PROTECTING POSSESSORY PARENTS: THE PROBLEMS WITH THE FIT-PARENT PRESUMPTION IN *IN RE C.J.C.*

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ABSTRACT

The fit-parent presumption is a constitutionally guaranteed right that protects all fit parents from government intrusion, absent compelling evidence that the child will be significantly impaired. Before the Supreme Court of Texas's groundbreaking decision in In re C.J.C.*, Texas family courts were obligated to apply the fit-parent presumption only in original suits affecting the parent-child relationship. Now, while extending the presumption to modification suits, the Texas Supreme Court attached the requirement that the parent must have been named a managing conservator to receive the constitutionally required benefit.*

This Comment uses a San Antonio Court of Appeals case that, although pre-dating In re C.J.C.*, would have the same unfair outcome if litigated today. The facts of this case highlight how the failure to apply the fit-parent presumption to parents who were granted possessory conservatorship for reasons other than being unfit leads to parental rights being trampled on in favor of nonparents.*

This Comment seeks to explore the historical development of the fit-parent presumption, describe the shortcomings of Texas's attempt to align its Family Code with constitutional requirements, and propose a solution that would protect possessory parents who were deemed fit in the original suit affecting the parent-child relationship from losing the fit-parent presumption. The legislature should amend the Texas Family Code to require judges to include in their findings of an original suit affecting the parent-child relationship whether the possessory conservator maintains the fit-parent presumption in modification suits involving a nonparent. This solution, although simple, has not been suggested in previous literature and allows for the trial court to protect possessory parents in the event the managing conservator passes away and a nonparent seeks possession or access to the child.

* A special thank you to Judge Jack W. Marr, Rosalind Perez, Kalee Sue Gore, my mom, and my grandparents. I could not have done it without y'all.

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I. INTRODUCTION

A mother and father fell in love, got married in 1995, and had a child in 1999.[1] Unfortunately, the couple got divorced in 2002, with the court granting the mother sole managing conservatorship of the child and naming the father as a possessory conservator.[2] The father had maintained a consistent visitation schedule with the child until he learned of the mother's affair with her boss.[3] The mother had moved an hour away from the father.[4] The father sought counsel after learning that the man his ex-wife was sleeping with had a family history of child abuse.[5] "World War III" began, and the mother denied the father access to the child.[6]

Around 2004, the father required a kidney transplant and open-heart surgery due to injuries sustained from his valiant service in Vietnam.[7] He wrote the mother letters begging to "re-establish" a relationship between him and the child.[8] After many failed attempts, the father stopped paying child support to afford an attorney to help enforce the visitation rights given to him in the divorce proceeding.[9]

The mother moved on and married her boss in 2005.[10] Because the mother refused to grant the father access to the child, the child knew only the stepfather as a father figure.[11] Unfortunately, the mother was an alcoholic, which led to the destruction of the family.[12] The stepfather assumed responsibility for the child most of the time, but he was not without fault.[13] He admitted to enabling his wife's alcohol addiction by purchasing the alcohol for her.[14] He had been arrested for grabbing his wife "by the neck, dragging her out of the room, and slapping her."[15] Also, the Texas Department of Family and Protective Services found, by the preponderance of the evidence, that both the mother and stepfather had "engaged in negligent supervision and physical neglect" of the child.[16]

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1. *In re* Guardianship of C.E.M.-K., 341 S.W.3d 68, 71 (Tex. App.—San Antonio 2011, pet. denied).
2. *Id.*
3. *Id.* at 71–72.
4. *See id.* at 72.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 81.
12. *Id.* at 72.
13. *See id.* at 73.
14. *Id.*
15. *Id.* at 72.
16. *Id.* at 73.

The mother eventually passed away from a drug overdose.[17] When the stepfather filed an application to be appointed guardian, the father requested to be appointed as his child's guardian.[18] However, the court awarded sole managing conservatorship to the stepfather.[19]

Why would an enabling, abusive, and neglectful stepparent be awarded sole managing conservatorship over the child's actual father? The answer lies with Texas courts' failure to comply with the constitutionally required fit-parent presumption in *Troxel*.[20] The fit-parent presumption, as described in *Troxel*, protects a parent who "adequately cares" for their child from government intrusion.[21] Currently, the Texas Family Code and the Supreme Court of Texas places limitations on the fit-parent presumption that are not found in *Troxel* by neglecting to afford parents, whose fitness was not determined in the original suit affecting the parent-child relationship (SAPCR), the fit-parent presumption in modification SAPCRs.[22] The Texas Legislature should amend the Texas Family Code to require judges to include in their findings of the original SAPCR whether the possessory conservator retains the fit-parent presumption in modification suits.[23]

This Comment discusses the history of parental rights in Texas and explains how requiring a finding of fitness in the original SAPCR will protect the fundamental right of parenthood against government intervention.[24] Part II provides a background of the development of the fit-parent presumption from *Troxel* to the Supreme Court of Texas's interpretation and application to the Texas Family Code.[25] Part III explains why an amendment to the Texas Family Code is necessary to comply with the constitutional fit-parent presumption required in *Troxel* and further addresses the objections to adjudicating fitness in the original SAPCR.[26]

II. THE HISTORY OF THE FIT-PARENT PRESUMPTION IN TEXAS

For a clear picture of how the fit-parent presumption developed from constitutional law, this Section will first discuss the U.S. Supreme Court's decision in *Troxel* and then describe how the Texas Supreme Court's decision in *In re C.J.C.* "fully adopted" the fit-parent presumption by extending it to

17. *Id.* at 74 & n.1.
18. *Id.* at 74.
19. *Id.* at 76.
20. *See infra* Section II.A (discussing the background of *Troxel*).
21. Troxel v. Granville, 530 U.S. 57, 68 (2000).
22. *See infra* Sections II.A–B (explaining the pertinent case law).
23. *See infra* Section III.A (discussing why the legislature should amend the Texas Family Code).
24. *See infra* Part II (reviewing the history of parental rights in Texas).
25. *See infra* Part II (discussing *Troxel*, *In re C.J.C.*, and the judicial aftermath).
26. *See* infra Part III (arguing for legislation to allow possessory parents to benefit from the fit-parent presumption).

modification SAPCRs.[27] Next, a background on the Texas Family Code is necessary to understand when the current presumption kicks in and under what circumstances a nonparent may intervene.[28] Then, this Section concludes by highlighting how the lower courts have dealt with Texas's version of the fit-parent presumption being inapplicable to modification suits, who is a fit parent, and what amount of evidence is required to rebut the presumption.[29]

A. Troxel *Sets the Standard*

Historically, common law principles have prevented nonparents from having legal access to a child against a parent's wishes.[30] This social policy allowed parents to make decisions for their children without the undue influence or interference by nonparents.[31] However, as Americans began to live longer and accumulate more wealth by retirement age, grandparents began to take a more active role in their grandchildren's lives.[32] In safeguarding their ability to do so, grandparents have successfully used their wealth and voting population to secure visitation statutes in nearly all states.[33] These nonparent visitation statutes were the subject of a due process challenge against parental rights in *Troxel v. Granville*.[34]

In *Troxel v. Granville*, the U.S. Supreme Court recognized that the Due Process Clause of the Fourteenth Amendment includes the fundamental right of a parent to make decisions regarding the care, custody, and control of their children against the objection of a nonparent.[35] *Troxel* involved a Washington statute that allowed "any person" at "any time" to petition the court for visitation if it was in the child's best interest.[36] The parents involved in this suit were never married.[37] After the death of the father, the mother of the children limited visitation between the children and their paternal grandparents.[38] The grandparents petitioned the court for visitation rights.[39]

The Washington Superior Court entered an order requiring visitation one weekend per month, one week during the summer, and four hours on the

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27. *See infra* Section II.A (discussing the background of *Troxel*).

28. *See infra* Section II.B (discussing the background of *In re C.J.C.*).

29. *See infra* Section II.C (explaining all pertinent parts of the Texas Family Code and its application).

30. Susan Tomaine, Comment, Troxel v. Granville*: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family*, 50 CATH. U.L. REV. 731, 736–37 (2001).

31. *Id.* at 734–38.

32. *See generally id.* at 739–40 (discussing the demographic shifts in America).

33. *Id.* at 745.

34. *Id.* at 750.

35. 530 U.S. 57, 57 (2000).

36. *Id.* at 61.

37. *Id.* at 60.

38. *Id.* at 61.

39. *Id.*

grandparents' birthdays.[40] On remand, the court relied on the best interest of the child standard and found that the child would benefit from spending time with their paternal grandparents.[41] The Washington Supreme Court reversed the lower court's visitation decision and held the statute unconstitutional.[42] The U.S. Supreme Court affirmed, creating the modern-day fit-parent presumption.[43]

The Fourteenth Amendment of the U.S. Constitution provides heightened protection for fundamental rights and liberty interests.[44] The right for parents to "establish a home and bring up children" has been protected as a liberty interest since the landmark decision of *Meyer v. Nebraska*.[45] From this right, the Court declared that

> [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[46]

Thus, "fit parents act in the best interest of their children" and the state should not be able to infringe upon a fundamental right of a parent simply because they believe a "better decision could be made."[47]

In *Troxel*, the Supreme Court made no mention of the history of custody litigation before applying the fit-parent presumption.[48] There had been no prior adjudication of the mother's fitness on record prior to the decision of the Court.[49] Regardless, the fit presumption applied, and the Court did not allow for the grandparents or the lower court to impose their judgment over the decision of the parent.[50]

B. In re C.J.C. *"Aligns" Texas with* Troxel

In the aftermath of *Troxel*, Texas has found its third-party visitation statutes unconstitutional absent a fit-parent presumption analysis.[51] However,

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40. *Id.*
41. *Id.* at 61–62.
42. *Id.* at 62–63.
43. *Id.* at 68.
44. *Id.* at 65 (citing Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997), and Reno v. Flores, 507 U.S. 292, 301–02 (1992)).
45. *Id.* at 65 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
46. *Id.* at 68–69.
47. *Id.* at 68, 73, 76–77 (Souter, J., concurring) (internal quotations omitted) (citing *In re* Custody of Smith, 137 Wash. 2d 1 (1998)).
48. *See id.* at 68–69 (noting that the grandparents did not allege that the parent was unfit).
49. *See id.* (pointing out that the trial court had not included any findings of the parent's fitness).
50. *Id.* at 75 (applying the fit-parent presumption to the parents).
51. *See In re* Aubin, 29 S.W.3d 199, 203–04 (Tex. App.—Beaumont 2000, no pet.) ("Absent a finding, supported by evidence, that the safety and welfare of the children is significantly impaired by the

this fit-parent presumption only applied in original SAPCRs and was not considered in modification SAPCRs until the Texas Supreme Court found the application in modification suits constitutionally required.[52]

The Texas Supreme Court announced its opinion in *In re C.J.C.* on June 26, 2020.[53] The child's parents were never married, and in 2016, the father requested a determination of conservatorship.[54] The trial court named both parents as joint managing conservators, granting the exclusive right to designate the child's residence to the mother and regular periods of possession to the father.[55]

In September 2017, the mother moved herself and the child into her boyfriend's house.[56] By January 2018, the mother had initiated a suit seeking to modify child support and the father's possession schedule.[57] The father requested this relief be denied.[58] While the modification suit was still pending, the mother passed away.[59] This led to the father moving to dismiss the pending suit.[60] While the dismissal was pending, the maternal grandparents intervened in the modification suit and asked to be named joint managing conservators with the father.[61] The mother's boyfriend intervened as well.[62] The trial court denied the father's motions to dismiss for lack of standing for both the grandparents and the boyfriend.[63] The Fort Worth Court of Appeals granted mandamus relief to the grandparents but denied relief to the boyfriend, finding standing in § 102.003(a)(9) of the Texas Family Code.[64]

After an evidentiary hearing, the trial court granted the boyfriend temporary managing conservatorship of the child.[65] The boyfriend was allowed an unrestricted duty of care, custody, control, and protection of the child during his periods of possession.[66] The child had only lived with the mother's boyfriend for about six months prior to the mother's death.[67]

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denial of [a third party's] visitation, [the parent's] decision regarding whether the children will have any contact with the [third party] is an exercise of her fundamental right as a parent.").

52. *In re* V.L.K., 24 S.W.3d 338, 344 (Tex. 2000); *In re* C.J.C., 603 S.W.3d 804, 819 (Tex. 2020).

53. 603 S.W.3d at 819.

54. *Id.* at 808; *see infra* Section II.C (describing conservatorships and SAPCRs).

55. *In re C.J.C.*, 603 S.W.3d at 808.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 808–09.

62. *Id.*

63. *Id.*

64. *Id.* Section 102.003(a)(9) of the Texas Family Code allows for an original SAPCR to be filed by "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition." TEX. FAM. CODE § 102.003(a)(9).

65. *In re C.J.C.*, 603 S.W.3d at 809–10.

66. *Id.* at 810.

67. *See id.* at 809.

The father appealed to the Texas Supreme Court seeking mandamus relief.[68] In recognizing that the lower courts were not giving constitutionally granted weight to the decisions of a fit parent, the Texas Supreme Court generally adopted *Troxel*'s fit-parent presumption and granted the much-needed relief to the actual father.[69] The section of the Texas Family Code affecting modification suits does not expressly have a fit-parent presumption.[70] In an attempt to avoid having a significant portion of § 153.131 of the Texas Family Code ruled unconstitutional, the Texas Supreme Court decided to read the fit-parent presumption into the statute.[71]

The Court concluded that the presumption is to be considered in the best interest determination in suits *in which the parent has previously been named managing conservator* and a nonparent is seeking possession or access.[72] However, in modification suits between a parent with only possessory conservatorship and a nonparent, *no fit-parent presumption shall be applied*.[73]

The concurring justice pointed out several issues that would need to be addressed in the future.[74] The most prominent omission in the majority opinion is the lack of clarification on what amount of evidence is needed to overcome the fit-parent presumption.[75] This daunting task has been taken on by the lower courts and will likely be addressed in future Texas Supreme Court decisions.[76] However, the technical issue that the court has largely ignored is that the best interest analysis is conducted by the trial court.[77] As a result, by neglecting to grant joint managing conservatorship in the original SAPCR, the court has essentially deemed the possessory parent unfit.[78]

C. The Code as Current

The Texas Family Code is the body of statutory law that governs all formal legal issues regarding familial relationships.[79] Title 5 of the Texas

68. *Id.*; *see also In re* Moore, 511 S.W.3d 278, 286 (Tex. App.—Dallas 2016, no pet.) ("Mandamus is an extraordinary remedy reserved for those exceptional cases in which the trial court clearly abused its discretion and there is no adequate remedy on appeal.").

69. *In re C.J.C.*, 603 S.W.3d at 818, 820.

70. *Id.* at 816.

71. *Id.* at 818–19.

72. *Id.* at 819.

73. *Id.*

74. *In re C.J.C.*, 603 S.W.3d at 821 (Lehrmann, J., concurring).

75. *Id.*

76. *See infra* Section II.D (discussing how the lower courts have interpreted the fit-parent presumption).

77. *See In re C.J.C.*, 603 S.W.3d at 819.

78. *See In re* H.V.S., No. 04-20-00217-CV, 2020 Tex. App. LEXIS 7670, at *1, *13 (Tex. App.—San Antonio Sept. 23, 2020, no pet.) (mem. op.) (not designated for publication).

79. *The Texas Family Code*, N. TEX. FAM. LAW. (July 31, 2020), https://www.northtexasdivorcelawyers.com/blog/2020/july/the-texas-family-code/#:~:text=The%20Texas%20Family%20Code%20is,a%20large%20range%20of%20topics.

Family Code specifically deals with the parent-child relationship.[80]

1. The Distinction Between Original and Modification SAPCRs

Chapters 153 and 156 of the Texas Family Code govern SAPCRs.[81] In these suits, a judge can determine the conservatorship of the child involved.[82] Conservatorship is a "legal term to describe the management of a child's life and the decision-making process for the child's well-being."[83] There are two types of SAPCRs: the original and modification suits.[84] An original SAPCR is governed by Chapter 153 of the Texas Family Code and is used when the action is the first instance of establishing a legal relationship between the parent and child or when the court needs to address a distinct issue not addressed in prior SAPCRs.[85] A modification SAPCR is governed by Chapter 156 and is used when a material and substantial change has occurred, deeming it necessary to modify an existing SAPCR to comply with the child's best interest.[86] There are three types of conservatorships: sole managing, joint managing, and possessory.[87]

A sole managing conservator has the ability to make all decisions for the child.[88] A joint managing conservatorship allows both parents to share in the decision-making of the child, often featuring a standard possession order that dictates when each parent has access to the child.[89] A possessory conservator maintains some rights as a parent; however, their decision-making ability is subject to the final say of the managing conservator.[90] The important distinction between managing and possessory conservatorship for purposes of this Comment is that the possessory conservator does not benefit from the fit-parent presumption in modification suits.[91]

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80. TEX. FAM. CODE tit. 5.

81. *See* TEX. FAM. CODE §§ 153.005, 156.101.

82. *SAPCR (Custody) Cases*, TEXASLAWHELP.ORG, https://texaslawhelp.org/article/parent-sapcr-custody-cases (last updated Jan. 18, 2023) [hereinafter *SAPCR (Custody) Cases*].

83. *Types of Conservatorships in Texas*, CLARK L. GRP., https://www.clgtx.com/blog/types-of-conservatorships-in-texas (last updated June 16, 2024),

84. *SAPCR (Custody) Cases*, *supra* note 82.

85. Taylor Seaton, Comment, *Standing Up for Nontraditional Families: How Third-Party Standing Prevents Courts from Examining the Best Interest of the Child in Texas*, 52 TEX. TECH L. REV. 937, 949 (2020).

86. *In re* RA, No. 09-20-00275-CV, 2022 WL 7180524, at *1, *7 (Tex. App.—Beaumont Oct. 13, 2022, no pet.) (mem. op.) (not designated for publication). *See also* TEX. FAM. CODE § 156.101(a).

87. TEX. FAM. CODE § 153.132. *See also Child Custody and Conservatorship*, TEXASLAWHELP.ORG (last updated Jan. 16, 2023) https://texaslawhelp.org/article/child-custody-and-conservatorship (detailing the three types of conservators).

88. FAM. § 153.132. *See also SAPCR (Custody) Cases*, *supra* note 82 (explaining "child custody" generally).

89. *SAPCR (Custody) Cases*, *supra* note 82.

90. *See* FAM. § 153.192.

91. *See In re* C.J.C., 603 S.W.3d 804, 817–18 (Tex. 2020).

2. The Presumption to Be Joint Managing Conservators

The Texas Family Code presumes that both parents should be granted joint managing conservatorship.[92] However, Texas Family Code § 153.134 allows the court to grant sole conservatorship to one of the parents if the appointment is in the best interest of the child.[93] The ability of the parents to "reach shared decisions in the child's best interest" and "whether each parent can encourage and accept a positive relationship between the child and the other parent" are factors included in this decision.[94] A court's granting of a sole managing conservatorship for these reasons does not establish the other parent as unfit, yet such a parent will lose the fit-parent presumption in the SAPCR modification proceedings against a nonparent.[95]

Courts have granted sole conservatorship in situations where the parents were unable to cooperatively engage in decision-making for their child.[96] For example, courts have determined that enough facts were alleged to rebut the joint management presumption when it was found that both parents' poor communication skills between each other led to hostile interactions.[97] Further, a court did not abuse its discretion in granting the mother sole managing conservatorship when it determined that the parents could not agree on marriage or commitment, child support payment amounts, or the needs of the child.[98] In both of these cases, the court did not adjudicate the fitness of the possessory conservator, as there were no allegations that the possessory parent alone would be incapable of making sound decisions for their child.[99]

3. The "Codified" Fit-Parent Presumption

Texas Family Code § 153.131(a) is the "parallel" fit-parent presumption to *Troxel* and was determined in *In re C.J.C.* to apply in both original and modification SAPCRs.[100] Ironically, the Texas Supreme Court case, *In re V.L.K.*, which ruled that the fit-parent presumption only applied to original SAPCRs, noted that "[t]he presumption that the best interest of the child is

92. FAM. § 153.131.

93. *Id.* § 153.134.

94. *Id.*

95. *See infra* Section II.D (explaining the consensus of courts to only apply the presumption to managing conservators).

96. *See* Doyle v. Doyle, 955 S.W.2d 478, 480 (Tex. App.—Austin 1997, no pet.); Martinez v. Molinar, 953 S.W.2d 399, 400 (Tex. App.—El Paso 1997, no writ).

97. *Doyle*, 955 S.W.2d at 480.

98. *Martinez*, 953 S.W.2d at 403.

99. *See Doyle*, 955 S.W.2d at 478; *Martinez*, 953 S.W.2d at 399.

100. TEX. FAM. CODE § 153.131(a) ("[U]nless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.").

served by awarding custody to [a] parent is deeply embedded in Texas law."[101]

The presumption that the parent be appointed managing conservator can be overcome by evidence proving the appointment would cause "significant[] impair[ment] on the child's physical health or emotional development[.]"[102] The statutory presumption only applies to those who were granted managing conservatorship in the original modification suit.[103]

Currently, nonparents seeking possession or access to the child against the managing conservator's wishes must allege in their pleadings enough information to prove the parent unfit.[104] A few cases after *In re C.J.C.* have attempted to address the concurring opinion's issue involving how much evidence is required to rebut the fit-parent presumption.[105] However, if the court concludes that enough information to rebut the fit-parent presumption was provided, then possession or access to the child will be granted using the best-interest standard.[106] Possessory conservators, who currently will not benefit from the fit-parent presumption, will need to litigate under the best interest of the child standard for all modification suits.[107]

4. Standing for Nonparents

Texas Family Code § 156.101 allows for a modification of an original SAPCR if the circumstances of the child, conservator, or other party have materially and substantially changed.[108] This is the section of the Family Code that nonparents can use to petition the court for possession and access of the child.[109] For example, the death of the managing conservator is considered a material and substantial change that would allow for modification.[110] In the situation where the sole managing conservator passes away, a nonparent can file for possession and access of the child against the surviving parent, who does not benefit from the fit-parent presumption in the subsequent proceedings.[111]

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101. *In re* V.L.K., 24 S.W.3d 338, 341 (Tex. 2000) (citing Lewelling v. Lewelling, 796 S.W.2d 164, 166 (Tex. 1990)).

102. *Id.* (citing FAM. § 153.131(a)).

103. *In re C.J.C.*, 603 S.W.3d at 804, 818–19.

104. *See id.* at 813.

105. *See infra* Section II.D (discussing the amount of evidence courts have required to rebut the fit-parent presumption post-*In re C.J.C.*).

106. *See* Rolle v. Hardy, 527 S.W.3d 405, 419 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

107. *In re* B.B., 632 S.W.3d 136, 139 (Tex. App.—El Paso 2021, no pet.).

108. TEX. FAM. CODE § 156.101.

109. *See, e.g.*, *In re* S.A.H., 420 S.W.3d 911, 927 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (allowing a great-aunt to have custody of the child because of the parent's history of unstable relationships, employment, and housing).

110. *See In re* P.D.M., 117 S.W.3d 453, 456 (Tex. App.—Fort Worth 2003, pet. denied).

111. *See id.* at 457–58.

Texas Family Code § 102.003 governs the general standing requirements for who can file an SAPCR.[112] There are currently fifteen enumerated ways a person could have standing to file a suit, with about three ways a nonparent may petition if they are not already a conservator or foster parent.[113] First, a nonparent has standing to file suit if they have had "actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing."[114] Second, a nonparent will have standing if they have lived with the parent and child for at least six months if the parent is deceased.[115] Third, a nonparent will have standing if they are a relative within the third degree of consanguinity of the child and the parents are deceased or the child's circumstances will significantly harm their health or emotional development.[116]

Texas Family Code § 102.004 provides another way for grandparents or those related to the child within the third degree of consanguinity to establish standing.[117] This section requires the grandparent or family member to allege that their intervention is necessary because the child's circumstances would "significantly impair the child's physical health or emotional development" or the surviving parent filed the suit.[118] This section is unusual because the Texas Legislature has conferred standing based on the existence of proof rather than the facts alleged in the pleadings.[119] The proof must be established by the preponderance of the evidence, so although it seems enticing to claim standing under this section, it is extremely difficult.[120]

D. Ensuing Struggles Applying In re C.J.C.

The lower courts have applied *In re C.J.C.* and yielded some interesting results in attempting to decide what makes a parent "fit" and what evidence is necessary to overcome the presumption.[121] They all have agreed, however, that the presumption does not apply to parents who were granted possessory

112. TEX. FAM. CODE § 102.003.

113. *Id.*

114. *Id.* § 102.003(9); *see also In re* H.S., 550 S.W.3d 151, 160 (Tex. 2018) (ruling that this statute is applicable regardless of the current status of the parent's rights).

115. FAM. § 102.003(11).

116. *Id.* §§ 102.003(13), 102.004.

117. *Id.* § 102.004.

118. *Id.*

119. *See* Rolle v. Hardy, S.W.3d 405, 416 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

120. *See* Mauldin v. Clements, 428 S.W.3d 247, 263 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (stating that family law standing requiring "satisfactory proof" must be proven by the "preponderance of the evidence").

121. *See generally In re* C.J.C., 603 S.W.3d 804, 821 (Tex. 2020) (Lehrmann, J., concurring) (commenting on the fact that trial courts will continue to struggle to evaluate whether the fit-parent presumption has been overcome as a result of the court not reaching the issue).

conservatorship in the original SAPCR.[122]

The lack of guidance in determining whether a parent is fit has led courts to consider several things.[123] Evidence of a parent's distant past conduct alone is not enough to deem a parent unfit.[124] However, distant past conduct coupled with recent incidents has been enough for some courts to rule a parent unfit.[125] The ability of the parent to provide a stable housing situation is considered in the fit-parent determination, but it has been weighed in various degrees.[126] Stable employment along with a steady job tends to determine a fit parent but will not be weighed against a parent who has a support system to adequately care for the child.[127]

Courts have applied various evidentiary standards for determining what amount of evidence overcomes the fit-parent presumption. The seemingly prevailing standard is that the nonparent must prove by compelling evidence that the appointment of the parent will "significantly impair" the child's physical health or well-being.[128] The presumption cannot be rebutted merely because a nonparent has access to better accommodations for the child or that the child will be sad in their absence.[129] Some courts have identified behaviors such as "[p]hysical abuse, severe neglect, abandonment, drug or alcohol abuse, or immoral behavior" as enough to rebut the presumption.[130] This standard is strong enough to protect the fundamental interest of a parent in raising their children free from interference while ensuring the child is in a safe environment.[131] If there is sufficient evidence indicating that the parent has abused, neglected, or abandoned their child, it is fair to say they are incapable of adequately caring for their child within the definition of a "fit

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122. *See, e.g.*, Johnson v. Kimbrough, 681 S.W.3d 430, 432–33 (Tex. App.—Austin 2023, no pet.) (finding that the trial court had erred in applying the fit-parent presumption to a child's parent that was appointed the possessory conservator in the original SAPCR).

123. Troxel v. Granville, 530 U.S. 57, 68 (2000) (defining a fit parent vaguely as one who "adequately cares for his or her children").

124. Danet v. Bahn, 436 S.W.3d 793, 797 (Tex. 2014).

125. *In re* S.T., 508 S.W.3d 482, 492 (Tex. App.—Fort Worth 2015, no pet.).

126. *Compare In re* B.B., 632 S.W.3d 136,141 (Tex. App.—El Paso 2021, no pet.) (finding a father who "couch surfed" unfit to adequately care for a child), *with* Lewelling v. Lewelling, 796 S.W.2d 164,167 (Tex. 1990) (finding that a "somewhat crowded" house is not enough to qualify as a significant impairment to the child).

127. *In re* A.V., No. 05-20-00966-CV, 2022 WL 2763355, at *5 (Tex. App.—Dallas July 15, 2022, no pet.) (mem. op.).

128. *In re N.H.*, 652 S.W.3d 488, 497 (Tex. App.—Houston [14th Dist.] 2022, pet. denied).

129. *In re* S.D., No. 14-20-00851-CV, 2021 WL 3577852, at *4 (Tex. App—Houston [14th Dist.] Aug. 10, 2021, no pet.) (mem. op.) (finding that access to an educational program for children with special needs is enough to overcome the fit-parent presumption); *In re Scheller*, 325 S.W.3d 640, 643–44 (Tex. 2010) (holding that children missing their grandparents is not enough to overcome the fit-parent presumption).

130. *Rolle v. Hardy*, 527 S.W.3d 405, 420 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

131. *See* Troxel v. Granville, 530 U.S. 57, 69–70 (2000) (requiring "at least some special weight to the parent's own determination").

parent."[132]

The San Antonio Court of Appeals addressed when the fit-parent presumption applies in *In re H.V.S.*[133] After the Department of Family and Protective Services removed a child, the mother was appointed as possessory conservator, and the department received sole managing conservatorship.[134] The foster parents petitioned to intervene for managing conservatorship and to terminate the mother's rights.[135] The trial court concluded, against the mother's objection, that the foster parents and the mother should be joint managing conservators and that the foster parents had the right to establish the child's residence.[136]

The San Antonio Court of Appeals affirmed, reasoning that the mother was not entitled to the benefit of the fit-parent presumption under *In re C.J.C.* because she had not been granted managing conservatorship in the original suit.[137] Since the Department of Family and Protective Services was named the managing conservator and not the mother, she would not receive the additional constitutional protection.[138] Assuming that fitness is required to become a joint managing conservator, what is the justification for neglecting to allow the parent the ability to make decisions for their child?[139] *Troxel* did not constrain the constitutional fit-parent presumption to only parents who were granted managing conservatorship in the original suit.[140]

In *In re B.B.*, the El Paso Court of Appeals reiterated the decision in *In re C.J.C.* that Texas courts were not going to apply the fit-parent presumption to parents who were not appointed managing conservatorship in an original proceeding.[141] The parent would not benefit from the presumption, and the court would proceed under the best interest of the child standard.[142]

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132. *See In re* J.F.-G., 627 S.W.3d 304, 317–18 (Tex. 2021) (establishing that a parent who was not around their child for eight years, had a history of dealing drugs, and did not look after the child's safety was unfit).

133. *In re* H.V.S., No. 04-20-00217-CV, 2020 Tex. App. LEXIS 7670, at *1–2 (Tex. App.—San Antonio Sept. 23, 2020, no pet.) (mem. op.).

134. *Id.* at *1.

135. *Id.*

136. *Id.*

137. *Id.* at *6.

138. *Id.*

139. *See infra* Section III.D (discussing the Texas Supreme Court's logic for excluding the fit-parent presumption in modification suits).

140. *See* Troxel v. Granville, 530 U.S. 57, 68 (2000).

141. *In re* B.B., 632 S.W.3d 136, 140 (Tex. App.—El Paso 2021, no pet.).

142. *Id.*

III. THE TEXAS FAMILY CODE SHOULD REQUIRE FINDINGS OF FITNESS FOR PARENTS GRANTED POSSESSORY CONSERVATORSHIP TO CONFORM WITH *TROXEL*

To ensure that possessory parents retain their constitutional right to be free from governmental influence in the "care, custody, and control" of their children in the event a nonparent is seeking access or possession, the court should be required to make a finding on fitness in the original SAPCR.[143] As previously discussed, a parent can be named possessory conservator not because they are unfit but because of their inability to co-parent.[144] This is not analogous to the granting of possessory conservatorship on the basis that the parent is inadequately capable of making sound decisions for their child.[145] Yet, in the eyes of the Texas Legislature, the inability to co-parent deems one an unfit parent.[146]

A. Troxel *Does Not Place a Managing Conservatorship Limitation on the Presumption*

Even after addressing the constitutional fit-parent presumption in *In re C.J.C.*, the Texas Family Code remains ill-aligned with the constitutional requirements found in *Troxel*.[147] The U.S. Supreme Court did not attach any additional requirements outside of the fit-parent determination to benefit from the additional safeguard against the government and outsiders.[148] According to the U.S. Supreme Court, the constitutional presumption is to be revoked only if it has been determined that a parent is unfit.[149] However, the Texas Supreme Court has determined the presumption to apply only if the parent was granted managing conservatorship in the original SAPCR.[150] Excluding a fit, possessory parent from a constitutionally guaranteed presumption against nonparents in modification suits will eventually lead to a challenge in the Texas Supreme Court, but this can be addressed before Texas again neglects to comply with basic constitutional principles.[151]

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143. *Troxel*, 530 U.S. at 66.

144. *See* TEX. FAM. CODE § 153.134.

145. *Compare supra* Section II.C.2 (discussing grounds for granting sole managing conservatorship based on inability to co-parent), *with Troxel*, 530 U.S. at 68 (requiring a finding of unfitness before the fit-parent presumption is defeated).

146. FAM. § 153.134(a)(3) (providing that an important factor in a court's determination of whether to appoint both parents as joint conservators is "whether each parent can encourage and accept a positive relationship between the child and the other parent").

147. *See supra* notes 71–78 and accompanying text (discussing the misapplication of the fit-parent presumption).

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

149. *Id.* (applying the presumption so long as the parent adequately cares for their child).

150. *In re* C.J.C., 603 S.W.3d 804, 819 (Tex. 2020).

151. *See id.* at 821 (Lehrmann, J., concurring).

To reconcile the Texas Family Code with *Troxel*, the Texas Legislature should require judges to include in their findings of the original SAPCR a determination regarding whether the parent not named managing conservator retains the fit-parent presumption in modification suits involving nonparents. Legislative language to align § 153.134 of the Texas Family Code with *Troxel* could be added below subsection (b) to include the following:

> In the case of the court granting only possessory conservatorship to a parent, the court shall include specific findings on the record determining whether the parent is fit and maintains the fit-parent presumption in potential modification suits involving a nonparent. The court shall presume that a fit parent will act in the best interest of their child. A fit parent is one who adequately cares for his or her children. The presumption shall only be rebutted by compelling evidence showing the parent's actions will significantly impair the well-being or physical health of the child.[152]

With this language, the court would need to adjudicate in the original SAPCR whether it based its decision to grant sole managing conservatorship to one parent on the basis of the unfitness of the other parent.[153] If the court decides to grant sole managing conservatorship to one parent because the other is deemed unfit, the possessory conservator will not benefit from the fit-parent presumption in modification suits involving a nonparent.[154] In that situation, the unfit parent and nonparent seeking access to the child would rightfully be placed on equal footing in the "best interest of the child" determination.[155] Then, modification suits can proceed as they would without the fit-parent presumption.[156]

However, if the court decides to grant sole managing conservatorship based on factors outside of the other parent's fitness—for example, the inability to co-parent or constant discourse between the parents—the court then must find whether the possessory conservator is fit.[157] If the court concludes that the other parent is fit, then it would include this in its findings, and the possessory parent would benefit from the fit-parent presumption in future modification suits against a nonparent.[158] In this situation, the nonparent seeking possession or access against the parent would need to establish standing and allege sufficient facts to rebut the fit-parent

152. *See* TEX. FAM. CODE § 153.134.

153. *See supra* Section II.C.2 (discussing the inability to co-parent as a reason to grant sole managing conservatorship).

154. *See* Guardianship of C.E.M.-K., 341 S.W.3d 68, 78–79 (Tex. App.—San Antonio 2011, pet. denied).

155. *See id.*

156. *See id.*

157. *See supra* note 154 and accompanying text (providing the solution to the lack of fit-parent presumption application in SAPCRs between a nonparent and possessory conservator).

158. *See supra* note 156 and accompanying text (requiring a finding of fitness).

presumption, and then the court would then need to decide whether placement with the nonparent is in the "best interest of the child."[159]

Several states have responded to *Troxel* by enacting statutes that codify parents' fundamental liberty interest in the upbringing of their children or recognizing the fit-parent presumption appropriately per common law.[160] Maryland dealt with *Troxel* like Texas, reading the presumption into the best interest of the child, but did not limit the application to only managing conservators.[161] Louisiana limits the factors in the best interest of the child to those constitutionally granted to the parent.[162] Montana first determines the fitness of the parent and then applies the fit-parent presumption that can be rebutted only by clear and convincing evidence.[163] As in Texas, some of these states already had a form of the presumption on the books but either amended their Family Code to align with the constitutional requirement or adopted it through common law.[164] Although Texas already has some precautionary measures in place, such as stringent standing requirements, it does not grant all parents the ability to benefit until proven otherwise.[165]

In giving the fit-parent presumption to parents who, although not granted managing conservatorship, are still found to be fit, the court will align itself with the constitutional right found in *Troxel*.[166] Requiring the judge to make a finding of whether the parent will maintain the fit-parent presumption prevents parents who were not granted joint managing conservatorship for reasons other than being unfit from being subjected to the "best interest" standard in suits against nonparents.[167] This prevents the court from neglecting to extend deference to a fit parent's decisions in the event the managing conservator dies and a nonparent is seeking access to the child.[168]

B. The Best-Interest Standard Is Not Enough to Protect Fit Parents

The best interest of the child standard lacks the predictability and safeguards the fit-parent presumption guarantees.[169] Under the best-interest

159. *See generally In re* C.J.C., 603 S.W.3d 804, 821 (Tex. 2020) (Lehrmann, J., concurring) (discussing the need for evidence to rebut the fit-parent presumption).

160. Sonya C. Garza, *The* Troxel *Aftermath: A Proposed Solution for State Courts and Legislatures*, 69 LA. L. REV. 927, 940 n.100, 941 nn.101–04, 942 nn.105–07 (2009).

161. MD. CODE ANN., FAM. LAW § 9-102 (West, Westlaw through 2024 Sess.).

162. LA. CIV. CODE ANN. art. 136(D) (Westlaw through 2024 Sess.).

163. MONT. CODE ANN. § 40-9-102(3) (West, Westlaw through 2023 Sess.).

164. TEX. FAM. CODE § 153.131.

165. *See supra* Section II.C.4 (discussing the standing requirements in the Texas Family Code).

166. Troxel v. Granville, 530 U.S. 57, 68 (2000).

167. *See infra* Section III.B (discussing the best interest of the child standard).

168. *See generally* Guardianship of C.E.M.-K., 341 S.W.3d 68, 71–84 (Tex. App.—San Antonio 2011, pet. denied) (finding that possessory conservatorship bars the application of the fit-parent presumption).

169. *See* David W. Lannetti, *A Nonparent's Ability to Infringe on the Fundamental Right of Parenting: Reconciling Virginia's Nonparental Child Custody and Visitation Standards*, 30 REGENT U.L. REV. 203, 213–14 (2018).

standard, the focus of the inquiry is on the child, with parental rights taking the backseat.[170] The Texas "best interest of the child" standard has proven to be muddled with judicial interpretation and its ruling will only be reversed for abuse of discretion.[171]

There is no legislative definition of the "best interest of the child."[172] There is also a lack of appellate guidance in applying the standard in SAPCRs.[173] In *Holley v. Adams*, the Texas Supreme Court shed some light on "best interest" factors to consider in child custody termination cases.[174] These *Holley* factors include (1) the desires of the child, (2) the emotional and physical needs of the child, (3) the present and future emotional and physical needs of the child, (4) the parental ability of the person seeking custody, (5) the programs available to assist the caretaker to promote the best interest of the child, (6) the caretaker's plans for the child, and (7) parental acts or omissions.[175]

However, the applicability of the *Holley* factors depends entirely upon the situation.[176] Due to *Holley* specifically involving child custody termination, courts have adopted only some of the factors, or none at all, in dealing with child custody cases.[177] Often, the court, in dealing with SAPCR modifications, will have difficulty applying the factors if both litigants are suitable to raise the child.[178] Both parties have the ability to satisfy the emotional and physical needs of the child and a satisfactory ability to parent; so, the outcome of the suit could turn on the child's desires or programs available to assist the caretaker.[179]

Even finding some of the enumerated factors does not necessarily mean the court will consider that dispositive.[180] A finding of a few relevant *Holley* factors has been considered enough to substantiate a "best interest of the

170. *See In re* C.J.C., 603 S.W.3d 804, 816 (Tex. 2020) (quoting *Troxel* in determining that a nonparent must overcome the presumption before the best-interest standard).

171. Gillespie v. Gillespie, 644 S.W.2d 449, 451 (Tex. 1982) (holding that the determination of the best interest of the child "will be reversed only when it appears from the record as a whole that the court has abused its discretion").

172. *See* Taylor v. Taylor, 254 S.W.3d 527, 536 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (implementing the parental presumption before the best interest of the child standard).

173. *Id.*

174. 544 S.W.2d 367, 371 (Tex. 1976).

175. *Id.* at 372.

176. *See* Morgan Tauscher, Comment, *A Solution to the Murkiness of Nonparent Visitation Rights in Texas*, 74 SMU L. REV. 873, 881 (2021).

177. *See* Hon. Donald Dowd, *Best Interest: Using the* Holley *Factors in Child Custody Cases*, STATE BAR TEX., https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=35145 (last visited Oct. 4, 2024) [hereinafter Hon. Donald Dowd] (describing the difficulty of applying the *Holley* factors).

178. *Id.*

179. *See* MacDonald v. MacDonald, 821 S.W.2d 458, 461 (Tex. App.—Houston [14th Dist.] 1992, no writ).

180. *In re* D.M., 58 S.W.3d 801, 807 (Tex. App.—Fort Worth 2001, no pet.).

child" determination on appeal.[181] Further, these factors have not been considered exhaustive, and courts can consider any outside factors they deem necessary.[182] Most importantly, the interest of the actual parent is missing entirely from the enumerated factors.[183] The court's ability to consider the programs available for the child is the perfect example of the difference between the best-interest standard and the fit-parent presumption.[184]

Since courts can consider any outside factors in their "best interest of the child" analysis, the phrase means whatever the attorneys can convince a judge or jury it means.[185] Some courts have instructed jurors that the best interest of the child is the choice that is most desirable or favorable for the child.[186] The American Bar Association recommends the best interest of the child be considered through the lens of child development, with great weight placed on the parent's ability to meet the needs of the child at that age.[187] Yet it should be the decision of a fit parent to determine what choices are most desirable or favorable to their child.[188]

Child custody cases are a fact-intensive determination.[189] Fact-intensive trials coupled with an extremely discretionary standard are a recipe for appeal.[190] Even with the abuse of discretion standard, countless cases have been reversed in the appellate court due to the trial court misinterpreting the best interest of the child standard and awarding conservatorship to the wrong person.[191] For example, trial courts have been reversed for considering that a parent was a Jehovah's Witness in declining to grant them managing

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181. Reyes v. Lafferty, No. 04-95-00937-CV, 1997 WL 13607, at *1–2 (Tex. App.—San Antonio Jan. 15, 1997, no writ) (not designated for publication).

182. *In re* V.L.K., 24 S.W.3d 338, 343 (Tex. 2000) (determining that in modification suits courts can also consider the child's need for stability and the need to prevent constant litigation).

183. Lauren Valastro, Comment, *Training Wheels Needed: Balancing the Parental Presumption, the Best Interest Standard, and the Need to Protect Children*, 44 TEX. TECH L. REV. 503, 510–11 (2012).

184. *Compare* MacDonald v. MacDonald, 821 S.W.2d 458, 461 (Tex. App.—Houston [14th Dist.] 1992, no writ) (considering the outside resources a parent has available to the child), *with In re* S.D., No. 14-20-00851-CV, 2021 WL 3577852, at *4 (Tex. App.—Houston [14th Dist.] Aug. 10, 2021, no pet.) (mem. op.) (concluding that the trial court erred in considering the grandparent's access to a school dedicated to special needs treatment).

185. Troxel v. Granville, 530 U.S. 57, 67 (2000) (noting that the best-interest determination rests "solely in the hands of the judge").

186. *Macdonald*, 821 S.W.2d at 460.

187. AMERICAN BAR ASSOCIATION, *A JUDGE'S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES* 65–76 (ABA Center on Children and the Law 2008).

188. Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 513 (1973) (stating that the best-interest standard lacks proper guidelines for judicial implementation).

189. *In re* De La Pena, 999 S.W.2d 521, 529 (Tex. App.—El Paso 1999, no pet.).

190. See *generally* Bell v. Hoskins, 357 S.W.2d 585, 586–89 (Tex. App.—Dallas, 1962, no writ) (explaining that because child custody determinations are fact-intensive, the trial judge should receive the presumption that they acted in the best interest of the child).

191. *See* Bennett v. Northcutt, 544 S.W.2d 703, 708 (Tex. App.—Dallas 1976, no pet.) (noting that the trial judge has broad discretion in determining what is in the best interest of the child because of their unique opportunity to observe the personalities of the parties involved in the original hearing).

conservatorship.[192] Historically, trial courts have taken interracial relationships into consideration when determining the best interest of the child.[193] The more recent, flagrant issue trial courts have considered is a person's sexuality in determining the best interest of the child.[194]

Even before *In re C.J.C.*, the Texas Supreme Court dealt with a case strikingly similar to *Troxel*, where parental rights took a backseat to the best interest of the child standard.[195] In *In re Mays-Hooper*, the mother, whose fitness was not adjudicated, was forced to allow her mother-in-law access to her child when the child's father passed away.[196] After countless hours and dollars spent litigating all the way up to the Texas Supreme Court, the obvious was decided.[197] The government had no right to infringe upon the decision of a fit parent to adequately care for their child.[198] Similarly, the Thirteenth Court of Appeals had to grant mandamus relief when a lower court granted grandparents access to their grandchild over the parent's objection.[199] The record was entirely devoid of facts pertaining to the child's physical or emotional best interest.[200] Seemingly, the court gave the grandparents access because it was a "better decision."[201] The court substituting its "better decision" for the choice of a fit parent is precisely what the fit-parent presumption is intended to prevent.[202]

C. Determining Fitness in the Original SAPCR Will Not Require Additional Litigation

There is a counterargument that requiring this finding will lead to more litigation in the original SAPCR.[203] The policy behind not granting the fit-parent presumption to parents granted possessory conservatorship of their child in the original SAPCR is essentially the argument made in *In re*

192. Alaniz v. Alaniz, 867 S.W.2d 54, 75 (Tex. App.—El Paso 1993, no writ); *see also* Reynolds v. Rayborn, 116 S.W.2d 836, 839 (Tex. App.—Amarillo 1938, no writ) ("However much we may disagree with or disapprove their religious beliefs, the failure of appellant, because financially unable, to supply greater comfort and pleasure for his daughter, together with their refusal to salute the flag, do not constitute a sufficient cause to adjudge the father disqualified and unfitted to have the care, custody, and control of his minor daughter.").

193. Palmore v. Sidoti, 466 U.S. 429, 429 (1984).

194. *In re* McElheney, 705 S.W.2d 161, 162 (Tex. App.—Texarkana 1985, no writ).

195. *In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006).

196. *Id.* at 777.

197. *Id.* at 778.

198. *Id.* at 777.

199. *In re* D.D.L., No. 13-22-00062-CV, 2022 WL 3652496, at *6 (Tex. App.—Corpus Christi–Edinburg Aug. 25, 2022, no pet.) (mem. op.).

200. *Id.*

201. *Id.* at *5 (quoting Troxel v. Granville, 530 U.S. 57, 72–73 (2000)).

202. *Troxel*, 530 U.S. at 78 (Souter, J., concurring).

203. *See In re* V.L.K., 24 S.W.3d 338, 340 (Tex. 2000).

V.L.K.[204] Although *In re V.L.K.* dealt with the application of the fit-parent presumption in modification suits, opponents may argue that affording the presumption raises problems of endless litigation.[205]

The glaring oversight in this argument is that most SAPCR adjudications involve enough information for the court to determine the fitness of the parents without any additional litigation being necessary.[206] In proceedings where parents are requesting sole managing conservatorship, they often allege certain specific acts that a court could find to prevent the other parent from adequately caring for their child.[207] For example, cases involving allegations of drug and alcohol abuse, domestic violence, and child abuse provide a court with ample information to determine whether the parent granted possessory conservatorship is unfit.[208] In the original SAPCR, the court would address in its findings whether the parent granted possessory conservatorship of the child was declared unfit and would thus not benefit from the fit-parent presumption in modification suits.[209]

The determination could work the same way for determining whether—although the parent was granted possessory conservatorship of the child—they could still be fit and should benefit from that presumption in modification suits involving nonparents.[210] Even if one parent is not making allegations that would instantly lead the court to determine their fitness, the absence of such allegations, along with facts learned at trial, should supply the court with enough information to determine fitness.[211] Parents often dedicate hours to documenting everything the other parent has done wrong in order to "sling mud" at each other in the courtroom.[212] The courtroom often sees some of the best people on their worst days.[213] When a parent takes the stand to testify as to why they should have sole managing conservatorship of the child, they will often attack the other parent's ability to raise the child.[214]

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204. *Id.* at 343 (citing legislative intent as the reason for not applying the fit-parent presumption in modification suits—the legislature intended to promote stability for the child and prevent additional litigation).

205. *Id.*

206. *See* Hon. Donald Dowd, *supra* note 179 ("Too often, judges merely witness battles of character assassination . . . .").

207. *See* TEX. FAM. CODE § 153.131(a).

208. *See* Zewde v. Abadi, 529 S.W.3d 189, 196–97 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (determining there had been no abuse of discretion in granting sole managing conservatorship when the husband engaged in cruel behavior towards the wife).

209. *See id.* at 196–97.

210. *See supra* Section III.A (requiring the court to include the finding of fitness in the original SAPCR regardless of why the parent was named possessory conservator).

211. *In re* D.D.L., No. 13-22-00062, 2022 WL 3652496, at *6 (Tex. App.—Corpus Christi–Edinburg Aug. 25, 2022, no pet.) (mem. op.) (noting the lack of evidence alleged as a sign the parent was fit).

212. *See In re* Suarez, No. 13-21-00379-CV, 2021 WL 6067350, at *6–7 (Tex. App.—Corpus Christi–Edinburg Dec. 22, 2021, no pet.) (mem. op.).

213. *See id.*

214. *In re* S.T., 508 S.W.3d 482, 494, 497–98 (Tex. App.—Fort Worth 2015, no pet.) (finding insufficient evidence to support granting sole managing conservatorship when no testimony was given alleging the father's lack of parental skills).

A judge is likely to conduct an interview in chambers with the child, where they are permitted to ask for the child's living preferences and the reasoning behind their choice.[215] Although rare, but even more compelling, a child may even be called to testify about serious accusations that one parent has alleged against the other.[216] The information determining a parent's fitness will come out in testimony and through evidence presented at the original SAPCR, and the court should thus include a finding of such.[217]

D. The Fit-Parent Finding Will Promote Efficiency Modification Suits That Respect Parental Rights

Allowing a parent that has been adjudicated fit to benefit from the presumption in modification suits involving a nonparent will allow more courts to dismiss suits for failure of the nonparent to allege enough information to overcome the presumption.[218] By promoting judicial economy, the court will have more time to prioritize child custody and termination cases that involve genuinely unfit parents.[219] It also prevents parents from being forced to hire expensive lawyers to defend against frivolous lawsuits, especially in circumstances against grandparents who might have greater financial access to high-quality lawyers.[220] This is the outcome the U.S. Supreme Court intended with its ruling in *Troxel*, and the outcome fit parents who gained managing conservatorship in the original SAPCR already enjoy.[221]

This addition to the Texas Family Code will allow for decisions much like those awarded to parents who were given managing conservatorship in the original SAPCR.[222] Even though *In re C.J.C.* left open questions about what type of evidence and how much is required to rebut the fit-parent presumption, courts are currently working through which standard to apply.[223] The fit-parent presumption's evidentiary standard will likely work its way up to the Texas Supreme Court, which will hopefully provide more

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215. *See* TEX. FAM. CODE § 153.009.

216. *See* Cline v. May, 287 S.W.2d 226, 227–28 (Tex. App.—Amarillo 1956, no writ).

217. *See supra* Part II (outlining the fit-parent presumption in Texas).

218. *See* Williams v. Paul, No. 01-18-00560-CV, 2019 Tex. App. LEXIS 767, at *4–5 (Tex. App.—Houston [1st Dist.] Feb. 5, 2019, no pet.) (mem. op.) (describing a no-evidence summary judgment application to a modification suit).

219. Applying the fit-parent presumption to fit possessory conservators will lead to more no-evidence suit dismissals. *See generally id.* (applying the no-evidence summary judgment standard to a suit for modification of a child support order).

220. Jesus R. Lopez, *Cost of a Texas Custody Lawyer*, L. OFF. JESUS R. LOPEZ (Jan. 26, 2023), https://www.sanantoniobonds.com/cost-of-a-texas-custody-lawyer/ ("On average . . . parents can expect to pay anywhere from $2,500 to $15,000 for the services of a custody lawyer.").

221. *See supra* Section II.A (discussing the constitutionally required version of the fit-parent presumption).

222. *In re* C.J.C., 603 S.W.3d 804, 819 (Tex. 2020) (allowing the fit-parent presumption for possessory parents if they were found fit in the original SAPCR).

223. *Id.* at 821 (Lehrmann, J., concurring).

guidance to lower courts.[224]

The presumption, coupled with Texas's stringent nonparent standing requirements, will protect parental rights from infringement by the government and outsiders looking to have influence on a child.[225] Texas limits standing for nonparents in SAPCRs to persons "who have played an unusual and significant parent-like role in a child's life" while recognizing the constitutional rights of a parent.[226] A parent's interest in the care, custody, and control of their children is regarded as one of the "oldest of the fundamental liberty interests."[227] It is acknowledged that parental rights are "not absolute" and can be overridden by a child's emotional and physical well-being.[228] Certainly, there are instances where a parent will act against the interests of the child in a way that requires governmental power to supersede constitutional parental rights.[229] However, a fit parent is capable of making decisions in the best interest of the child, and their rights should not be disturbed without furthering some legitimate state interest.[230] These parental rights cannot be substituted for the decisions of the court or nonparents simply because they might have a better idea of how to raise the child.[231] Only applying the best-interest standard for fit parents named possessory conservator creates a second-class parent out of one who could make sound choices for their child if given the chance.[232]

In the hypothetical scenario described in Part I, the legal outcome would be expedited, with the father gaining the benefit of the fit-parent presumption in the modification suit against the grandparents.[233] The grandparents would now need to jump through two hoops before the court gets to the "best interest of the child" standard: standing and the fit-parent presumption.[234] Texas's standing requirements to file a modification suit are already considered among the most stringent in the United States.[235] The grandparents would need to demonstrate that they exercised actual care, custody, and control of

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224. *See In re* R.W.N.R., No. 08-23-00087-CV, 2023 Tex. App. LEXIS 8105, at *13 (Tex. App.—El Paso Oct. 25, 2023, no pet.) (mem. op.).

225. *See In re* H.S., 550 S.W.3d 151, 163 (Tex. 2018).

226. *Id.*

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

228. *In re* C.J.C., 603 S.W.3d 804, 823 (Tex. 2020).

229. Parham v. J.R., 442 U.S. 584, 602–03 (1979).

230. *Troxel*, 530 U.S. at 68–69, 80 (Thomas, J., concurring) (noting that strict scrutiny should govern in applying the fit-parent presumption and the government should only be allowed to intervene if it has a compelling interest).

231. *In re* Derzapf, 219 S.W.3d 327, 333 (Tex. 2007) (applying *Troxel*, 530 U.S. at 72–73).

232. *See* Lannetti, *supra* note 171, at 213 (describing the heightened "best interest of the child" standard that is required by *Troxel*).

233. *See supra* Part I (describing the hypothetical scenario).

234. *See supra* Part I (explaining the current state of the grandparents' rights).

235. For an argument that Texas's standing requirements are too stringent, *see* Jessica Nation Holtman, Comment, *Standing in the Way of Our Goals: How the Best Interest of the Child (Whatever That Means) Is Never Reached in Texas Due to the Lack of Standing for Third-Party Parents*, 5 TEX. A&M L. REV. 563, 563 (2018).

the child for at least six months before filing suit.[236] Then, to survive a no-evidence summary judgment, the grandparents must allege enough facts to potentially rebut the fit-parent presumption.[237] This would require substantial facts alleging that the father is unfit and thus incapable of adequately caring for their child.[238] Then, at court, the grandparents would need to prove that granting the father managing conservatorship would "significantly impair the child's physical health or emotional development" by proving it is in the child's best interest to provide the grandparents a court-ordered part of their lives.[239]

Coupled with the fact that a fit parent can make decisions in the best interest of their children, the grandparents are rightfully going to have an uphill battle to even see a courtroom.[240] As much as it is societally appreciated for grandparents to have an active role in their grandchildren's lives, it is for the parent to decide if and when those events occur.[241] There is an even greater societal norm that parents should have the final say in the choices that affect a child—not the government.[242] It is important to remember that this presumption can be rebutted with evidence that the parent is not fit to make decisions for the care, custody, and control of their child.[243] However, the evidence needed to rebut the presumption cannot arbitrarily be based on factors that do not lead to negative effects on the child.[244]

Simply because the child will be spoiled by the nonparent, and their dad must work to pay the bills, that will not lead to the nonparent gaining possession and access to the child under the fit-parent presumption.[245] The same goes for the nonparents' decision-making skills.[246] Although decisions that lead to the detriment of the child will be taken into consideration, a fit parent's parenting choices will not be judged simply because the nonparent

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236. *See* TEX. FAM. CODE § 102.003(9).

237. *See In re* S.D., No. 14-20-00851-CV, 2021 WL 3577852, at *4–8 (Tex. App.—Houston [14th Dist.] Aug. 10, 2021, no pet.) (mem. op.). (ruling that no-evidence summary judgment was appropriate when the grandmother presented no indication that the mother's sole managing conservatorship would significantly impair the child).

238. *See id*.

239. TEX. FAM. CODE § 153.131(a).

240. *See supra* Section III.D (discussing finding the fit parent with respect to parental rights).

241. *See* Troxel v. Granville, 530 U.S. 57, 61 (2000) (ruling that the benefit of time spent with grandparents is not enough to justify a court order requiring it).

242. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) ("[T]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

243. *See supra* Section II.D (discussing instances where a nonparent has established enough information to rebut the presumption).

244. *In re* F.E.N., 542 S.W.3d 752, 770 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

245. *See, e.g.*, MacDonald v. MacDonald, 821 S.W.2d 458, 461–63 (Tex. App.—Houston [14th Dist.] 1992, no writ) (finding no reason to question the jury's determination that the nonparent, who was the primary caretaker of the children, should be named the children's sole managing conservator—despite evidence indicating that the children may be spoiled by the nonparent).

246. *In re* S.D., No. 14-20-00851-CV, 2021 WL 3577852, at *4 (Tex. App.—Houston [14th Dist.] Aug. 10, 2021, no pet.) (mem. op.).

would make a more reasonable choice.[247] Even if the nonparent has more financial freedom or "makes better choices" than the parents, the parental rights of a fit parent should reign supreme against government infringement.[248]

IV. CONCLUSION

In re C.J.C. was seen as the Texas Supreme Court's final alignment the Texas Family Code concerning the constitutionally required fit-parent presumption found in *Troxel*.[249] However, it should be seen as Texas simply taking a step in the right direction to protect fit parents.[250] Although the decision was correct to apply the fit-parent presumption in modification suits, the Texas Supreme Court restricted the presumption beyond what the U.S. Supreme Court held as constitutionally required in *Troxel*.[251]

Amending the Texas Family Code to require judges to include in their original SAPCR findings whether the possessory conservator maintains the fit-parent presumption in modification SAPCRs involving a nonparent will protect possessory parents from the government and others infringing upon their constitutional rights.[252] What might seem like a simple solution that is but a small part of the original SAPCR proceeding will have drastic consequences in the event that tragedy strikes.[253] In the event of the sole managing conservator's death, the fit-parent presumption finding of the possessory parent will allow an easy transition that protects the rights of the parent against outside interference.[254]

247. *Id.*
248. Troxel v. Granville, 530 U.S. 57, 78 (2000).
249. *In re* C.J.C., 603 S.W.3d 804, 818–19 (Tex. 2020); Troxel v. Granville, 530 U.S. 57, 68 (2000).
250. *See supra* Section II.A (discussing *In re C.J.C.*).
251. *See supra* Section II.A (noting the restriction of the fit-parent presumption in Texas); *Troxel*, 530 U.S. at 68.
252. *See supra* Section III.A (proposing a solution to align the Texas Family Code with *Troxel*).
253. *See supra* Section III.D (applying this Comment's solution to a hypothetical scenario).
254. *See supra* Part III (discussing the justification for this Comment's proposed solution).