01-0232
FILED
MAR 21, 2001

_____ No. _____

IN THE

SUPREME COURT

OF TEXAS

ROSEMARIE KLARA LENZ,

Petitioner,

v.

HEINRICH RUDOLPH LENZ,

Respondent.

PETITION FOR REVIEW

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ROSEMARIE KLARA LENZ

No. _____

ROSEMARIE KLARA LENZ,

Petitioner,

v.

HEINRICH RUDOLPH LENZ,

Respondent.

IDENTITY OF PARTIES & COUNSEL

Petitioner certifies that the following is a complete list of the parties, attorneys, and any other person who has any interest in the outcome of this lawsuit:

1. Petitioner, ROSEMARIE KLARA LENZ, and Appellant in the Court of Appeals;

2. Petitioner's Appellate Attorney, RICHARD R. ORSINGER, State Bar No. 15322500, 310 S. St. Mary's Street, Suite 1616, San Antonio, Texas 78205, 210/225-5567 (Telephone), 210/267-7777 (Fax);

3. Petitioner's Attorney in the Trial Court, H. E. MENDEZ, State Bar No. 13932950, 205 N. Presa Building, B201, San Antonio, Texas 78205, 210/224-4081 (Telephone), 210/224-4113 (Fax);

4. Respondent, HEINRICH RUDOLPH LENZ, and Appellee in the Court of Appeals;

5. Respondent's Appellate Attorney and Attorney in the Trial Court, JO CHRIS G. LOPEZ, State Bar No. 12566425, The North Frost Center, 1250 N.E. Loop 410, Suite 725, San Antonio, Texas 78209, 210/822-2018 (Telephone) and 210/822-3716 (Fax).

6. Respondent's Attorney in the Trial Court, CHRISTINE THARP, State Bar No. 20670600, 6217 Broadway, San Antonio, Texas 78209, 210/824-1500 (Telephone), 210/824-0182 (Fax).

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No. _____

ROSEMARIE KLARA LENZ,

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v.

HEINRICH RUDOLPH LENZ,

Respondent.

PETITION FOR REVIEW

Petitioner, ROSEMARIE KLARA LENZ, submits her petition for review. Petitioner will be referred to as "Rosemarie" and Respondent, HEINRICH RUDOLPH LENZ, will be referred to as "Rudolph."

STATEMENT OF THE CASE

This is a child relocation case between two German nationals, involving two children, one of whom is a German national and the other of whom is a dual citizen of Germany and the United States. The mother, Rosemarie, who is the principal custodian of the two boys, wishes to move with the children back to the family's country of origin, Germany. The boys' father, Rudolph, who has now married an American woman living in San Antonio, opposes the change.

Rosemarie brought suit in the 225th Judicial District Court of Bexar County, Texas, to modify a Decree of Divorce so that she could return with the children to Germany.

Rudolph sought custody in response. After a two-week trial, with Honorable John J. Specia, Jr., presiding, the jury awarded Rosemarie the exclusive right to determine the county of residence and the primary residence of the children. [App. Tab B, p. 8] Despite the fact that Texas Family Code § 105.002 prohibits a trial court from contravening the jury verdict on the determination of the primary residence of the child, Judge Specia's final Order restricted the primary residence of the children to "within Bexar County, Texas," and further limited the children's schooling to Bexar County, Texas. [App. Tab A, p. 3-4] Judge Specia also denied Rosemarie's request for attorney's fees.

Rosemarie appealed the Order to the Fourth Court of Appeals. A panel consisting of Justices Alma L. Lopez, Catherine Stone, and Paul Green affirmed the Trial Court's judgment on August 31, 2000. Justice Catherine Stone authored the Opinion, which is to be published in the Southwest Reporter. [App. Tab D]

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal under TEX. GOV'T CODE § 22.001(a)(2) & (6). Conflict jurisdiction exists under *T.A.B. v. W.L.B.*, 598 S.W.2d 936, 938 (Tex. Civ. App.--El Paso) (where Family Code makes verdict binding, trial court cannot grant j.n.o.v.), *writ ref'd n.r.e*, 606 S.W.2d 695 (Tex. 1980); *contra*, *In re Marriage of Robinson*, 16 S.W.3d 451, 454 (Tex. App.--Waco 2000, no pet.); *In the Interest of Soliz*, 671 S.W.2d 644, 648 (Tex. App.--Corpus Christi 1984, no writ); *Fambro v. Fambro*, 635 S.W.2d 945, 948 (Tex. App.--Fort Worth 1982, no writ).

ISSUES PRESENTED FOR REVIEW

Issue 1

The Trial Court erred by disregarding the jury's determination regarding the primary residence of the children, by imposing geographical restrictions not imposed by the jury, in contravention of Texas Family Code § 105.002, and Texas Constitution, art. I, § 15; art. V, § 10.

Issue 2

When the basis of a jury trial is to remove a geographical restriction limiting the residence of the children to the state of Texas, and the jury finds in favor of the modification, can the trial judge impose a new geographical restriction to Bexar County, Texas, in contravention of Texas Family Code § 105.002, and Texas Constitution, art. I, § 15; art. V, § 10?

Issue 3

Can a Texas court impose a geographical restriction on the residence of a child who is a German citizen and not an American citizen, and when both parents are German citizens and not American citizens?

Issue 4

Can a Texas court impose a geographical restriction on the residence of a child who is dual national (citizen of America and Germany), when both parents are German citizens and not American citizens?

Issue 5

The Trial Court abused its discretion by limiting the children's residence and schooling to Bexar County, Texas.

Issue 6

The Court of Appeals erroneously failed to address Rosemarie's relocation complaints in the mistaken belief that the Trial Court granted judgment n.o.v. based on there being "no evidence" that relocation would be in the

boys' best interest and a positive improvement. The Trial Court cannot j.n.o.v. a verdict made binding under Section 105.002. Further, there was legally sufficient evidence to support the jury's verdict.

Issue 7

The Trial Court reversibly erred by failing to find reasonable attorney's fees for Rosemarie, and by failing to award to Rosemarie a judgment against Rudolph for her attorney's fees and court costs.

PRELIMINARY STATEMENT

This is a child relocation case. The New York Court of Appeals captured the difficulty of child relocation cases in *Tropea v. Tropea*, 87 N.Y.2d 727, 642 N.Y.S.2d 575, 578 (1996):

> Relocation cases . . . present some of the knottiest and most disturbing problems that our courts are called upon to resolve. In these cases, the interests of a custodial parent who wishes to move away are pitted against those of a noncustodial parent who has a powerful desire to maintain frequent and regular contact with the child. Moreover, the court must weigh the paramount interest of the child, which may or may not be in irreconcilable conflict with those of one or both of the parents.

Several important principles apply to this case. Restricting relocation is an exercise of judicial power that has constitutional dimensions. [See Issue 5 below] Also, the Texas Legislature has specifically contemplated the fact that custodial parents and children can and do live more than 100 miles away from the non-custodial parent. To take this into account, the Texas Family Code's Standard Possession Order adjusts periods of possession so that a non-custodial parent who lives more than 100 miles from the children has essentially the same number of overnight stays with the children as does the non-custodial parent who lives within 100 miles. TEX. FAM. CODE ANN. § 153.312 & 153.313. The equivalency in overnights comes from reducing weekend visitation and expanding vacation time. Further the trial court can increase visitation beyond those limits, based on any relevant factor. TEX. FAM. CODE ANN. § 153.256. The Texas Legislature has never passed a law that requires both parents to live in the same town, or even the same state,

or that creates a presumption against such an arrangement. The Legislature has, however, taken the decision on relocation and put it in the hands of a jury when a jury is requested. TEX. FAM. CODE ANN. § 105.002. In this case, the jury awarded the exclusive right to determine the children's principal residence to the children's mother, Rosemarie, a citizen of Germany and resident alien in the United States. After verdict, the Trial Court took that power away by requiring that the children live and go to school in Bexar County, Texas. This act of the Trial Court violated the Texas Constitution and Texas Family Code, and constitutes an abuse of discretion.

STATEMENT OF FACTS

The Court of Appeals correctly stated the nature of the case, except that the Court of Appeals is incorrect in saying that the Trial Court granted a motion for judgment n.o.v. However, the Court of Appeals left out of its opinion some of the evidence and inferences that support the jury's verdict.

Rosemarie and Rudolph and their two children, Oliver and Dominic, are citizens of Germany. All but the youngest child are aliens residing in the United States on "green cards." The youngest boy is a dual national.

SUMMARY OF THE ARGUMENT

The Texas Constitution guarantees the right to a jury trial. TEX. CONST. art. I §15; art. V §10. Texas Family Code § 105.002 carries this right even further: the jury's decision on who has the right to determine the principal residence of the children is binding

on the Trial Court. The Trial Court's decision to limit Rosemarie's right to determine principal residence to Bexar County was in violation of the Family Code.

Additionally, Rosemarie, Rudolph, Oliver and Dominic are all German citizens. Except for Dominic, none are citizens of the United States. Federal law preempts any state law purporting to empower a state judge to direct under what circumstances a foreign national must remain in the United States. The Trial Court's decree that the two children must reside in Bexar County is preempted by federal law.

The Trial Court's restriction of relocation violates the right to travel protected by the U.S. Constitution, and can be supported only in furtherance of a compelling state interest. *In re Marriage of Cole*, 224 Mont. 207, 729 P.2d 1276 (1986). No compelling state interest exists to require the German children of two German national parents to live in Bexar County, Texas, for the duration of the children's minority.

Standards governing relocation decisions have not been articulated by Texas courts or the Texas Legislature. Many other states have either legislated or litigated in this area, and have articulated factors to apply. Upon a review of standards from around the country, the Trial Court in this case made a decision that was arbitrary and constituted an abuse of discretion.

The Trial Court erred in failing to award Rosemarie a judgment for her attorney's fees, since she prevailed on the trial, especially in the event of reversal by this Court. The issue of fees and costs should be remanded to be reconsidered in light of this Court's ruling

on appeal.

ARGUMENT

Issue 1

The Trial Court erred by disregarding the jury's determination regarding the primary residence of the children, by imposing geographical restrictions not imposed by the jury, in contravention of Texas Family Code § 105.002, and Texas Constitution, art. I, § 15; art. V, § 10.

Issue 2

When the basis of a jury trial is to remove a geographical restriction limiting the residence of the children to the state of Texas, and the jury finds in favor of the modification, can the trial judge impose a new geographical restriction to Bexar County, Texas, in contravention of Texas Family Code § 105.002, and Texas Constitution, art. I, § 15; art. V, § 10?

Article I, § 15 and Article V, § 10 of the Texas Constitution guarantee a right of trial by jury. Section 105.002 of the Family Code expressly provides that in a custody suit, "a party may demand a jury trial." This provision effectuates the right to trial by jury conferred by Article I, Section 15 of the Texas Constitution. *See Goetz v. Goetz*, 534 S.W.2d 716, 718 (Tex. Civ. App.--Dallas 1976, no writ) (holding Art. I, § 15 applicable to divorce actions).

Additionally, Texas Family Code § 105.002(c) & (d) provides that the court may not contravene the jury's verdict on, among other things, the determination of the primary residence of the child." [See Tab F]

The jury determined that Rosemarie "shall have the exclusive right to determine the

county of residence and the primary residence of the children." [Q. No. 2, Tab B] Notwithstanding the verdict of the jury, the Trial Court decreed that the children must reside in, and attend school in, Bexar County, Texas. [See Tab A] The Trial Court further decreed that the minor children must remain in Bexar County, and that the children could not be removed from Bexar County for the purpose of changing their residence or domicile, without a court order or a notarized written agreement, signed by both parents, filed with the court. [See Tab A]

These rulings of the Trial Court were in direct contravention of the jury's verdict, and in violation of Texas Family Code § 105.002(c) & (d).

At trial, Rudolph attempted to circumvent the jury verdict by arguing that limiting the children's residence or school to Bexar County is merely a specific term or condition of possession of or access to a child. [First Amended Motion for Judgment Non Obstante Verdicto, CR 662]. This argument is untenable, given the language of Family Code § 105.002. Subdivision 105.002(c)(1) lists issues for which a party *is* entitled to a jury verdict. Subdivision (c)(1) includes as mandatory jury issues the appointment of managing conservators (sole or joint), the appointment of possessory conservator, and the "determination of the primary residence of the child." Subdivision 105.002(c)(2) lists issues for which a party is *not* entitled to a jury verdict. Subdivision (c)(2) applies to child support, "a specific term or condition of possession of or access to the child," or "any right or duty of a possessory or managing conservator, other than the issue of primary residence

determined under Subdivision (1)(D)." Since "the determination of the primary residence of the child" is listed as a mandatory jury issue under Subdivision (c)(1)(D), it by definition cannot be a "specific term or condition of possession of or access to a child" governed by Subdivision (c)(2)(B).

The Trial Court's action in contravening the jury's verdict was in violation of law, and should be overturned.

Issue 3

Can a Texas court impose a geographical restriction on the residence of a child who is a German citizen and not an American citizen, and when both parents are German citizens and not American citizens?

Issue 4

Can a Texas court impose a geographical restriction on the residence of a child who is dual national (citizen of America and Germany), when both parents are German citizens and not American citizens?

[This field preemption argument is reserved
for the brief, if directed by this Court]

Issue 5

The Trial Court abused its discretion by limiting the children's residence and schooling to Bexar County, Texas.

The United States Supreme Court has established that the right of an individual to travel freely throughout the United States is protected by the Constitution. *E.g.*, *Jones v. Helms*, 452 U.S. 412 (1981); *Shapiro v. Thompson*, 394 U.S. 618 (1969). As the Montana Supreme Court recognized in a child relocation case, the fundamental right to travel

interstate can be restricted only in furtherance of a compelling state interest. *In re Marriage of Cole*, 224 Mont. 207, 729 P.2d 1276 (1986) (citing *Shapiro v. Thompson*). No compelling state interest supports the Trial Court's restrictions on relocation in this case.

Texas courts have not articulated any standards for making a relocation decision. Courts and legislatures of other states have. The Supreme Court of Florida adopted a presumption favoring relocation by the custodial parent, in *Mize v. Mize*, 621 So.2d 417, 419-420 (Fla. 1993). [See App. Tab G] *Accord, Russenberger v. Russenberger*, 669 So.2d 1044 (Fla. 1996). In *Mize*, the Florida Supreme Court adopted language from a lower court decision which said:

> [S]o long as the parent who has been granted the primary custody of the child desires to move for a well-intentioned reason and founded belief that the relocation is best for that parent's - and, it follows, the child's - well-being, rather than from a vindictive desire to interfere with the visitation rights of the other parent, the change in residence should ordinarily be approved.

Mize, 621 So.2d 419-420, citing *Hill v. Hill*, 548 So.2d 705, 707-708 (Fla. 3d DCA 1989) (Schwartz, J., specially concurring), *review denied*, 560 So.2d 233 (Fla. 1990). The Florida Supreme Court listed the following factors to consider:

1. Whether the move would be likely to improve the general quality of life for both the primary residential spouse and the children.

2. Whether the motive for seeking the move is for the express purpose of defeating visitation.

3. Whether the custodial parent, once out of jurisdiction, will be likely to comply with any substitute visitation arrangements.

4. Whether the substitute visitation will be adequate to foster a continuing meaningful relationship between the child or children and the noncustodial parent.

5. Whether the cost of transportation is financially affordable by one or both of the parents.

6. Whether the move is in the best interests of the child.

These factors have been acknowledged by other courts. *E.g., D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 365 A.2d 27 (1976), *aff'd*, 144 N.J. Super. 352, 365 A.2d 716 (1976). *See generally* FLA. STAT. § 61.13(2)(d) (providing no presumption for or against relocation of children, and enumerating six factors for courts to consider in deciding relocation cases). When the factors in *Mize* are applied to the facts of the present case, every factor favors Rosemarie 's freedom to return to Germany with the children.

Some states have shifted the burden in relocation cases to the nonmoving parent: *In re Marriage of Frederici*, 338 N.W.2d 156 (Iowa 1983); *Auge v. Auge*, 334 N.W.2d 393 (Minn. 1983). Others have placed the parents on an "equal footing" where the court makes an objective determination whether the proposed move or the denial of a move best serves the interests of the children. *See e.g., Jaramillo v. Jaramillo* 113 N.M. 57, 823 P.2d 299 (1991). California, in *In re Marriage of Burgess*, 13 Cal.4th 25, 51 Cal. Rptr. 2d 444, 913 P.2d 473 (1996) [see App. Tab H], adopted a rule that where the custodial parent has sound, good faith reasons for the move, then the noncustodial parent has the

burden to show that as a result of the move the child will suffer detriment. The court noted that "it is unrealistic to assume that divorced parents will permanently remain in the same location after dissolution . . . ." 13 Cal.4th at 35-36.

A number of states have liberal relocation standards. See *In re Marriage of Brady*, 115 Ill.App.3d 521, 71 Ill.Dec. 297, 450 N.E.2d 985 (1983) (custodial parent makes prima facie showing by demonstrating a desire to move, a sensible reason for the move, and "some showing that the move is in the best interests of the child"); *Jafari v. Jafari*, 204 Neb. 622, 624, 284 N.W.2d 554, 555 (1979) ("The general rule in cases where a custodial parent wishes to leave the jurisdiction for any legitimate reason is that the minor children will be allowed to accompany the custodial parent if the court finds it to be in the best interests of the children to continue to live with that parent"); *In re Matter of Ehlen*, 303 N.W.2d 808, 810 (S.D. 1981) ("The majority of cases dealing with removal of a child from the jurisdiction support the rule that if a parent who has custody of a child has good reason for living in another state, removal will be permitted, providing such a move is consistent with the best interests of the child"). As noted in *Landingham v. Landingham*, 685 So.2d 946 * 4 (Fla. App. 1 Dist. 1996), the "rigid enforcement of a relocation restriction may harm the very relationship which the court has previously determined to be in the best interest of the child."

Another factor to consider in deciding relocation is the ability of the non-moving parent to relocate. This issue arose in *Rampolla v. Rampolla*, 269 N.J. Super. 300, 635

A.2d 539 (1993) [see App. Tab I], where the trial court was reversed for refusing to permit the custodial mother of two children to relocate. The appellate court noted that relocation cases should not be viewed exclusively from the standpoint of the non-moving parent. Instead, the court should weigh the burden the oppositional parent would suffer if he is forced to relocate in order to remain close to the children. The court said:

> Instead of the status quo (regular contact or shared custody) being pitted against the move, the possibility of replicating the status quo in another location becomes a viable alternative with concomitant benefit to all parties. Realistically, in most cases, both parties will not have equal ability to relocate. However, there will be cases in which the party resisting the move has the flexibility to live elsewhere. For example, a person who runs a home business or one who travels long distances or is licensed to practice a profession in more than one state might well be able to move his or her base of operations.

Rampolla, 635 A.2d at * 7. In the present case, Rudolph admitted that he can go to work in Germany with his old company. [RR vol. 9, p. 119] Rudolph makes $175,000 per year in salary. [RR vol. 9, p. 11-12] Rudolph told Rosemarie that it would be very possible for him to move back to Germany and do his job from Germany. [RR vol. 4, p. 18] A family therapist, Patricia DeTerroil, testified to hearing discussion that Rudolph could move back and work in Germany in a similar capacity and be within an hour or two distance from where the family would move. [RR vol. 4, pp. 42-43] Rosemarie, too, is an alien in the United States, and Germany is her home country. She has a problem with the English language. [RR vol. 9, p. 139, 157]. Rosemarie was trained as a medical technician in Germany, but it has been 12 years since she worked in a medical office in

Germany. [RR vol. 9, p. 111] She has worked part-time as an outside seller for a travel agency. [RR vol. 8, p. 155] Rosemarie is more employable in Germany than in Texas [RR vol. 9, p. 111], and especially San Antonio.

Issue 6

> The Court of Appeals erroneously failed to address Rosemarie's relocation complaints in the mistaken belief that the Trial Court granted judgment n.o.v. based on there being "no evidence" that relocation would be in the boys' best interest and a positive improvement. The Trial Court cannot j.n.o.v. a verdict made binding under Section 105.002. Further, there was legally sufficient evidence to support the jury's verdict.

The Court of Appeals upheld the Trial Court's restriction on residency on the assumption that the Trial Court had granted a judgment n.o.v. on the grounds that there was no evidence that relocation would be a positive improvement or in the boys' best interest. This "no evidence" determination was wrong because: (1) Rudolph did not preserve the legal sufficiency challenge in the trial court; (2) a court cannot j.n.o.v. a verdict binding under Family Code § 105.002; and (3) because there was legally sufficient evidence to support the jury's verdict that the modification would be a positive improvement and in the children's best interest.

Although Rudolph filed a motion for judgment n.o.v., the record reflects no ruling by the Trial Court on this motion. A ruling on the motion for j.n.o.v must be reflected in the record in order to preserve a "no evidence" contention on appeal. *Quintero v. Citizens & Southern Factors, Inc.*, 596 S.W.2d 277, 279 (Tex. Civ. App.--Houston [1st Dist.]

1980, no writ); *Commercial Standard Ins. Co. v. Southern Farm Bureau Casualty Ins. Co.*, 509 S.W.2d 387, 392 (Tex. Civ. App.-Corpus Christi 1974, writ ref'd n.r.e.). Additionally, a trial court cannot grant a j.n.o.v. in contravention of a verdict made binding under the Family Code. The following cases differ on whether an earlier version of the statute prohibited a j.n.o.v. *T.A.B. v. W.L.B.*, 598 S.W.2d 936, 938 (Tex. Civ. App.--El Paso) (in face of Family Code language, trial court cannot enter a decree that contravenes the verdict of the jury once it is rendered), *writ ref'd n.r.e*, 606 S.W.2d 695 (Tex. 1980) (refusal of writ not to be construed as approving language that Family Code prohibits consideration of properly raised "no evidence" points); *contra, In re Marriage of Robinson*, 16 S.W.3d 451, 454 (Tex. App.--Waco 2000, no pet.), *In the Interest of Soliz*, 671 S.W.2d 644, 648 (Tex. App.--Corpus Christi 1984, no writ); *Fambro v. Fambro*, 635 S.W.2d 945, 948 (Tex. App.--Fort Worth 1982, no writ).

Even if Rudolph's appellate complaint had been preserved, the Court of Appeals could properly sustain Rudolph's "no evidence" point only if: (1) evidence of a vital fact is completely absent; (2) the appellate court is prohibited by either the rules of evidence or of law from giving weight to the only evidence offered in support of a vital fact; (3) the evidence offered as proof of the vital fact amounts to no more than a scintilla; or (4) the evidence conclusively establishes the opposite of the vital fact. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). In reviewing a no evidence claim, the appellate court must view the evidence in a light that tends to support the finding of the

disputed fact and disregard all evidence and inferences to the contrary. *Weirich v. Weirich*, 833 S.W.2d 942, 945 (Tex. 1992); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

Rosemarie established that she has been the primary caretaker of the children since their birth. The court-appointed psychologist, Dr. Murphey acknowledged that the boys' primary emotional bond was with their mother. [RR vol. 9, p. 127] Dr. Murphey also testified that, if Rosemarie is happier in Germany with her children, there would be natural benefits flowing to the children. [RR vol. 9, p. 123] The evidence showed that Rosemarie never expected to live in the United States forever. She came here on a temporary basis. [RR vol. 3, p. 34] Dr. Paredes testified that requiring Rosemarie to live in San Antonio and not be able to go back home with her children would be a very difficult adjustment for her to make. [RR vol. 6, p. 114] Forcing Rosemarie to live in Bexar County diminishes her happiness, which in turn negatively impacts the children. Courts in relocation cases have recognized that a child's best interests are closely interwoven with the well-being of the custodial parent, so that the custodial parent's interests must be considered. *Cooper v. Cooper*, 99 N.J. 42, 491 A.2d 606 (1984). Even Rudolph admitted on cross-examination that if Rosemarie was forced to live in Texas for 12 more years, it would affect her emotionally and that would have an effect on the children. [RR vol. 9, p. 22]

Also, having a family support network would be in the best interest of and a positive improvement for the children. All of the Lenz's extended family live in Germany,

including the children's only living grandparents. [RR vol. 8, p. 160] The children are close to Rosemarie's sister and brother-in-law. [RR vol. 8, p. 160] They are also close to Harmut, Rosemarie's fiancé. [RR vol, 8, p. 160-161]

Finally, it must be remembered that the parties and the children are German. When the parties moved from Germany to the United States, the oldest child spoke only German, not English. [RR vol. 2, p. 16] Dr. Paredes, a psychologist who testified at trial, said that it is "terribly important for these children to maintain and benefit from their culture of origin, the German culture." [RR vol. 6, p. 112] There was testimony at trial that Rudolph talks to his boys in German. [RR vol. 4, p. 100] Rudolph makes frequent trips to Germany. From March of 1997 to October of 1998, Rudolph took 17 business trips to Germany, and 8 trips in the United States. [RR vol. 2, p. 63-64] This evidence establishes that if the children lived in Germany, they would still have frequent access to their father, plus their living collateral relatives. The children have friends in Germany whom they have known for years. [RR vol. 3, p. 57] Both children are well-equipped to go to school in Germany and, after hearing all the evidence, the jury found that Rosemarie and the children should be free to return there. The benefits to the children of growing up in their country of origin, with a contented custodial parent and an extended-family support network, are clearly in the best interest of and a positive improvement for these children.

There is more than a scintilla of evidence to support the jury's verdict, and the Court of Appeals transgressed upon the constitutional and statutory role of the jury in

overturning the jury's verdict.

Issue 7

> The Trial Court reversibly erred by failing to find reasonable attorney's fees for Rosemarie, and by failing to award to Rosemarie a judgment against Rudolph for her attorney's fees and court costs.

If this Court reverses and grants judgment in Rosemarie's favor, then Rosemarie asks this Court to remand the question of attorney's fees and court costs as well. *See Bruni v. Bruni*, 924 S.W.2d 366, 368 (Tex. 1996).

PRAYER

Rosemarie asks this Court to reverse the lower court judgments and render judgment removing the restriction on the children's residence and school, and a remand to reconsider attorney's fees and costs of court. Rosemarie prays for relief generally.

Respectfully submitted,

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ATTORNEY FOR PETITIONER,
ROSEMARIE KLARA LENZ

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon Ms. Jo Chris Lopez, The North Frost Center, 1250 N.E. Loop 410, Suite 725, San Antonio, Texas 78209, by certified mail, return receipt requested, on the 19th day of March, 2001.

RICHARD R. ORSINGER