STANDING UP FOR NONTRADITIONAL FAMILIES: HOW THIRD-PARTY STANDING PREVENTS COURTS FROM EXAMINING THE BEST INTEREST OF THE CHILD IN TEXAS

Comment

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> *It is important for practical and psychological reasons to call any reasonably stable group that rears children a family. . . . The advantage of this view is that traditional and nontraditional families can all be seen to serve the interests of children. Children can also feel comfortable with an approved family form, even if it is not traditional.*
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> –Sandra Scarr, Psychologist and Yale University Psychology Professor[1]

I. TIMES ARE CHANGING

The family of yesterday is not the family of today. Due to societal changes, many children are raised by both a biological parent and an individual that is neither their biological nor adoptive parent. While it is positive that a nonbiological individual has stepped in to fulfill a role that was not previously satisfied in the child's life, there is also a risk to the child that this meaningful relationship will not continue. Third-party parents—individuals that have fulfilled a significant parent-like role—have limited rights in Texas to the children that they raise. This has negative implications for the child who neither chose to be raised in the nontraditional family nor has a say in the matter. The child can be ripped away from the third-party parent at a moment's notice simply because of the overpowering parental presumption that the biological parent possesses. The issue is compounded because many times third-party parents lack standing to bring a suit to protect their parent-child relationship. The de facto parent doctrine, a doctrine many other states recognize, is the best solution to protect the child.[2]

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1. AZ QUOTES, https://www.azquotes.com/quote/1242244 (alteration in original) (last visited May 30, 2020).

2. *See infra* Part III.E (discussing the de facto doctrine and its protection of a child's fundamental rights).

It is the best solution because after a third-party parent demonstrates that they fulfilled a significant parent-like role for the child by satisfying several requirements, this doctrine allows a third-party parent to be considered the child's legal parent and as an equal to the biological parent.[3] Recognizing de facto parents as legal parents would put a halt to the undeniable harm that a child suffers because of the arbitrary decisions the biological parent makes.

The de facto parent doctrine could have protected Tim's daughter, Katie,[4] from the harm she suffered because of her mother's decisions.[5] Katie was nearly four-years-old when she lost the only man she ever knew as her father.[6] He was not involved in a horrific accident nor did he sneak away in the night. Tim was ripped from Katie's life because Katie's mother, Marissa, chose to remove him from Katie's life.[7] Tim did not accept the loss of contact with his daughter without a fight.[8] But there was only so much Tim could do. Tim lost the fight, but not because he was not a great father; he lost the fight because the law was not on his side.

The law is not on Tim's side because Tim is not Katie's biological father.[9] Tim and Marissa began dating in 2013.[10] A few weeks after they began dating, Marissa informed Tim that she was pregnant.[11] There was only one problem with this information: Marissa was approximately three months pregnant.[12] Tim knew that Katie was not his biological child, but Katie's biological father was not interested in being a father.[13] Before Katie was even born, Tim agreed that he would be her father.[14] The couple moved in together, Tim was present for Katie's birth, Marissa listed Tim as the father on the birth certificate, and Katie took his last name.[15] From the moment of Katie's birth, Tim was Katie's father and cared for her as any father would.[16] However, there was one step that Tim never took.[17] He never took the legal step to adjudicate himself or formally adopt his daughter.[18]

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3. *See, e.g.*, Ferrand v. Ferrand, 16-7 (La. App. 5 Cir. 08/31/16); 221 So. 3d 909, 923; *In re* L.B., 122 P.3d 161, 176 (Wash. 2005) (en banc).

4. The child's name has been changed to protect her identity.

5. Brief for Appellant Timothy Rodriguez at 8, *In re* A.E.R., No. 11-19-00269-CV (Tex. App.—Eastland filed Oct. 18, 2019) [hereinafter Brief for Appellant].

6. *Id.*

7. *Id.* at 7–8.

8. *Id.*

9. *Id.* at 8.

10. *Id.* at 6, 8.

11. *Id.*

12. *Id.*

13. *Id.* at 8.

14. *Id.* at 6.

15. *Id.*

16. *Id.*

17. *Id.* at 15–16.

18. *Id.*

Unfortunately, the good times and the relationship did not last.[19] After more than three years together, Tim and Marissa separated.[20] Tim did not let the separation impact his relationship with Katie.[21] Tim saw his daughter every evening and every afternoon on the weekends.[22] This visitation schedule continued for more than ninety days until the parents agreed that there needed to be a formal arrangement.[23] The parents requested a child support and custody hearing in an attempt to establish a visitation schedule and permanent child support obligation.[24]

At the Attorney General's child support review conference, the two parties could not agree upon a support amount.[25] After this disagreement, Marissa decided that she no longer wanted Katie to have contact with Tim and began to deny Tim access to Katie.[26] Tim, with no other option, filed a suit affecting the parent-child relationship (SAPCR) to gain access to Katie.[27] Tim was able to bring this suit because he was the presumed father of his daughter.[28] However, Marissa wanted to sever all ties, so she challenged Tim's paternity.[29] The result, of course, conclusively showed that Tim was

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19. *Id.* at 7.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 7–8.
24. *Id.* at 3.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 14–15. Under § 160.204 of the Texas Family Code, a man can be the presumed father under a number of fact scenarios regarding when the man was married to the child's mother. TEX. FAM. CODE ANN. § 160.204(a)(1)–(4). In Tim's situation, because he never married Marissa, he met the presumption under § 160.204(a)(5) of the Texas Family Code. *Id.* § 160.204(a)(5) ("A man is presumed to be the father of the child if . . . during the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own.").
29. Brief for Appellant, *supra* note 5, at 3. The trial court used its discretion and chose to genetically test Tim, although no other man was interested in being Katie's father. *Id.* at app. B. Section 160.608 of the Texas Family Code gives the court discretion to deny a motion for genetic testing. FAM. § 160.608. This section of the Texas Family Code essentially acts as a safety valve and allows the court to deny genetic testing when the court thinks that it is in the best interest of the child for the presumed father to remain the child's father, regardless of what genetic testing would show. *Id.* § 160.608(a)–(b). The court may deny a motion for genetic testing when the court determines that: (1) the conduct of the mother or the presumed father estops that party from denying parentage; and (2) it would be inequitable to disprove the father-child relationship between the child and the presumed father. *Id.* § 106.608(a). When determining whether to deny the motion:

> [T]he court shall consider the best interest of the child, including the following factors:
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> (1) the length of time between the date of the proceeding to adjudicate parentage and the date the presumed father was placed on notice that he might not be the genetic father;
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> (2) the length of time during which the presumed father has assumed the role of father of the child;
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> (3) the facts surrounding the presumed father's discovery of his possible nonpaternity;
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> (4) the nature of the relationship between the child and the presumed father;
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> (5) the age of the child;
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> (6) any harm that may result to the child if presumed paternity is successfully disproved;
>
> (7) the nature of the relationship between the child and the alleged father;

not Katie's biological father.[30]

Because Tim was no longer the presumed biological father, the court dismissed the suit because Tim no longer had standing.[31] After the dismissal, no remedy existed to protect the parent-child relationship that Tim and Katie mutually recognized.[32] No protections were available for this little girl to continue a relationship with the father who had always acted in her best interest.[33]

As illustrated in the case of Tim—a nonbiological father who was precluded from asserting parental rights after he cared for and raised a child as his own—this Comment examines how Texas's failure to recognize an individual's right to a child when that individual has fulfilled a significant parent-like role causes irreversible harm to the child. This Comment particularly focuses on how the legislative scheme ties the courts' hands from ever reaching the best interest public policy section of the Texas Family Code.[34] The public policy section of the Texas Family Code expresses the importance of the best interest of the child, stating that the courts' primary consideration should be "[t]he best interest of the child."[35] However, another section allows the court to disregard this best interest of the child standard as a matter of law.[36] The best interest of the child is under-protected because the state-imposed standing threshold for third-party parents automatically bars these individuals from ever having their day in court and provides no other remedy.[37]

As one can guess, this denial of protection to *some* relationships causes problems. While this problem is not one that traditional families face, this poses huge implications to a new, ever-growing scenario: A child in a nontraditional family whose "parent" is neither biologically related nor the legal parent. Nontraditional family relationships are becoming more common.[38] This changing trend poses a problem and a need for the legal system to redefine parental roles to fall in line with today's social

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> (8) the extent to which the passage of time reduces the chances of establishing the paternity of another man and a child support obligation in favor of the child; and
>
> (9) other factors that may affect the equities arising from the disruption of the father-child relationship between the child and the presumed father or the chance of other harm to the child.

Id. § 160.608(b).

30. Brief for Appellant, *supra* note 5, at app. C.

31. *Id.* at app. D.

32. *Id.*

33. *See id.*

34. *See* FAM. §§ 153.001–.002.

35. *Id.* § 153.002.

36. *See id.* § 153.256.

37. *Id.* §§ 153.001–.002.

38. Christina Spiezia, *In the Courts: State Views on the Psychological-Parent and De Facto-Parent Doctrines*, 33 CHILD. LEGAL RTS. J. 402, 402 (2013); *see infra* Part II.A (discussing societal changes that have occurred in the family setting).

expectations.[39] This need exists because as it currently stands, Texas only considers an individual a parent when the individual is biologically related,[40] has taken legal steps to adjudicate themself as the parent, or has adopted the child.[41]

Family law issues traditionally belong to the states, so these growing issues fall on the shoulders of the states to resolve in the best way they see fit.[42] Some states have elected to resolve this issue by adopting various psychological or de facto parent doctrines, while others have declined to adopt such doctrines and instead elect a more easily applied rule.[43]

When the Texas Legislature decided how it would resolve family law issues in light of the always-changing social norms, the legislature chose to allow the courts substantial discretion when determining the best interest of the child.[44] Many times, however, the court does not reach this best interest standard because a standing issue bars the claim.[45] This is frustrating for third-party parents and courts alike. The courts are prevented from affording protection to factual scenarios, like the one discussed above, not because of the best interest standard, but because of an archaic standing requirement that has failed to adapt to social expectations.[46]

Texas's current third-party standing to bring a SAPCR fails to adapt to the changing social norms of today's society.[47] The current version of the

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39. *See* Spiezia, *supra* note 38, at 402.

40. FAM. § 160.204(a). In Texas, "[a] man is presumed to be the biological father if" one of the following scenarios is met:

> (1) he is married to the mother of the child and the child is born during the marriage;
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> (2) he is married to the mother of the child and the child is born before the 301st day after the date the marriage is terminated by death, annulment, declaration of invalidity, or divorce;
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> (3) he married the mother of the child before the birth of the child in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or before the 301st day after the date the marriage is terminated by death, annulment, declaration of invalidity, or divorce;
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> (4) he married the mother of the child after the birth of the child in apparent compliance with law, regardless of whether the marriage is or could be declared invalid, he voluntarily asserted his paternity of the child, and:
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> > (A) the assertion is in a record filed with the vital statistics unit;
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> > (B) he is voluntarily named as the child's father on the child's birth certificate; or
> >
> > (C) he promised in a record to support the child as his own; or
>
> (5) during the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own.

Id.

41. *Id.* § 101.024; *see also supra* note 28 and accompanying text (explaining that the parental presumption found in Texas Family Code § 160.204(a) allows the court to presume that the individual is biologically related to the child in several factual scenarios).

42. *See* Spiezia, *supra* note 38, at 403.

43. *Id.* at 402.

44. FAM. § 102.003.

45. *See infra* Part II.C (discussing standing as it pertains to SAPCR cases).

46. *See infra* Part II.A (explaining that the current definition of parent fails to adapt to the changes in society).

47. *See infra* Part II.C.2 (explaining that the Texas Family Code definition of parent does not include de facto parents, although many children are raised by de facto parents).

Texas Family Code only allows a third-party, whom many times children see as their parent, to bring a SAPCR when the parent has had actual care, control, and possession of the child for six months and then brings the suit within ninety days of no longer meeting that threshold.[48] This arbitrarily short window is a high bar that some biological parents cannot even meet.[49] This rule, while intended to protect the fundamental right of biological parents to dictate who is involved in their child's life, ultimately only harms the child. Because children possess a fundamental right to continue familial relationships regardless of biological links,[50] Texas should amend § 101.024 of the Texas Family Code to redefine *parent* to include de facto parents as the 2017 version of the Uniform Parentage Act suggests states should do.[51] This amendment will allow the court to protect the child's fundamental right, balance the two parents' competing interests, and allow the relationships that are in the best interest of the child to continue.

This Comment uses a current Texas case to illustrate how devastating the results can be when a third-party parent has no legal rights to a child.[52] This case helps to highlight the specific problems third-party parents face and how the outdated third-party standing statute in the Texas Family Code causes individuals who have continued to act in the best interest of the child to be ripped from an innocent child's life.

Part II discusses the changing social norms of today's families. The traditional family of yesterday is no longer the traditional family of today in our ever-changing society.[53] This sheds light on the importance and the growing issue that the narrow third-party standing statute in the Texas Family Code poses. Next, Part II provides background information to offer a deeper understanding of Texas's position on third-party standing, SAPCRs, the parental presumption, and the best interest of the child standard that impacts child custody cases.[54] Part II also discusses the Supreme Court decision in *Troxel v. Granville* that shaped the way states could allow a third-party standing, as well as the deference that the Texas Legislature gave to this plurality opinion.[55]

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48. FAM. § 102.003.

49. *See infra* Part II.C.2 (discussing the Texas courts' interpretations of actual care, control, and possession). Any parent of a child that is in college, boarding school, or even separated parents that share joint custody arguably cannot meet this threshold. *See infra* notes 164–74 and accompanying text (discussing the various approaches courts take on actual care, control, and possession). Parents with living situations described above will likely not be able to meet the actual possession requirement.

50. *See infra* Part II (discussing that children have a liberty interest in familial relationships and familial relationships are not limited to biological ones).

51. *See* FAM. § 101.024.

52. Brief for Appellant, *supra* note 5; *see supra* Part I (discussing Tim and Katie's case and how Tim lacked standing to bring a SAPCR).

53. *See infra* Part II.A (discussing the social norms of today's families).

54. *See infra* Part II.B (explaining the best interest of the child standard, parental presumption, and how Texas courts have devised a two-part inquiry in custody cases that includes both inquiries).

55. *See infra* Part II.C.1 (discussing the impact of the *Troxel* decision on third-party standing).

Next, Part III proposes how Texas should redefine parent to include de facto parents.[56] Part III explains how the proposed amendment to § 101.024(a) of the Texas Family Code is the best solution to allow the court to protect the interests of the child, biological parent, and third-party parent.[57] Specifically, Part III discusses how the de facto doctrine is constitutional under *Troxel*, includes limiting language to protect the biological parent's rights, and protects the child's rights by preventing the biological parent from arbitrarily denying a third-party parent's parentage.[58]

Lastly, Part IV encourages the Texas Legislature to correct this issue that the narrow standing poses to nontraditional families, and it recaps how the de facto parent doctrine is the best solution to protect the rights of the child, the biological parent, and the third-party parent.[59]

II. STATE COURTS RECOGNIZE A CHILD'S FUNDAMENTAL LIBERTY INTEREST IN FAMILIAL RELATIONSHIPS BUT DO NOT UNIFORMLY PROTECT THIS RIGHT

The notion of the parent's and child's fundamental liberty interest is well established in the law. The Fourteenth Amendment affords protection from state action that seeks to deprive an individual "of life, liberty, or property, without due process of law."[60] Courts have recognized that the right to relationships is encompassed in the word "liberty."[61] Following this reasoning, courts also have expressly recognized that parents have a substantive due process right to direct the care, custody, and control of their children, as well as a right to continue relationships with their children.[62] Courts also found that the parent's right to direct the care, custody, and control of their children encompasses the right to decide whom their child may associate with.[63]

While parents have a recognized interest in their children, children also have a reciprocal interest in the relationship with their parents.[64] This is

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56. *See infra* Part III (proposing meaningful amendments to the definition of "parent").

57. *See infra* Part III (analyzing the effects of an amendment to § 101.024(a)).

58. *See infra* Part III (discussing the constitutionality and benefits of the de facto parent doctrine).

59. *See infra* Part IV (concluding that the de facto parent doctrine is the best solution for the narrow standing issue).

60. U.S. CONST. amend. XIV.

61. *See* Espinoza v. O'Dell, 633 P.2d 455, 463 (Colo. 1981) (recognizing parent and child have a liberty interest in the mutual relationship); Reist v. Bay Cty. Circuit Judge, 241 N.W.2d 55, 62 (Mich. 1976) (holding that the mutual relationship between parent and child in their "fundamental human relationship" is encompassed in the "liberty" within the Fourteenth Amendment).

62. Troxel v. Granville, 530 U.S. 57, 65–66 (2000); *In re* E.N.C., 384 S.W.3d 796, 801–02 (Tex. 2012).

63. *See Troxel*, 530 U.S. at 78 (Souter, J., concurring) ("The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character.").

64. *See In re* Gault, 387 U.S. 1, 13 (1967).

because constitutional rights are not protected only when an individual reaches the age of majority.[65] Children also have due process rights.[66] The Supreme Court has previously expressed that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[67] Like adults who have a constitutionally protected right to relationships, children also retain a liberty interest in relationships regardless of their age.[68]

A child's constitutionally protected liberty interest in relationships is not limited to relationships with biologically-related individuals.[69] The Supreme Court has expressly rejected the notion that a constitutionally protected liberty interest in relationships exists only when the individuals are biologically related.[70] The Court explained:

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children, as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.[71]

The Supreme Court recognizes that biology is not a prerequisite for constitutional protection.[72] The *Roberts* Court went on to explain that "[f]amily relationships, by their nature, involve deep attachments . . . [and] personal aspects of one's life."[73] Accordingly, a child's right to continue familial relationships is a liberty interest that deserves equal protection to

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65. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).

66. *Id.*

67. *Id.*; *In re* Gault, 387 U.S. at 13 ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

68. *See* Smith v. City of Fontana, 818 F.2d 1411, 1419 (9th Cir. 1987) (determining that minors have a liberty interest in a relationship with their parents); Espinoza v. O'Dell, 633 P.2d 455, 463 (Colo. 1981) (recognizing the existence of a liberty interest in the mutual relationship between child and parent); Reist v. Bay Circuit Judge, 241 N.W.2d 55, 62 (Mich. 1976) (holding that the rights of parent and child in their "fundamental human relationship" are encompassed within the term "liberty").

69. Lehr v. Robertson, 463 U.S. 248, 261–65 (1983).

70. *Id.* at 261 (explaining that a "developed parent-child relationship" and not "the mere existence of a biological link" triggers constitutional protection).

71. Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844 (1977) (citation omitted); *see also* Roberts v. U.S. Jaycees, 468 U.S. 609, 619–20 (1984) ("Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."); *Lehr*, 463 U.S. at 261 ("But the mere existence of a biological link does not merit equivalent constitutional protection.").

72. *Lehr*, 463 U.S. at 261–63.

73. *Roberts*, 468 U.S. at 619–20.

those recognized fundamental rights of adults, regardless of any biological link.[74]

A. The Growing Impact of Nonbiological Relationships

The biological link, the tie that once bound together "traditional families," is not the tie that binds together many families in today's society.[75] According to a recent study released by the American Community Survey and Decennial Census data, the traditional family is rapidly becoming a thing of the past.[76] In the 1960s, nearly 73% of all families were traditional families.[77] Compare that to 61% in 1980 and then only 46% in 2012.[78] In 2009, the Census Bureau estimated that more than 3 million children lived with neither of their biological parents, more than 5.3 million lived with a parent and a stepparent, and that approximately 2.3 million children lived with a parent that was cohabitating with a third-party individual.[79]

This change in family dynamics has been attributed to several social factors. First, individuals are electing to marry later in life or not at all.[80] In fact, the average age that men and women elect to marry for the first time is the highest ever recorded—rising more than five years in the last half-century.[81] Second, the number of children born to single mothers has greatly increased. In 1960, only an estimated 5% of children were born to single mothers; that number has now climbed to an estimated 41%.[82] These

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74. *See infra* Part III.E (discussing the de facto doctrine and its protection of a child's fundamental rights).

75. Gretchen Livingston, *Fewer than Half of U.S. Kids Today Live in a 'Traditional' Family*, PEW RES. CTR.: FACT TANK (Dec. 22, 2014), https://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/. "Traditional family" for this Comment is defined as two married heterosexual parents and the biological children from that marriage. *See id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. ROSE M. KREIDER & RENEE ELLIS, LIVING ARRANGEMENTS OF CHILDREN: 2009 1, 9–14 (2011), http://www.census.gov/prod/2011pubs/p70-126.pdf (explaining that in 2009 approximately 3,083,000 children lived without any parent, 5,317,416 children lived with both a parent and stepparent, and that 2,340,819 children resided in a household that included their parent and a third-party that their parent was cohabitating with).

80. *The Decline of Marriage and Rise of New Families*, PEW RES. CTR. (Nov. 18, 2010), https://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/.

81. Livingston, *supra* note 75. The median age has risen to twenty-eight for men and twenty-six for women. *Id.* at n.1. This choice to marry later or not at all is attributed to several causes. *The Decline of Marriage and Rise of New Families*, *supra* note 80. The number of women in the workforce has nearly doubled since 1960; moreover society—especially the younger generations—has become more accepting of nontraditional family roles. *Id.* (explaining that nearly 44% of all adults and over 50% of adults between the ages of thirty to forty-nine have cohabited). Divorce and separation rates also have nearly tripled since 1960 and have caused many individuals to be wary of marriage. *Id.*

82. Livingston, *supra* note 75; *The Decline of Marriage and Rise of New Families*, *supra* note 80 (explaining that this number only accounts for the average from a 2008 study and that among certain minority groups this number can be much higher; for example, among black women that gave birth during that year, approximately 72% were unmarried, and 53% of Hispanic births were to unmarried women).

changes in family dynamics as a whole are attributed to the fact that society no longer views marriage as a prerequisite to parenthood.[83]

Because of the rise of single-parent households, other individuals have stepped in to help provide for these children. Due to this increased outside involvement in child rearing, the theory of psychological parenthood—or parenthood lacking a biological connection—was born.[84] The "Attachment Theory"[85] is credited with first communicating the underlying principles and science that support psychological parenthood.[86] The attachment theory was first coined by psychiatrist John Bowlby in the 1950s.[87] According to this theory, children's ability to form secure attachments is developed from their perception of their caregiver's availability.[88] This stems from the principle that children rely heavily on their caregiver's support to develop and for children to properly develop, there must be "a stable, consistent, and close relationship with their caregivers."[89]

The impact of not having those consistent relationships with caregivers can have detrimental effects on a child. Developmental psychologists conclude that "[w]hen children are exposed to traumatic events and stressors, such as forceful separation from their parents/caregivers, their sense of safety and security is disrupted."[90] Children that experience trauma from being separated from a caregiver are at a much higher risk for mental disorders "such as depression, anxiety, addiction, ADHD and PTSD."[91] This trauma can also negatively impact the child's physical health.[92] The trauma can be especially hard for younger children who are more likely to internalize the trauma, which can ultimately lead to self-destructive behavior as an adult.[93] One study found that "[s]eparation for as short as a week within the first two years of [the child's] life was related to higher levels of child negativity and

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83. *See* Livingston, *supra* note 75.

84. Allison Abrams, *Are We Doomed to Repeat Our Relationship Patterns?*, PSYCHOL. TODAY (Mar. 18, 2017), https://www.psychologytoday.com/us/blog/nurturing-self-compassion/201703/are-we-doomed-repeat-our-relationship-patterns.

85. *Id.* This theory is based upon the work by Mary Ainsworth and John Bowlby which states that each individual has certain attachment styles and these are developed during our childhood and carried with us into our adult relationships. *Id.*

86. *See* Lauren Valastro, Comment, *Training Wheels Needed: Balancing the Parental Presumption, the Best Interest Standard, and the Need to Protect Children*, 44 TEX. TECH L. REV. 503, 523 (2012).

87. *See id.*

88. Allison Abrams, *Damage of Separating Families*, PSYCHOL. TODAY (June 22, 2018), https://www.psychologytoday.com/us/blog/nurturing-self-compassion/201806/damage-separating-families.

89. *See* Valastro, *supra* note 86, at 523 (citing Nicole M. Onorato, Comment, *The Right to Be Heard: Incorporating the Needs and Interests of Children of Nonmarital Families into the Visitation Rights Dialogue*, 4 WHITTIER J. CHILD & FAM. ADVOC. 491, 495 (2005)).

90. Abrams, *supra* note 88.

91. *Id.*

92. *Id.*

93. *Id.*

aggression."[94] Therefore, separating a child—especially a younger child—from a caregiver for even a very short period can have lasting effects.

B. Suit Affecting the Parent-Child Relationship (SAPCR)

Because courts have recognized the importance of the relationship between the child and the child's caregiver, courts and legislatures have created legal avenues to protect this relationship. For an individual to establish court-mandated rights to a child, the individual seeking custody must file a suit affecting the parent-child relationship (SAPCR).[95] A SAPCR "means a suit filed . . . in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is requested."[96] The SAPCR allows an individual to establish legal rights to a child.[97] These rights carry great legal significance because they carry with them a large number of parental rights and duties, an obligation to support the child, and inheritance rights.[98] These legal rights, however, are not absolute and can be limited or modified by court order, an affidavit of relinquishment, or an affidavit designating another individual as managing conservator.[99] As discussed later in this Comment, the standard the court uses to determine who should have custody of a child changes depending on what type of SAPCR is filed.[100]

The way the court classifies an individual's SAPCR can have huge implications for an individual that is not the parent of the child.[101] There are two types of SAPCRs: An original suit and a modification suit. Chapter 153 of the Texas Family Code governs original suits, while Chapter 156 governs modification suits.[102] A suit is considered an original suit when: (1) the suit filed is the first suit to establish the parent-child relationship between that child and that parent; or (2) the issues the court is addressing are distinctive

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94. *Id.*

95. TEX. FAM. CODE ANN. § 101.032.

96. *Id.* § 101.032(a).

97. *Id.*

98. *Id.* § 151.001.

99. *Id.*

100. *See infra* notes 101–09 and accompanying text (explaining the different standards that apply in an original SAPCR compared to a modification SAPCR).

101. *In re* P.D.M., 117 S.W.3d 453, 457 (Tex. App.—Fort Worth 2003, pet. denied) (explaining that the Legislature chose to include the parental presumption in Chapter 153 but not in Chapter 156, so the burden in each chapter is distinctly different).

102. *Id.* at 455. "Family code chapter 153 is titled, 'Conservatorship, Possession, and Access.'" *Id.* (quoting FAM. ch. 153). "The provisions of the chapter clearly govern initial child conservatorship, possession, and access issues." *Id.* (citing FAM §§ 153.001–.434). While the "Family code chapter 156 is titled, 'Modification.'" *Id.* at 455–56 (quoting FAM. § 156.001). "Section 156.001 is titled, 'Orders Subject to Modification,' and provides that '[a] court with continuing, exclusive jurisdiction may modify an order that provides for the conservatorship, support, or possession of and access to a child.'" *Id.* at 456 (alteration in original) (quoting FAM. § 156.001).

issues that an earlier suit did not address.[103] For original suits, the parental presumption applies.[104] This presumption, discussed later in this Comment,[105] requires that before the court appoints a nonparent as sole or joint managing conservator, the court must find that appointment of the parent "is not in the best interest of the child and that parental possession or access would endanger the physical or emotional welfare of the child."[106]

A modification suit, on the other hand, is more favorable to a nonparent. Chapter 156 governs the modification SAPCRs, and because the parental presumption is in Chapter 153, the Supreme Court of Texas has ruled that the parental presumption only applies in original SAPCRs.[107] The reasoning that the parental presumption only applies in original SAPCRs is that it goes against public policy for the court to order a child to be removed from a well-settled living arrangement only because the parental presumption requires such transfer.[108] As a consequence of this changed standard in modification SAPCRs, if an individual can establish rights in an original proceeding, there is a greater chance that the court will continue to recognize those rights.[109] This indicates that Texas does recognize the importance of allowing children to maintain established relationships in *some* instances.

1. The Parental Presumption and the Best Interest Standard in SAPCR Cases

For more than 100 years, Texas has operated under the presumption that it is in the best interest of the child to maintain a relationship with at least one biological parent.[110] This presumption comes from the assumption that biological parents have a "natural affection" that flows from parentage for their child.[111] For a nonparent to overcome the parental presumption, the individual must show that significant emotional or physical harm would come to the child if the court chose to leave the child with the biological parent or parents.[112]

With the parental presumption looming in every original SAPCR, Texas law has recognized that the primary consideration for a court in all

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103. *Id.* at 457 (explaining that it is not the identity of the parties involved that determines whether the court will consider the suit an original suit or a modification; instead, once custody is established, subsequent proceedings are considered modification suits).

104. FAM. § 153.191; *In re P.D.M.*, 117 S.W.3d at 457.

105. *See infra* Part II.B.2 (explaining the effects of the parental presumption).

106. FAM. § 153.191.

107. *See In re* V.L.K., 24 S.W.3d 338, 339–40 (Tex. 2000).

108. *Id.* at 342–43.

109. *See id.*

110. *See* Lewelling v. Lewelling, 796 S.W.2d 164, 166 (Tex. 1990).

111. Taylor v. Meek, 276 S.W.2d 787, 790 (Tex. 1955).

112. *Lewelling*, 796 S.W.2d at 167; *see also* Thomas v. Thomas, 852 S.W.2d 31, 35 (Tex. App.—Waco 1993, no writ) (explaining that severe emotional trauma, immoral conduct, criminal conduct, and drug use poses a threat to the child's emotional and physical well-being).

conservatorship issues must be the best interest of the child.[113] Texas has even enacted § 153.001 which states that Texas's formal public policy is to "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."[114] Because the best interest of the child does not require a specific set of facts to be found, courts refer to the non-exhaustive list of factors outlined in *Holley*.[115] Courts have used the *Holley* factors as the guiding principle to determine the best interest of the child.[116] The true purpose of the factors is to ensure the decision the court makes provides the child with the best possible outcome in custody disputes; however, these factors are only one part of the analysis.[117]

2. How the Texas Supreme Court Weighs Both Interests

While the best interest standard remains the standard in all child custody cases, the recognition of parents' fundamental rights to determine how their child is raised, as well as the growing strength of the parental presumption, weakens the court's consideration of the best interest standard.[118] As a result of the two (sometimes competing) interests, Texas has established a two-prong test in SAPCR cases involving a nonparent.[119] This test is comprised of both the best interest factors and the parental presumption.[120] The first prong of the analysis is the best interest standard, and the second prong—arguably the more weighted consideration—is the parental presumption.[121]

While the parental presumption is not intended to be the more weighted prong, the Supreme Court of the United States has referred to the parental presumption as "perhaps the oldest of the fundamental liberty interests recognized by this Court."[122] This presumption can be best summarized as

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113. *See* TEX. FAM. CODE ANN. §§ 153.002, 160.608(b); *In re* Shockley, 123 S.W.3d 642, 652 (Tex. App.—El Paso 2003, no pet.) (explaining that the child's best interest is a paramount concern).

114. FAM. § 153.001.

115. Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976). Those factors include the following: (1) the desires of the child; (2) the present and future emotional and physical needs of the child; (3) the present and future emotional and physical danger to the child; (4) the parental abilities of the individual seeking custody of the child; (5) the programs available to assist and support the best interest of the child; (6) the plans for the child by the individual seeking custody; (7) the stability of the proposed home; (8) the acts or omissions of the parent which could indicate the current parent-child relationship is not proper; and (9) any excuses the parent has for his or her acts or omissions. *Id.*

116. *Id.*

117. *See* Taylor v. Taylor, 254 S.W.3d 527, 536 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (discussing that the nonparent must overcome the parental presumption—not just show that it is in the best interest of the child—before the court will award custody to that nonparent).

118. Legate v. Legate, 28 S.W. 281, 282 (Tex. 1894) ("[T]he law presumes that the best interest of the child will be subserved by allowing it to remain in the custody of the parents, no matter how poor and humble they may be, though wealth and worldly advancement may be offered in the home of another.").

119. *See Taylor*, 254 S.W.3d at 534, 536.

120. *Id.* (discussing both the parental presumption and the best interest standard that the court uses to determine whether to award custody to a nonparent).

121. *Id.* (discussing that the nonparent must first overcome the parental presumption).

122. Troxel v. Granville, 530 U.S. 57, 65 (2000).

allowing the court to find the custody dispute in favor of the biological parent "even when legal parents' decisions are inarguably damaging to their child's psyche and emotional well-being," because the court may still label the decision as being in the child's best interest.[123] In a perfect world, the presumption makes perfect sense; unfortunately, biological parents do not always have the best interest of the child as their primary consideration.

To further add to the problem in balancing the parental presumption and the best interest standard, the determination is different depending upon what type of child custody case is before the court. The parental presumption applies during an original SAPCR; however, in a modification, or a change to an already existing order, the parental presumption is *supposed* to sit backseat to the best interest of the child standard.[124]

This intertwined analysis of the parental presumption and best interest standard allows the parental presumption to overshadow the best interest of the child standard, so the court's decision no longer represents what is truly best for the child.[125] Instead, the best interest of the child standard reflects what is in the best interest of the child's parent.[126] This was exactly the case for Tim. Because Tim had no standing after Marissa rebutted his presumption of paternity, the court had no choice but to disregard Tim's pleas to remain in Katie's life and instead default to Marissa's parental decisions.[127] The court had no testimony to prove that Tim was not the perfect father in every aspect; Marissa even declined to testify at the hearing because there was nothing she could say to discredit Tim's parenting skills.[128] With all of this at its fingertips, the court was forced to choose no father over the willing and loving father that had been in Katie's life from the moment she was born.[129]

C. Standing

Before an individual can ever have his or her day in court multiple hoops must be jumped through, especially if the individual is not the legal parent of the child. The first hoop a third-party parent will encounter when bringing an original SAPCR is that the third-party parent must have standing.[130] Standing

123. Onorato, *supra* note 89, at 505.

124. *See In re* V.L.K., 24 S.W.3d 338, 342–43 (Tex. 2000) (explaining that courts should not change a child's living situation unless it is a positive improvement).

125. *Troxel*, 530 U.S. at 86 (Stevens, J., dissenting); *see* Ferrand v. Ferrand, 16-7 (La. App. 5 Cir. 08/31/16); 221 So. 3d 909, 920 (explaining that the best interest of the child is not considered until after finding that awarding custody to the biological parent would result in substantial harm to the child).

126. *Troxel*, 530 U.S. at 86 (Stevens, J., dissenting); *see also Ferrand*, 221 So. 3d at 920 (explaining that the parental presumption must be overcome before the court will complete a best-interest-of-the-child inquiry).

127. Brief for Appellant, *supra* note 5, at 9–10, app. D.

128. *Id.* at 6–9.

129. *Id.*

130. HON. SCOTT BEAUCHAMP, *NonParent Standing and Substantive Relief*, ADVANCED FAM. L. COURSE 12 (AUG. 2014). Standing is also required for a modification suit, but this Comment focuses on

is seen as the first line of defense for a biological parent against unwanted intrusion into the family unit.[131] Standing is an element of subject matter jurisdiction—as well as a constitutional requirement—for a party to maintain a lawsuit under both federal and state law.[132] The court may not waive standing, and the parties may not agree to waive the standing requirement.[133] As a result, because a court will not have subject matter jurisdiction to hear the case if a party lacks standing, the court will, as a matter of law, also lack authority to hear the case.[134] In fact, if a court would decide a case and later discover that there is a lack of subject matter jurisdiction—even because of a standing issue—all actions that the court had previously taken are void.[135]

In custody cases, standing is how the court prevents excessive intrusion into the family unit and protects the parent's liberty interest.[136] It ensures that parents' fundamental rights involving the decisions made regarding their child are not infringed upon due to unnecessary litigation.[137] When a third-party parent elects to file a SAPCR, the first issue the third-party must overcome is a challenge to his or her standing.[138] Also, it is at this time that the third-party parent will feel the constitutional implications of the *Troxel v. Granville* opinion.[139]

1. Troxel v. Granville*: Recognizing a Parent's Fundamental Right*

The 1993 Supreme Court decision in *Troxel v. Granville* had huge implications regarding who may petition for visitation rights with a child.[140] This dispute arose when the paternal grandparents petitioned for visitation with their grandchildren that their son had out of marriage.[141] Their son had committed suicide, and the children's mother, Tammie Granville, chose to reduce the paternal grandparent's visitation to one visit per month.[142] The grandparents wanted more time with their grandchildren, so they brought suit under a Washington statute that conferred standing to any person who wished

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the narrow standing issue that third-party parents face when attempting to bring an original suit affecting the parent-child relationship.

131. *Id.* at 6–9.

132. Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443–44 (Tex. 1993).

133. *In re* A.C.F.H., 373 S.W.3d 148, 150 (Tex. App—San Antonio 2012, no pet.); *see Tex. Air Control Bd.*, 852 S.W.2d at 443–44.

134. *Tex. Air Control Bd.*, 852 S.W.2d at 443–44.

135. *Id.*; *In re* Smith, 262 S.W.3d 463, 465–67 (Tex. App—Beaumont 2008, no pet.) (finding that the original orders were void due to lack of standing in a later modification suit).

136. *In re* Russel, 321 S.W.3d 846, 857 (Tex. App.—Ft. Worth 2010, no pet.) (citing *In re* Pensom, 126 S.W.3d 251, 255 (Tex. App.—San Antonio 2003, no pet.)).

137. *Id.* (citing *In re Pensom*, 126 S.W.3d at 255).

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

139. *Id.*

140. *Id.*

141. *Id.* at 60.

142. *Id.* at 60–61.

to petition for visitation rights.[143] This same statute also allowed a court to grant visitation if the visitation would be in the child's best interest regardless of the biological parent's wishes.[144] Tammie Granville challenged the statute's constitutionality, and the Supreme Court found that the statute was overly broad and unconstitutional as applied.[145]

In finding the statute unconstitutional, the Court explained that the statute infringed upon the parent's fundamental right because the statute did not require a court to give any deference to the parent's decision that the visitation may not be in the child's best interest.[146] Instead, the best interest of the child determination rested solely at the discretion of the judge.[147] In reaching this conclusion, the Court also explained that there is a presumption that a fit parent will act in the best interest of the child.[148] So as long as the parent adequately meets the needs of the child, then there is no reason for the State to inject itself into family matters.[149]

While the Court found that the statute was unconstitutional in this scenario, the Court refused to hold that all nonparental visitation statutes are unconstitutional per se.[150] The reasoning for this refusal was that while the Washington statute was overly broad, the Court explained that proper limiting language could narrow the statute to prevent infringement upon the parent's fundamental rights.[151] Unfortunately, the Court offered no direction on what type of limiting language a state should include to prevent such infringement upon the parent's rights.[152]

The dissent in *Troxel* warned that this opinion would allow parents to exert arbitrary power because this new standing threshold in SAPCR cases would require courts to disregard the best interest of the child, instead placing the competing liberty interest of the parents first.[153] Justice Stevens stressed that this constitutional protection for parents "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."[154] This interest should remain with the states to protect innocent children from "the social burdens of illegitimacy," as well as to ensure that children do not suffer emotionally or financially due to a parent's belated and self-serving concern over a child's biological origins.[155] Justice Stevens even

143. *Id.*
144. *Id.* at 61.
145. *Id.* at 66–67.
146. *Id.*
147. *Id.* at 67.
148. *Id.*
149. *Id.*
150. *Id.* at 66–67, 73.
151. *See id.* at 73.
152. *Id.* at 67.
153. *Id.* at 86 (Stevens, J., dissenting).
154. *Id.* at 88.
155. *See* Godin v. Godin, 725 A.2d 904, 909–10 (Vt. 1998).

foreshadowed future issues as he warned that in the ever-developing world of familial relationships, there should be strong opposition to a constitutional rule that allows a parent's rights to be "an isolated right that may be exercised arbitrarily."[156] As the dissent in *Troxel* warned, the *Troxel* majority caused a shift in deference to biological parent's decisions in the name of the parental presumption.[157] Since that time, however, many states have recognized the de facto doctrine, reasoning that the *Troxel* opinion does not preclude such doctrines.[158]

*2. Texas's Third-Party Standing Post-*Troxel

Texas has continued to give deference to the parental presumption by severely limiting its third-party standing.[159] To fully understand the limits of the third-party statute, one must first understand whom Texas views as a parent. Texas has defined *parent* to 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."[160] To put it more simply, Texas does not consider an individual a parent unless the individual is biologically related, has taken legal steps to adjudicate themselves as the parent, or is the adoptive parent.[161]

This definition of *parent* poses an issue for children of nontraditional families.[162] Third-party parents—or in other words, individuals that have assumed a significant parent-like role for the child but are not statutorily recognized as parents—do not have child-rearing rights and the court does not see them as an equal to the biological parent; the court sees them as an "other" in the eyes of the law.[163] This means that to have standing, a third-

156. *Troxel*, 530 U.S. at 90 (Stevens, J., dissenting).

157. *Id.*

158. *See* Hernandez v. Hernandez, 265 P.3d 495, 498 (Idaho 2011) (describing *Troxel*'s holding as "limited" and a "narrow proposition that Wash. Rev. Code § 26.10.160(3) (1994) is" unconstitutional as applied).

159. *Contra* UNIF. PARENTAGE ACT § 609 cmt. at 51 (UNIF. LAW COMM'N 2017) (citing MINN. STAT. § 257C.01-08; TEX. FAM. CODE ANN. § 102.003(9)) ("Other states extend rights to such individuals through broad third party custody and visitation statutes."). This broad third-party standing is considered broad not because of the relief granted, but because § 102.003(9) places few limits on who may bring the SAPCR. *See* FAM. § 102.003(a)(9). However, the ninety-day window and actual care, control, and possession language prevents more third-party parents from having standing. *Id.*

160. FAM. § 101.024.

161. *Id.* For clarity's sake, this Comment will refer to parents with legal rights to the child as biological parents, although there are individuals that the court would consider parents that are not biologically related to the child. *Id.*

162. *See* Livingston, *supra* note 75 and accompanying text (explaining that this Comment refers to nontraditional families as any family that is anything but two married heterosexual parents and their biological children).

163. *See* Taylor v. Taylor, 254 S.W.3d 527, 536 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (explaining that a third-party parent must overcome the parental presumption before being awarded custody).

party parent must take a completely different statutory avenue to gain rights to a child.[164] These limits are not because the third-party parent has been less of a parent to the child, but only because he or she failed to share genetic material with the child.[165] This current statutory definition of *parent* harms both the child and the third-party parent.[166] The third-party parent's rights always stand in the shadows of the biological parent regardless of the amount of care the third-party parent has given, while the child is ultimately harmed when the biological parent chooses to end contact with the third-party parent without cause.[167]

Texas has given much deference to *Troxel* when it defined who may bring a SAPCR. Texas's narrow definition of parent indicates the amount of deference it gave to *Troxel* as well as how severely limited Texas's third-party standing is in the Texas Family Code.[168] Texas legislation added even more stringent protections than the holding in *Troxel* demanded.[169] Because of these stringent protections, Texas has made it nearly impossible for children to maintain a parent-child relationship with third-party parents when the biological parent no longer wishes the relationship to continue.[170]

For a third-party parent to have standing to bring a SAPCR, they must look to § 102.003(a) of the Texas Family Code.[171] This outlines fourteen scenarios when an individual will have standing to bring a SAPCR.[172] If an individual is not biologically related to the child, the individual has two applicable provisions that confer them standing.[173] The first provision, § 102.003(a)(9), gives standing to a third-party when the biological parent is still living.[174] Specifically, § 102.003(a)(9) allows "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 [ninety] days preceding the date

164. FAM. § 153.131.

165. *See* Thomas v. Thomas, 852 S.W.2d 31, 34 (Tex. App.—Waco 1993, no writ).

166. Onorato, *supra* note 89, at 500.

167. *See* Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) ("[P]arental rights 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."); *Taylor*, 254 S.W.3d at 536.

168. FAM. § 102.003(a)(9) (allowing third-party standing only when the individual "has had actual care, control, and possession of the child for at least six months ending not more than [ninety] days preceding the date of the filing of the petition."); *see infra* Part III.D (discussing that Texas features a similar statutory scheme as other states that adopted the 2000 version of the Uniform Parentage Act, but no other state in the United States has the actual care, control, and possession language that Texas adopted in § 102.003(a)(9)).

169. *Compare Troxel*, 530 U.S. at 73 (holding that the overly broad Washington statute was unconstitutional as applied), *with* FAM. § 102.003(a)(9) (allowing suits only after the third-party has had actual care, control, and possession of the child for six months).

170. FAM. § 102.003(a).

171. *Id.*

172. *Id.*

173. *Id.* §§ 102.003(a)(9), (11).

174. *Id.* § 102.003(a)(9).

of the filing of the petition."[175] The second provision, § 102.003(a)(11), gives standing to a third-party when the biological parent is deceased.[176]

Texas appellate courts struggled to interpret the third-party standing section of the Texas Family Code. While § 102.003(a)(9) sounds like a clear-cut statute, until June 2018, appellate courts disagreed on the interpretation of actual care, control, and possession.[177] The general areas of disagreement among the appellate courts were the meanings of (1) actual care,[178] (2) the permanency of residence needed to establish the primary residence of the child,[179] and (3) whether control meant actual or legal.[180]

Texas appellate courts varied on their interpretation of *actual care*.[181] On one side, courts found that an individual had actual care if the care was exclusive to the biological parent.[182] In determining whether an individual had actual care of the child, the court examined whether the biological parents had "abdicated their parental duties and responsibilities to the [individual]."[183] Many courts held that to meet the actual care requirement of § 102.003, the individual must care for the child exclusively without the biological parent also residing in the residence.[184] On the other side, courts took a more relaxed approach and interpreted § 102.003 not to have an exclusive requirement.[185] Courts on the other side of the spectrum held that actual care existed if the third-party had provided parent-like care to the child and did not require an exclusivity element.[186]

The Texas appellate courts disagreed on how to determine what county the child *resides within*.[187] The residence of the child is determined by the

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175. *Id.*

176. *Id.* § 102.003(a)(11). This Comment will only address third-party standing allowed under § 102.003(a)(9) of the Texas Family Code. Third-party standing conferred in § 102.003(a)(11) is outside the scope of this Comment, although it poses the same restrictions.

177. *See In re* H.S., 550 S.W.3d 151, 160 (Tex. 2018) (holding that actual, care control, and possession of the child is met if the individual "served in a parent-like role by (1) sharing a principal residence with the child, (2) providing for the child's daily physical and psychological needs, and (3) exercising guidance, governance, and direction similar to that typically exercised on a day-to-day basis by parents with their children" for the statutory required six-month period).

178. *See infra* Part II.C.2 (discussing the "actual care" inconsistencies among appellate courts).

179. *See infra* Part II.C.2 (discussing the inconsistent tests to determine the child's residence).

180. *See infra* Part II.C.2 (discussing whether "control" is actual or legal).

181. *See* FAM. § 102.03(a)(9).

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

183. *Id.* at 759.

184. *Id.* (finding that the grandparents lacked actual care of the grandchildren because the parents resided in the same house); *see also In re* C.T.H.S., 311 S.W.3d 204, 209 (Tex. App.—Beaumont 2010, pet. denied) (finding that the nonbiological mother in a same-sex relationship did not have actual care of the daughter her partner conceived during their relationship because the care was not exclusive of the biological mother).

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

186. *Id*. (quoting *Hawkins*, 2010 WL 3718546, at *3).

187. *See* TEX. FAM. CODE ANN. § 103.001(c) (stating that a SAPCR may be brought in the county where the child resides, and that the child resides in the county where the child's parents reside).

residence of the child's parents or the party that has had actual care, control, and possession of the child for six months.[188] The courts looked to a three-element test for guidance. This test examined whether: (1) the child has a "fixed place of abode within the possession of the" party bringing the suit; (2) the residence is "occupied or intended to be occupied consistently over a substantial period of time[;]" and (3) the residence "is permanent rather than temporary."[189] The courts struggled to determine what constituted the *permanent residence* of the party bringing the suit.[190] The *Doncer* court explained that permanency can mean either "by presence in the county for an extended period of time or 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."[191] Option one only looks at whether the child has been within the county for a specific period of time, while the latter looks at the intent of the parties concerning the child's future living arrangements.[192]

Lastly, the courts could not come to a single conclusion on whether *control* meant legal or actual. Some Texas courts held that control meant more than physical control of the child, reasoning that if control were to only mean physical control, the word "possession" would not also be included as a requirement.[193] Specifically, the *In re K.K.C.* court interpreted the word control to mean that the individual had the "power or authority to guide and manage, and . . . make decisions of legal significance" on behalf of the child.[194] While on the other side, courts held that the individual only had to have the child in his or her possession for the prescribed amount of time.[195] These courts found that control only meant physical control of the child.[196] The courts that took this approach reasoned that the only word that modified control was the word "actual," not legal; thus, the control requirement was met by having actual physical control of the child for the statutory period, regardless of whether the individual had the legal authority to make decisions on behalf of the child.[197]

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188. *Id.*

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

190. *See id.* However, § 103.001 fails to give any other requirements to establish the parent's residence. *In re* S.D., 980 S.W.2d 758, 760–61 (Tex. App.—San Antonio 1998, pet. denied). Through the common law, courts have recognized that there must be an element of permanency to the residence. *Id.*

191. Doncer v. Dickerson, 81 S.W.3d 349, 361 (Tex. App.—El Paso 2002, no pet.) (citing *In re S.D.*, 980 S.W.2d at 761).

192. *See id.*

193. *In re* K.K.C., 292 S.W.3d 788, 792 (Tex. App.—Beaumont 2009, no pet.), *overruled by In re* H.S., 550 S.W.3d 151, 161 (Tex. 2018).

194. *Id.* at 793 (citations omitted).

195. *See* Jasek v. Dep't of Family & Protective Servs., 348 S.W.3d 523, 532, 535 (Tex. App.—Austin, 2011, no pet.).

196. *Id.* at 533–34.

197. *Id.*

The Supreme Court of Texas resolved some of the actual care, control, and possession inconsistencies in *In re H.S.*[198] The Supreme Court of Texas broadened the standing for third parties when it held in favor of the jurisdictions that took the more relaxed approach when interpreting the control requirement.[199] In *In re H.S.*, Heather's maternal grandparents brought a SAPCR that requested the Court to appoint them as managing conservators with the right to determine Heather's primary residence.[200] From the time that Heather was born in January 2013 until December 2014, she lived almost exclusively with her maternal grandparents because her mother struggled with alcohol addiction.[201] In March 2013, Heather's mother went to a rehab facility.[202] Heather's mother, father, and grandparents agreed that Heather would live with the grandparents while her mother was in rehab.[203] During the statutorily required six months, the father would have possession of Heather sporadically, but the principal place of residence remained the grandparents' home.[204] While the Court declined to expressly state the requirement to meet the actual possession threshold, the Court did find that the grandparents had standing to bring the suit because they had actual control of Heather, although they lacked legal control of her.[205]

The Court based much of its reasoning for choosing the actual control approach on the purpose of third-party standing.[206] In the opinion, the Court explained that it is the nature of the relationship that allows the third party to have standing.[207] The Court stated that the intent of the word *control* within the statute meant actual and not legal control.[208] It explained that the actual control conclusion is the most logical decision because the purpose of this statute is to protect the relationship that "develops over time between a child and a person who serves in a parent-like role—i.e., someone who has actual care, control, and possession of the child—is what justifies allowing that person to seek to preserve involvement in the child's life."[209] If the Court chose instead that third parties must have legal control, this choice would defeat that purpose.[210] While the Court's interpretation of control gave the appellate courts helpful authority to rely upon in the future, the Court did not end its opinion there.

198. *In re H.S.*, 550 S.W.3d at 161.
199. *Id.*
200. *Id.* at 155.
201. *Id.* at 153.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at 161.
206. *Id.*
207. *Id.* at 159.
208. *Id.*
209. *Id.*
210. *See id.*

The Court went on to explain how this holding fell in line with *Troxel* jurisprudence.[211] The Court first recognized that Texas's third-party standing is much narrower than *Troxel* requires.[212] The Court even went on to say that the Texas statute is "much higher and narrower than the one rejected in *Troxel*."[213] The Court backed its reasoning with an examination of how other jurisdictions have "declined to treat *Troxel* as a bar to recognizing *de facto* parenthood or other [similar] designations" for individuals who have assumed parent-like roles in a child's life.[214]

While the Supreme Court of Texas left the appellate courts wondering what actual care or permanency of residence meant, the opinion in *In re H.S.* demonstrates the frustration with the language—actual care, control, and possession—that the Texas Legislature created in the Family Code.[215] This opinion suggests the Court's willingness to adopt a more relaxed approach to standing. For the first time, the Court seemed to take a child-centered approach, unlike the plurality opinion in *Troxel*.[216] For once, the parental presumption did not reign supreme as the Court expressed the importance of allowing individuals who play a parent-like role in the child's life to continue.[217] While the Court fell short of adopting any type of more lenient standard than the actual care, control, and possession language, this opinion suggests that the Court is sympathetic to children whose best interest is never examined due to the narrow standing that bars the third-party's claim altogether.[218]

D. The 2017 Uniform Parentage Act and Standing in Other States

To better protect the best interest of the child, Texas should use the 2017 Uniform Parentage Act (UPA) and other states as an example for how Texas should deal with the narrow standing issues that the Texas courts are currently faced with. The UPA is the product of the National Conference of Commissioners on Uniform State Laws (Commission).[219] The Commission is a collection of qualified practicing attorneys, judges, legislators, and law professors, so their knowledge of the law is extensive.[220] The Commission creates model legislation and then encourages each state to adopt the

211. *Id.* at 161.
212. *Id.*
213. *Id.* at 162.
214. *Id.* (quoting Conover v. Conover, 146 A.3d 433, 445–46 (Md. 2016)).
215. TEX. FAM. CODE ANN. §§ 102.003, 103.001; *In re H.S.*, 550 S.W.3d at 159.
216. *In re H.S.*, 550 S.W.3d at 159–63.
217. *Id.*
218. FAM. § 103.001.
219. Lindsy J. Rohlf, *The Psychological-Parent and De Facto Parent Doctrines: How Should the Uniform Parentage Act Define "Parent"?*, 94 IOWA L. REV. 691, 712 (2009).
220. *Overview: About Us*, UNIFORM L. COMMISSION, https://www.uniformlaws.org/aboutulc/overview (last visited May 30, 2020).

legislation exactly as it has been written to create uniformity among the states.[221] The Commission created the UPA to promote uniformity among parentage laws, and many states have chosen to adopt one of the versions of the UPA.[222]

The UPA has gone through multiple versions; however, the changes to the UPA are made because advances in technology or social changes require amendment.[223] When previous versions were released, Texas chose to adopt much of the exact language from those versions of the UPA.[224] Currently, Texas's Family Code boasts much of the 2000 version of the UPA.[225] Because Texas chose to adopt much of the 2000 UPA language, many other states have similar statutory schemes as Texas's Family Code.[226]

While the 2000 version of the UPA did not include the de facto doctrine, the 2017 version chose to extend standing to de facto parents.[227] Specifically, it redefines parent to include de facto parents.[228] The language—borrowed from Delaware and Maine—allows individuals who have performed parent-like functions to adjudicate themselves as the child's parent.[229] When explaining why the Commission chose to include the de facto doctrine, the Commission stated that this "reflects trends in state family law."[230] The Commission also went on to state that: "This provision ensures that individuals who form strong parent-child bonds with children with the consent and encouragement of the child's legal parent are not excluded from a determination of parentage."[231]

Not only does the Commission recognize that due to changing times, de facto parents must be recognized as parents, but many other states—some with very similar statutory schemes as Texas—have already determined that de facto parents should be recognized as parents.[232] Many courts view the de

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221. *Id.*

222. *Id.*

223. *See* Rohlf, *supra* note 219, at 713–14. The first version of the UPA was promulgated in 1973 to address the equal protection issue of children born out of wedlock. *Id.* The next version came in 2000, was amended in 2002, and addressed new DNA technologies and the new issues that assisted reproduction posed. *Id.* The biggest change was the redefining of "parent." *Id.* The 2000 version still chose to keep the traditional definition of legal or adoptive parent but chose to include an individual that conceived the child through any means of assisted reproduction. *Id.* The 2017 version included the de facto parent doctrine to redefine parents again. UNIF. PARENTAGE ACT, Prefatory Note, at 2 (UNIF. LAW COMM'N 2017).

224. *Parentage Act (2000)*, UNIFORM L. COMMISSION, https://www.uniformlaws.org/committees/community-home?CommunityKey=5d5c48d6-623f-4d01-9994-6933ca8af315 (last visited May 30, 2020).

225. *Id.*

226. *Id.* (indicating that Illinois, New Mexico, Alabama, Oklahoma, North Dakota, Utah, Delaware, Wyoming, Washington, and Texas have adopted the 2000 version of the Uniform Parentage Act).

227. UNIF. PARENTAGE ACT § 609 cmt. at 50–52 (UNIF. LAW COMM'N 2017) (discussing that the 2017 version adopted the de facto parent doctrine).

228. *Id.*

229. *Id.*

230. *Id.* at 50.

231. *Id.* at 51.

232. *See Parentage Act*, UNIFORM L. COMMISSION, https://www.uniformlaws.org/committees/

facto doctrine as an equitable remedy because it prevents the biological parent from disestablishing a status—that the parent once encouraged—to the detriment of the child.[233] Other courts that have allowed de facto parents to have standing reason that this form of equitable relief is the most fair and best protects the child's interests.[234] One court explained that the purpose of this equitable remedy in paternity actions is to prevent individuals—due to their conduct of either encouraging or creating the parent-child relationship—from later denying parentage regardless of the child's true biological status.[235] This reasoning arose from the public policy idea that "children should be secure in knowing who their parents are" and should not be harmed by their parents' belated and self-serving challenges to the child's paternity.[236] Courts are especially inclined to award equitable relief in scenarios where the parent knowingly created a parent-child relationship with a child not biologically related to the parent.[237]

States have adopted several doctrines to allow third-party parents to establish rights to a child that is not biologically related to them; however,

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community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f (last visited May 30, 2020) (indicating that Pennsylvania, Connecticut, Rhode Island, and Massachusetts introduced the 2017 version of the UPA in 2019 and California, Vermont, and Washington enacted the 2017 version of the UPA). Just to name a few, Washington, Maryland, and Delaware recognize the de facto parent doctrine for third-party parents. *See* Smith v. Guest, 16 A.3d 920 (Del. 2011); Conover v. Conover, 146 A.3d 433 (Md. 2016); *In re* L.B., 122 P.3d 161 (Wash. 2005) (en banc). The de facto parent doctrine is especially prevalent in southern states. *See* Smith v. Smith, 922 So. 2d 94 (Ala. 2005) (recognizing the loco parentis and de facto parent doctrines in tort actions); Bethany v. Jones, 378 S.W.3d 731 (Ark. 2011) (recognizing loco parentis, a very similar doctrine to the de facto parent doctrine); Mullins v. Picklesimer, 317 S.W.3d 569, 578 (Ky.), *as modified on denial of reh'g* (Ky. 2010) (providing a statutory scheme that allows nonparents to seek custody if the court determines them to be de facto parents); Wilson v. Davis, 181 So. 3d 991 (Miss. 2016) (recognizing the loco parentis doctrine); Heatzig v. MacLean, 664 S.E.2d 347, 350 (N.C. 2008) (recognizing the de facto parent doctrine and in loco parentis status when the legal parent acts inconsistently with his or her constitutionally protected interest); Middleton v. Johnson, 633 S.E.2d 162 (S.C. Ct. App. 2006) (recognizing the de facto parent doctrine). South Carolina has also statutorily recognized de facto status; however, this status does not mirror the normal elements seen for a de facto parent doctrine. *See* S.C. CODE ANN. § 63-15-60 (Westlaw through 2020 Act No. 115).

233. *See In re L.B.*, 122 P.3d at 179.

234. *See* Freedman v. McCandless, 654 A.2d 529, 533 (Pa. 1995). In paternity suits, courts allow parents to assert these equitable remedies both offensively and defensively. *In re* Shockley, 123 S.W.3d 642, 652 (Tex. App.—El Paso 2003, no pet.). The equitable remedy can be applied offensively to prevent the father from denying parentage to a child after he voluntarily took on the role as father or defensively by preventing the mother from denying the father's paternity after she encouraged the relationship. *See id.*

235. *McCandless*, 654 A.2d at 533. In fact, one court created a hypothetical very similar to the facts of Tim's case. *See* John M. v. Paula T., 571 A.2d 1380, 1386 (Pa. 1990). In that case, the Supreme Court of Pennsylvania stated that in certain circumstances, individuals are estopped from challenging paternity, regardless of their knowledge of nonpaternity and stated: "The classic example of this principle is where a man who has lived with a woman and her children for a number of years and has held himself to the world as the father of said children" that woman should be estopped from denying the status which she has previously accepted. *Id.* (citing Commonwealth *ex rel* Weston v. Weston, 193 A.2d 782 (Pa. 1963)).

236. Hausman v. Hausman, 199 S.W.3d 38, 42 (Tex. App.—San Antonio 2006, no pet.) (quoting *In re Shockley*, 123 S.W.3d at 651–53).

237. *Paula T.*, 571 A.2d at 1386 (citing *Weston*, 193 A.2d at 782).

each state deals with the doctrine a little differently.[238] Some states choose to judicially recognize the doctrine, while other states promulgated legislation that adopts one of the approaches.[239] Even within a particular doctrine, there are variances among the states.[240] Some states, for example, require that the third-party parent show that he or she was the primary caregiver to the child as opposed to the biological parent, while other states do not require such showing.[241] Lastly, to add to the confusion, some states use the different doctrines synonymously, while other courts specifically recognize that there are different standards between the doctrines.[242]

While there are differences between the doctrines and the elements will vary slightly from state to state, each of these doctrines serves the same purpose: To ensure that an individual with legal rights to a child does not sever the non-biological parent-child relationship at the expense of the child's well-being.[243] Each has been used to resolve visitation and custody disputes for individuals that have fulfilled parent-like roles.[244] When a parent meets

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238. *See* Conover v. Conover, 146 A.3d 433, 439 (Md. 2016) (citing V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000)) (recognizing the de facto parent doctrine and explaining that this doctrine has long served to protect important relationships in children's lives); *see also In re* H.S.H-K., 533 N.W.2d 419, 435–36 (Wis. 1995) (adopting the psychological parent doctrine that has similar elements to the de facto parent doctrine). The Wisconsin Supreme Court recognized a psychological parent exists when:

> (1) . . . the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) . . . the petitioner and the child lived together in the same household; (3) . . . the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) . . . the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

Id. (footnotes omitted).

239. *Compare Conover*, 146 A.3d at 439 (adopting the de facto parent doctrine judicially), *with* DEL. CODE ANN. tit. 13, § 8-201 (West, Westlaw through ch. 236 of the 150th Gen. Assemb.) (recognizing the de facto parent doctrine statutorily).

240. *Compare In re* L.B., 122 P.3d 161, 176 (Wash. 2005) (en banc) (recognizing the de facto parent doctrine when: "(1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature"), *with Conover*, 146 A.3d at 439 (quoting *In re H.S.H-K.*, 533 N.W.2d 419 (1995)) (recognizing the de facto parent doctrine when "the legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged").

241. Heatzig v. MacLean, 664 S.E.2d 347, 350 (N.C. 2008) (recognizing the de facto parent doctrine and in loco parentis status when the legal parent acts inconsistently with his or her constitutionally protected interest).

242. Ferrand v. Ferrand, 16-7 (La. App. 5 Cir. 08/31/16); 221 So. 3d 909, 923 (discussing the various doctrines and indicating that they are not synonymous). For the remainder of this Comment, and for consistency's sake, this Comment will advocate for the adoption of the de facto doctrine, although other courts may refer to a similar doctrine by another name.

243. *Id.*

244. *Id.*

the requirements[245] of the de facto parent doctrine, the law views the individual as an equal to the biological parent of the child.[246] This has many implications for third-party parents because they no longer have to overcome the parental presumption.[247] This is why Texas must move away from the arbitrary six months and ninety-day rule and instead *expressly recognize* one of these doctrines to protect the interests of the child by allowing a third-party parent to be seen as an equal to the biological parent when the third-party parent has fulfilled a significant parent-like role for the child.[248]

III. TEXAS SHOULD ADOPT THE UPA'S DEFINITION OF "PARENT" TO INCLUDE DE FACTO PARENTS

Texas's failure to recognize the de facto parent doctrine and narrow third-party standing to bring a SAPCR prevents courts from protecting a child's liberty interest to continue familial relationships regardless of biological links; therefore, Texas should redefine *parent* to include de facto parents to protect the child's fundamental liberty interest in stable familial relationships that are in the best interest of the child.[249]

A. Proposed Legislation for Texas to Adopt Parts of the UPA

The most effective and efficient way for Texas to recognize the de facto parent doctrine would be through legislation to provide the most clarity to all parties involved.[250] This recognition would require an amendment to § 101.024 of the Texas Family Code.[251] More specifically, this amendment would redefine "parent" in subsection (a) to include de facto parents.[252] Currently, this section defines *parent* as:

> (a) "Parent" means 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

245. *Id.* The third-party parent must usually prove by clear and convincing evidence that the elements of the doctrine have been met. *Id.*

246. *Id.*; *In re* L.B., 122 P.3d 161, 176 (Wash. 2005) (en banc) (allowing the same-sex partner the same opportunity to seek custody as the legal parent).

247. *See supra* Part II.B.1 (discussing the parental presumption); *infra* Part III.E (explaining that de facto parents neither have to overcome the parental presumption nor does a strict scrutiny analysis apply).

248. TEX. FAM. CODE ANN. § 102.003(a)(9).

249. *See supra* Part I (explaining that children have a fundamental liberty interest in familial relationships).

250. UNIF. PARENTAGE ACT § 609 cmt. at 51 (UNIF. LAW COMM'N 2017).

251. FAM. § 101.024 (defining when Texas will consider an individual a legal parent).

252. *Id.* § 101.024(a).

> father. Except as provided by Subsection (b), the term does not include a parent as to whom the parent-child relationship has been terminated.[253]

This amendment to § 101.024(a) would add the de facto parent language from the 2017 version of the UPA.[254] The amended legislation would add the following additional language:

> (a) "Parent" means 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, . . . an adoptive mother or father,[255] *or de facto parent*. Except as provided by Subsection (b), the term does not include a parent as to whom the parent-child relationship has been terminated.[256]
>
> *(1) A de facto parent shall not be a de facto parent until the court determines by clear and convincing evidence that the person meets the definition of a de facto parent under paragraph (3) of this subsection. Once the court determines that the person meets the definition of a de facto parent, the court shall give the person the same standing in custody matters that it gives to each parent as defined in paragraph (a) of this section.*[257]
>
> *(2) The following rules govern standing of an individual who claims to be a de facto parent of a child to maintain a proceeding under this section:*[258]
>
> > *(i) The individual must file an initial verified pleading alleging specific facts that support the claim to parentage of the child asserted under this section. The verified pleading must be served on all parents and legal guardians of the child and any other party to the proceeding.*[259]
> >
> > *(ii) An adverse party, parent, or legal guardian may file a pleading in response to the pleading filed under paragraph (i). A responsive pleading must be verified and must be served on parties to the proceeding.*[260]
> >
> > *(iii) Unless the court finds a hearing is necessary to determine disputed facts material to the issue of standing, the court shall determine, based on the pleadings under paragraphs (i) and (ii), whether the individual has alleged facts sufficient to satisfy by clear and convincing evidence the requirements of paragraphs (1) through (7) of*

253. *Id.*

254. UNIF. PARENTAGE ACT § 609 cmt. at 50 (UNIF. LAW COMM'N 2017).

255. FAM. § 101.024.

256. *Id.* (emphasis added to indicate proposed amended material).

257. *See* KY. REV. STAT. ANN. § 403.270 (West, Westlaw through Ch. 5 of the 2020 Reg. Sess.) (emphasis to indicate amended proposed material).

258. UNIF. PARENTAGE ACT § 609(c) (UNIF. LAW COMM'N 2017) (emphasis to indicate proposed amended material).

259. *Id.* § 609(c)(1) (emphasis to indicate proposed amended material).

260. *Id.* § 609(c)(2) (emphasis to indicate proposed amended material).

> *subsection (2). If the court holds a hearing under this subsection, the hearing must be held on an expedited basis.*[261]
>
> *(3) An individual will be deemed a de facto parent if by clear and convincing evidence they demonstrate that: "(1) the individual resided with the child as a regular member of the child's household for a significant period; (2) the individual engaged in consistent caretaking of the child; (3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation; (4) the individual held out the child as the individual's child; (5) the individual established a bonded and dependent relationship with the child which is parental in nature; (6) another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and (7) continuing the relationship between the individual and the child is in the best interest of the child."*[262]

The adoption of the de facto parent doctrine through legislation is the best avenue to protect a child's rights for several reasons. First, it would help promote uniform recognition of a child's fundamental right to familial relationships.[263] Second, the proposed amendment to § 101.024(a) is constitutional because the de facto parent doctrine has withstood many state *Troxel* challenges, the commissioners of the UPA believe it is constitutional, and many United States Supreme Court Justices indicate that they would also find the de facto parent doctrine constitutional.[264]

Third, the proposed amendment to add de facto parents to § 101.024(a) allows third-party parents to avoid the inconsistent actual care, control, and possession language and the unpredictable applications of the de facto parent doctrine when the court judicially adopts the doctrine.[265] The inner workings of the Texas Family Code would allow a de facto parent to have standing to bring a SAPCR under § 102.003 of Texas Family Code, which confers standing to any individual defined as a parent under § 101.024(a).[266] This would also mean that de facto parents could bring a SAPCR at any time; the ninety-day limit would not apply to de facto parents.[267]

Fourth, subsection (1) of the proposed legislation allows the court to balance all of the competing interests.[268] Specifically, it allows the court to

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261. *Id.* § 609(c)(3) (emphasis to indicate proposed amended material).

262. *Id.* § 609(d)(1)–(7) (emphasis to indicate proposed amended material).

263. *See infra* Part III.B (discussing the benefits and constitutionally mandated uniform laws).

264. *See infra* Part III.C (discussing the constitutionality of the de facto doctrine).

265. *See* TEX. FAM. CODE ANN. § 102.003; *see also supra* Part II.C.2 (explaining the interpretation inconsistencies in the actual care, control, and possession language).

266. *See* FAM. §§ 102.003, 101.024.

267. *See id.* § 102.003.

268. *See supra* Part III.A (allowing the court to view the de facto parent as an equal to the biological parent).

view the de facto parent as an equal to the biological parent.[269] The court would only consider the best interest of the child, and there is no longer a parental presumption that the de facto parent must overcome.[270] This allows the court to adequately balance all the competing interests and prevent biological parents from arbitrarily denying a third-party parents' rights to the children the third-party has formed a bond with.[271]

Fifth, adding subsection (2) of the proposed language specifically protects a biological parent's rights to prevent excessive family intrusion.[272] While the limiting language proposed in subsection (3) would likely withstand any *Troxel* challenge because it is more limited than the overly broad statute the Court invalidated in *Troxel*, the heightened pleading standard is an extra safety measure to ensure that the biological parent's rights are protected and the de facto parent doctrine is upheld.[273]

Lastly, Subsection (3) of the proposed language expressly states the necessary facts that the third-party parent must allege for the court to view an individual as a de facto parent.[274] These seven elements ensure that all competing interests balance one another adequately. These seven elements, which the Uniform Law Commission proposed, include limiting language to further protect against excessive intrusion into the family unit.[275]

B. Benefits of Uniform Laws Recognizing the Child's Fundamental Right

The Uniform Law Commission (Commission) seeks to create uniformity among state laws, so they draft model legislation and then urge their home states to adopt it.[276] The Commission specifically created the UPA to promote uniformity of parentage laws.[277] Because of the benefits of uniform laws, the Commission encourages the states to adopt the UPA exactly as it was written.[278] Commentators generally see uniformity of laws as positive for multiple reasons.[279] First, laws across jurisdictions are the

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269. *See infra* Part III.E (explaining that the de facto parent allows the court to view the biological parent and the de facto parent as equals).

270. *See infra* Part III.F (discussing that the de facto parent doctrine allows the court to take a child-centered approach).

271. *See infra* Part III.E (explaining the necessary balancing the court must be willing to undertake to protect the rights of the child).

272. *See supra* Part III.A (requiring the de facto parent to plead the claim under a heightened pleading standard).

273. Troxel v. Granville, 530 U.S. 57, 73 (2000).

274. *See supra* Part III.A (explaining the elements of the claim that includes limiting language to ensure the biological parent's rights are adequately protected).

275. *See supra* note 273 and accompanying text (explaining how the decision in *Troxel* protects the family unit).

276. Rohlf, *supra* note 219, at 712.

277. Harry L. Tindall & Elizabeth H. Edwards, *The 2017 UPA: Strengthening Protections for Children and Families*, FAM. ADVOC. 30, 31 (2017).

278. *Id.*

279. Rohlf, *supra* note 219, at 713.

same.[280] Not only does this create uniformity among jurisdictions, but this also allows courts to apply the laws uniformly.[281] Uniform application occurs because courts from one jurisdiction can more easily use case law from another jurisdiction to help guide them in their own interpretation because the language of the statute is identical or almost identical.[282] Not only does this ensure the consistent application among the states, but uniformity of laws also ensures that individuals from one state have the same rights as individuals from another state.[283]

Not only are there benefits to having uniform laws among the states, but the Constitution also mandates some uniformities.[284] States must protect fundamental rights uniformly.[285] While a state may add additional safeguards to a fundamental right, they cannot relax or choose to disregard the required protection for a fundamental right.[286] Because of constitutionally-mandated uniformity, states must protect any fundamental rights that a child possesses.[287]

Because a child's right to relationships regardless of biology is a fundamental right, it is essential that states protect this right.[288] However, the narrow standing allowed for third-party parents in Texas causes courts to consider this right inadequately.[289] First, the narrow standing precludes many third-party parent claims.[290] But even if the third-party parent can establish standing, a child's right to familial relationships does not receive equal weight in Texas because the court does not give the interest that the child possesses the same importance as the parent's rights in custody hearings; instead, the parental presumption overshadows the child's best interest.[291] Although the Supreme Court is willing to recognize children's rights against outsiders and the state, the Supreme Court has been reluctant to recognize children's rights when those rights directly conflict with the wishes of their parents.[292] This reluctance occurs because a parent's decisions receive great

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280. *See id.* at 712.

281. *Id.*

282. *See id.* Another benefit that uniform laws create is that the uniformity allows individuals to more easily move from one state to the next, as well as promote economic growth because it allows companies to transact business more easily across many states. *Id.* at 713. However, that benefit is not particularly beneficial for this Comment's purpose.

283. *Id.*

284. U.S. CONST. amend. XIV, §1.

285. *See id.*

286. *See id.*

287. *See id.*

288. *See supra* Part I (discussing that children, like adults, have a fundamental right in relationships).

289. *See supra* Part I (discussing that children, like adults, have a fundamental right in relationships).

290. *See supra* Part II.C.2 (discussing the narrow standing for third-party parents in Texas).

291. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).

292. *Compare id.* at 72–75 (invalidating a Missouri law that required minors to receive parental permission before obtaining an abortion), *with* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 510–19 (1990) (upholding a statute that required an unmarried dependent minor to give notice to her parents before receiving an abortion).

deference even when the decision, from the outside looking in, may appear to not be in the best interest of the child.[293] In theory, courts should recognize children's rights independent from their parents' rights, but this rarely happens.[294] This failure to recognize a child's competing interest does not indicate that the courts do not believe the right exists; this only indicates that this right is under-protected.[295]

When the courts fail to recognize a child's competing interest and also do not recognize the de facto parent doctrine, the harm to the child compounds.[296] Failing to recognize rights has negative implications for children of nontraditional families.[297] Familial relationships satisfy both social and emotional needs; however, for children, familial relationships go even further as they provide children with their basic needs and protection, and even have a lasting impact on children for the remainder of their lives.[298] Because of the significant impact that relationships have on a child, courts must be especially mindful of severing established relationships.[299] To remedy an encroachment of the biological parent's rights by limiting the competing interest of the child only further negatively impacts the child and disregards his or her best interest.[300] In fact, the Texas Supreme Court has acknowledged a public interest "in securing stable homes and supportive families for children."[301] And this is not the only Texas court that has recognized the importance of stable family relationships. The San Antonio Court of Appeals also recognized the importance of preventing the severance of established relationships because children should be secure in knowing that the established parent-child relationship will continue.[302] Because of the importance of family relationships, not only does severance negatively impact the child's emotional well-being, but an established family relationship is a constitutionally protected interest that mandates uniform and adequate protection—more protection than the Texas Family Code currently affords.[303]

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293. *See supra* Part II.B (explaining that in many cases the parental presumption will outweigh the best interest standard).

294. *See* Charles D. Gill, *Essay on the Status of the American Child, 2000 A.D.: Chattel or Constitutionally Protected Child-Citizen?*, 17 OHIO N.U. L. REV. 543, 547–49 (1991).

295. *See id.*

296. *See supra* Part II.A (highlighting the way a child might depend on relationships with non-biological parents).

297. *See supra* Part II.A (discussing the negative impacts that separation has on a child).

298. *See* Onorato, *supra* note 89, at 495–96.

299. *See* Godin v. Godin, 725 A.2d 904, 909–10 (Vt. 1998).

300. *In re* J.W.T., 872 S.W.2d 189, 195 (Tex. 1994) (explaining that there are times when the child's right to a safe and stable home will trump the rights of the child's biological parent).

301. *Id.*

302. Hausman v. Hausman, 199 S.W.3d 38, 42 (Tex. App.—San Antonio 2006, no pet.) (citing *In re* Shockley, 123 S.W.3d 642, 651–53 (Tex. App.—El Paso 2003, no pet.)).

303. Abrams, *supra* note 88.

Redefining *parent* to include the de facto parent doctrine would ensure that Texas uniformly and adequately protects the child's fundamental rights and takes steps towards ensuring that all states uniformly protect the child's rights.[304] Under the current established law, a child may or may not have a right to continue an established relationship solely because of where the child lives.[305] This should not be the case considering the interest that is at stake. A state's failure to recognize any form of the de facto doctrine has a detrimental effect on the child. Thinking back to the example with Tim, had he and Katie lived in a state that recognizes the de facto parent doctrine the outcome would have been very different.[306] The court would have likely deemed Tim as Katie's de facto parent and would have considered him as an equal to Marissa.[307] The court would be hard-pressed to choose no father over the loving and devoted father that Katie has always known.[308]

C. The De Facto Parent Doctrine Is Constitutional under Troxel

Texas's adoption of a uniform de facto doctrine would not only provide uniformity to a child's recognized liberty interest, but the adoption would also fall well within constitutional bounds.[309] While the de facto doctrine has never undergone a *Troxel* challenge in the United States Supreme Court, support indicates the de facto doctrine's constitutionality: (1) the undertone of many of the justices' opinions in *Troxel*, (2) the fact that the de facto doctrine has withstood state *Troxel* challenges, and (3) the Commission's adoption of the de facto parent.[310] In *Troxel*, the Supreme Court held that the Washington statute was unconstitutional as applied and chose not to strike the statute down as unconstitutional per se.[311] Following the language of the *Troxel* holding, several states have expressly found this opinion to be very narrow and thus had no impact on the de facto doctrine.[312]

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304. *See* discussion *supra* notes 268–95 (discussing that a de facto parent doctrine would allow states to uniformly protect children's rights and ensure that all children are treated equally amongst the states).

305. *See supra* note 232 (discussing various states and the doctrine that the state chose to adopt).

306. *See supra* Part I (detailing the relationship between Tim and Katie).

307. *See supra* Part III.A (viewing the elements of the proposed de facto parent doctrine, Tim would have easily had enough evidence to prove he was a de facto parent by clear and convincing evidence).

308. *See supra* Part I (discussing Tim and Katie's relationship and the SAPCR related to it).

309. *See supra* Part III.B (explaining the best interest standard).

310. *See* Conover v. Conover, 146 A.3d 433, 439 (Md. 2016); UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017); Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v. Granville, 2000 SUP. CT. REV. 279, 283 (2000).

311. Troxel v. Granville, 530 U.S. 57, 73 (2000).

312. *See* Hernandez v. Hernandez, 265 P.3d 495, 498 (Idaho 2011) (describing *Troxel*'s holding as "limited" and that the case only stood "for the narrow proposition that Wash. Rev. Code § 26.10.160(3) (1994) is constitutionally infirm as applied in that case."); *see also* Jeff H. Pham, Comment, *Does Mother Still Know Best?:* In re Marriage of Harris *and Its Impact on the Rights of Custodial Parents*, 38 LOY. L.A. L. REV. 1871, 1878 (2005) (referring to *Troxel* as a "deliberately narrow opinion").

Many of the highest courts in multiple states have held that their de facto doctrine was constitutional on *Troxel* grounds.[313] The Washington Supreme Court in *In re L.B.* adopted the de facto parent doctrine, declining to find that the doctrine infringed upon the biological mother's rights under *Troxel*.[314] Additionally, in *Conover*,[315] the Maryland Court of Appeals chose to extend the de facto doctrine to same-sex couples.[316] When choosing to adopt the de facto doctrine, each court discussed how this doctrine fell in line with *Troxel*.[317] The *Conover* court relied heavily on Justice O'Connor's words in *Troxel* that the Court "would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter."[318] To explain the reasoning for the Court's refusal to find nonparental visitation statutes invalidated per se, the opinion of Justices Stevens and Kennedy explained that there is a difference between allowing any third party to interject into the family unit and allowing an individual who has fulfilled a substantial parent-like role in the child's life to interject.[319]

While eight Supreme Court Justices stressed the importance of parents' fundamental liberty interest in rearing their children, seven justices indicated the Court's willingness to recognize a third-party parent's rights compared to grandparents' rights.[320] That indicates that the Supreme Court, not just the dissent, recognizes that there is a difference between a grandparent that may petition for rights at any time compared to a third-party parent that has played a significant role in a child's life.[321] Therefore, the de facto parent doctrine is much more narrow than the statute the Supreme Court invalidated in *Troxel*.[322] The Washington statute in *Troxel* permitted anyone to bring a

313. *See Conover*, 146 A.3d at 435; *In re* L.B., 122 P.3d 161, 178–79 (Wash. 2005) (en banc).

314. *In re L.B.*, 122 P.3d at 178–79.

315. *Conover*, 146 A.3d at 435. In the *Conover* case, two women, Michelle and Brittany, began a relationship in 2002 and together they agreed to have a child through artificial insemination. *Id.* Brittany was artificially inseminated and gave birth to Jaxon in 2009. *Id.* In 2011, the two women separated. *Id.* In July 2012, Brittany prevented Michelle from seeing Jaxon. *Id*. In February 2013, Brittany formally filed for divorce, and in April 2013, the Circuit Court for Washington County recognized that Michelle was Jaxon's de facto parent. *Id.* Nonetheless, the court held that Michelle did not have standing to bring the suit. *Id.* Maryland granted Michelle's writ of certiorari and conferred standing to Michelle under the de facto doctrine. *Id.*

316. *Id.*

317. *Id.* at 453.

318. *Id.* at 444 (quoting Troxel v. Granville, 530 U.S. 57, 73 (2000)).

319. *Troxel*, 530 U.S. at 85 (Stevens, J., dissenting) ("Even the Court would seem to agree that in many circumstances, it would be constitutionally permissible for a court to award some visitation of a child to a parent or previous caregiver in cases of parental separation or divorce, cases of disputed custody, cases involving temporary foster care or guardianship, and so forth."); *id.* at 100–01 (Kennedy, J., dissenting) ("[A] fit parent's right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a *de facto* parent may be another.").

320. Buss, *supra* note 310, at 284–86.

321. *Id.*

322. *See Troxel*, 530 U.S. at 73.

SAPCR to petition for custody, while the de facto doctrine contains strict limiting language.[323]

Further, the Commission chose to adopt the de facto doctrine in the 2017 version of the UPA under the belief that the doctrine is constitutional under *Troxel.*[324] Because each member of the Commission must be a licensed lawyer and many are judges, legislators, and law professors, their knowledge of the law is extensive.[325] Not only do these individuals have extensive knowledge of their area of law, but they also donate their time and receive no compensation for the time they spend drafting model legislation.[326] This encourages the proposed legislation to be free from outside pressure or input.[327] The Commission seeks to propose laws where uniformity in the law is of the utmost importance.[328] Therefore, the Commission would not add language into the 2017 version of the UPA that the Commission thought was not of the utmost importance that the states adopt or that this group of highly qualified individuals did not believe to be constitutional under the current state of family law jurisprudence.[329]

D. Redefining "Parent" Provides the Clearest Application

Because the de facto parent doctrine is likely constitutional under *Troxel*, many states have adopted de facto parent doctrines, but there are some inconsistent applications.[330] To best recognize the child's right to a third-party parent, Texas should statutorily recognize the de facto parent doctrine.[331] This allows a third-party parent to avoid the unpredictable interpretations of the actual care, control, and possession language, and also prevents inconsistent applications like those seen in *Atkinson* and *Zahorik*.[332]

As already discussed, Texas has struggled to interpret the meaning of actual care, control, and possession.[333] Even when the Supreme Court had the opportunity to address the inconsistencies of the Texas appellate interpretations, the Texas Supreme Court in *In re H.S.* left many questions

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323. *See supra* Part III.A (proposing strict limiting language that requires the de facto parent to live with the child and the biological parent and encourage the relationship).

324. UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017).

325. *Overview: About Us*, *supra* note 220.

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Compare* Van v. Zahorik, 597 N.W.2d 15, 20 (Mich. 1999) (declining to extend the equitable parent doctrine to individuals that have never been married), *with* Atkinson v. Atkinson, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987) (adopting the equitable parent doctrine).

331. UNIF. PARENTAGE ACT § 609 cmt. at 50. (UNIF. LAW COMM'N 2017).

332. *Zahorik*, 597 N.W.2d at 15; *Atkinson*, 408 N.W.2d at 519.

333. *See supra* Part II.C.2 (discussing the Texas court's interpretation issues with the actual, care, control, and possession language).

unanswered.[334] The opinion indicated that the Court is willing to recognize the more lenient standards to better protect the interest of the child; however, the interpretation that the Court will take on the other two appellate splits is left unaddressed.[335] The Court had the opportunity to address the other interpretation issues but declined to do so because "the parties d[id] not dispute . . . the statute's 'actual possession' requirement."[336] While this case indicates when the Texas Supreme Court recognizes actual possession, it does not indicate which analysis the Court would take if this issue had been before it.[337] This likely means that the Texas Supreme Court will not address this issue until a case that disputes the interpretation of actual control reaches it.[338] Because of the declination to address current interpretation issues, this indicates that the interpretive inconsistencies will likely continue for the foreseeable future and third-party parents will or will not be able to meet the actual control threshold of the third-party standing solely dependent upon their zip code.[339]

Redefining *parent* through the legislature would allow third-party parents to bypass the interpretive mess that has become § 102.003 of the Texas Family Code.[340] While redefining a parent to include de facto parents does open the door to inconsistencies within the elements of the de facto parent doctrine, the doctrine is an equitable remedy that does not require a specific set of facts.[341] Instead, this standard allows the court to look primarily at what the most equitable resolution should be.[342] Also, to take into consideration, is the wealth of case law from other jurisdictions to help guide the Texas courts on the correct interpretation of the de facto parent

334. *In re* H.S., 550 S.W.3d 151, 156 (Tex. 2018) (holding that to meet the statutory definition of control, the third party only needs to have actual control, not legal, but declined to define the other elements in the opinion).

335. *See id.*

336. *Id.*

337. *Id.*

338. *See id.*

339. TEX. FAM. CODE ANN. § 103.001(a) ("[A]n original suit shall be filed in the county where the child resides . . . ."); *id.* at § 103.001(c) ("A child resides in the county where the child's parents reside or the child's parent resides, if only one parent is living . . . ."). However, the Family Code does not address how the parent's residence is determined, nor does it specify the minimum amount of time required. *In re* S.D., 980 S.W.2d 758, 759 (Tex. App.—San Antonio 1998, pet. denied). Therefore, in theory, a parent could forum shop for the jurisdiction that provides for the most restrictive interpretation of actual, care, control, and possession to ensure that a third-party parent could not meet that threshold. *See id.*

340. FAM. § 102.003.

341. *See supra* Part III.A (noting that the elements proposed are not bright-line rules but instead support the notion that the de facto parent doctrine should allow the court to provide equitable relief).

342. *See supra* notes 235–236 and accompanying text (discussing that many courts view the de facto parent doctrine as an equitable remedy).

doctrine.[343] This will help to avoid the interpretive stalemate that the appellate courts currently face with § 102.003.[344]

States that have chosen to *judicially* recognize the de facto parent doctrine have created inconsistent applications, so *legislatively* recognizing the de facto parent doctrine will provide the most consistent application throughout Texas.[345] Nothing in the Texas Legislature precludes recognizing the de facto parent doctrine in this manner.[346] As Chief Justice McKeithen from the Ninth District Court of Appeals explained, there is nothing in the Texas Family Code that prohibits Texas from statutorily recognizing a third party as a legal parent of the child.[347] The Chief Justice even went so far as to state that "[n]othing in the plain language of Section 102.003(a)(9) excludes a person who shares the role of parent with the biological parent from having standing as a person with 'actual care, control, and possession' of the child."[348] Many states have agreed with Chief Justice McKeithen and already chosen to recognize the de facto doctrine; however, many of these states have elected to recognize the doctrine judicially.[349] As a result, there are some inconsistent applications of the doctrine throughout jurisdictions.[350]

One such example of the inconsistent applications occurred in Michigan in *Atkinson v. Atkinson* and *Van v. Zahorik*.[351] The Michigan Court of Appeals in *Atkinson*[352] recognized the equitable parent doctrine.[353] However, in *Zahorik*, the Michigan Supreme Court declined to extend the equitable parent doctrine to third-party parents that were never married, reasoning that if the doctrine should be extended to individuals that were never married, it was an issue that should be addressed through legislation.[354] While the

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343. *Compare* FAM. § 102.003 (Texas is the only state with the actual care, control, and possession language), *with* sources cited *supra* note 232 (proving numerous examples of other states that have adopted the de facto parent doctrine).

344. *See* FAM. § 102.003.

345. *See* UNIF. PARENTAGE ACT § 609 cmt. at 50 (UNIF. LAW COMM'N 2017).

346. *In re* K.K.C., 292 S.W.3d 788, 794 (Tex. App.—Beaumont 2009, no pet.) (McKeithen, C.J., dissenting), *abrogated by In re* H.S., 550 S.W.3d 151 (Tex. 2018).

347. *Id.*

348. *Id.* at 795 (citing FAM. § 102.003(A)(9)).

349. *See* sources cited *supra* note 232 (giving numerous examples of states that have judicially recognized the de facto parent doctrine).

350. *See* Van v. Zahorik, 597 N.W.2d 15 (Mich. 1999); Atkinson v. Atkinson, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987).

351. *Zahorik*, 597 N.W.2d at 15; *Atkinson*, 408 N.W.2d at 516.

352. *Atkinson*, 408 N.W.2d at 517–19. In that case, a nonbiological father sought visitation of his three-year-old son whom the mother purported to be his biological child born during their marriage. *Id.* at 517. The court awarded the non-biological father custody and visitation under the equitable parent doctrine reasoning that he played a significant role in raising the child. *Id.* at 518–19.

353. *Id.* at 519 (holding that a person can be considered an equitable parent when "(1) the husband and the child mutually acknowledge" the parent-child relationship or the mother encouraged the parent-child relationship, "(2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.").

354. *Zahorik*, 597 N.W.2d at 20 (declining to extend the equitable parent doctrine to individuals who never married).

Zahorik case would likely have a different outcome in Texas, recognizing de facto through legislation ensures consistent application to all third-party parents and the clear intent for the doctrine to apply regardless of marriage.[355] Although Texas has already addressed the issue that the holding turned on in *Zahorik*, this Comment advocates for a change to ensure that *all children* are afforded the same rights and wishes to avoid the inconsistent application the Michigan Supreme Court and the Michigan Court of Appeals applied.[356]

E. The De Facto Parent Doctrine Provides the Best Balance Among Competing Interests

Beyond avoiding inconsistencies, the de facto parent doctrine allows courts to adequately weigh all competing interests involved in determining custody of a child.[357] This doctrine allows the court to examine what is in the best interest of the child and protect the child's fundamental rights.[358] The de facto doctrine also prevents the arbitrary exercise of parental power, while adequately weighing the interests of the biological parent, third-party parent, and the fundamental rights of the child.[359]

1. Protection of the Child's Interests

The de facto doctrine protects the child's interests not only because it gives the third-party standing, but it removes the parental presumption.[360] The parental presumption is given such deference because if a biological parent wishes to deny a third-party parent parental rights, there is no requirement to show that the third-party parent is no longer a fit parent because the third-party parent is not seen as an equal to the biological parent.[361] This

355. *See* TEX. FAM. CODE ANN. § 160.202 (stating that children of married and unmarried parents must have the same rights). Because Texas has dealt with this issue with legislation in § 160.202 of the Texas Family Code, the Texas Legislature has expressly recognized that marriage is not an indicator of the relationship, nor does it decline to differentiate rights based on marital status. *Id.*

356. *Zahorik*, 597 N.W.2d at 15; *Atkinson*, 408 N.W.2d at 519. One canon of construction requires the court to "examine first the language of the governing statute, guided not by 'a single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and to its object and policy.'" John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank, 510 U.S. 86, 94–95 (1993) (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987)). Therefore, when interpreting the Family Code as a whole, if parent was defined to include de facto parents, the equality provision in § 160.202 of the Family Code would allow this doctrine to extend to children of unmarried parents. *See id.*; FAM. § 160.202. This interpretation would best serve the purpose of the de facto doctrine because as previously discussed, children deserve to have their rights protected regardless of their parent's marital status because children have a fundamental liberty interest in familial relationships. *See supra* Part I (discussing the fundamental rights children have in familial relationships).

357. *See supra* Part II.B.2 (explaining how the parental presumption often outweighs the best interest of the child standard).

358. *See supra* Part II.B.2 (same).

359. *See supra* Part II.B.2 (same).

360. *See supra* Part II.B.2 (same).

361. *See* FAM. § 102.003(a)(9).

arbitrary exercise of power is in no way fact-intensive; instead, the strong parental presumption allows a court to completely disregard any facts that show the third-party parent played a significant role in a child's life simply because there is a lack of a biological link.[362]

When a court recognizes an individual as a de facto parent, they are seen as an equal to the biological parent.[363] Justice Thomas's concurring opinion in *Troxel* argues that these doctrines cannot pass the strict scrutiny test; however, the strict scrutiny analysis does not apply in custody battles between a de facto parent and a biological parent.[364] As previously discussed, the right to make decisions regarding one's child is a fundamental right.[365]

When a fundamental right is subject to legislation, the Supreme Court applies a strict scrutiny analysis to test the constitutionality of the challenged law.[366] Courts should employ the strict scrutiny analysis when there are competing interests between a biological parent and a nonparent because the nonparent petitioning for custody of a child does not have a competing fundamental right to raise the child.[367] This is where the parental presumption arose and why Justice Thomas reasoned that the state cannot allow anyone to petition for custody of a child.[368] In that instance, Justice Thomas was correct that the State does not have a compelling interest that justifies intruding upon the family unit so long as the parent is fit.[369]

However, a strict scrutiny analysis is not the appropriate analysis when the custody battle is between two individuals that each have fundamental rights.[370] When the court views the de facto parent as an equal to the legal parent, the analysis the court should employ is the same analysis that the court uses when considering custody between two biological parents.[371] When two individuals each have a fundamental liberty interest in the care, custody, and control of the child, the court does not apply a strict scrutiny analysis.[372] Instead, when the competing interests are both fundamental, the court employs the best interest of the child analysis.[373] The parental presumption is

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362. *See id.*

363. *See supra* Part II.B.2 (explaining in the proposed language that once a court finds an individual to be a de facto parent, the court will view that individual as an equal to the biological parent).

364. *See* Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).

365. *See id.* at 73; Reist v. Bay Cty. Circuit Judge, 241 N.W.2d 55, 62 (Mich. 1976) (holding that the fundamental right to relationships is encompassed in the word *liberty*).

366. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 54 (1983) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973)) ("[W]hen government action impinges upon a fundamental right protected by the Constitution" the Court will apply a strict scrutiny analysis). A strict scrutiny analysis requires the State to show that there is a compelling interest and that the means taken are narrowly tailored to meet this interest. *Id.* at 45.

367. *In re* L.B., 122 P.3d 161, 178 (Wash. 2005) (en banc).

368. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

369. *Id.*

370. *In re L.B.*, 122 P.3d at 178.

371. *Id.*

372. *Id.*; *Troxel*, 530 U.S. at 65.

373. *In re L.B.*, 122 P.3d at 178.

no longer a factor that the court considers.[374] The Delaware Supreme Court, in holding that *Troxel* neither precluded the de facto doctrine nor required a strict scrutiny analysis, explained:

> *Troxel* does not control these facts. The issue here is not whether the Family Court has infringed [upon the biological parent's] fundamental parental right to control who has access to [her child] by awarding [the third-party parent] co-equal parental status. Rather, the issue is whether [the third-party parent] is a legal "parent" of [the child] who would also have parental rights to [the child]—rights that are co-equal to [the biological parent's]. This is not a case, like *Troxel*, where a third party having no claim to a parent-child relationship (*e.g.,* the child's grandparents) seeks visitation rights. [The third-party parent] is not "any third party." Rather, she is a (claimed) *de facto* parent who (if her claim is established, as the Family Court found it was) would also be a legal "parent" of [the child]. Because [the third-party parent], as a legal parent, would have a co-equal "fundamental parental interest" in raising [the child], allowing [the third-party parent] to pursue that interest through a legally-recognized channel cannot unconstitutionally infringe [the biological parent's] due process rights. In short, [the biological parent's] due process claim fails for lack of a valid premise.[375]

Thus, a biological parent's due process argument does not apply when the biological parent asserts it against a third-party parent when the court deems the third-party parent to meet the requirements of the de facto parent doctrine.[376]

Viewing a de facto parent and the biological parent as equals is not precluded by law.[377] There is no constitutional restriction, either judicially or through legislation, as to how a state must define "parent or family."[378] In fact, the Supreme Court has expressly rejected biology as being a prerequisite before the Court recognizes an individual as a legal parent.[379] Once a court views the de facto parent and the biological parent as equals, the often-outweighed parental presumption no longer applies.[380] This allows the court to look at what is in the best interest of the child, and does not require the de facto parent to show that the child will suffer actual harm before the court will consider awarding custody and visitation to a de facto parent.[381]

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374. *See supra* Part II.B.1 (discussing the parental presumption).

375. Smith v. Guest, 16 A.3d 920, 931 (Del. 2011) (footnotes omitted).

376. *See id.*

377. *See In re L.B.*, 122 P.3d at 178.

378. *Id.*

379. *Id.* (citing Nancy D. Polikoff, *The Impact of* Troxel v. Granville *on Lesbian and Gay Parents*, 32 RUTGERS L.J. 825 (2001)).

380. *Guest*, 16 A.3d at 931.

381. *See id.*

Not requiring the de facto parent to overcome the parental presumption allows the court to consider and protect the fundamental rights of the child.[382] Although Texas recognizes that parents have fundamental rights concerning their children, courts have also recognized that protecting children "is of the highest importance because children are naturally unable to protect themselves."[383] Recognizing that the protection of children is important, courts have also recognized that the rights of a biological parent are not absolute.[384] Courts are more likely to diminish parental rights in favor of the child's interest when there is evidence that no other individual exists to fill the parental role if the court permits the biological parent to permanently remove the third party from the child's life.[385] As the *In re C.A.M.M.* court explained, there are some instances when public policy requires Texas courts "to resolve conservatorship disputes in a manner that provides a safe, *stable*, and nonviolent environment for the child," even if doing so infringes upon the parent's liberty interests.[386] Therefore, in some instances, the court must decide whether to allow the child to continue an established relationship when the liberty interests of the parent conflict with the child's liberty interests, the parent's interest must yield to the child's "where the child's welfare requires that its custody be given to others."[387]

2. Third-Party Parent's Protection from the Ninety-Day Window

Not only does the de facto parent doctrine protect the child's rights, but it also protects the third-party parent's rights from the harsh effects of the ninety-day threshold in § 102.003(a)(9).[388] As the dissent of *Troxel* warned, the current standing requirements for third-party parents to petition for custody of a child allows the biological parent to exercise arbitrary power that does not represent a child's best interest.[389] As § 102.003(a)(9) currently stands, it allows the arbitrary exercise of parental authority if the third-party parent fails to bring the SAPCR within ninety days.[390] If Texas chose to

382. *See supra* Part II.B.1 (discussing the parental presumption); *supra* Part II.B.2 (discussing how the court weights the parent's and child's interests).

383. Valastro, *supra* note 86, at 521.

384. *See In re* J.W.T., 872 S.W.2d 189, 195 (Tex. 1994) (explaining that the court may deny parents visitation to their children if it endangers the emotional or physical welfare of the children).

385. Godin v. Godin, 725 A.2d 904, 909–10 (Vt. 1998) (explaining that the state retains a strong interest to "protect[] innocent children from the social burdens of illegitimacy").

386. *In re* C.A.M.M., 243 S.W.3d 211, 216 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (citing TEX. FAM. CODE ANN. § 153.001(a)(2)); Valastro, *supra* note 86, at 521.

387. Reid v. Horton, 278 S.W.2d 626, 629–30 (Tex. App.—Amarillo 1954, writ ref'd n.r.e.).

388. *See* FAM. § 102.003(a)(9).

389. *See id.*; Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (stating that parental rights "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").

390. *See* FAM. § 102.003(a)(9); *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).

redefine parents to include de facto parents, this would provide de facto parents an avenue to always have standing to bring a SAPCR.[391]

Texas needs to allow de facto parents to not be limited to ninety days because that is too short of a time frame when considering the implications that failing to file within that window causes.[392] First, many individuals are not even aware of the rule because legal counsel does not represent them.[393] Between September 1, 2010 and August 31, 2011, approximately 21.6% (or 57,597) of the family law cases filed in Texas were by a pro se petitioner.[394] Secondly, the necessary facts to meet the actual care, control, and possession requirement can defeat a third-party claim if the biological parent and third-party parent have had an "off the record" agreement for more than ninety days.[395] For Tim, the ninety days passed because he believed that the informal visitation agreement that he and Marissa had would continue.[396] His belief was rightly justified.[397] That little girl had been his daughter from the moment she was born.[398] Marissa had encouraged him to be at the birth and placed his name on the birth certificate.[399]

By the time issues arose with child support, the ninety days had already passed and there was no way to remedy the issue.[400] There were no other statutory provisions that conferred standing.[401] Tim could not meet the actual care, control, and possession requirement for third-party standing because after the separation, he had his daughter for a couple of hours in the evening with the understanding that the child lived at Marissa's residence.[402] Tim failed to meet the threshold he had previously met for the entire life of his daughter.[403] Tim's failure to bring a SAPCR in no way indicates that his continued existence in his daughter's life is not in her best interest; instead, it only indicates that he is excluded from his daughter's life because of a technicality.[404] However, this technicality had huge implications for Tim; there was no other avenue to preserve this relationship.[405] This case illustrates

391. *See* FAM. § 102.003(a)(1). The biological parent of the child can bring a SAPCR without a time limitation. *Id.*

392. *See id.* § 102.003(a)(9).

393. TEX. ACCESS TO JUSTICE COMM'N, PRO SE STATISTICS, https://www.texasatj.org/sites/default/files/3ProSeStatisticsSummary.pdf (last visited May 30, 2020).

394. *Id.*

395. Brief for Appellant, *supra* note 5, at 7.

396. *Id.*

397. *Id.* at 6–7.

398. *Id.* at 6.

399. *Id.*

400. *See* TEX. FAM. CODE ANN. § 102.003(a)(9); Brief for Appellant, *supra* note 5, at 7.

401. *See* FAM. § 102.003(a)(9).

402. Brief for Appellant, *supra* note 5, at 7.

403. *See id.*

404. *See id.*

405. *See id.*

the harshness of the ninety-day limit that ties the court's hands and prevents any type of equitable remedy.[406]

3. The Heightened Pleading Standard Protects the Parent's and Child's Rights

While the court must always consider the children's rights in comparison to their biological parent's rights, both parent and child have an interest in the court preventing excessive intrusion into the family unit. Without a heightened pleading requirement, there could be instances when the de facto parent doctrine could allow excessive intrusion into the family unit. This threat is because Texas only requires notice pleading—instead of heightened pleading—for family law issues. To prevent the de facto doctrine from becoming too broad and failing a *Troxel* challenge, Texas should require a heightened pleading standard to protect the biological parent's liberty interest.[407] There are two avenues that the Texas Legislature could take to impose a heightened pleading standard. The first avenue suggests that the Texas Legislature adopt a claim-specific heightened pleading for de facto claims as the proposed language recommends, while the second avenue would require the legislature to amend Rule 91a of the Texas Rules of Civil Procedure to allow dismissing claims that arise under the Family Code.[408]

The second avenue, proposing to allow a dismissal under Rule 91a, is less favorable because it would require amendments to the Texas Rules of Civil Procedure and could have negative impacts on family law as a whole. Rule 91a is similar to a 12(b)(6) motion in federal court.[409] Before the addition of Rule 91a of the Texas Rules of Civil Procedure, there was no way to protect against frivolous claims because Texas was a fair notice state.[410] However, with the recent addition of Rule 91a, there is now a mechanism courts could use to dismiss frivolous de facto claims when there is no factual basis for the claim.[411] The threshold that the petitioner must overcome to survive a 91a challenge is that, based on the allegations in the pleading if

406. *See* FAM. § 102.003(a)(9). *See also* Brief for Appellant, *supra* note 5, at 7 (noting the lack of a remedy when the father does not have standing).

407. *See* TEX. R. CIV. P. 91a.1 (disallowing dismissal for failure to meet the heightened pleading requirement for family law cases).

408. *See* TEX. R. CIV. P. 91a.1; *supra* Part III.A (suggesting in subsection two of the proposed amended language to adopt a heightened pleading standard that is specific for de facto parent claims only).

409. FED. R. CIV. P. 12(b)(6). In federal court, heightened pleading acts as a protective measure that allows an individual to have a frivolous claim dismissed by filing a 12(b)(6) motion. *Id.* The Supreme Court in *Bell Atlantic Corp. v. Twombly* explained that an individual's grounds for relief must be more than a "formulaic recitation of the elements of a cause of action." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)). Instead, the pleading must indicate that the right to relief is above the speculative level if the allegations are taken as true. *Id.*

410. *See* TEX. FAM. CODE ANN. § 102.008 (only requiring the parties involved and facts that confer jurisdiction, but not any facts pertaining to the merits of the suit).

411. *See* TEX. R. CIV. P. 91a.1.

taken as true, the allegations indicate that the petitioner might receive the relief sought.[412] The allegations must be more than mere conclusory statements.[413] The pertinent part of Rule 91a states:

> [A] party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.[414]

While Rule 91a could add the same protections as the proposed language, as it is currently written, Rule 91a precludes dismissal of causes brought under the Family Code.[415] The reasoning for the exclusion of family law cases in Rule 91a is because "the paramount concern is the best interest of the child, and the niceties of the procedural rules of pleading will not be used to defeat that interest."[416] So for family law cases, to prevent the court from dismissing a claim simply because of a defect in the pleadings, the only requirement is to give the other party fair notice.[417] Much of this added protection in family law cases is because of the overwhelmingly large number of family law litigants that are pro se.[418] The Texas Access to Justice Commission stated that of all the family law cases filed between September 1, 2010 to August 31, 2011 approximately 21.6% or 57,597 of the cases filed were by a pro se petitioner.[419] Compare that statistic to only 16,862 of all other civil and probate cases combined that the petitioner filed pro se.[420]

Although there could be an amendment to allow a 91a dismissal for family law claims, the better solution would be for the legislature to include a heightened pleading for de facto suits specifically.[421] This would prevent other types of family law cases from being dismissed due to a pleading error.[422] This type of claim-specific pleading is not the first time that a heightened pleading requirement has been implemented.[423] For example, the

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412. Zelle, LLP, *Texas' Fair-Notice Pleadings Standard May Be in Trouble*, JDSUPRA (June 3, 2014), https://www.jdsupra.com/legalnews/texas-fair-notice-pleadings-standard-ma-00378/.

413. *Id.*

414. TEX. R. CIV. P. 91a.1.

415. *Id.*

416. Green v. Green, 850 S.W.2d 809, 812 (Tex. App.—El Paso 1993, no writ) (citing Boriack v. Boriack, 541 S.W.2d 237 (Tex. App.—Corpus Christi—Edinburg 1976, writ dism'd)).

417. *Boriack*, 541 S.W.2d at 242.

418. *See* TEX. ACCESS TO JUSTICE COMM'N, *supra* note 393.

419. *See id.*

420. *Id.*

421. *See supra* Part III.A (noting legislation Texas could adopt).

422. *See* TEX. ACCESS TO JUSTICE COMM'N, *supra* note 393. Because there is an overwhelming amount of pro se litigants in the family law realm, there is still an interest for the state to not require all claims to have the heightened pleading requirement. *Id.*

423. *See* FED. R. CIV. P. 9(b); *see also* TEX. FAM. CODE ANN. § 156.005 ("Notwithstanding Rules 296 through 299, Texas Rules of Civil Procedure, if the court finds that a suit for modification is filed

Federal Rules of Civil Procedure requires a heightened pleading for fraud and mistake.[424] Requiring a heightened, or fact-based, pleading for the de facto doctrine would provide a solution that balances the interest of the third-party parent and the biological parent. This heightened pleading standard would prevent just anyone from claiming that they have standing to bring a SAPCR as a de facto parent.[425]

While this heightened pleading will create an additional burden to litigants—especially pro se litigants—the pleadings of family law are not without guiding principles.[426] As the *Flowers* court explained, the Rules of Civil Procedure are still applicable in original and modification SAPCRs.[427] As the law currently stands, the court cannot grant relief that the petitioner has not specifically mentioned in the petition unless it has been tried by consent.[428] Therefore, while many family law cases involve pro se litigants, these litigants have to deal with the nuances of pleadings to ensure they have specifically requested the relief they seek.[429] Therefore, requiring the parties to allege facts that support a de facto claim is not so daunting a task that pro se litigants are incapable of accomplishing it, especially with the assistance of online legal aid for pro se litigants.[430]

4. The Limiting Language Protects Against Excessive Intrusion

Not only does the proposed heightened pleading standard protect against excessive intrusion into the family unit, but the proposed limiting language of the de facto parent doctrine also precludes excessive intrusion.[431] The Washington statute that the Court invalidated as applied in *Troxel* lacked any limiting language, which ultimately was its downfall.[432] The Court criticized the statute for creating an undue burden on parents by exposing biological

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frivolously or is designed to harass a party, the court shall state that finding in the order and assess attorney's fees as costs against the offending party.").

424. FED. R. CIV. P. 9(b) ("A party must state with particularity the circumstances constituting fraud or mistake.").

425. *See supra* Part III.A (suggesting proposed language that requires the de facto parent to live in the same household with the child and biological parent and for the biological parent to encourage the relationship).

426. *See* Flowers v. Flowers, 407 S.W.3d 452, 457 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *see also* FLA. R. CIV. P. 1.110(b) (West, Westlaw through Feb. 15, 2020) (requiring "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief"); MD. RULE 3-303(b) (West, Westlaw through Apr. 1, 2020) ("A pleading shall contain only such statements of fact as may be necessary to show the pleader's entitlement to relief or ground of defense.").

427. *Flowers*, 407 S.W.3d at 457.

428. Baltzer v. Medina, 240 S.W.3d 469, 475 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

429. *See id.*

430. *See Flowers*, 407 S.W.3d at 457.

431. *See supra* Part III.A (suggesting proposed language that limits the de facto claim to individuals that reside with the child and when the biological parent has encouraged the relationship between the child and de facto parent).

432. Troxel v. Granville, 530 U.S. 57, 66–67 (2000).

"parents to litigation brought by child-care providers of long standing, relatives, successive sets of stepparents or other close friends of the family."[433] However, the proposed language of the de facto doctrine has built-in mechanisms that prevent *just anyone* from bringing a SAPCR: (1) the de facto doctrine requires the biological parent to foster or encourage the relationship between the child and the de facto parent, and (2) the de facto parent must reside with the child.[434]

This limiting language prevents the slippery slope of allowing standing to any individual to intrude into the family unit.[435] The fundamental rights of biological parents are still protected because biological parents must allow the third-party parent to reside with them and actively encourage the relationship. This limiting language allows biological parents to assert their fundamental rights to decide who their child may associate with, because if the relationship was one that the biological parent thought was questionable, the biological parent would not actively encourage it and the result is the same: the third party lacks standing because he or she cannot prove the elements of the de facto parent doctrine.

Instead, the de facto doctrine enforces a status that the biological parent has allowed a de facto parent to assume.[436] This status only exists when the biological parent is an active encourager of a relationship between the de facto parent and the child.[437] This doctrine holds a parent liable for his or her prior conduct, which causes a bond to form between the child and the de facto parent.[438] Biological parents should not be able to encourage a relationship out of convenience and then later deny the relationship because of their own self-interest. Accordingly, the de facto parent doctrine "do[es] not infringe on the fundamental liberty interests of the other legal parent in the family unit" by allowing a de facto parent to bring a SAPCR to maintain the status quo.[439]

While the de facto doctrine will allow more individuals standing and will likely result in more litigation, this litigation will not result in instability for the children.[440] Precluding the de facto doctrine because the court fears instability during litigation only breeds more instability. The blink that litigation is in children's lives is incomparable to the life of instability

433. Nancy S. v. Michele G., 279 Cal. Rptr. 212, 219 (Cal. Ct. App. 1991).

434. *In re* L.B., 122 P.3d 161, 179 (Wash. 2005) (en banc).

435. *See supra* Part III.A (suggesting proposed language that will limit the scope of the de facto parent doctrine to prevent, for example, teachers, family friends, or babysitters from having standing to petition for custody).

436. *In re L.B.*, 122 P.3d at 179.

437. *Id.*

438. *See* Freedman v. McCandless, 654 A.2d 529, 533 (Pa. 1995) (discussing that courts view the de facto parent doctrine as an equitable remedy and treat it as such to hold parents liable for their prior conduct).

439. *In re L.B.*, 122 P.3d at 179.

440. Rohlf, *supra* note 219, at 716.

children may face if their biological parent can arbitrarily deny access to an individual that has played a significant parent-like role in the children's lives. The de facto parent doctrine holds biological parents accountable for their actions. Without some way to hold parents to their prior actions, children are the true victims of their parents' arbitrary decisions.

F. The De Facto Doctrine Allows the Court to Have a Child-Centered Analysis

Because the de facto parent doctrine holds parents accountable for their previous actions, the courts can take a child-centered analysis by allowing the true consideration to be the best interest of the child. Currently, Texas disregards the best interest of the child to overprotect the best interest of the parent.[441] One such example of this disregard is evidenced by the fact that Texas has judicially recognized equitable relief in paternity suits under a very narrow set of facts.[442]

Texas recognizes equitable estoppel in paternity actions when five elements are satisfied.[443] When adopting this equitable remedy, the court explained that "a person who by speech or conduct induces another to act in a particular manner should not be permitted to adopt an inconsistent position, attitude or course of conduct."[444] However, one of the elements for equitable estoppel in paternity actions is fraud.[445] This element prevents third-party parents who knowingly establish a relationship with a child that is not biologically theirs from being able to assert rights.[446] This seems illogical if the best interest of the child should be of paramount concern.

The parent's belief regarding the biological status of the child should be irrelevant if the court chooses to take a child-centered analysis. From the child's standpoint, the separation from the parent is just as traumatic regardless of the biological link. Children are indiscriminate when it comes to forming bonds with their caretakers.[447] In other words, children form bonds with the individuals that satisfy their needs, not the individuals that are biologically related to them.[448] For a child, this means that the same parent-child bond exists in the eyes of the child even when there is no

441. *See, e.g.*, *In re* Shockley, 123 S.W.3d 642, 653 (Tex. App.—El Paso 2003, no pet.) (citing *In re* Moragas, 972 S.W.2d 86, 89–90 (Tex. App.—Texarkana 1998, no pet.)).

442. *Id.*

443. *Id.* (citing *In re Moragas*, 972 S.W.2d at 89–90) (explaining that the elements of equitable estoppel in paternity actions are: "(1) there was a false representation or a concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) to a party without knowledge, or the means of knowledge, of those facts; (4) with the intention that it be acted upon; and (5) the party to whom it was made must have relied on the misrepresentation to his prejudice.").

444. *Id.* (citing *In re Moragas*, 972 S.W.2d at 89–90).

445. *Id.*

446. *Id.*

447. Onorato, *supra* note 89, at 498.

448. *Id.*

biological connection.[449] If the best interest of the child is the primary consideration in all custody disputes, then the court should prevent traumatic separation regardless of whether there is also fraud on the mother's part.

Because children's attachment to their caretakers is not biologically dependent and the best interest of the child is supposed to be the primary consideration, the court should extend third-party parents' rights even in the absence of fraud. The fraud requirement indicates that, again, the court is placing the focus on the parent's rights. It seems that Texas courts have chosen to defend *that* nonbiological relationship because if the parent truly believed that the child was his or her biological child, then the *nonbiological parent* should not be harmed because he or she relied on that belief. Instead, the court should examine what is truly in the best interest of the child.

This change in the court's examination would certainly create a very different outcome in many SAPCR cases. If the examination was truly a child-centered one, then equitable estoppel would not only apply in paternity actions that include fraud, but would also apply to actions when third-party parents knowingly have formed a bond with a child that is not their biological child. The court needs to shift its focus to the nature of the parent-child relationship and what is truly in the best interest of the child.

IV. THE DE FACTO DOCTRINE: HOLDING PARENTS ACCOUNTABLE

Texas must redefine the definition of parent to include third-party parents to protect the fundamental rights that children have to continue familial relationships with individuals that are in their best interest. While Texas legislation has created a presumption that biological parents act in the best interest of their children, this presumption has grown so strong as to completely preclude the best interest of the child analysis. To properly protect the child's rights, Texas must enact a different approach when dealing with relationships with individuals that have fulfilled substantial parent-like roles for the child. Texas must redefine parent in the Texas Family Code to include de facto parents.

The de facto parent doctrine allows the court to balance all the relevant facts to truly represent the best interest of the child. This is the true intent of the Texas Legislature. If the parental presumption was intended to be the major consideration in custody hearings, then the presumption would also apply in modification hearings. Modification proceedings are a true representation of how the legislature intended the court to treat the parental presumption—that it should always sit back seat to the court's consideration of the best interest of the child. The emphasis that the Texas Legislature placed on Chapter 156 of the Texas Family Code indicates that the best interest of the child should be the primary consideration in all custody

449. *Id.*

cases.[450] Had the legislature ever intended the parental presumption to be the primary consideration in conservatorship cases, it would not have required the parental presumption to be barred in modification suits.[451]

The de facto parent doctrine allows significant relationships to continue while preventing excessive intrusion into the family unit. This doctrine, with the proposed limiting language and heightened pleading requirement, effectively protects and balances the many competing interests. The limiting language ensures that the biological parent was an active encourager of the relationship with the de facto parent. The de facto parent doctrine only holds biological parents responsible for prior actions regarding their children. If parents are concerned that someone would be able to petition for rights to their child under the de facto parent doctrine that they otherwise would not want to have rights to their child, it may mean the biological parent needs to reconsider child-rearing decisions.

Another important factor to remember about the de facto parent doctrine is that this doctrine *only* confers standing to third-party parents that have met the elements of the de facto doctrine by clear and convincing evidence. Redefining parent only allows the court to examine the nontraditional upbringing of the child to determine if it would be in the best interest of the child for the relationship to continue; this does not determine what custody and visitation will look like. The de facto doctrine in no way *automatically* awards custody to the de facto parent. The best interest of the child standard is what the court will use to dictate what actual custody and visitation should consist of. This should be an equitable decision that is made to support the child's best interests.

When choosing to extend rights to nonbiological parents, one court perfectly summarized the purpose of the de facto doctrine: "[T]he State would be hard pressed to find a reason why a child would not be better off having two loving parents in her life, . . . than she would by having only one parent."[452] This is all Tim wanted: the opportunity to explain to the court that his daughter is better off having two parents in her life than only having one. Tim likely would have had his day in court if he had standing as a de facto parent. If the court had deemed Tim a de facto parent, he would have been an equal to Marissa. The court would have completed the best interest of the child inquiry and been hard pressed to justify that no father is better than the loving, nonbiological father that Katie has had for her entire life. Instead, because Tim had no standing to bring a SAPCR, Katie is now growing up in a single-parent household without the only man that she has ever known as her father. Katie was ripped from her father for no other reason than that her mother no longer wanted Tim in either of their lives. This

450. Valastro, *supra* note 86, at 513.
451. *See In re* V.L.K., 24 S.W.3d 338, 339–40 (Tex. 2000).
452. Ferrand v. Ferrand, 16-7 (La. App. 5 Cir. 8/31/16); 221 So. 2d 909, 927.

arbitrary decision came just weeks after Marissa had sought to establish a permanent child support obligation from Tim. Simply because of a disagreement, Katie—used as a bargaining chip—paid the ultimate price. The uncertainty and instability that litigation poses do not compare to the instability and harm a child suffers when the child is permanently separated from one of his or her parents.