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Standing in the Way of Our Goals: How the Best Interest of the Child (Whatever that Means) is Never Reached in Texas Due to Lack of Standing for Third-Party Parents

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COMMENT

STANDING IN THE WAY OF OUR GOALS: HOW THE BEST INTEREST OF THE CHILD (WHATEVER THAT MEANS) IS NEVER REACHED IN TEXAS DUE TO LACK OF STANDING FOR THIRD-PARTY PARENTS

*by: Jessica Nation Holtman**

ABSTRACT

Currently in Texas, standing options for third-party nonparents seeking to file suits affecting the parent-child relationship ("SAPCRs") are extremely limited. And, even though the standing options are codified, the evidence necessary to meet the threshold elements may be drastically different depending on the case's location. These third parties, who have previously exercised parental responsibilities, must make showings to the court that most divorced parents could not make; and this is just for a chance to bring a claim in court.

While this seems unfair, and Texas should absolutely resolve the split among its appellate courts, there is one extremely important part that has yet to be mentioned: the child. Standing determinations do not involve a best interest of the child inquiry; this must be changed.

This Comment uses a San Antonio Court of Appeals case to highlight both the Texas appellate-court split and the lack of a best interest of the child consideration. Using the case's facts, this Comment breaks down the general third-party standing option by venue to show just how different the requirements are depending on where in Texas the party resides. In most cases, the outcome spotlights that the child is the true victim of these standing limitations.

Professor James Dwyer explains that relationships have a far greater impact on children than on adults. Courts should consider this when determining the best interest of the child. More importantly, the best interest of the child should be a primary consideration, not one that is considered after the plaintiff establishes standing. Allowing a third-party parent to file suit is highly likely to serve the child's best interest. Once judges apply the best-interest standard at the appropriate stage, judges should then look through the child's lens for making recommendations on the child's behalf.

Too few judges have said too few words about the lack of the best interest of the child consideration when issuing standing determinations. But with our nation's evolving familial structure, the time has come to reconsider how courts determine who may bring suits affecting children.

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“In my opinion, this is an issue that should be addressed by the Legislature, and I would implore the Texas Legislature to do so.”¹

—Justice Alvarez, 2016

I. INTRODUCTION

The Texas Family Code is a work of art. The code is intertwined within itself, so that different sections depend on others for application.² This Article takes an in-depth look at Texas’s “public policy” in one Code section and how courts never reach this policy for some

1. *In re Sandoval*, No. 04-15-00244-CV, 2016 WL 353010, at *5 (Tex. App.—San Antonio Jan. 27, 2016, no pet.)(mem. op.) (Alaverz, J., concurring).

2. See, e.g., TEX. FAM. CODE ANN. §162.001 (West Supp. 2017) (stating application of this code section is subject to satisfying requirements from Chapter 102).

families' cases, because another Code section stops the courts in their tracks. Specifically, courts are supposed to protect children's rights, yet they seemingly deem those rights inferior to state legislation.³

This causes problems. Maybe not for "traditional" families of yesteryear, but definitely for a specific type of modern family whose children's "parents" are neither biologically nor legally the parents, but instead are mere third parties.⁴ The Texas Legislature says it wants the courts' primary consideration to be "[t]he best interest of the child."⁵ But is the best interest of the child actually Texas's primary consideration if courts may deny a person acting as a "parent" an opportunity to be heard because of severely limited options for meeting the state-imposed standing threshold?

Furthermore, if a third party satisfies the Legislature's strict time requirements, but lives in certain parts of Texas, the court will still deny standing due to additional judicially imposed restrictions, again disregarding the best interest of the child. Generally, third parties cannot show they have had "actual care, control, and possession"⁶ over a child for overcoming the deeply rooted parental presumption.⁷ To completely understand where Texas's third-party guidelines originate, *Troxel v. Granville*⁸ must be considered; only then can the Texas appellate-court split regarding that statutory phrase—"actual care, control, and possession"—be understood.⁹

Texas's legislative ancestors gave the courts generous discretion for tending to the best interest of the child.¹⁰ The Texas Legislature should review the past and enact a standing option so that certain factual scenarios, like the one presented later in this Comment, become an issue of the past.

However, if getting enough votes for a new standing option is too difficult, the Legislature should, at the very least, provide a uniform definition of "actual care, control, and possession." Currently, standing requirements for third-party parents depend upon which side of a county line they reside.¹¹ This inconsistency only displays a division within Texas that should not exist. Children's access to their parents, or those acting as parents, should not vary because of the county in

3. *Id.* at *4.

4. Joanna L. Grossman, *Parentage Without Gender*, 17 *CARDOZO J. CONFLICT RESOL.* 717, 724–27 (2016) (discussing the ever-changing dynamic of our familial structure and its effect on parentage laws).

5. *TEX. FAM. CODE ANN.* §153.001–.002 (West Supp. 2017).

6. *TEX. FAM. CODE ANN.* §102.003 (West Supp. 2017).

7. See discussion *infra* Section III.B.

8. *Troxel v. Granville*, 530 U.S. 57 (2000).

9. *TEX. FAM. CODE ANN.* §§102.003 (West Supp. 2017).

10. *TEX. FAM. CODE ANN.* §102.003 (cmt.) (West Supp. 2017).

11. HON. SCOTT BEAUCHAMP, *THIRD PARTY STANDING AND SUBSTANTIVE RELIEF*, *ADVANCED FAM. L. COURSE 12* (Aug. 2014) (Parents residing on one side of the Tarrant–Dallas County line have different requirements for showing "actual custody, control, and possession" than those residing on the other side.).

which their parents reside. Every parent-child relationship in Texas should be governed by the same rules and afforded the same protections.

This Comment explores the “best interest of the child” standard (“BIC”) and explains its priority in Texas. This Comment sheds light on standing issues faced by specific third parties in Texas courts by discussing a recent case from the San Antonio Court of Appeals. This illustration will help illuminate the specific problems faced by third-party parents who are not considered legal parents. Ultimately, this Comment’s goal is to remind its readers that the children—who have had their third-party parents ripped from their lives—are the victims of Texas’s outdated legislation and case law. And this status quo overlooks the children’s relational rights, or at the very least, pushes them to the side.

With the evolution of our nation’s family-structure, the Legislature must come to terms with the fact that the Texas Family Code is outdated, neither providing help to all “parents” seeking to care for their children nor protecting children’s rights to have loving adult persons care for them.

What, then, should Texas do? Redefining “parent” would likely fix the issue entirely, but that requires altering decades of case law and statutory framework. In the interim, perhaps supplying third-party parents a more lenient standing option would suffice, until the law can catch up with our evolving society. At the very least, “actual care, control, and possession” should be defined and applied so third-party parents have a chance to fight for their children, allowing the courts to apply their legislatively given, broad discretion.

Texas Legislature: Give the courts a way to use their “extraordinarily broad” discretion¹² and provide them an avenue to help all types of parents and children who seek the court’s help. Let the “best interest of the child” and the child’s right to have certain adults care for them truly be Texas’s primary concern by letting courts consider those interests when determining standing.

II. *IN RE SANDOVAL*, GENERALLY

Once upon a time, a woman was in a relationship that worked so well, she and her significant other decided to live together. Years into their relationship, they adopted a child. Only the woman legally adopted the baby, but both were there to witness the baby’s birth, and both raised the child as their own.

Two years later, the woman adopted another newborn. The four lived together as a family for almost ten years. Mom’s significant other was “Dad,” and the children did not know differently. In fact, Mom referred to Dad as the children’s father to friends, school officials, and

12. TEX. FAM. CODE ANN. §153.002 (cmt.) (West Supp. 2017).

church officials. He supported them, provided for them, and cared for them as his own. Dad even quit his job and became a stay-at-home parent to take care of the children, who both had special needs.

However, as often happens, Mom and Dad eventually separated. Initially, they reached an agreement regarding their children. The agreement allowed Dad to stay active in their children's lives, as he always had before, even though he no longer lived in the same residence. Dad continued to care for the children before and after school, as well as on the weekends.

Almost two years later, Mom realized she no longer wanted Dad in her or their children's lives; she informed Dad their agreement was over, and she would not allow him further contact with their children. Within a month, Dad sought the court's help, filing a Petition to Adjudicate Parentage and a Motion for Temporary Orders.

These are the general facts of *In re Sandoval*,¹³ which perfectly display the issue presented in this Comment: the court never considered the best interests of those children, and ultimately their relationship rights, because the person seeking the court's help was a third-party, nonlegal parent.

The rights of both biological parents had been terminated, as is customary with adopted children.¹⁴ The *only* difference between the people who the children called "Mom" and "Dad" was that "Mom" had filed paperwork with the State and legally adopted the children. Otherwise, both adults successfully met the requirements of the best interest of the child standard.¹⁵ Yet, only one was entitled to claim themselves as a "legal" parent in Texas.¹⁶

In other words, because "Dad" had never been before the court when raising those children, the courts are now punishing him by not granting relief. According to the Texas Family Code, Dad was only a third party and, as such, had extremely limited standing opportunities for bringing a suit to fight for his children.

Moreover, depending on where Dad filed suit in Texas, even if those extreme limitations were met, he still would not have had a fighting chance, because he did not have "actual care, control, and possession" over the children, as defined by jurisdictional Texas case law. This Comment explores this specific issue further below.

13. *In re N.I.V.S. and M.C.V.S.*, No. 04-14-00108-CV, 2015 WL 1120913, at *1 (Tex. App.—San Antonio March 11, 2015 (mem. op.)). Dad is transgender, and that, in fact, is the reason he was not allowed to adopt either child. The Author mentions this here because gender should not be the focus of a discussion concerning a right to seek the Court's help in maintaining relationships that are in the best interest of the child. See *infra* note 85.

14. *Id.* at *1.

15. See *id.*

16. *In re Sandoval*, No. 04-15-00244-CV, 2016 WL 353010, at *5 (Tex. App.—San Antonio Jan. 27, 2016, no pet.) (mem. op.) (Alaverz, J., concurring).

In re Sandoval is a prime example of how Texas children's interests, and their relationship rights, are overlooked, simply because those persons acting as the children's parents cannot comply with the strict standards imposed by the Texas Legislature and case law for third-party parents.

III. STANDING TO BRING SUITS IN TEXAS WHEN YOU ARE JUST A THIRD WHEEL—AHEM—PARTY

The evolution of Texas's standing requirements suggests Texas holds the best interest of the child above all else.¹⁷ However, this has not been the case in recent history, when Texas courts have halted determinations regarding the best interest of the child because of lack of standing.¹⁸

This reality is caused by the Texas Legislature and courts giving a heavy deference to the *Troxel* opinion by placing more stringent protections on parental rights than *Troxel* requires in some situations.¹⁹ Judges are now taking it upon themselves in their opinions to request change from the Legislature to help protect the interests of the child.²⁰

A. *Troxel v. Granville: Third-Party Standing as Applied to the Constitution, Texas Style*

Third-party standing cannot be discussed without an intimate viewing of the Supreme Court's opinion in *Troxel*,²¹ as courts are to interpret Texas standing statutes consistent with *Troxel*.²² However, as discussed further below, the Texas Legislature and courts have placed more stringent protections on parental rights than *Troxel* requires.²³ *Troxel* is now seventeen years old and, as such, perhaps the dissenting opinions should be re-examined, as each revealed problems nontraditional families would face then, and in the future.²⁴

1. The Plurality Opinion Left Holes

In *Troxel*, Isabelle and Natalia's father exercised his weekend custody and possession at his parents' home after separating from the girls' mother.²⁵ This lasted approximately two years until, tragically,

17. See *Bukovich v. Bukovich*, 399 S.W.2d 528 (Tex. 1966).

18. See discussion *infra* Sections III.B.1–3.

19. BEAUCHAMP, *supra* note 11, at 5.

20. *Sandoval*, 2016 WL 353010, at *5.

21. BEAUCHAMP, *supra* note 11, at 4 (citing to *Troxel v. Granville*, 530 U.S. 57 (2000)).

22. *Id.* at 6 (citing *In re C.T.H.S. and C.R.H.S.*, 311 S.W. 3d 204, 208 (Tex. App.—Beaumont Apr. 29, 2010, pet. denied).

23. *Id.* at 5.

24. See Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L. Q. 1 (Spring 2013).

25. *Troxel v. Granville*, 530 U.S. 57, 60–61 (2000).

the girls' father committed suicide.²⁶ At first, the children visited with their paternal grandparents, the Troxels, on the father's same possession schedule.²⁷ After a few months passed, however, the girls' mother informed the Troxels she wished to limit visitation to once per month.²⁸

The Troxels brought suit under a Washington state visitation statute that gave *any* person the right to petition for visitation with a child at *any* time and authorized the court to grant such rights if found to be in the best interest of the child.²⁹ The Troxels sought the court's help in overriding the mother's wishes and imposing a visitation schedule providing them access to their deceased son's children.³⁰

The Washington Superior Court afforded the Troxels standing and awarded them visitation rights.³¹ The mother appealed, the Washington Court of Appeals remanded for findings of fact and conclusions of law, and the Superior Court found the Troxels' visitation was in the best interest of the children.³² However, the Court of Appeals reversed the visitation order, holding that the Troxels lacked standing, as a pending custody action was necessary before the Troxels could seek visitation;³³ additionally, the Appellate Court was concerned with the "constitutional restrictions on state interference with parents' fundamental liberty interest[s]" in raising their children.³⁴ The Troxels petitioned the Washington Supreme Court for review, and that court affirmed the appellate decision due to its concern of violating the Federal Constitution.³⁵

Ultimately, the United States Supreme Court upheld the Washington Supreme Court's decision, finding the statute unconstitutional.³⁶ The court explained, "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."³⁷ Because of extensive precedent, the Due Process

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 61.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 62.

34. *Id.* (internal quotations omitted).

35. *Id.* at 62–63. The Washington Supreme Court felt there were two issues with the statute: 1) the statute allowed state interference only to prevent harm to a child, and that harm had not occurred in this case; and 2) the statute "swe[pt] too broadly" in allowing any person to bring suit, which infringed on parents' constitutional rights to raise their children. *Id.* at 63.

36. *See id.* at 73.

37. *Id.* at 72–73; *see* *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests."); *see* *Meyer v. Nebraska*, 262 U.S. 390 (1923) (Due Process Clause protects parents' in establishing a home, bringing up

Clause undoubtedly protects parents' rights to make decisions concerning the care, custody, and control of their children.³⁸

The Court reasoned that the presumption exists that a fit parent acts in the best interest of the child.³⁹ The Court also reasoned that States should not interfere into the private realm of family matters by questioning the fitness of a parent, without a showing that the parent inadequately cared for the child.⁴⁰

However, the Court stated the issue was not that the Washington Superior Court intervened but that it gave no weight to the mother's decision regarding the girls' best interests.⁴¹ In deciding the best interest of the child, *Troxel* requires a court to provide protection for parents' fundamental constitutional right to make decisions about raising their child;⁴² but is this presumption rebuttable?

The Court did not consider this question directly but provided string cites to varying state court decisions and statutes.⁴³ The Court did not hold that nonparent visitation statutes were *per se* unconstitutional, nor did the court elicit the exact scope of this fundamental right in the visitation context.⁴⁴ Moreover, the Court noted that the mother never sought to end visitation with the grandparents completely but merely sought to restrain it.⁴⁵

What will future courts consider concerning third-party standing when, for example, the parent ceases visitation with the third party entirely, as in *In re Sandoval*? Should a legal parent have the ability to terminate an established relationship with a third party acting as a parent, relying entirely on the weight of the parental presumption? These are a few holes left by the *Troxel* plurality opinion that the dissenting Justices critiqued.

children, and controlling their education); see *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

38. *Troxel*, 530 U.S. at 66. See also *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Parham v. J.R.*, 442 U.S. 584 (1979); *Santosky v. Kramer*, 455 U.S. 745 (1982). These cases generally discussed and described the fundamental interest of natural parents in the care, custody, and management of their child.

39. *Troxel*, 530 U.S. at 68.

40. *Id.* at 68-69.

41. *Id.* at 69.

42. *Id.* at 69-70.

43. *Id.* at 70.

44. *Id.* at 73.

45. *Id.* at 71.

2. The Dissenting Justices: Future Problem Solving at Its Best—If Only Their Advice Had Been Heeded

*“There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies—the child.”*⁴⁶

—Justice Stevens, 2000

The dissenting Justices raised the exact scenario this Comment addresses: courts disregarding the best interest of the child because of standing limitations. Each dissent raised a different reason *Troxel* could create that scenario.⁴⁷ Because Texas’s requirements are more stringent than *Troxel*’s,⁴⁸ relationships between third-party parents and their children are at risk.

Justice Stevens’s dissent focused on the Washington Supreme Court’s flawed federal constitutional analysis, specifically “that the Federal Constitution requires a showing of actual or potential ‘harm’ to the child before a court may” override a parent’s objections.⁴⁹ Even though, as Justice Stevens stated, our Federal Constitution contains no such requirement,⁵⁰ the Texas Legislature requires a showing of “harm” for some third-party parents establishing standing.⁵¹

Further, Justice Stevens argued that constitutional protections of parental rights are not absolute and have limits.⁵² Parental rights were created from the assumption that the Court must balance parental interest in a child against not only the State’s interest as *parens patriae*,⁵³ but also “critically, the child’s own complementary interest in preserving relationships that serve her welfare and protection.”⁵⁴

Moreover, Justice Stevens cautioned that this constitutional protection “should not be extended to prevent the States from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child.”⁵⁵ Justice Stevens explained that our society’s ever-changing familial relationships strongly oppose a constitutional rule treating biological parents’ constitutional liberty interest in their children “as an isolated right that may be exercised arbitrarily.”⁵⁶

46. *Id.* at 86 (Stevens, J., dissenting).

47. *See id.* at 80–103.

48. BEAUCHAMP, *supra* note 11, at 5.

49. *Troxel*, 530 U.S. at 85–86 (Stevens, J., dissenting).

50. *Id.*

51. BEAUCHAMP, *supra* note 11, at 17–18 (discussing standing under §102.004(a)).

52. *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).

53. *Parens Patriae* is a doctrine by which a government has standing to prosecute a lawsuit on a citizen’s behalf, especially on behalf of someone who is under a legal disability to prosecute the suit. *Parens Patriae*, BLACK’S LAW DICTIONARY (10th ed. 2014).

54. *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting) (emphasis added).

55. *Id.* at 89 (Stevens, J., dissenting).

56. *Id.* at 90 (Stevens, J., dissenting).

In addition to Justice Stevens's dissent, Justice Kennedy's dissent expressed concern that the holding would allow parents to arbitrarily deprive children of relationships with primary caregivers who are not the biological parents.⁵⁷ He opined that the holding stemmed from the assumption that third parties seeking visitation have no legitimate, established relationship with the child and that the parents have been the child's primary caregivers.⁵⁸ In Justice Kennedy's view, this holding would apply a "traditional" family standard to every family-law case, no matter a case's diversity.⁵⁹

He stated, "[T]his is simply not the structure or prevailing condition in many households. . . . For many [children] a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood."⁶⁰ Justice Kennedy did agree with the Washington Supreme Court's acknowledgment that preexisting relationships with third parties may "be so enduring that 'in certain circumstances . . . arbitrarily depriving the child of the relationship could cause severe psychological harm to the child.'"⁶¹ Justice Kennedy rightly added that third-party parents may also be harmed if these relationships are terminated.⁶²

Two decades later, case law shows the dissenting Justices were, unfortunately, correct. The *In re Sandoval* court allowed a legal adoptive parent to arbitrarily extinguish a healthy, loving relationship between the children and the only person they knew as "Dad."⁶³ One concurring Justice of the *In re Sandoval* court felt Dad could have reached the court using Texas Family Code section 102.003(a)(9) to maintain standing.⁶⁴ But as the following analysis will show, it is very unlikely this would have worked, unless the case occurred in the right part of Texas.

B. *Third-Party Standing Options for Maintaining Suits Affecting Children Post Troxel: The Texas Appellate-Court Split*

The Texas courts and legislature have given *Troxel* substantial deference and, in doing so, have filled some holes Justice O'Connor left open.⁶⁵ By taking *Troxel* a few steps further, Texas has placed more stringent protections on parental rights than the United States Supreme Court requires and, thus, have made it even more difficult for

57. *Id.* at 98 (Kennedy, J., dissenting).

58. *Id.*

59. *Id.*

60. *Id.* at 98 (citing *Moore v. East Cleveland*, 431 U.S. 494 (1977)).

61. *Id.* at 99 (Kennedy, J., dissenting) (citing *In re Custody of Smith*, 137 Wash. 2d 1, 20 (Wash. 1998)).

62. *Id.*

63. See discussion *supra* Section II.

64. *In re Sandoval*, No. 04-15-00244-CV, 2016 WL 353010, at *6 (Tex. App.—San Antonio Jan. 27, 2016, no pet.) (mem. op.) (Alaverz, J., concurring).

65. BEAUCHAMP, *supra* note 11, at 5.

children to maintain relationships with third parties acting as parents.⁶⁶

Nevertheless, establishing standing in an original suit affecting the parent-child relationship in Texas is a threshold issue.⁶⁷ Standing parameters in the Texas Family Code must be pled sufficiently, or the court must dismiss the suit.⁶⁸ Third parties, in particular, have extremely limited options available.

The limits imposed by the Texas Legislature begin with the definitions of “parent.” These include: “the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father.”⁶⁹ In other words, Texas does not consider a person a “parent” unless that person is biologically the child’s parent, or the court has named that person an adoptive parent.

This is problematic as our nation’s family dynamics evolve, because litigants seeking conservatorship of children do not always fit those statutory definitions.⁷⁰ Specifically, third parties acting as “parents” may be unable to meet Texas courts’ interpretations of the Family Code’s requirements. Thus, no matter the exceptional quality of the parenting skills shown, courts will deny third parties relief.

The Family Code’s primary source for standing is section 102.003(a), which details fourteen delineations for maintaining a suit.⁷¹ Third parties, who are not biologically related to a child and do not have the biological parent’s consent to maintain a suit, may use only the following two options:

[1] 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; [and]

[2] 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.⁷²

This Comment focuses on the first subsection (or, subsection nine of section 102.003). A standing determination under this section is fact

66. *Id.*

67. ELIZABETH M. BOSEK, et. al, 40A TEX. JUR. 3D FAM. L. §1913 (Westlaw 2016) (citing *In re A.M.*, 312 S.W.3d 76 (Tex. App.—San Antonio 2010, pet. denied)).

68. *Id.* (citing *In re A.M.*, 312 S.W.3d 76 (Tex. App.—San Antonio 2010, pet. denied); *In re M.K.S.-V.*, 301 S.W.3d 460 (Tex. App.—Dallas 2009, pet. denied)).

69. TEX. FAM. CODE ANN. §101.024(a) (West Supp. 2017).

70. BEAUCHAMP, *supra* note 11, at 4; see *supra* text accompanying notes 54–58.

71. TEX. FAM. CODE ANN. §102.003(a) (West Supp. 2017).

72. TEX. FAM. CODE ANN. §§102.003(a)(9), (11) (West Supp. 2017).

specific and determined on a case-by-case basis.⁷³ This sounds simple enough, but, unfortunately for Texans, the appellate courts disagree about what facts are sufficient for determining “actual care, control, and possession.”⁷⁴ This appellate-court split creates inconsistencies for parties residing on either side of certain county lines, but the Texas Supreme Court has granted certiorari on this issue.⁷⁵

However, the Court has said the lower courts should not be “mechanistic” when analyzing standing under this section of the Family Code.⁷⁶ Additionally, the lower courts cannot engraft additional statutory requirements under the guise of interpreting a statute,⁷⁷ but should “rely on the plain meaning of the text, unless a different meaning is supplied by legislative definition or is apparent from context, or unless such a construction leads to absurd results.”⁷⁸

Whether the appellate courts are legislating from the bench is not the topic of this Article; but, if contiguous county judges are applying different tests pursuant to the same statute, is there due process of law?⁷⁹ In an attempt to answer this question, presented below are the appellate courts’ disagreements surrounding the phrase “actual care, control, and possession.” The general categories of disagreement are: 1) relinquishment of parental rights; 2) duration, place, and schedule of possession; and 3) control, “legal,” or “actual.”⁸⁰

This Comment will apply and analyze *In re Sandoval*’s facts for a more comprehensive understanding of the differing case law. It will also analyze whether Justice Alvarez—the concurring justice in *In re Sandoval*—was correct in her assertion that Dad could have maintained standing under Family Code section 102.003(a)(9) had he filed suit within sixty days of Mom and Dad’s separation.

73. See *In re* M.P.B., 257 S.W.3d 804, 808–09 (Tex. App.—Dallas 2008, no pet.).

74. LISA HOPPES, GRANDPARENT, STEP PARENT, SAME SEX PARTNER AND THIRD PARTY STANDING AND ACCESS ISSUES, STATE BAR OF TEXAS, MARRIAGE DISSOLUTION INSTITUTE 2 (Aug. 2014), <http://www.texasbarcle.com/Materials/Events/12848/162835.pdf> [<http://perma.cc/P3WC-C6VN>].

75. *In re* H.S., No. 02-15-00303-CV, 2016 WL 4040497 (Tex. App.—Fort Worth 2016, pet. granted Sept. 1, 2017) (mem. op.).

76. *Jones v. Fowler*, 969 S.W.2d 429, 433 (Tex. 1998) (per curiam).

77. *Iloff v. Iloff*, 339 S.W.3d 74, 80–81 (Tex. 2011) (quoting *Duncan, Wyatt & Co. v. Taylor*, 63 Tex. 645, 649 (1885)) (“We have no right to engraft upon the statute any conditions or provision not placed there by the legislature.”).

78. *Jasek v. Dep’t of Family & Protective Servs.*, 348 S.W. 3d 523, 528 (2011) (citing *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008)).

79. This Article does not answer this question. It is proposed only to trigger the thought of fairness and equality whilst reading what follows.

80. BEAUCHAMP, *supra* note 11, at 12; Hoppes, *supra* note 74, at 2. Associate Judge Beauchamp and Lisa Hoppes’s “disagreement” categories and brief analysis are used, but more thorough discussions of the cases are presented as to provide a more complete understanding of current Texas case law.

1. Relinquishment of Parental Rights

In determining “actual care,” certain courts consider whether parents have abdicated their parental rights to a third party.⁸¹ Generally, the Beaumont/Fort Worth appellate courts have said “actual care” by a third party requires that the parent relinquish parental responsibilities to the third party.⁸²

Many Texas appellate courts have held that a third party, who resides with a parent and a child for the requisite time period, does not gain standing by providing care to the child while the parent is still doing so; there must be exclusivity.⁸³

In *In re M.J.G.*, the Fort Worth Court of Appeals rejected the grandparents’ standing claim because the parents had not abdicated their parental duties.⁸⁴ There, the children and parents lived in the grandparents’ home.⁸⁵ Even though the grandparents “performed day-to-day caretaking duties for the children,” there was no evidence the parents had relinquished their parental duties and responsibilities to the grandparents, nor that there was exclusivity in caring for the children.⁸⁶ Thus, the grandparents could not maintain they had “actual care, control, and possession” of the children for purposes of meeting Family Code section 102.003(a)(9)’s requirements.⁸⁷

Similarly, in *In the Interest of C.T.H.S. and C.R.H.S.*, the Beaumont Court of Appeals found that allowing standing without relinquishment would render Family Code section 102.003(a)(11) meaningless, as the requirement that the parent be deceased would be without effect since standing would separately exist under section 102.003(a)(9).⁸⁸ In that case, two women conceived by artificial insemination and proactively requested the court’s involvement early on in establishing that each had rights to the twins born from that insemination.⁸⁹ Unfortunately, some five years later when the mothers separated, the appellate court determined that the joint Agreed Order was void.⁹⁰ The Court reasoned that the mothers submitted the request too early (the twins were a mere four months old at the time of filing of the joint SAPCR).⁹¹

81. BEAUCHAMP, *supra* note 11, at 12.

82. *Id.*

83. *Id.*

84. *In re M.J.G.*, 248 S.W.3d 753, 758–59 (Tex. App.—Fort Worth 2008, no pet.).

85. *Id.* at 758.

86. *Id.* at 758–59.

87. *Id.* at 759.

88. *In re C.T.H.S. and C.R.H.S.*, 311 S.W.3d 204, 209 (Tex. App.—Beaumont 2010, pet. denied) (per curiam).

89. *In re Smith*, 262 S.W.3d 463, 465 (Tex. App.—Beaumont 2008, pet. denied).

90. *Id.* at 469.

91. *Id.*

The Court explained that the nonbiological mother did not have standing to bring the joint SAPCR,⁹² nor the subsequent modification request: 1) the biological mother did not totally relinquish parental responsibilities to the nonbiological mother, even though they had coparented the twins for five years in the same household; and 2) both mothers had cared for the children, but Texas case law regarding third-party standing requires that care, control, and possession be exclusive from the biological parent.⁹³

On the other side of the appellate-court spectrum (referenced here as the Dallas/Austin line of cases), courts have relied heavily on the concept that a child may have more than one place of residence. The courts have found third-party standing where relinquishment of parental rights was lacking, but the third party fully participated.⁹⁴

In *In re Fountain*, the First Court of Appeals in Houston stated that nothing in section 102.003(a)(9) requires exclusivity of parental responsibility.⁹⁵ In that case, two women had cared for an infant boy, at the direction of his biological father, for approximately two years.⁹⁶ As circumstances with the child evolved, the women discussed adopting the child to avoid foster-care placement.⁹⁷ For a quicker adoption process, only one woman became the child's legal parent at that time.⁹⁸ Still, the court found that the nonparent woman had "developed a significant relationship with the child" and "invested significant time raising and caring for the child," and thus, met the statutory-time requirements for section 102.003(a)(9) standing.⁹⁹

The *In re Fountain* court distinguished itself from the Beaumont/Fort Worth appellate courts discussed above, noting that the Legislature did not impose an exclusivity requirement.¹⁰⁰ Most notably, the *In re Fountain* court specifically restated the lower court's conclusion that it was "in the child's best interest for [the nonparent woman] to be able to proceed with her [suit]."¹⁰¹

92. The children were not yet six-months old, thus she could not have had standing through Family Code section 102.003(a)(9) as it requires the third party to have had care, control, and possession for at least six months prior to filing suit. *Id.* at 466–67.

93. *In re C.T.H.S. and C.R.H.S.*, 311 S.W.3d at 206–07.

94. BEAUCHAMP, *supra* note 11, at 12.

95. *In re Fountain*, No. 01-11-00198-CV, 2011 WL 1755550, at *4 (Tex. App.—Houston [1st Dist.] May 2, 2011, no pet.) (op. on rehearing) (citing *Smith v. Hawkins*, No. 1-09-00060-CV, 2010 WL 3718546, at *3 (Tex. App.—Houston [1st Dist.] Sept. 23, 2010, pet. filed) (mem. op.)).

96. *Id.* at *1.

97. *Id.*

98. *Id.* At the time of this case, adoption by both same-sex partners was impossible. See TEX. FAM. CODE ANN. §162.001 cmt. 10 (West 2014).

99. *In re Fountain*, 2011 WL 1755550, at *2.

100. *Id.* at *4.

101. *Id.* at *3.

In *In re Y.B., K.B., and T.B.*, the San Antonio Court of Appeals also did not require a third-party parent to show exclusivity.¹⁰² The Court found facts sufficient to maintain standing for the third party: the children thought of the third party as their father, the third party lived with the children and the mother for over six months, and the third party substantially interacted with the children.¹⁰³

If the *In re Sandoval* court subjected the dad in that case to the Beaumont/Fort Worth test, he too would have failed in maintaining suit for the exact same reasons as the *In re C.T.H.S. & C.R.H.S.* nonbiological mom. The adoptive mother in *In re Sandoval* had not relinquished all parenting responsibilities to Dad, nor could Dad establish actual care, control, and possession of the children exclusive of the adoptive mother.¹⁰⁴

When applying the Dallas/Austin case law to *In re Sandoval*'s facts, the Dad may have passed this portion of the "care, control, and possession" test. Dad had developed a significant relationship with the children and invested significant time raising and caring for the children.¹⁰⁵ Dad also showed that the children thought of him as their father and that he lived with the children and the mother for almost a decade.¹⁰⁶

If only all courts would adopt a similar standard of determining standing for third-party parents, perhaps all children could depend on the court to protect their established relationships. Children need the courts to protect them from parents who make arbitrary decisions based on their animosity with the other party; but courts cannot do this if Texas's Legislature shuts the courtroom door on third-party parents by not allowing them the opportunity to show their established relationship with the children. And, unfortunately, additional case law exists that further restricts third-party parents seeking the courts' help through Family Code section 102.003(a)(9).

2. Duration, Place, and Schedule of Possession

The Texas Family Code provides in section 102.003(b) that the trial court "may not require that [section 102.003(a)(9)'s six-month possession period] be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit."¹⁰⁷ Texas appellate courts are then left to decide how a residence becomes the "principal" residence by looking at a three-element test: whether 1) the child has a "fixed place of abode within the possession of the" petitioning party; 2) the residence

102. *In re Y.B.*, 300 S.W.3d 1, 5 (Tex. App.—San Antonio 2009, pet. denied).

103. *Id.* at 4–5.

104. See discussion *supra* Section II.

105. See discussion *supra* Section II; *In re Fountain*, 2011 WL 1755550, at *2.

106. See discussion *supra* Section II; *In re Y.B.*, 300 S.W.3d at 5.

107. TEX. FAM. CODE ANN. §102.003(b) (West Supp. 2017).

is “occupied or intended to be occupied consistently over a substantial period of time;” and 3) the residence “is permanent rather than temporary.”¹⁰⁸

The test’s third element concerning “permanency” is where the Texas appellate courts differ. Case law tells us there are two ways of establishing permanency: 1) “by presence in the county for an extended period of time,” **or** 2) “by some agreement, explicit or implied, by the party with a right to control the child’s residence, for the child to stay in the new county for an extended period of time.”¹⁰⁹

In *In re Kelso*, the Fort Worth Appellate Court chose the second method for establishing permanency and found the parent had not relinquished possession of the child since the parent still had control over the time duration that the child could spend with the paternal grandparents.¹¹⁰ As such, the grandparents’ residence was not the child’s principal residence, and therefore, the grandparents did not establish standing to sue.¹¹¹

The paternal grandparents kept the child for several months, including major holidays, with minimal interruption by the mother.¹¹² The child saw a pediatrician in the grandparents’ county of residence, and the grandparents paid for monthly full-time daycare with child support from the child’s father. Additionally, the baby sitter who watched the child during the mother’s possession period testified that the child had not spent “any substantial amount of time” in the mother’s care, and, therefore, considered the mother’s time with the child “temporary.”¹¹³

Nevertheless, the court latched onto the mother’s testimony that she never intended to “let” the child reside with the grandparents, but merely “let” the child visit.¹¹⁴ With this as its basis, the court determined the grandparents’ home was not the child’s “principal residence,” because the mother swore she never intended for it to be so, and as such, the grandparents’ possession depended on her consent.¹¹⁵

Essentially, the court concluded that a third-party principal residence can *only* occur *without* parental consent, even though case law tells us permanency is established “by some *agreement*, explicit or implied, . . . for the child to stay in the new county for an extended

108. *Snyder v. Pitts*, 241 S.W.2d 136, 140 (Tex. 1951).

109. *Doncer v. Dickerson*, 81 S.W.3d 349, 361 (Tex. App.—El Paso 2002, no pet.) (quoting *In re S.D.*, 980 S.W.2d 758, 761 (Tex. App.—San Antonio 1998, pet. denied)).

110. *In re Kelso*, 266 S.W.3d 586, 590–91 (Tex. App.—Fort Worth 2008, orig. proceeding).

111. *Id.*

112. *Id.* at 589–90.

113. *Id.* at 589.

114. *Id.*

115. *Id.* at 590–91.

period of time.”¹¹⁶ It seems the court may have relied on “abdication of parental rights” instead of actually applying the established “permanency” test provided by case law.

On the other hand, the Dallas Court of Appeals has applied an expanded concept of third-party standing under section 102.003(a)(9) regarding “permanency,” almost in contradiction of *In re Kelso*.¹¹⁷ In *In the Interest of M.P.B.*, the Court found standing for a grandmother who spent significant periods of time with the child and participated in raising the child.¹¹⁸ The grandmother also provided evidence showing the child had her own room at the grandmother’s house and had spent every weekend of her life there until her mother’s death.¹¹⁹ There was also testimony that the grandmother had clothed the child and taught the child “ABC’s” and how to spell her name.¹²⁰

The Court specifically noted that even though “Grandmother’s actual care, control, and possession of M.P.B. was not exclusive [and] with Mother’s consent,” the grandmother satisfied all three elements for establishing the grandmother’s home as the child’s principal residence.¹²¹ Specifically, the Court noted the record did not suggest that the grandmother’s possession “was intended to be a temporary arrangement to facilitate momentary housing difficulties, inconvenient travel schedules, the pursuit of higher education, or the inability to provide child care.”¹²² Thus, the Court granted the grandmother standing to file an original suit requesting managing conservatorship of M.P.B.¹²³

In *In re M.K.S.-V.*, the Dallas Court of Appeals again focused on the permanency of possession and caregiver arrangements and found a former same-sex partner had standing to sue for conservatorship.¹²⁴ There, T.S., the biological birth mother of M.K.S.-V., arbitrarily discontinued the visits between M.K.S.-V. and K.V., her former same-sex partner.¹²⁵ The Court considered the child’s principal residence and the fact that the arrangement between K.V. and T.S. closely resem-

116. See *supra* note 109.

117. Curiously, this is the case the *In re Kelso* court cited as its source. *In re Kelso*, 266 S.W.3d at 590.

118. *In re M.P.B.*, 257 S.W.3d 804, 808–09 (Tex. App.—Dallas 2008, no pet.).

119. *Id.* at 809.

120. *Id.*

121. *Id.*

122. *Id.* at 809.

123. *Id.* at 809–10. The court also explained that the *Troxel* holding did not require a different conclusion, because there were “special circumstances warranting interference with Father’s parental rights to primary care, custody, and control of M.P.B.” *Id.* at 810 (citing *In re Mays-Hooper*, 189 S.W.3d 777, 777–78 (Tex. 2006)) (holding grandmother was not entitled to visitation because there was no evidence the mother was unfit, the child’s well-being would suffer from minimized visitation with grandmother, or that mother arbitrarily excluded grandmother’s access to the child)).

124. *In re M.K.S.-V.*, 301 S.W.3d 460, 461 (Tex. App.—Dallas 2009, pet. denied).

125. *Id.* at 462.

bled a standard possession order.¹²⁶ M.K.S.-V. had an established presence at K.V.'s home, with her own room, including toys, movies, a television, a sandbox and a slide set outside.¹²⁷ The Court concluded that "this pattern of possession and caregiving was [not] intended to be a temporary arrangement . . . [and] evinced an intent" that M.K.S.-V. would consistently occupy K.V.'s home over a substantial time period.¹²⁸

Neither of these principal-residence tests applied to the *In re Sandoval* Dad, as he resided with Mom and the children prior to Mom and Dad's separation, and the children never stayed at Dad's house after the separation.¹²⁹

But, additional case law further restricts third-party parents seeking the court's help through section 102.003(a)(9). Sometimes "control" does not just mean "control"—or does it?

3. Control: "Legal" or "Actual"

Courts have considered how "control" impacts the standing analysis under section 102.003(a)(9). The Beaumont Court of Appeals reasoned that "control" must mean more than mere physical control, or else the word "possession" in the same phrase would be superfluous.¹³⁰ In *In re K.K.C.*, the Beaumont Court of Appeals commingled "abdication of parental rights" with the requirement that "control" of a child signifies "legal control."¹³¹ The Court held the third-party petitioner did not have standing, because the child's parent had not relinquished "legal control" over the child.¹³² There, the parties and child cohabitated as a family unit for almost seven years.¹³³ The third-party parent participated in supporting and disciplining the child, yet the Court stated he "had no legal right of control over the child and no authority to make decisions on behalf of the child."¹³⁴

The Court stated the word "control" means possession of the "power or authority to guide and manage, and . . . make decisions of legal significance for the child."¹³⁵ Additionally, the Court found that "control" need not be exclusive to meet the requirements, but the third party must have the legal authority to exert control over the

126. See *supra* note 108; *In re M.K.S.-V.*, 301 S.W.3d at 464–65.

127. *In re M.S.K.-V.*, 301 S.W.3d at 465.

128. *Id.*

129. See discussion *supra* Section II. The appellate opinions indicate Dad came to Mom's house to care for the children after school, in the mornings, and on the weekends, with no mention of the children ever going to Dad's house. *In re N.I.V.S.* and *M.C.V.S.*, 2015 WL 1120913, at *1.

130. *In re K.K.C.*, 292 S.W.3d 788, 792 (Tex. App.—Beaumont 2009, orig. proceeding).

131. *Id.* at 73.

132. *Id.*

133. *Id.* at 791.

134. *Id.*

135. *Id.* at 793.

child.¹³⁶ However, because the child's parent had not relinquished parental duties and obligations, the Court found that the third party lacked standing to maintain the suit.¹³⁷

Chief Justice Steve McKeithen, however, disagreed and wrote a dissenting opinion which stated, “[n]othing in the plain language of Section 102.003(a)(9) excludes a person who shares the role of a parent with the biological parent from having standing as a person with ‘actual care, control, and possession’ of the child.”¹³⁸ Chief Justice McKeithen pointed out that neither “relinquishment” nor “abdication” is in the plain language of the statute either.¹³⁹ He ended with his most powerful argument:

There is, however, a rational basis for conferring standing on a person who shares actual care, control, and possession of a child with that child's parent for a period in excess of six months. I do not believe a statute that merely confers standing on such a person is an unconstitutional infringement on the liberty interest of the parent who *voluntarily* shared care, control, and possession of the child for a period exceeding six months.¹⁴⁰

Nevertheless, taking *In re K.K.C.*'s holding another step, the Beaumont Court of Appeals in *In re Wells* found no loss of “legal control” from the parent's signing of a medical-emergency consent form in the third party's favor.¹⁴¹ The Court found that while the third-party parent, Ruppert, had establish actual care and possession of M.J., the child, Ruppert did not show she had “legal control.”¹⁴²

Ruppert and Wells began living together before the birth of M.J., and after they quit living together, Ruppert spent “substantial periods of exclusive periods of time with M.J.”¹⁴³ However, after an analysis citing to its opinion in *In re K.K.C.*, the court found Wells had maintained “legal control.”¹⁴⁴

Curiously, the Court did note that, “the desirability of compelling Wells to allow Ruppert a right to visitation might be debatable, when viewed from the child's point of view.”¹⁴⁵ This is noteworthy, as this Court appears to have never discussed the best interest of the child standard when determining standing issues.¹⁴⁶ But, yet again, Chief

136. *Id.*

137. *Id.*

138. *Id.* at 795. (McKeithen, C.J., dissenting).

139. *Id.* (McKeithen, C.J., dissenting).

140. *Id.* (McKeithen, C.J., dissenting) (emphasis added).

141. *In re Wells*, 373 S.W.3d 174, 177–78 (Tex. App.—Beaumont 2012, no pet.).

142. *Id.*

143. *Id.* at 177.

144. *Id.* at 178.

145. *Id.*

146. In reading a slew of case law from this court, the Author has yet to find a case where the court considers the best interest of the child when determining standing. The court did quickly dismiss its statement about the child's point of view, by re-

Justice McKeithen writes separately.¹⁴⁷ This time he concurred only “because *In re K.K.C.* is binding precedent of this Court,” but explained he stands by his dissenting opinion in *In re K.K.C.*¹⁴⁸

Luckily, the Austin Court of Appeals does not agree with its Beaumont counterpart. In *Jasek v. Texas Department of Family and Protective Services*, the Court specifically criticized *In re K.K.C.*’s analysis of the term “control,” arguing instead that the only adjective in the statute that modifies “control” is the word “actual;” “legal” is nonexistent in the statutory text.¹⁴⁹

In *Jasek*, the Department of Family and Protective Services (“DFPS”) had taken custody of two children, K.E. and T.E., and sued to terminate the biological parents’ rights.¹⁵⁰ DFPS placed the children with family friends, the Jaseks, and the children lived with them for over two years during the pendency of the suit and thereafter.¹⁵¹ However, before the Jaseks were made permanent conservators, Mr. Jasek tested positive for marijuana use, and DFPS removed the children from the Jasek’s home.¹⁵²

The Jaseks filed suit using section 102.003(a)(9) as its standing option,¹⁵³ but the trial court concluded the Jaseks did not have “control” of the children and struck their petition.¹⁵⁴ The Austin Court of Appeals felt that the Jaseks had “actual control” as required by the statute and that “legal control” was not a showing the Legislature required.¹⁵⁵ By combining the definitions of “actual” and “control,” the court found section 102.003(a)(9) “reflect[s] the Legislature’s intent to create standing for those who have, over time, developed and maintained a relationship with a child entailing the actual exercise of guidance, governance and direction similar to that typically exercised by parents with their children.”¹⁵⁶

The Court detailed four commonalities of those cases where “actual care, control, and possession” had been collectively found:

mindings its readers “*Troxel* does not allow a court to second-guess a fit parent’s decision.” *Id.* (citing *Troxel*, 530 U.S. at 68–69).

147. *Id.* at 178–79 (McKeithen, C.J., concurring).

148. *Id.* (McKeithen, C.J., concurring).

149. *Jasek v. Dep’t of Family & Protective Servs.*, 348 S.W.3d 523, 532, 535 (2011).

150. *Id.* at 526.

151. *Id.* at 527.

152. *Id.*

153. The Jaseks initially filed a “Petition in Intervention” using section 102.004(b) with the intention of intervening in the termination suit; however, this suit was no longer “pending.” The Appellate Court noted that because the Jaseks asserted general standing through section 102.003(a)(9), they sufficiently gave DFPS “fair notice” of their intention to bring an original SAPCR. *Id.* at 530.

154. *Id.* at 527.

155. *Id.* at 532–37.

156. *Id.* at 533 (citing *Coons-Andersen v. Andersen*, 104 S.W.3d 630, 636 (Tex. App.—Dallas 2003, no pet.)).

[T]he person asserting standing (1) lived in the same home as the child or lived in a home where the child stayed overnight on a regular and frequent basis, (2) made financial contributions benefitting the child, (3) was involved with the child's education, and (4) was involved in matters involving the child's general upbringing, like health care, feeding, and clothing.¹⁵⁷

The Court then attacked those determinations of the Fort Worth and Beaumont appellate courts with relation to the meaning of "control."¹⁵⁸ The Court stated that it is not the judiciary's job to add words to a statute and that requiring a person to have a "legal right to control a child" would not only read nonexistent words into the text, but "would [also] render the word 'actual' superfluous at best and meaningless at worst."¹⁵⁹

Several facts showed the Jaseks maintained "actual control" over the children for more than two years, and the Court found as a matter of law that these facts established standing under section 102.003(a)(9).¹⁶⁰ In closing, the Court noted that establishing standing does not imply winning a case on the merits—it only signifies the right to be heard in court.¹⁶¹

It is clear from these distinct cases that if the *In re Sandoval* Dad had been faced with these tests, he would have failed to establish standing under the *In re K.K.C.* and *In re Wells* standard. Dad did not have "legal control" over the children because the adoptive mother had not relinquished her parental rights to Dad.¹⁶² Because these courts analyze legal control together with relinquishment of parental rights, Dad could not have shown he had "legal control" over the children.¹⁶³

However, Dad likely would have established standing under the *Jasek* standard. Dad lived in the same home as the children, supported and provided for the children, quit his job to meet the children's special needs, and was involved in the children's general upbringing; taken collectively, these facts satisfy the *Jasek* court's four common threads to establish standing under section 102.003(a)(9).¹⁶⁴

The *Jasek* court believed the Legislature intended to confer standing on a person who had created a relationship with the child for at

157. *Id.* at 534 (citing *In re M.K.S.-V.*, 301 S.W.3d 460, 463–65 (Tex. App.—Dallas 2010, pet. denied); *In re M.P.B.*, 257 S.W.3d 804, 809 (Tex. App.—Dallas 2008, no pet.); *Smith v. Hawkins*, No. 01-09-00060-CV, 2010 WL 3718546, at *3 (Tex. App.—Houston [1st Dist.] Sept. 23, 2010, pet. denied) (mem. op.)).

158. *Jasek*, 348 S.W.3d at 534–35.

159. *Id.* at 535.

160. *Id.* at 537.

161. *Id.* at 538.

162. See discussion *supra* Section II.

163. See discussion *supra* Section II; *In re K.K.C.*, 292 S.W.3d 788, 793 (Tex. App.—Beaumont 2009, orig. proceeding); *In re Wells*, 373 S.W.3d 174, 177–78 (Tex. App.—Beaumont 2012, no pet.).

164. See discussion *supra* Section II; *Jasek*, 348 S.W.3d at 534.

least six months “by virtue of that person’s actual care, control, and possession of the child, as distinguished from a bare legal right of care, control, and possession.”¹⁶⁵ Arguably, this interpretation includes a best interest of the child determination. But does that inclusion sufficiently meet Texas’s priority, or should the best interest of the child standard be a wholly separate determination when allowing a person standing? An overview of the best interest of the child standard and an analysis of a case where the court looked to the child’s best interest *before* determining standing helps to answer this question.

IV. THE BEST INTEREST OF THE CHILD STANDARD (WHATEVER THAT MEANS)

Texas may not want to end its forward push into the future with only broadening third-party standing rights. Perhaps Texas should also seek to establish its children’s right to have parents. Texas could achieve this by using familial and relationship terms, instead of biological and legal terms. Then, the court could consider factors regarding the best interest of the child standard in the same way children would consider their own best interest. This is *not* to say courts should only consider a child’s view, but courts *must* look at the scenario with the child’s filtered lens.

The Texas Legislature should encourage courts to think about what the child thinks, feels, and wants—not just needs. The child’s mental health should have the same importance as physical health, and the child’s rights should influence the court’s decision as much as those of the parents. The question is how do we get there?

The Texas Family Code section 153.001 states:

- (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.¹⁶⁶

The Texas Legislature has taken steps in the right direction for courts to consider children’s rights. Thus, if parents request the courts’ involvement, it is the courts’ duty to make sure those three enumerations in section 153.001 are met at the end of the suit.¹⁶⁷ Accordingly,

165. *Jasek*, 348 S.W.3d at 535.

166. TEX. FAM. CODE ANN. §153.001 (emphasis added) (West Supp. 2017).

167. The Author feels that a duty is imposed because the Legislature took the time to list its public policy—meaning it intended that the judges act on this policy.

courts should focus on who can better serve the child's interest, not who has a better claim to the child.¹⁶⁸ What, then, does the "best interest of the child" mean?

A. *Best Interest of the Child: Factors Currently Considered by Texas Courts*

Since 1966, Texas case law has shown that parents' desires, acts, and claims are secondary considerations to the best interest of the child, reinforcing the Texas Family Code section 153.002, which states the best interest of the child "shall always be the primary consideration of the court."¹⁶⁹

In *Holley v. Adams*, the Texas Supreme Court established "factors" for courts to consider in determining the "best interest of the child," specifically for a private-termination case; but over time, courts have applied these factors in all suits involving children.¹⁷⁰

These factors, commonly referred to as the "*Holley*" factors, set the tone for what Texas courts may consider in this determination: the child's desires; the child's emotional and physical needs now and in the future; "the emotional and physical danger to the child now and in the future"; "the parental abilities of the individuals seeking custody"; the programs available to assist those individuals to promote the child's best interest; "the plans for the child by th[ose] individuals . . . seeking custody"; "the stability of the home"; the parent's acts or omissions that "may indicate that the existing parent-child relationship is not a proper one"; and any excuse for the parent's acts or omissions.¹⁷¹

Case law defined these factors further by providing specific facts for courts' consideration. For example, if a child cannot voice its desires because the child is too young to speak, courts may consider whether the child is well-cared for by a parent, is bonded to that parent, and has spent minimal time in the presence of that parent for determining the first *Holley* factor.¹⁷² Courts considering the second and third *Holley* factors, regarding the child's emotional and physical needs and the emotional and physical dangers to the child, reiterate that permanence is a paramount consideration.¹⁷³ Courts have also considered

168. JOAN FOOTE JENKINS & RANDALL B. WILHITE, O'CONNOR'S TEX. FAM. LAW HANDBOOK 484 (2015). See *Mumma v. Aguirre*, 364 S.W.2d 220, 221 (Tex. 1963) (holding that the courts' paramount concern in determining custody is the best interest of the child, not righteousness of claims of others to custody).

169. See *Bukovich v. Bukovich*, 399 S.W.2d 528, 529 (Tex. 1966); TEX. FAM. CODE ANN. § 153.002 (West Supp. 2017).

170. See SAMPSON, TINDALL & ENGLAND, TEX. FAM. CODE ANN. 644 (2017).

171. *Holley v. Adams*, 554 S.W.2d 367, 372 (Tex. 1967).

172. See *In re U.P.*, 105 S.W.3d 222, 230 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

173. See *Edwards v. Tex. Dep't. Protective & Regulatory Servs.*, 946 S.W.2d 130, 138 (Tex. App.—El Paso 1997, no pet.), *disapproved of on other grounds by In re*

parental abilities and cooperation for factors two and three to determine if parents will give the child first priority when making joint decisions regarding the child's best interest.¹⁷⁴

Factors four and five, available parenting programs and what plans each parent has for the child, have been determined by the court considering a parent's plan for living arrangements, education, after-school care, financial support, and the like.¹⁷⁵ Courts considering factors six and seven, which are excuses for parents' acts or omissions and whether those acts or omissions indicate an improper parent-child relationship, have considered parental fitness, past conduct, and substance abuse.¹⁷⁶

Over the years, courts' decisions have been fact intensive, and have provided the above listings as the basis of their best interest of the child determinations. However, these determinations happen only after a plaintiff has established standing to sue. If the best interest of the child is to be the focus, the primary goal of the courts in handling cases involving children,¹⁷⁷ why then do courts not consider it when determining who has standing? The El Paso Appellate Court felt the best interest of the child should play a role in determining standing; in *Doncer v. Dickerson*, the Court determined third-party standing based almost entirely on the child's best interest after reviewing statutory history.

B. *Doncer v. Dickerson: Consideration of the Best Interest of the Child Should Play a Role in Determining Standing*

The Texas Family Code's early versions had a statute almost identical to the Washington statute disputed in *Troxel*.¹⁷⁸ The Washington statute allowed "[t]he court [to] order visitation rights for any person when visitation [served] the best interest of the child."¹⁷⁹ We know now this type of broadly worded statute is unconstitutional,¹⁸⁰ but

J.F.C., 96 S.W.3d 256 (Tex. 2002); *In re U.P.*, 105 S.W.3d at 230–31 (stating children need security and permanency).

174. See TEX. FAM. CODE ANN. §153.134(a)(2) (West Supp. 2017). See, e.g., *Berwick v. Wagner*, 509 S.W.3d 411, 427 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (instructing the jury to consider whether the parents will reach shared decisions and encourage and accept a positive relationship between the child and the other parent).

175. See, e.g., *Reyes v. Reyes*, 458 S.W.3d 613, 617 (Tex. App.—El Paso 2014, no pet.) (The father's testimony showed no plans for living arrangements, proximity to schools, or after school care, but only future speculations).

176. See, e.g., *In re C.R.T.*, 61 S.W.3d 62, 66–68 (Tex. App.—Fort Worth 2002, no pet.) (noting a parent's utter failure to support her children even though she had a duty to do so by law indicated her appointment as a managing conservator would not be in the child's best interest).

177. TEX. FAM. CODE ANN. §153.002 (West Supp. 2017).

178. TEX. FAM. CODE ANN. §102.003 (cmt.) (West Supp. 2017).

179. WASH. REV. CODE ANN. § 26.10.160(3) (West 2012).

180. See discussion *supra* Section III.A.1.

what we can take from this history is that Texas's legislative ancestors knew the courts should have very broad discretion in determining a child's best interest.

However, courts strictly construed Texas's earlier statute regarding who had "an interest in the child."¹⁸¹ Thus, the Legislature omitted the overly broad standing option, and over time provided the several fact-specific standing options we have today.¹⁸² Apparently the Legislature simply forgot to add the courts' discretion back into the mix by referencing the best interest of the child in those specific standing options.

In *Doncer v. Dickerson*, the El Paso Appellate Court reviewed Texas's standing history in detail.¹⁸³ This Court considered the best interest of the child in maintaining substantial relationships *before* determining if a third-party parent has standing;¹⁸⁴ the best interest of the child standard is usually not discussed until the plaintiff has already established standing.¹⁸⁵

In *Doncer*, Stepmother Doncer filed for conservatorship of her stepson, Mikey, after the death of her husband—Mikey's father.¹⁸⁶ Dickerson, Mikey's biological mother, and Doncer's deceased husband were Mikey's joint-managing conservators, and Dickerson had the right to establish Mikey's primary residence.¹⁸⁷ The biological parents' conservatorship agreement awarded Mikey's father "possession of Mikey 51 percent of the time in even-numbered years and nearly 48 percent in odd-numbered years."¹⁸⁸ The Court found "there were seven months during which Mikey spent more than 50 percent of his time with the Doncers, the last [month being] well within the ninety day period before Doncer brought suit."¹⁸⁹

But the best part of the Appellate Court's opinion came next. Instead of narrowly focusing on "actual care, control, and possession," going through the checks and balances regarding relinquishment of rights and legal control, the court examined the best interest of the child standard.¹⁹⁰ This is unique because, as the Court explained only one paragraph prior, lack of standing is the same as lack of subject matter jurisdiction.¹⁹¹ If either is lacking, the court must dismiss the

181. TEX. FAM. CODE ANN. §102.003 (cmt.) (West Supp. 2017).

182. TEX. FAM. CODE ANN. §102.003 n.3 (West Supp. 2017).

183. *Doncer v. Dickerson*, 81 S.W.3d 349, 354 (Tex. App.—El Paso 2002, no pet.).

184. *Id.* at 353–54.

185. See discussion *supra* Sections III.B.1–3.

186. *Doncer*, 81 S.W.3d at 351.

187. *Id.*

188. *Id.* at 351–52.

189. *Id.* at 352–53.

190. *Id.* at 353–54.

191. *Id.* at 353.

suit, and the best interest of the child standard is not implicated until *after* standing has been established.¹⁹²

The Appellate Court only briefly mentioned the best interest of the child standard; but that mention came *before* establishing standing.¹⁹³ What if courts considered the best interest of the child when determining standing? The trial judge in *Doncer* indicated his concern for Mikey's best interest to the Appellate Court:

I can't imagine why it would be in the best interest of the child to have the contact cut off. So . . . if there's good cause shown by the mother why it should be cut off, I certainly would be interested in that; but, otherwise, I can't imagine why there would just be a—an arbitrary cutting off of that relationship.¹⁹⁴

Of course, the trial judge then poses the existing problem: "Obviously, we'll have to be guided by the statute and the case law, the Code and the case law . . ." Even still, the trial judge could not see how terminating the relationship would be beneficial.¹⁹⁵

In its conclusion, the Appellate Court recognized that the Supreme Court had just decided *Troxel*, and thus, it remanded the case to the trial court to determine *Troxel's* impact on *Doncer's* suit.¹⁹⁶

Merely allowing any person with an "interest in a child" to have standing upsets parents' constitutional protections.¹⁹⁷ But if Texas keeps the standing limitations intact, as is, and adds a little discretion for the judge to consider if third-party parent standing is in the best interest of the child, would that violate the Constitution? As the *Doncer* court reminded us, "[S]tanding to sue does not mean a right to win, but merely a right to be heard in court. . . . [T]hose [third-party parents] still will most often be faced with overcoming the parental presumption in a contest for managing conservatorship with the [other] parent."¹⁹⁸

C. *Relationship Rights of Children: Healthy Relationships Mean More*

Considering the best interest of the child when determining third-party standing is only the first step toward Texas achieving its goals. Texas should also consider giving more weight to certain best-interest factors, thereby emphasizing existing healthy relationships in the child's life. James G. Dwyer, author of *The Relationship Rights of*

192. *Id.*

193. *Id.* at 353–54.

194. *Id.* at 353.

195. *Id.* The trial judge then suggested that if there was "wiggle room" for *Doncer*, the judge would have been inclined to grant standing. *Id.*

196. *Id.* at 362.

197. See discussion *supra* Section III.A.1.

198. *Doncer*, 81 S.W.3d at 356 (citing John J. Sampson, Vol. 93–2 ST. B. TEX. SEC. REP.—FAM. L. 14 (1993)).

Children, asks “whether the state’s decisions about children’s relational lives should be governed to a greater extent, and perhaps exclusively, by rights of the children.”¹⁹⁹

1. Mind of a Competent Child

Children do not have rights like adults; but what if children were allowed interest-protection rights? Stated another way, what if the courts, in protecting a child’s interest, were *required* to consider that specific child’s best interest through *that child’s* filtered lens, without parental influence? Professor Dwyer suggests that allowing “a presumption that children possess the same basic moral rights that adults do” would require a transformation throughout family law in the United States.²⁰⁰

He explains children’s rights would not be identical to adults’ rights, merely “analogous and equally as strong.”²⁰¹ It is generally assumed that adults’ interests matter equally, regardless of societal status, and that, empirically, adults feel their own interests outweigh other peoples’ interests; specifically, adults feel they know what is best for their “well-being.”²⁰² Professor Dwyer submits that this assumption should also apply to children and that if we are to respect children as equals, we must recognize the importance of children’s relationships to their “well-being.”²⁰³

2. A Right to Continue Healthy Relationships

The quality of particular relationships has a greater impact on a child’s well-being than on an adult’s well-being.²⁰⁴ Arguably, then, Texas should take greater precautions with the child’s welfare than adults would take with theirs.²⁰⁵ The State should not determine children’s relational lives by looking to other peoples’ rights or by affording the children’s welfare lesser weight.²⁰⁶ Instead, the State should start focusing on the child, identifying with the child, and considering the child’s interests as if the child were fully competent.²⁰⁷

199. JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 4, 23 (2006) (“A complete account of children’s relationship rights against the state, therefore, requires identifying not only those legal rules that explicitly confer such rights but also legal rules that, though not speaking in terms of rights, implicitly confer rights on children by imposing on state officials a duty owed to children to respect their wishes, to make or act on an individualized assessment of their best interests, or to take particular actions assumed to be generally conducive to their welfare.”).

200. *Id.* at 124–25.

201. *Id.* at 127.

202. *Id.*

203. *Id.*

204. *Id.* at 129.

205. *Id.*

206. *Id.* at 130.

207. *Id.* at 131.

The State could accomplish this through the same manner used for incompetent adults, by using surrogate agents to inquire into the child's "preferences, values, and disposition."²⁰⁸ The best interest of the child standard currently applied by Texas courts nearly follows Professor Dwyer's suggestion of maintaining a child's filtered lens, but as discussed below in this Article, the parental presumption still trumps the best-interest consideration.²⁰⁹

In Texas, the child's agent, usually the judge, may *begin* by acting as an agent for the child, but then the judge must see if certain parental rights override the child's statutory interests.²¹⁰ Still, Texas is one of a minority of states that authorizes by statute nonlegal parents to petition for custody of a child.²¹¹ However, in several states, the best interest of the child is the controlling consideration when deciding nonlegal parents' child custody cases, just as it is in a case between two legal parents.²¹² Professor Dwyer thinks the minority states' legislators realize a social relationship with a caregiver may be more important to a child's well-being than that of a biological relation or legal status.²¹³

It is worth considering why another set of persons with whom a child's right to a relationship is protected: siblings. Is there some ethereal bond between siblings? Something like that attachment between mother and child? What exactly does the State feel is worthy of statutory protection?²¹⁴ The simple answer is: an existing relationship.²¹⁵

V. CHILD'S RIGHT TO "PARENTAL" RELATIONSHIPS VS. THE PARENTAL PRESUMPTION

Nearly 11 million children live with third parties in the United States.²¹⁶ If Texas intends on maintaining that the best interest of the

208. *Id.*

209. *See* discussion *infra* Section VI.

210. *See* TEX. FAM. CODE ANN. §153.001 (West Supp. 2017). *But see* discussion *supra* Section III.A.1.

211. Dwyer, *supra* note 199, at 50; TEX. FAM. CODE ANN. §102.003(a)(9), (11) (West 2015).

212. Dwyer, *supra* note 199, at 50 (citing *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000)) (applying a best-interest standard and citing statutes from other states).

213. *Id.*

214. *See* TEX. FAM. CODE ANN. §102.0045 (West Supp. 2017) (statute providing for sibling standing); TEX. FAM. CODE ANN. §153.251(c) (West Supp. 2017) (statute providing that children from a marriage usually should not be separated during custody disputes).

215. *See, e.g.,* *Beadles v. Beadles*, 251 S.W.2d 178, 180 (Tex. Civ. App.—Texarkana 1952, no writ) (discussing Texas's preference against divided sibling conservatorship).

216. The Census Bureau estimated in 2009 that 3,083,000 children lived with no parent, 5,317,416 children lived with a parent and stepparent, and 2,340,819 children lived with a parent that was cohabitating with a third party. Rose M. Kreider & Renee Ellis, *Living Arrangements of Children: 2009*, U.S. CENSUS BUREAU, P70-126, 9–14 (June 2011), <http://www.census.gov/prod/2011pubs/p70-126.pdf> [<http://perma.cc/J3TT-ZQR9>].

child is its priority, then it must find a way to do so for all children, including those who live with third-party, nonlegal parents. Establishing that children have a right to continue a loving relationship with whomever they know as their parent could allow Texas to achieve the best interests of its children.

Clearly, from the discussion of the best interest of the child standard, these rights are not new.²¹⁷ For centuries, courts have used the *parens patriae* doctrine, meaning “parent of the country,” to act as guardian to those legally disabled, e.g., adolescents.²¹⁸ Judge Cardozo has been given credit for defining the American understanding of this doctrine:

[A judge] is to put himself in the position of a “wise, affectionate, and careful parent,” and make provision for the child accordingly. . . . He is not adjudicating a controversy between adversary parties He “interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the Crown as *parens patriae*.”²¹⁹

Through Judge Cardozo’s declaration that the controlling concern should be the child’s welfare, arguably the children have enjoyed customary rights to have custody matters determined with a best interest of the child standard for at least a century.²²⁰ However, courts find tension when giving deference to both the parents’ and the children’s rights.²²¹ Should the parental presumption, as discussed above, override a child’s rights, or should the judiciary be allowed to balance them?

Parenting skills are neither innate from the child’s birth nor develop naturally—they must be learned.²²² Without a sound parental role model, a cycle of poor parenting can span generations.²²³ Yet Texas’s court system assiduously applies the parental presumption, foreclosing on claims by those already in parent-like roles who act in the child’s best interest.²²⁴ Supreme Court dissenters recognized the parental presumption is only helpful when the interests of parents and children

217. See discussion *infra* Section V.

218. Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113, 120–23 (2009) (discussing *parens patriae*’s origin and evolution).

219. *Finlay v. Finlay*, 240 N.Y. 429, 433–34 (1925) (citations omitted).

220. McLaughlin, *supra* note 218, at 129.

221. *Id.* at 135–37.

222. Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARO. L. REV. 569, 594 (1992). See also, Dwyer, *supra* note 189, at 2. (noting that family-law scholars can point to legal rules that are detrimental to a child’s welfare, giving as an example creating a parent-child relationship for newborn children solely based on biological connection, with no consideration shown for the preparedness to raise a child.)

223. See McMullen, *supra* note 222, at 594–95.

224. See generally, *In re Sandoval*, No. 04-15-00244-CV, 2016 WL 353010, at *1–5 (Tex. App.—San Antonio Jan. 27, 2016, no pet.) (mem. op.).

align.²²⁵ In any of these scenarios, the children are the victims whose rights (if they do indeed have any as United States citizens) appear to have been violated.

The courts justify the parental presumption on the basis that most parents act in the best interests of their children.²²⁶ In Texas, this presumption runs deep, and courts consistently discuss the natural affection flowing between parent and child.²²⁷ Unfortunately, this presumption is faulty and often dismisses the custody claims of third-party parents with whom the child has had a loving relationship, which the legal parent usually established and encouraged.

VI. CONCLUSION

Troxel raises more questions than it answers. The analysis of whether third-party standing might advance a child's fundamental rights is lacking. And we are left wondering whether the best interest of the child standard constitutes a compelling state interest to overcome a parent's fundamental right to custody.²²⁸

Maybe the solution to this problem is simple. The First District Court of Appeals of Houston considered if allowing third-party standing would be in the best interest of the child.²²⁹ What if part of judges' consideration in determining third-party standing was the best interest of the child? Of course, we know that the *Troxel* plurality requires limitations, but currently, those statutorily imposed by the Texas Legislature strip away all of the courts' discretion.²³⁰

Once, a family law district judge said in a bench-bar conference, "Give me something to work with; I want to help, but you have to give me something so I can rule in your favor."²³¹ Judges are trying to provide justice and fulfill their roles in Texas's courts of equity. Judges should have a clear and inconspicuous way through the Family Code

225. See *Michael H. v. Gerald D.*, 491 U.S. 110, 136 (1989) (Brennan, J., dissenting); *Lehr v. Robertson*, 463 U.S. 248, 268–70 (1983) (White, J., dissenting). By casting the dispute as between legal parents and third parties, in both cases, a child was denied a voice in the outcome, and the parental presumption failed the children. McLaughlin, *supra* note 218, at 140.

226. TEX. FAM. CODE ANN. §153.131 (West Supp. 2017). See *Lewelling v. Lewelling*, 796 S.W.2d 164, 166 (Tex. 1990) ("The presumption that the best interest of a child is served by awarding custody to a natural parent is deeply embedded in Texas law.").

227. See *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000).

228. See discussion *supra* Section III.A.2. Justice Kennedy recognized the best-interest standard may be applied to certain third-party suits.

229. See discussion *supra* in Section V.

230. None of the fourteen standing options in chapter 102 of the Texas Family Code allow a best interest of the child consideration for standing purposes. The courts can consider the best interest only after the plaintiff has established standing. TEX. FAM. CODE ANN. §102.003(a) (West Supp. 2017).

231. Hon. Dennise Garcia, statement at Dallas County Family Law Bench Bar 2016.

of using their discretion, within the bounds of the Constitution, when deciding cases before them. If the child's best interest is Texas's priority, then courts should be allowed to consider those interests when determining who has standing to bring a suit affecting the parent-child relationship.

