, 2010 Advanced Family Law Course, August 2010, San Antonio, TX

Speaker, 2010 Advanced Family Law Drafting Course, December 2010, Houston, TX

Speaker, 2011 Marriage Dissolution 101 Course, April 2011, Austin, TX

Speaker, State Bar College 13th Annual Summer School, July 2011, Galveston, TX

Speaker, 2011 Advanced Family Law Course, August 2011, San Antonio, TX

Speaker, 2011 Advanced Family Law Drafting Course, December 2011, Dallas, TX

Speaker, 2012 Marriage Dissolution 101, April 2012, Dallas, TX

Speaker, 2012 Advanced Family Law Course, August 2012, Houston, TX

Speaker, 2013 Sex, Drugs & Surveillance, January 2013, Houston, TX

Speaker, 2013 Marriage Dissolution Institute, April 2013, Galveston, TX

Course Director, Family Law Essentials Pro-Bono Seminar, presented by the Pro Bono Committee of
the Family Law Section, May 2013, Wichita Falls, TX

Speaker, State Bar College 15th Annual Summer School, July 2013, Galveston, TX

Speaker, 2013 Advanced Family Law Course, August 2013, San Antonio, TX

Speaker, 2014 Marriage Dissolution Institute, April 2014, Austin, TX

Speaker, State Bar College 16th Annual Summer School, July 2014, Galveston, TX

Speaker, 2014 Advanced Family Law Course, August 2014, San Antonio, TX

Course Director, 2015 Marriage Dissolution Institute, Dallas, TX

Speaker, State Bar College 17th Annual Summer School, July 2015, Galveston, TX

Speaker, 2015 Advanced Family Law Course, August 2015, San Antonio, TX

Speaker at Texas Advanced Paralegal Seminar 2015, October 2015, Fort Worth, TX

Speaker, 2015 Advanced Family Law Drafting Course, December 2015, Dallas, TX

Speaker, 2016 Marriage Dissolution Institute 101, April 2016, Galveston, TX

Speaker, State Bar of Texas Annual Meeting, June 2016, Fort Worth, TX

Speaker, Texas Bar College 18th Annual Summer School, July 2016, Galveston, TX

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MODIFICATION

I. INTRODUCTION

The Greek philosopher Heraclitus is believed to have said, "Nothing is constant but change;" and that is certainly the case in family law. In family law, change usually means modifying existing orders of the Court. To do so, we must file petitions or motions to modify those existing orders. In this paper we will look at those petitions and motions. The title I was given was "Modification." Unfortunately, that term is much too broad to cover in a 30 minute presentation. Traditionally the areas included in this paper would each have their own 30 minute presentation. Fortunately for all of us; they only gave us 30 minutes, so I will attempt to focus on those areas we encounter most often in our practice. I hope you will find them helpful when you return to your individual practice.

To explore "Modification" we will examine the statutes and case law that support each type of change and hopefully you'll leave with a few hints to help you along the way.

II. GENERAL PROVISIONS

Any discussion on modifying conservatorship, possession & access, or determination of residence must start with the General Provisions of the Texas Family Code Chapter 156.

A. §156.001 Orders Subject to Modification

A court with continuing, exclusive jurisdiction may modify an order that provides for the conservatorship, support, or possession of and access to a child.

B. §156.002 Who can File

Texas Family Code §156.002 provides us with the exclusive list of who has standing to file a modification suit.

- (a) A party affected by an order may file a suit for modification in the court with continuing, exclusive jurisdiction.
- (b) A person or entity who, at the time of filing, has standing to sue under Chapter [102](#) may file a suit for modification in the court with continuing, exclusive jurisdiction.
- (c) The sibling of a child who is separated from the child because of the actions of the Department of Family and Protective Services may file a suit for modification requesting access to the child in the court with continuing, exclusive jurisdiction.

Thus, we need to look at Texas Family Code §102.003 to further identify those parties that have general standing to file a modification.

(a) An original suit may be filed at any time by:

- (1) a parent of the child;
- (2) the child through a representative authorized by the court;
- (3) a custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or country;
- (4) a guardian of the person or of the estate of the child;
- (5) a governmental entity;
- (6) the Department of Family and Protective Services;
- (7) a licensed child placing agency;
- (8) a man alleging himself to be the father of a child filing in accordance with Chapter [160](#), subject to the limitations of that chapter, but not otherwise;
- (9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition;
- (10) a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Chapter [161](#) or to whom consent to adoption has been given in writing under Chapter [162](#);
- (11) a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition;
- (12) a person who is the foster parent of a child placed by the Department of Family and Protective Services in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition;
- (13) a person who is a relative of the child within the third degree by consanguinity, as determined by Chapter [573](#), Government Code, if the child's parents are deceased at the time of the filing of the petition; or
- (14) a person who has been named as a prospective adoptive parent of a child by a pregnant woman or the parent of the child, in a verified written statement to confer standing executed under Section

[102.0035](#), regardless of whether the child has been born.

- (b) In computing the time necessary for standing under Subsections (a)(9), (11), and (12), the court may not require that the time be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit.
- (c) Notwithstanding the time requirements of Subsection (a)(12), a person who is the foster parent of a child may file a suit to adopt a child for whom the person is providing foster care at any time after the person has been approved to adopt the child. The standing to file suit under this subsection applies only to the adoption of a child who is eligible to be adopted.

C. Where do you file?

As directed by §156.002, a suit for modification must begin in the court with continuing, exclusive jurisdiction. A general rule of thumb is the court with continuing, exclusive jurisdiction is the Court that issued the order you are seeking to modify.

However, if you are attempting to modify an order issued by another state, you must comply with Chapter 152 of the Texas Family Code – The Uniform Child Custody Jurisdiction and Enforcement Act. The UCCJEA will help you determine whether or not Texas has jurisdiction or not. There are some great papers on the UCCJEA, thus, I am not going to attempt to cover that here; but it would be to your benefit to become very familiar with that act if you have a case from another state.

D. Frivolous Filing of Suit For Modification?

Texas Family Code §156.005 warns anyone filing a modification suit to make sure it isn't frivolous before filing same.

If the court finds that a suit for modification is filed frivolously or is designed to harass a party, the court shall tax attorney's fees as costs against the offending party.

WARNING: Even more importantly, Rule 13 of the Texas Rules of Civil Procedure warns us of even more drastic consequences for filing a frivolous suit. **DO NOT** rely solely on your client's representations as to the facts of the case! Do your homework! As lawyers, prior to any filing, we are required to make reasonable inquiry into the basis of the pleading to insure that it is not frivolous. Rule 13 of the Texas Rules of Civil Procedure provides in relevant part:

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment.

Rule 13 further provides:

If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both.

As you can see from Rule 13 of the Texas Rules of Procedure, even the lawyer can be sanctioned for filing a frivolous suit. Those sanctions are detailed in Rule 215-2b of the Texas Rules of Civil Procedure and they include, but are not limited to, financial sanctions, prohibiting that party from putting on any evidence to support or defend their position and striking all pleadings. Too often we as lawyers take our client's story to Court before we make a "reasonable inquiry" as to the truth of that story.

E. Temporary Orders

Just as in an original suit, the Court may render temporary orders in a suit for modification. Texas Family Code §156.006 provides the authority for a Court to issue temporary orders in a modification suit.

- (a) Except as provided by Subsection (b), the court may render a temporary order in a suit for modification.
- (b) While a suit for modification is pending, the court may not render a temporary order that has the effect of changing the designation of the person who has the exclusive right to designate the primary residence of the child under the final order unless the temporary order is in the best interest of the child and:
 - (1) the order is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development;
 - (2) the person designated in the final order has voluntarily relinquished the primary care and possession of the child for more than six months; or

- (3) the child is 12 years of age or older and has expressed to the court in chambers as provided by Section [153.009](#) the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child.

(b-1) A person who files a motion for a temporary order authorized by Subsection (b)(1) shall execute and attach to the motion an affidavit on the person's personal knowledge or the person's belief based on representations made to the person by a person with personal knowledge that contains facts that support the allegation that the child's present circumstances would significantly impair the child's physical health or emotional development. The court shall deny the relief sought and decline to schedule a hearing on the motion unless the court determines, on the basis of the affidavit, that facts adequate to support the allegation are stated in the affidavit. If the court determines that the facts stated are adequate to support the allegation, the court shall set a time and place for the hearing.

- (c) Subsection (b)(2) does not apply to a conservator who has the exclusive right to designate the primary residence of the child and who has temporarily relinquished the primary care and possession of the child to another person during the conservator's military deployment, military mobilization, or temporary military duty, as those terms are defined by Section [153.701](#).

III. CHILD SUPPORT

A. Grounds for Modification of Child Support

Texas Family Code §156.401 gives us the grounds upon which you can request a modification of child support.

- (a) Except as provided by Subsection (a-1), (a-2), or (b), the court may modify an order that provides for the support of a child, including an order for health care coverage under Section [154.182](#), if:
- (1) the circumstances of the child or a person affected by the order have materially and substantially changed since the earlier of:

the date of the order's rendition; or

- (B) the date of the signing of a mediated or collaborative law settlement agreement on which the order is based; or

- (2) it has been three years since the order was rendered or last modified and the monthly amount of the child support award under the order differs by either 20 percent or \$100 from the amount that would be awarded in accordance with the child support guidelines.

(a-1) If the parties agree to an order under which the amount of child support differs from the amount that would be awarded in accordance with the child support guidelines, the court may modify the order only if the circumstances of the child or a person affected by the order have materially and substantially changed since the date of the order's rendition.

(a-2) A court or administrative order for child support in a Title IV-D case may be modified at any time, and without a showing of material and substantial change in the circumstances of the child or a person affected by the order, to provide for medical support of the child if the order does not provide health care coverage as required under Section [154.182](#).

- (b) A support order may be modified with regard to the amount of support ordered only as to obligations accruing after the earlier of:

- (1) the date of service of citation; or
(2) an appearance in the suit to modify.

- (c) An order of joint conservatorship, in and of itself, does not constitute grounds for modifying a support order.

- (d) Release of a child support obligor from incarceration is a material and substantial change in circumstances for purposes of this section if the obligor's child support obligation was abated, reduced, or suspended during the period of the obligor's incarceration.

BE AWARE OF BIG CHANGES TO TEXAS FAMILY CODE §156.401 COMING SEPTEMBER 1, 2018!

Effective September 1, 2018, the language of Texas Family Code §156.401 changes to:

- (a) Except as provided by Subsection (a-1), (a-2), or (b), the court may modify an order that provides for the support of a child, including an order for health care coverage under Section [154.182](#) or an order for dental care coverage under Section [154.1825](#), if:

- (1) the circumstances of the child or a person affected by the order have materially and substantially changed since the earlier of:

- (A) the date of the order's rendition; or
(B) the date of the signing of a mediated or collaborative law settlement agreement on which the order is based; or

- (2) it has been three years since the order was rendered or last modified and the monthly amount of the child support award under the order differs by either 20 percent or \$100 from the amount that would be awarded in accordance with the child support guidelines.

(a-1) If the parties agree to an order under which the amount of child support differs from the amount that would be awarded in accordance with the child support guidelines, the court may modify the order only if the circumstances of the child or a person affected by the order have materially and substantially changed since the date of the order's rendition.

(a-2) A court or administrative order for child support in a Title IV-D case may be modified at any time, and without a showing of material and substantial change in the circumstances of the child or a person affected by the order, to provide for medical support or dental support of the child if the order does not provide health care coverage as required under Section [154.182](#) or dental care coverage as required under Section [154.1825](#).

- (b) A support order may be modified with regard to the amount of support ordered only as to obligations accruing after the earlier of:

- (1) the date of service of citation; or
(2) an appearance in the suit to modify.

- (c) An order of joint conservatorship, in and of itself, does not constitute grounds for modifying a support order.
(d) Release of a child support obligor from incarceration is a material and substantial change in circumstances for purposes of this section if the obligor's child support obligation was abated, reduced, or suspended during the period of the obligor's incarceration.

While the statute gives us two specified grounds for modifying child support, (three if it is a IV-D case), the main justification for a modification request – a finding of a material and substantial change in circumstances of the child or a person affected by the order. The statute goes on to specify at least three scenarios upon which the material and substantial change in circumstances will be presumed or not required.

- (2) it has been three years since the order was rendered or last modified and the monthly amount of the child support award under the order differs by either 20 percent or \$100 from the amount that would be awarded in accordance with the child support guidelines.

...

(a-2) A court or administrative order for child support in a Title IV-D case may be modified at any time, and without a showing of material and substantial change in the circumstances of the child or a person affected by the order, to provide for medical support of the child if the order does not provide health care coverage as required under Section [154.182](#).

...

- (d) Release of a child support obligor from incarceration is a material and substantial change in circumstances for purposes of this section if the obligor's child support obligation was abated, reduced, or suspended during the period of the obligor's incarceration.

As noted above, the waiver of the requirement for a material and substantial change provided in (a-2) will be amended to include the failure on the part of the obligor to provide “dental care coverage.”

B. Guidelines

Once you've meet the standards to request a modification under Texas Family Code §156.401 you must still meet the requirements of Texas Family Code §156.402 which states that any modification must still comply with the guidelines set out in Texas Family Code §154.122.

Texas Family Code §156.402:

- (a) The court may consider the child support guidelines for single and multiple families under Chapter [154](#) to determine whether there has been a material or substantial change of circumstances under this chapter that warrants a modification of an existing child support order if the modification is in the best interest of the child.
- (b) If the amount of support contained in the order does not substantially conform with the guidelines for single and multiple families under Chapter [154](#), the court may modify the order to substantially conform with the guidelines if the modification is in the best interest of the child. A court may consider other relevant evidence in addition to the factors listed in the guidelines.

It is important to note the last sentence of sub section (b) that authorizes a Court to consider "other relevant evidence in addition to the additional factors listed in the guidelines." Those "additional factors" are detailed in Texas Family Code §154.123 as shown below. Thus, before we move on, we must examine the guidelines provided in the Texas Family Code.

Texas Family Code §154.122 states that the child support payments established in the Family Code are presumed to be reasonable and in the best interest of the child.

- (a) The amount of a periodic child support payment established by the child support guidelines in effect in this state at the time of the hearing is presumed to be reasonable, and an order of support conforming to the guidelines is presumed to be in the best interest of the child.
- (b) A court may determine that the application of the guidelines would be unjust or inappropriate under the circumstances.

Since this is a rebuttable presumption, the Texas Family Code gives us a list of "Additional Factors" a Court may consider in determining whether or not to vary from the guidelines. Texas Family Code §154.123 provides as follows:

- (a) The court may order periodic child support payments in an amount other than that established by the guidelines if the evidence rebuts the presumption that application of the guidelines is in the best interest of the child and justifies a variance from the guidelines.
- (b) In determining whether application of the guidelines would be unjust or inappropriate under the circumstances, the court shall consider evidence of all relevant factors, including:
 - (1) the age and needs of the child;
 - (2) the ability of the parents to contribute to the support of the child;
 - (3) any financial resources available for the support of the child;
 - (4) the amount of time of possession of and access to a child;
 - (5) the amount of the obligee's net resources, including the earning potential of the obligee if the actual income of the obligee is significantly less than what the obligee could earn because the obligee is intentionally unemployed or underemployed and including an increase or decrease in the income of the obligee or income that may be attributed to the property and assets of the obligee;
 - (6) child care expenses incurred by either party in order to maintain gainful employment;
 - (7) whether either party has the managing conservatorship or actual physical custody of another child;
 - (8) the amount of alimony or spousal maintenance actually and currently being paid or received by a party;
 - (9) the expenses for a son or daughter for education beyond secondary school;
 - (10) whether the obligor or obligee has an automobile, housing, or other benefits furnished by his or her employer, another person, or a business entity;
 - (11) the amount of other deductions from the wage or salary income and from other compensation for personal services of the parties;
 - (12) provision for health care insurance and payment of uninsured medical expenses;
 - (13) special or extraordinary educational, health care, or other expenses of the parties or of the child;
 - (14) the cost of travel in order to exercise possession of and access to a child;

- (15) positive or negative cash flow from any real and personal property and assets, including a business and investments;
- (16) debts or debt service assumed by either party; and
- (17) any other reason consistent with the best interest of the child, taking into consideration the circumstances of the parents.

It is very important to remember that the list of “Additional Factors” provided in §154.123 can be used as a basis to increase or decrease the amount of support ordered by the Court. However, pursuant to case law and Texas Family Code §154.126 the “Additional Factors” of §154.123 by themselves alone, cannot be used to support a request to go above the maximum guideline amount. If an obligor’s net resources exceed the current maximum of \$8,550.00 per month, the Court cannot order child support above guideline unless it is shown to be necessary due to the “proven needs of the child.”

- (a) If the obligor's net resources exceed the amount provided by Section [154.125\(a\)](#), the court shall presumptively apply the percentage guidelines to the portion of the obligor's net resources that does not exceed that amount. Without further reference to the percentage recommended by these guidelines, the court may order additional amounts of child support as appropriate, depending on the income of the parties and the proven needs of the child.
- (b) The proper calculation of a child support order that exceeds the presumptive amount established for the portion of the obligor's net resources provided by Section [154.125\(a\)](#) requires that the entire amount of the presumptive award be subtracted from the proven total needs of the child. After the presumptive award is subtracted, the court shall allocate between the parties the responsibility to meet the additional needs of the child according to the circumstances of the parties. However, in no event may the obligor be required to pay more child support than the greater of the presumptive amount or the amount equal to 100 percent of the proven needs of the child.

Texas Family Code §154.126

Merely proving the needs of the child exceed the maximum guideline support is not enough to force a Court to go above maximum guideline support. Texas Family Code §154.126 is discretionary, thus a court has the authority to refuse above maximum guideline support. The Fort Worth Court of Appeals, has held that when a petitioner in a modification suit is requesting above maximum guideline support, the petitioner is not required to establish that the needs of the children have increased since the date of the divorce decree. In *McCain v. McCain*, 980 S.W.2d 800 (Tex. App. – Fort Worth 1998, no pet.) the Fort Worth Court of Appeals held as follows: “...section 154.126 requires only that the court consider the income of the parties and the proven needs of the child. It does not require an increase in the proven needs of the child.” *Id* at 801. Thus, if your modification request is for above maximum guideline support, this is one less hurdle you have to clear!

C. Other Factors for the Court to Consider in a Modification

1. [§156.403 Voluntary Additional Support](#)

The legislature has made it very clear that a history of the obligor paying above what would be his/her guideline support does not justify an increase in his/her support.

A history of support voluntarily provided in excess of the court order does not constitute cause to increase the amount of an existing child support order.

2. [§156.404 Net Resources of New Spouse](#)

The Court may not include any portion of a new spouse’s income when calculating the net resources of the obligor. On the other side of that argument, the obligor may not deduct from his/her net income the needs of the new spouse or dependent of a new spouse.

- (a) The court may not add any portion of the net resources of a new spouse to the net resources of an obligor or obligee in order to calculate the amount of child support to be ordered in a suit for modification.
- (b) The court may not subtract the needs of a new spouse, or of a dependent of a new spouse, from the net resources of the obligor or obligee in a suit for modification.

3. [§156.405 Change in Lifestyle](#)

The obligee cannot use a change in his/her lifestyle to justify an increase in support.

An increase in the needs, standard of living, or lifestyle of the obligee since the rendition of the existing order does not warrant an increase in the obligor's child support obligation.

D. §156.406 Children in More than One Household

If the obligor is obligated to support children in more than one household, the Court must take that into consideration.

In applying the child support guidelines in a suit under this subchapter, if the obligor has the duty to support children in more than one household, the court shall apply the percentage guidelines for multiple families under Chapter [154](#).

E. §156.408 Modification of Support Order Rendered by Another State

If both parties and the child(ren) reside in Texas, then a Court of this State may modify the child support order of another state after the order has been registered in Texas.

- (a) Unless both parties and the child reside in this state, a court of this state may modify an order of child support rendered by an appropriate tribunal of another state only as provided by Chapter [159](#).
- (b) If both parties and the child reside in this state, a court of this state may modify an order of child support rendered by an appropriate tribunal of another state after registration of the order as provided by Chapter [159](#).

IV. CONSERVATORSHIP, POSSESSION & ACCESS, OR DETERMINATION OF RESIDENCE**A. §156.101 Grounds for Modification of Order Establishing Conservatorship or Possession & Access**

The Texas Family Code §156.101 authorizes three grounds for modifying conservatorship, possession & access, or determination of residence.

- (a) The court may modify an order that provides for the appointment of a conservator of a child, that provides the terms and conditions of conservatorship, or that provides for the possession of or access to a child if modification would be in the best interest of the child and:
 - (1) the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the earlier of:
 - (A) the date of the rendition of the order; or
 - (B) the date of the signing of a mediated or collaborative law settlement agreement on which the order is based;
 - (2) the child is at least 12 years of age and has expressed to the court in chambers as provided by Section [153.009](#) the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child; or
 - (3) the conservator who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child to another person for at least six months.

- (b) Subsection (a)(3) does not apply to a conservator who has the exclusive right to designate the primary residence of the child and who has temporarily relinquished the primary care and possession of the child to another person during the conservator's military deployment, military mobilization, or temporary military duty, as those terms are defined by Section [153.701](#).

As we saw in modifying child support, the most prevalent ground for modifying conservatorship, possession & access, or determination of residence is that the circumstances of a party have materially and substantially changed; and that the requested relief would be in the best interest of the child(ren). Whether or not there has been a material and substantial change in these types of circumstances is extremely fact and case specific. The Petitioner is required to establish the circumstances as they existed at the time the last order was entered. Then the Petitioner must show the Court what changes have occurred and convince the Court that those changes rise to the level of "material and substantial." This burden is exacerbated by the fact that there are conflicting cases on what constitutes a "material and substantial change."

What is a material and substantial change:

Texas courts have deemed the remarriage of one or both parents to be a pertinent factor. *Barron v. Bastow*, 601 S.W.2d 213, 214-15 (Tex.Civ.App.--Austin 1980, writ dismissed)

[However see *Files v. Thomasson* cited below.]

A change in the number of children under the control of the visitation order is itself a substantial change, as is the natural change that occurs between age one and age six, and the concomitant change in the scope of activities and the needs of the children involved. See *Voros v. Turnage*, 856 S.W.2d 759, 762 (Tex.App.--Houston [1st Dist.] 1993, writ denied); *Randle v. Randle*, 700 S.W.2d 314, 316-17 (Tex.App.--Houston [1st Dist.] 1985, no writ).

In re Davis, 30 S.W.3d 609, 614 (Tex. App. – Texarkana 2000, no writ)

Moving a child from one location to another generally results in some change of the circumstances of the child or parents. ... Deciding whether a move causes a substantial and material change requires intensive examination of the facts of each case.

In re P.M.G., 405 S.W.3d 406, 412 (Tex. App. – Texarkana 2013, no pet.)

What isn't a material an substantial change:

There is also authority cited that the remarriage of the father, moving into his own residence and expecting a new child is by itself not a material nor substantial change.

Files v. Thomasson, 578 S.W.2d 883 (Tex.Civ.App.--Houston [14th Dist.] 1979, no writ).

[However, see *Barron v. Bastow* cited above.]

A parent's desire to spend more time with a child is not a material and substantial change in circumstances.

In re C.H.C. 392 S.W.3d 347, 352 (Tex. App – Dallas 2013, no pet.)

It is this court's belief that the father's move from New Mexico to Nebraska for a better job is not a material change warranting the overturning of a valid decree of a sister state. Nor is the fact that the paternal grandmother will be required to move temporarily to Nebraska to care for the children and possibly hire a nursemaid for their care such a change.

Short v. Short, 354 S.W.2d 933, 936 (Tex. 1962)

Therefore, as stated above, each case must be treated on its own merits and you will need to do some research to find the cases that support your claim; whether it is for or against a “material and substantial change.”

B. §156.102 Modification of Exclusive Right to Determine Primary Residence of Child Within One Year of Order

- (a) If a suit seeking to modify the designation of the person having the exclusive right to designate the primary residence of a child is filed not later than one year after the earlier of the date of the rendition of the order or the date of the signing of a mediated or collaborative law settlement agreement on which the order is based, the person filing the suit shall execute and attach an affidavit as provided by Subsection (b).
- (b) The affidavit must contain, along with supporting facts, at least one of the following allegations:
 - (1) that the child's present environment may endanger the child's physical health or significantly impair the child's emotional development;
 - (2) that the person who has the exclusive right to designate the primary residence of the child is the person seeking or consenting to the modification and the modification is in the best interest of the child; or
 - (3) that the person who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child for at least six months and the modification is in the best interest of the child.
- (c) The court shall deny the relief sought and refuse to schedule a hearing for modification under this section unless the court determines, on the basis of the affidavit, that facts adequate to support an allegation listed in Subsection (b) are stated in the affidavit. If the court determines that the facts stated are adequate to support an allegation, the court shall set a time and place for the hearing.
- (d) Subsection (b)(3) does not apply to a person who has the exclusive right to designate the primary residence of the child and who has temporarily relinquished the primary care and possession of the child to another person

during the conservator's military deployment, military mobilization, or temporary military duty, as those terms are defined by Section [153.701](#).

As you can see, the requirements to modify the exclusive right to determine primary residence of a child within one year of an order are basically the same as §156.101 with the added burden of an affidavit. The affidavit must contain more than mere allegations. It must contain facts that if true, would establish one of the following:

- (1) that the child's present environment may endanger the child's physical health or significantly impair the child's emotional development;
- (2) that the person who has the exclusive right to designate the primary residence of the child is the person seeking or consenting to the modification and the modification is in the best interest of the child; or
- (3) that the person who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child for at least six months and the modification is in the best interest of the child.

If the affidavit lacks facts sufficient to support those allegations, or the court does not believe that the stated facts support those allegations; the court **MUST** deny the relief sought and **MUST** refuse to schedule a hearing for modification. This is a very high threshold if applied correctly.

C. She/He Who Moves Pays: §156.103 Increased Expense Because of Change of Residence

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

D. Military Deployment Does Not By Itself Constitute a Material and Substantial Change of Circumstance §156.105. Modification of Order Based on Military Duty

The military duty of a conservator who is ordered to military deployment, military mobilization, or temporary military duty, as those terms are defined by Section [153.701](#), does not by itself constitute a material and substantial change of circumstances sufficient to justify a modification of an existing court order or portion of a decree that sets the terms and conditions for the possession of or access to a child except that the court may render a temporary order under Subchapter L, Chapter [153](#).

V. GEOGRAPHIC RESTRICTIONS

Without a doubt, one of the most prolific areas of modification cases, are the ones based on some form of geographic restriction. Given the increasing mobility of our population, these types of cases show no sign of decreasing. Unfortunately, neither the Texas Family Code or Texas Legislature has given us clear and concise guidance in this area.

Several sections of the Texas Family Code are relevant to the issue of geographic restrictions.

A. §153.001 Public Policy

- (a) The public policy of this state is 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 of raising their child after the parents have separated or dissolved their marriage.

B. §153.002 Best Interest of the Child

The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.

C. §153.134 Court-Ordered Joint Conservatorship

- (a) If a written agreed parenting plan is not filed with the court, the court may render an order appointing the parents joint managing conservators only if the appointment is in the best interest of the child, considering the following factors:

- (1) whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators;
 - (2) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;
 - (3) whether each parent can encourage and accept a positive relationship between the child and the other parent;
 - (4) whether both parents participated in child rearing before the filing of the suit;**
 - (5) the geographical proximity of the parents' residences;**
 - (6) if the child is 12 years of age or older, the child's preference, if any, regarding the person to have the exclusive right to designate the primary residence of the child; and
 - (7) any other relevant factor.
- (b) In rendering an order appointing joint managing conservators, the court shall:
- (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 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;**
 - (2) specify the rights and duties of each parent regarding the child's physical care, support, and education;
 - (3) include provisions to minimize disruption of the child's education, daily routine, and association with friends;
 - (4) allocate between the parents, independently, jointly, or exclusively, all of the remaining rights and duties of a parent as provided by Chapter [151](#); and
 - (5) if feasible, recommend that the parties use an alternative dispute resolution method before requesting enforcement or modification of the terms and conditions of the joint conservatorship

through litigation, except in an emergency.

Emphasis added

As you can see, §153.134 is silent on factors a Court should consider when making a geographic restriction determination. The leading case on such factors is *Lenz v. Lenz*, 79 S.W.3d 10 (Tex.2002). The Texas Supreme Court recognized this as a case of first impression following an appeal out of Bexar County. The *Lenz* case involved two German citizens, Rosemarie (Rimy) Lenz and Rudolph (Rubi) Lenz, who were divorced in Bexar County in 1998. The divorce decree contained a residency restriction. A month after the divorce decree was entered, Rimy filed a suit for modification, seeking to remove the residency restriction so that she could return to Germany with the children and remarry.

In its opinion, the Texas Supreme Court discussed the issues raised in Texas Family Code §153.001 and §153.002 as follows:

The Legislature has made clear that "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child." TEX. FAM.CODE§ 153.002. Yet, 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. Neither have Texas courts articulated any specific standards to apply in this context. Nonetheless, the Legislature has provided a basic framework upon which we may build guidelines for reviewing a modification that removes a residency restriction for purposes of relocation. Family Code § 153.001 outlines this framework by pronouncing our public policy for all suits affecting the parent-child relationship:

(a) The public policy of this state is 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 of raising their child after the parents have separated or dissolved their marriage.

Id. § 153.001(a). We must endeavor to give meaning to these public policy imperatives as we interpret the Family Code modification standards in the relocation context.

The Legislature's expressed public policy considerations guide our analysis of the positive-improvement and best-interest standard in the relocation context, **but no bright-line test can be formulated.** Suits affecting the parent-child relationship are intensely fact driven, which is why courts have developed best-interest tests that consider and balance numerous factors. Given the many relevant factors, courts have explicitly rejected formulaic tests in relocation cases.

Emphasis added

My favorite portion of this extremely long analysis by the Texas Supreme Court is contained in the last portion quoted above. In it the Texas Supreme Court admits that there is "no bright line test" regarding relocation cases and that such cases are "intensely fact driven," which of course means that every case will be different and similar facts in two different cases may result in vastly different results.

In a case after the *Lenz* decision, the Fifth District Court Of Appeals in Dallas tried to clarify some of the factors a trial court should consider when deciding relocation cases. In the case of *In re K.L.W.*, 301 S.W.3d 423,425-26 (Tex. App. – Dallas 2009, no pet.) the Dallas court held as follows:

Section 153.134 is silent as to factors a trial court should consider when determining whether a domicile restriction is in the best interest of the child.

In the context of residency restrictions and authorization of relocation, the supreme court has instructed us to consider the public policies outlined in family code section 153.001(a). Section 153.001 states that the public policy of Texas is to:

- (1) assure that children will have frequent and continuing contact with parents who have shown an ability to act in the best interest of the child;
- (2) provide a safe, stable, and nonviolent environment for the child; and
- (3) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.

The *Lenz* court noted that a wide array of other factors can be relevant to the determination of a child's best interest after a parental relocation. These include the (1) reasons for and against the move, (2) education,

health, and leisure opportunities afforded by the move, (3) accommodation of the child's special needs or talents, (4) effect of extended family relationships, (5) effect on visitation and communication with the noncustodial parent, (6) noncustodial parent's ability to relocate, and (7) the child's age.

We may also consider the general factors relevant to the best interest of a child, such as (1) the child's desires, (2) the child's current and future physical and emotional needs, (3) any physical or emotional danger to the child in the present or future, (4) the parental abilities of the individuals involved, (5) the programs available to those individuals to promote the child's best interest, (6) the plans for the child by these individuals, (7) the stability of the home, (8) acts or omissions by a parent tending to show that the existing parent-child relationship is not a proper one, and (9) any excuse for the acts or omissions of the parent.

Id.

Accordingly, since there are no "bright line test" you are well advised to give the Court as many of the factors listed above as possible (and anything else you can think of!)

If you are trying to prevent a move you must anticipate that opposing counsel will also be using the factors listed above. Therefore, you should examine each factor closely in regard to how they applied to that specific case, i.e. *Lenz* or *K.L.W.* or the myriad of others, and provide your Court with solid evidence of how the facts of your case are distinguishable from the facts of those cases.

D. § 105.002(c)(1)(E)(F) Jury

The Texas Family Code allows the issue of a geographic restriction to be submitted to a jury and a judge may NOT overrule the jury.

(c) In a jury trial:

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

- (D) the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child;
- (E) the determination of whether to impose a restriction on the geographic area in which a joint managing conservator may designate the child's primary residence;

VI. TEMPORARY ORDERS

After Temporary Orders are entered, there is often a change in circumstances that may require changing

the existing orders. For example, if one parent may begin to exhibit a dramatic change in behavior, or begins using illegal drugs, or begins drinking to excess, or there may be a change in financial circumstances such as a parent losing their job. To modify temporary orders you must file a Motion to Modify Temporary Orders as provided for in §105.001 of the Texas Family Code. The Motion to Modify Temporary Orders should specifically state the grounds for seeking the modification and give fair notice of what relief is being sought.

Remember that pursuant to Texas Family Code §156.006(b) the Court may not render a temporary order that has the effect of changing the person who has the exclusive right to designate the primary residence of the child(ren) unless the temporary orders are in the best interest of the child(ren) and can meet the requirements of Texas Family Code §§156.006(b),(1),(2),(3), and (b-1).

- (a) Except as provided by Subsection (b), the court may render a temporary order in a suit for modification.
- (b) While a suit for modification is pending, the court may not render a temporary order that has the effect of changing the designation of the person who has the exclusive right to designate the primary residence of the child under the final order unless the temporary order is in the best interest of the child and:
 - (1) the order is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development;
 - (2) the person designated in the final order has voluntarily relinquished the primary care and possession of the child for more than six months; or
 - (3) the child is 12 years of age or older and has expressed to the court in chambers as provided by Section [153.009](#) the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child.
- (b-1) A person who files a motion for a temporary order authorized by Subsection (b)(1) shall execute and attach to the motion an affidavit on the person's personal knowledge or the person's belief based on representations made to the person by a person with personal knowledge that contains facts that support the allegation that the child's present

circumstances would significantly impair the child's physical health or emotional development. The court shall deny the relief sought and decline to schedule a hearing on the motion unless the court determines, on the basis of the affidavit, that facts adequate to support the allegation are stated in the affidavit. If the court determines that the facts stated are adequate to support the allegation, the court shall set a time and place for the hearing.

- (c) Subsection (b)(2) does not apply to a conservator who has the exclusive right to designate the primary residence of the child and who has temporarily relinquished the primary care and possession of the child to another person during the conservator's military deployment, military mobilization, or temporary military duty, as those terms are defined by Section [153.701](#).

It is important to remember that when you are modifying temporary orders, you are not required to meet the burden of a “material and substantial change in circumstances” as you are in other modifications under Chapter 156. Instead, you are only required to establish that the modification is necessary “for the safety and welfare of the child.” Texas Family Code §105.001 provides in relevant part as follows:

- (a) In a suit, the court may make a temporary order, including the modification of a prior temporary order, **for the safety and welfare of the child**, including an order:

Emphasis added

In addition to the stated requirement in Texas Family Code §105.001 at least one court has held that modification of temporary orders does not required the petitioner to meet the burden of a “material and substantial change in circumstances.” In the case of *In re Casanova*, 2014 Tex. App. LEXIS 12638 (Tex. App. – Dallas November 20, 2014, orig. proceeding) (mem. opinion) (Cause No. 05-14-01166-CV) the Dallas Court of Appeals held that a movant did not have to establish a material and substantial change in circumstances under the standards outlined in Chapter 156 to warrant modification of the agreed temporary orders. Instead, the COA found that any modification of temporary orders must be measured by their need to protect the safety and welfare of the child under TFC §105.001(a).

VII. CONCLUSION

At the beginning I quoted a famous Greek philosopher saying, "Nothing is constant but change." I would now like to respectfully disagree with Mr. Heraclitus. As Terrance Mann, played by (James Earl Jones) explains to Ray Kinsella, played by (Kevin Costner) in one of my favorite movies "Field of Dreams", baseball is the one true constant!

The one constant through all the years, Ray, has been baseball. America has rolled by like an army of steamrollers. It's been erased like a blackboard, rebuilt, and erased again. But baseball has marked the time.

Terrance Mann

