

**I LOVE YOU, YOU LOVE ME, CAN YOU COME UP
WITH A HAPPY VISITATION SCHEDULE,
PLEASE?: ANALYZING THE REFORM OF
TEXAS’S PARENTAL POSSESSION SCHEDULE
FOR CHILDREN LESS THAN THREE YEARS OF
AGE**

Comment

*Laurel W. Brenneise**

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I. CHILDREN AND SOCIETY

At the launch of the Nelson Mandela Children’s Foundation on May 8, 1995, Nelson Mandela boldly spoke the inspiring, honest words as follows: “There can be no keener revelation of a society’s soul than the way in which it treats its children.”¹ Children are the future of society—thus, a successful society depends upon the successful development of its children.² Unfortunately, the development of many children involves

* B.A. Psychology, The University of Texas at Austin, 2010; J.D. Candidate, Texas Tech University School of Law, 2013; M.P.A. Candidate, Texas Tech University Graduate School, 2013. To my family, thank you for being my constant source of strength. Your love and support means the world to me. To my friends, thank you for your constant encouragement and assistance. To Will Reppeto, thank you for providing me with the idea for this Comment and for discussing family law issues with me. To Professor Spain, thank you for your guidance and help throughout the development of this Comment.

1. See NELSON MANDELA ET AL., IN HIS OWN WORDS 421 (2003). Nelson Mandela notably continued on to state the following: “The vision of a new society that guides us should already be manifest in the steps we take to address the wrong done to our youth and to prepare for their future. Our actions and policies, and the institutions we create, should be eloquent with care, respect and love.” See *id.*

2. See *id.* at 421-23.

dealing with divorce.³ According to the Texas Department of State Health Services, Texas alone granted and recognized 79,438 divorces in 2008, and of those divorces, Texas divorce law affected 62,695 children under the age of eighteen.⁴ The emerging concern is how Texas can best serve these children of divorce to ensure a positive, successful development of its children and society.⁵

Consider the following scenario: Lisa and Gregory fell in love and were married in a beautiful, fall wedding ceremony.⁶ Less than four years later, the newlyweds welcomed the healthy, joyous birth of their baby boy, Cameron.⁷ Less than four months later, the couple separated, and Lisa filed for divorce.⁸ In the initial divorce proceedings, Lisa asserted that Gregory may not be the biological father of baby Cameron, but blood tests proved Gregory's paternity.⁹ A psychotherapist noted that Lisa came from a difficult family background, one in which she was forced to choose between her mother and father during her parents' divorce.¹⁰ While Lisa does not want baby Cameron to suffer the same fate and believes Gregory—as the child's father—should be involved in baby Cameron's life, Lisa is also very concerned about Gregory's psychological problems, including anxiety attacks and an inability to maintain intimacy and honesty in close relationships.¹¹ Gregory disagrees and has described the loving and nurturing bond that he has with his young son.¹² Two psychologists also have observed Gregory and did not find any evidence of interpersonal problems, yet Lisa remains uneasy with Gregory's parenting capabilities.¹³ Trial court Judge Hooks is assigned to this complicated case, and he must determine a parenting possession schedule for baby Cameron.¹⁴ How should Judge Hooks decide what is best for the young child?

The scenario described above portrays the all too frequent reality of many parents and children. The present Comment analyzes a special section of serving children of divorce: the reform of Texas's parental possession schedule for children less than three years of age.¹⁵ First, Part II introduces a historical perspective of Texas's overall regulation of family issues through the Texas Family Code. Part III provides an extensive discussion

3. See Table 42: Number of Children Affected by Divorce-Texas, 2008, TEX. DEP'T OF STATE HEALTH SERVS., <http://www.dshs.state.tx.us/CHS/VSTAT/latest/t42.shtm> (last updated Mar. 3, 2011).

4. See *id.*

5. See TEX. FAM. CODE ANN. § 153.002 (West 2011).

6. See *Davis v. Davis*, 794 S.W.2d 930, 931 (Tex. App.—Dallas 1990, no writ).

7. See *id.*

8. *Id.*

9. *Id.* at 932.

10. See *id.*

11. See *id.*

12. See *id.*

13. See *id.*

14. See *id.* at 930-37.

15. See *infra* Part IV.D.

of the current research regarding the effects of divorce on children and the respective roles that the child's parents and the state play in minimizing the effects. The discussion further includes a specific look into the special needs and considerations of children less than the age of three.¹⁶

Part IV of this Comment provides a statutory history of the parental visitation rights in Texas, explaining the progression to the "best interest of the child standard" and how the standard is incorporated into possession schedules of young children. Next, Part V presents the recent amendment (Amendment) to § 153.254 of the Texas Family Code, which regulates the possession of a child less than three years of age. Further, Part V presents in detail the legislative history and the consequential controversies surrounding the Amendment, leaving a need for an informative exploration into the struggle of creating a statutory regulation that is in the best interests of children. Thus, Part VI launches the exploration by providing a comparative analysis of child visitation regulations among the states of the Fifth Circuit and also looks to a different approach taken by the state of Indiana. Part VII attempts to constructively analyze the possible options for Texas and concludes with an educated proposal to improve § 153.254 of the Texas Family Code by modifying the Amendment to focus more on the best interests of children.

The overarching goal of the Texas Family Code is to ensure that family law practitioners are complying with the imperative state public policy to act in the best interest of the particular child given his or her unique surrounding circumstances.¹⁷ Thus, the overarching goals of this Comment are to (1) advocate the importance of making decisions that align with the best interest of the child standard and to, consequently, (2) present a proposal for how to ensure that judges render parental visitation schedules that are in the best interests of children less than the age of three.¹⁸

II. TEXAS'S OVERALL REGULATION OF FAMILY ISSUES

Dating back to 1888 when the United States Supreme Court rendered the landmark decision of *Maynard v. Hill*, state legislatures have had the power to regulate marriage and divorce as they see fit for society.¹⁹ Naturally, state regulation extends to disputes concerning child care as well.²⁰ As a result of *Maynard*, there is no unified set of laws regulating family issues in the United States, but rather, there are fifty independent

16. See *infra* Part III.

17. See *infra* Part IV.A-B.

18. See *infra* Part VII.B.3.

19. See Steven H. Hobbs, *In Search of Family Value: Constructing a Framework for Jurisprudential Discourse*, 75 MARQ. L. REV. 529, 555-56 (1992).

20. See *id.* at 555 ("As a general proposition, the state is responsible for the overall regulation of domestic relations. The state establishes the ground rules for marriage, divorce, and the care of children.").

sets of family law principles.²¹ Texas's principles are set forth in the Texas Family Code. In pertinent part, the Texas Family Code begins with a subsection (Title 1) devoted to regulating the marriage relationship, including the dissolution of marriage, and then progresses to a subsection (Title 5) devoted to regulating the parent-child relationship, including the suits affecting the parent-child relationship.²²

Marriages dissolve for numerous reasons, and Texas grants divorces on a no-fault or fault basis.²³ To bring an action for divorce on any basis in Texas, generally at least one of the parties involved at the time of filing suit must have been a domiciliary of Texas “for the preceding six-month period” and a “resident of the county” for the preceding ninety-day period.²⁴ A nonresident spouse may file suit in a resident-spouse's county of residence if the resident-spouse has been domiciled in Texas for at least the past six months.²⁵ Further, a Texas resident may be granted a divorce in Texas even if there is no personal jurisdiction over a nonresident spouse.²⁶

Texas law can determine child custody issues if (1) Texas “is the home state of the child” or was the home state of the child within six months of the filed action; (2) “the home state of the child has declined to exercise jurisdiction” and instead authorizes Texas to do so; or (3) no other states have proper jurisdiction.²⁷ When determining the issues of child custody between the divorcing parents, the court must follow the best interest of the child standard.²⁸ The family court judge has discretion under the statutory standard to render a custody order that would be the best situation for the particular child.²⁹ The parent not awarded primary custody—the noncustodial parent—is subject to a determination outlining possession and access rights with the child.³⁰ The best interest of the child standard also applies when determining the noncustodial parent's visitation schedule.³¹

21. *See id.* at 552; *see also* ROBERT E. OLIPHANT & NANCY VER STEEGH, *WORK OF THE FAMILY LAWYER* 5 (Vicki Been et al. eds., 2d ed. 2008) (discussing that states make their own independent determinations regarding family law matters).

22. TEX. FAM. CODE ANN. §§ 1.001-266.010 (West 2011) (providing the Texas statutes regulating the marriage relationship, collaborative family law, children in relation to the family, juvenile justice, protective orders and family violence, and the parent-child relationship).

23. *Id.* §§ 6.001-.007.

24. *Id.* § 6.301.

25. *Id.* § 6.302.

26. § 6.301 introductory cmt. (noting that “status adjudication” does not require personal jurisdiction over the nonresident, respondent spouse). For wholly adequate relief and the adjudication of any personal rights—such as support and possession issues—however, personal jurisdiction over the nonresident spouse is needed. *Id.* (“Without this personal jurisdiction, the Texas divorce court is not authorized to render any orders that would require such jurisdiction, including payments of spousal maintenance, attorneys fees, or division of marital property.”).

27. *Id.* § 152.201.

28. *Id.* § 153.002.

29. *Id.*

30. *See id.* § 153.251.

31. *Id.* § 153.002.

Child psychologists and other practitioners have dedicated extensive research to determining the effects of divorce on children in order to devise regulations that protect the child and promote the child's healthy development.

III. THE EFFECTS OF DIVORCE AND CUSTODY DISPUTES ON CHILDREN

A. Researching the Effects and Discovering the Negative

With divorce a persistently common occurrence in the United States today, much research has been dedicated to learning the effects that divorce has on children involved in the often-complicated situations surrounding divorce.³² Although the majority of children who face divorce seem to adapt well and develop normally in the long run, the experience is still "a psychosocial stressor and a significant life transition for most children, with long-term repercussions for many."³³ Specifically, researchers have determined the following:

Overall, most children of divorce experience dramatic declines in their economic circumstances, abandonment (or the fear of abandonment) by one or both of their parents, the diminished capacity of both parents to attend meaningfully and constructively to their children's needs (because they are preoccupied with their own psychological, social, and economic distress as well as stresses related to the legal divorce), and diminished contact with many familiar or potential sources of psychosocial support (friends, neighbors, teachers, schoolmates, etc.), as well as familiar living settings.³⁴

The overarching goal, thus, is to minimize the negative effects of divorce and to encourage positive child development by acting in the best interest of the child.³⁵

32. See, e.g., Michael E. Lamb, Kathleen J. Sternberg & Ross A. Thompson, *The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment*, 35 FAM. & CONCILIATION CTS. REV. 393, 394 (1997).

33. *Id.* at 395-96 ("Some children from divorced homes show long-term behavior problems, depression, poor school performance, acting out, low self-esteem, and (in adolescence and young adulthood) difficulties with intimate heterosexual relationships.").

34. *Id.* at 395.

35. See *id.* at 402 ("Greater efforts must clearly be made to inform the public, mental health professionals, the bar, and the judiciary regarding the effects of divorce and parental separation on children's well-being and development."); see also § 153.002 (providing the statutory language for the best interest of the child standard).

B. Minimizing the Negative Effects of Divorce on Children

1. The Role of Parents

Parental adjustment to divorce has a strong influence on the child's adjustment.³⁶ While conflict and disagreement between the parents to some degree in divorce situations are characteristically unavoidable, substantial discord that remains unresolved and continues past the divorce proceeding can exacerbate the negative effects on the child.³⁷ Ideally, parents need to work through their anger, disappointment, and loss associated with the divorce in a timely manner so that they can civilly focus on the child's best interest.³⁸ Despite the termination of the marriage, ex-spouses should continue to share parental responsibilities in most cases.³⁹

Most children form important and significant relationships with both parents, and therefore, it is usually in the best interests of children for both parents to remain actively involved in their children's lives.⁴⁰ Parent-child relationships are crucial in shaping the child's development, and the absence of a meaningful relationship with one parent can lessen the child's ability to reach full potential.⁴¹ Of course, however, some parents are deemed unfit to care for their children due to mental illness, incapacity, lack of parenting dedication, serious substance abuse, or past acts of abuse that pose clear physical or psychological risks to children.⁴² In such circumstances, the risks to the child may outweigh the potential benefits of maintaining the parent-child relationship.⁴³

In the ideal scenario when both parents are fit to be involved in the child's life, each parent needs to have extensive and regular interaction with the child to maintain a meaningful relationship.⁴⁴ Thus, post-divorce

36. See Lamb, Sternberg & Thompson, *supra* note 32, at 398.

37. See Michael E. Lamb, *Placing Children's Interests First: Developmentally Appropriate Parenting Plans*, 10 VA. J. SOC. POL'Y & L. 98, 105-06 (2002); Lamb, Sternberg & Thompson, *supra* note 32, at 398 (noting that a child's exposure to destructive and unresolved conflict increases the child's risk of behavioral and psychological maladjustment).

38. See Lamb, Sternberg & Thompson, *supra* note 32, at 396 (discussing that high-conflict parents often allow their interparental struggles to take center stage and overshadow the personal needs of the child).

39. See *id.* at 398 ("When marriage ends, shared responsibility for offspring should remain, even though the realities of divorce significantly alter how (and whether) these obligations are exercised or maintained.").

40. See *id.* at 400 (noting that most children of divorce express a strong desire to maintain relationships with both parents after the separation); Lamb, *supra* note 37, at 106-07.

41. See Lamb, *supra* note 37, at 111-12. "[T]here is substantial evidence that children are more likely to attain their potential when they are able to develop and maintain meaningful relationships with both of their parents, whether or not the two parents live together." *Id.* at 112.

42. See, e.g., Lamb, Sternberg & Thompson, *supra* note 32, at 401.

43. See, e.g., *id.* (noting that the potential costs of terminating the child's relationship with a dangerous or incapable parent needs to be thoroughly evaluated by trained professionals and implemented accordingly in the child's best interest).

44. See, e.g., *id.* at 400.

arrangements should aim to ensure quality involvement of both parents in the critical aspects of the child's everyday routine and should especially strive to promote the maintenance of the relationship between the child and the noncustodial parent.⁴⁵ All too often, post-divorce arrangements do not sufficiently foster the active involvement of the noncustodial parent, leading to an increased risk of detriment to the child.⁴⁶

2. *The Role of the Judiciary System*

The extent of divorce's detrimental effects on children may be minimized by seeking to lessen the conflicts and disputes surrounding the determination of custody and visitation arrangements between parents in legal proceedings.⁴⁷ Judicial intervention on post-divorce parenting plans greatly affects children's lives, and yet the children's best interests are often shrouded by what is most fair for the parents instead.⁴⁸ The judicial system vitally benefits from utilizing scientific research on children's developmental needs in order to determine a post-divorce parenting plan with a visitation schedule that is truly in the best interests of children.⁴⁹

The main point from scientific research today is that "children are best served when they develop strong and secure attachments to each parent . . . [and] attachments should be enhanced, rather than disrupted during separation and divorce."⁵⁰ Given the significance of a child's relationship with each parent, court-ordered parenting plans should not marginalize the noncustodial parent but should promote the child's attachment with each parent by encouraging active co-parent involvement.⁵¹ Thus, "Brief dinners and occasional weekend visits do not provide a broad or extensive enough

45. See, e.g., *id.*

46. See Lamb, *supra* note 37, at 103 ("[T]he well-being of children was significantly enhanced when their relationships with nonresidential fathers were positive and when the nonresidential fathers engaged in 'active parenting.'"); see also Lamb, Sternberg & Thompson, *supra* note 32, at 397 (noting that the decline in the amount of time the noncustodial parent spends with the child is attributable to difficult visitation schedules, which reduces the opportunity for the nonresidential parent to be involved in varied areas of the child's life and makes the relationship seem artificial).

47. See Lamb, Sternberg & Thompson, *supra* note 32, at 402; see also OLIPHANT & VER STEEGH, *supra* note 21, at 157 (discussing the importance of lawyers and courts adopting "decision-making processes and approaches aimed at reducing conflict and helping parents establish workable post-divorce parenting relationships").

48. See Lamb, *supra* note 37, at 98.

49. See *id.* ("The failure of policy and decision makers to take advantage of a burgeoning and increasingly sophisticated understanding of child development is unfortunate and may threaten the quality of social policy."); see also Jonathan Gould, *One, Two, Buckle My Shoe: Crafting Age-Appropriate Parenting Plans for Your Children*, 33 FAM. ADVOC. 8, 11 (2010) ("The bottom line is that using child development research to create age-appropriate parenting plans makes sense . . .").

50. Gould, *supra* note 49, at 9-10.

51. See Lamb, *supra* note 37, at 116 (noting that parenting plans should especially strive, when necessary, to increase the participation of the parent that had previously lacked in involvement with the child); see also Gould, *supra* note 49, at 8 ("[T]he general consensus today is that children are best served by continuous and frequent contact with both parents.").

basis for such relationships to be fostered, whereas daytime and nighttime activities during both weekdays and weekends are important for children of all ages.”⁵² The focus of post-divorce visitation schedules should be to maximize a healthy bond with the noncustodial parent; merely ensuring that minimal levels of visitation are reached is not enough.⁵³ Further, children thrive upon consistency and stability in both a psychological and geographical sense.⁵⁴ Court-ordered visitation schedules must be clearly and thoroughly articulated to each parent to reduce the need for future negotiation and re-litigation, which may disrupt continuity for the child.⁵⁵

C. *Considering the Special Needs of Children Less Than Three Years of Age*

1. *The Developmental Stages of Infancy and Early Childhood*

Post-divorce visitation schedules must be specifically tailored to the individual circumstances of the child, taking into account special consideration for the child’s age and developmental needs.⁵⁶ Children less than three years of age are especially in need of an age-appropriate plan, as “the first 36 months of life are critically important” for parental attachment and positive youth development.⁵⁷ A child’s first year of life—the infancy stage—is characterized by the fundamental development of an attitude toward oneself and the surrounding world.⁵⁸ The firm establishment of a basic trust of oneself and of others through parental support and interaction is necessary for the growth of a healthy autonomy.⁵⁹ A child’s second and third years of life—the early childhood stage—are crucial for the development of independency.⁶⁰ Children need consistent and frequent interaction with parents involving a variety of activities to facilitate a young child’s feeling of security and self-sufficiency.⁶¹

52. Lamb, *supra* note 37, at 118.

53. *See id.* at 103.

54. *See* Lamb, Sternberg & Thompson, *supra* note 32, at 400.

55. *See id.* at 401; *see also* Gould, *supra* note 49, at 10 (noting the importance of creating a “stable, safe, and predictable environment” for children).

56. *See, e.g.,* Lamb, Sternberg & Thompson, *supra* note 32, at 400.

57. Gould, *supra* note 49, at 10; *accord* Lamb, *supra* note 37, at 109 (discussing that meaningful parent-child attachments are consolidated by the middle of a child’s first year of life). “Infant-parent attachments promote a sense of security, the beginnings of self-confidence, and the development of trust in others.” Lamb, *supra* note 37, at 111.

58. *See* ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* 96 (1968).

59. *See id.* at 110 (“Only parental firmness can protect [the child] against the consequences of [the child’s] as yet untrained discrimination and circumspection.”).

60. *See id.* at 107 (noting that in this stage of child development, “the still highly dependent child begins to experience his *autonomous will*”).

61. *See id.* at 110 (noting that the child’s “environment must also back [the child] up in [the child’s] wish to ‘stand on his own feet,’” while also protecting the child from potential detriment); *see also* Gould, *supra* note 49, at 10 (discussing that children need to engage in a variety of activities with

2. *Incorporating the Developmental Stages into an Age-Appropriate Visitation Schedule for Children*

A visitation schedule for children less than the age of three should incorporate regular interaction with both the custodial parent and the noncustodial parent over a broad range of daily contexts and situations, such as feeding, playing, disciplining, diapering, soothing, bathing, putting to bed, and waking in the morning.⁶² Hence, extended visits and overnight stays with the noncustodial parent ideally should be included when possible.⁶³ The noncustodial parent who is denied overnight possession without just reason will be excluded from critically important infant and toddler activities needed to establish a significant parent-child relationship.⁶⁴ Yet, overnight visits often pose difficulties when the custodial parent (the primary caretaker of the child) is anxious and conflicted about the arrangement, increasing the need for the overnight schedule to be predictable and consistent to the agreement of both parents.⁶⁵ Further, shuttling children back and forth between parents and households can also often cause inconveniences and troubles.⁶⁶ The parenting plan should rationally address the logistics involved with the overnight visitation schedule in order to encourage smooth transitions for the child.⁶⁷

Although infants and toddlers thrive upon regular and consistent interaction with each parent, young children are unable to emotionally tolerate long periods apart from either parent.⁶⁸ Thus, possession schedules for children less than three years of age should involve more frequent transitions, such as requiring that “the noncustodial parent . . . visit with the

each parent so that the child develops the belief that he or she is comfortable, secure, and safe across different contexts with either parent).

62. See Lamb, *supra* note 37, at 111-13 (discussing the importance for infants and toddlers to have frequent and consistent interaction with their “attachment figures”).

63. See *id.* at 113-14 (“These periods increase the opportunities for crucial social interactions and nurturing activities, including bathing, soothing hurts and anxieties, guiding bedtime rituals, giving comfort in the middle of the night, and providing the reassurance and security of snuggling in the morning that one to two hour long visits cannot provide. According to attachment theory, these everyday activities promote and maintain trust and confidence in the parents, while deepening and strengthening child-parent attachments, and thus need to be encouraged when decisions about custody and access are made.”).

64. See *id.* at 115; see also Gould, *supra* note 49, at 10 (“If [the child is] a very young infant, the sooner [the] child learns to spend the night with each parent, the more likely the child is to form secure attachments to each parent.”).

65. See Gould, *supra* note 49, at 10 (noting that most infants and toddlers have few problems spending the night with the noncustodial parent).

66. See *id.*

67. See *id.*

68. See *id.*; see also Lamb, *supra* note 37, at 115 (“Schedules involving separations spanning longer blocks of time, such as five to seven days, should be avoided, as children this age may still become upset when separated from either parent for too long.”).

child at least three to four times a week.”⁶⁹ As the child grows older, the time spent away from each parent can increase as deemed suitable to the particular child’s needs.⁷⁰

IV. PARENTAL VISITATION RIGHTS IN TEXAS

A. *The Legal Standard Shift to the Best Interest of the Child*

When considering custody and visitation issues, policymakers and courts in the 1930s through the 1960s focused on the “tender years doctrine,” which held that young children needed their mothers more than their fathers.⁷¹ As scientific research expanded, so did the importance placed upon the role of the father in a child’s life.⁷² The legal standard, thus, shifted away from the tender years doctrine and toward the best interest of the child standard, which “focused attention on what was best for the child, whether it was parenting from the mother or from the father.”⁷³

Texas law specifically states the following: “The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.”⁷⁴ The best interest of the child standard allots extraordinarily broad discretion to the trial courts and allows for case-by-case determinations to be made on a specific fact-by-fact basis concerning the particular circumstances of the child.⁷⁵ Trial courts possess such wide discretion because of the ability to directly observe the parties and witnesses involved, thus, putting the trial courts in a favorable position to determine the best interest of the particular child.⁷⁶ An appellate court will only reverse the judgment of a trial court if

69. See Gould, *supra* note 49, at 10; accord Lamb, *supra* note 37, at 115 (“To minimize the deleterious impact of extended separations from either parent, attachment theory suggests that infants should enjoy more frequent transitions than might be desirable with older children.”).

70. See Gould, *supra* note 49, at 10; see also Lamb, *supra* note 37, at 115 (discussing a child’s ability to tolerate longer separations from parents as the child increases in age).

71. See OLIPHANT & VER STEEGH, *supra* note 21, at 158; see also Gould, *supra* note 49, at 8 (noting that during this time, research examining parent-child attachment focused solely on the relationship between young children and mothers). “The results that were generated from the narrowly focused mother-child research perpetuated the notion that children were best served by maternal caretaking.” Gould, *supra* note 49, at 8.

72. See Gould, *supra* note 49, at 8-9.

73. *Id.* at 9.

74. TEX. FAM. CODE ANN. § 153.002 (West 2011).

75. See *id.* cmt. (commenting that the “best interest” of the child “is in the eye of the beholder”); see also OLIPHANT & VER STEEGH, *supra* note 21, at 172 (“[D]espite its popularity and sex-neutral approach, critics allege that the best interests standard promotes litigation because outcomes are difficult to predict with accuracy.”).

76. See *Prause v. Wilder*, 820 S.W.2d 386, 387 (Tex. App.—Texarkana 1991, no writ) (citing *Maxiner v. Maxiner*, 641 S.W.2d 374, 376 (Tex. App.—Dallas 1982, no writ)) (“The trial court has discretion because the court sees the parties and the witnesses, observes their demeanor, views their personalities, and senses the forces and powers which motivate them.”).

there was a clear abuse of discretion.⁷⁷ Further, once a trial court gives an order establishing custody, possession, or visitation of a child, the order will not be modified unless doing so is in the best interest of the particular child.⁷⁸ A child's best interest is always the focal point—the heart of Texas's public policies that guide the decision-making process.

B. Public Policy of Texas and the Best Interest of the Child Standard

Texas's public policy encourages shared parental involvement in raising children in a healthy environment and seeks to ensure that children have regular and ongoing contact with fitting and able parents.⁷⁹ Accordingly, Texas law mandates that it is presumptively in the best interest of the child for the parents to be appointed as joint managing conservators, which grants each parent with the equal authority to engage in and decide upon major decisions concerning the child's health, welfare, and education.⁸⁰ This presumption, however, remains fully rebuttable if the facts of a particular child's case demonstrate that "the appointment [of joint managing conservatorship] would significantly impair the child's physical health or emotional development."⁸¹ Further, although Texas policy strongly encourages the maintenance of the child's relationship with both parents, joint managing conservatorship does not necessarily require that each parent will be awarded equal or even nearly equal periods of possession and access to the child.⁸² The court determines a visitation schedule involving both parents that is in the best interest of the child, and the Texas Family Code provides courts with statutory guidelines to render an appropriate order.⁸³

77. *Id.* (citing *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982)).

78. *See In re M.M.S.*, 256 S.W.3d 470, 476 (Tex. App.—Dallas 2008, no pet.) (citing TEX. FAM. CODE ANN. § 156.101 (West 2011)). A two-prong test must first be satisfied to support any modification of an original order: First, the modification must be found to be in the best interest of the child, and second, (1) the circumstances of the child must have "materially and substantially changed," or (2) the child is at least twelve years old and has expressed his or her preference to the court, or (3) a conservator with the "exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child to another person for at least six months." FAM. § 156.101(a)(1), (3).

79. *See* TEX. FAM. CODE ANN. § 153.001 (West 2011) ("The public policy of this state is to: (1) assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child; (2) provide a safe, stable, and nonviolent environment for the child; and (3) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.").

80. *See id.* § 153.131; *see also id.* § 153.073 (listing the statutory rights of a parent appointed as a conservator of a child).

81. § 153.131 (noting that a history of family violence involving the child's parents removes the presumption).

82. *See id.* § 153.135; *see also supra* notes 42-43 and accompanying text (noting that there are situations in which visitation with a parent is a threat to the child's physical or emotional health).

83. *See* TEX. FAM. CODE ANN. §§ 153.001-.002 (West 2011).

C. The Standard Possession Order

For children over the age of three, the Texas Legislature designed a statutory standard possession order that is a visitation schedule presumptively in the best interest of children and that provides a joint managing conservator with reasonable minimum possession of a child.⁸⁴ The standard possession order includes two tenets, providing similar but tailored provisions for (1) parents who live 100 miles or less apart from one another and for (2) parents who live over 100 miles apart from one another.⁸⁵ The Texas Legislature's goal in devising the standard possession order was to create a single, uniform order that would remain in effect throughout the period of conservatorship of the child—an order that would provide stability yet flexibility for the child's life.⁸⁶ A court will typically use the standard possession order unless there are special circumstances that require a deviation because the standard possession order would be unworkable for the parents involved or would be inappropriate for the particular child.⁸⁷

Of course, the judicial system first encourages parents to amicably reach a mutual agreement so as to eliminate the possibility of prolonged litigation and undesirable court-ordered terms and to lessen the possible detrimental effects on the child involved in the dispute.⁸⁸ Under § 153.255 and § 153.311 of the Texas Family Code, parents may mutually agree to deviate from the standard possession order and instead follow their own approved terms regarding possession and visitation of the child.⁸⁹ In the event that parents fail to reach a mutual agreement, the court will direct the specific terms of the standard possession order to take effect.⁹⁰

For family law practitioners, the standard possession order for children of separated or divorced parents has become a regular and expected way of life as its terms have become widely accepted and supported by the State Bar of Texas and by Texas courts.⁹¹ Courts have specifically stated that the standard possession order accurately meets the Texas state public policy of “encourag[ing] frequent contact between a child and each parent for periods of possession that optimize the development of a close and continuing

84. *See id.* § 153.251(d) (“The standard possession order is designed to apply to a child three years of age or older.”); *id.* § 153.252.

85. *Id.* §§ 153.312-.313.

86. *See id.* § 153.3101 introductory cmt.

87. *See id.* §§ 153.252-.253.

88. *See* Lamb, Sternberg & Thompson, *supra* note 32, at 402 (“Children are best served by arrangements that are reached by genuinely mutual consent and in a timely fashion.”); *see also* OLIPHANT & VER STEEGH, *supra* note 21, at 157 (noting the importance of reducing conflict for the child's well-being and helping parents reach an agreement on parenting time schedules).

89. *See* TEX. FAM. CODE ANN. §§ 153.255, .311 (West 2011).

90. *See* § 153.311.

91. *See id.* § 153.312.

relationship between each parent and child.”⁹² Absent any substantive and probative evidence to support a finding that the standard possession order would not be in the best interest of the child, an alteration or limitation of the standard possession order will not be upheld by the court.⁹³ For example, a mother who sought to limit a father’s visitation rights—as permitted by the standard possession order—based upon the fact that the children would sometimes stay with the father’s parents on his given weekends was denied the modification.⁹⁴ The court reasoned that there was no substantive or probative evidence that the visits with the father’s parents—the children’s grandparents—caused any detriment to the children.⁹⁵ Further, the court did not find any sufficient evidence to support that the best interests of the children would be served by limiting time spent with their father; rather, the court found that limiting the father’s periods of possession with the children would be against state public policy.⁹⁶

There are, however, certainly cases in which there is sufficient evidence to warrant a deviation from the standard possession order.⁹⁷ For instance, a finding of severe alcoholism is sufficient to support a deviation and to restrict or even deny a parent’s possession of and access to the child.⁹⁸ The court must consider the best interest of the child in light of the surrounding circumstances and determine whether the parent’s possession or access would endanger the child’s physical or emotional welfare.⁹⁹ Given the significance of the parent-child relationship, though, “complete denial of [a parent’s] access should be rare.”¹⁰⁰ In such cases when the court orders child visitation terms other than the standard possession order, the court must take into consideration the guidelines of the standard possession order as well as (1) the child’s age, developmental status, specific needs and circumstances, and the child’s best interest; (2) the

92. *In re M.M.S.*, 256 S.W.3d 470, 476 (Tex. App.—Dallas 2008, no pet.) (quoting TEX. FAM. CODE ANN. § 153.251 (West 2011)).

93. *See id.* at 476-77.

94. *See id.*

95. *See id.* at 476.

96. *See id.* at 476-77 (“Given this state’s policy and the complete absence of evidence to support a finding that it was in the best interest of the children to alter the standard possession order and limit their contact with [their father], we conclude the trial court abused its discretion in modifying the possession and visitation provisions of the original decree.”); *see also* § 153.251 (stating the statutory public policy of the state).

97. *See, e.g., In re Walters*, 39 S.W.3d 280, 288 (Tex. App.—Texarkana 2001, no pet.).

98. *See id.* at 287-88 (holding that a mother’s past alcoholic actions that put the child in danger and her attempts to cover up her excessive drinking problem sufficiently warranted the trial court to order a more restrictive visitation schedule than is provided by the standard possession order).

99. *See id.* at 287 (citing TEX. FAM. CODE ANN. § 153.002 (West 2011)) (“The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.”).

100. *Id.* (noting further that “any danger [the parent] poses to [the child’s] physical or emotional welfare can be remedied by an order that restricts her access or possession”); *see also* Lamb, *supra* note 37, at 111-12 (discussing the importance of the parent-child relationship on a child’s development).

circumstances regarding the managing conservator and the possessory conservator; and (3) any other factor determined to be relevant.¹⁰¹ These guiding factors allow the trial court to still exercise great discretion in determining the terms of possession of the child.¹⁰² Further, the trial court must state the specific reasons for the variance from the standard possession order upon written request by the contesting parent.¹⁰³

D. Special Provision for Children Less Than Three Years of Age

1. The Statute Prior to the Recent Amendment to the Texas Family Code

The Texas Legislature recognized that special, more specific attention should be given to a possession schedule for children less than three years old.¹⁰⁴ In drafting the guidelines for the standard possession order, the Texas Legislature determined that “[v]ery young children, infants through toddlers, at least theoretically must be dealt with individually,” and thus, “no guidelines exist for a child under three.”¹⁰⁵ Therefore, the Texas Family Code explicitly states that the standard possession order is not designed to apply to a child under the age of three but that it is intended to automatically take effect on the child’s third birthday.¹⁰⁶ Prior to September of 2011, courts were simply instructed to deal with very young children pursuant to § 153.254, which stated the following: “The court shall render an order appropriate under the circumstances for possession of a child less than three years of age.”¹⁰⁷ Such an instruction is ambiguous and leaves much room for interpretation.

2. The Effect of the Statute Prior to the Recent Amendment to the Texas Family Code: The Appellate Case of In Re C.B.M. as an Example

Courts interpreted the language of § 153.254 to provide wide latitude in granting a visitation schedule and agreed that a child’s young age

101. TEX. FAM. CODE ANN. § 153.256 (West 2011); *see also In re Walters*, 39 S.W.3d at 288 (noting the statutory factors to be considered by the court when deviating from the standard possession order).

102. *See, e.g., In re Walters*, 39 S.W.3d at 285 (citing *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990)) (“The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles, i.e., whether the act was arbitrary or unreasonable.”).

103. TEX. FAM. CODE ANN. § 153.258 (West 2011).

104. *See id.* § 153.251 introductory cmt.

105. *Id.*

106. *See* § 153.251; *see also id.* § 153.254(d) (“The court shall render a prospective order to take effect on the child’s third birthday, which presumptively will be the standard possession order.”).

107. Act of Apr. 20, 1995, 74th Leg., R.S., ch. 20, § 1, 1995 Tex. Sess. Law Serv. 20 (West) (amended 2011) (current version at FAM. § 153.254).

justified deviation from the standard possession order.¹⁰⁸ For example, in the Texas appellate case of *In re C.B.M.*, the father, who filed a voluntary petition to establish his paternity, argued that the trial court improperly relied upon the outdated tender years doctrine in not following the standard possession order when granting visitation rights to his one-year-old child.¹⁰⁹ The appellate court majority struck down the father's argument on the grounds that the record showed nothing to support the accusation that the trial court relied upon the tender years doctrine; rather, the record showed that the trial court reasonably relied upon the factors set forth in § 153.256 of the Texas Family Code, which provide guidance for a court when determining appropriate terms of possession other than the standard possession order.¹¹⁰

Nevertheless, the Texas Family Code's allowance of wide latitude regarding possession for children less than the age of three left much room for disagreement and debate.¹¹¹ The dissenting opinion by Judge Burgess of *In re C.B.M.* focused on Texas's state policy of encouraging a close parent-child relationship and, therefore, contended that the amount of possession periods awarded to the father were insufficient to accurately reflect this policy.¹¹² Specifically, Judge Burgess noted that the father was defectively granted "virtually no visitation for the first three years of the child's life."¹¹³ Without a specific standard order applicable to children less than three years of age, courts are placed in a difficult position based upon personal discretion regarding what is considered to be "an order appropriate under the circumstances" that is fashioned in the best interest of the child.¹¹⁴

108. See, e.g., *In re C.B.M.*, 14 S.W.3d 855, 858-60 (Tex. App.—Beaumont 2000, no pet.) (holding that because the child was under three years old at the time of trial, the guidelines of the standard possession order did not apply).

109. *Id.* at 859-60.

110. See *id.* at 858-60; see also TEX. FAM. CODE ANN. § 153.256 (West 2011) (listing specifically the age of the child as a factor).

111. See *In re C.B.M.*, 14 S.W.3d at 862-66 (Burgess, J., dissenting).

112. See *id.*

113. *Id.* (discussing the unreasonableness that the father was only allowed supervised visitation of two hours per month and noting the father's initiation to parent and his cooperation with the mother). Judge Burgess concluded his dissent by stating: "I can only hope the father and son develop the proper bonding and proper relationship despite two courts' attempt to thwart that goal." *Id.*

114. See TEX. FAM. CODE ANN. § 153.254 (West 2011); see also *In re C.B.M.*, 14 S.W.3d at 866 (Burgess, J., dissenting) ("It is never easy to say a trial judge abused his discretion in matters that are historically, legislatively and judicially reserved to a trial judge.").

V. THE RECENT AMENDMENT TO THE TEXAS FAMILY CODE FOR
POSSESSION OF A CHILD LESS THAN THREE YEARS OF AGE

A. Adding a “Laundry List” of Factors to the Statute

In the most recent session of the Texas Legislature, the 82nd Legislative Regular Session, Texas legislators amended § 153.254 of the Texas Family Code to now include a list of factors that the court must consider when rendering a possession order for a child less than three years old.¹¹⁵ These factors include the following: (1) the child caregiving provided by the parents; (2) the parental separation effect on the child; (3) the availability and willingness of the parents to be caregivers; (4) the child’s developmental, behavioral, medical, and physical needs; (5) the parents’ social, economic, emotional, medical, and physical conditions; (6) the impact of other individuals present during periods of possession with the child; (7) the presence of the child’s siblings; (8) the need for the child to develop healthy parent-child attachments; (9) the need for maintaining routine continuity for the child; (10) the location and proximity of the parents’ homes; (11) the need to incrementally shift a temporary possession schedule to a prospective schedule that will take effect when the child turns three years old—presumably the standard possession order; (12) the parents’ ability to share parenting responsibilities, rights, and duties; and (13) any other evidence that is relevant to determine the best interest of the child.¹¹⁶

Further, the Amendment requires that the court must promptly make and enter specific findings to support the possession order upon written or oral request by an involved party.¹¹⁷ The amended inclusion of a “laundry list”—a long enumeration of items¹¹⁸—became effective September 1, 2011, and has fostered controversy among family law practitioners surrounding the legislative history of the Amendment as well as arguments for and against the Amendment.¹¹⁹

115. See § 153.254.

116. See *id.*

117. See *id.*

118. See BLACK’S LAW DICTIONARY 410 (3d pocket ed. 2006).

119. See *Bill Text*, TEX. LEGISLATURE ONLINE (2011), <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB00820I.pdf#navpanes=0>; Michael P. Granata, *H.B. No. 1262 Possession Guidelines for Children Under 3 Years of Age*, DALL. DIVORCE LAW. ATT’Y BLOG (Feb. 17, 2011, 2:33 PM), <http://www.dallasdivorcelawyer.com/divorcelawyerblog/h-b-no-1262-possession-guidelines-for-children-under-3-years-of-age>; E-mail Interview with William M. Reppeto III, Partner, McCurley Orsinger McCurley Nelson & Downing, L.L.P. (Aug. 17, 2011) [hereinafter Reppeto E-mail Interview].

B. Legislative History of the Amendment—Senate Bill 820

1. The Legislature's Struggle with Court-Ordered Possession Schedules

At the outset, the Texas Legislature noted that “[d]rafting a court order in a final [Suit Affecting the Parent-Child Relationship] decree for possession of and access to a child of whatever age to be in effect over an extended period of time is, by definition, an impossible task to do perfectly.”¹²⁰ While a court-ordered possession schedule can settle immediate questions and provide parents with a foundation for future arrangements, it can also cause stress and conflict that reduces a court’s ability to render a perfect possession order.¹²¹ Further, the legislature recognized that drafting a possession order becomes even more of a difficult and contentious task when dealing with infants and toddlers—children less than three years old.¹²²

2. A Senator's Intent to Provide Guidance

Senator Chris Harris¹²³ authored the Amendment, Senate Bill 820, because he recognized a need to provide the court with guiding factors to devise an age-appropriate possession schedule.¹²⁴ In his statement of intent, Senator Harris opined that the standard possession order most often used in child visitation cases is usually inappropriate for a younger child—a child who is not yet in school and who has different developmental needs than a child over the age of three.¹²⁵ The enumeration of factors set forth in the Amendment serve as a “paradigm of common sense” that is thought to

120. § 153.254 cmt. (relating the process to firing off one shot at a countless number of moving targets through time).

121. *See id.* (“For the most part, periodic return to court for an updating of the order for most parents no longer living together is impracticable in the extreme.”).

122. *See id.* (noting that an individual’s needs and developments move most swiftly during young childhood).

123. *See Senator Chris Harris: District 9*, SENATE OF TEX., <http://www.senate.state.tx.us/75r/senate/members/dist9/dist9.htm> (last visited Nov. 7, 2011). Senator Harris has served the Texas Legislature since 1985 and is the highest ranking Republican in the Texas Senate. *See id.* Further, Senator Harris is a family law attorney with years of trial experience and knowledge in complex family law cases and has been recognized for his outstanding leadership by, among many others, the National Child Support Enforcement Association, Family Law Specialty of the Texas State Bar, and Tarrant County Family Law Association. *See id.* Recently, Senator Harris was honored as the 2011 Legislator of the Year by the Texas Family Law Foundation. *See* Press Release, Office of State Senator Chris Harris, Senator Harris Named Legislator of the Year by the Family Law Foundation (Aug. 2, 2011), available at <http://www.senate.state.tx.us/75r/senate/members/dist9/pr11/p080211a.htm>. In response to receiving the distinguished award, Senator Harris stated, “I have worked throughout my time in public office to protect Texas families and all children in Texas.” *Id.*

124. *See* SEN. RESEARCH CTR., BILL ANALYSIS, Tex. S.B. 820, 82d Leg., R.S. (2011), available at <http://www.capitol.state.tx.us/tlodocs/82R/analysis/pdf/SB008201.pdf#navpanes=0>.

125. *See id.*

sufficiently draw a court's focus to render an order that is in the best interest of the young child for the foreseeable future.¹²⁶

Before its submission to the Senate and House committees, Senate Bill 820 went through multiple iterations, including a proposal for an actual standard schedule to be designed that would be modified to apply to different ages under three—a set schedule for one to six months, a set schedule for seven to twelve months, a set schedule for thirteen to twenty-four months, etc.¹²⁷ Protesting interest groups, however, argued against overnight visitations and advocated the impossibility of devising set schedules.¹²⁸ Thus, the legislature ultimately overruled the proposal largely due to the protests and left Senate Bill 820 to stop short of implementing an actual schedule, like the standard possession order, and instead, to utilize a list of focused guidelines.¹²⁹

Senator Harris's Senate Bill 820 received strong support within the Texas Legislature.¹³⁰ Senate Bill 820 received five supporting votes and zero opposing votes—two voting members were absent—from the Senate Committee on Jurisprudence and then received seven supporting votes and zero opposing votes—four voting members were absent—from the House Committee on Judiciary and Civil Jurisprudence.¹³¹ As Senate Bill 820 became law and amended § 153.254 of the Texas Family Code, the legislature commented the following: “The modification of this plain-vanilla section covering the first three years of life is far from the extreme detail in the Texas Standard Order for older children, but the result is most certainly a good faith effort to attack an intractable problem.”¹³²

C. The Positive and Negative Impacts of the Amended Statute

1. The Good: Hugs and Kisses

Many family law practitioners agree that the Amendment by Senate Bill 820 is, in fact, a good faith effort to remedy the especially difficult procedure of rendering a possession order for young children under the age of three.¹³³ The laundry list of factors has been critically applauded as providing judges with a sound guide needed to produce more age-

126. FAM. § 153.254 cmt.

127. See Granata, *supra* note 119.

128. Interview with William M. Reppeto III, Partner, McCurley Orsinger McCurley Nelson & Downing, L.L.P., in Dall., Tex. (Dec. 29, 2011) [hereinafter Reppeto In-Person Interview]; Interview with Larry Spain, Professor of Law, Tex. Tech Univ. Sch. of Law, in Lubbock, Tex. (Dec. 5, 2011).

129. See, e.g., Granata, *supra* note 119; Reppeto In-Person Interview, *supra* note 128.

130. See *Bill Stages*, TEX. LEGISLATURE ONLINE, <http://www.capitol.state.tx.us/billlookup/BillStages.aspx?LegSess=82R&Bill=SB820> (last visited Sept. 19, 2012).

131. See *id.*

132. TEX. FAM. CODE ANN. § 153.254 cmt. (West 2011).

133. See Granata, *supra* note 119; Reppeto E-mail Interview, *supra* note 119.

appropriate, beneficial visitation schedules.¹³⁴ The adoption of such specific factors may serve to encourage, or even force, judges to think more deliberately about the best interest of the particular child—at least to some extent, the previous unfettered discretion reserved to judges is minimized and put in a less ambiguous context.¹³⁵ The factors listed in the Amendment seem to recognize the diversity of parenting interests in, and capability for, the caretaking of young children.¹³⁶ Specifically, the Amendment now seems to reward those parents who actively step up and desire to parent the child and to filter out those parents who display little or no interest in caretaking—thus, operating in alliance with the best interest of the child standard.¹³⁷

In addition, supporters believe that the amended statute will provide families with some relief from the unpredictability of case outcomes, which is an effect of several Texas Family Code provisions that is often criticized.¹³⁸ The laundry list of factors at least increases the likelihood of providing more standardization and uniformity across the state by providing more clarification of what considerations guide the court in making its determination of a possession schedule.¹³⁹ Nevertheless, while the Amendment demonstrates a good faith effort to solve the ongoing issue of determining parent visitation schedules that are in the best interest of young children, the Amendment is not a perfect solution.

2. *The Bad: Temper Tantrums and Time-Outs*

As is true with most legislative actions, the reviews of the Amendment to § 153.254 of the Texas Family Code are not unanimously supportive.¹⁴⁰ Some family law practitioners criticized the Amendment for being unnecessary and ambiguous—for instance, how exactly is a judge to measure “the effect on the child that may result from separation from either party” if the child is too young to verbalize opinions and both parents have actively participated in parenting?¹⁴¹ More troublesome is that the laundry list might actually discourage a judge from focusing on the best interest of a particular child by allowing an easy way out.¹⁴² The adoption of specific factors perhaps now provides a judge with a simple “check the box” approach rather than encouraging the judge to look at a child’s entire

134. See Reppeto E-mail Interview, *supra* note 119; Interview with Larry Spain, *supra* note 128.

135. See Interview with Larry Spain, *supra* note 128.

136. See *id.*

137. See TEX. FAM. CODE ANN. § 153.002 (West 2011); Granata, *supra* note 119.

138. See Reppeto E-mail Interview, *supra* note 119.

139. See *id.*; Interview with Larry Spain, *supra* note 128.

140. See Granata, *supra* note 119; Reppeto E-mail Interview, *supra* note 119.

141. See TEX. FAM. CODE ANN. § 153.254 (West 2011); see also Granata, *supra* note 119 (discussing the difficulty in quantifying certain factors included in the list).

142. See Reppeto E-mail Interview, *supra* note 119.

surrounding circumstances.¹⁴³ While the factors listed are certainly crucial to the determination of a possession schedule in the best interest of the child, the factors listed are common sense considerations that should have previously been taken into account by a judge.¹⁴⁴ The creation of a laundry list now introduces the problem of incompleteness and creates the concern that a judge may, therefore, leave a consideration out that is of particular importance to a certain child.¹⁴⁵ Critics further contend that the laundry list, unfortunately, encourages timeless and ruthless litigation between the parents; the factors leave room for varying interpretations that may polarize parents against one another, which reduces the ability of a judge to render a stable and consistent possession order that is in the best interest of the young child.¹⁴⁶

The Texas Legislature directly recognizes the difficulty in creating a perfect solution for § 153.254 that is free of negative criticism.¹⁴⁷ Texas is not alone in this struggle—forty-nine other states also struggle with how to best regulate the possession of, and access to, young children of divorced or separated parents.¹⁴⁸ Texas does, however, stand alone among the Fifth Circuit with regard to including specific and detailed statutes regulating visitation schedules, but Texas law is not nearly as comprehensive as Indiana law.¹⁴⁹

VI. WHAT ARE OTHER STATES DOING?

A. A Comparative Analysis Among the Fifth Circuit

1. Louisiana Does Not Distinguish Among Age

Prior to 1988, Louisiana did not have any statutory provisions concerning child visitation or possession.¹⁵⁰ The landmark case of *Maxwell v. LeBlanc* in 1983 set forth a comprehensive body of jurisprudential rules governing child visitation rights among custodial and noncustodial parents

143. See *id.*

144. See Reppeto In-Person Interview, *supra* note 128.

145. See Reppeto E-mail Interview, *supra* note 119.

146. See Granata, *supra* note 119 (“Custody litigation almost always polarizes the parents against each other and makes it difficult for parents of young children to start out on a nonadversarial footing from the very beginning of trying to jointly raise a child. I think this is a disservice to Texas parents.”).

147. See TEX. FAM. CODE ANN. § 153.002 cmt. (West 2011) (commenting that determining a court order in a final Suit Affecting the Parent-Child Relationship decree for possession of a young child is an impossible task to do perfectly).

148. See Hobbs, *supra* note 19, at 555-56 (discussing that states are independently responsible for establishing the ground rules for the care of children).

149. See TEX. FAM. CODE ANN. §§ 153.254, .312-.313 (West 2011); LA. CIV. CODE ANN. art. 136 (2011); MISS. CODE ANN. § 93-5-23 (West 2011); IND. PARENTING TIME GUIDELINES §§ IIA(1)-(3) (West 2011).

150. See LA. CIV. CODE art. 136 revisor’s cmt. b.

and initiated the need for legislative action.¹⁵¹ In *Maxwell*, the Supreme Court of Louisiana held that the trial court's judgment denying an acknowledged birth father visitation rights to his child solely because of illegitimacy was based upon an error of law.¹⁵² A noncustodial parent has a natural right to visitation—whether the child is legitimate or illegitimate does not make a difference.¹⁵³ The court further acknowledged, like the Texas Family Code, that a parent's visitation with his or her child is crucial for the child's mental and physical growth, and thus there is a presumption in favor of the child's frequent and continued contact with the noncustodial parent.¹⁵⁴ Of course, the court also recognized that a parent's natural right to visitation is not immune to limitations but is rather subservient to the best interest of the child.¹⁵⁵ The *Maxwell* court set forth a test for parental visitation comprised of several factors for the trial judge to consider in deciding whether visitation to the child should be limited or denied.¹⁵⁶ The *Maxwell* factors became the basis for the creation of Louisiana's first statutory provision regulating the award of child visitation rights.¹⁵⁷

The Louisiana Legislature created a general, all-encompassing statute that contains five specific guideline factors but does not distinguish among the age of the child.¹⁵⁸ In contrast to the Texas Family Code, there is no standard possession order that applies to older children or a special provision for younger children.¹⁵⁹ Thus, there is great discretion left in the hands of the trial judge to determine what is in the best interest of the child, and the judgment will not be overturned unless an appellate court

151. *Maxwell v. LeBlanc*, 434 So. 2d 375, 376-78 (La. 1983); *see, e.g.*, LA. CIV. CODE art. 136 revisor's cmt. b.

152. *See Maxwell*, 434 So. 2d at 380.

153. *See id.* at 376-80 (“[R]ights to visitation . . . belong to all parents regardless of illegitimacy of parenthood.”).

154. *See id.* at 379; *see also* TEX. FAM. CODE ANN. § 153.001 (West 2011) (stating that it is the public policy of Texas to encourage parents to share in the rights and duties of raising their child after separation and to assure that children have frequent and continuing contact with fitting parents).

155. *Maxwell*, 434 So. 2d at 377-79 (“The presumption in favor of visitation can only be overcome by conclusive evidence that the parent has forfeited his right of access by his conduct or that exercise of the right would injuriously affect the child's welfare.”).

156. *See id.* at 378-79. The guiding factors established by the court were as follows: (1) the emotional ties existing between the parents and child; (2) the capacity of the parents involved to love, educate, and raise the child; (3) the ability of the parents involved to provide the child with material needs; (4) the length of time the child has resided in a stable environment and the desirability of maintaining continuity for the child; (5) the relationship of the child's parents; (6) the moral fitness of the parents; (7) the child's reasonable preference; (8) the ability of the parents to encourage the parent-child relationship; and (9) the effect of visitation upon the child's physical condition. *Id.*

157. *See* LA. CIV. CODE ANN. art. 136 revisor's cmt. b (2011).

158. *See id.*

159. *Compare id.* (stating that a noncustodial parent is entitled to reasonable visitation of the child), with TEX. FAM. CODE ANN. § 153.251 (West 2011) (stating that the established standard possession order applies to children three years of age or older), and TEX. FAM. CODE ANN. § 153.254 (West 2011) (discussing the special provision for children less than three years of age).

determines there was a clear abuse of discretion.¹⁶⁰ As the *Maxwell* court noted, the parental visitation factors should not be applied mechanically to every case.¹⁶¹ The statute makes a determination regarding visitation on a case-by-case basis depending upon the particular facts of each child's situation.¹⁶² Although the statute does not directly address the age of the child—but merely allows “reasonable visitation rights” for the noncustodial parent—the child's age is an important consideration in the judge's determination of a visitation schedule that is deemed to be in the best interest of the child.¹⁶³ Still, the absence of any statutory language focusing on the age of the child provides greater discretion for the trial judge.¹⁶⁴ The Mississippi Legislature takes the allowance of wide discretion even a step further.¹⁶⁵

2. Mississippi Allows Incredible Discretion

In Mississippi, the chancery court, or trial court, “enjoys a large amount of discretion in making its determination of what is in the best interest of the child” on all issues concerning children, including visitation schedules.¹⁶⁶ The Mississippi Legislature has not developed any specific statutory provision regarding child visitation—much less any statutory provision focusing on the child's age—but rather has grouped the determination of a visitation schedule with the determination of child custody.¹⁶⁷ Specifically, in pertinent part, the applicable statute reads as follows:

When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody and maintenance of the children of the marriage¹⁶⁸

The court's main consideration in making all equitable and just orders is the best interest of the child.¹⁶⁹ Given the court's broad discretion, the

160. See *Smith v. Smith*, 948 So. 2d 386, 388-89 (La. Ct. App. 2007).

161. See *Maxwell*, 434 So. 2d at 379.

162. See *id.*; *Smith*, 948 So. 2d at 388-89.

163. See LA. CIV. CODE art. 136; *Smith*, 948 So. 2d at 390 (holding that the child's especially young age was a major consideration in denying parental visitation rights to an incarcerated father).

164. See LA. CIV. CODE art. 136; *Smith*, 948 So. 2d at 388-89.

165. See MISS. CODE ANN. § 93-5-23 (West 2011).

166. See *Haddon v. Haddon*, 806 So. 2d 1017, 1020 (Miss. 2000).

167. See MISS. CODE §§ 93-5-23 to -24.

168. See *id.* § 93-5-23.

169. See *Bolton v. Bolton*, 63 So. 3d 600, 611-12 (Miss. Ct. App. 2011).

chancellor's determination will not be disturbed unless it was based upon an erroneous legal standard.¹⁷⁰

In alliance with Texas's and Louisiana's state policies, the Mississippi Legislature also recognizes the importance of both parents' roles in the life of a child and has similarly created a rebuttable presumption that joint custody is in the best interest of a young child when both parents are fit and able.¹⁷¹ Still, the specifications of times for parental possession and visitation with the child are committed to the incredible discretion of the chancery court—guiding factors do not even exist.¹⁷² In fact, Mississippi House Bill No. 364 (House Bill No. 364) was introduced in January of 2011, proposing to amend § 93-5-24 of the current Mississippi Code to further state that “the court shall have the widest discretion to order a custody arrangement that is in the best interest of the child.”¹⁷³ Although House Bill No. 364 ultimately died, the absence of a specific provision for child visitation schedules and the lack of any guiding factors clearly leaves the best interest of the child solely in the hands of the chancery court—much greater discretion than that left in the hands of the trial courts in neighboring states of Louisiana and Texas.¹⁷⁴ A look beyond the Fifth Circuit, however, provides the other end of the spectrum with comprehensive statutory guidelines for visitation schedules with young children.

B. A Look Beyond the Fifth Circuit: Indiana's Parenting Time Guidelines

1. Introducing the Parenting Time Guidelines

In contrast to the Fifth Circuit, Indiana has specific statutory provisions that precisely regulate the noncustodial parent's visitation rights to his or her child based upon the child's given age falling within set categories from birth to teenager.¹⁷⁵ The Indiana Legislature created the Parenting Time Guidelines (Guidelines) based upon the widely accepted

170. *See id.*

171. *See* MISS. CODE § 93-5-24(5), (6) (“Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents.”); *see also* TEX. FAM. CODE ANN. § 153.131 (West 2011) (stating that there is a rebuttable presumption that parents shall be appointed as joint managing conservators); *Maxwell v. LeBlanc*, 434 So. 2d 375, 379 (La. 1983) (discussing that it is generally in the child's best interest to have continuing contact with both parents).

172. *See Haddon v. Haddon*, 806 So. 2d 1017, 1020 (Miss. 2000).

173. H.R. 364, 126th Leg., Reg. Sess. (died in H. Comm.) (Miss. 2011).

174. *See id.* Compare MISS. CODE §§ 93-5-23 to -24 (providing the statutory language regulating child care, custody, and maintenance), and *Haddon*, 806 So. 2d at 1020 (discussing the wide discretion given to the chancellor with regard to child visitation), with LA. CIV. CODE ANN. art. 136 (2011) (providing the statutory language that a noncustodial parent is entitled to reasonable visitation of the child), and TEX. FAM. CODE ANN. §§ 153.251, .254 (West 2011) (providing the statutory language for the standard possession order and the special provision for children less than three years of age).

175. *See* IND. PARENTING TIME GUIDELINES §§ IIA1-3 (West 2011); *supra* Part V.A.

and utilized notion that it is generally in a child's best interest to maintain frequent, continuing, and meaningful contact with both parents post-divorce or separation.¹⁷⁶ Nevertheless, the legislators also recognized the reality that shared parenting time is often difficult and, at times, even impossible.¹⁷⁷ Therefore, the purpose of the Guidelines "is to provide a model which may be adjusted depending upon the unique needs and circumstances of each family."¹⁷⁸ Adjustment of the Guidelines is within the discretion of the trial court. Latitude is granted to the trial court and the decision will only be reversed if there was an abuse of discretion in which the trial court's decision clearly lacked a rational basis.¹⁷⁹ Of course, like Texas, the Indiana Legislature also first encourages parents to negotiate an amicable and sensible parenting plan of their own without judicial intervention.¹⁸⁰ Otherwise, the courts are provided with the Guidelines to order a parenting plan including a visitation schedule for the noncustodial parent.¹⁸¹

2. *Developing the Parenting Time Guidelines*

The Domestic Relations Committee of the Judicial Conference of Indiana developed the Guidelines after an extensive study and review of the current, relevant scientific literature concerning visitation; the visitation regulations of other geographic areas; the professional input of family law practitioners and child development specialists; data from surveys of judges, lawyers, and mental health experts who focus on working with children; reviews of past court records; and a public hearing.¹⁸² The Committee members' comprehensive research yielded guidelines for

176. See IND. PARENTING TIME GUIDELINES pmb. ("It is assumed that both parents nurture their child in important ways, significant to the development and well being of the child."); *supra* Part III.B. Further, the legislators note that the designed Guidelines represent the minimum recommended time schedule that a noncustodial parent should spend with his or her child. See IND. PARENTING TIME GUIDELINES pmb., cmt. 2.

177. See IND. PARENTING TIME GUIDELINES pmb. (acknowledging that determining a shared parenting visitation schedule is difficult with separate households and requires continual effort and communication between cooperating parents); see also *id.* at Scope of Application (noting that there is a presumption that the Guidelines apply to all cases concerning child custody and visitation, but explaining that they do not apply "to situations involving family violence, substance abuse, risk of flight with a child, or any other circumstances the court reasonably believes endanger the child's physical health or safety, or significantly impair the child's emotional development").

178. *Id.* at pmb.

179. See *In re Paternity of C.H.*, 936 N.E.2d 1270, 1273 (Ind. Ct. App. 2010) (discussing further that trial courts are not foreclosed by the Guidelines from reasonably granting additional or reduced parenting time depending upon the circumstances of the given case).

180. See IND. PARENTING TIME GUIDELINES § II intro. ("The best parenting plan is one created by parents which fulfills the unique needs of the child and the parents."); TEX. FAM. CODE ANN. §§ 153.255, .311 (West 2011) (encouraging parents to reach a mutual agreement regarding possession and visitation time with the child).

181. See *In re Paternity of C.H.*, 936 N.E.2d at 1273.

182. See IND. PARENTING TIME GUIDELINES pmb.

visitation schedules that are based upon the physical and emotional developmental stages of children and seek to ensure that at least the basic needs of children at each stage are met.¹⁸³ Specific age categories are used to address the developmental stages of children—the broad categories included are as follows: (1) parenting time for infants and toddlers; (2) parenting time for a child three years of age and older; and (3) parenting time for adolescents and teenagers.¹⁸⁴

Based on the research gathered on the developmental stages of children, the Indiana Legislature devotes special attention to children less than three years of age in the Guidelines:

The first few years of a child's life are recognized as being critical to that child's ultimate development. Infants (under eighteen months) and toddlers (eighteen months to three years) have a great need for continuous contact with the primary care giver who provides a sense of security, nurturing and predictability. It is thought best if scheduled parenting time in infancy be minimally disruptive to the infant's schedule.¹⁸⁵

Further, the legislators note that it is critical for a child to usually be given ample opportunity to significantly bond with both parents and for both parents to take an active parenting role in the daily routine of the child—assuming, of course, that both parents are deemed fit and proper to care for the child.¹⁸⁶ When incorporating visitation time for the noncustodial parent into the shared parenting plan for an infant or toddler, the Guidelines acknowledge that short, frequent visits are generally better than longer visits spaced further apart.¹⁸⁷ Overnight visits with the noncustodial parent are also incorporated in the Guidelines but are given special consideration: parenting time for the noncustodial parent will not include overnight visits prior to the child's third birthday if the noncustodial parent had not previously actively assisted in the regular caretaking for the child.¹⁸⁸ Giving such special, careful attention and consideration to the particular needs of children less than three years of age is familiar to the Texas

183. *See id.*; *see also id.* at A Child's Basic Needs ("To insure [sic] more responsible parenting and to promote the healthy adjustment and growth of a child each parent should recognize and address a child's basic needs . . .").

184. *See id.* § II.3 ("The chronological age ranges set forth in the specific provisions are estimates of the developmental stages of children since children mature at different times.").

185. *See id.* § II.A intro.

186. *See id.* § II.A intro. cmt. 1 (noting that parents, therefore, must be flexible in providing opportunities for each parent to share in the routine and special events of their young child's early development).

187. *See id.* § II.A intro. cmt. 2 (explaining that infants and toddlers have a limited but evolving sense of time with a limited ability to recall persons that are not directly in front of them).

188. *See id.* § II.A.1 (recognizing the importance of overnight caretaking for the bond between parent and child but also recognizing very young children's need for a consistent and comfortable daily routine).

Legislature, but the Indiana Legislature has taken it much further in statutory action.¹⁸⁹

3. *Looking at the Specific Parenting Time Guidelines for Children Less Than Three Years of Age*

Parenting time for infants and toddlers is broken down into two subcategories: (1) parenting time in early infancy and (2) parenting time in later infancy.¹⁹⁰ These two subcategories are then even further broken down into several specific age ranges with schedules that incrementally increase the noncustodial parent's visitation time.¹⁹¹ The first specific age range is birth through four months, and the legislature commented that the parenting time in this incredibly vulnerable age range should especially occur in a stable place, if possible, and without disruption to the infant's typical routine.¹⁹² The second specific age range covers five months through nine months and only slightly extends the noncustodial parent's visitation time with the young infant.¹⁹³ The next specific age range enters the subcategory of later infancy and covers an infant of ten months through twelve months.¹⁹⁴ The fourth specific age range covers an infant of thirteen months through eighteen months and continues the gentle, steady increase of visitation time awarded to the noncustodial parent.¹⁹⁵ Finally, the Guidelines set out a specific visitation schedule plan for a child within the age range of nineteen months to thirty-six months (three years).¹⁹⁶ In addition, the Indiana Legislature included a separate parenting time provision for when the distance between the homes of the child's parents is a major factor.¹⁹⁷ The provision specifically references children less than

189. *See supra* Parts IV.D.1-2, V.A-C; IND. PARENTING TIME GUIDELINES §§ II.A.1-3.

190. IND. PARENTING TIME GUIDELINES §§ II.A.2-3.

191. *See id.*

192. *See id.* § II.A.2(A). The noncustodial parent is awarded (1) three non-consecutive days each week of two-hour-long visitation times; (2) any scheduled holidays of two-hour-long visits; and (3) one overnight period each week with the infant if the noncustodial parent had previously exercised regular caretaking responsibilities. *See id.*

193. *See id.* § II.A.2(B) (extending the two-hour-long visits to three-hour-long visits).

194. *See id.* § II.A.3(A). The noncustodial parent is awarded one non-work day each week of eight-hour-long visits plus any scheduled holiday visits of eight-hour-long visits in addition to the prior set, three non-consecutive days each week of three-hour-long visits. *See id.*

195. *See id.* § II.A.3(B) (extending the weekly non-work-day visit to ten hours).

196. *See id.* § II.A.3(C). The noncustodial parent is awarded (1) alternate weekend visits of ten hours on Saturdays and ten hours on Sundays with an overnight if appropriate; (2) one day each week, preferably during the middle of the week, of three hours with overnight if appropriate; and (3) any scheduled holidays for ten-hour-long visits. *See id.* Further, at this time, overnight visitations may begin to take place for the noncustodial parent that did not previously substantially partake in the young child's daily care and that has exercised the applicable responsibilities under the Guidelines for at least nine consecutive months. *See id.*

197. *See id.* § III ("When there is a significant geographical distance between the parents, scheduling parenting time is fact sensitive and requires consideration of many factors which include:

three years old, stating as follows: “For a child under 3 years of age, the noncustodial parent shall have the option to exercise parenting time, in the community of the custodial parent, up to two five hour periods each week. The five-hour period may occur on Saturday and Sunday on alternate weekends only.”¹⁹⁸

Notably, the Texas Legislature did similarly consider the creation of such specific standard guidelines regarding visitation schedules for noncustodial parents of children less than three years of age, but the proposal was overruled, and the controversial Amendment containing the laundry list of factors succeeded instead.¹⁹⁹ With a varying degree of approaches to handling the vulnerable family issue deemed in the best interest of the child, Texas is faced with a three-pronged fork in the road to the future following the recent Amendment to § 153.254 of the Texas Family Code.

VII. WHAT DOES THIS MEAN FOR TEXAS?

A. *An Honest Look at Texas’s Current Situation*

The truth—acknowledged by the Texas Legislature—is that creating a successful statutory solution to devising a visitation schedule that is in the best interest of a child less than three years of age is a challenging and ongoing issue.²⁰⁰ The reality—acknowledged by rather harsh statistics and common sense—is that marriages often do not sustain the promises spoken reciprocally in traditional wedding vows between spouses.²⁰¹ The misconception, then, is that divorces in which young children are involved mark not only the end of a marital relationship but also the end of a parent-child relationship.²⁰² However, “the children and the noncustodial parent are still as biologically connected as during the marriage, but are just living in different places.”²⁰³ Nonetheless, it may not be such a misconception that the noncustodial parent receives the short end of the deal regarding quality time spent with his or her young child.²⁰⁴ The best interest of the child standard instilled into the Texas Family Code seeks to remedy this by

employment schedules, the costs and time of travel, the financial situation of each parent, the frequency of the parenting time and others.”).

198. *See id.* § III. cmt. A.

199. *See supra* Part V.B.2.

200. TEX. FAM. CODE ANN. § 153.254 cmt. (West 2011).

201. *See supra* Part I; *see also* Marsha B. Freeman, *Reconnecting the Family: A Need for Sensible Visitation Schedules for Children of Divorce*, 22 WHITTIER L. REV. 779, 781 (2001) (“Marriages often turn out to be anything but a bed of roses . . .”).

202. *See* Freeman, *supra* note 201, at 781 (“Where children are involved, the fact that one or both spouses would prefer to pretend there is no longer a connection between the children and the noncustodial parent has little to do with reality.”).

203. *Id.*

204. *See id.* at 783; discussion *supra* Part III.B.1.

providing the judiciary with a statutory provision for a visitation schedule.²⁰⁵ The issue is how to best accomplish this goal now that Texas has arrived at a fork in the road yielding three options: (1) repeal the recent Amendment to § 153.254 of the Texas Family Code; (2) devise a standard possession order for § 153.254 of the Texas Family Code that is applicable to children less than three years old; or (3) modify the recent Amendment to § 153.254 of the Texas Family Code.²⁰⁶

B. The Options to Consider

1. Be a Friendly Fifth Circuit Neighbor and Repeal the Amendment?

One possible course of action is to repeal the Amendment and revert back to the previous provision that gave wide discretion to the trial court in rendering a visitation schedule deemed appropriate under the circumstances for a child less than three years of age.²⁰⁷ Removing the laundry list of factors would put Texas back into a more consistent alignment within the Fifth Circuit, where Louisiana and Mississippi place especially high value on great discretion left to the trial courts.²⁰⁸ At the outset, the likelihood of the Texas Legislature repealing the Amendment is very slight given that the Amendment just became effective in September of 2011 and that the Amendment received such strong support within the legislature.²⁰⁹ In large part, support for the Amendment derives from its ability to limit the trial judge's use of personal discretion in determining what is in the child's best interest—more specifically, to restrain the uninhibited with applicable guidelines that must be followed.²¹⁰

There are two key problems with wide discretion left in the hands of the trial judge: (1) the inevitable inconsistency and unpredictability of case outcomes due to differing opinions and (2) the high likelihood of biases applied to case situations.²¹¹ First, the accordance of much discretion promotes numerous interpretations of the best interest of the child standard, and “[g]iven the historically amorphous nature of the best interests standard, determining the best interests of children in custody and visitation

205. See *supra* Part IV.B.

206. See *supra* Part VI; *infra* Part VII.

207. See *supra* Part IV.D.1-2.

208. See *supra* Part VI.A.1-2.

209. See *supra* Part V.

210. See *supra* Part V.C.1; see also Amy B. Levin, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 UCLA L. REV. 813, 817 (2000) (“In general . . . judges have few ‘rules of thumb’ to guide their decision making, and they are forced to use their own discretion in child custody and visitation cases.”).

211. See Freeman, *supra* note 201, at 794; Levin, *supra* note 210, at 817.

cases is an arduous task for judges.”²¹² Indeed, trial court judges are placed in a complicated position with a great burden: the life of a vulnerable, young child is put directly into their hands, and the child does not come with proper instructions on how to best handle his or her situation.²¹³ While a judge is able to consult with an older child and take an older child’s personal preference into consideration when determining a visitation schedule that is best, a child less than three years old is unable to effectively communicate, and therefore, a judge must act as the young child’s voice of reason.²¹⁴ One judge is likely to be on a different, or even opposite, page than another judge, creating great inconsistency among the courts and frustration for the parents who entrust judges to create an order in their child’s best interest.²¹⁵ Even with today’s availability of vast scientific knowledge regarding the developmental needs of young children,²¹⁶ legislators and judges disagree over what factors—and to what extent—the factors should be considered in devising a visitation schedule in a child’s best interest.²¹⁷

Second, a judge’s interpretation of an order that is in a child’s best interest often includes personal views stemming from life exposures and experiences.²¹⁸ Although usually not with intention, an impartial judge may still bring personal biases into the decision making process, which is a concern that could have a great effect on the outcome of a case.²¹⁹ For example, when the daughter of a Texas family law judge released a childhood video of her father—the family law judge—cursing and beating her lavishly with a belt, the Texas Department of Family and Protective Services (DFPS) requested that the judge be removed from any cases

212. Levin, *supra* note 210, at 821.

213. See *Haddon v. Haddon*, 806 So. 2d 1017, 1021 (Miss. 2000) (Pittman, J., concurring) (“I write today to emphasize the great burden placed on chancellors in deciding matters of child custody. . . . Again, it is the duty of the chancellor not only to apply the law to a specific set of circumstances, but also to exercise careful judgment in deciding matters affecting the lives of our children.”).

214. See Freeman, *supra* note 201, at 794-95.

215. See *Haddon*, 806 So. 2d at 1021 (McRae, J., dissenting) (explaining that because a chancellor, or trial court judge, is given such wide discretion in determining an order in the child’s best interest, the justices of the Supreme Court of Mississippi are in disagreement over whether to reverse or affirm the decision); see also Freeman, *supra* note 201, at 794 (discussing that while families entrust courts with such decisions, the judges receive little help as to what truly constitutes the best interest of the child); Levin, *supra* note 210, at 823 (“As a result, critics warn that many custody decisions are left solely to the unconstrained discretion of judges, resulting in judicial decisions that are contradictory and unpredictable.”).

216. See *supra* Part III.

217. See Levin, *supra* note 210, at 823-24.

218. See Freeman, *supra* note 201, at 794 (“Although the right words are all there, courts in reality focus on their own views of what is in the child’s best interest . . . as justifications for child custody and visitation decisions.”).

219. See *Police Won’t File Charges Against Texas Judge Caught on Video Beating Daughter*, FOXNEWS.COM (Nov. 3, 2011), <http://www.foxnews.com/us/2011/11/03/texas-judge-caught-on-video-beating-daughter-needs-help/>.

dealing with child abuse.²²⁰ The DFPS worried that the judge's personal behavior called his integrity and professional standards into question while bewildering the public's confidence in his judiciary role.²²¹ Judges are held in a special high regard by the public as honorable promoters of justice.²²² In crucial part, the justice system depends upon the judge's ability to approach each child's situation in an impartial manner.²²³

For the two previously explained reasons, any guidelines—such as the laundry list of factors now included in § 153.254 of the Texas Family Code—are beneficial to (1) help inform judges on the appropriate needs of young children; (2) help judges maintain focus on the best interests of the child; and (3) increase consistency among child possession cases.²²⁴ Taking such guidelines too far, however, may conversely stunt these benefits.

2. Take the Statute the Full Distance Like Indiana?

A second possible course of action is to follow in the footsteps of the Indiana Legislature and devise a standard possession order to apply to children less than the age of three.²²⁵ While a set, court-ordered schedule would lessen the issue of inconsistency and unpredictability previously discussed, the task is incredibly difficult.²²⁶ Because children under the age of three are especially vulnerable and unique, and because cases dealing with children under the age of three require special consideration of the particular circumstances, creating a standard possession schedule that will apply across the board is seemingly impossible.²²⁷ Indiana gave a good faith effort to designing a schedule that appropriately aligned with the extensive scientific literature and professional knowledge regarding the specific needs of infants and toddlers, but the state's legislature and judiciary still recognize that the schedule does not apply to all situations.²²⁸ Default visitation schedules, such as Indiana's Parenting Guidelines and Texas's standard possession order for children over the age of three, may unintentionally bolster an inaccurate notion that the noncustodial parent is

220. *See id.*

221. *See id.*

222. *See* State Comm'n on Jud. Conduct, Public Statement No. PS-2012-1 (Nov. 2, 2011), available at <http://www.scjc.state.tx.us/pdf/PublicStatement.pdf>.

223. *See id.*

224. *See* Levin, *supra* note 210, at 821.

225. *See supra* Part VI.B.

226. *See* Levin, *supra* note 210, at 823 (discussing that “[t]he best interests of the child standard is indeterminate at best”).

227. *See id.*; *see also* Interview with Larry Spain, *supra* note 128 (“The fact that no consensus could be reached on a standard possession schedule to be applicable to children under the age of three is most likely a recognition that individual circumstances of the parties and particular needs of a young child make it impossible to come up with a possession schedule that will apply in almost all circumstances.”).

228. *See supra* discussion Part VI.B.

less important to the child—a mere visitor in the child’s life—by undermining the amount of time spent with the child.²²⁹

Reality shows that family law judges apply the Texas Family Code statutes literally and will, therefore, apply a default order absent any substantial evidence not to.²³⁰ Further, because the default visitation schedules provide only the minimum amount of time a noncustodial parent should have with his or her child, the statute may be doing a disservice to the parent-child relationship that is so significant to the child’s development.²³¹ Thus emerges a balancing challenge to restrain a judge’s discretion with informative and applicable guidelines while also eliminating the use of a one-size-fits-all visitation schedule.

3. Proposal: Texas Pride with Modification

Statutory guidelines that limit a judge’s personal discretion are helpful for making well-informed decisions regarding young child visitation schedules, but they also present an issue of a too-literal application that fails to take into account the entire circumstances of the particular young child. The third option and recommendation is to support the Texas Legislature’s good faith attempt to solve an obstinate problem with modifying the recent Amendment to § 153.254 of the Texas Family Code—the goal is not to fall backwards but to continually progress forward.²³² Perhaps what is needed most is a friendly reminder for the judge to keep the best interest of the child—the particular infant or toddler in the present case—in the forefront of the mind when ordering a parental possession schedule.²³³

The proposal for modification aims to improve the statute by re-emphasizing the golden standard that should be the heart of all decisions involving children: the best interest of the child standard.²³⁴ Currently, with the recent Amendment, § 153.254 lists twelve crucial factors that provide judges with an informed guide and that surely must be considered when devising a visitation schedule appropriate for the physical and emotional development of a young child.²³⁵ Then, pushed down to the bottom of the

229. See Freeman, *supra* note 201, at 786-87.

230. See Reppeto In-Person Interview, *supra* note 128 (discussing the tendency for family law judges to literally apply statutes); *supra* Part IV.C.

231. See Freeman, *supra* note 201, at 786-87 (explaining that “traditional visitation schedules between the child and the noncustodial parent, a schedule that supposedly places emphasis on the child’s physical stability but which, in actuality, erodes the emotional ties with the noncustodial parent, and, therefore, the stability of that relationship”).

232. See *supra* Parts IV.D, V.A-B.

233. See Levin, *supra* note 210, at 846 (“Children are ‘secondary victims’ in the legal system [because] [c]ourts purport to follow a best interests of the child standard in child custody and visitation decisions, yet judges continue to focus on the mother and the father to the exclusion of the child in making judicial decisions.”).

234. See TEX. FAM. CODE ANN. § 153.002 (West 2011).

235. See *id.* § 153.254.

statute, a thirteenth factor resides that tells judges to consider “any other evidence of the best interest of the child”—this is the golden standard.²³⁶ The golden standard should be factor number one that is considered first, rather than the last factor that could easily be overlooked in a literal attempt to comply with the preceding twelve factors.²³⁷

Moving the best interest of the child standard to the forefront of the statute vigorously attempts to resolve the balancing challenge because (1) judges are first encouraged to look at the specific child’s entire surrounding circumstances and (2) judges are then encouraged to focus on particular factors that knowledgeably restrain discretion.²³⁸ This proposal would ensure that a judge’s personal discretion is channeled through the use of educated guidelines that keep the heart of Texas’s public policies as the most vital factor.²³⁹ In result, this proposal encourages judges to devise a well-informed visitation schedule that is unique to the child and that maximizes the child’s relationship with both the custodial and noncustodial parent as much as possible.²⁴⁰ More importantly, in result, Texas law actively serves in the best interests of its young, vulnerable children dealing with divorce.²⁴¹

VIII. CONCLUSION: REMEMBERING WHAT’S IMPORTANT

The state regulation of child care, including that of parental possession schedules, presents challenging and complicated issues for Texas’s legislative and judicial branches.²⁴² Dealing with young, vulnerable children less than the age of three further exacerbates the issues because it adds an element of special consideration that presents much room for doubt and debate.²⁴³ Given the vast research available today regarding the developmental needs for infants and toddlers of divorce, family law legislators and practitioners are progressively seeking ways to better serve the best interests of children.²⁴⁴ The most important aspect is that a happy visitation schedule is one that has the best interest of the young child at heart—a creed not to be forgotten in the progressive pursuit for solutions to an arduous problem.²⁴⁵

236. *Id.*; accord § 153.002.

237. § 153.254; see also Levin, *supra* note 210, at 856 (“[O]ne thing is clear about the best interests [of the child] standard: Its sole purpose is to protect children’s psychological and physical well-being in child custody and visitation decisions. Children first—that is the goal.”).

238. See discussion *supra* Part V.C.1-2.

239. See *supra* Part IV.B.

240. See discussion *supra* Parts III.A-C, IV.A-D.

241. See *supra* note 5 and accompanying text.

242. See *supra* Part II.

243. See *supra* Parts IV.D.1-2, V.A-C, VI.A-B.

244. See *supra* Part III.

245. See *supra* Part VII.

Although not perfect, modifying the recent laundry list Amendment to Texas Family Code § 153.254 by naming the best interest of the child standard as the number one factor is a further good faith effort and positive step toward bettering the lives of Texas's young, vulnerable children.²⁴⁶ Now children, like baby Cameron, can receive the careful individualized and thoughtful attention that children less than the age of three deserve to ensure that judges, like Judge Hooks, are devising parental possession schedules in the child's best interest.²⁴⁷ Texas's soul is intelligently compassionate and its future is bright.²⁴⁸

246. *See supra* Part VII.B.3; *supra* note text accompanying 232.

247. *See supra* notes 6-14 and accompanying text.

248. *See supra* notes 1-2 and accompanying text.