DRAYTON WATERS HOLLEY, II

VERSUS

ALEXANDRA ROBIN HOLLEY

NO. 17-C-325

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPLICATION FOR SUPERVISORY REVIEW FROM
THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 747-986, DIVISION "O"
HONORABLE DANYELLE M. TAYLOR, JUDGE PRESIDING

November 20, 2017

FREDERICKA HOMBERG WICKER
JUDGE

Panel composed of Judges Susan M. Chehardy,
Fredericka Homberg Wicker, and Jude G. Gravois

JUNE 22, 2017 JUDGMENT REVERSED IN PART; JUNE 26, 2017 AND AUGUST 3, 2017 JUDGMENTS VACATED; MATTER REMANDED

FHW
SMC
JGG

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WICKER, J.

In this writ application, relator-mother seeks review of the trial court's judgment sustaining father-respondent's objection to her relocating their minor child from New Orleans to Baton Rouge. Additionally, relator-mother seeks review of the trial court's issuance of a preliminary injunction, enjoining her from leaving Orleans and Jefferson Parishes with the child "for any reason whatsoever," as well as the trial court judgments awarding interim joint custody to the parties. [1]

First, as to the relocation issue, we find that the trial judge committed a prejudicial legal error in applying the incorrect law and we, thus, conduct a *de novo* review of the relocation issue. Upon our *de novo* review, we find that the appropriate method to measure "miles" under the Relocation Act is by radial miles, or "as the crow flies," rather than by surface or road miles. In this case, we find that the proposed relocation at issue is less than 75 radial miles from the father-respondent's domicile and, thus, the relocation statutes, La. R.S. 9:355.1 *et seq.*, do not apply. Second, we find that the preliminary injunction issued is invalid as a matter of law because Mr. Holley failed to post security as required under La. C.C.P. art. 3610. Finally, as to the interim custody orders issued, we find that the trial judge erred in considering evidence not properly offered and introduced. Accordingly, for the reasons herein, we vacate the interim custody orders, the preliminary injunction, and the relocation judgment at issue, and remand this matter for further proceedings.

[1] In brief to this Court, Mr. Holley asserts that the relocation judgment at issue is a final, appealable judgment and asks this Court to dismiss Ms. Holley's writ application. Upon our review of the entire record in this matter, we find that the trial court judgment at issue is an interlocutory, non-appealable judgment. The judgment sustaining Mr. Holley's objection to relocation determined that the relocation statutes in fact applied under the facts of this case and further determined that Ms. Holley failed to follow the statutory notice requirements under La. R.S. 9:355.2. Our review of the record reflects that the trial judge intentionally limited the hearing to the procedural objection to relocation only, *i.e.,* whether the relocation statutes applied to the facts of this case, and did not consider the merits of the relocation issue, *i.e.*, consideration of the relocation factors, or if the proposed move, whether a "relocation" under the statutes or not, was in C.H.'s best interest. Therefore, we find that the relocation judgment at issue is an interlocutory and non-appealable judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Drayton Waters Holley, II, and Alexandra Robin Holley were married on September 27, 2014. Of the marriage, one child, C.H, was born on January 4, 2015. Prior to the proceedings at issue filed in Jefferson Parish, the parties filed dual petitions for protective orders in Civil District Court for the Parish of Orleans.[2] In Ms. Holley's petition for protective order, she alleged that Mr. Holley "shook" C.H. when C.H. was a three-day old infant. On March 23, 2015, the trial judge in Orleans Parish granted Ms. Holley's petition for protection from abuse as to C.H. only and denied Mr. Holley's petition for protection from abuse. The transcript from the Orleans Parish hearing reflects the trial judge found that Mr. Holley's actions against C.H. were not intentional and ordered that both Mr. Holley and Ms. Holley attend new parenting classes at Children's Hospital. The trial judge in Orleans Parish issued a protective order on March 26, 2015, for a six-month period, with an established expiration date of September 26, 2015. The protective order additionally awarded Ms. Holley temporary custody of C.H. and Mr. Holley supervised visitation.

On March 23, 2015, Mr. Holley filed a petition for divorce in the 24th Judicial District Court, seeking a divorce as well as a determination on initial custody and child support matters. On November 15, 2015, Ms. Holley filed exceptions of insufficiency of citation and service of process, lis pendens, and improper venue.[3] On April 21, 2016, the trial judge denied Ms. Holley's exceptions. In the same judgment, the trial judge awarded Mr. Holley supervised

[2] Ms. Holley and C.H. are domiciled in Orleans Parish. The record reflects that Mr. Holley is domiciled in Jefferson Parish.

[3] Ms. Holley alleged that she had not been properly served with Mr. Holley's petition for divorce; that the parties had other domestic litigation pending in the Civil District Court for the Parish of Orleans; and that the parties had previously certified that the Parish of Orleans was the proper venue for determination of community property and other incidental domestic issues between the parties.

visitation with an independent supervisor, Ms. Martha Bujanda, and further appointed Dr. Edward Shwery to perform a custody evaluation as well as conduct psychological testing of both parties.[4]

On April 26, 2017, Mr. Holley filed a pleading titled, "Objection to Defendant's Unauthorized Relocation of the Minor Child's Residence and Request for Attorney's Fees and Court Costs all with Incorporated Memorandum in Support[;] Request for Ex Parte Temporary Restraining Order Not to Remove Minor Child From Jurisdiction of the Court Pending a Hearing and Request for Injunction, Rule to Change/Modify Custody to Joint Custody with Petitioner Designated as Domiciliary Parent all with Incorporated Memorandum in Support." In his objection, Mr. Holley alleged that Ms. Holley relocated C.H. to Baton Rouge in February or March 2016, without his knowledge or proper notice as required under La. R.S. 9:355.4(A).[5] Mr. Holley alleged that Ms. Holley forwarded correspondence to his counsel on March 28, 2017, notifying him that she planned to relocate C.H. to Baton Rouge on May 28, 2017,[6] but that the written notification did not provide a specific address in Baton Rouge as required under La. R.S. 9:355.5.[7] On April 10, 2017, Mr. Holley responded through correspondence to Ms. Holley's counsel, objecting to the proposed relocation.

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[4] The judgment further declared the parties separate in property and enjoined and prohibited the parties from encumbering or disposing of community property.

[5] La. R.S. 9:355.4(A) provides:

> A person proposing relocation of a child's principal residence shall notify any person recognized as a parent and any other person awarded custody or visitation under a court decree as required by R.S. 9:355.5.

[6] The record reflects that Mr. Holley made numerous attempts to determine whether Ms. Holley had relocated C.H. to Baton Rouge, to no avail. On January 24, 2017, Mr. Holley forwarded correspondence to Ms. Holley's counsel inquiring whether Ms. Holley relocated C.H. to Baton Rouge and, if not, whether Ms. Holley intended to relocate C.H. Mr. Holley forwarded additional correspondence on March 7, 2017, stating that Ms. Holley had failed to respond to Mr. Holley's previous correspondence concerning possible relocation and, again, inquiring whether Ms. Holley had relocated C.H. to Baton Rouge or planned to do so in the near future. On March 28, 2017, Mr. Holley forwarded additional correspondence to Ms. Holley's counsel, again stating that he had received no response from his previous correspondence concerning relocation. In that correspondence, Mr. Holley additionally attached Interrogatories and Request for Production of Documents. In correspondence dated March 28, 2017, Ms. Holley finally responded to Mr. Holley's inquiries and notified Mr. Holley of her intent to relocate C.H. to Baton Rouge.

[7] La. R.S. 9:355.5 provides:

> Notice of a proposed relocation of the principal residence of a child shall be given by registered or certified mail, return receipt requested, or delivered by commercial courier as defined in R.S. 13:3204(D), to the last known address of the person entitled to notice under R.S. 9:355.4 no later than any of the following:
> (1) The sixtieth day before the date of the proposed relocation.

In his objection, Mr. Holley asserted first that Ms. Holley had in fact "relocated" C.H. as contemplated under the Relocation Act, *i.e.*, that the proposed address in Baton Rouge exceeds the 75-mile restriction set forth in the Act and, second, that Ms. Holley should be prohibited from relocating C.H. to Baton Rouge as it is not in the minor child's best interest. Mr. Holley contended that Ms. Holley's March 28, 2017 correspondence was both insufficient and untimely to constitute proper notice of relocation under La. R.S 9:355.5.

Mr. Holley further requested that the parties be awarded joint custody of C.H. He asserted that the custody evaluation with appointed evaluator Dr. Shwery was near completion and that supervised visitation, as ordered in the April 26, 2016 judgment, had continued with no incidents. He further contended that a change of circumstances occurred since the April 21, 2016 judgment awarding supervised visitation. Specifically, he alleged that Ms. Holly moved C.H. into her new husband's home in Baton Rouge and that Ms. Holley encouraged C.H. to refer to her new husband as "Daddy." Mr. Holley further alleged that Ms. Holley continued to refuse to inform him of C.H.'s whereabouts, including the address where C.H. lived.[8]

Mr. Holley also requested a temporary restraining order, and a subsequent preliminary injunction, prohibiting Ms. Holley from removing C.H. out of

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(2) The tenth day after the date that the person proposing relocation knows the information required to be furnished by Subsection B of this Section, if the person did not know and could not reasonably have known the information in sufficient time to provide the sixty-day notice, and it is not reasonably possible to extend the time for relocation of the child.

B. The following information shall be included with the notice of intended relocation of the child:

(1) The current mailing address of the person proposing relocation.

(2) The intended new residence, including the specific physical address, if known.

(3) The intended new mailing address, if not the same.

(4) The home and cellular telephone numbers of the person proposing relocation, if known.

(5) The date of the proposed relocation.

(6) A brief statement of the specific reasons for the proposed relocation of a child.

(7) A proposal for a revised schedule of physical custody or visitation with the child.

(8) A statement that the person entitled to object shall make any objection to the proposed relocation in writing by registered or certified mail, return receipt requested, within thirty days of receipt of the notice and should seek legal advice immediately.

C. A person required to give notice of a proposed relocation shall have a continuing duty to provide the information required by this Section as that information becomes known.

[8] Concerning Mr. Holley's complaint that he is unaware of C.H.'s whereabouts, Ms. Holley responded, "he is not regularly in the know for all the child's day to day going ons, neither does he need to be."

Jefferson and Orleans Parishes pending a hearing on his objection to the relocation. On April 26, 2017, the trial judge issued a temporary restraining order prohibiting Ms. Holley from removing the minor child from Jefferson and Orleans Parishes "for any reason whatsoever" pending a hearing set for May 30, 2017.

Ms. Holley filed an Answer to Mr. Holley's Objection, as well as a "Motion to Establish Child Support for the Minor Child, Terminate Supervised Visitation, Remove Ms. Bujanda as Supervisor, Request for Attorney Fees and Costs and for Sanctions, and that a TRO be Denied." In response to Mr. Holley's objection to relocation, Ms. Holley asserted that her move to Baton Rouge is not in fact a relocation because the distance between her prior residence, which was the child's primary residence, and her new residence is less than the 75-mile restriction provided in La. R.S. 9:355.2(B). Therefore, she contended that the relocation statutes do not apply in this case. Concerning custody, Ms. Holley claimed that any custody determination would be premature because the custody evaluation was not yet complete.

The trial court conducted a hearing on May 30, 2017. The matters set before the court were visitation and custody; a request for an injunction prohibiting Ms. Holley from traveling with C.H. outside of Jefferson and Orleans Parishes; and Mr. Holley's objection to Ms. Holley's unauthorized relocation to Baton Rouge. Concerning relocation, Mr. Holley asserted first that Ms. Holley had in fact "relocated" the child as contemplated under the Relocation Act, *i.e.*, that the proposed address in Baton Rouge exceeds the 75-mile restriction set forth in the relocation statutes and, second, that Ms. Holley should be prohibited from relocating C.H. to Baton Rouge because it is not in C.H.'s best interest.

At the hearing, Mr. Holly testified that he resides at 160 Citrus Road in Jefferson Parish. He testified that he received correspondence dated March 28, 2017 from Ms. Holley's counsel indicating that she intended to relocate C.H. to

Baton Rouge on or about May 28, 2017. He testified to his suspicions that Ms. Holley relocated with C.H. sometime between Halloween and Christmas of 2016 without his knowledge or the permission of the Court. He testified that he searched MapQuest, Google maps, and AAA Direction to determine the distance between Ms. Holley's Baton Rouge address and C.H.'s principal residence in Orleans Parish. He testified that Google Maps reflected the drive to be 75.7 miles and MapQuest reflected the drive as 75.1 miles.[9]

Ms. Holley testified at trial that she is married to Mr. Richard Dickson, who lives and works in Baton Rouge. She testified that her mailing address is 9472 Boone Drive in Baton Rouge and that, since the April 26, 2017 restraining order was issued, she has resided with C.H. at 7300 Lakeshore Drive in New Orleans. She testified that she has abided by the restraining order and further that she has never prevented Mr. Holley from exercising visitation. Although she testified that a relocation to Baton Rouge would make visitation with Mr. Holley more difficult, she maintained that she would still drive to Jefferson Parish to allow Mr. Holley to exercise his visitation with C.H. Ms. Holley introduced into evidence a map reflecting that the mileage, in straight-line or radial miles, from the child's principal residence in New Orleans to the proposed Baton Rouge address is 64 miles.

Ms. Holley discussed the MapQuest route suggested by Mr. Holley and testified that the route she takes from New Orleans to the Baton Rouge address involves exiting the interstate one exit closer to New Orleans than the route proposed by Mr. Holley, and traveling through residential streets. She testified that everyone in her neighborhood avoids taking the Essen Lane exit of the highway, which is the interstate exit reflected in the MapQuest and other search engines'

[9] Mr. Holley introduced copies of various maps into evidence, reflecting the recommended routes from C.H.'s principal residence to Ms. Holley's proposed address in Baton Rouge, reflecting a drive of 75.7 miles with GoogleMaps, 75.1 miles with MapQuest, and 75.7 miles with AAA maps.

results, because the hospital near the interstate exit creates a significant amount of traffic. She stated that the route she takes "religiously" reflects a 73.8-mile drive on MapQuest from C.H.'s principal residence in New Orleans to the proposed Baton Rouge residence.

Mr. Richard Dickson testified that he is married to Ms. Holley and that he resides at 9472 Boone Drive in Baton Rouge. He testified as to his customary route he travels from Ms. Holley's residence in New Orleans to his home in Baton Rouge, which travels through residential neighborhoods and reflects a 73.8-mile drive. He reiterated Ms. Holley's testimony that the highway route proposed by Mr. Holley, reflecting a 75.7-mile drive, is not his customary route because it includes exiting the interstate next to a major hospital, which significantly increases travel time due to heavy traffic.

During the hearing, the trial judge made it clear that the only issue to be determined, initially, was whether the proposed relocation of C.H.'s principal residence would be considered a "relocation" to which the Relocation Act notice requirements would apply. When counsel attempted to question Ms. Holley on her reasons for moving to Baton Rouge, the trial judge instructed, "I think that would go to the [relocation] factors, if we got to the factors. But we are not there yet." Counsel reiterated that "we're limiting ourselves strictly to the number of miles. I would like to put on a relocation case, but I understand your Honor would prefer I not." The trial judge stated on the record that the merits of relocation was not before the Court at that time.

The Court took a recess and indicated that, upon return, the hearing would continue on the issues of custody and visitation. During the recess, the parties and counsel attempted to reach a compromise on the issue of custody. However, the record indicates that Ms. Holley, who was pregnant at the time, experienced a

panic attack and left the hearing to seek medical treatment. No consent judgment was reached and no agreement was read into the record.

At the conclusion of the recess, the trial judge returned to the bench and issued her ruling. As to Mr. Holley's objection to relocation, she determined that "the intention of the legislature was the distance to mean traveling distance and not as-the-crow flies distance." She found that "we are not crows" and determined that the "most commonly traveled route" should be utilized when calculating mileage under the relocation statutes. She consequently found that the distance between C.H.'s principal place of residence in New Orleans and the proposed relocation address in Baton Rouge is more than 75 miles and, thus, the relocation statutes apply to this case.

On June 22, 2017, the trial judge issued a written judgment sustaining and granting Mr. Holley's Objection to Ms. Holley's "Unauthorized Relocation." The judgment further granted Mr. Holley's request for a preliminary injunction in the same form and substance as the temporary restraining order issued April 26, 2017, prohibiting Ms. Holley from removing the minor child from Jefferson or Orleans Parishes for any reason whatsoever.[10]

The trial court issued a second judgment on June 26, 2017, titled an "Interim Judgment," granting the parties joint legal custody of C.H. and implementing a 3-3-2 physical custody schedule and parenting guidelines. The trial court set a custody hearing for November 29, 2017.[11]

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[10] In her judgment, the trial judge further denied Mr. Holley's request for attorney fees and costs under the relocation statutes. The trial court judgment also denied Ms. Holley's request for a TRO and for attorney fees.

[11]This Court issued an order to the trial judge during the pendency of this writ application, instructing her to combine her June 22 and June 26, 2017 judgments to one, amended judgment, pointing out two inconsistencies in the judgments. As to which law the trial judge applied in ruling on relocation, this Court found that "while it seems the district court applied La. R.S. 9:355.2(B)(3) in its June 22, 2017 judgment granting Mr. Holley's Objection to Ms. Holley's Unauthorized Relocation of the Minor Child's Residence, the district court seemed to apply La. R.S. 9:355.2(B)(2) in its June 26, 2017 judgment ordering that '[n]either parent shall move the residence of the child out of state or within the state at a distance of more than 75 miles from the other parent without giving the other parent written notice[.]'" As to the June 26, 2017 interim custody order, this Court found that the judgment's language that "[n]either parent shall move the residence of the child out of state or within the state at a distance of more than 75 miles…" could be inconsistent with the June 22, 2017 judgment language, enjoining Ms. Holley from removing the minor child out of Jefferson and Orleans Parishes for any reason whatsoever. In our order, this Court stated, "we cannot discern what the district court meant by its June 22, 2017 order enjoining Ms. Holley or

LAW AND ANALYSIS

In brief to this Court, Ms. Holley asserts three assignments of error. In her first assignment of error, Ms. Holley contends that the trial court erred in applying the relocation statutes to the facts of this case. She contends that the proposed move to Baton Rouge is not a "relocation" as contemplated under the Relocation Act because the proposed move does not exceed the statutorily provided 75-mile restriction. Second, Ms. Holley contends that the trial court erred in issuing an overly restrictive injunction, prohibiting her from leaving Orleans and Jefferson Parishes with C.H. "for any reason whatsoever." Third, Ms. Holley argues that the trial judge erred in issuing an interim custody order without any evidence presented relevant to the issue of custody and under the facts of this case.

For the following reasons, we first find that the trial judge committed an error of law in applying the relocation statutes to the facts of this case and we thus conduct a *de novo* review of the relocation issue. Upon our *de novo* review, we find that the proposed move to Baton Rouge is not a relocation contemplated under the Relocation Act because the distance between Mr. Holley's residence and the Baton Rouge address is less than 75 radial miles. We therefore vacate the judgment sustaining Mr. Holley's objection to relocation. We further find that the preliminary injunction issued, prohibiting Ms. Holley from leaving Jefferson and Orleans Parishes with C.H. for any reason, is invalid because Mr. Holley failed to provide

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any other person acting on her behalf from 'removing the minor child from the jurisdiction of this Court and the New Orleans area, particularly, the Parish of Jefferson and the Parish of Orleans, for any reason whatsoever, pending order of this Court.'" This Court sought clarification to discern whether the trial judge's June 22, 2017 judgment intended to prohibit Ms. Holley from *relocating* C.H. outside of Jefferson and Orleans Parishes or to prohibit Ms. Holley from *removing* C.H. from those parishes for any reason, including visiting with family or attending a doctor's appointment. In her response to this court, the trial judge declined to amend the judgments but rather issued a *per curiam* opinion. In her *per curiam*, the trial judge opined that the judgment as to Mr. Holley's objection to relocation was a final, appealable judgment and, thus, did not prepare one, amended judgment as ordered. Instead, the trial judge amended the June 26, 2017 interim custody order to remove the co-parenting guidelines language related to relocation. The trial judge did not, however, amend the June 22, 2017 judgment sustaining Mr. Holley's objection to relocation, which applied La. R.S. 9:355.2(B)(3). The trial judge further did not address this Court's concern as to the preliminary injunction. Because the trial judge did not address the preliminary injunction issue, we assume the most restrictive interpretation of the preliminary injunction in our analysis, *i.e.,* that it is intended to prohibit Ms. Holley from removing C.H. out of Jefferson and Orleans Parishes "for any reason whatsoever."

security as required under La. C.C.P. art. 3610 and we, thus, vacate that portion of the trial court judgment. Finally, considering the interim custody order issued, we find that the trial judge improperly considered evidence not formally introduced and we vacate that judgment. We remand this matter to the trial court for further proceedings.

In her first assignment of error, Ms. Holley contends that the proposed move is not a "relocation," as contemplated under the Relocation Act and defined in La. R.S. 9:355.1, *et seq*. Specifically, Ms. Holley contends that the trial judge erred in calculating the 75-mile distance restriction from the principal residence of the child in New Orleans to Baton Rouge, as provided in La. R.S. 9:355.2(B)(3), rather than from Mr. Holley's domicile in River Ridge to Baton Rouge, as provided in La. R.S. 9:355.2(B)(2). Moreover, Ms. Holley argues that even if the 75 miles is calculated from C.H.'s principal residence in New Orleans pursuant to La. R.S. 9:355.2(B)(3), the proposed move to Baton Rouge is still less than the statutory 75 miles when the distance is measured in radial or air miles, *i.e.*, "as the crow flies," not highway or surface miles as applied by the trial court. We agree.

The statutory provision at issue, La. R.S. 9:355.2(B) provides, in pertinent part:

> This Subpart shall apply to a proposed relocation when any of the following exist:
>
> * * *
>
> (2) There is no court order awarding custody and there is an intent to establish the principal residence of a child at any location within the state that is at a distance of more than seventy-five miles from the domicile of the other parent.
> (3) There is a court order awarding custody and there is an intent to establish the principal residence of a child at any location within the state that is at a distance of more than seventy-five miles from the principal residence of the child at the time that the most recent custody decree was rendered.

Louisiana's relocation statutes, La. R.S. 9:355.1, *et seq.*, govern the relocation of a child's principal residence. La. R.S. 9:355.2(B) instructs that if there is no custody order in effect, the relocation statutes apply if the child's proposed new residence is 75 miles or more from the *domicile of the other parent*. If, however, there is a custody order in effect between the parties, then the relocation statutes apply when the child's proposed residence is 75 miles or more from the *principal residence of the child*. Therefore, to determine the starting point from which the 75-mile restriction begins, a court must first determine whether a custody order was in effect at the time of the proposed relocation.

Our review of the record reflects that there was no custody order in effect at the time of the proposed relocation. Although Ms. Holley was previously granted temporary custody in connection with the protective order issued in Orleans Parish, that order expired as a matter of law and by its own terms in September 2015, long before the relocation hearing at issue. Further, although the trial judge issued a judgment concerning supervised *visitation* in April 2016, that judgment did not award custody.

Therefore, a review of the record reflects that there was no custody order in effect between the parties at the time of the filing of the objection to the relocation or at the time of the relocation hearing. Therefore, La. R.S. 9:355.2(B)(2), which provides that the 75 miles should be calculated from the domicile of the other parent, applies. In her judgment, the trial judge applied La. R.S. 9:355.2(B)(3), as reflected by her finding that the proposed relocation was more than 75 miles "*from the principal residence of the child*." We find that the trial judge applied the incorrect law in calculating the 75-mile restriction from the principal residence of the child. Because the trial judge committed a prejudicial legal error in applying the incorrect law, we conduct a *de novo* review of the relocation issue. *See Evans v. Lungrin*, 97-0541 (La. 2/06/98), 708 So.2d 731, 735.

Once the starting point for the 75-mile restriction is determined, the court must next determine whether a proposed relocation address is more than 75 "miles" from that starting point. The legal question presented, then, is whether "miles" as provided in the relocation statutes should be defined and calculated in straight line, radial miles, *i.e.* as the crow flies, or in surface or roadway miles using the most commonly traveled or shortest route available.

Ms. Holley contends that the traditional and customary definition of the word "mile" should apply. She asserts that a "mile" is a uniform measurement of distance in a straight line, or "as the crow flies." Mr. Holley, on the other hand, contends that because the purpose of the relocation statutes is to assist relocating and non-relocating parents to share custody and maintain contact with the minor child, the most commonly traveled route of roadway or highway miles should be the applicable method of measurement.

The trial judge rejected Ms. Holley's argument, opining that "we are not crows," and applied the commonly-used highways or roadways method of measurement, accepting the most common route as determined by the MapQuest map Mr. Holley introduced into evidence. For the reasons discussed below, we find that the straight line or "as the crow flies" method of measurement is the standard and most uniform method to measure distances under the relocation statutes.

This is a *res nova* issue in Louisiana in the context of child relocation. The starting point in the interpretation of any statute is the language of the statute itself. *Faget v. Faget*, 10-18 (La. 11/30/10), 53 So.3d 414, 420. A law shall be applied as written when it is clear and unambiguous and its application does not lead to absurd consequences. La. C.C. art. 9. If, however, the law is susceptible to different meanings, the statute must be interpreted in a light best conforming to the law's purpose. La. C.C. art. 10. La. R.S. 1:3 instructs that courts shall read and

construe statutory words and phrases in their context and in accordance with the common and approved usage of the language. *Burnette v. Stalder*, 00-2167 (La. 6/29/01), 789 So.2d 573, 577; *Barron v. Hutzler*, 16-485 (La. App. 5 Cir. 8/30/17), 2017 La. App. LEXIS 1543.

The Louisiana Supreme Court has acknowledged that the Louisiana Relocation Act was modeled after the American Academy of Matrimonial Lawyers Model Relocation Act. *Curole v. Curole*, 02-1891 (La. 10/15/02), 828 So.2d 1094, 1096, *citing* Edwin J. Terry, Kristin Proctor, P. Caren Phelan, & Jenny Womack, "Relocation: Moving Forward, or Moving Backward?" 15 Journal of the American Academy of Matrimonial Lawyers 167, 225 (1998). Many other states have enacted relocation legislation, or have jurisprudentially recognized the relocation factors and other provisions within the Model Act. (*See, e.g.*, *Harrison v. Morgan*, 2008 OK CIV APP 68, P23, wherein the Oklahoma court found that its relocation legislation is "based on the 'Model Relocation Act' (the Act), which was prepared by the American Academy of Matrimonial Lawyers for consideration by state legislatures 'as a template for those jurisdictions desiring a statutory solution to the relocation quandary[.]'" *See also Dupre v. Dupre*, 857 A.2d 242, 259, wherein Rhode Island jurisprudentially recognized the Model Act's relocation factors and instructed that said factors should be considered in relocation cases; and *W.H. v. S.M., 2016*, Del. Fam. Ct. LEXIS 19, wherein a Delaware court recognized that although the legislature has not specifically adopted the Model Act, courts may consider the relocation factors provided in the Act, in addition to consideration of the best interest of the child.)

Our research reflects that, concerning the method of measurement of "miles" in a child relocation context, courts which have opined on the subject have found that the straight line or "as the crow flies" method of measurement is the most uniform and, in the absence of any contrary statutory language or provision,

applies in child relocation cases. *See, e.g.*, *Carreiro v. Colbert*, 5 N.Y.S.3d 327, 327 (Sup. Ct. 2014); *Bowers v. Vandermeulen-Bowers*, 278 Mich. App. 287, 294, 750 N.W.2d 597, 601 (2008); *Tucker v. Liebknecht*, 86 So.3d 1240, 1242 (Fla. Dist. Ct. App. 2012). For example, a Florida court stated clearly that "[i]n the absence of any statutory or contractual provision governing the manner of measurement of distances, the general rule is that distance should be measured along the shortest straight line, on a horizontal plane and not along the course of a highway or along the usual traveled way." *Tucker v. Liebknecht*, 86 So.3d at 1242. The Court further explained that, "utilizing a method of measurement other than the straight line method would create uncertainty and generate needless debate." *Id*.[12]

Upon our review of the law in this state and others, we find that, absent any contrary statutory language or governing provision, the straight-line or "as the crow flies" method of measurement is the most uniform method to measure distances and that such method should apply in Louisiana child relocation cases. Applying the straight-line measurement method to the facts of this case, we find that the distance between Mr. Holley's residence in River Ridge and the address for the proposed relocation in Baton Rouge is less than 75 radial or straight-line miles. Accordingly, we find that the Relocation Act does not apply in this case and, thus, we reverse that portion of the trial court's judgment sustaining Mr. Holley's procedural objection to relocation.

In her second assignment of error, Ms. Holley asserts that the trial judge erred in issuing an overly restrictive and vague preliminary injunction, prohibiting

[12] In other contexts, the United States Fifth Circuit Court of Appeals has opined that, absent any contrary statutory language or provision, the straight line or "as the crow flies" method to measure distances should be applied. *See Sprow v. Hartford Ins. Co.,* 594 F.2d 412, 417 (5th Cir. 1979), wherein the Fifth Circuit found that "the straight lines or 'as the crow flies' measure of air miles," is "a uniform standard, offering more certainty than a measure based on road miles, which will continually fluctuate as new and different routes are constructed."

her from removing the minor child from Jefferson and Orleans Parishes "for any reason whatsoever."

La. C.C.P. art. 3610 provides that "[a] temporary restraining order or preliminary injunction *shall not issue* unless the applicant furnishes security in the amount fixed by the court, except where security is dispensed with by law." (emphasis added). The record before us does not reflect that the trial judge set any security in conjunction with the preliminary injunction at issue. Consequently, we find that the trial judge erred in granting the petition for preliminary injunction without requiring plaintiff to post security. Accordingly, the preliminary injunction is invalid and the trial court's judgment as it relates to the granting of a preliminary injunction is vacated. *See Cochran v. Crosby*, 411 So.2d 654, 655.[13]

In her third assignment of error, Ms. Holley contends that the trial judge erred in awarding Mr. Holley interim joint custody of C.H. under the facts of this case, where Mr. Holley has only previously exercised supervised visitation and where no evidence relevant to the issue of custody or care of C.H. was introduced at the May 30, 2017 hearing.

Our review of the record reflects that *no* evidence was introduced at the May 30, 2017 hearing and that no stipulations or consents were entered on the record. However, it is apparent from the record that the trial judge considered the expert report of Dr. Shwery in rendering the interim judgment on the issue of custody.

[13] When an injunction is issued without security, this Court has stated that it is "faced with two alternatives, remand the case to the trial court with directions that security be furnished or reverse the judgment that granted the preliminary injunction." *Advanced Collision Servs. v. Dep't of Transp.*, 631 So.2d 1245, 1247 (La. App. 5 Cir. 1994). While other circuits have held that this decision is based upon the "totality of the circumstances" and that a remand may be appropriate for judicial efficiency when the grounds for the injunction are clear (*See High Plains Fuel Corp. v. Carto Intern. Trading, Inc*., 640 So.2d 609 (1st Cir. 1994); *Stuart v. Haughton High School,* 614 So.2d 804 (2d Cir. 1993)*; Liberty Bank & Trust Co. v. Dapremont,* 844 So.2d 877 (4th Cir. 2003)*; Hernandez v. Star Master Shipping Corp*., 653 So.2d 1318 (1st Cir. 1995) and the cases cited therein*),* this Circuit has consistently found that the language provided in La. C.C.P. art. 3610, requiring security for the issuance of a preliminary injunction, is mandatory. Moreover, under the facts of this case, we find that the injunction prohibiting Ms. Holley from removing C.H. from Jefferson and Orleans Parishes, for "any reason whatsoever," is overly restrictive and an abuse of the trial judge's discretion. Accordingly, we decline to remand this matter and find that the injunction is, as a matter of law, invalid.

The law is clear that evidence not properly and officially offered and introduced cannot be considered, even if it is physically placed in the record. *Denoux v. Vessel Mgmt. Services, Inc*., 07-2143 (La. 5/21/08), 983 So.2d 84, 88. Documents attached to memoranda do not constitute evidence and cannot be considered as such on appeal. *Id*. Appellate courts are courts of record and may not review evidence that is not in the appellate record, or receive new evidence. *Id*.; La. C.C.P. art. 2164. These principles are well established in this Circuit. *See, e.g., Gulf Coast Bank and Trust Co. v. Eckert*, 95-156 (La. App. 5 Cir. 5/30/95), 656 So.2d 1081, *writ denied*, 95-1632 (La. 10/6/95), 661 So.2d 474; *Ray Brandt Nissan, Inc. v. Gurvich*, 98-634 (La. App. 5 Cir. 1/26/99), 726 So.2d 474; *Jackson v. United Services Auto. Ass'n Cas. Ins. Co*., 08-333 (La. App. 5 Cir. 10/28/08), 1 So.3d 512; *Wilson v. Beechgrove Redevelopment, L.L.C*., 09-1080 (La. App. 5 Cir. 4/27/10), 40 So.3d 242; *Anowi v. Nguyen*, 11-468 (La. App. 5 Cir. 12/13/11), 81 So.3d 905, 2011 WL 6187110; *Tolmas v. Parish of Jefferson*, 11-492 (La. App. 5 Cir. 12/29/11), 80 So.3d 1260. Accordingly, we find the trial judge erred as a matter of law in considering evidence not properly introduced, and we thus vacate the June 26, 2017 and the August 3, 2017 interim custody judgments.

For the reasons fully provided herein, we reverse the trial court's June 22, 2017 judgment insofar as it sustained Mr. Holley's objection to relocation and issued a preliminary injunction prohibiting Ms. Holley from removing C.H. from Orleans and Jefferson Parishes. We further vacate the trial court's June 26, 2017 and August 3, 2017 interim custody orders. We remand this matter to the trial court for further proceedings.

JUNE 22, 2017 JUDGMENT REVERSED IN PART; JUNE 26, 2017 AND AUGUST 3, 2017 JUDGMENTS VACATED; MATTER REMANDED

SUSAN M. CHEHARDY
CHIEF JUDGE

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MARC E. JOHNSON
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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **NOVEMBER 20, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

17-C-325

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE DANYELLE M. TAYLOR (DISTRICT JUDGE)
MITCHELL J. HOFFMAN (RELATOR)
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